

Case No. []
Claimant XXXX
Respondent YYYY

Sample Agreement for a Virtual Hearing¹²

The parties to the above-captioned arbitration case (“**Arbitration**”) hereby agree as follows (“**Agreement**”) to conduct the evidentiary hearing of the Arbitration using an online video-conferencing platform (“**Virtual Hearing**”).

I. Period³

- 1 The Virtual Hearing shall be conducted within the following time and period unless otherwise agreed by the parties and the arbitral tribunal:

Between [HH:MM] and [HH:MM] each day (JST), [MM] [DD] [YYYY] – [MM] [DD] [YYYY]⁴

II. Platform

- 2 The Virtual Hearing shall be conducted using an online video-conference platform [Zoom/Microsoft Teams/Google Meet/Cisco WebEx/Skype for Business/other] (“**Platform**”).
- 3 [teleconferencing system/other platform] shall be prepared as a back-up in case of technical failure of the Platform.
- 4 The arbitral tribunal (including the tribunal secretary; the same shall apply hereunder), staff of [arbitral institution], the parties (including counsel and interpreters; the same shall apply hereunder), witnesses and experts (“**Participants**”) who participate in the Virtual Hearing shall install the latest version of the application software of the Platform onto their PCs, and shall participate to the Virtual Hearing through the application.

¹ While this kind of document is sometimes referred to as a “protocol,” we entitled this document an “agreement,” taking into account the criticism that “protocol” could evoke the existence of a main agreement (including institutional rules), just like a protocol annexed to a convention.

² This document can be prepared as a procedural order issued by the arbitral tribunal.

³ Conducting test sessions before the virtual hearing and testing all of the systems used in the virtual hearing is advisable to ensure the internet communication environment and operation of equipment. It is worth drafting a framework of such test session in this agreement.

⁴ The parties should consider their time zone differences and set the period and timeframe in order to avoid imposing significant burden on only one party. Long and multiple sessions without the intervention of a break should be avoided because participants in virtual hearings tend to tire easily.

Case No. []
Claimant XXXX
Respondent YYYY

III. Management of the Virtual Hearing / Due Process

5 Management of the Virtual Hearing

- 5.1 The arbitral tribunal shall manage the Virtual Hearing and play the role of “host” of the Platform.
- 5.2 The arbitral tribunal may designate [an assistant⁵ and/or the staff of the [arbitral institution]] to be a (co-)host of the Platform.

6 Maintenance of due process

- 6.1 The parties hereby confirm that conducting the evidentiary hearing of the Arbitration via online using the Platform would not, in itself, deprive the parties of their opportunity to present or defend their case.⁶
- 6.2 The parties hereby confirm that this Agreement is intended to confirm the best practices in conducting the Virtual Hearing, and that in the actual proceedings of the Virtual Hearing the parties shall comply with the instructions by the arbitral tribunal exercising its discretion.⁷
- 6.3 The arbitral tribunal shall treat the parties equally, and grant the parties sufficient opportunities to present or defend their case in the Virtual Hearing.

IV. Access to the Virtual Hearing

7 Method of access and location for access

- 7.1 The Participants shall not access the Platform of the Virtual Hearing through public Wi-Fi.⁸

⁵ The tribunal secretary or an IT vendor is intended as the assistant here.

⁶ For the purpose of mitigating the risk that conducting an evidentiary hearing via online itself is found as a violation of due process, etc. and it constitutes grounds for setting aside an arbitration award, it is advisable to obtain the parties’ agreement for conducting the evidentiary hearing via online, particularly if the applicable arbitration law or institutional rules are not clear as to whether a virtual hearing is allowed without the parties’ agreement.

⁷ Setting forth the detailed rules could increase the risk that the actual proceedings during a hearing could be deviated from the agreed rules, which may constitute grounds for setting aside an arbitral award due to a violation of the parties’ agreement as to the arbitral proceedings (although in many cases the parties could be deemed to have waived their right of objection by not having raised an objection without delay, or such violation could be considered to be not so material to set aside the arbitral award). For the purpose of mitigating this risk, this provision stipulates that this Agreement merely sets forth “best practices” and the actual proceedings during the hearing shall be managed by the arbitral tribunal exercising its discretion.

⁸ Public Wi-Fi could be accepted if data security can be ensured by using a VPN (virtual private network), etc.

Case No. []
Claimant XXXX
Respondent YYYY

- 7.2 The Participants shall not access the Platform of the Virtual Hearing from any locations where the Platform on the screen could be viewed by third parties (e.g., on a train or at a café, etc.).
- 7.3 The Participants shall access the Platform of the Virtual Hearing from the locations listed in the Annex⁹, unless otherwise permitted by the arbitral tribunal.
- 7.4 The parties shall not communicate with the arbitral tribunal *ex parte* regarding the substance of the case without the other party's consent.¹⁰
- 8 Advance registration of usernames and management of access information
- 8.1 The arbitral tribunal shall provide all the Participants with a conference ID and password for the Platform of the Virtual Hearing.
- 8.2 The Participants shall join the Platform of the Virtual Hearing with the usernames which have been reported to the arbitral tribunal in advance.
- 8.3 The Participants shall not disclose the conference ID and password to any third party who is not one of the Participants.
- 9 Multiple accesses by the same Participant
- 9.1 The Participants [may/may not] access the Platform of the Virtual Hearing through multiple devices with a single username.
- 9.2 The arbitral tribunal permits each party to designate up to [xx] Participants who may access the Platform of the Virtual Hearing through up to [xx] devices with a single username.
- 10 Camera/screen/microphone/etc.
- 10.1 Each member of the arbitral tribunal shall make more than [xx] screens available in participation of the Virtual Hearing.¹¹
- 10.2 Each Participant may participate in the Virtual Hearing with more than two screens.

⁹ The Participants' home, place of work, counsel's office, etc. are expected to be access locations. If domestic transportation is permitted, a hearing center in each country would also be an option as an access location.

¹⁰ This clause is drafted as a precaution, because in case where the arbitral tribunal and only one party access the Virtual Hearing from the same venue (building), a potential risk of *ex-parte* communication between them would increase. Depending on the parties' preference, the parties may agree that either party shall not access the Platform of the Virtual Hearing from the same venue (building) as the arbitral tribunal.

¹¹ Multiple screens can be used to capture the entire hearing room of the venue, speaker, presentation slides, evidence to present to a witness, live transcript, etc. The number of screens should be decided by the parties and arbitral tribunal taking into account the nature of the case and budget.

Case No. []
Claimant XXXX
Respondent YYYY

- 10.3 The arbitral tribunal may turn off the video feed of the Participants at any time during the Virtual Hearing.
- 10.4 The arbitral tribunal may mute or unmute the Participants' audio at any time during the Virtual Hearing.
- 10.5 The arbitral tribunal may direct the Participants to adjust the positioning and angle of their camera at any time during the Virtual Hearing.¹²
- 10.6 The arbitral tribunal shall [fully activate/fully deactivate/partially activate] the chat function of the Platform during the Virtual Hearing[, to the extent that messages will only be able to be sent to all the Participants/to the extent that only the arbitrators will be able to use the function].¹³

11 Virtual background

- 11.1 [The arbitral tribunal/staff of [arbitral institution]/parties/counsel/witnesses/experts] [may/may not] use a virtual background.¹⁴

12 Use of other communication tools

- 12.1 [The arbitral tribunal/each party and its counsel] [may/may not] communicate with each other by email, other platform, chat function or any other tools during the Virtual Hearing.
- 12.2 Each party shall not communicate with the arbitral tribunal in a way that the other party cannot monitor such communication; provided, however, that this does not apply if the other party permits such *ex parte* communication, or in cases where a party or its counsel communicates with the arbitral tribunal just before and after breaks for house-keeping matters.¹⁵

¹² This is to ensure that there is no coaching or advising exercise toward witnesses, and that only the authorized Participants are present in the room. Alternatively, this provision may be replaced by other arrangements, such that the arbitral tribunal shall have a remote control over the witness' camera, that multiple cameras shall monitor the entire room, witness, PC screen at which the witness is watching, and the witness' hands at the same time, and that the witness and (part of) the arbitrators shall be in the same room, etc.

¹³ An appropriate measure should be implemented to deter coaching or advising exercise toward witnesses as well as *ex parte* communication between one party and the arbitral tribunal.

¹⁴ Use of a virtual background is in general not recommended, for the same reason as in the footnote at Clause 10.5.

¹⁵ The purpose of both Clause 7.4 and Clause 12.2 is the same in that Clause 7.4 intends in-person conversations, while Clause 12.2 covers remote communications through the Platform.

Case No. []
Claimant XXXX
Respondent YYYY

V. Actions in case of occurrence of technical failure

- 13 In case of the occurrence of the technical failure such as an access problem, the arbitral tribunal and each party shall promptly notify the arbitral tribunal and each party of the same in accordance with a list of contacts to be prepared separately.¹⁶ If the arbitral tribunal finds it difficult to continue the virtual hearing, the arbitral tribunal shall stop the virtual hearing and attempt to resolve the issue.
- 14 If the arbitral tribunal cannot resolve the above technical failure within a reasonable time¹⁷, it shall continue the hearing with a back-up Platform described in Clause 3.
- 15 [The parties shall give notice of the occurrence of a technical failure such as an access problem as provided in Clause 13 above by the end of the hearing of the same day, failing which the party may not thereafter request to redo the hearing day due to any such technical failure.]

VI. Proceedings of the Virtual Hearing

- 16 Screen Sharing
- 16.1 The participants [may/may not] use the screen-sharing function of the Platform to show documents.
- 16.2 If the participants may use the screen sharing of the Platform, they shall identify the document displayed by exhibit number and the page of the document, and [the arbitral tribunal/the tribunal secretary/the participants] shall display it on the Platform by screen sharing.
- 17 Printed copy¹⁸
- 17.1 The parties [will/will not] prepare printed copies of the case file for the arbitral tribunal's use.
- 17.2 The parties [may/may not] show the printed copy of the case file to witnesses and experts instead of using the screen-sharing function of the platform.
- 17.3 Each party [may/may not] send the printed copy of the exhibits to be shown to witnesses and experts of the other party in advance.

¹⁶ Because the parties cannot report the occurrence of technical issues which disturb the access to the Platform to the arbitral tribunal through the Platform, it is worth considering that the parties agree on the method of how to let the arbitral tribunal know such technical failure in advance, such as preparation of an emergency-contact list.

¹⁷ To avoid such a situation, it is advisable to have IT specialists on standby at all times.

¹⁸ If the participants use the document management/sharing platform, it is advisable to set forth some clauses which regulate the use of such document management/sharing platform.

Case No. []
Claimant XXXX
Respondent YYYY

18 Break time

- 18.1 If the arbitral tribunal sets the break time in the Virtual Hearing, the arbitral tribunal shall [use the breakout room function of the Platform¹⁹ /disconnect the Platform temporarily/make other appropriate agreement].
- 18.2 The parties cannot communicate with witnesses and experts who have not yet finished their testimony during the break time.

19 Deliberation of the arbitral tribunal

- 19.1 The arbitral tribunal, if it considers it necessary, may conduct the deliberation.
- 19.2 If the arbitral tribunal conducts the above deliberation, it shall [use breakout room breakout room function of the Platform/disconnect the Platform temporarily/make other appropriate agreement].
- 19.3 The Parties cannot communicate with witnesses and experts who have not yet finished their testimony during the deliberation.

20 Time management

- 20.1 [The arbitral tribunal/The Parties] shall manage and record the elapsed time of the Virtual Hearing.
- 20.2 [The arbitral tribunal/The Parties] shall check the elapsed time of the Virtual Hearing by [appropriate way agreed by the parties]

VII. Witness Examination

21 Attendance and support of the parties

- 21.1 The parties [may/may not] attend with their witnesses and experts to have a preparatory meeting or to support setting up of the Platform.
- 21.2 The other party of witnesses and experts [may/may not] attend the location/room where witnesses access the Virtual Hearing; provided, however, that this does not apply if the arbitral tribunal permits otherwise.

22 Camera

- 22.1 Witnesses and experts shall sit in front of the equipment with which they shall access the

¹⁹ Some people appreciate the usefulness of the breakout room system, while others say that establishing a separate web conference system is safer and recommended because breakout rooms may allow unintended people to enter the room due to wrong room setting, etc.

Case No. []
Claimant XXXX
Respondent YYYY

Virtual Hearing, and set their cameras so that [appropriately agreed by the parties] is visible during their witness examination.

22.2 [The additional cameras shall be set in the room where witnesses and experts are present so that [appropriately agreed by the parties] is visible.]²⁰

23 Testimony

23.1 The parties may not say anything to coach or advise on the content of testimony during the testimony of witnesses or experts.²¹

23.2 Witnesses and experts [may/may not] take notes during their testimony.

23.3 The participants other than the arbitral tribunal, the witness, and the counsel conducting the examination shall mute during the testimony.

23.4 If the participants other than the above wish to speak, they shall [appropriate agreement].

23.5 In case a party raises an objection, the arbitral tribunal shall take appropriate measures such as [appropriate agreement].

24 Use of a witness supervisor

24.1 The arbitral tribunal and parties may let a witness supervisor, who shall be independent from the parties and shall be agreed separately, sit in the same place/room to be agreed separately where witnesses or experts access the Platform.²²

24.2 The witness supervisor shall submit a report in accordance with [the format as set forth in Annex or the format to be separately determined by the arbitral tribunal and parties] to the arbitral tribunal and parties after the end the hearing day without delay. The witness supervisor may observe and take pictures of the witness/expert to the extent necessary for preparing the report.

24.3 The witness supervisor may reach out to the arbitral tribunal [and the parties] pursuant to the list of emergency contacts to be prepared separately, in case where a suspicious

²⁰ Please see footnote 12 (footnote to Clause 10.5) as to the options to prevent coaching or advising exercise toward witnesses.

²¹ Especially in case where witnesses testify without other persons' presence in the room, there are cases that witnesses see the memorandums prepared in advance during their testimony to make a sincere and accurate explanation in good faith. Thus, the arbitral tribunal and counsel should instruct the witnesses that such action is not allowed, and it is worth considering that the parties include the same in the parties' agreement just in case.

²² The legal nature of the witness supervisor might become an issue depending on circumstances, such as when the arbitral tribunal's breach of duty is alleged in relation to the problems on the witness supervisor's performance or when the witness supervisor's performance is alleged, in extreme cases, as a violation of the due process and thus as a ground to set aside or refuse to enforce the award.

Case No. []
Claimant XXXX
Respondent YYYY

behavior is found on the witness/expert during their testimony, in case of the occurrence of technical failure such as an access problem, or any other case where the arbitral tribunal finds it necessary.

24.4 [The witness supervisor shall provide the arbitral tribunal with a letter undertaking a confidentiality obligation and statement of impartiality and independence in advance of the hearing, pursuant to the format to be determined by the arbitral tribunal separately.]

VIII. Interpretation

- 25 The interpretation of the Virtual Hearing is conducted by [consecutive interpretation/ simultaneous interpretation].
- 26 The parties may raise objections to the accuracy of the interpretation of the interpreter.
- 27 The other party [may/may not] have its own interpreter attend the hearing in order to check the accuracy of the interpretation of the interpreter of the witnesses and experts.

IX. Recording • [Transcription/Real-Time Transcription]

- 28 The recording of the Virtual Hearing is [appropriately agreed by the parties]²³.
- 29 The Parties [may/may not] use the recording function of the Platform.
- 30 Use of [Transcription/ Real-Time Transcription service] is [appropriately agreed by the parties].

X. Confidentiality

- 31 To protect the confidentiality of the case, in addition to the matters set forth in this Agreement, the arbitral tribunal and the parties shall take appropriate steps [such as executing appropriate separate agreement to ensure the cyber security] in the Virtual Hearing.

XI. Location

- 32 The Virtual Hearing shall be deemed to be conducted in [**City, **(Country)]²⁴.

²³ The parties may agree that the participants may not record the hearing unless otherwise permitted by the arbitral tribunal. It is worth considering that parties agree that the participants may not save the recording data in third-party servers such as a platform vendor's servers.

²⁴ If the location of the virtual hearing does not have any legal significance, this clause is considered unnecessary.