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I. Procedural Order – Explanatory Note

Dear colleagues, this note is intended to provide further clarification in light of the Procedural Order (the **Order**). In the Order, I have sought to ensure that all parties are *'treated equally, allowing each party a full and equal opportunity to present his case or defense,'*¹ but also that the proceedings are conducted in an *'efficient and cost-effective'*² manner and without *'undue delay.'*³ In doing so, I have sought to comply with, among others, the parties' wishes, CIArb Rules and Saudi Arbitration law.⁴ Between them, the parties have requested an in-person hearing (either now or in the future), a virtual hearing, a hybrid hearing, or a documents-only arbitration, as well as advancing arguments against several of those suggestions. Whilst the tribunal may allow a documents-only hearing, it may only do so where it deems this sufficient for adjudication,⁵ as parties must have a full opportunity to present their case.⁶ I believe that documents only arbitration is unsuited to the present case, in which cross-examination is indispensable given the accusations of deceit and orchestration and the high stakes involved, given the global importance of a COVID-19 vaccine. Conversely, holding an in-person hearing, and disregarding evidence of those not present, would currently not grant all parties an opportunity to be heard, as witnesses cannot attend through no fault of the parties. If postponed until the global situation stabilises (which is potentially contingent upon the outcome of this case), this could lead to unnecessary and potentially extensive delays and additional costs, which should be avoided in light of the expedited proceedings. The only viable options are therefore holding an entirely virtual or mixed hearing,⁷ which courts in the Claimant's jurisdiction have found not to deprive parties of fundamental fairness.⁸ An entirely virtual hearing would avoid parties being exposed to the current COVID-19 as well as COVID-14 situation in Saudi Arabia. However, it would also lead to time zone issues, given that California and Riyadh are 10 hours apart. Whilst the use of asynchronous hearings is growing, the practice is still in its infancy and too exposed to due process challenges. I therefore propose a mixed hearing, using elements of various technical protocols⁹ in order to guaranty parity and allow for the effective presentation of cases and cross-examination of witnesses. This proposal is permitted under both procedural laws and rules¹⁰ as well as substantive law.¹¹

¹ Art. 27 of Saudi Arabia's Law on Arbitration; CIArb - Managing Arbitrations and Procedural Orders.

² CIArb - Managing Arbitrations and Procedural Orders, p. 2.

³ CIArb - Managing Arbitrations and Procedural Orders, Art. 1.4.

⁴ CIArb - Managing Arbitrations and Procedural Orders, Art. 1.1.

⁵ Art. 33.1 of Saudi Arabia's Law on Arbitration.

⁶ Art. 27 of Saudi Arabia's Law on Arbitration; CIArb - Documents-Only Arbitration Procedures, p. 1.

⁷ As permitted under Art. 28(3) of the CIArb Rules and Art. 9(1) of the Expedited Procedure Rules Appendix to the SCCA Arbitration.

⁸ *Eaton Partners, LLC v. Azimuth Capital Mgmt. IV, Ltd.*, 2019 WL 5294934, at *4 (S.D.N.Y. Oct. 18, 2019), citing *Bisnoff v. King*, 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001)).

⁹ CIArb Guidance Note on Remote Dispute Resolution Proceedings, the Seoul Protocol and the ICCA Protocol on Cybersecurity, as well as various elements of the Hague Guide on the use of Video-Links, the ICC Commission Report on IT in International Arbitration, the SIA Digital Communication Standard and the DELOS checklist on holding arbitration hearings intimates of COVID-19.

¹⁰ Under Art. 33(1) of Saudi Arabia's Law on Arbitration, a tribunal may hold "hearings"; there is no express provision for holding a hearing remotely, but equally no prohibition. CIArb Rules Art. 28(4) allows witnesses to testify remotely but does not expressly state that other persons may do so too. However, the tribunal has wide procedural discretion (Art. 17(1)). Furthermore, allow for virtual hearings for all parties, and given the specialised nature of these rules, such a rule would take precedence. Therefore, the procedural order permits other persons in addition witnesses (though not arbitrators) to attend the hearing remotely

¹¹ *Polanski v Conde Nast* [2005] et al.; also, hybrid hearings deemed fair, see *C (Children: Covid-19: Representation)* [2020] EWCA Civ 734

As all parties will have a meaningful opportunity to present their case, the risk of non-enforcement is low,¹² especially as courts have consistently demonstrated significant reluctance to interfere with arbitral awards unless egregious due process issues are present.¹³ I am therefore confident that the proposed Order will guarantee due process and equal opportunities, especially given the technological advances that exist in 2020.

II. Procedural Order

Arbitration Proceedings Under CIArb Rules

In the Matter of an Arbitration Between

Carrousel Technologies Inc.

Claimant

and

Fleuron S.A.

Respondents

Saudi Chemicals L.L.C.

Draft Procedural Order # I

This Procedural Order No. I (the **Order**)¹⁴ sets out terms for holding the merits hearing by means of a hybrid hearing, that is a hearing with both in-person and virtual elements.

I. Key preliminary matters

- I.1. The hearing shall be seated in Riyadh, Saudi Arabia, and shall take place on 7 and 8 October 2020, which are working days for all persons concerned. Making note of the one-day hearing recommended in Article 9(2) of the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules, the present hearing has nonetheless been scheduled over two days to grant each remote witness located in an alternate time zone the opportunity to present during regular business hours. It also grants additional time for translation (where required) and any potential issues with the connection or other technical failures that may occur during the hearing.
- I.2. For the purposes of *lex arbitri*, any witness, counsel, party or other third party such as an interpreter attending the hearing virtually (each a Remote Attendant) is deemed to be located in Riyadh.
- I.3. All witnesses and the subject matter of their anticipated testimonies must be identified by midnight on 5 October 2020 (Riyadh time).¹⁵

¹² *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, and the US case of *Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298, 99 (5th Cir. 2004).

¹³ *Terna Bahrain Holding Company v Ali Marzook Al Bin Kamil Al Shamsi and others* [2012] EWHC 3283; *Bandwidth Shipping Corp v Intaari (A Firm)* [2007] EWCA Civ 998.

¹⁴ In limited instances and where of relevance, standard wording has been used.

¹⁵ Saudi Chemicals is kindly asked to provide further information on the identity of Ms. Khoury, given that Dr. Al-Majid is listed as its sole witness. Did Saudi Chemicals mean to refer to Dr. Ajram or are they proposing a different witness altogether?

- I.4. All Remote Attendants wishing to testify remotely must inform the tribunal by midnight on 5 October 2020 (Riyadh time). Where a representative or colleague informs the tribunal on a Remote Attendant's behalf, this shall be deemed sufficient notice.
- I.5. All written witness statements and pre-hearing submissions, including exhibits, must have been exchanged between parties by 5 October 2020 (Riyadh time).
- I.6. Requests for document production between parties shall be limited to documents that are directly relevant to the matters in dispute or to its outcome, given the expedited nature of the proceedings.¹⁶

2. Language

Making note of Article 29(2) of Saudi Arbitration Law, the arbitration shall nonetheless be conducted in English, though interpreters may be used.

3. Technical specifications and requirements

- 3.1. The merits hearing shall be conducted via the WebEx video conference system (the **Platform**). The Platform has been selected in order to ensure confidentiality, given that it is one of the few platforms that uses end-to-end encryption.
- 3.2. Each Remote Attendant testifying virtually shall have a device (laptop or tablet) and have access to high speed broadband access during the hearing. The speed needs to be sufficient to support the reasonable functioning of the WebEx platform being used for this hearing. In addition, each participant must use the latest version of operational software and have a second method of connecting to the video conference (such as telephone, and the telephone number must be communicated to the tribunal and the participants in advance of hearing,) in case the primary means of connection fails. In case of such a failure, the tribunal may postpone the proceedings until the connectivity issue is resolved or continue the proceedings by telephone conference only.
- 3.3. The highest possible quality of audio and/or video connection available to parties should be used. Connections should be capable of showing a full image of the persons involved and clear audio of their pleadings and interventions. This will not only ensure more dynamic proceedings, but also eliminate prolongation of time frames needed for due process observance. If possible, cameras should be at eye level and to avoid any backlighting, and a headset should be used.
- 3.4. Remote Attendants should arrange for a secondary means of connecting to the internet, such as through a personal hotspot accessed via a mobile device.
- 3.5. The standards for ensuring the confidentiality of the virtual cross-examination shall be those set out in the Seoul Protocol,¹⁷ whilst the information security measures of the ICCA Protocol on Cybersecurity shall also be followed closely.¹⁸

¹⁶ Art. 8 of the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules Proceedings by Written Submissions

¹⁷ Seoul Protocol on Video Conferencing in International Arbitration (Article 5)

¹⁸ The ICCA Cybersecurity Protocol for International Arbitration (Article 3)

4. E-bundle

- 4.1. Electronic bundles rather than hard copies shall be used, given the various Remote Attendants as well as the fact that reduced staffing of third-party suppliers and couriers may lead to delays in delivering hard copies.
- 4.2. The parties shall submit in electronic format a consolidated and comprehensive set of joint exhibits no later than 48 hours prior to the first hearing. This set of joint exhibits shall be used during the in-person as well as virtual hearing. All exhibits shall be deemed admitted and authentic unless an objection is stated to a specific exhibit with reasons within 24 hours of receipt. No new exhibits shall be admitted at the hearing.
- 4.3. The e-bundle should be properly tabulated and utilise the full features of PDFs, such as functional internal referencing and tabs. This will help all parties work on large documents and will assist when navigating documentation during the virtual hearing.
- 4.4. Any interpreters must receive a copy of the e-bundle at least 24 hours prior to the first hearing.
- 4.5. These e-bundle must be printed by each Remote Attendant to ensure that a hard copy is available in the event of technical difficulties.¹⁹ To ensure consistency, no changes may therefore be made in the 24 hours prior to the commencement of the first hearing.

5. Technical support provider

- 5.1. The parties will appoint ADR ODR as their technical support provider. It will operate, support, and work to resolve problems that arise concerning the Platform.
- 5.2. The chair of the tribunal shall be responsible for liaising with ADR ODR in order to enable or disable technical settings in WebEx so as to comply with this Order.
- 5.3. ADR ODR is designated as host of the hearing and will control who is allowed into the WebEx meeting, following instructions received from the tribunal. However, the chair will also be able to exercise control over settings.
- 5.4. ADR ODR will administer the e-bundle to ensure documents are displayed in real time. There will not be any live transcription, as per Article 9(1) of the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules.
- 5.5. Whilst test-runs (see 6 below) shall be conducted beforehand, ADR ODR as well as WebEx support staff shall be on hand in the unexpected case of technical issues during the hearings.

6. Test run

- 6.1. On 6 October 2020 at 19:00 (Riyadh time), all persons participating in the hearing will conduct a test session of the Platform.²⁰ It is important that beyond the Remote Attendants, those attending in-person also attend, given that they will be cross-examining or adjudicating witnesses testifying virtually.

¹⁹ ICC Commission Report Information Technology in International Arbitration (Section 3)

²⁰ CIArb Guidance Note on Remote Dispute Resolution Proceedings (Section 1.2)

The only people exempt from attending the test run are witnesses testifying in person. Failure by any other party to attend may lead to exclusion from the hearing(s).

- 6.2. The test session will include a mock direct and cross-examination of a witness, including the display of exhibits and such common procedures. During the test session, the parties must set up the equipment exactly as it will be at the hearing, including lighting and camera angle. All participants to the hearing must show a 360° view of the room in which they are situated.
- 6.3. All participants to the hearing, apart from the in-person witnesses, shall view any online training materials offered by the Platform in advance of the hearing and notify the tribunal that they have done so at least at the latest during the test hearing on 6 October 2020.
- 6.4. Where, upon viewing the online training materials, any Remote Attendant is still struggling with certain elements of technology, the technical support provider will go through a personalised training session with the Remote Attendant, including the use of an interpreter where necessary. This ensures that there is a level playing field regarding parties' familiarity with the technology to be used.

7. General hearing specifications

- 7.1. Remote Attendants must log on to the Platform at least 20 minutes in advance of the scheduled start time of each hearing. The hearing shall not begin until the tribunal is satisfied that all participants are adequately connected to the Platform.
- 7.2. Prior to the scheduled start time, Remote Attendants will be placed in a virtual waiting room where they will remain until the tribunal is ready to start the hearing.
- 7.3. At the beginning of the hearing each Remote Attendant shall identify themselves and any other persons present at that Remote Attendant's physical location. Each Attendant has an ongoing obligation to alert the tribunal and other parties if an additional person enters the Remote Attendant's physical location. Remote Attendant may not use a virtual background and the remote room in which they are located must be visible.
- 7.4. Assuming that the witnesses from California will attend in person, each hearing day will commence at 11:00 (Riyadh time) and conclude at 19:00 (Riyadh time). Evidence shall first be presented by the Claimant and then the Respondent, either virtually or in person.
- 7.5. Each Remote Attendant that is a witness will be testifying between 10:00 and 15:00 local time (i.e. the official time of the country in which they are located),²¹ and witness evidence shall be collected in accordance with the CI Arb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.
- 7.6. Each Remote Attendant that is not a witness may have to attend the hearing outside usual business hours.
- 7.7. Each cross-examination, virtual or in person, may not exceed 30 minutes. During this time, counsel may ask the witness to highlight certain facts in the statement but may not elicit new evidence.

²¹ This is based on the assumption that the Californian witnesses shall be in attendance in Riyadh.

The tribunal may allow a longer examination-in-chief if technical issues occur, or where new evidence or allegations arise which they did not have a previous opportunity to address.

- 7.8. Waiver by a party of its right to cross-examine a witness shall not imply acceptance of the content of the corresponding witness statement. When a party has waived its right to cross-examine a witness, the tribunal may assess the witness' evidence in its discretion.
- 7.9. The tribunal shall decide whether or not to apply any national law rules of evidence as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion. The tribunal may exclude from evidence, whether at the request of a party or on its own motion, any document, statement, oral testimony or inspection which lacks sufficient relevance to the issues in dispute or materiality to the outcome of the case, or for reasons of procedural economy, proportionality, fairness or equality of the parties the tribunal finds to be compelling.

8. Technical hearing specifications

- 8.1. There should be several breakout rooms, i.e. virtual spaces where relevant persons to talk privately, e.g. deliberate on objections and disputes as they arise. Correspondingly, there should also be physical breakout rooms at the physical place of hearing, or at the very least the ability for in-person attendees to join the virtual breakout rooms using technical devices.
- 8.2. During the proceedings, the number of video connections must be kept to a minimum and to active participants only to prevent video degradation.
- 8.3. No participant may record via audio, video or screenshot any part of the proceeding without the advance, written authorisation of the tribunal. The tribunal may, however, record any part of the hearing.

9. In-person facility requirements

- 9.1. The hearing facilities must have an appropriately sized hearing room in light of distance measures due to COVID-19 and COVID-14.
- 9.2. If there is insufficient space, plastic dividers must be installed to guarantee non-contamination and those not speaking must wear masks. For this purpose, 'not speaking' does not include those permitted to interject, even if they remain silent.

10. Costs

- 10.1. Any and all costs incurred by any of the Remote Attendants who are witnesses in relation to any purchases of devices or other matters, tools or services required for this video conference hearing (e.g. technical training), whether provided by the parties themselves, or any third party provider, shall be borne by the parties in such proportion as the tribunal may determine.

10.2. This shall not be the case where the virtual cross-examination takes place in counsels' offices. Where witnesses testify remotely from their counsel's offices, this shall be subject to the constraints imposed by a lawyer's professional code of conduct.

11. Powers of attorney

In relation to Saudi representation, power of attorney documentation must be completed and provided to all parties and the tribunal as soon as possible but in any case prior to the hearing, to the extent this has not already occurred.

12. Failure to appear or notify

Failure of any witness notified under 1.3 to appear during the virtual or in-person cross-examination will result in the exclusion of that witness's evidence, absent extraordinary circumstances or a showing of good cause as determined by the tribunal. Failure of any Remote Attendant to notify their wish to attend the hearing remotely under 1.4. will require such Remote Attendant to attend the in-person hearing.

13. Sanctions for non-compliance

Any disruptive conduct may be taken into account when allocating the costs of the arbitration and may, in extreme cases, lead to sanctions.

14. Award

The Award shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law or determined by the Administrator, the award shall be made no later than 30 days from the date of the closure of hearing.²²

15. Amendments

The tribunal may modify this Order at its discretion to protect the fairness and integrity of the hearing, and this Order shall continue in effect unless and until amended by subsequent order of the tribunal.

[Signature]

[Name]

[Location, 1 October 2020]

²² Art. 10 of the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules Proceedings by Written Submissions