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VIRTUAL HEARING GUIDELINES, 2020

September 2020



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Nairobi Centre
for International
Arbitration

where disputes meet resolution

**THE NAIROBI CENTRE FOR
INTERNATIONAL ARBITRATION
(VIRTUAL HEARING) GUIDELINES,
2020**

September 2020

“These Guidelines adapt and reproduce the Africa Arbitration Academy Protocol on Virtual Hearings in Africa, 2020, in part, with the prior written approval of the Academy.”

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PART I - PRELIMINARY

Clause 1

Citation.

These Guidelines may be cited as the Nairobi Centre for International Arbitration (Virtual Hearing) Guidelines, 2020.

Clause 2

Interpretation

In these Guidelines unless the context otherwise requires –

“**Act**” means the Nairobi Centre for International Arbitration Act, 2013;

“**Centre**” means the Nairobi Centre for International Arbitration established under section 4 of the Act and includes the Board of Directors or any committee, sub-committee or Registrar and other staff or other body or persons specifically designated by the Centre to perform the functions referred to in the Guidelines;

“**Pre-virtual Hearing Agreement**” means agreement between the Parties to conduct hearings through online means in accordance with the First Schedule of these Guidelines.

“**Registrar**” means the Chief Executive Officer of the Centre appointed under section 9 of the Act.

Clause 3

Notices and communications on Virtual Hearings

1. All communications between a party and the Centre shall be made through the Registrar.
2. On the formation of the Arbitral Tribunal, all written communications between a party and the Arbitral Tribunal shall continue to be made through the Registrar, unless the Arbitral Tribunal directs that

communications shall be made directly between the Arbitral Tribunal and the parties.

3. Where the Arbitral Tribunal directs that communication be made directly to it as provided under paragraph (2), any such communication shall be copied to the Registrar for information purposes.
4. Where the Registrar sends any written communication to one party on behalf of the Arbitral Tribunal, the Registrar shall also send a copy of the communication to each of the other parties.
5. A notice or other communication that is required to be given by a party under these Guidelines shall be, in writing, and shall be delivered by hand, registered post or courier, or transmitted by facsimile, telex, e-mail or any other means of telecommunication that provides a record of its transmission.

Clause 4

Preliminary Considerations

1. The parties and the Arbitral Tribunal shall agree in advance, as much as possible, upon all the procedures, schedules and deadlines to be followed during the virtual hearings.
2. The parties and the arbitral tribunal shall agree in advance, as much as possible, upon all the technology, software, equipment, and platform to be used by all participants in the virtual hearings. In any event, the technology, software, equipment, and platform to be used in virtual hearings shall meet the minimum standards detailed under the First Schedule these Guidelines.

3. The parties and the Arbitral Tribunal shall agree on the virtual platform to be used at the hearing, and shall inform the Centre, the witnesses, transcribers, and interpreters at least one month before the hearing to ensure that every participant has access to such platform.
4. The parties and the Arbitral Tribunal shall also take into consideration the level of cybersecurity required to safeguard the security and integrity of the virtual hearing. In any event, the parties and the arbitral tribunal shall agree to the cybersecurity measures that meet the minimum cybersecurity standards detailed under the First Schedule of these Guidelines. In considering the minimum cybersecurity standards and measures, the parties and tribunals may also be guided by the ICCA Protocol on Cybersecurity in International Arbitration 2020 and/or any other relevant and established cybersecurity protocol or guideline.
5. The parties and the Arbitral Tribunal shall have in place at least one (1) back-up internet service provider and an alternative virtual platform or such other means for holding the hearing to be used should any technical or communications breakdowns occur and threaten the smooth continuation of the virtual hearing.
6. Where any of the parties do not have access to the technology, software, and equipment to be used for virtual hearings, parties may solicit the Centre as a venue for conducting its virtual hearings at the parties' costs.

Clause 5

Logistics

1. To the extent necessary, a party shall request the Arbitral Tribunal to convert a scheduled physical hearing to a virtual mode no later than 21 (twenty-one) days before the scheduled date of the arbitral hearings.
2. The parties and the arbitral tribunal shall engage in a pre-hearing virtual conference that should be held no later than (72) hours before the scheduled start date of the arbitral hearing. During this pre-hearing virtual conference, all the means of technology intended to be used in the virtual arbitral hearing as well as the back-up plans shall be tested thoroughly by the parties and the arbitral tribunal. The testing shall be completed using the same platform and technology that will be used in the virtual hearing.
3. Each party shall be responsible for its virtual hearing arrangements. No witness should, however, be allowed to confer with counsel or with any party representatives while giving evidence.
4. The parties shall ensure that at each of the locations from which persons are joining the virtual hearing, there is a suitably qualified technician available to attend to technical problems that may occur during the hearing.
5. Unless the parties have expressly agreed, it is not recommended that one of the parties attend the hearing physically at the same venue as the arbitral tribunal if the other party can only attend through the virtual hearing.

Clause 6

Pre-Virtual Hearing Agreement

1. To dispense with frivolous challenges to arbitral awards rendered in cases where virtual hearings were held, where there is no agreement between parties on the use of virtual hearings and there are no provisions expressly regulating such hearings under the applicable procedural rules governing the arbitration, parties shall, prior to the hearing and to the extent necessary, enter into a Pre-Virtual Hearing Agreement to expressly consent to the use of virtual hearings as per the draft in the First Schedule of these Guidelines. In the alternative, the Tribunal shall, where appropriate and after due consultation with the parties, direct that the evidentiary hearing be conducted virtually as per the draft procedural order in the First Schedule of these Guidelines.
2. The parties and the arbitral tribunal shall endeavor to use their best efforts to ensure that the agreement referred to under Clause 5(1) of these Guidelines complies with any mandatory requirements for conducting hearings under the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 and its amendments.

PART II

THE VIRTUAL HEARINGS AND PRESENTATION OF EVIDENCE

Clause 7

Conduct of Virtual Arbitral Hearings

1. The sole or presiding arbitrator (where there is a three-panel member tribunal) (or his/her designee) shall serve as the host of the virtual hearing. The parties and their counsel shall dial in to the hearing platform in good time for the virtual hearing, to test the technical features of the platform to be used. The arbitral tribunal shall ensure that all parties are properly notified of the agenda for virtual hearing so that necessary technical arrangements are made by the parties to test and connect to the platform.

2. In scheduling virtual hearings, the arbitral tribunal shall consider the following amongst other factors:
 - a. different time zones of participants;
 - b. number of remote locations and the possibility for tribunal members to be in the same physical location;
 - c. method of taking evidence from fact witnesses and experts to ensure that the integrity of any oral evidence is preserved;
 - d. method for confirming and identifying all participants, including any technical administrator; and
 - e. possibility of using demonstratives, including shared screen views or electronic hearing bundle hosted on a shared document platform that guarantees access by all participants.

Clause 8**Witness Examination**

1. Where evidence is to be given during virtual hearings, all participants shall ensure that all connecting locations meet the logistical and technical requirements as outlined in these Guidelines.
2. Witnesses need not be at the same location as parties and counsel, but the location chosen by the witnesses shall comply with the minimum specifications outlined in the Guidelines. The video conferencing system at the location of the witness shall allow enough visibility to see the witness and to verify that no unauthorized person is present with him/her.
3. The witness shall identify all individuals present in the location where the witness is testifying and confirm that the witness is not receiving communications or assistance of any sort from any unauthorized person during the testimony. The witness shall be visible to counsel and counsel shall always be visible to the witness during the direct examination, cross-examination, and re-examination, if any.
4. Witnesses who testify shall affirm or swear in an oath as per the first schedule of these Guidelines that they act in accordance with the arbitral tribunal's procedures. The parties shall ensure that an agreed translation of the affirmation or oath, placed before the witness in the location from which the witness will be connecting before the commencement of witness' testimony.

5. The witness shall give evidence during the virtual hearing under the arbitral tribunal's direction and the arbitral tribunal may terminate the video conference at any time if it deems the video conference so unsatisfactory or that it is unfair to either party to continue. It is recommended that where it is possible, the hearing be reconvened as soon as it is practicable as directed by the arbitral tribunal.
6. When allocating time during virtual hearings, the arbitral tribunal shall set aside some time for housekeeping matters, objections, applications, and/or other unexpected incidents or events.

Clause 9

Documents

1. The parties shall ensure that all the documents which the witness may be questioned about during the virtual hearing are clearly identified, paginated, and made available to the witness during the examination, without any annotations, notes, or mark-ups. If available, a separate display screen/window (other than the screen/window used to display the video transmission) shall be used to show the relevant documents to the witness during questioning.
2. The parties may agree to utilize a cloud-based storage service to host all documents introduced during the virtual hearing and shall take adequate steps to ensure that such storage and sensitive electronic documents are password-protected and secure (i.e. from unlawful interception or retention by third parties).

3. The parties may agree to use a document sharing platform during the virtual hearing, which permits all viewers to simultaneously view the document being discussed.
4. An electronic hearing bundle of all documents to be presented or used shall be tailored to any specificities of the virtual hearing and the platform used and shall be made available to the arbitral tribunal and all parties by no later than one (1) week before the virtual hearing.

Clause 10 **Interpretation**

1. Where interpretation services are needed for witness examinations, each party shall ensure that qualified interpreters approved by the Centre are made available to the witness. The parties and the arbitral tribunal shall consider the arrangements needed to:
 - a. ensure that the interpreter can provide his/her services virtually;
 - b. provide simultaneous or consecutive interpretation as preferred; and
 - c. secure the availability of any certain additional equipment for the efficiency of the interpretation process.
2. Where the interpretation is required simultaneously in multiple languages, arrangements shall be made for several audio feeds with participants selecting which audio channel they wish to hear. In considering the appropriate virtual platform, the parties and the arbitral tribunal shall, to the extent necessary select a platform that allows 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.

Clause 11

Recording

1. A full recording of the virtual hearing shall be made available to the arbitral tribunal and the parties, through the Centre, unless otherwise agreed. The arbitral tribunal shall discuss and agree with the parties the manner in which the virtual hearing is recorded and in what format.
2. Any recordings of the virtual hearing shall be used to produce hearing transcripts which shall be circulated to the Parties, through the Centre within timelines agreed at the end of the virtual hearing.

Clause 12

Security and Privacy Considerations

1. Virtual hearings and any exchange of information made during the hearing shall be secure and private.
2. Each party to a virtual hearing shall provide the arbitral tribunal with a list of all participants, not later than one week before the hearing. Subject to any other direction by the arbitral tribunal, participants to a virtual hearing shall be limited to parties' representatives, counsel, witnesses, tribunal members, tribunal secretary, reporters, and such logistical, technical, or other support as may be required to assist in the presentation of evidence or with any technical issue.
3. Only the persons on the list of participants submitted to the arbitral tribunal shall be permitted to attend the virtual hearing and where a party desires to include a person, not on the list of participants, such person may participate only upon approval by the arbitral tribunal, after hearing the other party's views. The

parties shall inform the arbitral tribunal in case of any change in participation after each break in the proceedings, or in case a change occurs during the hearing itself.

4. The parties and the arbitral tribunal shall arrange for separate virtual meeting room(s) during the virtual hearing, which can be used as breakout rooms for parties and counsel, for arbitral tribunal deliberations and witness sequestration. The parties and the arbitral tribunal shall ensure that breakout rooms are secure and only accessible to those participants to whom the room(s) are allocated.
5. The parties shall ensure that the rooms used to connect to virtual hearings either at their offices or in such other locations are well equipped with any equipment necessary for the virtual hearing, isolated and inaccessible to non-participants or unauthorized persons during the virtual hearing and soundproofed to the extent possible.

Clause 13

Hearing Protocol, Infrastructure and Technical Standard

1. The parties shall connect to the virtual hearing platform through locations with reliable internet connectivity that offer seamless and smooth streaming and communications during the virtual hearing. The minimum technical requirements and any back-up measures or contingency plan(s) shall be agreed between the parties and the arbitral tribunal.
2. The parties shall ensure that any agreed audio/video conferencing platform is licensed with adequate security and privacy standards. The technical setup should be secure and user friendly.

The parties shall ensure that the arbitral tribunal, witnesses, reporters, interpreters, and other participants in the virtual hearing have access to the necessary software and equipment during the hearing days and during pre-hearing tests.

3. Any participant who is not speaking at any point in time during the virtual hearing should mute his/her microphone to minimize any background noise and ensure the best experience in connectivity and streaming.
4. The parties shall ensure that the virtual hearing platform and/or the infrastructure meet the requirements of all relevant or applicable laws of Kenya.

SCHEDULES

FIRST SCHEDULE

PART I

Minimum Cybersecurity Standards

1. Full network security, audio & video encrypted at 128-bits AES or as recommended/verified by IT support.
2. Parties, Tribunal, and all other participants to take the following precautions:
 - a. Do not join meeting/hearing via an unsecured/public Wi-Fi connection;
 - b. Check device setting to ensure encryption is properly set up and NOT turned off; and
 - c. Ensure that user accounts on the virtual platform are biometric or password protected either an automatically generated OTP, passwords generated through password generating device of self-created strong password with no less than 8 (eight) characters containing at least one each of an upper case character, a lower case character, a number and a special character such as the exclamation mark (!) dollar sign (\$) percent (%) or ampersand (&).
3. Where possible, procure the use of Artificial Intelligence for continuous user authentication, facial recognition, silhouette tracking, and multifactorial authentication.
4. Any/all chosen platforms shall be SDL secured at the minimum subject to verification by IT support.

PART II

Model Nairobi Centre for International Arbitration, Arbitration Clause (including Virtual Hearing Option)

“Any dispute, controversy, or claim arising out of or in relation to this agreement, including any question regarding its breach, existence, validity or termination of the legal relationships established by this agreement, shall be finally resolved by arbitration under the Nairobi Centre for International Arbitration (Arbitration) Rules 2015 (Revised 2019). It is agreed that:

- a. The Seat of the Arbitration shall be [xxxx].
- b. The Venue of the arbitration shall be [xxxx]
- c. The Number of Arbitrators shall be [one or three].
- d. The Language of the Arbitration shall be [xxxx].
- e. Where a dispute can be determined fairly otherwise than by physical hearing, as determined by the arbitral tribunal, hearings in the arbitration shall be conducted virtually in accordance with the Nairobi Centre for International Arbitration (Virtual Hearing) Guidelines, 2020 and any such procedural order as may be issued by the arbitral tribunal. It is hereby agreed that no objection shall be taken to the decision, order, or award of the arbitral tribunal on the ground that the hearing regarding the dispute was conducted virtually.”

PART III

Model Nairobi Centre or International Arbitration Virtual Hearing Agreement

“We the undersigned Parties agree to proceed with a virtual hearing regarding the claims, defences and arguments, pleaded in the parties written submissions and evidenced in the materials on record. The hearing shall be conducted virtually in accordance with the Nairobi Centre for International Arbitration (Virtual Hearing) Guidelines, 2020. All other aspects of the arbitration shall be administered in accordance with the arbitration agreement in clause [xx] of the Contract. We further agree that no objection shall be taken to the decision, order, or award of the arbitral tribunal on the ground that the hearing regarding the dispute was conducted virtually.”

OR

“We the undersigned Parties agree to proceed with a virtual hearing in accordance with the Nairobi Centre for International Arbitration (Virtual Hearing) Guidelines, 2020. The arbitral tribunal shall hear the Parties on the issues listed in the attached joint list of issues. The hearing shall be conducted virtually and all other aspects of the arbitration shall be administered in accordance with the arbitration agreement in clause [xx] of the Contract. We further agree that no objection shall be taken to the decision, order, or award of the arbitral tribunal on the ground that the hearing regarding the dispute was conducted virtually.”

PART IV

Tribunal-Issued Cyber Protocol

The Arbitral Tribunal constituted to decide the dispute between the Claimant and the Respondent in accordance with the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 (Revised 2019) issues this Procedural Order following due consultation with and/or agreement of the Parties.

1. [background/ chronology of events leading up to the decision to hold a virtual hearing]
2. [list of participants]
3. [hearing locations – indicating which participant(s) will be joining from each location]
4. [indicate date and time – specifying time according to different time zones from which participants will join the hearing]
5. Technical Specifications
 - a. [indicate agreed software]
 - b. [indicate agreed technical specifications]
 - c. Each Party agrees to be responsible for ensuring that said party, its representatives and witnesses shall be available to join the hearing on the date and time indicated in paragraph 4 above and shall join the hearing promptly using the agreed software and equipment specified in paragraphs 5(a) and (b) above. In addition, Parties agree to ensure that all other persons such as the Tribunal Secretary, Rapporteurs, and Reporters who will take part in the proceedings shall join the hearing on the date and time indicated in paragraph 4 above and shall join the hearing promptly using the agreed software and equipment specified in paragraphs 5(a) and (b) above.

- c. Furthermore, each party shall ensure the use of a secure and reliable internet connection which will enable participants to participate effectively in the hearing.
- d. Any test-runs, trainings, manuals or guidelines including videos, pictures, and presentations which may be required to provide participants with a working knowledge of and enable them to make efficient use of the selected hearing platform will be promptly made available to the Arbitral Tribunal and all other participants no less than [insert number of days/weeks] before the start of the hearing. For clarity, all training, simulations, and equipment testing shall be completed no later than 72 hours before the first day of hearing.
- f) [confidentiality provisions, as required]

Issued on [insert date]

Arbitrator

PART V

Witness Oath

“In accordance with [insert reference to procedural order/applicable legal clause] I confirm that I have followed the Virtual Hearing Guidelines and the tribunal’s procedures regarding the accuracy and truthfulness of my testimony, to the best of my ability. I affirm that there is no one else with me in the location from which I am connecting [except authorized attendees], that I will not be communicating with any of the parties or their representatives during the course of my testimony, and that I am not being assisted in the presentation of my evidence except as authorized by the Tribunal.”

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