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## Guidance Note on Remote Dispute Resolution Proceedings



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## **Preamble**

The global pandemic of COVID-19 has severely affected the personal and professional lives of people worldwide. Numerous governments have been obliged to impose strict constraining measures on their natural and legal persons, which has resulted in often injurious repercussions to business relationships. It is everyone's responsibility to contribute to the global effort to prevent the spread of the virus. However, Ciarb believes that resolving disputes by alternative dispute resolution procedures should not be dependent on the surrounding circumstances in the majority of cases. Thus, business should not be burdened by unresolved disputes due to the inability of parties to meet physically to resolve disputes. Ciarb seeks to reassure disputing parties that, in most cases, applying some sensible checks as set out in this Guidance Note, parties can still use remote procedures for full resolution of their disputes.

Ciarb offers this 'Guidance Note on Remote Dispute Resolution Proceedings' to provide parties to existing and future disputes, as well as neutrals, a guide for conducting proceedings in any circumstance where parties to the dispute are unable to meet physically. This Guidance Note is intended to be broadly applicable to the current 2020 global health crisis and well beyond.

This Guidance Note is intended to be taken into consideration to help participants in arranging remote procedures. The Guidance Note relies on related existing practices and scholarly writings produced before and after the 2020 pandemic and is in no way a definitive work. We welcome any feedback, comments and suggestions from our members and colleagues around the world. We are eager to contribute to the global effort of establishing best practices on remote dispute resolution and facilitation of its use.

## **Introduction**

The Guidance Note is intended for use in conjunction with and adjusted to any governmental and arbitral institutions' advice with reference to any dealings during the COVID-19 pandemic or other circumstance that prevents physical meetings and any laws applicable, including public policy provisions of the possible place(s) of enforcement.

Where travel bans and severe government restrictions become more widespread, parties and neutrals should immediately express any concerns regarding their participation in pending proceedings to their neutrals, co-neutrals, and case

managers and discuss possible schedule or procedural amendments, in particular the possibility of remote participation.

Although the definition of remote dispute resolution includes, but is not limited to, video and audio conferences, email and offline means such as documents-only proceedings, this Guidance Note will focus on the use of video and audio conferencing. Ciarb encourages parties to primarily use combined video or audio conferencing whenever possible. This is because combined video and audio allows participants to create a “working environment” that allows participants to be more engaged in the process. Further, combined video and audio conferencing is a more efficient means of resolving ongoing complex disputes where physical hearings or meetings have been cancelled or postponed.

This Guidance Note can be applied to arbitration, mediation, adjudication, negotiation, expert determination, dispute boards, or any other type of alternative dispute resolution. However, Ciarb recognises that arbitration proceedings may be affected by a circumstance preventing physical meetings to a greater degree than other procedures and thus parties to arbitration may need to take more adjustments into consideration.

## **Part 1.**

### **Technology and Logistical Matters**

We recommend parties to follow the guidance specified in Part 1 of the Note to the highest level possible. However, Ciarb is mindful that depending on the circumstances or level of crisis, this might not be achievable. The Guidance Note presumes, at a minimum, reliable electrical supply and access to a stable and secure internet connection.

Ciarb also recognises that parties will most likely be using well-known commercial internet applications. In the event that such internet technology is not available, audio conferencing is an option, though is not considered optimal. In any circumstance, the matters set forth below should be taken into account to ensure equal rights of all participants in a remote proceeding and an enforceable outcome of said proceeding.

Since some countries have widely different levels of response to situations such as the COVID-19 pandemic, their regulatory requirements on remote proceedings may also vary. Hearings and other meetings might therefore be conducted either entirely remotely (where there is no physical contact between any participants) or semi-

remotely (where one party or a number of neutrals are in the same physical room, while other participants connect remotely from hearing venues or their homes). Such situations should be considered while interpreting and applying provisions set out below.

## **1. Preliminary considerations**

1.1. Procedures to be followed, schedules and deadlines, as well as participants to be involved in the remote proceeding should be planned and agreed in advance. All important information to this end should be circulated between such participants via email. Physical post should only be used where a non-physical alternative does not exist or where domestic legislation requires it.

1.2. Technology, software, equipment and type of connection to be used in a remote proceeding should be agreed upon by the parties and tested with all participants in advance of any meetings or hearings.<sup>1</sup>

1.3. Sufficient time frames should be allocated to eliminate possible connection or other technical failures once a meeting or hearing has begun. Technical assistance and monitoring of the status of connection at all stages of remote proceedings should be provided for wherever possible and arranged in advance.

1.4. The highest possible quality of audio and/or video connection available to parties should be used. Connections should be capable of showing a full image of the persons involved and clear audio of their pleadings and interventions. This will not only ensure more dynamic proceedings, but also eliminate prolongation of time frames needed for due process observance.<sup>2</sup>

1.5. The level of cybersecurity and security technology required to cover remote proceedings should be taken into consideration and agreed by the parties in advance of any remote meeting, conference, or hearing.<sup>3</sup>

<sup>1</sup> Ciarb recognizes that there are a variety of commercial brands of digital platforms and software available. Ciarb does not promote or advocate the use of any specific brand(s). Parties should examine options and choose the one that is best suited for their dispute.

<sup>2</sup> See also paragraphs 4 and 8.2. below.

<sup>3</sup> For recommendations regarding more detailed technical and security specifications for video conferences please see the Korean Commercial Arbitration Board's newly adopted [Seoul Protocol on Video Conference in International Arbitration](#) as well as The International Council for Commercial Arbitration, New York City Bar Association and International Institute for Conflict Prevention & Resolution Working Group's [2020 Cybersecurity Protocol for International Arbitration](#).

1.6 In the case of a semi-remote hearing, parties should discuss and agree in advance whether a party and a neutral may be physically in the same room. This can arise where one party and one or more neutrals are located in a jurisdiction where they are not subject to social distancing restrictions. In the interests of equality, it is preferable that if one party must appear to the tribunal remotely, both parties should do so. However, parties may agree otherwise.]

## **2. Venue**

2.1. Some arbitral institutions and chambers are able to offer their venues for conducting hearings depending on the restrictions imposed in their jurisdictions. Their technological and connection services are usually of a high level and are able to provide necessary equipment, software, high-quality internet connection and minimal chance of signal interruptions. Any domestic government regulations on physical meetings should be strictly followed when using such facilities.

2.2. While some countries may not be severely affected by distancing restrictions, it is highly advisable to take precautionary measures in order to protect yourself and others when deciding whether hearings or meetings should be conducted in physical form.<sup>4</sup>

## **3. Virtual proceedings**

3.1. Virtual hearing rooms are the preferred way to conduct hearings remotely. These are organised via the use of commercial digital platforms and can be equipped to create an atmosphere approximating face-to-face proceedings. All participants should be visible and audible in the chosen virtual hearing room. Simultaneous access to shared documentation through means such as screen sharing should also be provided.

3.2. A breakout room, or a separate meeting from the virtual hearing room, can be used for caucus proceedings. The other party should not have the ability to hear or view muted caucus proceedings as body language of participants, as well as their reaction might negate the whole idea of confidentiality of caucus meetings. This is particularly important in mediation proceedings.

<sup>4</sup> Please see for example the [Delos checklist on holding arbitration and mediation hearings in times of COVID-19](#) and note that this is the latest version of the checklist at the time of drafting of this Guidance Note.

3.3 In arbitration proceedings, separate virtual breakout rooms for tribunal deliberations and caucusing by parties are recommended. However, party breakout rooms should never be visible or audible to neutrals to prevent the possibility of inadvertent ex parte communication. Likewise, tribunal deliberations should never be visible or audible to parties. Should a neutral or party find that they are able to hear a separate caucus within a breakout room, they should report this to all participants immediately and sever the connection.

3.4 In mediation proceedings, parties should allow for neutrals to participate in their caucuses as necessary. However, neutrals in mediation should follow 3.3 above in the event they find they have been given access to a caucus untimely or unwittingly.

#### **4. Interpreters, witnesses and experts**

4.1. While remote proceedings can provide an opportunity to increase the time efficiency of proceedings, witnesses and experts in some cases may require more time to present their information. Adjusted time frames may also be necessary for interpreters in remote proceedings, as consecutive interpretation is commonly used. Parties are encouraged to consider and agree the time and duration needed to present information and make oral pleadings before commencing remote hearings.

4.3 For further efficiency, parties should utilise electronic bundles for cross examination of witnesses and experts. Electronic bundles may be shared immediately before the commencement of the cross examination.

#### **5. Procedural documentation**

5.1. In a remote proceeding, a list of documents to be presented in the remote hearing, including, but not limited to, memorials, witness statements, exhibits, slides, and graphics, should be available to all parties in digital form.

5.2 A procedure and a digital platform for transmission and storage of documentation for a remote proceeding should be agreed by parties before commencing the proceeding. This is to prevent duplicate communication of documents and to ensure the accessibility of all documentation that has been made available to neutrals.

5.3 Parties should agree and list which documents can be shared with all or with only certain participants during the proceedings and to create secure digital platforms to

this end. It is recommended to choose platforms which allow files to have permissions set to allow or restrict the ability to download and/or print the documents shared.

5.4 The use of electronic bundles is also encouraged to allow participants to share content concurrently (for instance, in a “share screen” mode).

## **6. Confidentiality and privacy concerns**

6.1. It is imperative to ensure that the technology used allows all participants to feel secure about the confidentiality of the information they disclose in a remote hearing. Access to all virtual hearing rooms and breakout rooms should be strictly limited to their allocated participants.

6.2. Full names and roles of all participants to a remote proceeding including, but not limited to, counsel, parties, witnesses, interpreters, tribunal secretaries and computer technicians as well as their allocated virtual hearing and breakout rooms should be circulated between parties and neutrals in advance and strictly adhered to.

6.3. Physical rooms occupied by participants in a remote proceeding, either at their homes, offices, or in special hearing venues, should be completely separate from non-participants to the remote proceeding, soundproofed where possible, and have sufficient visibility to eliminate the possibility of the presence of undisclosed non-participating individuals in the room and/or any audio/video recording equipment that has not been agreed to. The use of headsets is recommended to increase both privacy and audibility of participants.

6.4 Parties may request an affirmation of privacy from all participants at the commencement of proceedings.

## **Part 2.**

### **Legal Matters and Procedural Arrangements**

## **7. Dispute resolution clauses**

7.1 In the context of both current and future proceedings it is important to demonstrate parties' affirmative agreement to the use of a particular type of remote proceeding.

7.2 Parties should be aware of any applicable regulations or requirements of relevant domestic jurisdictions regarding the use of remote or non-physical proceedings



in dispute resolution. In certain jurisdictions, domestic court proceedings may be suspended under local public health restrictions and there may be no facility for remote hearings with those courts. It is each party's responsibility to ensure compliance of their procedures with relevant and applicable domestic laws. The Guidance Note should be used only where it is not in conflict with applicable laws and regulations.

7.3 Due to differences in legal opinions and interpretations across jurisdictions, remote means of reaching a resolution to a dispute might be questioned by some enforcing domestic courts or may be used a ground for challenge by parties. Parties should be aware of this possibility and adjust where necessary to ensure enforceable resolutions to disputes.

7.4 Even though digital technology is rapidly becoming a widely accepted business and legal tool, it is advisable to keep key procedural documents in both soft and hard copies, containing signatures of participants where necessary.<sup>5</sup> The same applies to arbitral awards, mediated settlements or any other outcomes of remote dispute resolution proceedings, as some national courts may reject enforcement if such documents were produced solely via digital means.

## **8. Choice of neutrals**

8.1. Ciarb understands that parties' choice of neutrals will be influenced by numerous factors. However, in order to assure efficiency in remote dispute resolution proceedings, consideration of a potential neutral's practical acquaintance with and a positive attitude towards remote proceedings is strongly recommended.

8.2. Remote proceedings inherently limit personal connections between all participants to a dispute. Therefore, active listening and verbal engagement, expressive body language and clear speech, as well as any other step necessary to create a comfortable professional environment should be used. This is particularly important for neutrals who should take every opportunity to assure parties of their full attention to proceedings.

8.3 Neutrals in remote arbitration proceedings should make themselves visible and audible to all the parties in the proceeding at all times times, save in cases of deliberations and/or discussions between members of the arbitral tribunal.<sup>6</sup>

<sup>5</sup> Digital signature platforms are commercially available. Parties and neutrals should verify whether digital signatures are accepted in the relevant jurisdiction(s) prior to using such means of signing. Parties should agree and keep a record of their agreement to use digital signatures.

<sup>6</sup> See also 3.3 above.

## **Part 3.**

### **Institutional and *Ad Hoc* Proceedings**

At the time of drafting of this Guidance Note, many arbitral institutions are faced with requests for postponement or suspension of pending hearings. However, their case management teams remain fully, though remotely, operational. It is therefore possible to proceed with commencing or continuing dispute resolution proceedings, arbitration or otherwise, with them.

#### **9. Institutional proceedings**

9.1 Where parties have agreed to use institutionally administered procedures, parties should consult directly with the applicable institution and follow any guidelines on remote proceedings the relevant institution has issued.

#### **10. *Ad hoc* proceedings**

10.1. Ciarb recognises that institutional proceedings may be more efficient for some disputes. However, for the purposes of the present Guidance Note, Ciarb emphasises that flexibility is one of the greatest advantages of *ad hoc* proceedings, as they allow parties to orchestrate resolution of their disputes, both physically and remotely, in accordance with the financial and logistical expectations, preferred time frames, and technical abilities of parties.

10.2. Ciarb along with a number of dispute resolution bodies worldwide offer *ad hoc* procedures across a variety of dispute resolution mechanisms to assist parties with flexible and efficient remote dispute resolution. Our rules and schemes give parties the ability to create bespoke approaches to their disputes and reduce the risk of stagnation of their business dealings, regardless of external circumstances.

10.3 Throughout the 2020 global pandemic, Ciarb Dispute Appointment Service will be up and running and ready to provide high-quality assistance for parties interested in initiation of *ad hoc* dispute resolution proceedings. Ciarb recognises the importance of meeting the needs of parties seeking to resolve their dispute, especially in times of crisis, and is ready to facilitate efficient remote resolution of disputes. For further information on Ciarb Dispute Appointment Service, Ciarb's *ad hoc* rules, guidelines and other important resources please visit [www.ciarb.org](http://www.ciarb.org).

## **Appendix 1**

### **Preliminary checklist prior to conducting remote dispute resolution proceedings**

1. Applicable governmental requirements on social distancing have been followed.
2. Relevant institutional guidelines on remote proceedings have been consulted where applicable.
3. Domestic laws and regulations regarding the validity and enforceability of remote dispute resolution outcomes have been considered.
4. A record of parties' affirmative agreement to use remote proceedings has been made.
5. Relevant scheduling amendments or extensions to facilitate remote proceedings have been agreed to by both parties and a record made.
6. A neutral/neutrals has/have been selected that has/have practical familiarity with remote proceedings and the required technology.
7. An online video/audio conferencing platform has been agreed by parties and a record made.
8. Cybersecurity requirements have been considered, agreed by parties and a record made.
9. Technical support for all participants to the remote proceeding has been arranged.
10. A platform and procedure for transfer and storage of documentation has been agreed by parties and arranged.
11. A list of attendees to the remote proceeding has been circulated and agreed by parties.
12. An order of appearance and timeline making consideration for specific needs of witnesses and for translation where necessary has been circulated and agreed by parties.
13. A list of documents to be presented by each party in the remote proceeding has been distributed.
14. Electronic bundles for use in presentation and in cross examination have been prepared and timely distributed.
15. Attendees have chosen physical rooms that are fully enclosed and separated from non-attendees, those rooms have been soundproofed where possible, and headsets are in use where possible.
16. Attendees' physical rooms can be made visible to all participants to the extent to show that no individual or recording device is present that was not agreed to.
17. A procedure for virtual breakout rooms and for deliberations and private caucusing has been agreed by parties and arranged.
18. All software as well as telephone and internet connections have been tested beforehand and are of sufficient audio-visual quality.
19. Screen sharing is available to participants and has been tested beforehand.

