
REMOTE HEARING PROTOCOL



AFSA

The Arbitration Foundation of Southern Africa
NPC

EXPLANATORY STATEMENT

This Remote Hearing Protocol ("**the Protocol**") is recommended for the use in all remote hearings and hybrid-remote hearings ("**Remote Hearings**") conducted by parties in accordance with the various Rules (as amended for time to time) of the Arbitration Foundation of Southern Africa NPC ("AFSA") including the AFSA International Rules for the Conduct of an administered Arbitration, the AFSA Commercial Rules and the AFSA Expedited Rules. This Protocol is not part of the various Rules of AFSA, but constitutes a guideline which parties to AFSA arbitrations may adopt.

The purpose of the Protocol is to provide guidance to parties on the efficient conduct of Remote Hearings in respect of arbitrations administered by AFSA to ensure fairness amongst the participating parties. The Covid19 pandemic has resulted in several AFSA arbitration hearings being conducted remotely since March 2020 to ensure compliance with the various government measures in South African and other jurisdictions. AFSA recognises that remote hearings or hybrid-remote hearings have become the norm and thus found it prudent to develop this Protocol for the conduct of remote hearing arbitrations.

The Remote Hearing Protocol is further directed for use in conjunction with any domestic and international legislation applicable to arbitrable disputes and with parties' agreement where it is intended to serve as a best practice guide for Remote Hearings to ensure that one party does not enjoy an unfair advantage over the other. The Remote Hearing Protocol is further recommended for use in institutional proceedings, ad hoc proceedings (where AFSA is the appointing authority), mediation proceedings and any other proceedings conducted under the auspices of AFSA.

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CONTENTS

1.	Preliminary Considerations.....	5
2.	Due Process – Fairness, Equal Treatment and Impartiality	6
3.	Venue	6
4.	Remote Hearing Proceedings.....	7
5.	Documentation and Exhibits.....	8
6.	Interpreters, Interpretation, Independent Legal Representatives, Witnesses and Experts	9
7.	Online Etiquette	10
8.	Confidentiality, Privacy and Security.....	11
9.	Technical Requirements	11
10.	Recording	12

DEFINITIONS

Bundle of documents	shall mean the agreed bundle of documents of the parties for use during the remote hearing arbitration
Participants	shall mean the Tribunal, parties, party representatives and other persons attending a remote hearing or part thereof with the permission of the Tribunal
Participant schedule	shall mean a schedule referred to in paragraph 1.1.3
Party/Parties	shall mean the parties to the arbitration
Remote hearing	shall mean hearings conducted using communication technology including simultaneous two-way audio-visual transmission technology or various cloud-based audio-visual hearing platforms for hearing by the participants in a remote hearing from various venues, or a hybrid-remote hearing conducted at a designated venue with some participants or witnesses attending from remote venues
Remote hearing platform	shall mean communication technology including simultaneous two-way audio-visual transmission technology or various cloud-based audio-visual hearing platforms chosen and agreed to in writing by the parties to facilitate the remote hearing conducted from various venues. The remote hearing platform to be used and to be agreed to by the parties may include MS Teams, Skype, Zoom Meeting, Cisco Webex Meeting or any other electronic cloud-based audio-visual platform agreed to between the parties
Tribunal	shall mean a single arbitrator or a three member panel of arbitrators comprising the Tribunal
Venue	shall mean and include an audio-visual remote conferencing location including the remote hearing venue, party, witness and participant venue/s, remote breakaway rooms for Tribunal deliberations and caucusing by parties and party representatives facilitated, on and by the remote hearing platform from which the participants will participate in the remote hearing
Witness	shall mean the individual who presents evidence and is the subject of examination by way of the remote hearing platform and includes an expert witness

1. Preliminary Considerations

- 1.1. In the event that the Tribunal directs that the arbitral proceedings are to be conducted by way of a remote hearing, or the parties agree to a remote hearing, then the Tribunal and parties to the arbitral dispute must agree, which agreement may be made a procedural directive by the Tribunal in advance of the remote hearing on:
 - 1.1.1. The use of a remote hearing and the remote hearing platform to resolve their dispute/s.
 - 1.1.2. The remote hearing platform to be used in the conduct of the remote hearing.
 - 1.1.3. The identification of the participants to the remote hearing on a participant schedule identifying and referencing the designation, title, name and surname, email address and telephonic contact details of the participants and the remote hearing location or venue from which they will participate.
 - 1.1.4. The remote venues from which witnesses will participate, the associated security and integrity requirements in relation to the remote witness venue, or the physical presence of an independent person to observe the production of oral evidence by witnesses at the remote witness venues.
 - 1.1.5. The host of, and/or person or party to manage and control the remote hearing platform, either continuously or intermittently, on demand.
 - 1.1.6. The identity, use and participation of at least one on-call, or on-site individual with adequate technical knowledge to assist in the planning, testing and the conducting of the remote hearing by way of the agreed remote hearing platform.
 - 1.1.7. The software, hardware equipment, the cyber/internet security and system security requirements appropriate for the remote hearing, remote hearing platform and remote hearing venues.
 - 1.1.8. The manner and methodology of connecting to the internet and remote hearing platform, preferably connecting by way of fixed cable networks, alternatively Wifi networks, and/or the use of high-speed and quality fibre internet to ensure the best possible use of the remote hearing platform to prevent interruptions, delays and connectivity lagging.
 - 1.1.9. Whether or not some, or all the parties and/or party representatives will appear at the same physical hearing venue as the Tribunal. In the event that one of the party representatives cannot attend at the same venue as the Tribunal, then it is advisable that none of the parties and party representatives attend at the hearing venue with the Tribunal.
 - 1.1.10. The various locations of the physical venues from which the participants will participate in the remote hearing.
 - 1.1.11. All participants in the remote hearing must attend the remote hearing proceedings properly identified with their designation, title and name and surname appearing on the remote hearing platform.

2. Due Process - Fairness, Equal Treatment and Impartiality

- 2.1. Separate from the arbitration agreement, parties intending to conduct remote hearings are encouraged to enter into an agreement dealing with essential aspects of the remote hearing as set out at in paragraph 1 above.
- 2.2. The Tribunal may in its discretion direct that a remote hearing be held on the application of the parties, some of them or in the exercise of its own discretion.
- 2.3. In the event of a dispute on the conduct of a remote hearing the Tribunal shall, after due consideration of the party views direct that a remote hearing be held, or not.
- 2.4. The participants in the remote hearing must be in a position to effectively and equally participate in the remote hearing with the minimum basic requirements including a stable internet connection, appropriate remote hearing venues and suitable devices.
- 2.5. The Tribunal must ensure that the hearing platform provides for the fair, equal and reasonable right of access to all parties in the conduct of the remote hearing proceedings without any party enjoying an unfair advantage over the other.
- 2.6. Should the Tribunal in a procedural directive order the conduct of remote hearings, the Tribunal must confirm the essential elements for such remote hearings with the parties as set out in paragraph 1 in order to prevent unfairness or an improper advantage to any of the disputing parties to the arbitration.
- 2.7. The Tribunal may adjourn a remote hearing at any stage due to technical difficulties which it regards as rendering the proceedings as no longer fair.

3. Venue

- 3.1. Insofar as it is possible, and insofar as agreed to between the parties or ordered by the Tribunal, the remote hearing conducted on the remote hearing platform shall be implemented and occur from various remote hearing venues complying with the minimum required technical, technological and security requirements.
- 3.2. Various remote venue rooms could be created on the remote hearing platform to include a remote waiting room from which participants are allowed access to the remote hearing room, various remote hearing breakaway rooms (if required) for use by the Tribunal, parties and participants.
- 3.3. General access and audio-visual access should be provided to all the participants to the remote hearing, remote hearing venues and remote venue rooms and restricted access must be provided to the Tribunal, parties, party representatives and participants allocated to the various remote hearing venues and remote hearing breakaway rooms.
- 3.4. Audio-visual access to the various remote hearing venues including remote hearing breakaway rooms should be restricted to only the participants agreed to and allowed access to those specific remote hearing venues and remote hearing breakaway rooms. In the event necessary, remote hearing venues should be created for neutrals to caucus with parties, or neutrals should be granted access to remote hearing party venues.
- 3.5. The remote hearing host must be provided with list of the parties and participants that should have audio-visual access and restricted access to the remote hearing rooms, various remote hearing breakaway rooms and the remote hearing venues.

4. Remote Hearing Proceedings

- 4.1. Remote hearings and hybrid-remote hearings are to be conducted by way of a remote hearing room, remote witness rooms and remote party breakaway rooms on the remote hearing platform.
- 4.2. By way of the remote hearing platform a face-to-face proceeding is to be created and conducted with all parties participating audio-visually on the remote hearing platform.
- 4.3. The parties and the party representatives should have audio-visual access to the remote hearing waiting room and the remote hearing room. Tribunal and member restricted access is to be provided to the various remote breakaway rooms to be used for tribunal deliberations and inter-party consultation and caucus proceedings during the remote hearing proceedings.
- 4.4. The remote hearing breakaway rooms should not be accessible in any manner to any of the participants not granted access thereto, to ensure the integrity of tribunal deliberations, inter-party consultations and caucus proceedings.
- 4.5. By way of the remote hearing platform all participants to the remote hearing must have simultaneous access to the shared documentation, bundle of documents, exhibits and any additions thereto produced during the remote hearing, by means of screen sharing on the remote hearing platform.
- 4.6. The witnesses and expert witnesses shall give evidence from remote hearing witness rooms, seated at a desk with access to a computer, keyboard, mouse, microphone and speakers or headphones with a microphone and two or more large monitors or large display screens, the witness being clearly visible from both a camera near and immediately in front of the witness, and an overhead wide-angle camera viewing the witness, the desk, the room and the entrance leading into the remote hearing witness room.
 - 4.6.1. The device or computer and monitors or display screens used by the witness will not be available for any other purpose but for the conduct of the remote hearing.
 - 4.6.2. The participants in the remote hearing are to be viewed on one monitor or display screen and the other monitor or display screen is to be used for the presentation of documents, bundles of documents, exhibits and screen sharing.
- 4.7. In the event of the abovementioned technology and hardware not being available:
 - 4.7.1. The only persons allowed in the remote hearing witness room shall be the witness giving evidence with an interpreter, individuals required to assist with both the technology and bundle of documents and party representatives on a watching brief basis.
- 4.8. The identity and identification details of each individual and party representative present in the remote hearing witness room shall be recorded, be made available to all parties and such individual and party representatives must record their attendance audio-visually on the remote hearing platform, also certifying after the completion of the witness evidence that the evidence presented by the witness was in accordance with justice and without interference.
- 4.9. The Tribunal may ask a witness to orientate his or her camera to provide a 360-degree view of the remote venue in order to confirm that no unauthorised person/s are present.
- 4.10. The witness and expert witness shall present evidence during the hearing under the direction of the Tribunal, which shall include the administering of an oath or affirmation with the witness and

expert witness providing consent to be recorded, both audibly and visually with confirmation that the witness is alone in the remote hearing witness room, or identify any individuals in the remote hearing witness room and their role and function in the remote hearing witness room.

5. Documentation and Exhibits

- 5.1. The parties to the remote hearing must make available the bundle of documents in electronic format and if so required by the Tribunal in hardcopy format, an index or indices of all documentation to be used during the remote hearing proceedings including, but not limited to witness statements, statements and memorials, the agreed to bundle of documents and evidence and additional documents handed in during the remote hearing proceedings ("documents" or "documentation" used interchangeably) to be used in the remote hearing proceedings, to the Tribunal, participants and witnesses in the remote witness rooms.
- 5.2. The documentation referred to in the index or indices must be available in electronic format to all participants in the remote hearing which is to be shared and accessed by all participants on the remote hearing platform.
- 5.3. The Tribunal may ask a witness to display the documents and/or witness statements made available to and used by the witness in hardcopy format to ensure that there are no annotations thereon.
- 5.4. The parties should agree, identify and list documents that may be shared with either all, or some of the participants in the remote hearing proceedings and they should ensure that documents are neither incorrectly, nor improperly shared with participants that should not have access thereto.
- 5.5. The parties to the remote hearing must agree to a procedure for the transmission, storage and accessing of documentation to be used by the parties both prior to and during the remote hearing and the use of any specific document sharing platform.
- 5.6. All documentation contained in the bundle of documents, exhibits and other documents to be used during the remote hearing must be in .PDF format, clearly identified, paginated, indexed and made available to all participants to the remote hearing.
- 5.7. All documentation must be in an OCR (optical character recognised) format allowing it to be text readable, text-searchable and allowing text to be highlighted, marked-up and electronically annotated.
- 5.8. All documentation must be presented in .PDF upright portrait mode and format. In the event that the original documents are in landscape format, such documents must be made available in a 90 or 180 degree rotated document upright .PDF format, and also in the original landscape format, if so required.
- 5.9. The default view setting for all pages contained in the document must be at 100%.
- 5.10. The documentation to be used during the remote hearing proceedings must be contained in as few electronic bundles as possible, preferably in one date chronological and numerically numbered bundle.
 - 5.10.1. Generally speaking, the documents contained in the bundles must be in date chronological format, numbered and indexed. The document numbering appearing on the individual page numbers must be a computer-generated number and not numbered by hand.

- 5.10.2. The document numbering appearing on the individual page should preferably be preceded by an alphabetical letter to assist in quick searching of documents, it being easier and quicker to search for document "A198" rather than "198".
 - 5.10.3. Documents should not be OCR scanned greater than 300 dpi in order to avoid slow scrolling and rendering.
 - 5.10.4. In the event that it is possible, indexes or tables of contents should be hyperlinked to the indexed documents.
 - 5.10.5. The allocated page numbers captured on the pages contained in the electronic bundle must be the same number as the electronic .PDF page number appearing on the program used to view the .PDF documents.
 - 5.10.6. In the event of additional documentation being made available during the remote hearing such documents should be allocated a separate bundle, document and exhibit number.
- 5.11. Insofar as it is possible, the participants to the remote hearing with the exception of witnesses should make use of two, preferably three large monitors or large display screens, the first to view the participants in the remote hearing, the second to view the documents used during the remote hearing and the third to be used for any other purposes including inter-party communications on whichever other party platform the parties may use.

6. Interpreters, Interpretation, Independent Legal Representatives, Witnesses and Experts

- 6.1. The parties are to agree, failing which the Tribunal will decide whether consecutive or simultaneous interpretation services are to be used during the remote hearing and the location of the interpreter.
- 6.2. The parties are to agree, failing which the Tribunal will decide on the physical presence of an independent legal representative to observe the production of oral evidence via remote hearing by a Witness.
- 6.3. The independent legal representative must be physically present to observe the production of evidence by a witness and file a statement with the Tribunal confirming that the independent legal representative:
 - 6.3.1. Was available, present and observed the production of oral evidence by the witness in the remote hearing room on the hearing date; and
 - 6.3.2. Does not have any have any relationship with the parties, their legal representatives or the witness that would constitute a conflict of interest and/or would impair the ability to objectively and independently observe the production of evidence by the witness.
- 6.4. Expert witnesses should convene remote expert witness meetings prior to the remote hearing to reach consensus on issues admitted and issues in dispute, including agreement on documents to be used during the remote hearing.
- 6.5. Both expert witnesses and witnesses should have access to the agreed bundle of documents electronically on the remote hearing platform and if required in hardcopy format in the remote hearing witness room.

- 6.6. The expert witnesses, witnesses and interpreters should have access to the remote hearing platform by way of a party agreed to computer and electronic hardware which should include, as a minimum requirement, two monitors, a microphone and speakers, a web camera to record the individual in the remote hearing witness room and a wide-angle camera to record the environment of the remote hearing witness room to ensure the integrity and reliability of the evidence presented.
- 6.7. Witnesses shall not be allowed to be aided by any notes, unless permitted by the Tribunal on good cause shown.
- 6.8. Witnesses shall attend in the witness room without any personal electronic equipment, cellular telephones or communication devices.

7. Online Etiquette

- 7.1. Participants in the remote hearing must log-on to the remote hearing platform at least 15 minutes before the commencement of the remote hearing, in the remote hearing entrance room.
- 7.2. Witnesses, expert witnesses and all non-party representatives not required to attend the remote hearing will attend in the waiting room until given access to the remote hearing platform.
- 7.3. Participants to the remote hearing must register and identify themselves by way of their designation, title, full name and surname which is to appear on the remote hearing platform to identify such participant.
- 7.4. Participants on the remote hearing platform must consider and ensure appropriate camera positioning reflecting the face, torso and desk where the participant is positioned.
- 7.5. The Tribunal, participants and party representative must endeavour not to speak at the same time except in circumstances of either an objection, or to alert participants of technical difficulties. In the event of participants wanting to attract attention, it should be done by way of the hand raising function on the remote hearing platform, if unsuccessful then visually by the participant raising a hand in front of the camera and lastly by way of voice audible intervention.
- 7.6. In the event of a party representative not speaking during, or participating directly in the proceedings, such participant must mute his or her microphone.
- 7.7. A person not participating in the proceedings must turn his or her audio and video function off.
- 7.8. Audio quality can be affected and interfered with through a variety of factors, including ambient noise and interference through physical contact with the microphone. These interferences must be avoided and in the event of multiple participants in the same location, all but one microphone must be muted to prevent audio interference and audio echo.
- 7.9. All participants must eliminate background noise and use rooms with minimal disturbance.
- 7.10. Witnesses and expert witnesses must not use the remote hearing platform "virtual backgrounds" and the remote hearing venue or room environment from which they participate must be visible.
- 7.11. Witnesses, expert witnesses and participants not required to attend shall sign-off from the remote hearing platform at the conclusion of their evidence or required participation.
- 7.12. All participants participating in the remote hearing by way of the use of their video function must ensure adequate lighting, prevent backlight or over-exposed light interference to ensure that facial expressions are discernible.

- 7.13. The Tribunal and participants must agree on the dress code to be observed during the remote hearing.

8. Confidentiality, Privacy and Security

- 8.1. The remote hearing platform should have a unique and automatically generated meeting ID for each remote hearing, it not being a personal meeting ID that may be utilised on various occasions.
- 8.2. In the event of the remote hearing being password-protected, such unique password must be shared between the participants thereto, on a platform other than the remote hearing platform.
- 8.3. The various participants to the remote hearing must connect to the remote hearing platform by way of secure Internet connections and not from public locations.
- 8.4. The identity of all the participants to the remote hearing must be recorded and circulated between the parties. Any other additional participants must be specifically identified to and be invited by the Tribunal.
- 8.5. The exact physical location from where the various participants to the remote hearing are to participate must be identified and witnesses and expert witnesses must preferably participate in the remote hearing proceedings from a dedicated remote hearing witness room to ensure the integrity of the evidence presented.
- 8.6. The remote hearing witness room should only be used and accessed by the individual presenting evidence from that remote hearing witness room and should be recorded by way of two cameras, the one a web-camera and the other an overhead wide-angle camera.
- 8.7. The tribunal may request the witness and/or expert witness whilst administering the oath or affirmation to state under oath as part of the oath or to affirm as part of the affirmation that there is no-one other than the witness and/or expert witness in the remote hearing witness room, or from whichever facility the evidence is presented.
- 8.8. The designation, title, full names and surnames of the participants to the remote hearing and their role therein, their respective email addresses and telephonic contact numbers must be made available to the tribunal members and the various party representatives.
- 8.9. In the event that the remote hearing platform has a "private" chat feature, the settings of such chat feature must be disabled in respect of the witness testifying from a remote venue and set to allow chat with "everyone".
- 8.10. The remote hearing access should be restricted to the participants only.
- 8.11. Access to the remote hearing room and breakaway remote hearing rooms must be limited to the parties and participants specifically identified and designated to have access thereto.

9. Technical Requirements

- 9.1. All parties including interpreters should have access to quality high-speed internet networks and connect, preferably by way of a data cable to the Internet and the remote hearing platform.
- 9.2. The connection and link of the parties from their respective venues to the remote hearing platform must be of sufficient quality and speed to allow for proper, clear and continuous audio-visual transmission.

- 9.3. The Tribunal and parties may agree on the technical requirements for the audio-videoconference and remote hearing in circumstances where the minimum bandwidth (up/down) requirements should be not less than 1.5 mbps, 30 frames/second with minimum peer-to-peer video quality, preferably high quality video, the recommended bandwidth being 2.5 mbps upload and 3 mbps download with HD video.
- 9.4. The parties should, if possible have access to computers and two, if not more large display screens or large monitors, appropriate microphones and speakers or headphones with a microphone and cameras to allow all parties and participants to adequately hear, see and participate in the hearing.
- 9.5. The various participating parties should test the remote hearing platform and the associated audio-visual connectivity thereto and the venues in advance of the remote hearing
- 9.6. Screen sharing and any screen writing functionality on the remote hearing platform must be available to all participants in the remote hearing and have been tested by all participants prior to the remote hearing.
- 9.7. The party representatives should ensure the availability and participation of a relevant individual with the appropriate technical expertise to assist in the participation of the various parties in, and with the remote hearing platform prior to and during the remote hearing.
- 9.8. The party representatives must agree to the audio-visual recording of the remote hearing proceedings and the transcribing thereof and all participants must be informed that the proceedings are recorded both audio-visually, and must consent thereto which consent must be confirmed either in writing or at the commencement of their participation in the remote hearing.

10. Recording

- 10.1. The settings on the remote hearing platform must be set to allow only the host to the remote hearing to receive and distribute the remote hearing recording.
- 10.2. The participants in the remote hearing must reach agreement on the use of the platform recording features, failing which the Tribunal will decide thereon and in the event of the proceedings being recorded, such recordings must be made available to the parties within 24 hours of the platform recording being made available to the Tribunal, subject to confidentiality and the recording not being distributed to witnesses which are yet to testify.
- 10.3. In the event of the platform recording features being used, the recording link made available to the Tribunal and parties should be password protected which password must be sent to the Tribunal and parties separately from the communication containing the recording link or the Tribunal should send the recording link directly to the various party representatives.
- 10.4. No recording other than the platform recording of the remote hearing proceedings shall be made without the leave of the Tribunal.