

# An Arbitration Center's Perspective: Due Process in Online Dispute Resolution

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## A. Approach to the Issue

Arbitration is based on the free will of the parties, and so only if there is a specific agreement (the ‘arbitration agreement’) can this means of dispute resolution be employed. This will may be manifested through two channels: *ad hoc* arbitration, and what is known as institutional arbitration.

In the latter case, the parties entrust an arbitration institution or body with the power to lay down the rules of procedure, and the institution will then administer the arbitration.

Institutional arbitration is growing in step with the expansion of international trade, making it entirely logical to suppose that a higher level of globalisation means a higher profile for arbitration.

If this is true with regard to international arbitration, it is no less true that the same parallels may be observed in national or domestic arbitration.

With regard to the former, and also the latter, the parties seek supplementary guarantees which they sometimes fail to find in state courts.

There are many reasons why institutional arbitration may be considered to offer significant advantages over *ad hoc* arbitration.

One need only state a few in general terms, connected with the topic that concerns us here:

### I. Guarantees in Dispute Resolution

As the parties entrust the administration of arbitration to an institution, it may be presumed that the experience this institution has built up contributes more efficiently to the successful completion of the procedure.

### II. Simplification

In *ad hoc* arbitration, the arbitration clause must define and settle all or most of the procedural aspects, although clearly many situations are difficult to foresee. This could lead to complex clauses being drawn up and agreed, which might on occasion not correspond to the reality that emerges.

Arbitration institutions, on the other hand, have proven procedural regulations which are continuously reviewed and improved in application

to various cases and situations, capable of responding to any incidents that may arise.

### *III. Respect for the Will of the Parties and Flexibility.*

Arbitration bodies establish procedures that nonetheless seek to preserve the will of the parties.

Article 1 of the CIMA Rules (paras. 2, 3 and 5) states the following:

2. Unless otherwise provided by the parties, the Court shall apply to all proceedings whose administration is entrusted to the Court the provisions of the Statutes and Rules in force at the time of submission of the request for arbitration or of the request for an emergency Arbitrator.
3. The Court will address any questions raised regarding the interpretation, application and enforcement of the Rules, ex officio or at the request of any party.
5. In the administration of arbitrations entrusted to the Court, the Secretariat shall assist both the Court and the Arbitral Tribunal. The Court shall ensure the appropriate conduct of the arbitral proceeding and the compliance with time limits, as well as the respect –in coordination with the Arbitral Tribunal– of the rights of a fair hearing, presentation of the case and equality of the parties.

### *IV. Procedural Momentum*

In cases where the proceedings are excessively delayed or even brought to a halt because of negligence or bad faith by one of the parties, or even because of certain attitudes taken by the arbitrator, the institution can take steps to restart the process.

### *V. Administrative and Logistical Assistance*

Lastly, two aspects of relevance should be highlighted. As for the first, this support is very important for the smooth handling of the proceedings and compliance in practice with the principle of ‘due process’. The proceedings will be conducted in an orderly manner.

The logistical aspect is of great importance and becomes even more significant when viewed from the perspective that concerns us this afternoon.

Logistics are very important for the hearings process. The institutions have advanced audiovisual and document reproduction and display systems as well as professionally trained ancillary staff.

In short, the success of institutional arbitration is based on the administration of arbitration by a prestigious, reliable institution with adequate logistical and support resources, providing a quality service.

If this is the case in general, there can be no doubt that the recent events that have so seriously altered the normal rhythm of our societies have reinforced this approach and the conclusions here set out.

The role of arbitration bodies in conducting this process has thus become (and will undoubtedly continue to become) more significant.

### *B. Extraordinary Health Crisis Situation*

The pandemic, which emerged first in certain locations and then spread exponentially across the globe in the early months of 2020, represents an unexpected and radical change in the habits of society and disruption to legal relations of all kinds, with an unquestionable impact in the judicial field and also in arbitration.

These events have shaken to the core the way in which people view life and also how they relate with one another, not only in the personal sphere, but also professionally, in the world of business and, in a unique way, in the world of law, as specifically reflected in the sphere of arbitration which concerns us here.

Until early 2020, we lived in a mobility-based society, as reflected in all our personal and professional activities. Business and professional travel and meetings were an essential aspect of daily life.

The first specific (negative) effect of the pandemic consisted of restrictions on mobility, insofar that travel was practically cancelled for months.

This had a direct effect on all business activities, and of course also had a very direct impact on arbitration.

Faced with a challenge of this magnitude, the need arose to explore and advance different alternatives in an attempt to respond to the legitimate aspirations of the parties that were already or about to be involved in arbitration proceedings.

Legislators in different countries sought to respond to this situation, and edicts were issued declaring a state of emergency.

In Spain, the situation was addressed through Royal Decree 463, of 14 March 2020, declaring a state of emergency, in order to manage the health crisis caused by Covid-19.

Regulations were established for the administration of different public services, and the possibility of conducting various activities, some of which were considered essential.

As regards procedural deadlines, it was generally established that:

Time limits under procedural laws for all courts are suspended and interrupted. Calculation of time limits shall be resumed once this Royal Decree or, where applicable, any extensions thereto, is no longer in force.

In other words, there was a complete halt to judicial activity, with some exceptions in criminal procedure and in special regulatory proceedings for the protection of the fundamental rights of the individual.

Notwithstanding all the above, provision was made for judges or courts to issue any rulings required in order to avoid irreparable harm to the legitimate rights and interests of the parties to the proceedings.

As one would expect, no provisions were made with respect to arbitration proceedings. In light of this situation, arbitral tribunals naturally analysed the situation and came up with solutions for the various scenarios that could arise.

The Court of Civil and Commercial Arbitration (*Corte Civil e Mercantil de Arbitraje*, CIMA) studied the situation, aiming to balance the interests of the parties to the arbitration with the general mandatory rules, while also taking into account the personal positions of those involved in the proceedings (lawyers, witnesses, experts and even the staff of the Court itself).

Due process thus had to be guaranteed, without undermining any interests of those who were and would usually be involved in each arbitration.

In this respect, CIMA adopted several measures:

### C. Resolution of 16 March 2020

IN THE LIGHT OF THE STATE OF EMERGENCY DECREED BY THE SPANISH GOVERNMENT, THE COURT HAS DECIDED TO ADOPT THE FOLLOWING MEASURES:

1. Staff will work from home. All activities of the Court will likewise be conducted by remote procedures.
2. Face-to-hearings or face appearances provided for in the Rules or agreed by the parties and the Arbitral Tribunals (Mission Statements, Article 31, or any other) are suspended, and may be held by means of a

telephone conference, provided that this is agreed by the parties and the corresponding Arbitral Tribunal, with the Secretariat of the Court having been consulted.

3. Evidence hearings are suspended.
4. All deadlines for ongoing arbitration proceedings are suspended. As an exception, procedures may be carried out if, due to their special characteristics, this is ruled by the Arbitral Tribunal, with the agreement of the parties, and following consultation of the Court.
5. All professional travel is postponed, except in urgent and essential cases, which must be duly authorised by the Court.
6. The above measures take effect from today and will continue for as long as the competent authorities so determine, while the current situation remains in place.
7. The Court remains entirely at the disposal of all arbitrators, parties and all legal agents, and regrets any incidents and/or delays arising in the provision of its services.

#### *D. CIMA Briefing Note of 6 April 2020*

A Briefing Note on the Resolution of 16 March was subsequently issued:

In light of the consultations addressed to the Court as to the application of the Resolution of 16 March on the suspension of deadlines and hearings in arbitration proceedings currently taking place, this BRIEFING NOTE is duly issued to clarify the scope and application of the suspension of the deadlines to which the resolution refers, in addition to the possibility of lifting said suspension provided that the arbitral tribunals and the parties affected thereby so agree.

In order to resolve any possible doubts that may arise in the interpretation and application of the aforementioned resolution, the Court deems it necessary to issue this BRIEFING NOTE which: a) first analyses the scope of application of the aforementioned resolution; b) then refers to the procedures and actions excluded from the suspension; c) third, refers to the procedures to be completed in writing by the parties or the arbitral tribunal; d) fourth, the note analyses the effects of the resolution in relation to in-person appearances and hearings; and e) lastly, refers to the procedures relating to the pronouncement of the award, notification and the deadlines for clarification, supplementation or rectification.

ONE. REGARDING THE SCOPE OF APPLICATION OF THE RESOLUTION OF 16 MARCH 2020.

1. The Spanish Government decreed a State of Emergency as a consequence of the pandemic known as CORONAVIRUS (COVID-19), which led to the confinement of the public to their homes. Many arbitrators and lawyers agreed to adopt measures in this regard, in order not only to avoid appearances in person, but also the processing of ongoing proceedings, given the possible difficulty for the parties and their lawyers to access to documents and other resources so as to draw up their respective written submissions.
2. On this basis, and in the face of such an exceptional situation, the Court adopted the aforementioned resolution in which, among other measures, all deadlines of the arbitration proceedings managed by it were suspended, while allowing the proceedings to continue in certain cases, provided that the arbitrator and the parties were in agreement.
3. The aim was as far as possible to make the exceptional situation caused by the aforementioned State of Emergency compatible with the specific features of arbitration proceedings.
4. The terms of the Court's resolution should thus be understood to refer solely and exclusively to 'arbitration proceedings' and not to other stages of arbitration. Hence the fact that in referring to the possibility of lifting the suspension and continuing the proceedings, reference is made to the parties and also to the Arbitral Tribunal, and not the Court, whose involvement is confined to consultation.
5. In practice, in order to be able to lift the suspension and thus agree on the continuation of the 'proceedings', the Arbitral Tribunal and the parties must all so agree. This mutual agreement can scarcely occur if the Arbitral Tribunal is not formally constituted.
6. At a preliminary stage (initial phase), prior to the arbitration proceedings themselves, one may distinguish three fully differentiated moments: a) the request and response regarding the arbitration (Articles 6 to 8); b) the preliminary assessment of the arbitration agreement (Article 9); and c) the constitution of the arbitral tribunal (Articles 15 to 21).
7. Once the Arbitral Tribunal has been constituted, the procedural phase begins (the arbitration proceedings per se), with Tribunal receiving the case file previously processed by the Court Secretariat, as indicated in Article 23 of the Rules. Article 24 literally refers to the '**terms of reference and calendar for the arbitration procedure**', indicating here, that it is following the constitution of the arbitral tribunal, and its

receipt of the case file, that the processing of the arbitration procedure itself begins.

8. The power to interpret the Rules lies with the Court (Article 1.3 of the Rules). In exercising this power of interpretation, and taking into account the resolution of 16 March 2020, it must be understood that the suspension of deadlines refers exclusively to the arbitration procedure itself, as indicated in Article 23.

## TWO. REGARDING THE PROCEDURES TO BE DEEMED EXCLUDED FROM THE SUSPENSION.

Taking into account the above considerations, the following procedures and/or actions should be understood to be excluded from the suspension ruled by the Court on 16 March 2020:

1. The procedures in response to the request for arbitration and announcing a counterclaim.
2. The defendant's raising of procedural objections, and service thereof on the plaintiff to formulate arguments.
3. The preliminary assessment of the arbitration agreement by the Court.
4. Appointment of the arbitral tribunal, including the deadline for a challenge to it, or to any of its members if a collegiate body.

## THREE. REGARDING PROCEDURES TO BE COMPLETED IN WRITING.

1. Once the arbitral tribunal has been constituted, all procedures comprising written submissions by the parties, decisions of the Court or procedural orders of the arbitral tribunal must be deemed suspended for the period indicated in the resolution of 16 March.
2. However, this general rule may be disregarded as long as this is agreed by the arbitral tribunal and the disputing parties, with the Court having been consulted. This possibility is therefore left to the good judgment of the tribunal and the parties, who must weigh up in each case whether or not it is appropriate to continue with the proceedings on the terms and up to the procedural steps they deem sensible and reasonable.
3. To this end, likewise taking into account the characteristic features of arbitration, the Court encourages arbitration tribunals (single-person or collegiate), if they deem so appropriate, to contact the legal representatives of the parties in order to seek their opinion as to whether or not they should avail themselves of this option.



#### FOUR. REGARDING IN-PERSON APPEARANCES AND HEARINGS.

1. Specific reference and treatment are required for in-person appearances and hearings during the course of arbitration proceedings, such as the terms of reference (Article 24.2), the organisation of the procedural calendar (Article 31) or the examination of witness and expert witness evidence (Articles 32.2 and 33.8). This is without prejudice to any appearances that may be agreed by the parties and the arbitral tribunal (e.g. in the case of oral conclusions).

2. Of the appearances set out in the Rules, only that referring to preparation of the terms of reference is optional, and may be replaced by draft terms of reference exchanged among the parties and drawn up by the tribunal itself, in order for the lawyers to suggest or propose any additions or modifications they might deem appropriate. However, if the arbitrator and the parties consider it necessary to meet, this could be conducted remotely.

3. The same applies to the appearance scheduled for the establishment of a calendar of actions, both for the examination of evidence and for the presentation of written conclusions (Article 31 of the Rules). In this case the appearance could be replaced by written communications between the tribunal, the parties and the Court, could be performed remotely, although given the terms of this principle, it would be advisable to conduct it digitally, with the agreement of all the parties.

4. With regard to the hearing for the examination of witness and expert witness evidence, although it is true that the Rules of the Court for the examination of witness evidence allow this to be conducted by audiovisual means (Article 32.5), provided that this is agreed by the Court itself and the arbitral tribunal, the Court has held that this must be examined in person, since at least the parties, the arbitral tribunal and the Court Secretary must be present. Therefore, and given the special circumstances that exist, the resolution of 16 March does not consider lifting the suspension of such an important hearing.

#### FIVE. REGARDING THE FINAL AWARD AND WRITTEN CLARIFICATIONS

1. With regard to the issuance of the final Award, a distinction must be made between those cases in which, following completion of the conclusions procedure by the parties, the respective award is pending pronouncement, and those others in which it has already been issued and notified to the parties.

2. In both cases, the arbitration proceedings per se have by this point been concluded, and the deadline for issuing the award should therefore not in principle be deemed to be suspended. As a result, the arbitral tribunal must, when presented with the written conclusions or, where applicable, when the parties appear remotely to present their oral conclusions, issue the corresponding award by the deadline.

3. Following issuance of the award, notice must be served on the parties, with deadlines being left open for them to present their respective written submissions in a request for clarification, correction, supplementation and rectification of the award.

## SIX. FINAL CONSIDERATIONS.

1. In short, the resolution of the Court of 16 March must be interpreted, and therefore applied, by taking into account the considerations contained in this note, resulting in the following situations, by way of conclusion:

- a) The arbitration must follow the regulatory procedures from commencement up until the constitution of the arbitral tribunal and delivery to it of the corresponding case file. Consequently, none of these procedures is affected by the suspension referred to in said resolution.
- b) The evidence hearing is affected by the suspension, which cannot be lifted during the term of validity of the aforementioned resolution.
- c) Once the arbitral tribunal has been constituted, the procedures to be completed in writing by the parties, the decisions of the Court and the Procedural Orders may be reactivated following agreement by the arbitral tribunal and the parties, with the Court being consulted.
- d) Likewise, once the arbitral tribunal has been constituted, in-person appearances, with the exception of the evidence hearing, may be replaced either by written communications between the parties and the arbitral tribunal, with a copy to the Court, or by remote appearances. All the above provided that the arbitral tribunal and the parties so agree, with the Court being consulted.
- e) Once the conclusions procedure has been completed, the deadlines for issuance of the award are not deemed to have been suspended, nor for the parties to request that they be corrected, clarified, supplemented and rectified.

2. The Court would like to thank its associates, the various arbitral tribunals now constituted or in the process of constitution, as well as the legal representatives of the different parties involved in the arbitration administered by CIMA, for their understanding, comments and suggestions to reconcile the exceptional situation in which we find ourselves,

with the continued processing of such arbitration, at all times with proper respect for the right to due process and the inalienable rights of the litigants.

3. In short, if it is the wish of the parties to maintain the suspension of the arbitration proceedings, they may do so once the arbitration tribunal has been constituted, since it is at this point that the resolution of 16 March 2020 fully applies. If they instead wish to lift the suspension and continue with the proceedings, they may be resumed, where applicable, up until the conclusion of the arbitration, or until the applicable procedural stage, as allowed by the resolution of the Court.

4. The Court encourages both the arbitral tribunals and the parties and their legal representatives, as far as possible and in the light of the circumstances of each case, to find the ways and means by common agreement to facilitate their arbitration proceedings.

#### *E. CIMA Resolution of 2 June 2020*

This resolution established the following:

**One.** By resolution of the Court on 16 March, it was decided, as a result of the state of emergency decreed by the Government of Spain, to suspend ‘the in-person hearings or appearances established in the Rules or agreed by the parties and the Arbitral Tribunals (Terms of Reference, Article 31, or any other), which may be held by means of a telephone conference, provided that this is agreed by the parties and the corresponding Arbitral Tribunal, with consultation of the Secretariat of the Court’. It was also decided to suspend ‘the evidence hearings’ and ‘all deadlines for ongoing arbitration proceedings. As an exception, those procedures which are, due to their special characteristics, so agreed by the Arbitral Tribunal may be conducted with the agreement of the parties and consultation of the Court’.

These resolutions were supplemented by the briefing note of 6 April 2020.

Finally, it was agreed that ‘the above measures take effective from today and will continue for as long as the competent authorities so determine, while the current situation remains in place’.

**Two.** Whereas Royal Decree 537/2020, of 22 May 2020 (Article 8) provides that ‘from 4 June 2020 onwards, the suspension of procedural deadlines is lifted, repealing the second additional provision of Royal

Decree 463/2020, of 14 March 2020', leaving all procedural deadlines suspended.

**Three.** On the basis of the above, the Court deems it necessary to resolve, and therefore does resolve, to lift the suspension of the aforementioned deadlines, such that all arbitration proceedings handled by the Court may complete their normal process until the award is issued or, where applicable, until the clarification, correction or supplementation thereof.

The lifting of the suspension will begin to take effect from 5 June 2020.

**Four.** For the continuation of arbitration proceedings the deadlines of which have been suspended, it is resolved to resume the aforementioned deadlines, in each case it being up to the arbitrators strictly to comply with the right of defence and the principle of equality between the parties.

**Five.** Arbitral tribunals are authorised to ensure that all actions and proceedings, with the agreement of the parties and consultation of the Court, except for evidence hearings, can be conducted remotely or in the manner deemed most appropriate in each case, while guaranteeing the integrity of the proceedings.

**Six.** With regard to evidence hearings, these may be conducted by audiovisual means if the arbitral tribunal so decides, with the agreement of the parties and consultation of the Court. The Court has in place the 'Microsoft Teams' system, guaranteeing the quality, security and confidentiality of the hearings, with recording capacity. In any event, the Court will provide the arbitral tribunals and the parties with the rules (protocol) to ensure the utmost authenticity in the proceedings.

**Seven.** For in-person evidence hearings, and for as long as this recommendation by the health authorities remains in place, appropriate measures will be taken and required of the attendees (distances, face masks, gel and other additional measures) to protect the health of the parties involved, in accordance with the recommendations of the competent public authorities, with the corresponding information being provided in due course for such measures.

**Eight.** The services of the Court will provide the arbitral tribunals and the parties with all the Information necessary for the normal course of arbitration activity and the continuation of the respective arbitration proceedings.

## *F. CIMA Rules or Audiovisual Witness or Expert Witness Evidence Hearings*

Subsequently, the court (CIMA) turned to the question of establishing rules on the use of audiovisual means for witness or expert witness evidence hearings. These are intended as longer-term rules, since these audiovisual systems seem destined to remain in use.

There can be no doubt that the profound crisis caused by the pandemic served as the trigger for implementation of these systems.

As a result, CIMA implemented complete regulations for evidence hearings for witnesses and expert witnesses by audiovisual means, dated 8 June 2020, summarised as follows:

### *I. Introduction*

Arbitration must, as an alternative means of resolving disputes, also take into account new technological advances, and arbitration institutions must promote and have in place appropriate systems serving to conduct appearances and hearings remotely with the utmost guarantee of quality and reliability, especially in the case of evidence hearings, where it is necessary to find the formulae and methods that offer the greatest guarantees for arbitrators, users and arbitration institutions, and ensure the absence of external interference with witnesses and experts.

The fact is that there is no use in having a reliable audiovisual communication system for evidence hearings, if one cannot ensure that witness evidence or expert witness statements are delivered without assistance or intervention by third parties unrelated to the evidence, who could condition their responses one way or another, thereby undermining the very essence of the process, and consequently the end result of the dispute.

We must not forget that the significant advances made in communication techniques may be used for unlawful purposes, especially when the person providing the statement is not under the face-to-face scrutiny of the arbitral tribunal, since the most sophisticated virtual communication formulae in existence could allow the witness to connect to external elements that could affect the statements or responses given.

Audiovisual media were of course used by most arbitration institutions before the emergence of the pandemic situation affecting numerous countries. CIMA makes provision for this option in Article 32.5 of the Rules of Procedure, and witness statements have been given by such means in many cases. The Seoul Protocol was drafted and signed in 2018.

However, the exceptional situation arising from what is known as Covid-19 has in particular led to the clear and unquestionable consideration of the suitability of using such resources, in order to facilitate the processing of arbitration proceedings given the serious consequences that could result from a suspension or delay.

CIMA deems it essential for the proper conduct of virtual hearings to provide the users of the arbitration (arbitrators, parties, lawyers, witnesses and expert witnesses) with access both to the audiovisual technical resources allowing for the quality of appearances and hearings (with the utmost guarantees of security and confidentiality) and the indications (rules) for their use and the examination of witness and expert evidence, so as to offer the arbitration community a combination that combines the security and quality of audiovisual hearings, with the guarantee of the purity of the proceedings, ensuring the absence of external interference in the statements of witnesses and expert witnesses, avoiding any form of communication among them or between them and their lawyers or third parties.

One must nonetheless recognise the desirability and usefulness, as a general rule, of hearings for the examination of witness and expert witness evidence to be conducted in person if possible, thus using the audiovisual system only for special cases where the physical and economic difficulty (high costs) of an in-person hearing would make this advisable.

In fact, at in-person hearings, the immediacy of the relationship between arbitral tribunals and lawyers, and witnesses and expert witnesses, involves the study and direct analysis of their gestures, doubts, responses and a host of nuances which may not be perceived when using remote means. Hence the importance of the in-person approach, and where appropriate, the importance of the quality of the audiovisual system used for remote hearings.

However, the significant reduction in costs and time that the use of audiovisual systems may entail for the parties cannot be ignored. The use of audiovisual resources will therefore make it desirable and necessary for arbitration institutions to implement as an additional service those telematic systems that would facilitate any remote hearings demanded that users might call for.

Either party may in each case propose hearings for the examination of witness and expert witness evidence, whether in person or not, and the arbitrators and arbitration institutions must decide, in coordination with them, if it would be suitable, appropriate and feasible to conduct the examination by audiovisual means. In any event, arbitration institutions must have systems in place allowing evidence to be examined with

the utmost guarantees of security and confidentiality, together with rules (protocols or guidelines) underpinning the guarantee of procedure and compliance with the principles of equality and an adversarial approach.

This is why CIMA considers that the most reliable method for audiovisual evidence hearings is to have venues where witnesses and experts are supervised with full guarantees, so that no external elements can interfere with the examination of evidence.

It is to this end useful for CIMA, as the institution responsible for the administration of arbitration, to make delegations or sign collaboration agreements with other arbitration institutions, corporations and associations (or legal practices) located where the witnesses and experts are present, to provide not only a room in which each of them can make their statements, but also to check their identity and ensure their isolation, without the possibility of internal or external communication, requiring them to use the technical resources provided by the partner institution itself for their evidence or statement.

## *II. CIMA Audiovisual System*

The system made available by the Court for users, arbitrators, lawyers, witnesses and expert witnesses is 'Microsoft Teams', with the following technical characteristics, guaranteed by Microsoft:

Microsoft Teams is a system enabling video conferencing (audio/video), guaranteeing the privacy and security of users who connect remotely, allowing meetings of up to 300 people to be held.

It allows us to decide who, from outside CIMA, can join our meetings directly, and who must wait until we give them access.

The organisers of the meeting can at all times bring in new participants and remove those who were part of the meeting but can no longer continue participating.

Microsoft Teams offers the possibility of recording meetings, always showing a message to everyone in attendance that a recording is being made. Information from the organisations and individuals within the meeting is not used for other purposes.

At the end of the meeting, all those who took part in the meeting can access the recording, as well as any others to whom the organiser provides access.

Microsoft Teams has in place an identity protection and account information system for those taking part in its meetings, with:

- a) **Multifactor authentication (MFA)** requiring users to provide additional forms of verification to prove their identity, helping protect their accounts from attacks that exploit weak or stolen passwords. This ensures the identities and security of those accessing the application.
- b) **Conditional access** allowing one to set risk-based policies for access based on user context, device status, location, and more.
- c) **Microsoft Endpoint Manager** allowing one to manage devices and applications and enforce conditional access on any device.
- d) **Secure guest access** allowing users to collaborate with people outside their organisation while controlling their access to the organisation's data.
- e) **External access** providing an authenticated connection to another organisation, enabling collaboration among organisations.

Each person's information is deleted once the subscription is deleted or expires.

Regular and transparent reports are provided on how the information requested from the company by third parties is processed.

As regards security, Teams network communications are encrypted by default, requiring all servers to use certificates and using OAUTH, TLS, Secure Real-Time Transport Protocol (SRTP) and other industry standard encryption techniques, including 256-bit Advanced Encryption Standard (AES). All Teams data are thus protected within the network.

Meanwhile, Azure Active Directory (Azure AD) provides a single trusted back-end repository for user accounts. User profile information is stored in Azure AD through Microsoft Graph actions.

Transport layer security (TLS) and mutual TLS (MTLS) encrypt instant messaging traffic and enable endpoint authentication. Point-to-point audio, video, and application sharing sequences are encrypted and checked for integrity with the Secure Real-Time Transport Protocol (SRTP). OAuth traffic can also be used for monitoring, especially with reference to negotiable permissions while switching between tabs in Teams, for example, to move from posts to files.

Teams also uses industry standard protocols for user authentication whenever possible, and features the standards ISO 27001, ISO 27018, SSAE16 SOC 1 and SOC 2, HIPAA and the EU model clauses (EUMC).



### *III. Rules to ensure the Reliability and Transparency of Remote Hearings*

#### *1. Identification of the Parties to the Hearing*

Following conclusion of the hearing provided for in Article 31 of the Court Regulation, and having established the calendar and date for the examination of witness and expert witness evidence admitted by the arbitral tribunal, it will reach agreement with the parties and provide the Court with the number of witnesses and experts whose testimonies or statements need to be processed via the audiovisual system, as well as their full names, ID numbers and any documented accreditation (ID card, passport, etc.), as well as the place (country, city and room location) from which they will give their statement.

The arbitral tribunal may, at the start of each intervention, carry out the corresponding check as to the IP address of the issuing computer, the identity of the witness or expert, to place this on record in the case. The same verification will be carried out to identify those persons (translators, transcribers or technicians) who will be present at the respective hearing.

Aside from these individuals, no one else will be allowed access to the hearing. The parties involved or present will gain access by means of the corresponding password. Access control will be conducted by the Court's services.

#### *2. IP Address from which the Evidence or Statement is issued*

Before the session begins, the parties will email the IP address used for connection to the arbitral tribunal, which will forward it to the Court, as well as the technical audiovisual communication system to be used by each of them, and in particular by the witnesses and/or expert witnesses, the parties being responsible for ensuring that said system offers the necessary guarantees of image and sound quality to ensure and place on record that the arbitral tribunal and the lawyers will be able to conduct the examination of evidence with due fluidity.

Before the session begins, the Court services will check the suitability of the remote digital systems to be used.

If the required image and sound quality cannot be obtained, the Arbitral Tribunal may, having consulted the technical services of the Court and of the parties, suspend the process and pass the resolution (Procedural Order) best suited to the arbitration process, preventing possible technical

deficiencies from being used as a delaying tactic by either party to prevent the procedure and/or delay the arbitration proceedings.

### *3. Measures to ensure simultaneous Visibility of all Participants*

Although the Microsoft Teams system allows for simultaneous visibility of all parties involved, as well as the display on screen of only the speaker, it is advisable that the system be set to simultaneous display so that the arbitral tribunal and the lawyers have an overall and combined view of all the participants. However, the arbitral tribunal will, in each specific case, decide what is most appropriate for the smooth conduct of the hearing.

### *4. Measures to ensure the Reliability of Evidence and Statements*

CIMA considers that the most reliable method for audiovisual evidence hearings is not to provide the access password to witnesses until the moment of their intervention.

### *5. Measures to be taken to ensure the Isolation of Witnesses and Expert Witnesses*

Each of the witnesses and experts summonsed to the hearing must appear only when giving their testimony or statement, avoiding communication between them, before and after their testimony and/or statements. They must be positioned in front of the computer screen (or equivalent) at a sufficient distance to allow them to be clearly heard. They may not be assisted by any instrument or technical means allowing them to be contacted externally and, if possible, in a position that allows most of the room from which they give their evidence or statement to be observed. Experts may rely on their opinions or reports. In the event of face-to-face comparison of witnesses and experts, the arbitral tribunal will decide, in agreement with the parties and duly in advance, how to conduct this practice.

The tribunal will call on them not only to state the truth, but also to declare that they will not use any technical or other means allowing them to connect to and/or receive information from other witnesses or expert witnesses and third parties.

## 6. *Measures regarding the Presentation of Documents*

In the event that the lawyers of the parties wish the witnesses or expert witnesses to be presented with documents included within the different classes of evidence, they must record this with the arbitral tribunal and the other party, indicating them and identifying them at the hearing, presenting them to the other party's lawyer and to the tribunal for confirmation that they match the aforementioned documents. Once they are identified, the lawyer will show them to the witness or the expert, without any annotations, deletions, or any sign which could influence the statements of the witness.

If available, a separate screen/window (other than the screen/window used to show the video transmission) will be used to show the witness or expert the relevant documents during questioning.

## 7. *Recording of the Hearing*

Regardless of whether the parties can save the video session on the corresponding computer issuing the signal, the services of the Court will make the corresponding recording, of which a copy will be sent as soon as possible to the arbitral tribunal and the lawyers of the parties, with the Court recording being deemed the original for all purposes.

If, at the request of a party, the Court considers it necessary to authorise the presence of an interpreter during the hearing, it will issue this ruling sufficiently in advance so that the Court services can coordinate with the interpreter the ways and means to facilitate his/her presence, providing him/her with the space and means necessary to perform the role in the normal manner.

## G. *CIMA Virtual Hearing Organisation Protocol*

Similarly, the Madrid International Arbitration Centre (MIAC) in which CIMA participates has established a **FULL PROTOCOL ON THE ORGANISATION OF VIRTUAL HEARINGS**, published on its website (<https://madridarb.com>), the main recommendations of which are as follows:

- a) Determine the minimum technical conditions to be met by both the devices and the type of connection of the Participants;

- b) Connect to the Hearing via a desktop or laptop computer, refraining from using tablets or mobile phones, which may present an unstable connection with reduced functionalities;
- c) Preferably use a wired rather than a wireless internet connection to facilitate higher speed;
- d) Use a functional webcam and microphone, providing a clear and flawless image and audio, to ensure the best possible quality during the Hearing;
- e) Consider the acoustics and lighting levels of the location from where the participant connects to the Hearing;
- f) Verify that the IT devices are properly charged and that power cables or backup batteries are available as required;
- g) Ensure that the platform application is updated on the device;
- h) Disable automatic IT updates on the devices, which risk being automatically activated and could interrupt the Hearing;
- i) Compile a list of all Participants at the Hearing and how their presence and identity will be confirmed;
- j) Take into account the different time zones when setting Hearing dates, start and end times, breaks and duration of each day of the Hearing;
- k) Determine the manner in which the parties' pleadings, witness and expert witness evidence are presented, together with any documentary presentation and inspections or expert opinions that may be required.

**17.** In short, in the field of arbitration we have arrived at a point where we have systems offering complete guarantees to those involved in conducting online procedures, while guaranteeing 'due process'.

*Madrid, 29 June 2021.*