

21 KEY ARBITRATION DEVELOPMENTS FROM 2020

11. The emergence of cyber-protocols as soft law instruments

Due to **COVID-19** and the increase in **virtual hearings**, as reported in our first key arbitration development in 2020, there is a greater need for:

- A **reliable internet connection**
- Methods to ensure the **preservation of witness credibility**
- Anticipating new methods of **document management**
- A process to address **technical problems** and their impact on the hearing
- Greater care to be taken to ensure **confidentiality** is preserved

Cyber-protocols allow parties to anticipate these problems by agreeing on relevant procedures, including:

Internet Connectivity

- Connect through a stable internet connection, preferably using a wired Ethernet cable
- Avoid using equipment that interferes with connectivity
- Agree on minimum system specifications
- Determine whether e.g. phones, back up computers, connectivity boosters are required in any location

Witness Examinations

- Factual witnesses should only have access to the hearing when they are called to testify and should be virtually sequestered into digital break-out rooms when not testifying
- Ensure that side-chat functions are disabled on the systems used by witnesses so counsel and witnesses cannot communicate off the record
- Risks can be mitigated by witnesses being required to stay on screen during breaks or by using a 360-degree “owl camera”

Document Management

- Use a videoconferencing system that allows for a “Share Screen” function for presentation of evidence
- Designate a Document Manager on each side to ensure smooth viewing of documents/exhibits

Confidentiality

- Agree that recording(s) are stored by the Tribunal and made available to the parties only if requested
- Parties may draw up a separate cybersecurity protocol to address specific concerns of hacking and third party interference.

Technical Problems

- Designate a Videoconferencing Emergency Contact Person on each side, responsible for informing the Tribunal of any connection issues so the Hearing can be paused

Examples of cyber-protocols include:

ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (bit.ly/ICCAREport6)

ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (bit.ly/ICCcovid19)

Seoul Protocol on Video Conference in International Arbitration (bit.ly/KCABSeoul)

IBA Cyber Security Guidelines (bit.ly/IBAcyber)

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