

Delos checklist on holding arbitration and mediation hearings in times of COVID-19

Version ~~1.2~~ of ~~1220~~ March 2020¹ – TEXT FOR DISCUSSION

You have an arbitration or mediation hearing coming up and want to consider the implications of COVID-19² on whether to proceed with the hearing and in what manner. The table below provides a checklist of matters to consider in deciding whether to maintain the date of the hearing, and preparing, conducting and following up on the hearing in light of COVID-19. For other considerations that may come into play, [such as whether to suspend the proceedings](#), please refer to **Appendix 1** for a non-exhaustive list.

In reviewing the checklist, you should consider the potential disruption that not taking steps – moving the venue, postponing the hearing or conducting it online – may create for participants and their families.

As will be apparent, dialogue among the tribunal/mediator and the parties is key. It is recommended: (i) to hold a **“Conference Call”**³ to discuss the questions raised in the checklist, which can serve as an agenda for this purpose; and (ii) for the call participants to consider the checklist in preparing for the call and be in a position to answer the relevant questions for their side.

This checklist is a work in progress and will be updated in light of feedback received on it. If you have comments on it, edits to suggest, resources to recommend in addition to the World Health Organisation (WHO) sources cited in the checklist, etc., please do so and send to info@delosdr.org. Please note that this checklist is for information purposes only, and not legal advice.

Finally, for information on the impact of the coronavirus on business contracts, please refer to this [Delos resource page](#).

#	STAGE / QUESTIONS	COMMENTS
A	CONSIDERING WHETHER TO PROCEED WITH THE IN-PERSON HEARING	
1.	Where is the original hearing location?	Check whether: (i) the local population at the location is under any restrictions on leaving and/or moving freely within that area; and (ii) the health facilities in that location are not already

¹ By [Hafez R Virjee \(Delos\)](#), with many thanks [for their valuable feedback](#) to Michael McIlwrath (Baker Hughes) and [Maria Hauser-Morel \(Hanefeld\)](#) ~~for their valuable feedback~~, [Alice Fremuth-Wolf \(VIAC\)](#) and [Mickael Viglino \(J. G. Assis de Almeida & Associados\)](#).

² **“Coronavirus”**: *“a large family of viruses which may cause illness in animals or humans. In humans, several coronaviruses are known to cause respiratory infections ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The most recently discovered coronavirus causes coronavirus disease COVID-19.”*

“COVID-19”: *“COVID-19 is the infectious disease caused by the most recently discovered coronavirus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019.”*

Source: <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>, last accessed on 11 March 2020.

³ This may be separate from, or included as part of, any pre-hearing conference call already scheduled in the procedural timetable.

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		<p>strained and likely to remain so at the date(s) of the hearing (whether as a result of COVID-19 or other reasons).</p> <p>If the answer to either of the above questions is ‘yes’, consider moving the hearing to another, safer, location.⁴</p> <p>If it is not fully possible or reasonable to move the location of the hearing, consider holding all or part of it online. More on online hearings under B6, below.</p>
2.	Who are the hearing participants? Do they all need to attend?	<p>Consider exchanging lists of intended participants⁵ ahead of the Conference Call to facilitate an informed discussion of the below.</p> <p>Hearing “participants” include the arbitrators and any tribunal secretary, counsel and party representatives, witnesses and experts, stenographers and any interpreters.</p> <p>Consider limiting the number of counsel, support staff and representatives to the bare minimum necessary both to limit any risk of contagion and for the hearing to go forward.</p>
3.	Are the participants able to travel to the location?	<p>Check whether there are any departure, entrance or return restrictions (including at any necessary places of transit) that would prevent any participant from attending the hearing or disrupt or impact their ability to return home to their families. If so, these participants should consider participating remotely.</p> <p>Also check whether the participants from each side have any travel restrictions imposed by their organisations,⁶ and whether they may require any internal approvals and/or changes to their corporate travel/health insurance to participate in the hearing.</p>
4.	Where is everyone coming from?	<p>Check whether anyone is coming from an “affected area”.⁷ To determine whether an area is affected given the large number of countries where the disease is being locally transmitted,⁸ consider whether there are restrictions on gatherings and travel affecting the area and mandatory closures of schools and public</p>

⁴ To the extent that this raises a question about whether the hearing may be held elsewhere than at the seat of the arbitration, the [Delos Guide to Arbitration Places \(GAP\)](#) may assist with ascertaining the response to this rapidly. The question of whether meetings and/or hearings may be held outside of the seat of the arbitration can be found in the in-house counsel summaries at the start of each GAP chapter. For ease of reference, the in-house counsel summaries have all been combined [here](#).

⁵ It is assumed for the purposes of this checklist that a participant does not have COVID-19 at the time of the Conference Call, nor does he or she have the symptoms (and not had a test to the extent available).

⁶ This may be due to policy, legal and/or regulatory reasons, and should be possible if need be for the organisation to evidence. For further information on the impact of the coronavirus on staff mobility, see the Delos resource page available [here](#). Organisations should check the labour law requirements applicable to them to ensure the protection of the physical health of their staff.

⁷ The WHO defines an ‘affected area’ as one where COVID-19 is being locally transmitted, as opposed to having imported cases only; see the WHO website [here](#) and its [situation reports](#) (both last accessed on 11 March 2020).

⁸ See the WHO [situation reports](#) (last accessed on 11 March 2020).

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		<p>spaces. To some extent, the definition is a matter of common sense.</p> <p>If anyone would be coming from an affected area, then they should consider either participating remotely or, if there is enough time to do so prior to the hearing, isolating themselves upon arrival for 14 days ('self-quarantine') before joining up with the other hearing participants.⁹</p>
5.	Have any of the participants been in close physical proximity with people from 'affected areas' in the 14 days prior to the hearing?	<p>If the answer is yes, considering the incubation period for COVID-19, they should be deemed to be coming from an 'affected area' (see A4).</p> <p>"Close physical proximity", and, relatedly, the "minimum recommended personal distance", can be defined by reference to WHO guidelines as being within 1 metre (3 feet) distance of a given person¹⁰ (but subject to upward revision by government guidelines).</p>
6.	Do any of the participants have any compelling personal reason related to COVID-19 for not being able to attend the hearing in person?	<p>The following developments should be approached on the basis that this is a personal, sensitive matter.</p> <p>Some participants may be more at risk of developing a severe form of COVID-19¹¹ or have other compelling personal reasons related to COVID-19 for not being able to attend a hearing in person (irrespective of location).</p> <p>An initial list of such personal considerations, and a proposed approach to addressing them, has been set out at Appendix 2. It need not be necessary to investigate these personal issues in order to conclude about relocating the hearing or holding it online. Care should be taken in investigating these matters to respect the privacy of the intended participants at the hearing.</p>
7.	Can the hearing be shortened?	It may be possible, and appropriate, to shorten the hearing by replacing any oral closing submission with written closing submissions.
8.	What about the cost implications due to COVID-19 of maintaining or postponing the hearing?	<p>Identify the costs implications for the hearing of COVID-19 upfront. These may include changing the venue, hiring larger rooms, cancellation charges, and more.</p> <p>The costs implications should be discussed between the hearing participants (on the Conference Call) and may require specific guidance from the tribunal.</p>

⁹ The 14-day time-period is based on the WHO's view of the incubation period for COVID-19 (see [here](#), last accessed on 11 March 2020).

¹⁰ See <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>, last accessed on 11 March 2020.

¹¹ According to the WHO, "older persons and persons with pre-existing medical conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes) appear to develop serious illness more often than others" (see [here](#), last accessed on 11 March 2020).

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		<p>→ <i>Based on the answers to the above questions, decide whether (i) to maintain a physical hearing for at least some of the participants, (ii) to maintain the original location or change it to another, safer, location, or (iii) to hold all or part of the hearing online.</i></p> <p><i>If the hearing is taking place in-person (for at least some participants), consider the following additional questions.</i></p>
9.	“Daily Checker”	<p>Consider designating / proposing (during the Conference Call) one or more persons who will be responsible, in the run-up to the hearing, during the hearing and for the two weeks following it, for checking and reporting daily on the COVID-19 status and related measures that might be taken by the authorities- and the hearing venue. The form and recipients of the daily reports can be agreed at the same time (e.g. email every morning and/or evening).</p>
10.	Is the hearing venue adequately setup?	<p>Check that the following:</p> <ul style="list-style-type: none"> • All meeting and hearing rooms at the venue¹² have adequate space to accommodate all participants while maintaining the minimum recommended personal distance (see A5); e.g. it may as a result be useful to look into larger hearing / breakout rooms and/or additional breakout rooms. • Also check with The hearing venue what its venue’s cleaning and disinfecting policy is and that you are comfortable with it.¹³ • Whether the hearing venue refuses access to persons with the symptoms of COVID-19. <p>If the answer to either any of the above points is ‘no’, consider changing hearing venue. You may also wish to consider the points discussed at B1 below.</p>
11.	Is it safe to send documents by courier from an affected area?	<p>It would appear that it is safe to send documents by courier, even from an affected area.¹⁴</p> <p>This may, however, be an opportunity for the hearing participants to consider using electronic documents instead.</p>

¹² Consider as well any other facilities at the venue that you were planning on using, such as a lounge or dining area.

¹³ Depending on the level of detail you want to go into, you may wish to enquire about cleaning of the bathrooms, replacement of glasses and coffee cups, cleaning of any coffee machines and filtered water bottles, use of plastic gloves, etc.

¹⁴ According to the WHO, “the likelihood of an infected person contaminating commercial goods is low and the risk of catching the virus that causes COVID-19 from a package that has been moved, travelled, and exposed to different conditions and temperature is also low.” See <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>, last accessed on 11 March 2020.

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12.	Do the answers to the above questions impact any existing Procedural Order in the proceeding?	<p>Consider recording any decisions on the above questions in a Procedural Order. In doing so, consider whether said answers might:</p> <ul style="list-style-type: none"> • have any impact on existing Procedural Orders, such as regarding the presence of witnesses at a hearing;¹⁵ and/or • potentially create an imbalance between the parties or otherwise potentially raise due process concerns? <p>The tribunal should be mindful of these potential difficulties when dealing with procedural motions relating to COVID-19, and decide them on a case by case basis, taking into account the enforceability of the Award.¹⁶</p>
13.	What if a participant develops COVID-19 symptoms prior to the hearing?	<p>This scenario is one where the participant did not have any symptoms prior to the Conference Call, but developed them afterwards and before the start of the hearing.</p> <p>The participant should take a test (to the extent available) and, if he or she has COVID-19, the other participants should be informed. If the participant is not able to take a test and determine conclusively and in a timely manner whether he/she is infected, he/she should consider not participating in person at the hearing and inform the other participants of this, bearing in mind that the hearing venue may in any event refuse access.</p> <p>The tribunal and parties can then take a view as to whether this impacts the prior decision to proceed with the in-person hearing- (at the selected venue). This potential situation could be addressed in the Procedural Order discussed at A12 above.</p>
B	AT THE IN-PERSON HEARING	
1.	Before the start of the hearing, general check of the hearing venue	<p>Further to A10 above, the participants may wish to agree that representatives for each party conduct a prior check of the hearing room setup so as to ensure minimum personal distance between the seated participants.</p> <p>The parties could also discuss during the Conference Call certain additional setup requirements acceptable to all participants, such as:</p> <ul style="list-style-type: none"> • sufficient number of microphones and disinfectant wipes available to clean them if needed;

¹⁵ Consider too whether there might be an impact on any existing Award and, if so, whether a Procedural Order is the right approach to address the above.

¹⁶ See, notably, Article V.1(d) of the [New York Convention of 1958](#) (last accessed on 11 March 2020), which provides as follows: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] (d) [...] the arbitral procedure was not in accordance with the agreement of the parties [...]”.

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		<ul style="list-style-type: none"> • sufficient number of bottles of hand sanitizer in the hearing room and breakout rooms; • paper tissues made available in the hearing room and breakout rooms; • multiple dustbins in the various rooms; • availability of frontal thermometers in breakout rooms (and disinfectant wipes next to them); and • availability of face masks, subject to any disruption in supply (see also B3, below). <p>In considering the above, the tribunal and parties may also wish to agree during the Conference Call who will be responsible for ensuring that the above requirements have been respected by the venue and/or carried out by the participants prior to the start of the hearing, and that they are maintained during the hearing.</p>
2.	Greeting etiquette	Considering that it is generally accepted that handshaking and hugging should be avoided as a result of COVID-19, it is acceptable not to shake hands or hug, and no offence should be taken from this. For the same reason, and in order to maintain personal distance, it is recommended not to hand out business cards during a hearing.
3.	Should participants wear masks?	Participants may consider the WHO guidance as to when and how to use face masks ¹⁷ and rely on their own preference.
4.	Daily checks for COVID-19 updates	Further to A9 above, during the hearing, the participants are encouraged to check daily the local status of COVID-19 and related measures that might be taken by the authorities-local authorities and by the countries of residence of the participants at the hearing . For example, such (impending) measures might make it necessary to shorten the hearing in order to ensure that everyone is able to return to their homes and families.
5.	Coffee breaks, lunch breaks	Limit close physical proximity as much as possible (see A5 above). To the extent possible, individually packaged lunch boxes are preferable to a buffet; and individually packaged snacks are preferable to open trays of biscuits. ¹⁸
6.	Online hearing	As indicated in section A above, the tribunal and parties may agree to hold the hearing, or parts of the hearing, via video conference, chat rooms etc. As the case may be, the tribunal and parties may wish to:

¹⁷ See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks>, last accessed on 11 March 2020.

¹⁸ See also the WHO's "[Five keys to safer food](#)" (last accessed on 11 March 2020).

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		<ul style="list-style-type: none"> • agree on prior technical testing; • assume that technical problems may occur during the hearing, which can cause delays (i.e., foresee reserve time); and • agree whether the videoconference should be recorded. <p>The tribunal and parties may agree during the Conference Call on rules to follow in case the connection fails for one party (to avoid allegations of <i>ex parte</i> communications).</p> <p>Regarding witness/expert examination via videoconferencing, the tribunal and parties may wish to agree during the Conference Call on applicable rules, and in particular (i) whether a representative of one party should be present in the room with the witness/expert for the other party who is being cross-examined and (ii) what documents will be available to the witness/expert during their examination.</p> <p>Finally, at the start of each online session, the tribunal may wish to confirm visually who is present online before proceeding with that session (e.g. by having the camera rotate), notably to ensure compliance with any procedural rules on the presence of witnesses and experts during certain parts of the hearing.</p>
7.	What to do if, during the hearing, a participant develops symptoms of COVID-19?	<p>If any of the participants thinks that he or she may have symptoms of COVID-19, he or she should openly discuss this with all participants (on the record) and leave the hearing in order to take a test (to the extent available).</p> <p>If such a situation arises, the tribunal should discuss appropriate measures and next steps with the parties (without the participation of the potentially infected participant), pending confirmation (to the extent tests are available) of whether the participant is infected.</p>
C FOLLOWING THE IN-PERSON HEARING		
1.	Continuing the daily checks for COVID-19 updates	For 14 days following the hearing, the Daily Checker(s) (see A9 above) should maintain daily checks on the status of COVID-19 at the hearing location and the hearing venue , in case it would be prudent for the participants at the hearing to self-quarantine.
2.	What to do if, after the hearing, a participant develops symptoms of COVID-19?	If within 14 days of the close of the hearing a participant develops symptoms that, upon being tested, correspond to COVID-19, the other participants and the hearing venue should be informed as soon as possible so that they may monitor their own health situation. If tests are not available, said participant should nonetheless consider informing the other participants at the hearing and the hearing venue, for the same reasons.

Appendix 1 to the Delos COVID-19 hearing checklist – Non-exhaustive list of considerations in deciding whether to maintain or postpone a hearing

There may be cases in which the parties and/or the tribunal take a different view as to whether the hearing should be maintained or postponed due to COVID-19. Considerations may include the difficulty in securing the attendance of witnesses and/or experts, availability of interpreters, personal or legal preferences about conducting examinations by way of videoconference (whether from the perspective of the examiner or the tribunal), uncertainty about future date at which another hearing may be scheduled or significant delay this could add to the proceeding, and/or due process issues.

In the case of mediation hearings, parties may be concerned about not being able to initiate arbitration proceedings due to the requirements of their multi-tier dispute resolution clause, and possible related time-bar issues.

~~Finally, in fast track arbitrations based on the arbitration agreement, when deciding whether to maintain or postpone the hearing, the tribunal and parties should consider requirements at the seat of arbitration, if any, regarding modifying time limits established in the arbitration agreement.~~

The decision of whether to hold or postpone a hearing will need to be made on a case-by-case basis by the tribunal / mediator considering all of the relevant circumstances. Rather than tribunals / mediators / institutions opting for an automatic suspension of the proceedings or of time limits due to COVID-19, tribunals / mediators should decide each matter on the basis of its individual circumstances, taking into account the provisions of the dispute resolution agreement (e.g. time limits for pre-arbitral steps, fast-track arbitration), the specific characteristics of the case (such as a pending request for interim measures) and requirements at the seat of arbitration. In case of administered arbitration / mediation, arbitrators / mediators and/or parties are encouraged to liaise with the relevant institution to discuss available options. Some institutions may be prepared to provide guidance and/or may have developed specific COVID-19 policies. Finally, when deciding whether to maintain or postpone the hearing, the tribunal / mediator should afford the parties an opportunity to comment.

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Appendix 2 to the Delos COVID-19 hearing checklist – Personal grounds related to COVID-19 for not being able to participate in person at a hearing

With reference to checklist item no. A6, participants should consider the following personal statements and decide for themselves if any apply. If they do, it may be better for them not to participate in person at a hearing.

Health

- I am a person more at risk of developing a severe form of COVID-19, as described by the WHO.¹⁹
- I am pregnant.

Parenting

- As a result of closures of nurseries / pre-schools / schools in my area of residence due to COVID-19, I need to work from home and am not able to arrange for childcare for the duration of the hearing.

Should the tribunal / mediator and/or parties consider it necessary to address the above in further detail, they can do so in the following manner:

- Enquiry: *“Do any of the participants wish to invoke personal reasons for not being able to participate in-person at the hearing (see Appendix 2 to the Delos COVID-19 hearing checklist?)?”*
- If the answer is affirmative, the participant(s) could be invited to provide a statement of truth in place of evidence (e.g.: *“One or more of the grounds stated in Appendix 2 to the Delos COVID-19 hearing checklist applies to one or more participants on [the tribunal / claimant’s side / respondent’s side / adapt as required], who would not otherwise than by reason of COVID-19 be prevented from attending the hearing in person. I confirm the truth of this statement.”*).

The above exchange may not be dispositive of the question of how to approach the hearing; and it may be necessary in specific instances to clarify how many participants are covered by the statement.

¹⁹ According to the WHO, *“older persons and persons with pre-existing medical conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes) appear to develop serious illness more often than others”* (see [here](#), last accessed on 11 March 2020).