



ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC

PROTOCOL ON REMOTE ARBITRATION HEARINGS

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INTRODUCTION

1. This protocol is intended to serve as a guide to assist parties and arbitral tribunals with the preparation for and conducting of remote hearings in an *ad hoc* arbitration. It does not purport to be exhaustive or to constitute legal advice.
2. Parties and arbitral tribunals may take decisions or take actions different from what is suggested below to suit the needs of their specific case.

DEFINITIONS

3.

“Participant” shall mean any person authorised to participate in the proceedings, such as the arbitrator(s), party representatives, the parties and witnesses;

“Party” or “parties” shall mean the party or parties to the arbitration;

“Remote hearing” shall mean a hearing which is conducted in whole or in part, or only with respect to certain participants, through teleconference, videoconference or other means of telecommunication technology by which persons in more than one location simultaneously participate;

“Tribunal” shall mean the arbitrator or arbitrators;

“Witness” shall mean a person who is subjected to giving evidence in the arbitration, including experts.

4. Save as defined above, the words in this protocol shall have their ordinary meaning.

REGULATORY FRAMEWORK

5. The Arbitration Act, 42 of 1965, and the 2018 edition and prior editions of the Rules for the Conduct of Arbitrations, published by the Association of Arbitrators (Southern Africa) NPC, do not allow a tribunal the discretion to direct that a hearing must be conducted remotely, absent party agreement. The arbitration agreement in a specific case may also not allow for a remote hearing.

6. In every case, agreement should be reached between the parties that the hearing may be conducted remotely via an electronic platform, and that the tribunal shall have the power to issue directives as to how the remote hearing should be conducted.

FURTHER CONSIDERATIONS

7. Before deciding on a remote hearing, it must be considered whether, in the particular case, a remote hearing will allow the parties an adequate, fair and equal opportunity to present their respective cases. The following factors may be relevant:
 - 7.1. Firstly, the reasons why a hearing should be held remotely and whether these outweigh the benefits of a hearing in person. In this regard, health concerns, travel restrictions, convenience and costs may play a role;
 - 7.2. Secondly, the nature of the hearing. To this end: Is it only for procedural purposes (like a pre-arbitration meeting)? Is it to hear evidence? Or is it to hear argument? Certain hearings, like those dealing with procedure only, can conveniently be dealt with remotely. Other hearings, such as evidence hearings, will be more complicated to set up and manage;
 - 7.3. Thirdly, will the hearing be semi-remote? A semi-remote hearing is where one party and the tribunal find themselves in one location, while the other party participates remotely. This is not desirable, because the parties will not be on an equal footing. It would be advisable to obtain express agreement on a semi-remote hearing to avoid any possible challenges;
 - 7.4. Fourthly, time: The dispute may require expeditious determination. Consideration should be given to the delay aspect. If the parties have to wait for an in-person hearing, it may make a remote hearing desirable;
 - 7.5. Fifthly, the issue of costs of a remote hearing as opposed to an in-person hearing may be of significance;
 - 7.6. Finally, attention ought to be given to technical factors, namely the availability of the required equipment, software and internet connectivity.

REQUEST FOR A REMOTE HEARING

8. A request that a hearing be held remotely should be made well in advance. The tribunal may also propose a remote hearing. This is necessary so that:
 - 8.1. The most suitable platform can be chosen;

- 8.2. Technical requirements are met;
- 8.3. Arrangements can be made regarding the management and use of documents;
and
- 8.4. The procedure and timetable can be agreed.

PLATFORM

- 9. The most suitable platform that will suit the needs of the arbitration should be chosen.
- 10. When selecting the platform, these factors are relevant:
 - 10.1. Audio and visual requirements: Will the platform show the face, upper body, hands and desktop of participating persons, and will there be clear audio?
 - 10.2. Will screen sharing of documents, charts, photographs, maps and the like be possible?
 - 10.3. Are there limits on the number of persons participating?
 - 10.4. Will private remote rooms be provided, for instance, private breakout rooms for the parties and the tribunal?
 - 10.5. Will there be a chat function available for private chats between participants?
 - 10.6. Will the platform recording function be used, or will a third party perform the recording function?
 - 10.7. Will a third party host be necessary? The advantage of a third party host is that the arbitrator and the parties will not be distracted by technicalities. However, a third party host will not be necessary in a straightforward matter. Some considerations are:
 - 10.7.1. Whether the third party will provide full support; and
 - 10.7.2. The costs attendant upon the employment of a third party.
 - 10.8. In any event, irrespective of whether a third party is employed, at least one on-call person with adequate technical expertise should be available to assist with the planning, testing and conducting of the remote hearing.

SECURITY AND CONFIDENTIALITY

- 11. The level of security required to preserve the privacy and confidentiality of the remote

hearing is pivotal. The platform should offer password protection so that no unauthorised person can have access to the proceedings.

12. A list of participants with their full names, roles, contact details and details of the locations from where they will participate, should be obtained and circulated to the parties, the tribunal and, where applicable, the third-party host, in advance.
13. Only persons on the list of participants should be allowed to join the hearing. Any change to the list should immediately be communicated to the parties and the tribunal.
14. Participants should use secure internet connections and should not attend from public locations or where non-invitees can see or hear them.

DOCUMENTS

15. The lists of documents to be presented at the remote hearing should be agreed and circulated. It should cover pleadings, witness statements (if any), exhibits and document bundles. The lists should be made available to the parties and to the tribunal.
16. Before the remote hearing, a procedure for the storage and transmission of documents should be agreed. The parties may agree on using a shared document server in which event it should be accessible to all authorised participants. In simple, straightforward matters, the parties may agree to use document bundles in hard copy, subject to the proviso that bundles to be utilised by witnesses should be unmarked. Witnesses should always be provided with unmarked copies of documents, be it in soft or hard copy.

WITNESSES

17. It may be necessary to have one or more invigilators present at each venue from where a witness or expert will testify. This is to ensure that there is no unauthorised person present with the witness and to ensure the integrity of the evidence.
18. However, in the normal course the presence of an invigilator will not be necessary. In such circumstances the following measures will contribute to ensure the integrity of the evidence:
 - 18.1. The tribunal should confirm with the witness that he or she is alone and will not receive any communication during his or her evidence;
 - 18.2. The witness should be positioned close enough to the camera so that facial expressions can be gauged. His or her upper body, hands and desktop ought to be visible; and

- 18.3. A proper view of the room at the beginning of the session should be displayed. It must be required that the witness does not have a virtual background.

RECORDING AND TRANSCRIPTION

19. The parties will need to consider arrangements for transcription services. The proceedings can normally be recorded through the online platform. If there is an audio and a visual recording of the proceedings, agreement will have to be reached as to whether, and to what extent, the arbitrator and party representatives can use it during the hearing and subsequently.
20. In almost every case a transcription will be necessary, whether provided through the online platform or by a third party. Agreement must be reached as to which recording will be the official record of the hearing. No other recording should be permitted, without the tribunal's consent.
21. The transcription must be made available simultaneously to the tribunal and the party representatives. Agreement must be reached as to whether the transcription will be provided electronically and/or in hard copy.

INTERPRETERS

22. When interpretation services are required, the parties and the tribunal should be informed as soon as possible. Consecutive interpretation is commonly used. Whilst this simplifies the audio arrangements, it requires more time than simultaneous interpretation. To this end, it may necessitate adjustments to agreed time frames.

PRACTICAL MEASURES

23. The following practical considerations apply:
- 23.1. Each party must take responsibility for testing platform connectivity of its participants, including witnesses, before the remote hearing;
 - 23.2. Participants should log on as early as possible before the scheduled commencement of the remote hearing and verify their connectivity;
 - 23.3. Participants should position the camera of their device at the correct angle, and should be mindful of glare from windows or bright light;
 - 23.4. The tribunal and the lead party representatives must be visible throughout the remote hearing; and

- 23.5. Participants should ensure that their remote site is, as far as possible, free from background noise.

HEARING ETIQUETTE

24. Participants should:
 - 24.1. Mute their microphones unless speaking;
 - 24.2. Use physical gestures to indicate that they wish to speak, for instance, by raising a hand;
 - 24.3. Avoid speaking at the same time as other participants;
 - 24.4. Look at the camera; and
 - 24.5. Reduce body movements as much as possible.

BEFORE THE HEARING

25. The tribunal must ensure that the following is in place:
 - 25.1. The parties' agreement to an online, remote hearing;
 - 25.2. That the chosen online platform is an acceptable means for conducting the arbitral hearing;
 - 25.3. That confidentiality undertakings have been provided;
 - 25.4. That participants are properly identified;
 - 25.5. That the parties are committed throughout the course of the hearing, to an ongoing obligation to advise the tribunal when any additional person joins or is present at the venue from where a participant is engaging in the hearing;
 - 25.6. An agreement as to which recording and/or transcript will be the official record of the hearing; and
 - 25.7. An agreement on the duration of the hearing and a realistic daily timetable.
26. It is prudent to retain procedural agreements, directives, settlements and awards in both soft and hard copy, duly signed where necessary. This may become necessary when the arbitrator's award is sought to be enforced.

THE HEARING

27. At the commencement of the hearing, the tribunal should:
 - 27.1. Verify participants by asking the party representatives to place themselves and their participants on record;
 - 27.2. Confirm the connectivity of the participants;
 - 27.3. Re-state the basic rules as to etiquette; and
 - 27.4. Confirm that no participant may record via audio, video or screenshot, or permit any other person to record via audio, video or screenshot, the hearing or any part of it, except as agreed or allowed by the tribunal.
28. The private “chat” function of the virtual platform may be disabled by the tribunal to prevent participants from having private communications during the hearing. The “chat” function of a witness, while he or she is giving evidence, should in any event be disabled.
29. The tribunal may, during the proceedings, upon request, allow private conversations in breakout rooms to enable party representatives to confer outside of the presence of the tribunal and witnesses.
30. If any technical issues regarding connectivity should arise, the tribunal must direct that steps be taken to get them resolved and, if not, must decide whether the hearing may proceed remotely.
31. Should the connection of one or more participants fail, the tribunal must ask the remaining participants to mute their audio and turn off their video in order to avoid concerns about potential *ex parte* communications.
32. The tribunal may deem the quality of the virtual hearing so unsatisfactory that it would be unfair to continue. In such event it may be re-scheduled or any other appropriate step may be taken to ensure the fairness and integrity of the proceedings.