

THE HAGUE VIDEO CONFERENCING AND VIRTUAL HEARING GUIDELINES 2020

These guidelines are drafted to give guidance on conducting a virtual hearing in (inter)national arbitrations through videoconferencing with the seat of arbitration in the Netherlands.

The Netherlands' Arbitration Act¹ provides for the possibility of conducting arbitral proceedings through electronic means in Article 1072b. In accordance with this provision an arbitral tribunal may:

- (1) allow for electronic communication to be an acceptable and valid form of communication (paragraph 1);
- (2) allow for electronic submissions by means of 'electronic data on a data carrier' (paragraphs 2 and 5);
- (3) render an electronic judgment (paragraph 3); and
- (4) allow for witness hearings and pleadings to be held via videoconferencing (paragraph 4).²

The current guidelines specifically aim to provide a practical approach to a videoconference hearing. The objective is to make videoconference hearings a suitable and effective replacement for physical hearings by using high quality devices, a secure platform and by ensuring an appropriate set-up of the venue. It should be noted that any replacement of an in-person hearing by a virtual hearing should be

¹ Book IV of the Netherlands' Code of Civil Procedure ("Wetboek van Burgerlijke Rechtsvordering").

² In this respect we also would like to make reference to Article 1041 (3) of the Netherlands' Arbitration Act, which states that if an oral hearing of witnesses or experts takes place, the arbitral tribunal shall determine the time and place of the hearing and the manner in which the hearing will take place.

considered and decided upon on a case-by-case basis, including considering conducting a hearing in a hybrid form whereby certain participants meet in-person while others join the hearing virtually.

These guidelines are not intended to give an exhaustive listing of recommendations; it will be at the discretion of the tribunal and the parties to deviate from these guidelines.

1. PRE-HEARING ARRANGEMENTS

- (a) If the parties wish to proceed with a virtual hearing, the parties should inform the arbitral tribunal as soon as possible in writing, preferably at least two weeks prior to an already scheduled hearing and preferably prior to any travel arrangements being made.
- (b) If the parties do not agree on whether to conduct a virtual hearing, or if the parties agree not to conduct a virtual hearing, the arbitral tribunal may, after having heard the parties, and in deciding on the suitable measures to progress the arbitration in a fair, time-efficient and cost-effective manner, decide to proceed with a virtual hearing without the agreement of the parties, carefully taking into account all relevant circumstances. The arbitral tribunal's decision to conduct a virtual hearing without party agreement should be reasoned.
- (c) If the arbitral tribunal decides to proceed with a virtual hearing, the arbitral tribunal is to issue a procedural order as soon as possible, preferably at least two weeks prior to an already scheduled hearing and preferably prior to any travel arrangements being made.
- (d) In principle, the parties are responsible for making appropriate arrangements in a timely manner to secure adequate venues and equipment for all those participating in the virtual hearing.
- (e) The parties and the arbitral tribunal shall set up a virtual pre-hearing conference. In this conference, a

host and moderator may be appointed (e.g. the chair of the arbitral tribunal, the tribunal secretary or a dedicated technology expert). It is advisable to determine, during the pre-hearing conference, if it is desired to have dedicated technical support present during the actual virtual hearing.

- (f) After consulting with the parties, the chair of the arbitral tribunal (or the sole arbitrator) will in advance assess the features of the platform or system that will be used for the virtual hearing, including e.g. features to conduct break-out sessions or to share screens or documents.
- (g) Witnesses, interpreters and court reporters, if any, shall be informed of the content of these guidelines prior to the commencement of the hearing.
- (h) To avoid security and privacy issues, electronic calendar invites with links to the relevant platforms shall be sent to authorized participants only.
- (i) Each party shall appear with its counsel in a single venue together, to the extent possible.
- (j) Arbitrators shall appear in a single venue together, to the extent possible. Should a tribunal secretary be appointed, the secretary shall appear together with the arbitral tribunal in a single venue together, to the extent possible.
- (k) In the event of a hybrid form of a hearing, the arbitral tribunal shall ascertain that the parties are treated equally, inter alia, with respect to the appearance of the parties and their counsel before the arbitral tribunal.

2. TECHNICAL ISSUES, SPECIFICATIONS, REQUIREMENTS AND SUPPORT

- (a) The parties shall agree on a reliable provider of videoconferencing services, taking into consideration

the arbitral tribunal's preference (if any). The provider should enable all participants to make use of a reliable video-link of sufficient quality to effectively participate in the hearing.

- (b) The parties shall consult and endeavor to agree on minimum system specifications and technical requirements for continuous and adequate audio-visual connectivity, as well as any required hardware, equipment and software applications.
- (c) Prior to a hearing, tests will be carried out to ensure the reliability and the quality of the equipment and the video-link. The parties are responsible for testing their own venue and equipment as well as that of their witnesses.
- (d) The parties shall ensure that adequate and appropriate technical support is available to each participant at each venue, if that is agreed during the pre-hearing conference.
- (e) If the parties cannot agree on any matter that requires the parties' agreement, the arbitral tribunal shall render a decision after having heard the parties.
- (f) The use of headsets is recommended for those participants where this increases privacy and/or audibility, e.g. due to unforeseen background noise.
- (g) The participants are encouraged to ensure that the devices used to access the hearing are fully charged and can be charged during the hearing.
- (h) If so requested, the participants should be prepared to show a 360° view of the room in which they are situated.
- (i) The virtual hearing shall be initiated by the arbitral tribunal once it is confirmed that all parties and any legal representatives are in the virtual waiting room, if the platform provides for one.

- (j) The parties shall agree in advance on a procedure for alerting the arbitral tribunal during the virtual hearing in case of any technical difficulties. Such procedure could entail alerting the arbitral tribunal through a platform chat-function or by contacting dedicated technical support staff. In such circumstances, the virtual hearing will be put on hold and the other party will be asked to leave the platform, or in any event asked to leave the virtual room with the arbitral tribunal, until the technical difficulties have been resolved. If technical difficulties are encountered prior to the commencement of the virtual hearing, the arbitral tribunal shall inform the parties thereof.
- (k) At least 48 hours prior to the commencement of the hearing, the parties shall each confirm in writing that the appropriate tests have been conducted and that the service provider, the equipment, technical specifications and requirements are adequate for their participation in the hearing, including the participation of any witnesses, if any.

3. HEARING VENUES

- (a) The conditions in all physical rooms to be used for a connection to the online platform hosting the hearing should be optimized for the use of videoconference, including the room size, layout, access, acoustics and lighting.
- (b) The videoconferencing equipment should, where possible, be set up and installed at each venue in such a way that it resembles an “in-person” hearing, ensuring an appropriate number of cameras and microphones so that:
 - (i) each participant can be seen and heard with minimal difficulty or disruption; and
 - (ii) all or a reasonable part of the room in which a witness is located can be shown on screen, while maintaining a clear view of the witness.

- (c) To the extent possible, each party and its counsel should be visible together in one room and on one screen.
- (d) To the extent possible, the arbitral tribunal, and the tribunal secretary if appointed, should be visible together in one room and on one screen.
- (e) A computer with email facilities and/or connected to a shared virtual document system, and a printer if so required, should be available at all venues.
- (f) The participants may not use a virtual background.
- (g) The venues occupied by participants should be separate from non-participants and should be soundproofed where possible. The venues should have sufficient visibility to eliminate the possibility of the presence of undisclosed non-participating persons in the rooms.

4. CONFIDENTIALITY, PRIVACY AND SECURITY

- (a) The participants to the hearing shall be identified by the parties in accordance with the procedural order or instructions of the arbitral tribunal. Furthermore, technical consultants and/or support staff that will or may be present during the hearing shall be identified. The attendance of any other person shall also be announced well in advance.
- (b) Video and/or audio recordings of the hearing are admissible provided that all participants give their prior written consent, in which case the parties shall also agree on the use of the recordings as well as the time period that the recording may be retained. If no agreement is reached on the retention period, the parties and the arbitral tribunal shall delete the recordings taking in account the applicable legal retention period and any other relevant time periods. In the event that consent for recording is not obtained,

the parties shall discuss alternatives, such as the use of a court reporter or hearing notes drafted by or on behalf of the arbitral tribunal.

- (c) The participants shall ensure an appropriate security level when choosing a platform, including considerations of the level of encryption offered by the platform, as well as matters such as password-protected sessions and potential cyber-risks.
- (d) The participants shall ensure that a secure network is used for their connections, devices and technology.
- (e) The parties are responsible for complying with the relevant applicable laws with respect to privacy, confidentiality, data protection and (cyber) security requirements. After consulting with the parties, the arbitral tribunal shall decide on what measures, if any, to take to address these matters.
- (f) If any party considers that additional security measures are required, that party shall raise its concerns immediately. The arbitral tribunal shall then decide on any further measures after having heard the parties.

5. ONLINE ETIQUETTE AND DUE PROCESS

- (a) To minimize the disruption resulting from possible delays due to an inadequate connection, the participants shall observe the following etiquette (oftentimes the suggestions below will not differ from the etiquette as applicable during physical hearings):
 - (i) Lead speakers for each party shall be identified at the commencement of the hearing;
 - (ii) Participants shall agree in advance on the expected approximate timeframes allocated to each party to set out its oral argument and, where appropriate, examination of witnesses;

- (iii) Participants shall refrain from interrupting a speaker;
- (iv) Participants shall mute their microphones when they are not speaking;
- (v) Any speaker shall clearly indicate when he or she has finished speaking;
- (vi) Speakers shall refrain from speaking until the previous speaker is finished;
- (vii) Counsel and party shall remain visible at all times unless agreed upon differently with the arbitral tribunal;
- (viii) Sufficient time shall be allocated to allow the parties to deliberate with their counsel privately (either via dedicated tools on offer via the virtual platform or via an agreed alternative way);
- (ix) Parties could agree on whether to use an open chat window during the hearing. Such chat-function shall not be used for ex-parte communication with the arbitral tribunal; the parties and their counsel remain free to use such chat-function amongst themselves;
- (x) The arbitral tribunal shall agree on a suitable and confidential line of communication to deliberate without the parties present. This includes, but is not limited to, a closed and private room for deliberations, separate from the hearing room; and
- (xi) Participants losing connectivity should make this known to the arbitral tribunal via a designated channel of communication, in which case the arbitral tribunal shall suspend the hearing until the lost connection is restored or until the connection functions again in a reliable fashion.

- (b) At the start of the hearing, the arbitral tribunal shall identify whether all registered participants are present.
- (c) The arbitral tribunal shall set a mechanism for raising objections at the commencement of the virtual hearing.
- (d) Parties should agree on who is responsible for making arrangements for a recording of the hearing, if they have so agreed with the arbitral tribunal.
- (e) The arbitral tribunal shall, in consultation with the parties, determine if any additional (confidential) lines of communication may be advisable or necessary, for example if a party or a witness and their legal representative are participating from different venues.

6. PRESENTATION OF EVIDENCE AND EXAMINATION OF WITNESSES

A. DOCUMENTS

- (a) Parties should agree on a digital platform for transmission and storage of documents submitted during the arbitral proceedings, including but not limited to memorials, witness statements and exhibits. These documents should be available in a digital form to all parties and the arbitral tribunal during the hearing. All documentation made available to the arbitral tribunal shall be digitally accessible to all parties.
- (b) It is recommended that parties agree on a secure shared virtual document system to be made available via computers at all venues during the hearing, in order to efficiently exchange relevant documents with all participants. Such system may be incorporated in the videoconferencing platform. It is advisable to use a platform permitting all attendees to view the document simultaneously, that can be properly

managed, while agreeing in advance who will handle the document production and review.

B. WITNESSES

- (c) Witnesses (fact or expert) shall give their evidence during the course of the hearing under the direction of the arbitral tribunal.
- (d) Witnesses shall give their evidence sitting at a desk, preferably empty. The witness' face shall be clearly visible at all times, while at the same time allowing the tribunal to assess a witness' body language.
- (e) The recommendations under paragraph "hearing venues" above equally apply to the witness' venue.
- (f) In the event an interpreter is involved, consecutive interpretation is, in general, preferred over simultaneous interpretation. If possible, the interpreter will be located at the same venue as the witness for whom interpretation is required.
- (g) The parties should discuss and agree in advance whether the witness will be accompanied by a representative of the parties in the venue where the witness is located during the virtual hearing.
- (h) Documents on the record that a witness may refer to, or that may be referred to during the witness hearing, must be clearly identified and made available to the witness, the parties and the arbitral tribunal.