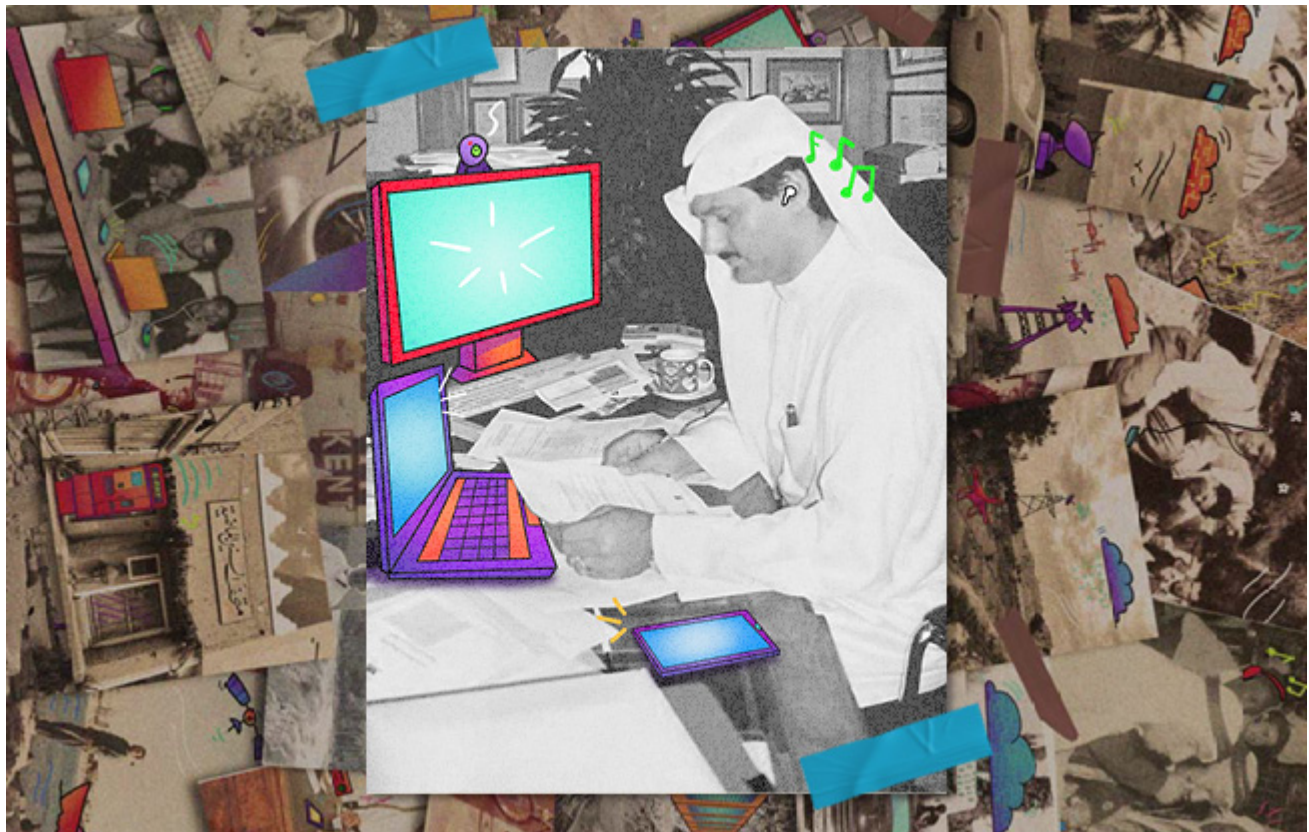


The ADGMAC Protocol for Remote Hearings: An Overview

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Introduction

The Abu Dhabi Global Market Arbitration Centre (“ADGMAC”) introduced its Protocol for Remote Hearings (“Protocol”) in June 2021. The Protocol provides parties, their lawyers and the Tribunal with a set of procedural and logistical arrangements for the conduct of hearings that may be conducted remotely (whether fully or in part).

Previously, in September 2019, ADGMAC published its Arbitration Guidelines (“Guidelines”). While the Guidelines did not expressly provide guidance for remote hearings, where applicable they (a) permitted witnesses to attend the hearing by video conference or telephone, and (b) encouraged parties to convene case management conferences by telephone or by video-conference (unless the parties agree otherwise or the tribunal is reasonably satisfied that it is necessary and cost-effective for the parties to meet in person).

Many arbitration rules and guidelines have been amended to expressly allow proceedings to be conducted virtually, including the ADGM Arbitration Regulations 2015 (which were amended on 23 December 2020) (the “ADGM Arbitration Regulations”). The recently-amended Arbitration Regulations clarify, and indeed promote, the use of technology in arbitration in multiple instances.

Following the amendment of the ADGM Arbitration Regulations and publication of the Guidelines, the introduction of the Protocol is timely as it introduces a clear set of guidelines that ensure remote hearings are organised and conducted in a fair, efficient, reliable and cost-effective manner. In this article, we review selected and key aspects of the Protocol.

Key aspects of the Protocol

Structure and Use of the Protocol

The Protocol is designed to cover merits hearings in which fact and expert witness evidence are heard and oral submissions are made, but it can also be adapted for case management conferences where procedural and organisational matters are discussed. As with the Guidelines, the Protocol (or any part of it) may be adapted by the Parties and/or the Tribunal to the specific requirements of each case and, if necessary, implemented by the Tribunal in a procedural order.

The Guiding Principles

In Section A, the Protocol provides that the parties shall agree to conduct remote hearing in a manner that (a) is consistent with the principles of fairness, cooperation and good faith; (b) ensures the enforceability of any resultant arbitral award; and (c) ensures confidentiality.

Choice of Platforms and Service Providers for Remote Hearing

In Section B, the Protocol clarifies that the functional requirements for a remote hearing must comprise: (a) a video-conferencing system; (b) an electronic document management system; and (c) real-time transcript.

Speakers and Attendees

In Section C, the Protocol makes a distinction between 'Speakers' and 'Attendees'. It clarifies that Speakers are the participants who can be both seen and heard by all other participants on any given day. Speakers comprise the Tribunal, advocates appearing for the parties, the testifying fact and expert witnesses, and an interpreter, if any.

The Protocol clarifies that Attendees are participants who are only able to see and hear the Speakers, but cannot themselves be seen or heard. Attendees are all the other individuals (other than Speakers), such as members of the legal team who are not appearing as lead counsel, party representatives or personnel, and any other permitted Participant(s) such as a secretary to the Tribunal.

The Protocol also affords the parties the right to object to any of the participants within 24 hours of the exchange of the list of participants.

Semi-Remote Hearing Arrangements

In Section J, the Protocol addresses situations in which several participants attend the remote hearing from the same physical room. The Protocol allows semi-remote hearing arrangements, but encourages the parties to agree on such semi-remote configuration in advance of the remote hearing.

Notwithstanding the foregoing, the Protocol recommends avoiding the following semi-remote arrangements: (a) The Tribunal and the legal team of one of the parties appearing in person, while the legal team of the other Party appears remotely; and/ or (b) The legal team of one of the parties examining an opposing party's witness or expert in person, without the opposing party and/ or its legal team being also present in person.

Witnesses

Section L of the Protocol provides that fact witnesses must give an affirmation before giving their testimony in accordance with any applicable laws.

The Protocol encourages the parties to arrange for a hearing invigilator to attend at the same premises as the fact or expert witness, to ensure the integrity of the examination (e.g., ensuring there is no person or recording-device present that was not approved or agreed). The invigilator may inspect the room from which the witness is expected to testify to ensure that only authorised materials and equipment are present. The invigilator may also remain inside the room during the witness's testimony to ensure that no one enters the room, and may observe that sequestration of the witness is maintained.

Alternatively, if the attendance of an invigilator is not possible, the Protocol requires witnesses to testify alone in a room containing a camera which provides a clear and reasonably complete view of the witness and the room he or she is in. The Protocol also provides that each fact witness must confirm the following at the start of his or her evidence:

1. The witness can see and hear the other Speakers clearly;
2. No other person other than those persons agreed by the Parties, or approved by the Tribunal, is in, or will enter, the room in which the witness is providing evidence;
3. The witness does not have access to hard copy documentation other than his or her witness statement(s); and
4. The witness will not and has no means to communicate with any person in any way while the witness's examination is in progress, other than through the approved Platforms.

Confidentiality

Section I of the Protocol confirms that parties must take all steps necessary to ensure the confidentiality of the proceedings. It obliges parties to notify the Tribunal of any laws applicable at any participant's location that may present an obstacle or issue of legal compliance with privacy, confidentiality, data protection and security requirements.

The Protocol encourages the parties to agree on a more detailed "cyber-protocol" prior to the remote hearing to ensure compliance with any applicable regulations and to protect the confidentiality of electronic communications within the arbitration proceedings and any platforms used for the remote hearing.

Recognition and Enforcement

For the purposes of recognition and enforcement of the arbitral award, Section T of the Protocol encourages the parties to agree in writing that remote video-conferencing constitutes a fair and acceptable means of holding hearings and taking of evidence by the Tribunal pursuant to the arbitration agreement and the applicable law and rules.

The Protocol also encourages parties to agree that the conduct of the remote hearing is consistent and compliant with the law of the seat, and that no party will seek to set aside or oppose the recognition or enforcement of any resultant arbitral award on the basis that the arbitral hearing was conducted by remote video-conferencing.

Commentary

Prior to the unwelcome arrival of the pandemic in early 2020, the use of technology was not novel in international arbitration. Parties and arbitrators had been accustomed to using modern means of communication to, for example, hold case management conferences, and utilise hearing room technologies such as real-time electronic transcripts. International arbitration had thus already shifted into a more technologically-oriented culture, albeit maintaining for the large part traditional in-person hearings.

The pandemic continues to shift the way hearings in international arbitration are conducted, such that they become routine. As a result, the Protocol is perfectly timed and helps complement ongoing efforts by arbitral tribunals in tailoring arrangements for remote hearings in procedural orders, protocols and/or agreements.

Having said that, and having reflected on the approaches of other institutions, we suggest the addition of the following three elements that would encourage the efficiency and effectiveness in the conduct of remote hearings.

In particular:

- Guidelines requiring that each participant shall endeavour to (a) identify a lead speaker for each party, (b) speak one at a time and not while another participant is speaking, except if required to interpose an objection to a question asked or to alert of technical difficulties, (c) avoid using equipment that interferes with connectivity, (d) mute microphones when not in use to minimise audio disruptions, (e) eliminate any background noise, (f) avoid wasting time during the remote hearing, and (g) take whatever measures or practices necessary to support the procedural efficiency of the remote hearing. Similar ideas are included in other virtual hearing protocols recently released, for example, section D of the International Chamber of Commerce (ICC) Checklist for a Protocol on Virtual Hearing, and Section 6 of the Bahrain Chamber for Dispute Resolution – American Arbitration Association (BCDR-AAA) Guidelines on the preparation and conduct of online hearings administered by BCDR).
- Regulating where one of the Speakers (i.e., party or arbitrator) loses connection to the platform or experiences a security incident by providing guidelines for a back-up plan to troubleshoot and deal with such incidents and, if necessary, to reconvene if technical challenges prevent the participants from continuing to participate in the remote hearing.
- Providing for the pausing or termination of the remote hearing if the arbitrator determines that the platform is not working as anticipated, confidentiality or security are compromised, or the format is otherwise inadequate, prejudicial to any party or to the integrity of the remote hearing.

These suggestions could be adopted independently by parties and/or the tribunal in the procedural order. They may also be taken into account in any future revision of the Protocol. However, leaving aside these

quibbles, the Protocol will complement and bolster existing efforts to provide a framework for the conduct of remote hearings generally and on a case-by-case basis. It confirms ADGM's commitment regulating arbitration to an international "best practice" standard.

For further information, please contact [John Gaffney](#).

This article was first published in the Kluwer Arbitration Blog on 20 June 2021.