

Remote Hearings (2020 Survey): A Spectrum of Preferences

Gary BORN^{*}, Anneliese DAY^{**} & Hafez VIRJEE^{***}

A detailed survey of users' experience of remote hearings shows that, as of July 2020, in-house and external counsel, and arbitrators and tribunal secretaries, were generally enthusiastic about fully remote hearings, but more nuanced when it came to breaking down their preferences according to the amount in dispute and the number of witnesses and experts to be examined: for short hearings and meetings, users will very likely prefer a videoconference over meeting in person or conducting the proceeding by telephone, whereas for merits hearings and hearings dealing with major procedural issues, preferences hinge primarily on the value of the case and secondly on the number of witnesses and experts to be examined. Where parties are in disagreement as to how to hold the hearing, tribunals are likely to factor into their decision any flexibility around the hearing dates, cost considerations and the number of time-zones that need to be accommodated.

The article also discusses the survey results relating to the benefits and challenges of fully remote hearings, the rate of objections to fully remote hearings and how tribunals dealt with them, and provides additional insight into the profile of fully remote hearings resulting from the pandemic.

Keywords: Arbitration, hearings, remote, virtual, data, survey, preferences, benefits, challenges, objections, time zones

In *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views*,¹ we presented our preliminary findings from a detailed survey of users' experiences with remote hearings, which we had run from 10 June to 6 July 2020. We summarized these preliminary findings based on the responses of 210 users as follows:

- the prevalence of fully remote hearings in the second quarter of 2020 was over ten times greater than at any time previously;

^{*} Chair of the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP.
Email: Gary.Born@wilmerhale.com.

^{**} QC practises from Fountain Court Chambers in London and Singapore.
Email: amd@fountaincourt.co.uk.

^{***} The President and a co-Founder of Delos Dispute Resolution. Email: hafez.virjee@delosdr.org.

¹ Gary Born, Anneliese Day QC & Hafez Virjee, *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views*, in *International Arbitration and the COVID-19 Revolution* Ch. 7 (Scherer et al. eds, Wolters Kluwer 2020) ('Preliminary Findings'). We renew here our thanks to the many institutions, organizations, and individuals that kindly supported the survey, particularly Professor Maxi Scherer; a full list is available at footnote 1 of Preliminary Findings.

- while the collective experience of fully remote hearings appears to be limited, users have a preference for in-person or semi-remote over fully remote hearings (at least so far as final hearings are concerned); and
- fully remote hearings have been integrated into the toolbox of arbitration practitioners and service providers and those with experience of remote hearings reported a greater willingness to propose them in the future, particularly for case management or interim hearings.²

In this article, we (1) provide additional profiling of the fully remote hearings resulting from the pandemic; (2) discuss the survey results on objections to fully remote hearings and how tribunals dealt with these; (3) share additional insights into the experience of fully remote hearings; (4) consider the future of fully remote hearings according to the survey respondents; before (5) drawing these findings together in the form of concluding remarks.³

In short, fully remote hearings are likely the future for lower value, simpler cases, while in-person and semi-remote hearings will likely remain the default for larger, more complex cases.

We have used here the same definitions as in our earlier book chapter,⁴ with reference to the same four key time periods: pre-15 March 2020; 15 March–30 June 2020; 1 July–31 December 2020; and 1 January 2021 onwards.⁵ As will be recalled, Coronavirus diseases 2019 (COVID-19) was characterized as a pandemic by the World Health Organization (WHO) on 11 March 2020, which was followed by three months of uncertainty and initial mass engagement with remote hearings.⁶

² Preliminary Findings, *supra* n. 1, at 138.

³ We previously presented some of these further findings on the Delos Dispute Resolution and Wolters Kluwer webinar of 2 Nov. 2020, *International Arbitration and the COVID-19 Revolution*, <https://member-delosdr.org/video-international-arbitration-and-the-covid-19-revolution/> (accessed 16 Mar. 2021).

⁴ Preliminary Findings, *supra* n. 1, at 139–140: ‘a “remote hearing” is one “conducted using [video-conference or other] technology to simultaneously connect participants from two or more locations”. This definition would also include a telephone hearing. A remote hearing is “semi-remote” if it “use[s] one main venue, and one or several remote venues”. It is “fully remote” if “all participants are in different locations, with no existing main hearing venue”. In addition, “in-person hearings” for the purposes of this study mean hearings taking place with all participants physically present, and “hearings”, whether in part or full, refer to arbitration hearings dealing with major procedural issues and/or the merits of the case, i.e., to the exclusion of case management conferences and minor procedural meetings ... We define “Participants” to refer to participants at hearings and related parties, namely arbitrators and tribunal secretaries, counsel and counsel teams, in-house counsel and experts. Conversely, “Providers” are taken to refer to the providers of arbitration hearing services, namely hearing centres, technology providers and arbitral institutions’. For present purposes, we add the following definition: ‘Practitioners’ will be taken to refer to Participants to the exclusion of in-house counsel and experts.

⁵ See further on the significance of these time periods Preliminary Findings, *supra* n. 1, at 139.

⁶ See further Mihaela Apostol & Hafez Virjee for Delos Dispute Resolution, *Resources on Holding Remote or Virtual Arbitration and Mediation Hearings*, first published on 12 May 2020 and most recently updated on 11 Mar. 2021, <https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>

1 FURTHER PROFILING THE FULLY REMOTE HEARINGS RESULTING FROM THE PANDEMIC

In our Preliminary Findings, we noted that there was a spike in fully remote hearings after 15 March 2020, especially in the period 15 March–30 June 2020, and we considered how the pandemic had impacted hearing dates and locations.

As developed below, it appears that the move from in-person or semi-remote hearings to fully remote hearings had little impact on hearing durations, albeit oral submissions tended to be shortened and the examination of witnesses and experts reduced. A couple of Practitioners also indicated that additional reserve time was scheduled and finally not used in this context. Our analysis also shows that, following 15 March 2020, fully remote hearings involved more parties, more persons examined and greater amounts in dispute than had previously been the case.

1.1 HOW LONG

The survey asked respondents to indicate whether there had been any changes to the duration of hearings that were originally scheduled as in-person or semi-remote and had become fully remote.⁷ Hearings that were shortened were on average reduced by 2.3 days, while hearings that were lengthened had an additional 3.6 sitting days. About the same number of respondents reported an increase as those that reported a decrease. Those respondents who reported a change, however, were less than half as many as the respondents who stated that there had been no change to the duration of their hearings.

Irrespective of whether hearing durations were changed or kept the same, 29% of Practitioners reported that the move to fully remote hearings had resulted in shorter oral submissions (56%), reduced evidence taking (56%) or both (19%). For those who indicated reduced oral submissions, two-thirds indicated that pleadings were shortened and one-third that closings were cancelled.

1.2 HOW MANY PEOPLE

Practitioners were asked to compare how many parties were involved and how many witnesses and experts were examined in their fully remote hearings prior to and since 15 March 2020.⁸

(accessed 15 Mar. 2021); Gary B. Born, *International Commercial Arbitration* 2432–2437 (3d ed., Wolters Kluwer 2021).

⁷ Question 10 of the Survey, which received sixty-nine responses.

⁸ Question 11 of the Survey, which received eighty-two responses.

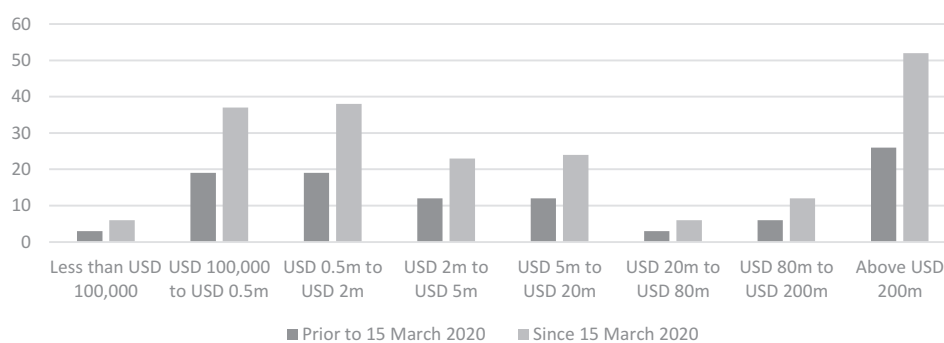
A 20% increase was observed in the number of parties involved, from 2.9 parties on average prior to 15 March 2020 to 3.5 subsequently. In the four countries with the most answers to this question, the reported increase was two-fold for Practitioners based in the United Kingdom and Switzerland, as compared with a 7% increase for Practitioners based in the United States and a 32% decrease for Participants based in Brazil.

As for witnesses and experts, the average went from 3.7 persons called for examination prior to 15 March 2020 to 6.0 subsequently (i.e., a 62% increase) and the range in the number of persons called for examination increased from 0–5 to 0–14. All four of the above geographies reported an increase in the number of witnesses and experts examined, ranging from 15% and 27% in Brazil and the United Kingdom, respectively, to x2.2 and x2.8 in Switzerland and the United States, respectively.

1.3 HOW MUCH

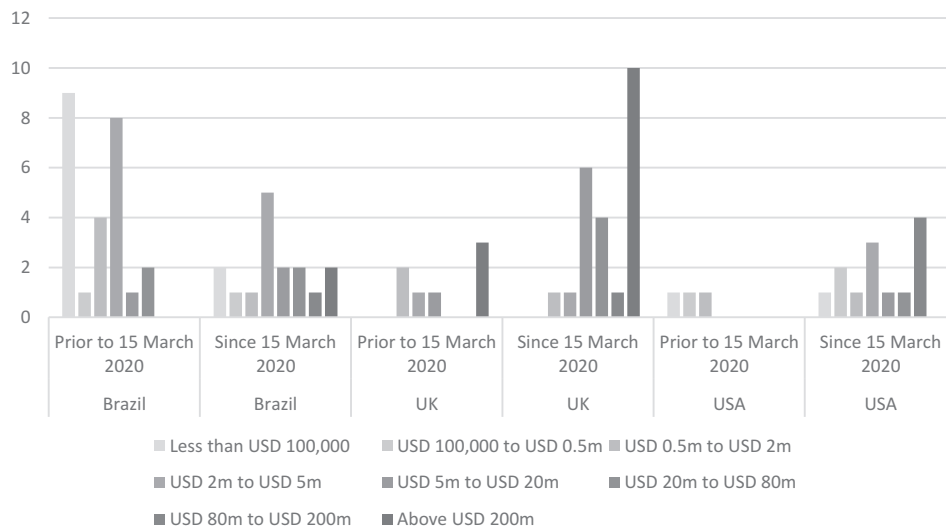
Practitioners were asked to break down their fully remote hearings, whether completed or scheduled, according to the amount in dispute. Figure 1 shows the distribution for Practitioners both prior to and since 15 March 2020.

Figure 1 Survey Q12: ‘How Many Fully Remote Hearings Have you Conducted or Been Planning When Broken Down According to the Amount in Dispute?’ (Responses of 60 Practitioners)



These results were further segmented according to the jurisdictions where a significant number of answers were received (see Figure 2).

Figure 2 Number of Fully Remote Hearings Conducted or Scheduled by Amount in Dispute for Practitioners Based in Brazil, the UK and the US

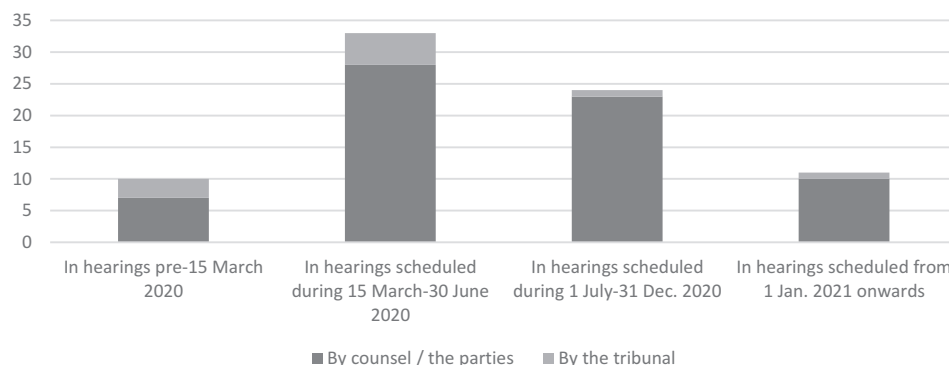


Both Figures 1 and 2 show a clear increase after 15 March 2020 in the value of cases with a fully remote hearing. They also highlight different levels of experience and/or comfort with fully remote hearings prior to 15 March 2020, at least as far as the survey respondents were concerned: while overall it appeared that no amount in dispute was considered too high to hold a hearing fully remotely, Practitioners in Brazil did not report any fully remote hearings for cases with an amount in dispute greater than USD 80 million prior to 15 March 2020 and, for US-based Practitioners, this threshold stood at USD 2 million. Subsequently to 15 March 2020, both groups of survey respondents had conducted or scheduled fully remote hearings for much greater amounts in dispute.

2 MORE OBJECTIONS TO FULLY REMOTE HEARINGS, MORE FREQUENTLY DISMISSED

Practitioners were asked whether objections were raised in their cases to holding hearings fully remotely, and how this had been dealt with by tribunals. As shown in Figure 3, Practitioners reported an increase in the number of objections to fully remote hearings post 15 March 2020, mostly by counsel rather than by tribunals.

Figure 3 Survey Q36: 'In How Many of Your Cases Have Objections Been Raised to Holding a Hearing Fully Remotely?' (Responses of 34 Practitioners)



For each Practitioner, we compared the above volume of objections to the number of fully remote hearings they had conducted or scheduled. The average ratio rose from 21% prior to 15 March 2020⁹ to 46% subsequently, and the median from 0% to 10%. Post 15 March 2020, some Practitioners reported ratios greater than 100%, meaning that they had encountered objections to fully remote hearings in more cases than the number of cases in which their hearing was (scheduled to be) held fully remotely. All of this suggests that the scheduling of fully remote hearings became a lot more contentious post 15 March 2020.

At the same time, it also appears that tribunals became a lot more robust in deciding to proceed with a fully remote hearing over the objections of one side¹⁰: post 15 March 2020, they overruled objections in 32% of cases on average, as compared with 17% before. Put differently, the number of Practitioners who reported that objections were dismissed in some or all of their cases increased from 17% prior to 15 March 2020 to 50% subsequently.¹¹

In sum, while counsel were more likely to raise objections to fully remote hearings post 15 March 2020, tribunals were also more likely to dismiss such objections than they had been in the past.

⁹ In other words, for every ten cases in which a fully remote hearing was conducted or scheduled, the survey respondent had encountered 2.1 cases in which objections were raised to holding the hearing fully remotely. Said 2.1 cases are not necessarily contained within the ten cases, as this depends on whether the objections were upheld/accepted.

¹⁰ Question 37 of the Survey, which was answered by thirty-four Practitioners.

¹¹ For the sake of clarity, the percentage of Practitioners who reported that objections were upheld in all of their cases decreased from 83% prior to 15 Mar. 2020 to 50% subsequently.

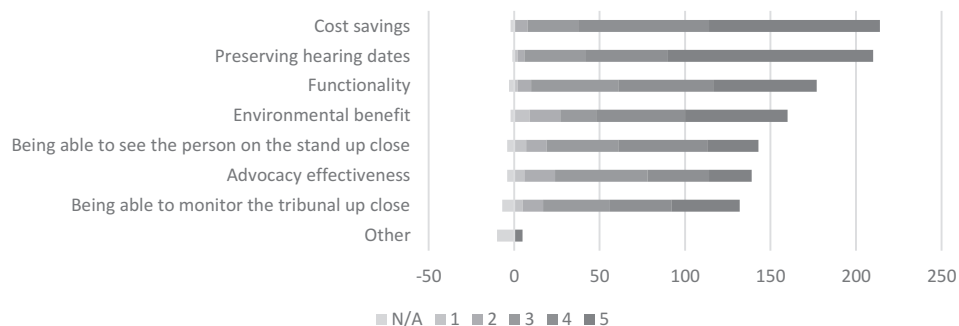
Finally, survey respondents reported that, prior to 15 March 2020, no award had been challenged in setting aside or enforcement proceedings because the hearing had been held fully remotely; and only one Practitioner answered that their award had been so challenged, ‘but not on the basis that one of the parties had objected to holding a remote hearing in the first place’.¹²

3 A CLOSER LOOK AT THE EXPERIENCE OF FULLY REMOTE HEARINGS

In our Preliminary Findings, we discussed how users’ experience of fully remote hearings compared with that of in-person and semi-remote hearings, particularly as regards (1) the examination of experts and witnesses, (2) advocacy, and (3) the tribunal’s understanding of the case.¹³

In addition, survey respondents were asked to identify the greatest benefits and challenges associated with fully remote hearings.¹⁴ The results from fifty five responses are shown in Figures 4 and 5.

Figure 4 Survey Q34: ‘What do You Consider to be the Benefits of Fully Remote Hearings, and How Important are They to You (1 is of “Limited Importance” and 5 Is “Essential”)?’

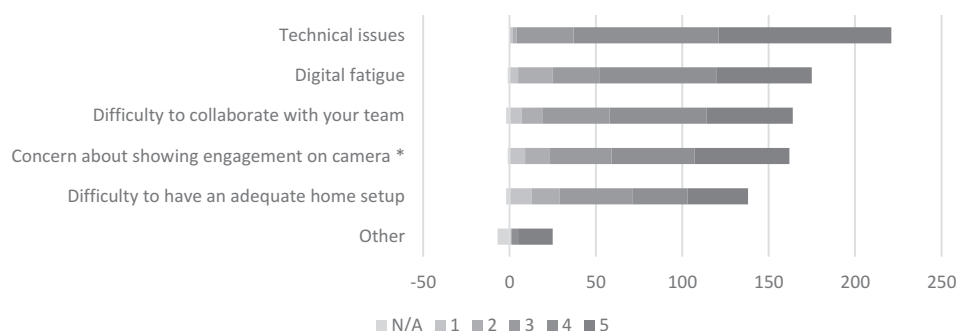


¹² Question 38 of the Survey, which received thirty-two responses, as discussed by Erica Stein, *Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings*, in *International Arbitration and the COVID-19 Revolution* Ch. 9 168 (Scherer et al. eds, Wolters Kluwer 2020); See also Born, *supra* n. 6, at 2433–2436.

¹³ Preliminary Findings, *supra* n. 1, s. 3.

¹⁴ Respectively Questions 32 and 34 of the Survey. Question 33 gave respondents the possibility of providing additional comments. The responses to this question are discussed in the commentary.

Figure 5 Survey Q32: "What Do You Consider to Be the Challenges of a Fully Remote Hearing, and How Problematic are They for You (1 Is "Barely Noticeable" and 5 is a "Real Problem")?"



* while exchanging with colleagues or taking notes/looking up materials

Starting with the benefits, two stood out above all others: cost savings (first overall) and preserving hearing dates (second overall, but most strongly held views). This latter point very much relates to the current pandemic situation and, going forward, corresponds to another important advantage of fully remote hearings: the ability to schedule hearings more easily since a fully remote hearing can be 'squeezed in' more easily in busy schedules than an in-person hearing, especially as its constituent parts can be broken up into discrete pieces.

Among the other potential benefits considered by survey respondents, the perception of advocacy effectiveness in a fully remote hearing was equally distributed on either side of a dominant middle ground. This matches up with Figure 7.5 of our Preliminary Findings, which showed that a majority of respondents found fully remote hearings to be comparable to in-person hearings when it came to the effectiveness of advocacy (46%), as compared with 30% who found it to be less good and 24% who found it to be better.¹⁵

Finally, respondents also noted as a benefit that arbitrators could more easily communicate informally with each other in a fully remote hearing than during in-person hearings.¹⁶

¹⁵ See also Wendy Miles, Q.C., *Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings*, in *International Arbitration and the COVID-19 Revolution* Ch. 6 (Scherer et al. eds, Wolters Kluwer 2020), s. 4; Born, *supra* n. 6, at 2436–2437; See further, Delos Dispute Resolution, *Resources on Remote Oral Advocacy*, <https://delosdr.org/index.php/remote-oral-advocacy-programme/resources/> (accessed 5 Jan. 2021).

¹⁶ See further, AmCham Perú & Delos Dispute Resolution, *The Present and Future of Remote Oral Advocacy*, webinar held on 30 Nov. 2020, <https://member-delosdr.org/video-the-present-and-future-of-remote-advocacy/> (accessed 16 Mar. 2021).

Turning to the challenges of fully remote hearings, Figure 5 shows that technical issues were by far the greatest challenge highlighted by respondents in their experience of fully remote hearings. This was followed by a cluster of three additional issues: digital fatigue; difficulty of collaboration within the team; and concern about showing engagement on camera. Finally, a smaller number of respondents highlighted their home set-up as being a source of difficulty.

An additional concern flagged by respondents was the amount of visual information that could be processed at any given one time: as one respondent explained, 'I have the impression to be unable to get the entire picture: I can focus and engage with two people at time, and I have the impression that I lose the others appearing on the screen'. An expert further pointed to the '[d]ifficulty to assess the other participants and tribunal's reception of one's evidence, given the concentration on the slides is needed, removing the other people from your visual field'. This issue is even greater for lead counsel and tribunal members, who typically will have four to six screens each in a fully remote hearing.

To place the above findings in context, it will be recalled that survey respondents had also been asked about their greatest concerns prior to participating in their first fully remote hearing, whether those had materialized, and how they looked upon those concerns with hindsight.¹⁷ Technical issues had featured most prominently there too, but generally had not materialized during the hearing and survey respondents were a lot more confident subsequently.¹⁸ Indeed, of the various challenges raised above, technical issues, together with the adequacy of the home set-up, are those most easily addressed through advance preparation and testing.

Conversely, several publications have underlined the reality of digital fatigue, the reasons for it, and how it impacts our ability to participate effectively in fully remote hearings.¹⁹ Additionally, where a hearing day doesn't fit into a hearing participant's time-zone, that participant can experience 'energy dips akin to jet-lag'.²⁰ This aligns with the answers we received about survey respondents'

¹⁷ Preliminary Findings, *supra* n. 1, s. 4.

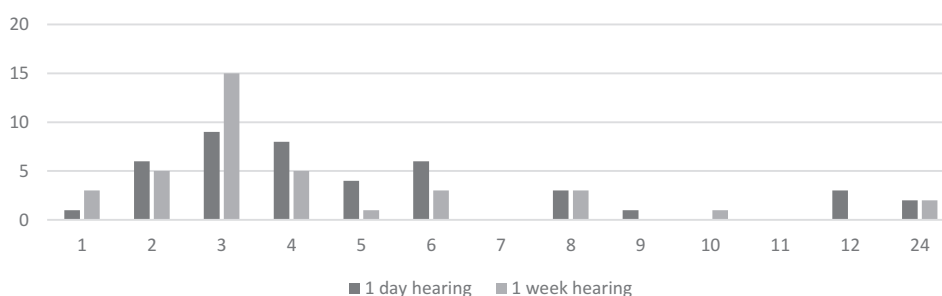
¹⁸ *Ibid.*, s. 4.

¹⁹ See e.g., Sophie Nappert & Mihaela Apostol, *Healthy Virtual Hearings* (Kluwer Arbitration Blog, 17 July 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/17/healthy-virtual-hearings/?doing_wp_cron=1595748578.1755490303039550781250; Chiann Bao & Ula Cartwright-Finch, *Trial by Zoom on Trial* (Global Arbitration Review 25 Sept. 2020), <https://globalarbitrationreview.com/virtual-hearings/trial-zoom-trial> (both accessed 18 Feb. 2021); Born, *supra* n. 6, at 2437; See also Dr Ula Cartwright-Finch & Cortex Capital, *Justice Rebooted – Psychology in Virtual Hearings* (series published in 2020 & 2021), <https://www.cortexcapital.org/justicerebooted> (accessed 16 Mar. 2021).

²⁰ Bao & Cartwright-Finch, *supra* n. 19; Maxi Scherer, Franz Schwarz, Helmut Ortner & J. Ole Jensen, *In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns* (Kluwer Arbitration Blog, 24 Oct. 2020), <http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> (accessed 16 Mar. 2021).

experience of conducting fully remote hearings across multiple time-zones. As shown in Figure 6, while users can accommodate a larger range of time-zones for one-day fully remote hearings, their preference for one-week fully remote hearings is to have all participants located within three to four contiguous time-zones.

Figure 6 Survey Q35: 'In Your Personal Opinion, How Many Time Zones Can Be Adequately Covered in a Fully Remote Hearing?' (43 Responses)



4 FUTURE OF FULLY REMOTE HEARINGS ACCORDING TO THE SURVEY RESPONDENTS

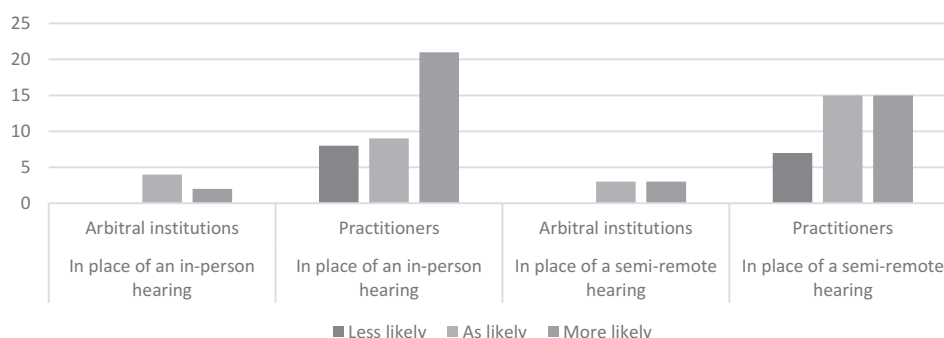
As part of our Preliminary Findings, we found that 14% of Practitioners expressed a positive preference for fully remote hearings, 45% considered them to be as good as in-person hearings, and 41% expressed a negative view about them.²¹ On one reading of these numbers, 59% of Practitioners found fully remote hearings to be as good as or better than in-person hearings. On another reading, there were about three times as many negative views as there were positive views. Inevitably, the reality is more complex. We asked survey respondents (1) about how likely they were to propose fully remote hearings in the future; (2) how likely they were to use them for short hearings and meetings; and (3) about their offline reactions to fully remote hearings. The data and analysis bring out a more nuanced picture of the international arbitration community's views as they stood in the summer of 2020, at the time of filling out our survey.

4.1 FUTURE ATTITUDES TO FULLY REMOTE HEARINGS

Building on survey respondents' experience of fully remote hearings, we asked them how likely they were to propose them in the future as compared with in-person and semi-remote hearings. Their answers were as shown in Figure 7.

²¹ Preliminary Findings, *supra* n. 1, at 148.

Figure 7 Survey Q40: ‘How Likely are You to Propose a Fully Virtual Hearing: (a) in Place of an in-Person Hearing? (b) in Place of a Semi-remote Hearing?’ (38 Responses)

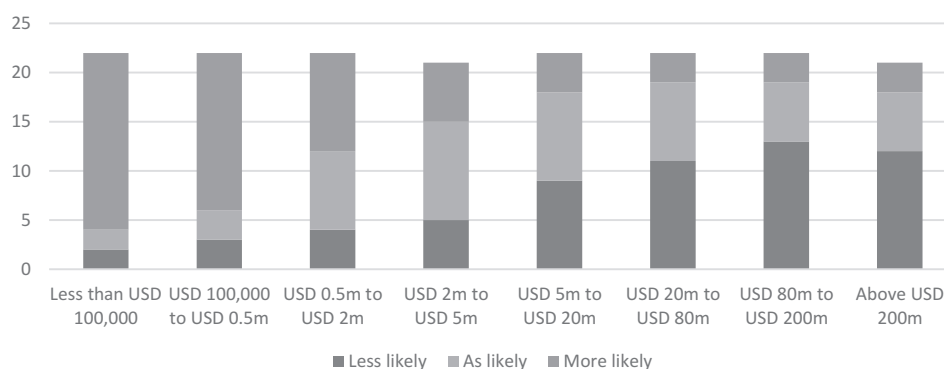


Overall, Practitioners indicated that they were much more likely to propose fully remote hearings in place of in-person or semi-remote hearings. In answering a further sub-question, survey respondents, particularly arbitral institutions, indicated that the likelihood that they propose a fully remote hearing had increased as compared to the views they held prior to 15 March 2020.

Next, respondents were asked if their answers would vary according to (1) the amount in dispute; (2) their role in the hearing; and (3) the number of witnesses and experts to be examined at the hearing.

4.1[a] Amount in Dispute

Figure 8 Survey Q41: ‘Would Your Answer to the Above Question [Q40] Vary According to the Amount in Dispute?’ (Responses of 22 Practitioners)



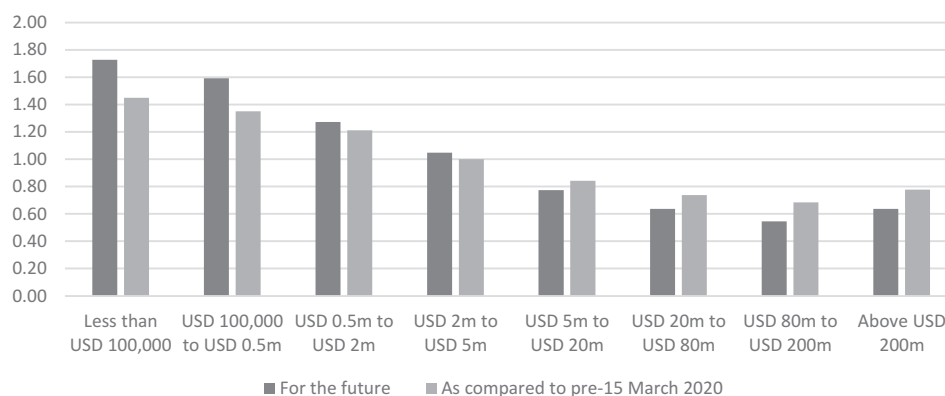
As can be seen in Figure 8, there are two inflexion points in the amount in dispute at which Practitioners are likely to propose a fully virtual hearing in place of an in-person or semi-remote hearings.

The first one is based on the relative importance of ‘less likely’ and ‘more likely’ answers, and lies around the USD 2 million to 5 million mark: for lower value cases, Practitioners are more likely to turn to fully remote hearings; for cases in the USD 2 million to 5 million bracket, they are as likely to use fully remote hearings as they are to use in-person or semi-remote hearings; and for higher value cases, they are more likely to have in-person or semi-remote hearings.

The second one is based on the relative importance of ‘as likely’ and ‘more likely’ responses as compared with ‘less likely’ responses. Here, the inflexion point lies in the USD 20 million to 80 million band: within this range of amounts in dispute, as many survey respondents indicated that they were as or more likely to propose a fully remote hearing in place of a semi-remote or in-person hearing, as survey respondents who indicated that they were less likely to do so.

The above answers were weighted in Figure 9 on a spectrum of 0 (‘less likely’) to 2 (‘more likely’), with 1 standing for ‘as likely’. Practitioners were also asked how their views compared to those they held prior to 15 March 2020; these results were weighted in the same manner and are shown in Figure 9 too.

Figure 9 Survey Q41 Likelihood Over Time

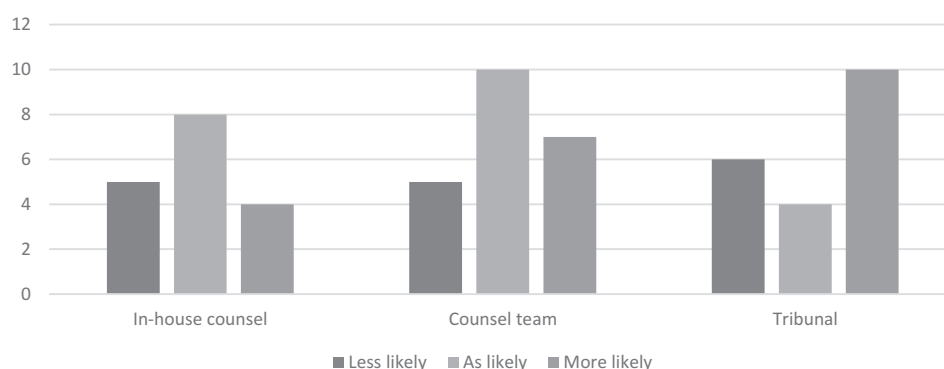


Besides reiterating the inflexion at the USD 2 million to 5 million mark, Figure 9 suggests that, prior to 15 March 2020, Practitioners had lower expectations about the benefits of fully remote hearings for lower value cases, and greater expectations for higher value cases, than they did by the time of filling out the survey: they systematically indicated that, for cases with a value above USD 5

million, they were now less likely to propose fully remote hearings in place of in-person or semi-remote hearings than they had been prior to 15 March 2020.

4.1[b] *Practitioners' Role in the Hearing*

Figure 10 Survey Q42: 'Would Your Answer to the Above Question [Q40] Vary According to Your Role in the Hearing?' (Responses of 23 Practitioners)



The results shown in Figure 10 suggest that external counsel and tribunals (i.e., Practitioners) are at least as likely in the future, if not more so, to propose fully remote hearings in place of in-person or semi-remote hearings.

We then performed the same weighted analysis as above, including how the answers compared to views held prior to 15 March 2020. The results are shown in Figure 11.

Figure 11 Survey Q42 – Likelihood Over Time

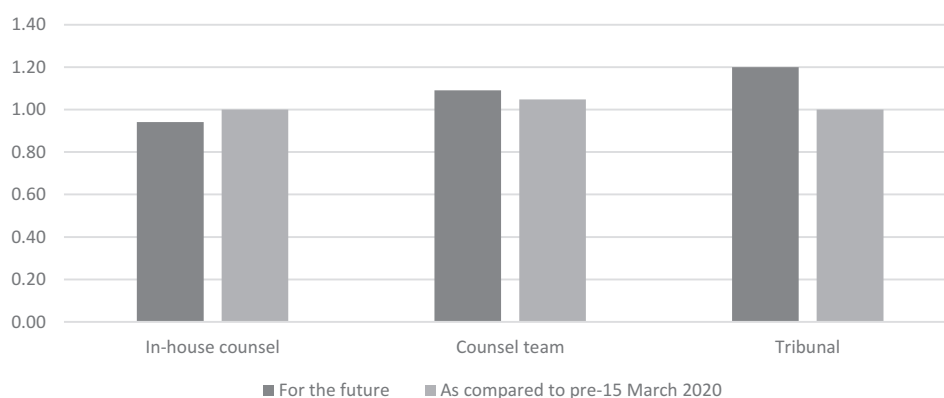
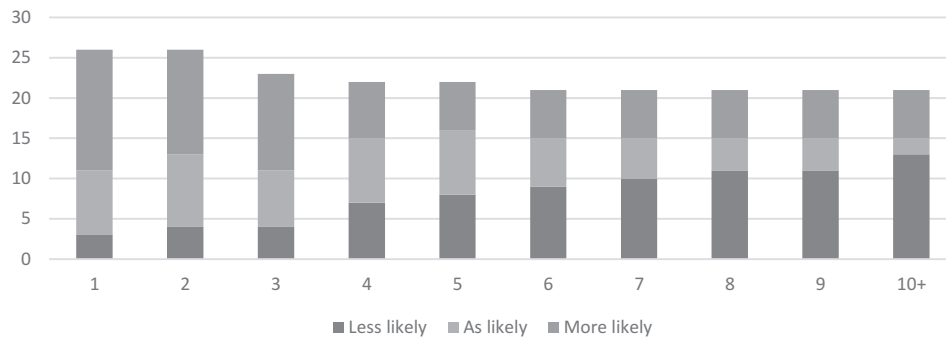


Figure 11 suggests that neither in-house counsel nor tribunals changed their view of fully remote hearings over time: in-house counsel continued to slightly prefer in-person or semi-remote hearings, while tribunals preferred fully remote hearings. Only external counsel appeared to have had a change of position, towards a slightly more favourable view of fully remote hearings.

4.1[c] *Number of Witnesses and Experts to Be Examined at the Hearing*

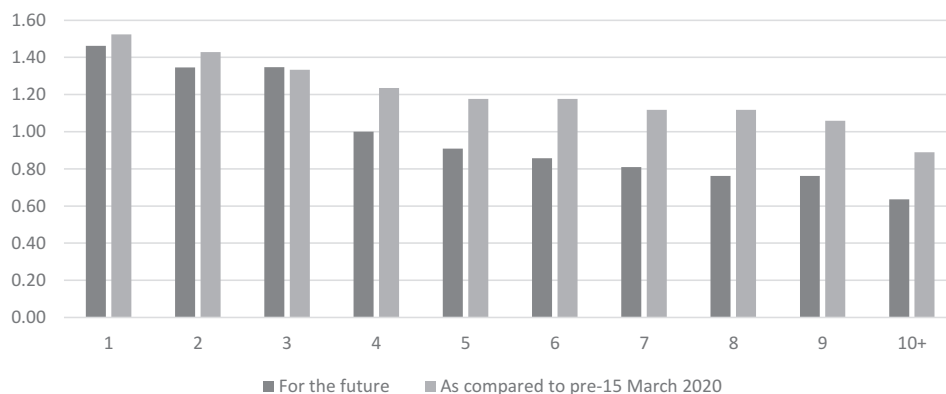
Figure 12 Survey Q43: 'Would Your Answer to the Above Question [Q40] Vary According to the Number of Witnesses and Experts to Be Examined at the Hearing?' (Response of 27 Practitioners)



There appear from the data in Figure 12 to be two inflexion points: a first one at four witnesses/experts to be examined with a shift from 'more likely' to 'as likely', and at six witnesses/experts to be examined with a shift from 'as likely' to 'less likely'.

Here too, we weighted the results and looked at how views compared to those held prior to 15 March 2020 (Figure 13).

Figure 13 Survey Q43 – Likelihood Over Time



In Figure 13, we see the same inflexion point at four witnesses/experts to be examined: for one to three witnesses/experts, Practitioners are likelier to propose a fully remote hearing in place of an in-person or semi-remote hearing; for four witnesses/experts, Practitioners are as likely to use one or the other hearing type, which corresponds to a more favourable disposition towards fully remote hearings than they had prior to 15 March 2020; and for five or more witnesses/experts, Practitioners lean increasingly towards in-person or semi-remote hearings over fully remote ones, albeit with a generally more favourable disposition towards fully remote hearings than they held previously.

4.2 FULLY REMOTE HEARINGS FOR CMCs

Question 46 of our survey read as follows: ‘For short hearings and meetings, such as case management conferences, how likely are you from now on to hold them via videoconference, as opposed to by telephone or in person?’

38 Practitioners answered the question. While the range of answers covered the full spectrum from never (0%) to always (100%), the average likelihood stood at 72% and the median likelihood at 80%, indicating a strong preference for fully remote hearings going forward for short hearings and meetings and case management conferences (CMCs).

Arbitral institutions were even more enthusiastic: with a range of 75–100%, the average likelihood across five institutions was 88%, with a median likelihood at 90%.

Looking at the jurisdictions with the largest number of Practitioners who answered this question, the most ambivalent were in the United Kingdom (range of responses of 0–80%) and the most assertive in Switzerland (range of responses of 70–100% likelihood in the future of holding short hearings and meetings via videoconference as opposed to by telephone or in person); the most positive were in Brazil (median at 96%), and the least so in Spain (median at 65%).

4.3 OFFLINE REACTIONS TO FULLY REMOTE HEARINGS

Survey respondents were asked what, in their experience since 15 March 2020, had been the offline reaction to fully remote hearings of the following participants in the arbitral process (1 being ‘definitely opposed’ and 5 being ‘wholly enthusiastic’) (see Figure 14).

Figure 14 Survey Q45 Enquiring About Offline Views on Fully Remote Hearings (41 Answers), Excluding Answers Marked as 'N/A'



As may be seen, arbitral institutions, hearing centres and tribunal secretaries were the most enthusiastic about fully remote hearings (in order of '5' ratings), with arbitrators and the international arbitration community being generally quite favourable too (overall view). Conversely, in-house counsel, their external counsel and experts displayed the most mixed views.

5 CONCLUSION

Drawing the threads together, the above data and analysis can be summarized as follows, as of the time of the survey, i.e., July 2020: when asked about fully remote hearings in general, Practitioners are enthusiastic, but when asked 'to put their money where their mouth is', that enthusiasm leans towards lower value, simpler cases. More specifically:

- For short hearings and meetings, such as CMCs, users will very likely prefer a videoconference over meeting in person or conducting the proceeding by telephone.
- For merits hearings and hearings dealing with major procedural issues (e.g., questions of jurisdiction or preliminary phases addressing issues such as the admissibility of evidence), preferences hinge primarily on the value of the case and secondly on the number of witnesses and experts to be examined:
- For cases with an amount in dispute of USD 2 million or less, users are very likely to prefer fully remote hearings over in-person or physical hearings, save perhaps if a (very) large number of witnesses and experts need to be examined.
- For cases with an amount in dispute of USD 2 million to 80 million, users are as or more likely to choose fully remote hearings as they are to propose

in-person or semi-remote hearings. The key consideration is likely to be the number of witnesses and experts to be examined: up to four, the hearing will likely take place fully remotely; and for six or more witnesses and experts, users may prefer to conduct their hearing in-person or semi-remotely.

- For cases with an amount in dispute of USD 80 million or more, users tend to prefer in-person or semi-remote hearings over fully remote hearings, especially if the number of witnesses and experts to be examined is greater than four.

Where parties are in disagreement as to how to hold the hearing, tribunals are likely to consider the following factors in deciding the question (in addition to circumstantial matters such as sanitary conditions and the possibility of travel²²):

- whether hearing dates can be maintained; if not, they are likely to favour fully remote hearings;
- whether the cost of holding the hearing in-person or semi-remotely is relevant given the amount in dispute; if it is, they are likely to favour fully remote hearings; and
- based on the location of participants at the hearing, the number of time-zones that would need to be accommodated, bearing in mind the duration of the hearing. Shorter hearings over fewer time-zones are better suited to fully remote hearings than longer hearings over five or more contiguous time-zones.

In considering these findings, we should keep in mind that the collective experience of fully remote hearings was still very limited as of the time of the survey,²³ and that personal experiences of fully remote hearings can vary largely depending on whether a hearing participant is connecting alone from a laptop and phone working from home or from an office meeting room with a full IT set-up and their team by their side.

To conclude on a futuristic note, the survey asked respondents whether they believed that the future of hearings would be augmented or virtual reality hearings.²⁴ Of the fifty-four users who answered the question, 52% left it open or stated that they were not familiar with augmented or virtual reality, 15% said ‘no’ and one-third said ‘yes’. More change may be afoot!

²² See e.g., Hafez Virjee for Delos Dispute Resolution, *Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19*, first published on 12 Mar. 2020 and updated on 20 Mar. 2020, <https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/> (accessed 6 Jan. 2021); Born, *supra* n. 6, at 2436–2437.

²³ Preliminary Findings, *supra* n. 1, at 140–141.

²⁴ Question 47 of the Survey.

