Does a Right to a Physical Hearing Exist in International Arbitration?

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THE NETHERLANDS
a. Parties’ Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)*?

**Short answer:** No.

As per its Article 1073, the Dutch Arbitration Act (“DAA”) – appearing in Book 4 (Articles 1020-1076) of the Dutch Civil Code of Procedure (“DCCP”) – applies if the place of arbitration is located in the Netherlands. The DAA does not expressly provide for a right to a physical hearing in arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

**Short answer:** This matter is unsettled. The law provides the discretionary power to order a remote hearing, but these powers must be exercised in accordance with fundamental notions of due process.

As noted, the DAA does not expressly provide for a right to a physical hearing in arbitration. Article 1072b of the DCCP, conversely, specifically provides for the use of electronic means in arbitral proceedings. The provision contains several subclauses on the use of electronic means in arbitration, including wording on electronic consent to...
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Arbitration (Article 1072b(1) of the DCCP), electronic filing of documents (Article 1072b(2)) and e-awards (Article 1072b(3)).

Article 1072b(4) of the DCCP provides specific arrangements with respect to remote hearings. The provision grants the arbitral tribunal the discretionary power to decide that a personal appearance of a witness, an expert or a party, will take place “by electronic means” capable of placing that person “directly in contact with the arbitral tribunal.” The discretionary power granted to the tribunal in Article 1072b(4) is phrased as being of a mandatory nature. The parties may thus, in principle, not deviate from it. As will be elaborated below, the mandatory character of Article 1072b(4) has been challenged in recent scholarly writing.

Remote hearings may occur in all shapes and sizes. They may be of a procedural nature (such as case management conferences) or may concern substantive issues (such as pleadings and hearings of witnesses and experts). Thus, in principle, all hearings may take place in electronic form. Fundamental principles of procedural law, however, impose certain restrictions. These principles are briefly introduced below, which introduction serves as the framework for the analysis in this submission.

The fundamental principles of procedural law serve as a basis in answering the question of whether and when a remote hearing is permissible. Article 6 of the European Convention on Human Rights (“ECHR”) is of course important before the regular courts.


3 These two elements are at the heart of Fokker’s dissertation. See Johannis P. FOKKER, E-arbitrage (Kluwer 2009).

4 Article 1072b(4) of the DCCP. An unofficial, yet widely used, translation of the DAA is available on the website of the Netherlands Arbitration Institute at <https://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf> (last visited on 1 March 2021).

5 See, e.g., ICC Regulation 24. But the case management conference is not used only in ICC proceedings. See also, including references, Henk SNIJDERS, “Article 1043 of the DCCP” in GS Burgerlijke rechtsvordering, fn. 2.

6 In Loebl’s words: “The response to what factors are decisive in order to ascertain whether any dispute resolution system is good or not have always been simple: whether such dispute resolution program complies with fundamental guarantees of a fair trial contained in the European Convention on Human Rights (ECHR). Ethical issues are the most important for designing any ODR system, state or private. Designers of any ODR system must have these rights always in mind during their work”. Zbyněk LOEBL, Designing online courts: The future of justice is open to all (Kluwer Law International 2019) pp. 55-78; See, dated, but in the same sense: Thomas SCHULTZ and Gabrielle KAUFMANN-KOHLER, Information technology and arbitration (Kluwer Law International 2006) p. 236.
but it also plays a role in (a Netherlands-seated) arbitration. Article 6 of the ECHR provides that anyone is entitled in the determination of that person’s civil rights and obligations to (1) a fair and (2) public hearing, within (3) a reasonable time, by (4) an independent and impartial tribunal, (5) established by law. Although not all these elements are equally applicable in arbitration, it has been submitted that “Article 6 of the ECHR must to a certain extent be taken into account during arbitration proceedings.”

This applies in particular for the requirements of a fair hearing and the impartiality and independence of the tribunal.

The principle of the independence and impartiality of the (arbitral) tribunal, for instance, is recorded in Article 1033 of the DCCP. It is of course important, yet not central to this analysis. The requirement of a fair hearing, conversely, is of pivotal importance to the assessment of whether a remote hearing is permissible. The fair hearing-requirements may be dissected into three sub-elements: equality of arms, adversarial proceedings and a reasoned decision.

The equality of arms element, is laid down in Article 1036(2) of the DCCP. This provision of fundamental procedural law mandates that the arbitral tribunal must give both parties the opportunity to present and explain their arguments and to respond to each other's positions. The principle of adversarial proceedings (i.e., the right to be heard) is closely related (but not identical) to the equality of arms requirement. It also follows from Article 1036(2) of the DCCP. The sub-elements of equality of arms and adversarial proceedings imply the right of effective participation by each party to the proceedings.

The sub-element of a reasoned decision, finally, is set out in Article 1057(4), opening lines and paragraph (e), of the DCCP and the corresponding Article 1065(1), opening lines and paragraph (d), of the DCCP. The latter Article provides that a (very) poorly reasoned award may be set aside. The principle of a decision within a reasonable time follows not only from the ECHR, but also from Article 1036(3) of the DCCP. This provision allows the arbitral tribunal to take measures to prevent unreasonable delay of
an arbitral proceeding. Ordering a remote hearing could be such a measure, either at a party’s request or of the arbitral tribunal’s own accord.

In conclusion, the arbitral tribunal may decide not to have any physical hearing, and it is explicitly empowered to order a remote hearing, but its decision on either issue is subject to the fundamental principles of procedural law. In particular, the element of a fair hearing – which follows from both Article 6 ECHR and Article 1036 of the DCCP – has to be taken into account. The arbitral tribunal may order a remote hearing as a measure in order to avoid unreasonable delay of the proceedings (Article 1036(3) of the DCCP), but at the same time has to adhere to (and counterbalance) the principles of equality of arms and adversarial proceedings (Article 1036(2) of the DCCP).

b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?

Short answer: No.

As noted in the preceding section, an arbitral tribunal, as per mandatory arbitration law, has discretion to order a remote hearing. The tribunal’s decision is, however, subject to the fundamental principles of procedural law. In particular, the element of a fair hearing – which has its roots in Article 6 ECHR – may prevent a tribunal from ordering a hearing to be held through electronic means.

Even though the general rules of (Dutch) civil procedure also do not provide for a right to a physical hearing, such general rules are equally subject to the limits provided by Article 6 ECHR. Consequently, the notion that a remote hearing may unduly interfere with a party's fundamental right to a fair hearing and the effective presentation of its case, may prevent a (state court) hearing from being conducted through electronic means. In other words: both the state courts and arbitrators are in this respect bound by Article 6 ECHR.

14 See sub-paragraph a.2.
15 Unlike in the DAA, the litigation provisions of the DCCP do not contain provisions on online hearings. Practical arrangements are, however, in place in authoritative procedural rules applied by the courts.
4. If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?

Short answer: N/A

As mentioned above, the general rules of (Dutch) civil procedure do not provide for a right to a physical hearing, subject to the limits provided by Article 6 ECHR.

As to the relevance of this to arbitration, the matter is unsettled. It may be submitted that, in specific cases, the right to a physical hearing follows from Article 6 ECHR. This is true for both arbitration and court hearings.\(^\text{16}\) Whether a virtual witness hearing is contrary to the fundamental notions of procedural law, depends on the applicable facts and circumstances of the case.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: N/A

As mentioned above,\(^\text{17}\) Dutch law does not expressly provide for a right to a physical hearing in arbitration. Therefore there is no right to be waived.

On a related point, however, parties are free to agree that hearings take place remotely. In this respect, the fundamental notions of procedural law as embedded in Article 6 ECHR and Article 1036(2) DCCP may also work vice versa, i.e., where an arbitral tribunal is confronted with parties agreeing on a remote hearing that does not comply with standards of due process flowing from Article 6 ECHR and Article 1036(2) DCCP, the arbitral tribunal may be obliged to apply these fundamental notions of procedural law. This is, however, a somewhat academic point. A more practical analysis invites the conclusion that where the arbitral tribunal, in principle, has the discretion to order a remote hearing, the fact that parties voluntarily choose to have a hearing conducted by electronic means is unlikely to be considered contrary to fundamental notions of procedural law.

6. To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

\(^{16}\) See sub-paragraph a.2.

\(^{17}\) See sub-paragraph a.2.
Short answer: This matter is unsettled.

Please also refer to sub-paragraph a.2 above. There is no conclusive answer as to whether the arbitral tribunal can decide to hold a remote hearing where the parties have agreed to a physical hearing. The answer depends on the interpretation of the nature of Article 1072b(4) of the DCCP and whether this Article prevails over the principle of party autonomy. There are two approaches to answering this question. A proper understanding of these approaches requires some context.

The first approach would entail the argument that Article 1036 of the DCCP is the key benchmark in Dutch arbitral proceedings, as it codifies principles of fundamental arbitral rules of procedure and determines the hierarchy of arbitral rules of procedure. It puts party autonomy first and foremost: “arbitral proceedings are conducted in the manner agreed on between the parties”, albeit “subject to the provisions of mandatory law”. The provisions of mandatory law are followed by the permissive provisions in the DCCP, i.e., rules that apply unless the parties opt out. Those rules can usually be identified by the use of the words “unless the parties agree otherwise”.  

The ‘autonomy first’ approach of Article 1036 DCCP corresponds to the nature of arbitration and the fact that arbitrators’ powers are based on an agreement made between the parties. Former Supreme Court Justice Professor Daan Asser therefore refers to party autonomy as “the most fundamental characteristic of arbitration”. After all: if parties do not opt for arbitration (thereby waiving access to the state court), no arbitration will take place. But Professor Asser also draws attention to the fact that “parties are essentially not as autonomous as they appear with regard to arbitral proceedings”. In other words, although the revision of the DAA on 1 January 2015 led to “a shift from mandatory law to directory law”, a choice in favour of Netherlands-seated arbitration means that various rules of mandatory law apply. Parties cannot contract out of those rules. Arbitration is therefore not a “non-committal activity”, in the words of Professor Asser.

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18 Article 1036(1) of the DCCP.
21 Ibid.
22 Articles 1020-1076 of the DCCP.
24 At the end of par. 2, Asser adds: “The effect of public order and mandatory substantive law and procedural law is increasingly restricting party autonomy. The general procedural principles, whose effect is becoming increasingly powerful, are also contributing to that increasing restriction […]”. See Daan ASSER, “Beginselen van een faire arbitrale rechtspleging”, fn. 20 above, par. 2.
In the second approach, Article 1072b(4) of the DCCP is understood to be of a mandatory nature. Therefore, the arbitral tribunal is free, in principle, to order a remote hearing. The parties’ consent is not required. It has, however, been submitted that the power of the arbitral tribunal to order a remote hearing as set out in Article 1072b(4) of the DCCP being a rule of mandatory law, is not apparent from its legislative history. The government implied in its memorandum in response to the report that party autonomy is indeed key: “First and foremost, the legislative proposal does not oblige parties to use electronic means, but merely offers the possibility of using such means. In practice they allow parties, for instance, to communicate with the arbitrators by email or to be heard by means of videoconferencing”.\footnote{Emphasis added. See Kamerstukken II 2012/13, 33611, no. 5, p. 19.} This phrase could imply that the legislator believes that the parties must play an important role in the decision to hold a remote hearing.

Furthermore, the fundamental principle of procedural law of Article 1036(3) of the DCCP requires that arbitrators take action only in the event of unreasonable delay. A delay is unlikely to be unreasonable if parties themselves agree (prior to or pending the proceedings) to postpone the hearing until it can take place in person.

Finally, the analysis that Article 1072b(4) is not, in fact, mandatory, is supported by Articles 1038b\footnote{Article 1038b of the DCCP provides that the arbitral tribunal must give the parties the opportunity at their request or of its own accord to orally explain their arguments at a hearing, “unless the parties agree otherwise”.} and 1039\footnote{Article 1039(1) of the DCCP provides that the provision of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence are at the arbitral tribunal’s discretion “unless the parties agree otherwise”.} of the DCCP. Although the foregoing provisions are directory in nature, they allow the parties (in the implementation of the principle of party autonomy) to agree on the organization of the hearing and the assessment of evidence. If parties make use of this opportunity to agree on specific arrangements, failure of the arbitral tribunal to apply such arrangements may constitute a breach that could result in the award being set aside.

Against this background, it has been submitted that, although it is correct that parties surrender part of their autonomy by opting for arbitration,\footnote{Daan ASSER, “Beginselen van een faire arbitrale rechtspleging”, fn. 20 above, par. 2.} the fundamental characteristic of party autonomy is paramount in answering the question whether a remote hearing is permissible: arbitration cannot take place if parties do not actively opt for arbitration. If parties in agreeing to arbitration also agree that a remote hearing will not take place, the arbitral tribunal is therefore bound by that agreement.

\section*{d. Setting Aside Proceedings}

\subsection*{7. If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?}
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Short answer: Yes.

As noted, Dutch law does not expressly provide for a general right to a physical hearing in arbitration.29 As also noted, however, it has been submitted that the arbitrators’ power to order a remote hearing may also be circumscribed by fundamental notions of procedural law embedded in Article 6 ECHR and Article 1036(2) DCCP or by the parties’ agreement. Violation of these notions may, under Article 1065(1) sub (e) give rise to a claim for setting aside of the award at the court of the seat.

It is debated whether the obligation, as per Article 1048a DCCP, for a party to object to the arbitral tribunal without unreasonable delay, as soon as it knows or reasonably should know of any act contrary to, or failure to act in accordance with any provisions of the DAA, also applies to violations of rules of ordre public, such as the right to due process. It has been submitted that the untimely objection to a violation of public order bars a party from bringing a claim for setting aside based on that alleged violation.30 The converse has, however, also been submitted.31 The legislator has noted that the obligation to ‘blow the whistle timely’ as embedded in Article 1048a DCCP, does not apply to mandatory EU (competition) law. This same reasoning may be applied to obligations arising from the ECHR.

8. To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?

Short answer: N/A

As noted above, there is no general codified right to a physical hearing in arbitration and therefore no question of a breach arises.

9. In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?

Short answer: Yes.

29 See sub-paragraph a.2.
30 Gerard MEIJER, “Article 1048a of the DCCP” in Tekst & Commentaar Rv, note 2 sub (a); Gerard MEIJER, “Article 1065 of the DCCP” in Tekst & Commentaar Rv, note 8 sub (e).
31 Henk SNIJDERS, “Article 1048a of the DCCP” in GS Burgerlijke rechtsvordering, note 2.
As noted above, a tribunal denying a physical hearing may constitute a violation of the fundamental notions of Article 1036 DCCP. These rules are of public order. Violation of such rules may give rise to a claim for setting aside under Article 1065(1)(e) DCCP.

As to whether a claim to set aside premised on denying a physical hearing is likely to succeed, it is worthwhile to note that under leading Dutch case law, violations of due process/the right to be heard are subject to a full review by the set-aside courts.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: This is unsettled.

A request for recognition and enforcement may be refused where recognition and enforcement would be contrary to Dutch ordre public. As an arbitral tribunal denying the right to a physical hearing may constitute a violation of fundamental norms, recognition and enforcement of an arbitral award rendered in violation of such norms may be refused. A complication in this respect is that the Dutch courts, in assessing a request for recognition and enforcement of a foreign arbitral award, apply the Dutch interpretation of international public policy, rather than purely Dutch notions of public policy. It is unclear whether the Dutch courts consider the denial of the right to a physical hearing a violation of this Dutch international public policy. Should an (alleged) violation of the right to a physical hearing under the laws of the seat be pursued in a setting aside proceeding in the courts of the seat, this may give rise to an adjournment of the decision on recognition and enforcement as per Article VI of the New York Convention.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

32 See sub-paragraph c.6.
Short answer: The Temporary COVID-19 Act allows electronic means of communication if it is not possible to hold a physical hearing.

On 22 April 2020, the Dutch government announced the “Temporary COVID-19 Justice and Security Act”. This is a collective law in which various provisions and legal amendments are included to guarantee the continuity of legal transactions during the outbreak of the coronavirus. The purpose of the law is to safeguard the functioning of the legislative process, the judiciary and the public administration during the COVID-19 period.

For the purpose of this questionnaire, Article 2, paragraph 1, of the Temporary COVID-19 Justice and Security Act is particularly important. That article states: “If, in connection with the outbreak of COVID-19 in civil and administrative legal proceedings, it is not possible to hold a physical hearing, the oral hearing can take place by means of a two-way electronic means of communication”.

This provision was necessary, as the various judicial authorities closed their doors with effect from 17 March 2020 to prevent the spread of COVID-19. In order to allow the progress of urgent civil (and administrative) cases outside of a physical session, a legal basis was needed for the use of telephone connections, video links or other audio-visual transmission for all those involved in the session, even without the consent of one or more of the parties.

Lastly, it is of interest to note that the Netherlands Arbitration Institute published the “The Hague Videoconferencing and Virtual Hearing Guidelines 2020”.

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33 Temporary Act COVID-19 Justice and Security, Stb. 2020, 124, now incorporated in the (again temporary) Corona-act, which is in force as of 1 December 2020 (Stb. 2020, 482).