



Best Practice Guidelines for Virtual Dispute Board Proceedings

Introduction

Prior to 2020, it was rare for a Dispute Board (DB) to have any meetings or hearings that were not held in person. However, the global pandemic that began in early 2020 caused restrictions to in-person meetings worldwide, and the industry has embraced new methods to ensure dispute avoidance and resolution techniques remain in place as work continues.

Enter the *virtual meeting*, a meeting conducted electronically using audio, video, text or a combination, where the participants are in separate locations and not face-to-face, sometimes referred to as online or remote meetings.

Conditions vary in the implementation of the DB process worldwide. These guidelines lay out the various considerations and recommendations to be considered by the DB members and the contracting parties when determining whether to move procedures online, and how to do so for the best possible outcomes.

These guidelines reflect best practices for ensuring the best possible outcome for a virtual DB meeting or DB hearing when attendance in person is impossible or impractical. A quick-reference checklist highlighting some of these key best practices is also available.

It should be noted that the basic principles for effective DB proceedings remain in place, despite the logistics. Please refer to the DRBF's [*Dispute Board Manual: A Guide to Best Practice and Procedures*](#) for guidance. The details included here are specific to the logistics of virtual proceedings.

Contract Documents

Parties should review the contract documents, including the DB Agreement and any associated DB Specification or DB Rules/Operating Procedures, to determine whether virtual proceedings are reasonably covered in the contract and procedures. If necessary, the relevant documents may need to be amended to allow virtual proceedings and to establish the conditions in which they will take place.

In modifying contract documents, the parties and DB must take care to ensure that all legal requirements regarding data protection (including the European Union's General Data Protection Regulation) and confidentiality are observed. The parties may consider if the virtual DB hearing will be recorded, and if so, any related details about the obligations of the parties may also be included in any contract amendment.

In some cases, parties may agree to a revised pay structure, in order to effectively cover, the time needed for document review in preparation for and participation virtual proceedings. Alternatively, there may already be an agreed hourly rate for DB members in the contract documents, and the parties may agree to

apply those hourly rates to review documents in preparation for virtual proceedings. Retainers or monthly management fees for time spent reviewing project documents between meetings are unlikely to be affected, although travel time and travel expenses are likely to be minimized.

Virtual Platforms

There are many service companies offering online platforms for delivery of virtual meetings and hearings. In most cases, the parties will agree for one of the parties to host using their company's software, and handle all logistics related to the hosting of the proceedings under direction of the DB Chair. If necessary, the Dispute Board (through the Chair or one of its members) may organize the logistics needed to host the DB proceeding.

When selecting the platform, consider:

- Security protocols of the service
 - Do participants need to be customers of the service?
 - Do participants need to download an app or compatible software in advance?
 - Is there end-to-end encryption?
 - Are the meetings password-protected?
 - Are there data protection policies and procedures to be met based on the company's guidelines, or on the jurisdiction of the participants?
- Is use of the preferred platform allowed in all relevant countries/jurisdictions?
- Are the DB members or parties restricted in the choice of platform by corporate policies or pre-existing agreements?
- Does the platform have restrictions to the number of people who can participate at any given time?
- Is there is a cost for the service? If so, establish how and by whom those costs will be paid and reimbursed.
- If parties are in different countries, ensure the service works well in all areas, as some services are stronger in certain countries than others.
- Check the requirement for strong internet connections, as some services have a higher requirement for a stronger connection.
- Ensure that the participants will have the hardware needed to participate online (consider cameras and microphones, multiple screens if desired, etc).
- Different features may be needed for meetings as compared with hearings (for example, hearings may need to include a breakout capacity for each of the parties and the DB members).

Once the platform is agreed by all parties, someone should be appointed to manage the administrative logistics of scheduling the meeting or hearing, either the DB Chair or a nominee selected by the Chair.

Scheduling logistics include:

- Setting up the meeting or hearing and inviting all relevant participants, ensuring they have login details.

- Ensuring all materials are submitted in advance and in a form able to be shared with the participants (through screen-sharing or other method).
- Scheduling a practice run to test audio, video, whiteboards, screen-sharing, breakout rooms, and other logistical points.
- Include in the agenda a short introduction of the platform's technical tools, options, and virtual proceeding's protocol at the start of the proceedings.

Recording Meetings and Hearings

DB meetings and hearings are not normally recorded and no transcriptions are prepared, except in certain extenuating circumstances.

In the virtual delivery, participants are generally on a video platform which allows for easy recording.

Therefore, the issue should be addressed up front and procedures put in place to ensure all participants agree whether or not to record the meeting or hearing, and then follow the agreement. This can be included in any amendment to the contract documents. Participants may also be asked to sign an agreement not to personally record any meetings or hearings, including the taking of un-authorized screenshots, and participants may be asked to agree verbally at the start of each meeting.

If recording is agreed by all participants, copies of the recording should be distributed to each participant immediately following the meeting or hearing.

Scheduling Virtual Proceedings

Virtual meetings and hearing have the benefit of eliminating travel time, but raise other issues which should be discussed and agreed in advance:

- What time will the meeting or hearing occur? This may be particularly challenging if the parties are in dramatically different time zones as can occur with multi-national projects. In this case, consider times which are the most agreeable for the majority of the participants. In the case of regular meetings, consider shifting times so that any inconvenient times do not always impact only one party.
- How long will the meeting or hearing last? Virtual proceedings may seem easy, but they are draining on the participants who must listen carefully, remain in one place, and juggle various technical issues.
- For meetings, allow for shorter, more frequent sessions; and for both meetings and hearing build in regular breaks for all participants.
- DB members who are in the same jurisdiction may choose to meet in the same premises, if it is in compliance with current authority guidelines.

Virtual Dispute Board Meetings

DBs meet on an agreed schedule, and this should continue, although the schedule may be revised to best suit the conditions on the project. One option may be to increase the frequency of meetings and shorten the duration, for example scheduling monthly meetings to last no longer than four hours, rather than full-day meetings that occur quarterly.

Some considerations for successful virtual DB meetings:

- Who will participate? Seek to ensure the continued engagement of senior executives as well as project personnel.
- Does the system have capacity limits which require restricting the number of people?
- Who will host? The DB Chair may do so to ensure maximum control of the meeting, but if a party hosts then the Chair should set some ground rules in order to retain control of the meeting.
- Prepare a very detailed agenda, including anticipated time allocations. Plan to have breaks at regular intervals, although this may not be set at a particular time in order to preserve the flow of discussions.
- What reports and documents will be provided in advance and by whom?
- Ask the parties to provide a brief joint summary in advance.
- What reports, presentations and/or documents will be provided during the meeting and by whom?
- DB members may consider having two or more screens, one to see the parties and one or more to view documents.
- Depending on the platform, consider selecting “Gallery View,” (shown far right) where all participants can all be seen, rather than “Speaker View,” where the person speaking is shown in a larger screen.
- Some platforms have a capacity for participants to dial-in (and not be seen by video and not be identified by name). It is important that the identity of all participants, including those phoning in, be established at the outset of the proceedings.
- The Chair should identify the participants at the beginning and at the end of each session.



Virtual Site Visits

DB members typically do a site visit of the project during regular in-person meetings. In order to be kept informed of project progress, the parties should find and agree on alternative methods such as photos, videos, or drone footage. Ideally these are prepared and circulated in advance, although they may be done as a livestream in some circumstances.

Some considerations for successful virtual site visits:

- Ensure adequate lighting and resolution of the images that are being presented. When possible, use proper digital cameras and video cameras or drones rather than cameras built into phones, tablets, or computers.

- Stationary cameras which take photos at timed intervals may be set at important areas of the project.
- Use a tripod to minimize movement; avoid taking videos while walking or driving.
- Eliminate or minimize talking and background sounds during video recording.
- Do not edit the images.
- Photos and videos should be time and date stamped.
- Parties need to explain why each photo or video footage is being shared, what it is showing and where it was taken. This might be done through the use of site plans or drawings. Parties should agree which photos to show and which to exclude.
- Arrange a file transfer system as file sizes are likely to be very large.
- Factor into the agenda and scheduling the time required for review of visual aids. Allow ample time for participants to review and discuss project photos or videos, as this system is not as efficient as walking the site and viewing the works first-hand.

Virtual Dispute Board Hearings

Every hearing will be different depending on the demands of the project. A protocol should be developed for procedural and technical aspects of the virtual hearing.

Technical considerations:

- What platform will be used?
- Who will control the screen and will control be transferred to different presenters during the proceedings?
- Depending on the platform, DB members should consider setting the primary party representatives to always display (sometimes called “pinning the video”).
- Will multiple screens be used, and if so, what should each show?
- How will attendees communicate with each other and with the DB members?
- How will participants indicate a desire to speak without interrupting the speaker?
- DB members and the parties should establish respective private lines of communication to allow private consultation during the hearing that does not impede the virtual hearing, or which is done during scheduled breaks. Options include email, texting, direct messaging, phone calls, etc. Make sure you do not message through the virtual platform, in case an error is made and the message is viewed by all participants. Be mindful if you have the platform on multiple devices (for example, both laptop and mobile phone) that you do not have the platform open while making private calls.
- Determine if breakout rooms are to be used, and if so in what way.
- Determine the format of the documents and supporting materials, the timing and method of transmission, etc.
- Review any data protection and/or confidentiality declarations required regarding electronic distribution of materials and online proceedings. For example, disable private chat function if the system allows.

- Have a backup plan in case of system failure or technical problems, e.g. one of the parties is temporarily disconnected.

A commercial transcription service competent in virtual hearings may be considered to manage all logistics, in particular for high value disputes.

Procedural considerations:

- Schedule a prehearing conference to include testing of equipment and review of documents to ensure all are viewable by participants.
- Establish timelines for position papers to be circulated in advance with adequate time for review.
- Establish adequate time during the hearing for presentation of materials, and any rebuttals and witness presentations.
- DB members should establish plans for having a caucus during breaks and/or holding a post-hearing meeting.
- Consider how to ensure witnesses (if any) are not influenced during questioning by the DB.

Overall, the DB has the right to adjourn, terminate and/or postpone the virtual hearing at any time if, for any reason, the fairness and equal treatment of the parties cannot be respected.

Participants

Fairness of the procedure should always be observed; however, controlling the number of participants may be necessary based on the capacity of the chosen technical platform.

It is recommended that participants include party-appointed representatives, those who have decision-making power and those needing to present information about the issues in dispute. Additional participants may include project personnel, experts, and interpreters or technical assistants if needed.

Ideally, the final list of attendees should be established prior to the meeting, e.g. at the prehearing meeting (if there is one), and any changes should be discouraged.

Documents

For a virtual DB hearing, it is important that position papers, documents, visual aids, etc. are submitted in a compatible format with the platform being used. When establishing the virtual procedure, the DB should impose guidelines for document submission and strictly limit the submissions of new documents during the hearing. A joint bundle of documents or Common Reference Document (CRD) is recommended.

The parties may agree on utilizing a shared virtual document repository (i.e. document server) to be made available via computers at all locations, provided that the parties use best efforts to ensure the security of the documents (i.e. from unlawful interception or retention by third parties).

The hearing procedure should deal also with practical aspects such as how the documents are going to be shared and viewed:

- Who will be responsible for document management, will the task be split between the parties, or managed by one party? Consider establishing exhibit numbers and having a technical assistant (who could, by agreement, be from one of the parties) manage coordination during the hearing.
- Review the CRD and component documents beforehand to ensure that they open/display properly.
- Videos and some PowerPoints can be very large files which may be difficult to circulate or display effectively, so be sure to test in advance.
- How is each participant going to view the documents? Using two screens, or a split screen option? Are screens big enough to do this?
- If using annotated bundles electronically, do not use them on a screen that might be visible during the meeting.

Translation

If needed, consecutive translation/interpretation is preferred to simultaneous translation. There are systems allowing for simultaneous interpretation; however, they should be tested prior to a decision to use them.

Hybrid Proceedings

It may be possible to have DB meetings or hearings semi-remotely, where parties or individuals within the same area are together at the same location, and those who are not can dial in.

Such an arrangement should only be permitted with the agreement of all parties and care should be taken to ensure that any such arrangement complies with the requirements of the contract.

If such an arrangement is agreed, the DB must take care to ensure that the process is fair to all parties, those attending in person or virtually. If there is any concern that this approach could result in a perceived unfairness, then a completely virtual process should take place.

The DB should confirm with the parties that hybrid proceedings be carried out safely and in accordance with the safety requirements of the relevant jurisdiction.

Practical Considerations for All Virtual Proceedings

Remind all attendees to:

- Update all software to the latest version.
- Ensure best possible internet connection; this may include turning off other devices on the same system to maximize bandwidth. If connection weakens during the meeting, try turning off video to preserve best possible audio.
- Devices should be fully charged and connected to power.
- Turn off all notifications on primary and secondary devices to avoid distractions.
- Shut doors and windows to avoid background sounds and/or visual distractions.
- Notify others of meeting status to minimize interruptions.

- Test camera angles, background, and lighting. Each attendee’s face should fill 50% of the screen. Some systems allow a virtual background to neutralize the location, or participants may want to adjust location to have a simple plain wall behind them. Lighting should be from the front and not from behind.
- Test sound (perhaps with others beforehand). Do you need to wear headphones and use a microphone?
- Position your notes so they cannot be seen by the camera.
- Wear what you would normally wear to a meeting.
- Make eye contact with the camera when speaking.
- Be mindful of the mute button. Use it when you are not speaking and when you are on any scheduled breaks. Remember to “unmute” when it is your time to talk. The DB should remind the participants of this at the outset of any meeting or hearing.
- Remember each participant is “on show” throughout the proceedings, so it will be obvious if they are distracted by something else.
- If using screen-share or other functions of the online platform, make sure users are properly trained on the technique; view how-to videos online and have a practice session with the administrator.
- Allow for sufficient pauses when addressing remarks and asking questions. There can be short delays in the technical system, or a pause as someone considers their response.
- If you will be sharing your screen, be careful to close all other documents or programs so as to not accidentally share confidential or personal information with others.

Acknowledgments

The DRBF is grateful for the contribution of lead developers Jeremy Glover, Leo Grutters, and Ann Russo and contributors Bill Barton, Kurt Dettman, Giovanni di Folco, Graham Easton, Ron Finlay, Andy Griffiths, Eric Kerness, Hal McKittrick, Matt Michalak, Giorgiana Tecuci, Elizabeth Tippin, Anton van Langelaar, and John Westland.

5 August 2020