



# Love them or hate them: Virtual hearings are here to stay

**This article cites data gathered by A&O in surveys conducted June-August 2020 of over 300 legal professionals.**

Commercial dispute resolution has undergone a forced revolution during 2020, with courts and arbitral tribunals in many major jurisdictions responding to social restrictions put in place to control the spread of coronavirus by introducing technological solutions.

Most notably, there has been a global increase in virtual hearings, which has challenged the way formal court and arbitration proceedings have previously been conducted for large commercial cases.

Although the technologies are not novel, fully virtual hearings were almost unheard of before the start of 2020. As clients, witnesses, lawyers, judges and arbitrators are prohibited from travelling or assembling in large numbers it has therefore been heartening (and in many cases somewhat surprising) to see how well the court systems in many countries have responded, with one survey respondent commenting that “the approach adopted has been extremely important and an overwhelming success story”. Thankfully, the pandemic will not be here forever, and the rapid pace of recent change raises questions about the role that virtual hearings might play in dispute resolution when we again have the freedom to choose.

Allen & Overy recently conducted a survey of our disputes lawyers globally and our network of advocate contacts. The aim was to get a sense of how the profession is reacting to the substantial changes it has seen and whether the continued use of virtual hearings in the longer term is likely to be beneficial, or detrimental, to the interests of litigants and the administration of justice. **The views expressed varied widely but what was clear is that these questions are playing on the minds of many in the legal sector.** We received responses from people with experience of litigating in courts and tribunals in more than 15 countries, including Australia, Hong Kong, the Netherlands, Singapore, the UAE, the UK, and the United States, to name a few. In this article, we discuss the widely varying responses we received and what this might mean for the future of virtual hearings around the globe.

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# Rising to the challenge

## **The concept of a virtual hearing is not new.**

Telephone hearings on procedural matters have been commonplace in international arbitration, for example, for some years. In England and Wales (the jurisdiction where most of our survey respondents had experience) the courts have also made use of telephone hearings for several years and witnesses have been able to give evidence remotely, even at trial if necessary. However, before the start of the pandemic, virtual hearings were still relatively uncommon. Figures from the Courts & Tribunal Service in England show that between 19 March and 6 April 2020, as the UK went into lockdown, the number of court cases making use of telephone conferencing grew from 100 to 1,850 and those using video conferencing grew from 150 to 1,100 – a substantial increase. In the Commercial Court specifically, the use of virtual hearings has meant that most hearings have continued uninterrupted throughout the pandemic.

A number of steps have been taken in the UK to facilitate greater use of remote hearings. For example, legislation passed in March made provision for the use of more video links and introduced new rules about streaming cases live to allow public access. Soon afterwards, an entire High Court trial brought by the Republic of Kazakhstan involving claims for USD530m against parties including Bank of New York Mellon was conducted via Zoom and live streamed on YouTube.

Elsewhere in the world, we've seen similar moves. For example, the courts in Singapore have used Zoom to hear civil cases and Dutch courts have heard urgent cases via Skype. In the U.S., a jurisdiction which has not historically made much use of remote hearings, some courts have moved faster than others, with the U.S. Supreme Court hearing oral arguments by telephone conference, and with courts beginning to schedule remote bench trials, although the use of juries in some civil cases continues to present challenges in the era of social distancing. In Australia, the use of audio-link and video-link conferences and hearings is just one of the ways that courts are dealing with social distancing requirements.

Our survey found that the shift to virtual hearings has been broadly welcomed, with 57% of respondents indicating that clients had reacted positively to participating in hearings on a virtual basis, with 89% saying they would welcome virtual hearings for procedural hearings long term.

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# Embracing change

With cases the world over being conducted by video conference and all participants, including judges, arbitrators and lawyers, connecting from home, **the pandemic has afforded court systems an opportunity to test the merits and practicalities of virtual hearings.**

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Many of the benefits are obvious, not least the significant reductions in travel requirements. Prior to the pandemic it was not uncommon for witnesses to travel halfway around the world only to find they were required in court for a matter of minutes; by appearing remotely, the expense, time, visa challenges and environmental impacts of travel are reduced, and scheduling can be made easier as a result.

A further upside is client engagement; virtual hearings are much more accessible to parties not based in the country where the proceedings are taking place. It is also easier for multiple individuals within the companies involved to dial in and attend hearings to observe events first-hand, potentially dropping in and out, which can extend participation beyond the legal team and permit greater visibility in jurisdictions where this is allowed. For court hearings in these jurisdictions for commercial cases, the option to participate virtually rather than having to travel to the court to sit in on the hearing may lead to greater engagement by the public and increased transparency, given the relative ease and accessibility of an online setting.

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Another observation is that virtual hearings tend, out of necessity, to be more structured, which at least in theory can lead to quicker decision-making and more efficient case management. There is also some evidence that hearings are faster and cheaper as a result. Our survey respondents were divided on this point with only 28% stating that hearings were shorter and 41% stating that there was no difference.

**64% of our survey respondents felt virtual hearings were either as efficient or more efficient than in-person hearings,** pointing to savings on travel time and more preparation being done in advance. Where virtual hearings have been lengthier, this was generally felt to be the result of technical difficulties, the need for more frequent breaks away from the intensity of screens, slightly more difficult communication paths and struggling to access documents.



# Potential hurdles for complex hearings

While there is broad consensus around the positive effects of virtual proceedings when used for case management conferences or other procedural hearings, that consensus diminishes for more complex hearings. Among those we surveyed, some 89% felt that virtual hearings should be used long-term for procedural hearings, with one respondent commenting that “we should embrace the practicality offered.” In contrast, looking at trials and substantive hearings, our respondents were not convinced a permanent change was the answer: we found just 44% of advocates felt virtual hearings should be used for substantive hearings moving forward and only 52% of solicitors felt this.

One respondent noted that “as practitioners, we should see virtual hearings as an additional tool available to us to use where appropriate.”

**The difference with trials is the degree of complexity involved** and a fear that the two-dimensional nature and limited field of vision of the video-conferencing route might not pick up the nuances that are visible to those in a courtroom. There is widespread concern that witnesses behave differently when located remotely and interacting with a screen, while advocates will require different skill-sets and judges and arbitrators might not be able to pick up on the more subtle interactions or expressions that they can normally observe during live proceedings.

It is likely that in the future virtual hearings will be more common for arbitrations than for court hearings, not least because finding dates when parties, counsel and tribunals can gather in a single place for international arbitrations is a well-recognised source of delay that can now be more easily overcome with technology. Procedural hearings in international arbitration are already routinely held by telephone, and with arbitration specifically intended to be flexible and user-friendly, practitioners will likely welcome the additional tool of virtual hearings on the merits.

**An interesting question will be who makes the decision as to whether a hearing should be held virtually, live or using a hybrid of the two.** How much parties will be able to influence that decision, whether the choice is ultimately made by the judge or tribunal, or indeed whether that discussion becomes just one further area for time-consuming debate at the outset, will need to be ironed out. Parties will want plenty of notice in order to prepare for whichever option is ultimately chosen, and if there is a presumption that case-management conferences and other procedural hearings will be virtual by default, there is a question around whether it should be permissible to take a different approach if both parties would prefer to meet in person.

These sorts of issues may require the development of a specific protocol for virtual hearings in due course – indeed, **89% of our advocate respondents outside A&O confirmed they would be in favour of developing such a protocol.** Some arbitral institutions have already produced such protocols. There is, however, a risk of being overly prescriptive when it comes to procedural rules so it may take some time before courts and arbitral institutions in different jurisdictions find the right balance.

If virtual hearings are here to stay, there are other potential complexities that may need to be dealt with. For example, in some countries there are legal restrictions which may prevent witnesses giving evidence from within the country in hearings taking place in other countries without permission from the local courts. If these restrictions remain in place in the longer term, this may complicate the procedural steps required to ensure that some witnesses can give evidence remotely.

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# Impact on fairness and access to justice

**Virtual hearings have inarguably fulfilled a need in the short-term**, allowing proceedings to continue world-wide, in some cases relatively unhindered. Despite this, the wholesale adoption of virtual hearings requires careful thought, with the need to preserve the rule of law and access to justice being critical. Many have observed that anything that can speed up the progress of court hearings and reduce cost for participants can only be a good thing for access to justice, with one respondent commenting that “remote hearings greatly increase the openness of the profession to working parents, pregnant women and the disabled”. But there are questions about what is being sacrificed at the altar of efficiency.

One limitation felt keenly by advocates both at A&O and externally is the negative impact that virtual hearings have on the ability to conduct effective advocacy.

Two-thirds of the advocates that responded to our survey from outside A&O observed that their ability to read witnesses, judges or arbitrators is impacted by virtual hearings, with many noting the tendency for judges and arbitrators to switch off video in order to improve audio quality, or to step back from the process and keep quiet in order not to disrupt the flow of proceedings. There was a sense that it can be more difficult for judges to make effective interventions remotely than it is when everyone is in the same room. Some respondents were of the view that true advocacy is best served by the advocates, judge or arbitrator and the witnesses all being physically in the same room referring to physical documents with one responder noting that virtual hearings are “a pale imitation of a normal hearing”. It also raises a pertinent question around the ability of junior members of the legal profession to learn advocacy skills without in-person exposure to those skills.

Spontaneity can be diminished, there is likely to be less counsel or judicial intervention, and body language cues are more difficult to observe virtually. Indeed, there may be little connection with those not directly engaged in proceedings at any one time (it may not be possible to watch the judge while an opponent is addressing the court, for example). In jurisdictions that commonly provide for witnesses to be cross-examined by advocates for one or other of the parties,

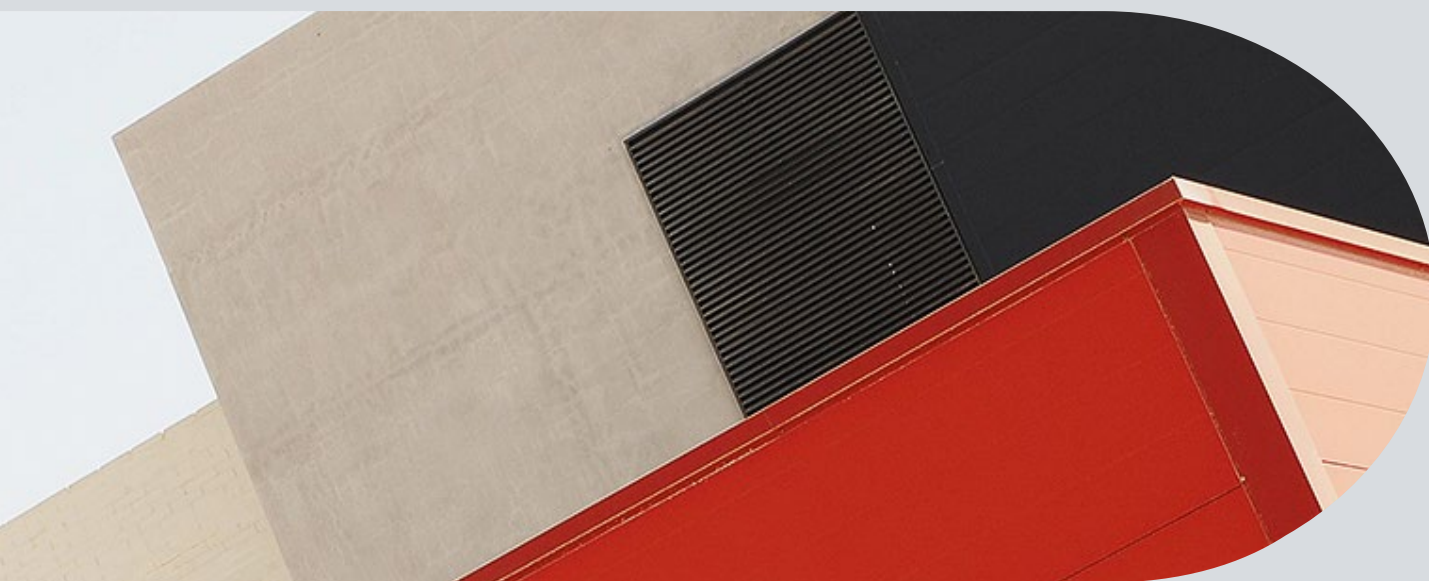
respondents observed that those advocates require different skills when conducting a cross-examination via video link compared to doing so face-to-face, and then there are further issues that arise around the risk that witnesses might be coached off camera while giving evidence. Other challenges relate to the way in which communications are passed between clients and their advocates or other members of the legal team. It can be surprisingly difficult to do this sufficiently quickly and securely during remote proceedings when the individuals are not all sitting in the same room.

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Despite these potential difficulties, overall, most of our respondents judged the impact on fairness as a result of virtual trials and substantive hearings to be neutral, with the biggest concerns for those based in jurisdictions where public access to proceedings is the norm being that the process may be less fair in terms of transparency and public scrutiny. **Protecting the sanctity of the system, including from cyber security threats, must be paramount.**

There is of course no right or wrong answer when considering the role that virtual hearings

could, or should, play – or as one respondent puts it, “should we continue to order our food from delivery services rather than going to restaurants?”. The likelihood is that the legal profession will need to collaborate with both clients and courts and tribunals to strike a happy medium. As one survey respondent surmised, “our challenge will be to adapt to [virtual hearings] and take the utmost of the good things they provide us with”. The future may be online, but not exclusively, and not without adequate, old-fashioned checks and balances.



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