

The Hague Conference guide to good practice on the use of video-link under the Hague Evidence Convention

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Video conferencing has undergone a significant evolution these past few years. The recent outbreak of Covid-19 and the public health measures taken by almost all governments have increased even more the interest in the use of this technology.

Given the need of practical guidance on this hot topic, the Hague Conference on Private International Law (HCCH) recently published a guide to good practice on the use of video-link^[1](the Guide) under the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).^[2] This Guide reviews the latest developments in relation to the use of video-link in the taking of evidence under the Hague Evidence Convention and outlines good practices to be followed by its member states (member states). It was drafted after HCCH conducted an extensive survey of all member states by means of a questionnaire to synthesise and present their most frequent practice (the HCCH Survey).

The present contribution aims at highlighting the main takeaways of the Guide for the taking of evidence under Chapter 1 of the Hague Evidence Convention, to the exclusion of Chapter 2 which concerns the taking of evidence by diplomatic officers, consular agents and commissioners. Mentioning the specific case of Switzerland, it first sets out the legal framework and procedure for the taking of evidence through video-link before outlining the benefits and potential dangers of this technology. It then describes practical obstacles often encountered by member states and presents HCCH's main recommendations intended to help them preparing for and conducting such hearings.

Legal framework

The admissibility of video-link under the Hague Evidence Convention depends on whether the taking of evidence is direct or indirect:

- The taking of evidence is direct when the authority before which proceedings are pending ‘conducts the witness examination by video-link with the permission and assistance of an authority of the State in whose territory the witness is located’.[3]
- By contrast, the taking of evidence is indirect when the authority of the State in whose territory the witness is located ‘conducts the witness examination and permits the requesting court (as well as the parties and/or their representatives) to be “present” at and/or participate in (but not conducting) the examination by video-link’.[4]

The use of video-link for indirect taking of evidence is allowed under the Hague Evidence Convention.[5] By contrast, the question is disputed among member states for the direct taking of evidence.[6]

Switzerland does not allow for the direct taking of evidence.[7] As for the indirect taking of evidence, it considers there are no domestic legal obstacles to it but nevertheless answered to HCCH Survey that it is not possible in practice.[8] An examination of Switzerland’s response to HCCH Survey shows that its current position is motivated by a lack of infrastructure.[9] It is important to note that this answer dates from September 2017. The situation has drastically changed since the onset of the Covid-19 crisis which has given a push for the equipment of Swiss courts with technology allowing hearing by video-link.[10]

Switzerland’s lack of resources is not an isolated case. The Guide states that the main practical hurdle to video link hearings are the lack of equipment and support resources.[11]

Procedure

Under Chapter 1 of the Hague Evidence Convention, the requesting state shall issue a letter of request asking the requested state to obtain evidence via the appropriate judicial authority (Article 3, Hague Evidence Convention).[12] The requested state then takes the evidence (eg, conducts a witness examination, requests or inspects documents) following its domestic procedural rules (Article 9(1), Hague Evidence Convention). If the requested state does not generally foresee the use of video-link, the requesting state may wish to request the establishment of a video-link as a special method or procedure pursuant to Article 9(2), Hague Evidence Convention. In such case, the requested authority is required to comply ‘unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties’ (Article 9(2), Hague Evidence Convention *in fine*).[13]

The requesting authority is encouraged to use the model form for letters of request.[14] According to the Guide, the letter of request should also specify ‘the requirements for the video-link, including whether additional assistance, equipment or facilities are available and/or required’.[15]

HCCH further recommends that member states include an optional video-link-specific form,[16] which provides for technical parameters of the video-link device (brand, type of encryption used, etc) and full contact details of the support staff in charge. According

to the Guide, the use of the form will help expedite the handling of video-link requests and limit possible technical problems.[17]

Benefits and potential hazards of video-link

Video-link provides greater flexibility in the scheduling of hearings as well as in accommodating witnesses with certain physical conditions, time or travel constraints. It thus generally improves access to justice and renders court proceedings more efficient.[18]

The use of video-link for the taking of evidence also present certain disadvantages, which is why HCCH considers this tool as a ‘complement to’ and not a ‘substitute for’ traditional methods of obtaining evidence.[19] The Guide stresses that the level of interaction with the person to be heard is less than that which occurs when this person is physically present in front of the judge. As a consequence, the judge’s ability to assess this person’s credibility may be impaired, ‘particularly where the technology and lack of proximity exacerbate differences of language or culture, leading to a loss of nuance’.[20]

HCCH invites courts to carefully examine the situation in the concrete circumstances of the case and consider, on balance, if video-link is beneficial to the parties. As will be seen, HCCH also gives a number of practical recommendations to its member states to make video-link hearings resemble traditional hearings as closely as possible.

Practical recommendations for member states

Scheduling

HCCH encourages member states to bear in mind possible time zone differences between the requesting and requested states when scheduling video conference hearings.[21]

HCCH further encourages the requesting and requested states to consult one another, possibly informally, in particular with respect to the facilities and equipment to be used. Member states are further encouraged to keep a register of facilities and equipment to facilitate the process.[22]

Testing and technical support

HCCH encourages member states to test the equipment, working parameters and connection prior to any hearing.[23]

HCCH considers that technical support staff should be ‘on site’ at both locations during the video-link hearing in order to handle any technical problems that may arise. HCCH further recommends that legal staff and interpreters have training in ‘troubleshooting and applicable equipment maintenance procedure’, or any other person who may have to use the technology.[24]

Aware of the significant differences in the member states' judicial systems and the difficulties in identifying the appropriate contact person, HCCH recommends that all member states publish contact details of their support staff. HCCH further encourages them to keep in contact with each other regularly in order to share and define best practices, with a view to improve efficiency and facilitate the use of video-link under the Hague Evidence Convention over time.[25]

Facilities

Many member states reported during HCCH Survey that hearing rooms equipped for video-link 'can be any hearing room, as long as it is located in a court building'.[26] To give another example, another member state reported that such hearings can take place either in a court or the facility of another authority provided that it is a 'separate room'.[27] Before filing a request for judicial assistance, the requesting state should check which equipment and facilities are available in the requested state, so as to ensure that (possible) specific needs in terms of facilities are met.[28]

Despite the set-up differences among member states, HCCH provided general recommendations to ensure the quality of facilities. Member states are in particular invited to select locations where intrusions or disruptions are minimised, and which provides for a safe and secure waiting area for the witnesses and experts.[29]

Environment and positioning

The Guide draws the member states' attention to the fact that video-link hearings must 'seem as close as possible to an in-person hearing'. It provides important tips and recommendations as to, *inter alia*, the positioning of the equipment, the lights and acoustics.[30]

The experience for a witness or an expert of providing evidence through video-link may differ from providing it in a courtroom. The Guide reminds member states that a hearing room has an important influence on the way the hearing is conducted by a judge and the importance of considering the remote location as an extension of the courtroom. To the greatest extent possible, the atmosphere of a courtroom should be replicated.[31]

The Guide recommends that the layout of the room 'be organised so as to enhance the witness' feeling of participating in a traditional courtroom setting'.[32] Member states are encouraged to provide for appropriate lighting and acoustics, as well as correctly position the participants and equipment.[33] Member states in particular need to ensure that participants are positioned so that they are facing the camera, with a clear view of facial movements when speaking.[34] They must also ensure that 'the regular lighting in each room is free from reflections, shadow and glare'.[35]

From an acoustic perspective, member states should further ensure that 'the space is designed to both minimise the intrusion of noise and distraction, but also to confine sound inside the space, for confidentiality and privacy reasons'.[36] Member states are also encouraged to consider other disturbing factors such as reverberation time, sound absorption and sound diffusion.[37]

Conclusion

The Guide is noteworthy and most welcome, given the significant evolution video-link has undergone these past few years and the need of guidance in this context for both member states and practitioners. Although the Guide is primarily intended for member states, it provides useful insight for practitioners and might help them guide in turn their respective jurisdictions, in particular when these have little experience in this area.

[1] The term ‘video-link’ all technologies employed to enable video conferencing or any other form of video presence.

[2] The Guide was published on 16 April 2020. It is available for download on HCCH’s website at www.hcch.net/en/publications-and-studies/details4/?pid=6744&dtid=3.

[3] Guide, para. 37.

[4] Guide, para. 37.

[5] Guide, para. 34. See also ‘Synopsis of responses to the country profile questionnaire on the taking of evidence by video-link’, 105, available for download on HCCH’s website at <https://assets.hcch.net/docs/1dfce8db-44c1-459e-b6b2-025954328dc0.pdf>.

[6] Guide, para. 40.

[7] Direct taking of evidence is forbidden pursuant to Article 271 of the Swiss Criminal Code unless specifically authorised by Swiss authorities. See the guidelines published by the Federal Office of Justice (last update on January 2013), 33, available on its website at: www.rhf.admin.ch/dam/rhf/en/data/zivilrecht/wegleitungen/wegleitung-zivilsachen-e.pdf.download.pdf/wegleitung-zivilsachen-e.pdf. See also Switzerland’s profile (last update on 11 September 2017), 5, available for download on HCCH’s website at <https://assets.hcch.net/docs/2ffec1e7-6304-4e30-a56c-83bb1758d42e.pdf> (Switzerland’s Profile).

[8] Switzerland’s Profile, 8–9.

[9] To the question ‘Does YOUR STATE consider that there are practical obstacles to the use of video-link technology for the taking of evidence under Chapter 1 of the Convention?’, Switzerland replied: ‘Yes, lack of equipment’. See Switzerland’s Profile, 21.

[10] See Remote Courts Worldwide – Switzerland, available at <https://remotecourts.org/country/switzerland.htm>.

[11] Guide, para. 149.

[12] Guide, para. 52.

[13] Guide, para. 53.

[14] Available for download on the Evidence Section of HCCH's website at www.hcch.net/en/publications-and-studies/details4/?pid=3309&dtid=2.

[15] Guide, para. 59.

[16] This optional form is included in Annex IV of the Guide.

[17] Guide, para. 61.

[18] Guide, para. 13

[19] Guide, para. 13.

[20] Guide, para. 13

[21] Guide, paras 159 and 160.

[22] Guide, para. 159.

[23] Guide, para. 162.

[24] Guide, para. 166.

[25] Guide, para. 167.

[26] Guide, para. 169.

[27] Guide, para. 169.

[28] Guide, para. 170.

[29] Guide, para. 171.

[30] Guide, para. 197.

[31] Guide, para. 191.

[32] Guide, para. 196.

[33] Guide, para. 193.

[34] Guide, para. 196.

[35] Guide, para. 194.

[36] Guide, para. 195.

[37] Guide, para. 195.

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