

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Hela Schwarz GmbH

v.

People's Republic of China

(ICSID Case No. ARB/17/19)

PROCEDURAL ORDER NO. 6
DECISION ON THE RESCHEDULING OF THE HEARING

Members of the Tribunal

Sir Daniel Bethlehem QC, President of the Tribunal
Professor Campbell McLachlan QC, Arbitrator
Mr. Roland Ziadé, Arbitrator

Secretary of the Tribunal

Mr. Francisco Abriani

25 September 2020

Background

1. By Annex A to Procedural Order No. 1, dated 9 March 2018, the Tribunal, after consultation with the Parties, laid down the Procedural Timetable applicable to this arbitration. By paragraph 23.2 of the Procedural Order, the location of the hearing and the precise dates of the hearing, within a window of 22 June to 1 July 2020, were left for future determination.
2. The Procedural Timetable was revised by Procedural Order No. 5, dated 29 July 2019. By the revised schedule, the hearing window of 22 June to 1 July 2020 was maintained for a hearing of 5 to 8 days, the precise dates of the hearing within that window being left for future determination.
3. In anticipation of the hearing, the Tribunal wrote to the Parties on 7 February 2020. In that correspondence, noting that “coronavirus restrictions are currently impeding travel in many parts of the world, notably to and from the People’s Republic of China”, the Tribunal invited the Parties to consult and to revert to the Tribunal “in the event that any serious impediment looks like presenting itself as regards the conduct of the hearing”.
4. In correspondence dated 5 March 2020, addressing, *inter alia*, the procedural schedule for the hearing and the hearing location, the Tribunal “encourage[d] the Parties to raise any issue or concern relating to the Coronavirus at the earliest possible point.”
5. By correspondence dated 18 March 2020, the Tribunal wrote to the Parties indicating, *inter alia*, that, “[h]aving regard to current projections on the likely course of COVID-19 infections over the coming months, the Tribunal considers that it will be neither possible nor desirable to proceed with an in-person hearing on 22-30 June 2020, wherever such a hearing might take place.” The Tribunal accordingly invited the Parties to consult and revert to the Tribunal on the possibility of the hearing taking place by video conferencing on the dates then reserved for the hearing.
6. By correspondence dated 24 April 2020, in response to an enquiry from the Tribunal about the appropriate length of the hearing, the Claimant wrote to the Tribunal indicating that the Parties had been unable to agree on the length of the hearing. In the Claimant’s submission “[t]he hearing should ... not last longer than five days, but the Claimant would be willing to undertake to work also on the Saturday of the hearing week, in case a sixth day was necessary.” The Claimant noted, additionally, that the Parties had agreed on the desirability of an in-person hearing and that the June 2020 hearing dates should be

“postponed”. The Claimant further proposed that an in-person hearing should be scheduled for the period 30 November to 5 December 2020.

7. By correspondence dated 25 April 2020, the Respondent noted its agreement on the issue of preference for an in-person hearing but indicated that it considered that a six day hearing, with one day held in reserve, would be necessary. On hearing dates, the Respondent proposed that dates be reserved for an in-person hearing from 30 November to 6 December 2020 (with 6 December in reserve) “or the earliest dates that are available in 2021 for the Tribunal and the Parties.”
8. By correspondence dated 30 April 2020, acknowledging the Parties’ agreement that the June 2020 hearing dates should be rescheduled, the Tribunal vacated the witness notification dates and other pre-hearing scheduled events, pending a rescheduling of the hearing.
9. By correspondence dated 19 May 2020, the Tribunal informed the Parties that the Tribunal could not make the hearing dates proposed by the Parties in November – December 2020.
10. By correspondence dated 22 June 2020, the Tribunal wrote to the Parties to consult further on the rescheduling of the hearing, drawing attention to COVID-19 travel constraints by members of the Tribunal and various logistical issues associated with the holding of a video hearing having to span an 11-hour time zone range. The Tribunal invited the Parties to consult and revert to the Tribunal on a number of possible hearing alternatives.
11. By correspondence dated 10 July 2020 and 14 July 2020, from the Claimant and the Respondent respectively, the Parties indicated their agreement “that an in-person hearing continues to be the preferred option, even if this implies that the hearing can only take place in the summer of 2021.” The Parties further indicated that they and their counsel were available in the period 5–16 July 2021, the period proposed by the Tribunal for the holding of the hearing. In communicating the Parties’ agreement, the Claimant added its request that “any further delays in the proceeding be prevented by all available means.” In its communication to the Tribunal, indicating its preference for an in-person hearing and its agreement to the proposed hearing window, the Respondent requested that “the hearing start on 5 July 2021 (with any unused days held in reserve on the week of 13 [sic] July).”

Decision

12. Having regard to the agreement of the Parties, the Tribunal determines that the hearing in this matter is to be rescheduled to take place in the period 5–16 July 2021. Insofar as is

possible, having regard to the continuing uncertainties associated with the COVID-19 health pandemic and related travel and quarantine restrictions, the Tribunal further determines that the hearing shall take the form of an in-person hearing, to take place in either Paris (at the ICC) or London (at the IDRC), venue availability having been confirmed in both locations for the dates in question. In the event that, for any COVID-19 or other imperative reason, the hearing cannot take place in an in-person format, whether in whole or in part, the Tribunal determines that the hearing will proceed by way of a video hearing or, as the case may be, a hybrid in-person / video hearing within the designated hearing window.

13. Having regard to continuing COVID-19 uncertainties, and the timing, organisational and logistical issues that would be associated with the holding of a video or hybrid hearing, as well as the Parties' disagreement as to the appropriate length of the hearing, the Tribunal defers for later decision the precise dates of the hearing within the designated hearing window. The Tribunal nonetheless affirms its intention that the hearing will commence on Monday, 5 July 2021. Without prejudice to this intention, the Tribunal requests the Parties to hold available for the hearing the whole of the period 5–16 July 2021, in the event that organisational and logistical constraints, particularly as may be associated with a video or hybrid hearing, require an extended use of time.
14. The additional pending procedural steps associated with the revised schedule are set out in the revised Procedural Timetable at Annex A hereto.

On behalf of the Tribunal,

[signed]

Sir Daniel Bethlehem QC

President of the Tribunal

Date: 25 September 2020

ANNEX

REVISED PROCEDURAL TIMETABLE

Description	Party / Tribunal	Final date / period
Preliminary In-Person Hearing Feasibility Assessment – submission of views	Parties	29 March 2021
Preliminary In-Person Hearing Feasibility Assessment	Tribunal	5 April 2021
Simultaneous submissions on the appropriate length of the hearing (on in-person and video scenarios), on the location of an in-person hearing, and any other outstanding procedural issues relating to the hearing requiring decision by the Tribunal	Parties	12 April 2021
Decision on the length of the hearing (on in-person and video scenarios), on the location of an in-person hearing, and on any other outstanding procedural issues relating to the hearing requiring decision by the Tribunal	Tribunal	26 April 2021
Notification of Witnesses / Experts for Cross-Examination	Parties	10 May 2021 <i>[8 weeks before hearing]</i>
Further In-Person Hearing Feasibility Assessment – submission of views	Parties	10 May 2021
Call of Witnesses / Experts not Called by the Parties (if any)	Tribunal	24 May 2021 <i>[Within 2 weeks of Notification by Parties]</i>

Further In-Person Hearing Feasibility Assessment	Tribunal	24 May 2021
Pre-Hearing Organizational Meeting	Parties and Tribunal (or President)	<i>TBD</i>
Hearing	All	5 – 16 July 2021 <i>5 to 7 day in-person hearing, as appropriate</i> <i>Length of video or hybrid hearing TBD</i>
[Post-Hearing Briefs]	Parties	<i>TBD</i>
Statements of Costs	Parties	<i>TBD</i>
Award	Tribunal	<i>TBD</i>