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Hogan Lovells Protocol for
the use of technology in virtual
international arbitration hearings

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Purpose

Given the very nature of international arbitration—with parties, counsel, witnesses, and tribunals often spread around the world—the use of technology to conduct entirely on-line virtual hearings can result in tremendous savings and efficiencies, and in certain circumstances may be the only option.

Whether conducting a virtual hearing out of convenience or necessity, implementing an agreed protocol of procedures will help ensure a smooth process with minimal technical issues, resulting in an excellent means of communicating directly and effectively, second only to live presentation.

Hogan Lovells presents the following general guidance on best practices in conducting virtual hearings. These are simply recommendations and its use is optional and will invariably require further adapting and customizing on a case-by-case basis. It is intended to promote and enable the fair and transparent presentation of evidence and prioritize the seamless and secure transmission of documents, video, and audio from different locations, while limiting technical disruptions. In circumstances where the use of technology may present a greater-than-acceptable risk of disruption to a hearing, this Protocol should not be used. Although highly relevant to these particular times we are all living in, this Protocol is offered as guidance on best practices well after we all return to some expected level of normalcy. It is hoped that the use of this Protocol to encourage virtual hearings will help, where appropriate, reduce barriers to the efficient adjudication of disputes in international arbitration.

As with fundamental arbitration doctrine, this Protocol shall not supersede any agreement between the parties, but ideally will become part of the parties' agreement, subject to any modifications necessary for particular circumstances as well as any agreed-upon arbitration rules, which shall govern in the event of a conflict.

The Protocol

1. Hearing preparation

In advance of the hearing, parties will undoubtedly need to participate in technical preparation sessions, including with testifying witnesses. The technical mechanisms utilized for such preparation sessions shall mirror those that will be used in the pre-hearing conference and the hearing.

- a) In the preparation session counsel shall employ all technical features that will be employed during the hearing.
- b) This may include the testing of internal mechanisms counsel will use to communicate among themselves during the hearing (e.g. an open conference line among counsel to communicate during breaks, or the use of an additional device to communicate in writing during the hearing).
- c) Counsel shall arrange for all relevant documents to be transmitted to the testifying witnesses in advance of the preparation sessions so that the witness may prepare to be examined with documents during the hearing.
- d) Counsel is responsible for ensuring that witnesses comply with the non-technical parameters listed in the "Attendance" section of the Protocol and those parameters specific to framing in the section on "Staging and Venue."

1.1 Pre-hearing conference

In advance of the hearing, the parties and the tribunal shall attend a pre-hearing conference. Such conference shall be held no later than 48 hours prior to the commencement of the hearing.

- a) The presiding arbitrator shall serve as the "host" of the meeting.
- b) The presiding arbitrator shall test the various technical features that the parties will employ, including the platform(s) to be used to view and mark exhibits, and to conduct break-out sessions.
- c) If parties intend to use transcription services or translation services, such service providers shall be present at the pre-hearing conference to ensure that they understand the Protocol and are able to connect virtually via the means agreed to by the parties.

2. The hearing

2.1 Calendaring

Parties shall cooperate to find an acceptable schedule that is practical for all involved for all proceedings, bearing in mind the availability of support staff. If there are competing preferences, parties are to defer to the wishes of the tribunal. To protect the security of the hearing, electronic calendaring invites shall be limited to authorized attendees and to the extent possible shall only include the relevant case number.

2.2 Time zones

- a) Parties shall consider, where appropriate, traveling to locations that minimize time zone differences.
- b) In situations where travel is not practical, parties shall give preference to individuals and witnesses with special circumstances. For example, witnesses with health, family, or other circumstances that raise special concerns as to the location from which they will testify shall be given preference over those that do not have such limitations.
- c) No party shall be expected to partake in a hearing at an unreasonable time based on their individual time zones, and the Tribunal will determine the proper timing and shall allow for at least an eight-hour gap between the end of one session and the start of another.

2.3 Technical support

At each venue, the parties shall jointly designate at least one person with adequate technical knowledge to be present (virtually or otherwise) at the pre-hearing conference and available during the actual hearing. This person shall be familiar with the technology, platforms, systems, and devices used at the venue they are supporting. To the extent more than one technical advisor participates in the proceedings, they shall cooperate with each other, and report any issues promptly to the tribunal.

2.4 Platforms

The parties shall agree to the platform(s) to be used in aid of the pre-hearing conference and hearing, and shall endeavor to select a secure and stable platform to protect the integrity of the proceedings. In selecting such platforms, parties should consider the level of encryption a platform offers, the types of security measures in place (e.g. whether the platform offers password protected meetings), and inquire into the potential cyber-risks presented by the platform. Those platforms may include, but are not limited to:

- a) Video-conferencing and text messaging platforms such as WebEx (Cisco); Skype (Microsoft), or other proprietary high-end teleconference systems. The chosen video-conferencing platform should be password-protected and all other security features of the platform should be utilized to ensure that the platform is secure.
- b) Document sharing platforms such as CaseMap, Exhibit Manager, FileCloud, Opus Magnum, SharePoint, Strutlegal, TransCEND, or Affinitext.

In order to minimize disruption, a secondary platform shall be selected should the first fail for any reason. Details of this secondary platform shall be circulated in advance of the hearing, to ensure ease of access, should a change become necessary.

Additionally, the parties should select a separate means of internal communication via secure text message, video-conferencing platform, or telephonic dial-in. Virtual break out rooms are one such option available within many video-conferencing services. If the parties use virtual break out rooms, such features should be password-protected to prevent one party joining another's break out session.

2.5 Technology

The parties will agree on the specifications of the technology to be used in aid of the hearing. In reaching any such agreement, the parties shall adhere, to the extent practicable, to the following recommendations:

2.5.1 Video

- a) Recommended Bandwidth of the chosen platform
- b) Generally, parties shall aim to comply with the following:
 - i) Receiving 1080p HD video – 2.5Mbps upload/download
 - ii) Sending 1080p HD video – 3Mbps upload/download
 - iii) H.323 for internal video conferencing bridge.

2.5.2 Audio

- a) A headset with integrated microphone is preferred.
- b) If a speaker is used, it shall have sufficient volume to be audible for all participants.
- c) In order to minimize background noise, participants shall use a microphone or headset whenever possible and shall mute these devices when others are speaking.
- d) Mute all cell phones and disable other alert systems on personal laptops and devices.

2.5.3 Connection

- a) A wired network connection is preferred over wireless connections.
 - i) Stable, reliable internet connection.
 - ii) Minimum of 3Mbps upload/download and 0% packet loss is preferred.
- b) Where a wired connection is unavailable, parties should not use public WiFi networks but should instead use a password-protected, secure wireless connection.

2.6 Recording

- a) Some form of recording will be required and it is recommended that the parties agree to a single procedure for recording the proceedings.
- b) The parties shall jointly designate an individual responsible for ensuring that all proceedings are recorded; that individual shall, in turn, either have the technical training required to record the proceedings or have immediate access at all times to support staff that can readily assist in troubleshooting recording issues.
- c) With the exception of reporters, the hearing participants are not to separately record—or otherwise capture—the proceedings unless all parties agree.
- d) Individuals responsible for such recording shall comply with the technical specifications indicated herein and shall circulate the recordings to parties, representatives, and tribunal within 24 hours of the close of the proceedings.

2.7 Reporters

- a) If the parties agree to transcribe the proceedings, the parties shall agree to a single reporter for any given hearing session.
- b) That reporter need not be present at the same venue as the parties but shall remain available to contact at all times during the proceedings to ensure integrity and ease of communication between the parties and the reporter.
- c) Further, parties shall consider using a litigation support service that provides a reporter, a real-time display of the transcript, and a video connection with all other participants. To the extent practicable, such transcript shall be displayed on a different device from the one utilized for the videoconferencing.
- d) Any service shall also provide its own dedicated support staff that is available throughout the hearing to troubleshoot problems as they arise.

2.8 Staging and venue

- a) To the extent practicable, parties shall appear with counsel in a single venue. However, parties shall endeavor to have no more than two individuals in the camera frame at once.
- b) At all times the tribunal and at least any speaking participant(s) shall be visible.
- c) Each party shall arrange for its own procedure for internal communications during the course of the proceedings.
- d) When presenting a witness, counsel shall ensure that both the table in front of the witness and the top of the witness's head are in frame.

2.9 Additional practical considerations

- a) Each party to the proceedings shall, on behalf of its team, including representatives, witnesses and experts testifying on its behalf:
 - i) arrange for their own video and audio capabilities;
 - ii) if possible, use a wired network connection and, whether or not such a connection is feasible, establish and test the connection before the hearing begins;
 - iii) shut down all background browsers and applications on the device used in aid of the arbitral hearing;
 - iv) disable pop-up notifications on the device in use;
 - v) ensure that their connection, devices, and technology are maintained on a secure network; and
 - vi) ensure compliance with all data protection laws and regulations.
- b) In case one of the parties loses connectivity throughout the hearing, it should be immediately reported to the rest of the attendees using a designated messaging system. This is especially relevant where there is only an audio connection.
- c) To the extent possible, an open chat window shall remain active during the proceedings. The chat window shall be used to allow all participants (including the reporters) to raise non-time sensitive communications with all participants

at the hearing. There shall be no *ex parte* chat window communication with the tribunal. Similarly, there shall be no *ex parte* chat window communication between testifying witnesses and counsel offering their testimony. Each party should identify a member of their team to monitor the chat room and flag any relevant issues to their team.

- d) Parties should agree, prior to the hearing, on time allocation for their respective presentations of argument and evidence. The parties will keep a chess clock and advise the tribunal daily of the length of time used.
- e) Members of the Tribunal may be physically present with one another during the hearing but no other participant should be at any location used by any member of the Tribunal.
- f) Parties should agree to equally share costs associated with the virtual hearing, absent good cause.

2.10 Agreement not to challenge award on basis of virtual hearing

- a) Prior to the hearing, the parties shall sign a joint agreement that:
 - i) videoconferencing constitutes an acceptable means of communication permitted by the applicable rules, including those at the juridical seat of the arbitration;
 - ii) the parties have agreed to the use of videoconferencing as the means for conducting the arbitral hearing;
 - iii) no party will seek to vacate any resultant arbitral award on the basis that the arbitral hearing was not held in person; and
- b) In order to minimize any risk of vacatur in certain jurisdictions where virtual hearings may be viewed as infringing on due process rights, it is recommended that the parties sign the above-referenced agreement and present it to the tribunal at the pre-hearing conference described above.

2.11 Presiding arbitrator as host and moderator

- a) At the outset of any virtual proceedings, the presiding arbitrator (or the tribunal- designated assistant) shall be made the host and moderator of the meeting to the extent possible.
- b) The presiding arbitrator shall outline the agenda for the virtual proceedings.
- c) If multiple parties and/or witnesses are speaking at the same time, it shall be the role of the presiding arbitrator (or the tribunal-designated assistant) to operate the “mute” function on the audio feed, and to pause the proceedings and determine the appropriateness of any participants’ contribution at the time in question.
- d) If disagreement or uncertainty regarding the application of this Protocol and other procedures arises during the course of the proceedings, the tribunal shall resolve such a dispute.
- e) If one of the parties or the person speaking loses connectivity and reports it through a designated messaging system, the presiding arbitrator shall request that the rest of the attendees remain silent until the connectivity is restored.

2.12 Attendance

- a) The parties shall provide the tribunal and opposing counsel a list of all anticipated attendees at least 48 hours in advance of the hearing.
 - i) Participants to a hearing shall be limited to party representatives, counsel, witnesses, tribunal members, reporters, and such logistical, technical, or other support as may be required to assist in the presentation of evidence; and
 - ii) If a party wishes to include an additional person not noticed in advance of the hearing, such person may participate only with the agreement of all parties or at the direction of the tribunal. In any event, no individual shall be in attendance who is not announced and to which all parties have not agreed.
- b) Some electronic or technological attendance sheet will be taken of all participants for each day of the proceedings.
- c) At the outset of the proceedings, all participants shall be identified; the parties shall agree upon measures to be taken to orally identify all individuals present at each venue.
- d) Additionally, the presiding arbitrator is encouraged to conduct and record a colloquy with the parties to confirm that:
 - i) The only persons permitted to attend the hearing are those noticed or approved by opposing counsel and the tribunal, and that no unauthorized parties shall attend in violation of that agreement; and
 - ii) Any witness who is giving evidence shall not be assisted during the course of his / her evidence.
- e) It is recommended that each participant announces the individuals present upon continuing proceedings after each break in the proceedings.

3. Witness examination

3.1 Attendance

- a) Witnesses need not be in attendance at the same venue as the parties but parties shall ensure that witness participation will not be inhibited by their chosen venue. The chosen venue shall, to the extent practicable, comply with the minimum specifications outlined in the Protocol.
- b) When providing witness testimony, counsel and the witness shall identify all individuals present in the room where the testifying witness is present, and confirm that the witness is not receiving communications of any sort during the course of his / her testimony.
- c) The witness should be visible to counsel—and counsel should be visible to the witness—at all times during the examination.
- d) The witness shall not use a “virtual background” and the remote venue from which they are testifying shall be visible.

3.2 Documents

- a) The parties may agree to utilize a cloud-based storage service to host all documents introduced during the course of the proceedings. Any sensitive electronic documents should be password-protected. If third-party cloud storage is used to transfer documents, the parties should take adequate steps to ensure that such storage systems are password-protected and secure. If sensitive documents are printed for use in the proceedings, the parties should take care to ensure that those documents are either returned to the parties or destroyed at the conclusion of the proceedings.
- b) All exhibits and documents used in the course of a witness direct and/or cross-examination shall either be provided immediately prior to the commencement of cross-examination or be available via screensharing from the party questioning the witness. It is recommended that hard copies, clearly marked with a numbering system, be presented to witnesses upon examination, if practicable. The examining

counsel will then take the witness through the relevant documents during the examination. Those materials shall be provided to all parties electronically after the examination.

- c) It is preferable for a representative of the examining party or for a designated neutral individual to be present at the venue with the testifying witness to assist with the exhibits.
- d) It is advisable to use a document sharing platform that can be managed by a technology consultant during the duration of the hearing, which permits all viewers to simultaneously view the document/ passage being discussed.
- e) If additional documents that are not available to the witness in hard copy need to be shown to the witness during the examination, such document sharing platform shall be used to question the witness.
- f) If it is not possible for a witness to be accompanied by a representative, the cross-examining party shall deliver to the locale of testimony, prior to the hearing date, a sealed package containing the relevant documents. The witness shall unseal and open the package on camera in front of all parties to ensure that the enclosed documents were not previously viewed.

3.3 Cross-examination

Witnesses who testify shall affirm in an oath that they act in accordance with the tribunal’s procedures. A suggested version of the oath is below:

“I swear to have followed the tribunal’s procedures regarding the accuracy, truthfulness, and fairness of my testimony to the best of my ability. I affirm that there is no one else in the room with me [except authorized attendees], that no unauthorized parties can communicate with me, and that I am not currently aware of what documents will be shown to me by opposing counsel.”

3.4 Objections

- a) Parties and witnesses are to be mindful during examinations that the other party may object to questions posed to witnesses.
- b) As a result, all parties and witnesses shall allow additional time for such objections to be made.
- c) If multiple participants are speaking at once, it will be the collective role of the tribunal and of counsel to defer to the representative defending the testimony.
- d) Where “side-bars” are required between only certain participants in the hearing (such as between the tribunal and counsel), arrangements should be made for briefly disconnecting the audio feed for the remaining participants and resuming when the tribunal and/or counsel instructs it is appropriate to do so.

3.5 Interpreters

- a) In the event that interpretation services are needed for witness examinations, counsel shall arrange for any interpreters he or she needs in aid of his or her examinations.
- b) In case simultaneous interpretation in multiple languages is required, arrangements shall be made for several audio feeds with participants selecting which audio channel they wish to hear. Some platforms allow the host to assign interpreter roles to certain participants, which will allow them to see a different interface, intended to facilitate the process of switching channels.
- c) If only one audio feed can be arranged, parties should opt for sequential interpretation in order to avoid situations where the witness, interpreter, and examining counsel speak over each other.
- d) Each audio feed shall be recorded, consistent with the recommended procedures described in the “Audio” section above.
- e) Opposing counsel may retain his or her own separate interpreter to ensure the accuracy of the interpretation, but coordination will need to be made for the inclusion of such participants in the virtual hearing.





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