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SCC VIRTUAL HEARING SURVEY

In October 2020, the SCC conducted a survey with SCC arbitrators to learn more about the use and attitudes towards using virtual hearings. This report presents the findings from that survey including a list of tips from SCC arbitrators on how to conduct a successful hearing online.



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

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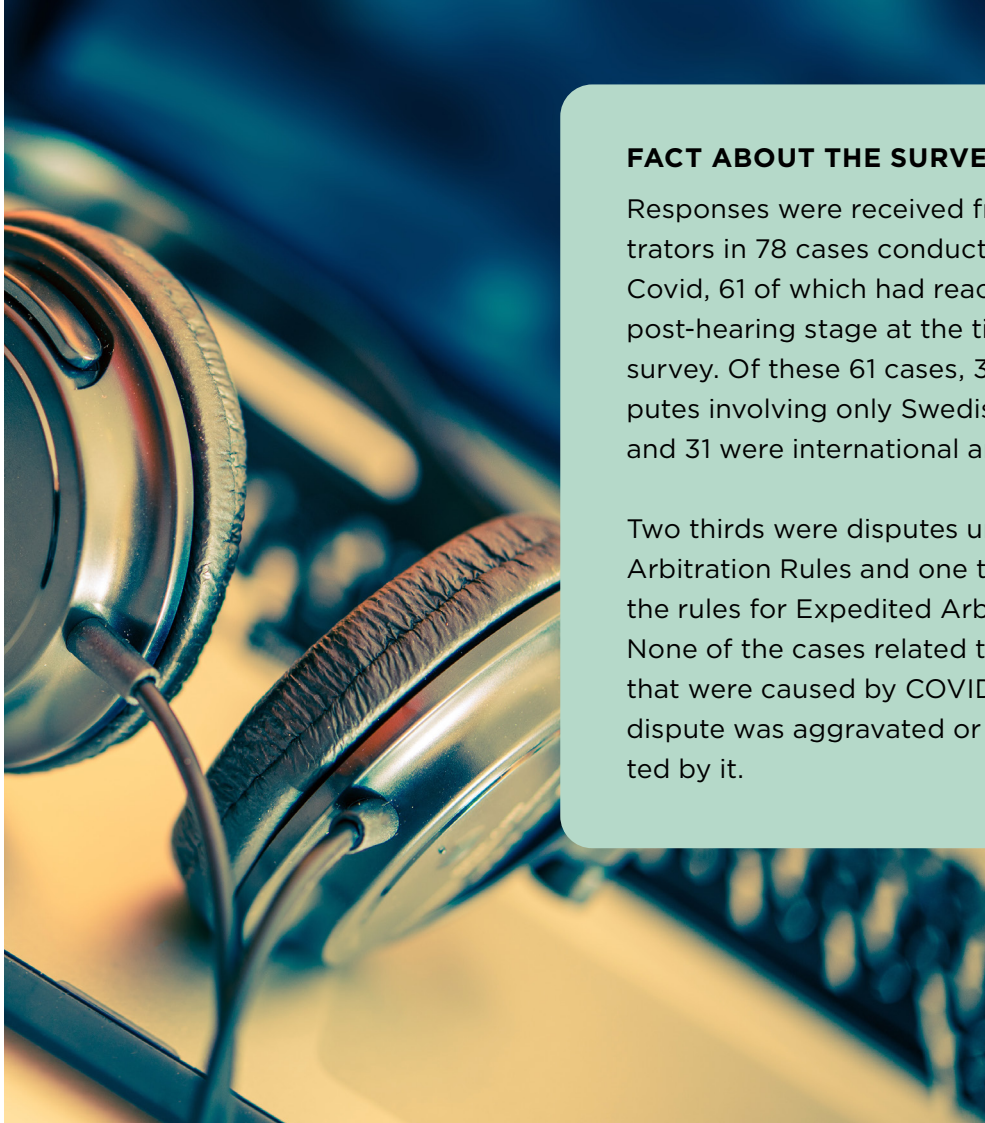
Fast-tracking the future?

Virtual hearings during the pandemic (and beyond)

The onset of the COVID-19 pandemic in March 2020 resulted in a fast-tracking of digitalisation in international arbitration. Ideas and technologies that to many arbitration practitioners had seemed futuristic only weeks before suddenly took center stage. The most notable change has been the quick move in the direction of virtual hearings. With no end in sight to travel restrictions and limitations on group gatherings, the arbitration community has come to embrace — or at least accept — the virtual hearing as a necessary choice when meeting in person is not possible. To learn more about the virtual hearings taking place in SCC arbitrations, the SCC conducted a survey in October 2020. The survey found that virtual hearings have replaced in-person hearings in most international arbitrations, and to a lesser extent in disputes involving only Swedish parties. Arbitrators report a generally positive experience of the virtual hearings, despite some hesitations around technology and the assessment of witnesses.

Viewed from a broader perspective, the survey findings suggest that the current pandemic may serve as a catalyst for renewal and improvement of the international arbitration process. Changes necessitated by the crisis may in fact leave a permanent imprint in the international arbitration landscape, perhaps making virtual hearings the norm rather than the exception. Because, as one arbitrator wrote, “assuming the technical platform functions smoothly, online hearings have the great benefit of saving time, cost and inconveniences related to the organization of in-person hearings.” Other arbitrators added “reduced climate impact” to that list of benefits.

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FACT ABOUT THE SURVEY

Responses were received from arbitrators in 78 cases conducted during Covid, 61 of which had reached the post-hearing stage at the time of the survey. Of these 61 cases, 30 were disputes involving only Swedish parties, and 31 were international arbitrations.

Two thirds were disputes under the Arbitration Rules and one third under the rules for Expedited Arbitration. None of the cases related to disputes that were caused by COVID-19; one dispute was aggravated or accelerated by it.

1. The pre-pandemic trend toward digitalization in arbitration

The move toward greater digitalization had begun before the outbreak of the current pandemic. At the SCC, electronic submissions replaced paper many years ago, and in 2019 the [SCC Platform](#) created a virtual space for file-sharing and communication in all SCC arbitrations. Virtual hearings have been extremely rare, however. Procedural conferences have long been held by telephone in international disputes, and video conferencing has been used for witnesses unable to join hearings in person. But very few arbitration practitioners had experienced a fully virtual arbitration hearing before March 2020, when COVID-19 changed the playing field.

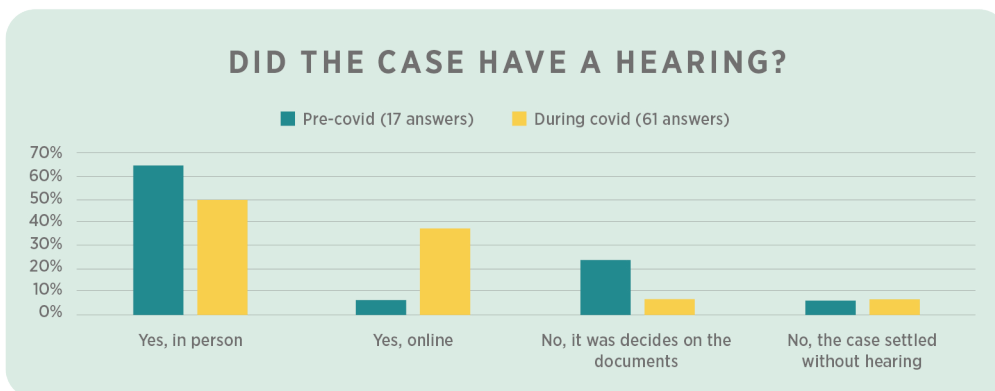
In the [2018 Queen Mary International Arbitration Survey](#), only 8 percent of those interviewed had “frequently” or “always” used a virtual hearing room in an international arbitration. A September 2020 [report by DLA Piper](#) similarly noted that the conduct of a fully remote hearing in international arbitration was very rare before the current pandemic. However, the Queen Mary survey showed that the attitude toward such technological solutions was generally optimistic, with 66 percent of respondents saying that virtual hearing rooms should be used more often.

2. Arbitration institutions encourage using technology to avoid delays

In light of this pre-pandemic trend toward digitalization, the SCC and other arbitration institutions quickly encouraged the use of virtual hearings to avoid delays during the COVID crisis. On March 27, the SCC issued [guidance to parties and arbitrators](#) in pending SCC arbitrations, stating that unless illness prevented the case from continuing as planned, “arbitral tribunals are expected to manage the proceedings in accordance with timetables previously established.”

“A September 2020 report by DLA Piper similarly noted that the conduct of a fully remote hearing in international arbitration was very rare before the current pandemic.”

This included, when necessary and deemed possible, “transferring the arbitration to a fully digital environment, including using audio- and visual meeting facilities.” On April 16, the SCC together with 12 other arbitration institutions worldwide released [a joint statement](#) emphasizing the need for collaboration and “the best use of digital technologies.”



3. A steep increase in the number of virtual hearings during COVID-19

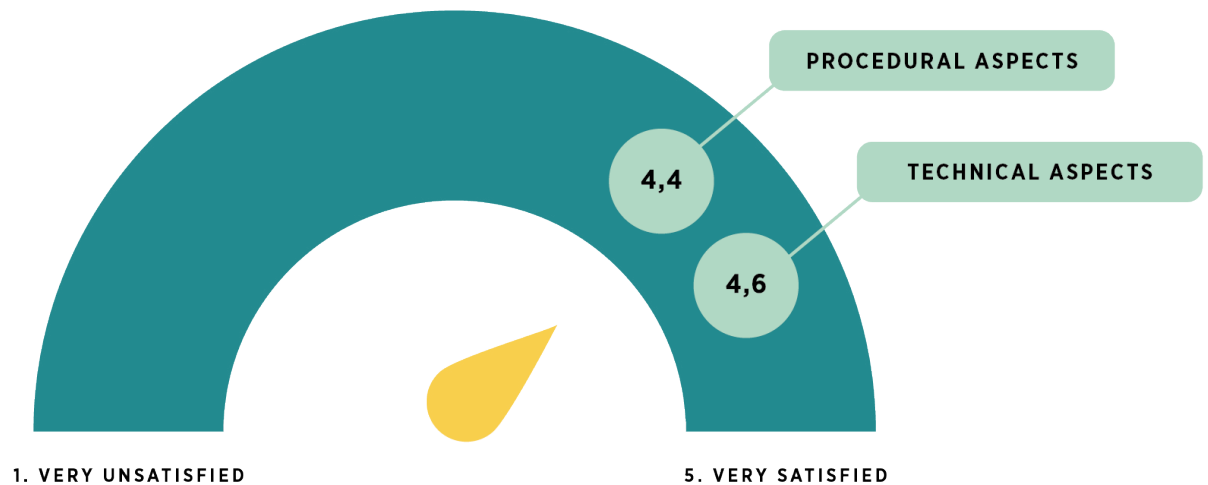
To learn about the virtual hearings taking place in SCC arbitrations, and to explore arbitrators’ experiences and views of such hearings, the SCC conducted a survey approximately six months into the pandemic. The survey was sent out in early October 2020 to sole arbitrators and chairpersons in all arbitrations that were in the pre-hearing stage at the onset of the pandemic (defined here as March 15), or that were initiated after that date.

Of the 61 arbitrations that had been finalised at the time of the survey, a virtual hearing had been held in 23 cases — a remarkable number considering that virtual hearings were practically unheard of only six months earlier. Only 4 cases were decided on the documents, and 4 disputes were settled by the parties. An in-person hearing took place in as many as 30 arbitrations — 20 involved only Swedish parties and 10 were international cases.

This relatively high share of in-person hearings must be viewed in the context of Sweden's much-publicised approach to managing the COVID-19 outbreak, which has eschewed lock-downs and hard restrictions and relied instead on social distancing and other recommendations. In arbitrations involving only Swedish parties, hearings typically require little or no travel. Moreover, almost all arbitrators reported that special arrangements had been made due to COVID-19 restrictions.

23 OUT OF **61**
CASES HELD VIRTUAL
HEARINGS.





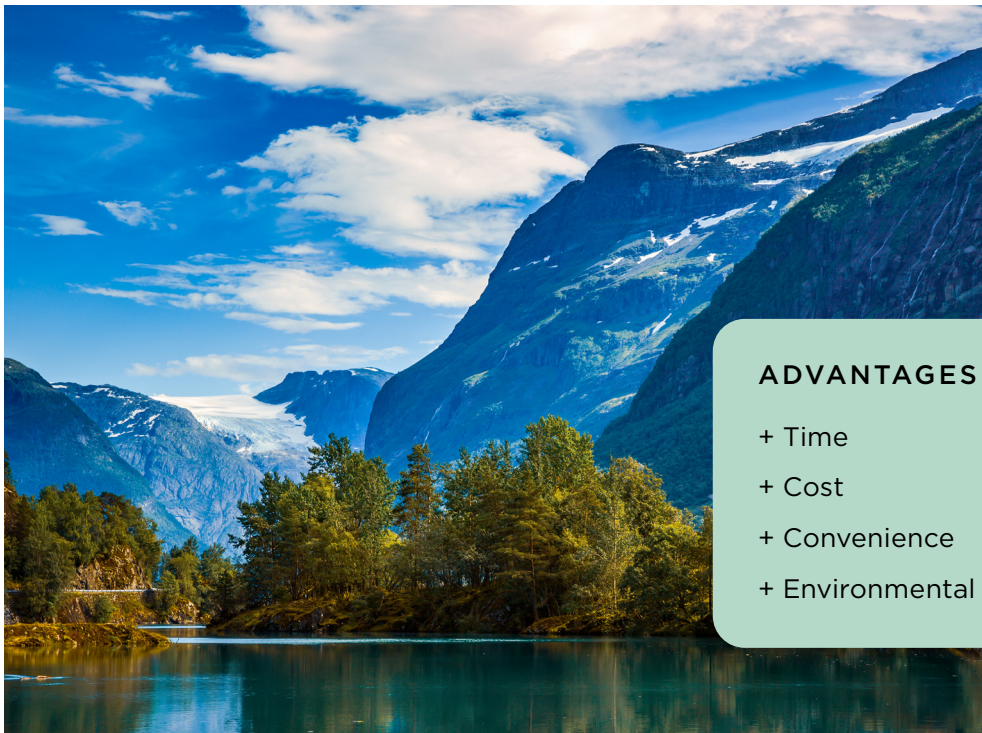
4. Arbitrators are generally satisfied with their virtual hearing experience

In the 23 cases where a virtual hearing had taken place, most of the arbitrators surveyed were very satisfied with the process — both the technical and procedural aspects. On a scale from 1 to 5, where 5 indicated “very satisfied”, the average score was 4.6 on the technical aspects and 4.4 on the procedural aspects. As one respondent noted, “there is not much of a difference in the end of having a hearing via Teams, but it is good to have your IT expert close to you.” Another respondent exclaimed, “Don’t be nervous, it works just as well as an ordinary hearing!” Others were a bit more tempered in their comments, noting that a virtual hearing “is second best, but a better choice than no hearing.”

*“Don’t be nervous,
it works just as well as an ordinary hearing!”*

The generally positive attitude toward virtual hearings was also reflected among the speakers at [two online seminars](#) organised by the SCC in April and May 2020 and attended by a total of more than 300 arbitration practitioners. At the first of these seminars, Wendy Miles of Debevoise & Plimpton noted that the virtual hearing technology is mature, and that institutions and hearing centres stand by to provide guidance. At the same seminar, Prof. Maxi Scherer of WilmerHale dismissed the common view that cross-examinations would be hampered in virtual environments, noting that an HD screen creates an even more immediate impression of the witness than if he or she were sitting five metres away from the arbitrator in a conference room.

The SCC survey showed that the video conferencing tool most frequently used for virtual hearings was Microsoft Teams (50 percent), followed by Zoom (25 percent). Arbitrators praised the breakout-room feature in Zoom, which allows parties and arbitrators to approximate the experience of private discussions and tribunal deliberations that take place during an in-person hearing. The same functionality will be added in Microsoft Teams during November 2020. At SCC's online seminar in April, Paul Cohen of 4-5 Gray's Inn Square noted that virtual hearing technology is not one-size-fits-all and suggested that the tribunal may engage a "secretary for tech" to assist the tribunal in navigating and implementing the necessary tools.



5. Advantages: time, cost, efficiency and sustainability

The main benefit of virtual hearings in the current global climate is, as one arbitrator surveyed put it, "getting the case finished." Many survey respondents noted that virtual hearings is what makes it possible to finalise arbitrations despite the pandemic and without any health risk to the people involved. In addition to this obvious and most fundamental benefit, virtual hearings have several other advantages. These were summarised by one arbitrator as "cost, convenience, speed, and climate and environmental impact."

Asked by the survey to list any benefits of virtual hearings, 75 percent of arbitrators highlighted the time-saving aspect. Because a virtual hearing does not require time-consuming travel, it can be scheduled for every other day or for shorter days, meaning that participants do not need to put all other work on hold during the hearing. According to the arbitrators surveyed, this makes it easier to find suitable hearing dates within a reasonable time frame, and awards can be rendered faster. Some survey respondents noted that “online hearings are often also quite efficient”, that they are “shorter and more focused on the important matters”, and that “people tend to come earlier to their point” during virtual hearings.

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Related to time and efficiency, of course, is cost. More than 60 percent of the arbitrators surveyed pointed out that virtual hearings saved costs. This is particularly true in cases where the cost of travel and accommodation for the hearing is high relative to the value of the dispute. The cost savings may be less significant in cases involving only Swedish parties, where there is typically less of a need for travel and accommodation.

Several of the surveyed arbitrators also raised environmental considerations as an advantage of virtual hearings over in-person hearings. Traditional hearings necessitate a lot of air travel for arbitrators, parties and witnesses, which exponentially increases the carbon footprint of the dispute-resolution. Sustainability is a prime concern for many arbitration users, and the ability to lower the climate impact of their disputes may be as welcome as the time and cost savings of reduced travel.



DISADVANTAGES

- Loss of human interaction
- Harder assessments of oral evidence
- Technical hassle

6. Disadvantages: technical issues, witnesses, communication

Reflecting on the negative aspects of virtual hearings, one arbitrator wrote: “Loss of human interaction, harder assessments of oral evidence and technical hassle are the main disadvantages.” These three aspects were those most commonly listed by the arbitrators that took part in the survey.

The loss of human interaction seems to be by far the biggest concern related to virtual hearings, raised by a majority of the surveyed arbitrators. They noted that “a meeting on a screen is not the same as a meeting in person” and that “not ‘smelling’ and ‘feeling’ the parties” was a disadvantage. Likewise, the “dynamics of the room are lost” and “counsel’s opportunity to use courtroom rhetoric by means of eye contact, body language etc is significantly limited”. In arbitrations with a three-member tribunal, the limited possibility to discuss with co-arbitrators during breaks is another disadvantage.

Similarly, many arbitrators noted that assessment of witnesses is more difficult in a virtual hearing, because “you don’t get the same feeling for the witnesses” or the “full experience of counsel and examinations”. One arbitrator reasoned that “the skills that counsel have acquired in oral advocacy will need some adjustment and relearning”, because in the online format “it takes extra work effectively to test the credibility of a witness in cross”. Many surveyed arbitrators mentioned the risk of obstruction, because “it might be easier for a witness to secretly listen to previous parts of the hearing,” and there is a risk of “undue influences of witnesses during the hearing.”

About 25 percent of the surveyed arbitrators raised concerns relating to technology, pointing out “lack of experience of counsel and poor technical equipment” as a main pitfall of virtual hearings. One arbitrator noted that “running an online hearing smoothly requires that all the participants involved (counsel, witnesses and arbitrators) have the requisite technical capabilities”, and another argued that virtual hearings are “vulnerable to technical failures and perhaps even more likely, to human error in using the technology.” Technical issues are more pronounced in big cases; one arbitrator noted the difficulty in having to follow several screens. While these are real concerns, technical issues are likely to decrease as arbitration participants become more familiar with the virtual hearing technology and acquire better technical equipment.

Other disadvantages mentioned were problems with simultaneous translation, and the reduced chances of an amicable settlement in the absence of an in-person meeting of the parties.

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SCC ARBITRATORS' TIPS FOR A SUCCESSFUL VIRTUAL HEARING

Be **well prepared** and very organized! Read the many guides available on virtual hearings.

Use an **external service** offered by a specialised vendor for very large or technologically complicated hearings (e.g. involving simultaneous translation).

Carefully consider how to conduct the hearing as authentically as possible. Give participants **clear guidance** on the technical aspects and digital etiquette, including on such details as lighting and eye contact. Do not be afraid to micromanage.

- Should the camera be on at all time?
- Should counsel sit with the witness?

Provide participants with a **detailed agenda** well in advance.

- Keep in mind that the pace of a virtual hearing is slower than an in-person hearing.
- Allow for more breaks and keep the days shorter.
- Include time for technical issues.

Safe up the tech!

- Make sure everyone has access to the documents and knows how to locate relevant sections.
- Test run the hearing platform, individually and as a group, and ensure everyone knows the relevant functions (e.g. mute, video, presentation).
- Have an IT-expert on standby.
- Have a back-up plan.



7. Balance between benefits and disadvantages likely to change over time

The experience of online arbitration hearings is still new for most members of the arbitration community; arbitrators and counsel are still very much getting used to the experience. It is likely that the balance between advantages and disadvantages will shift over time, as arbitration practitioners adapt to the new context. Arbitrators will get used to viewing and evaluating witnesses on HD screens, and learn to use online breakout rooms for the tribunal's discussions. Likewise, counsel will adapt their skills to present arguments and evidence efficiently in a digital environment, leveraging the tools available in that setting. A standard for virtual hearings will develop, regulating such aspects as digital etiquette and best practices for taking oral evidence.

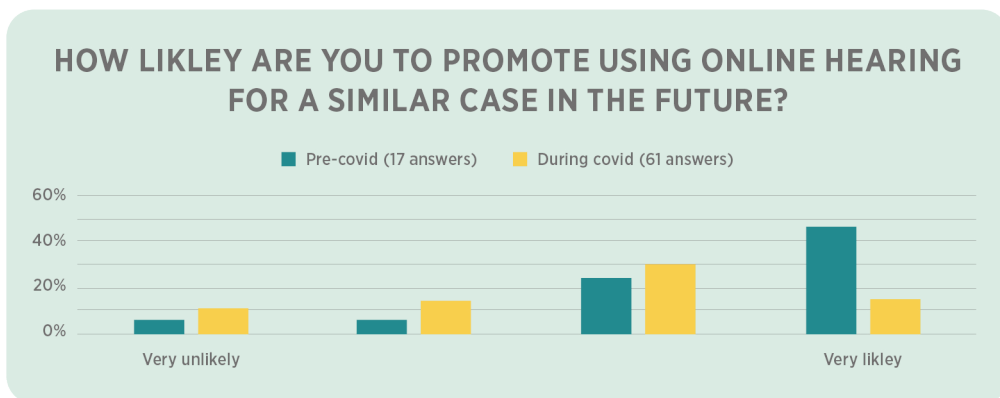
Importantly, the technical issues that many arbitrators are experiencing in virtual hearings will lessen as all participants become more familiar with the virtual hearing technology. Some law firms and arbitrators may need to upgrade their equipment, creating virtual hearing rooms with multiple screens and optimised lighting and sound. Others may simply need to get a better internet connection. With time, it may become standard practice to engage an external vendor to tailor and run the virtual hearing. For example, the [Stockholm International Hearing Centre](#) (SIHC) has launched a virtual platform for digital hearings. Experienced SIHC staff and technicians curate what is being presented to the participants and provide technical support before, during and after the hearing.

8. Virtual hearings against the wish of one party

The SCC survey showed that five of the 23 virtual hearings were conducted over the objection of the respondent. Two of these were international arbitrations, and three involved only Swedish parties. One award has been challenged on grounds relating to the virtual hearing. The case is pending in the Svea Court of Appeal, and the SCC will report on the decision when it is delivered by the Court. Deciding a similar case recently, the Austrian Supreme Court rejected the argument that the virtual hearing violated due process, and confirmed the arbitral tribunal's power to hold remote hearings over the objection of a party.

The SCC survey showed that five of the 23 virtual hearings were conducted over the objection of the respondent.

Whether it is in line with due process to carry out a virtual hearing against the objection of one party has been widely debated throughout the international arbitration community, and the issue will not be discussed at any length here. A [report from the SCC's seminar](#) on this topic is available on Kluwer Arbitration Blog, and a [recording of the event](#) is available on the SCC website.



9. The future of virtual hearings in a post-pandemic world

The survey shows that most arbitrators are positive toward using virtual hearings going forward, both during and after the pandemic. Arbitrators appear less likely to promote virtual hearings in cases involving only Swedish parties than they are in international cases; this is likely because in-person hearings in such cases require less travel, and the time and cost savings of a virtual hearing are less significant. The survey also shows that arbitrators who have already experienced a virtual hearing are more likely to propose such a hearing again. This is a classic development in most technology adoption — as a user gets more comfortable using a platform for a specific purpose, some of the initial unease related to technical hassle or uncertainty typically fades.

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While this survey focused on the arbitrators' views and experiences of virtual hearings, it is also important to consider the user perspective. Users may place an even greater value on saving time and cost by

reducing travel and holding shorter, more efficient hearings. Users may also be more motivated by the sustainability perspective on virtual hearings, which naturally have a much lower carbon footprint than in-person hearings that require air travel. Moreover, according to a September 2020 [DLA Piper report](#), a number of the firm' clients preferred the online format because "rather than participating from the back row of the hearing room, clients could engage with the hearing on equal terms with both the tribunal and the counsel team."

In sum, the survey suggests that virtual hearings will be the norm for the duration of the COVID-19 crisis. The question is what happens once the pandemic is over – will the arbitration community retreat from the new technology and go back to things the way they were? By that time, arbitration practitioners will be used to virtual interaction, and users will have come to expect the time, cost and environmental savings of the new online format. The balance may then have tipped, making virtual hearings the default.

Read more

During the pandemic, the arbitration community has produced a plethora of articles, guidance documents and checklists to build a body of knowledge and best practices around the organisation of virtual hearings.

The SCC publishes guidance relating to COVID-19 on a dedicated page on its website: <https://sccinstitute.com/about-the-scc/information-from-the-scc-relating-to-covid-19>

Jus Mundi maintains a comprehensive collection of resources on virtual hearings: <https://blog.jusmundi.com/a-collection-of-online-resources-on-virtual-hearings/>

Delos dispute resolution maintains a collection of guidance, checklists, protocols, model procedural orders, case materials and webinar recordings: <https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>

IBA Checklist to support virtual hearings: <https://www.ibanet.org/technology-resources-for-arbitration-va.aspx>