CHAPTER 15

Virtual Arbitration Hearings under Swedish Law

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Videoconferencing is increasingly used to conduct entire remote hearings, i.e., virtual hearings. This raises the question if it is possible under Swedish law to hold a virtual hearing against the objection of one of the parties. The fundamental principle relevant to the question of virtual hearings is the universally recognized principle of due process and equality in the treatment of the parties, established in section 24 of the Swedish Arbitration Act. Section 24 of the Swedish Arbitration Act is an expression of due process as expressed in Article 6 of the European Convention on Human Rights. The European Court of Human Rights considers videoconferencing in general to be compatible with due process. Virtual hearings are also accepted as meeting the standards of due process according to the Swedish Code of Judicial Procedure. It can also be noted that there is nothing under the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules from 2017 or the IBA Rules on the Taking of Evidence that prohibits a hearing by virtual means. Moreover, many arbitration institutes explicitly accept virtual hearings. It would therefore appear reasonable to assume that section 24 of the Swedish Arbitration Act permits virtual hearings, also against the objection of one of the parties. Whether a virtual hearing can be held against the objection of a party is yet to be tried under Swedish law. Consequently, time will tell if virtual hearings are compatible with the Swedish Arbitration Act.

§15.01 INTRODUCTION

In early 2020, at the onset of the COVID-19 pandemic, it was initially difficult to imagine that the situation would last longer than a few weeks or, at the most, a couple of months. However, the pandemic became the 'new normal' during 2020 and at least for parts of 2021. Strategies were thus adopted worldwide to limit and cope with the spread of the virus. Although the worst is luckily behind us in terms of the pandemic, it did indeed raise a number of interesting, albeit complex, issues within the field of

arbitration that may change the way we look at certain aspects in the aftermath of the pandemic.

A highly relevant issue is how arbitration hearings should be conducted during the midst of a pandemic. For many years now, technology has been used in arbitrations for, e.g., remote witness examinations, either by telephone or by videoconference. The pandemic has accelerated the developments of the use of technology. Notwithstanding the pandemic, there is overall an increased demand for hearings by virtual means as this saves both time and cost. Videoconferencing is increasingly used as a means to conduct entire remote hearings, i.e., virtual hearings.

Given the apparent longevity of the pandemic, it has been difficult to argue that arbitration hearings, as a general rule or principle, should be postponed until the pandemic was over. However, during the midst of the pandemic, it was not always possible (or appropriate for that matter) due to travel and other restrictions to gather a room filled to the brim with tribunal members, counsel, party representatives, witnesses, experts, translators, court reporters, etc., for a traditional physical hearing. Instead, an alternative has been to conduct the hearing virtually.

Party autonomy is one of the cornerstones of arbitration allowing the parties much freedom to decide how to conduct the proceedings. Can the parties agree that a virtual hearing is held instead of a traditional hearing where the participants are physically present? That the parties agree on procedural issues is nevertheless not always the case. The claimant is often keen to have the dispute tried as speedily as possible and may thus opt for a virtual hearing, especially if the alternative is an indefinite postponement of the hearing. The respondent usually does not have the same wish for a speedy procedure and may reject the idea of a virtual hearing.

If this is the case, is it possible to hold a virtual hearing against the objection of one of the parties? If so, to what degree can a hearing be held virtually – can a partially virtual hearing be held where, e.g., the arbitral tribunal and counsel are physically present, but where witnesses and experts participate virtually, or can the hearing be fully virtual? Can 'asymmetry' be accepted, e.g., where one of the parties is physically present through counsel whereas the other party's counsel participates virtually?

§15.02 FUNDAMENTAL PRINCIPLES OF RELEVANCE

Swedish arbitration procedure is governed by a few fundamental principles.

First, and as already mentioned, the principle of party autonomy is fundamental, and pursuant to section 21 (second sentence) of the Swedish Arbitration Act (hereinafter the SAA), the arbitrators shall 'act in accordance with the decisions of the parties, unless they are impeded from doing so'.[1] The arbitration procedure is to a significant

1. Translated by the Swedish Ministry of Justice (Ds 1999:22) and revised and updated by Joel Dahlquist on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf (accessed 2021-04-22).

degree governed by the agreement of the parties, subject, however, to a small number of statutory requirements.[2]

Second, the arbitrators shall adhere to the principles of impartiality, practicality and speed. This is expressed in section 21 of the SAA, which stipulates that the arbitrators shall 'handle the dispute in an impartial, practical, and speedy manner'.[3]

Third, and of particular interest for the subject matter of this chapter, the universally recognized principle of due process and equality in the treatment of the parties is established in section 24 of the SAA. This principle is considered perhaps the most fundamental procedural principle[4] and means that the parties shall be afforded the opportunity not only to present their case[5] but also to respond to the statements made and evidence invoked by the opposing party.[6]

§15.03 THE RIGHT TO AN ORAL HEARING UNDER THE SWEDISH ARBITRATION ACT

The SAA is from 1999. At that time, the legislator did probably not consider the possibility or the necessity of virtual hearings. Nor did the legislator do so when the SAA was amended in 2018.[7]

The first two paragraphs of section 24[8] of the SAA read as follows:

> The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution.

2. Kaj Hobér, *International Commercial Arbitration in Sweden*, 203-204 (Oxford University Press 2011).
3. Translated by the Swedish Ministry of Justice (Ds 1999:22) and revised and updated by Joel Dahlquist on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf (accessed 22 April 2021).
4. Stefan Lindskog, *Skiljeförfarande: En kommentar*, 579 (3d ed., Norstedts Juridik 2020).
5. *See, e.g.*, Lindskog, *supra* n. 4, at 579-580; Marie Öhrström, *En handbok och regelkommentar för skiljeförfaranden*, 198 (Norstedts Juridik 2009); Finn Madsen, *Commercial Arbitration in Sweden*, 269 (5th ed., Jure 2020); Thorsten Cars, *Lagen om skiljeförfarande: En kommentar*, 117 (3d ed., Fakta Info Direkt Sweden AB 2001).
6. *See, e.g.*, Lindskog, *supra* n. 4, at 694; Lars Heuman, *Skiljemannarätt*, 402 (Norstedts Juridik 1999); Öhrström, *supra* n. 5, at 198; Madsen, *supra* n. 5, at 269; Cars, *supra* n. 5, at 117.
7. For the 2018 amendments to the SAA, *see* SFS 2018:1954.
8. The SAA is largely based upon the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the 'Model Law'). Pursuant to Article 24(1) of the Model Law, the arbitrators shall decide whether the proceedings shall be oral or in writing, subject to any contrary agreement of the parties. It is thus a matter for the parties to decide whether an oral hearing shall be held or not. If the parties have agreed that no oral hearing shall be held, the arbitral tribunal is bound by this agreement.

> A party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the opposing party or another person.[9]

The second sentence of the first paragraph stipulates that a hearing shall be held if requested by a party. Accordingly, a party has an absolute right to a hearing; the necessity of the hearing is irrelevant. However, as expressly stated in the provision, this is only the case unless the parties have agreed otherwise. The principle of party autonomy means that the tribunal may not decide that a hearing shall be held if the parties have agreed on an exclusively written procedure. Correspondingly, an arbitral tribunal may not deny the parties a hearing if the parties have agreed that a hearing shall be held.[10]

According to the first sentence of the first paragraph, the parties have the right, to the extent necessary, to present their respective cases in writing or orally. It is expressed in *travaux préparatoires* and legal doctrine that the provision is mandatory in the sense that a party cannot *in advance* waive its right to present its case to the extent necessary.[11] One commentary to the SAA goes one step further by stating that the parties cannot, with binding effect, agree in advance on an exclusively written procedure since such a procedure does not live up to the standards of due process.[12] However, this does not prevent the parties from jointly agreeing on an entirely written procedure once the arbitration has been initiated.[13] If the parties so agree, a party thereby waives its right to challenge the award on the basis that it was not given a proper opportunity to present its case.[14] This follows from the second paragraph of section 34 which states that a party is not 'entitled to rely upon a circumstance, through participation in the proceedings without objection, or in any other manner, the party may be deemed to have waived'.[15]

9. Translated by the Swedish Ministry of Justice (Ds 1999:22) and revised and updated by Joel Dahlquist on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf (accessed 22 April 2021).
10. Lindskog, *supra* n. 4, at 695.
11. Govt. Bill 1998/99:35, p. 227; Lindskog, *supra* n. 4, at 695-696; Cars, *supra* n. 5, at 117; Heuman, *supra* n. 6, at 273; Bengt Lindell, *Civilprocessen*, 722 (4th ed., Iustus 2017); Johan Kvart & Bengt Olsson, *Tvistlösning genom skiljeförfarande,* 103 (3d ed., Norstedts Juridik 2012). It should be noted that the parties' right to present their case pursuant to section 24 is restricted through the words 'to the extent necessary' (*translated by the author*) meaning that a party is prevented from relying on section 24 in order to obstruct the proceedings by submitting superfluous documents and materials, *see* Cars, *supra* n. 5, at 117.
12. Lindskog, *supra* n. 4, at 691-692 and 695-696. Cf. Heuman, *supra* n. 6, at 273-274.
13. Lindskog, *supra* n. 4, at 691-692 and 697.
14. Lindskog, *supra* n. 4, at 692 n. 2691.
15. Translated by the Swedish Ministry of Justice (Ds 1999:22) and revised and updated by Joel Dahlquist on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf (accessed 22 April 2021).

§15.04 ACCEPTABLE FORM OF HEARING UNDER THE SWEDISH ARBITRATION ACT

As cited above, section 24 stipulates that an 'oral hearing' shall be held if requested by a party. A hearing in the traditional sense is where the arbitral tribunal and counsel meet physically and where the parties are afforded the opportunity to present their case before the tribunal.[16] There is nothing under Swedish law, the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter the SCC) Arbitration Rules from 2017 (hereinafter the 'SCC Arbitration Rules'), or the International Bar Association (hereinafter the IBA) Rules on the Taking of Evidence in International Arbitration that expressly prohibits a hearing by virtual means.[17] Nonetheless, whether an 'oral hearing' can be conducted virtually as opposed to a traditional hearing is a topic which has been subject to much debate.

The common view in Swedish arbitration law is that virtual hearings can fully replace traditional hearings where the participants are physically present.[18] It is suggested that with the necessary technology now available, a virtual hearing may be the only way to comply with the fundamental arbitration requirements of efficiency and speed, subject to the principles of party autonomy and equal treatment of the parties.[19]

One contrasting view is found in Swedish arbitration law where it is argued that a virtual hearing is not an adequate substitute for a hearing where the hearing participants meet physically.[20] However, it should be stressed that it seems that this view is held by one author alone and cannot be considered to constitute the general opinion on the matter.

§15.05 THE IMPACT OF TECHNOLOGICAL DEVELOPMENTS IN OTHER LEGAL AREAS

Although the focal point of this chapter is virtual hearings, it is relevant to consider what impact the technological developments have had on other areas.

16. Lindskog, *supra* n. 4, at 699.
17. *See* further sections 15.08 and 15.09 *infra*.
18. Kristoffer Löf, Aron Skogman & Sara Johnsson, 'Chapter 9: The Proceedings', in Annette Magnusson, Jakob Ragnwaldh, et al. (eds), *International Arbitration in Sweden: A Practitioner's Guide*, paras 188-193, (2d ed., Kluwer Law International 2021); Velislava Hristova & Malcom Robach, *Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway from the SCC Online Seminar Series*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/05/16/legal-and-practical-aspects-of-virtual-hearings-during-and-after-the-pandemic-takeaway-from-the-scc-online-seminar-series/ (accessed 19 April 2021); Lars Edlund, *Om virtuell förhandling – en replik*, SvJT 2021 p. 401; Kristoffer Lööf, *Remembrance of Things Past – a reply to Stefan Lindskog's argument that only a traditional hearing is a hearing in arbitration*, SvJT 2021 p. 406.
19. Löf, Skogman & Johnsson, *supra* n. 18, at 217, 264-265.
20. Stefan Lindskog, *Virtuella slutförhandlingar i skiljeförfaranden mot parts bestridande*, SvJT 2021 p. 293.

By way of example, it is now a widely accepted view in the Swedish courts that written documents not only are limited to physical paper documents but also include electronic documents such as emails. In two rather recent cases, the Swedish Supreme Court has found that electronic documents should be deemed equivalent to a paper document. In a case from 2015, the Supreme Court found that the prohibition against confiscation of documents in certain situations should be equally valid for electronic documents. The Supreme Court pointed out that this was in line with the purpose of the regulation in question.[21] Further, in a case from 2017, the Supreme Court stated that an electronic document can be a valid negotiable debt instrument subject to certain requirements.[22]

Considering the technological advancements and the impact it has had on other areas of the law, it does not appear too far-reaching to suggest that a 'hearing' or indeed an 'oral hearing' may mean something else today than what it did when the SAA was drafted and entered into force some twenty years ago. The question remains if an interpretation that would allow virtual hearings under the SAA is in line with the purpose of the provision.

§15.06 THE PURPOSE OF SECTION 24 OF THE SWEDISH ARBITRATION ACT

The *travaux préparatoires* to the SAA state that the purpose of the right to an oral hearing pursuant to section 24 of the SAA is to ensure the right to due process and a fair trial.[23] Therefore, the use of videoconferencing seems to be in line with the purpose of section 24.

As discussed above (*see* section 15.02), section 24 of the SAA affords the parties an equal right to fully present their case orally. Furthermore, it is also clear that a party has an absolute right to an oral hearing, if so requested.

This raises the question what an oral hearing entails. Is it limited to a hearing in the traditional sense, i.e., in a hearing room with the arbitrators, parties, witnesses and experts physically present? Or can it include a hearing conducted merely by telephone, or does it need to be by means of videoconferencing in order to count as a hearing?

The words 'oral' (Sw. *muntlig*) and 'oral hearing' (Sw. *muntlig förhandling*) suggest that a hearing in the form of a telephone conference would be permissible under Swedish arbitration law. There is no explicit requirement for the oral hearing to take place through physical participation, it just needs to be oral.

The *travaux préparatoires* to the SAA are silent as to what an oral hearing is. It is however stated that an oral hearing under the SAA is rather equivalent to a main hearing according to the Swedish Code of Judicial Procedure.[24] Hence, the statement in

21. 'Husrannsakan på tidningsredaktionen' which means 'the Search of the premises at the newspaper office', NJA 2015 p. 631.
22. 'Collectors elektroniska skuldebrev', which means 'Collector's electronic promissory note', NJA 2017 p. 769.
23. Govt. Bill 1998/99:35 p. 110.
24. Govt. Bill 1998/99:35 p. 110.

the *travaux préparatoires* is aimed at a hearing in the Code of Judicial Procedure's traditional sense, i.e., a hearing where the participants are physically present. As already discussed, virtual hearings were most likely not envisioned at the time when the SAA entered into force. What was intended with an 'oral' hearing at the time was thus a physical hearing.

The legislative process leading up to the SAA may shed some light on the Act's concept of 'oral' hearing.[25] In the *travaux préparatoires* to the SAA, it is stated that the purpose of the right to an oral hearing pursuant to section 24 is to ensure the right to due process and a fair trial. Section 24 is thus an expression of the fundamental principles of due process expressed in Article 6 of the European Convention on Human Rights (hereinafter the ECHR).[26] Although the ECHR was designed primarily for court proceedings, it is not lacking in relevance with regard to arbitrations.[27] Article 6(1) of the ECHR is relevant in that it can be said to express a 'common core of essential safeguards for the integrity of the arbitral process'.[28]

There are several cases, primarily criminal cases, from the European Court of Human Rights (hereinafter the ECtHR), which acknowledge videoconferencing as a means of satisfying the right to a fair trial.

In the criminal case *Marcello v. Italy*, a person with connections to the mafia had been accused of a serious crime. The person was not allowed to be physically present in the court and instead participated via videoconference. The ECtHR found that it was acceptable for a person accused of a criminal offence to participate in the hearing through videoconferencing for security reasons.[29] The ECtHR came to the same conclusion in the criminal case *Golubev v. Russia*.[30] Furthermore, in the criminal case *Schatschaschwili v. Germany*, the court stated that even cross-examination of witnesses can be conducted through special means such as videoconferencing.[31] In addition, the ECtHR has stated in the case *Yevdokimov and others v. Russia* that the use of videoconferencing instead of appearing in person is generally acceptable in civil matters.[32]

25. Stig Strömholm, Max Lyles & Filippo Valguarnera, *Rätt, Rättskällor och rättstillämpning: En lärobok i allmän rättslära*, 450 (6th ed., Norstedts Juridik 2020); Lars Heuman, *Metoder för rättstillämpning och lagtolkning: Generaliseringar, logik och argumentation*, 333 (Jure 2018).
26. Govt. Bill 1998/99:35 p. 110.
27. Georios Petrochilos, *Procedural Law in International Arbitration*, 130 para. 4.51 (Oxford University Press 2004).
28. Petrochilos, *supra* n. 27, at 151 para. 4.95.
29. *Marcello Viola v. Italy*, case no. 45106/04, http://hudoc.echr.coe.int/eng?i=001-77246 (accessed 19 April 2021); *See* also Hans Danelius, *Mänskliga rättigheter i europeisk praxis,* section 6.9 298, (Norstedts Juridik, Juno Version 5 2015).
30. *Golubev v. Russia*, case no. 26260/02, http://hudoc.echr.coe.int/eng?i=001-78357 (accessed 19 April 2021).
31. *Schatschaschwili v. Germany*, case no. 9154/10, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-159566%22]} (accessed 19 April 2021); *see* also *Al-Khawaja and Tahery v. The United Kingdom,* https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-108072%22]} (accessed 19 April 2021) which also refers to the possibility to use special measures such as videoconferencing.
32. *Yevdokimov v. Russia*, case nos 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, http://hudoc.echr.coe.int/eng?i=001-160620 (accessed 19 April 2021).

To sum up, the use of videoconferencing is not considered by the ECtHR to be incompatible with the notion of a fair and public trial. The views of the ECtHR and its interpretation of Article 6 of the ECHR are well described by the court in the above-cited case *Golubev v. Russia*, in which the following is stated with regard to participation through means of videoconferencing:

> Thirdly, even assuming, in the applicant's favour, that he did not waive his right and had no other choice but to participate in the hearing through a video communication system, the Court recalls that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole.[33]

The above reasoning of the ECtHR demonstrates that the crucial point of Article 6 is due process, not that the participants are physically present during the hearing. The ECtHR is evidently of the opinion that the principle of due process can be satisfied through the use of videoconferencing systems.

As mentioned, section 24 of the SAA does not regulate the form for the hearing. If the parties have not agreed on the form for the hearing, this decision is left to the tribunal.[34] In the *travaux préparatoires* of the SAA, the possibility for the tribunal to examine witnesses via telephone or 'TV monitor' is mentioned.[35] The *travaux préparatoires* expressly mention that the boundaries for witness examinations are not determined by law, but by technology.[36]

In this respect, it may also be noted that examination of witnesses in an arbitration pursuant to the SAA can, at the request of a party, be held at and administered by a Swedish District Court. The SAA does not require the tribunal to attend such witness examination. It is sufficient that the tribunal has access to a video recording of the witness examination.[37] This is thus an acceptable form for the taking of evidence pursuant to the SAA.

In summary, the *travaux préparatoires* to the SAA state that the purpose of the right to an oral hearing pursuant to section 24 is to ensure the right to due process and a fair trial. Section 24 is thus an expression of due process as expressed in Article 6 of the ECHR. It is evident from the above-mentioned case law from the ECtHR that the ECtHR does not consider videoconferencing in general to be incompatible with the notion of a fair and public trial. The use of videoconferencing for a virtual hearing is thus in line with the purpose of section 24 of the SAA.

33. *Golubev v. Russia*, case no. 26260/02, http://hudoc.echr.coe.int/eng?i=001-78357 (accessed 19 April 2021).
34. Govt. Bill 1998/99:35 pp. 110-111.
35. Govt. Bill 1998/99:35 p. 114.
36. Govt. Bill 1998/99:35 p. 114.
37. *See* section 26 of the SAA.

§15.07 A GLANCE AT THE SWEDISH CODE OF JUDICIAL PROCEDURE

It is stated in the *travaux préparatoires* for the Code of Judicial Procedure that the ECHR should not be considered an obstacle to a virtual hearing.[38] Virtual hearings are thus accepted as meeting the standards of due process according to the Swedish Code of Judicial Procedure.

The Swedish Code of Judicial Procedure regulates a large number of issues that have been left unresolved in the SAA. The principles and rules in the Code of Judicial Procedure should not be applied automatically in arbitrations[39] and should not be considered a complement to the SAA. [40] Even though the Code of Judicial Procedure has had a significant impact on the SAA, the SAA should be applied independently of the Code of Judicial Procedure.[41] However, the procedures before the general courts and the general principles of the Code of Judicial Procedure may serve as inspiration where the arbitrators can seek guidance when faced with procedural issues.[42] This would reasonably be limited to Swedish arbitrations, whereas in international arbitrations seated in Sweden, it is perhaps more appropriate for the arbitrators to apply international best practice than to glance at the Code of Judicial Procedure.[43]

The Code of Judicial Procedure contains a brief requirement in Chapter 43, section 5, namely that 'the hearing shall be oral'. The general rule is that the parties shall be physically present at the hearings.[44] However, according to Chapter 5, section 10 of the Code of Judicial Procedure, the court may decide that a party or other person who is to be present at a meeting, such as a hearing, shall participate by audio only or audio visually, i.e., videoconference. When someone participates through videoconference, that person is deemed to be participating in the hearing. Since the general rule is that the parties shall be physically present at the hearings, participation through videoconference against the will of a party is generally not permitted. However, exceptions are allowed if it appears justified. It is the court that has the ultimate responsibility to determine whether participation through videoconferencing should take place.[45]

When assessing whether participation should take place through videoconferencing, consideration should be taken to the parties' views on the matter although, ultimately, it is the decision of the court. The court must, when evaluating the matter, make an overall assessment of all relevant circumstances and in particular consider the

38. Govt. Bill 2004/2005:131 p. 90.
39. Heuman, *supra* n. 6, at 306; Finn Madsen, *Skiljeförfarande i Sverige*, 60-61 (2d ed., Jure 2009); Hans-Gunnar Solerud, 'Har skiljemannalagen och rättegångsbalken ett förhållande?', in Jan Hellner (ed), *Festskrift till Ulf K. Nordenson,* 411, 428 (Carlsson Law Network 1999); Lindskog, *supra* n. 4, at 645.
40. Bengt Westerling, 'Rättegångsbalken och skiljeförfarandet', in Stockholms handelskammares skiljedomsinstitut (ed), *Svensk och internationell skiljedom 1981: Årsbok,* 17 (Stockholms handelskammare 1981).
41. Govt. Bill 1998/99:35, p. 47; Swedish Government Official Reports 1994:81, p. 74.
42. Lindskog, *supra* n. 4, at 68.
43. Lindskog, *supra* n. 4, at 68 n. 234; Westerling, *supra* n. 40, at 17.
44. Govt. Bill 2004/2005:131 p. 224.
45. Govt. Bill 2004/2005:131 pp. 224-225.

role of the person in question, the nature of the case and the topics to be addressed during the hearing. If the parties agree that a person can participate through videoconference, there is generally no reason for the court to make a different assessment. In the case of a hearing for evidentiary purposes, the wishes of the party invoking the evidence must generally be considered. However, the other party's opinion can also be relevant in many cases and should therefore be taken into account.[46]

In the *travaux préparatoires* to the so-called En modernare rättegång (hereinafter the EMR) Revision of 2008 of the Code of Judicial Procedure, it is expressly stated that participation through videoconference is consistent with the ECHR.[47] Consequently, a virtual hearing conducted through means of videoconferencing even against the will of one party must thus still be considered to meet the requirements of due process under the Code of Judicial Procedure.

The audiovisual alternatives as a means for party participation in hearings as well as a means for the taking of evidence are common in Swedish courts. In fact, the *travaux préparatoires* conclude that the taking of evidence through audiovisual participation is generally considered to work well.[48]

In a decision from the Swedish Office of the Chancellor of Justice, an individual had claimed damages from the Swedish State on the basis that his right to a fair trial according to the ECHR had been violated in criminal proceedings before the Svea Court of Appeal. More specifically, he had demanded that witnesses should attend the hearing physically rather than through videoconference in order for him to be able to duly question them. The Chancellor of Justice found that the use of videoconferencing was not in conflict with Article 6 of the ECHR with reference to the fact that he was, albeit with some difficulties, afforded the opportunity to examine the witnesses through the available videoconferencing system.[49]

In a recent case from the Court of Appeal for Western Sweden, the issue of a virtual hearing in light of the pandemic was addressed.[50] The Court of Appeal found that the District Court had committed a procedural error when cancelling a hearing in a case in which the main hearing had been delayed. The case itself had been going on for a long time. The Court of Appeal found that it was not acceptable to cancel a hearing with reference to the pandemic and the regulations from the Swedish Public Health Authority. The Court of Appeal stated that the District Court had an obligation to conduct the proceedings in an expeditious manner and in order to do so it should have utilized the existing possibilities to allow for participation through telephone or videoconference.

In summary, virtual hearings are accepted as meeting the standards of due process according to the Swedish Code of Judicial Procedure. As also mentioned, it is

46. Govt. Bill 2004/2005:131 pp. 224-225.
47. Govt. Bill 2004/2005:131 p. 90.
48. Govt. Bill 2018/19:81 p. 28.
49. Decision from the Office of the Chancellor of Justice dated 13 October 2016, Reference number 5024-16-40.
50. Court of Appeal for Western Sweden, case no. Ö 4485-20.

stated in the *travaux préparatoires* for the EMR Reform of the Code of Judicial Procedure that the ECHR should not be considered an obstacle to a virtual hearing.

§15.08 HEARINGS UNDER THE SCC ARBITRATION RULES

The SCC has conducted a survey with SCC arbitrators to learn more about the use of, and attitudes towards, using virtual hearings.[51] The survey demonstrates that the pandemic has resulted in an increase in virtual hearings. Moreover, the survey concludes that the arbitrators are generally satisfied with and positive towards using virtual hearings also after the pandemic. In sum, the survey suggests that virtual hearings will be the norm for the duration of the COVID-19 crisis and also remain as a viable option thereafter. It seems that the possibility to conduct a virtual hearing under the SCC Rules against the will of one party is compatible with the SCC Arbitration Rules, especially considering the requirement of speed in arbitration.

As stated above, there are views that the parties cannot, with binding effect, agree *in advance* on an exclusively written procedure since such a procedure does not meet the standards of due process.[52] It can be noted that it is always possible for the parties to agree to an exclusively written procedure once the arbitration has commenced.[53] Nonetheless, would it be possible for the parties to agree in advance on a virtual hearing instead of a traditional hearing? It is unlikely that the parties' agreement contains any specific or detailed agreements or instructions for the proceedings in the event of a dispute. Instead, the arbitration agreement normally refers to a set of arbitration rules such as in Sweden (and elsewhere), the widely used SCC Arbitration Rules. What effect does a reference to the SCC Arbitration Rules in the arbitration agreement have in terms of the possibility to conduct a virtual hearing against the will of one party? Do the SCC Arbitration Rules only accept an oral hearing in the traditional sense or could a virtual hearing be accepted?

Article 32(1) of the SCC Arbitration Rules regulates hearings. This article differs in one respect from section 24 of the SAA. Article 32(1) of the SCC Arbitration Rules reads as follows:

> A hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate.

Unlike section 24 of the SAA which uses the wording 'oral hearing', the SCC Arbitration Rules merely use the word 'hearing', but these rules are silent as to the form of such hearing. The wording of Article 32(1) is the same in the previous version of the Arbitration Rules from 2010.

In a commentary to the Arbitration Rules from 2010, it is pointed out that even if the parties, by agreeing to settle disputes through arbitration, may have opted out of the

51. Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Virtual Hearing Survey*, October 2020, https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf (accessed 19 April 2021).
52. *See* section 15.03 above.
53. *See* section 15.03 above; Lindskog, *supra* n. 4, at 691-692 and 697.

right to settle their disputes before the courts, a party still has an absolute right to an oral hearing if so requested.[54] However, this absolute right to an oral hearing has its limits since the parties can agree that no oral hearing shall be held. In other words, the parties are free to agree that no oral hearing shall be held.[55] It may be noted that in international arbitration, it is considered widely accepted that the requirement of an oral hearing can be waived without breaching Article 6 of the ECHR.[56]

Under the SCC Arbitration Rules for Expedited Arbitrations from 2017 (hereinafter the 'Expedited Rules'), a party has the right to an oral hearing *only* at the request of the party *and* if the sole arbitrator considers the reasons for the request to be compelling.[57] Considering the risk for challenge of the award based on arguments of due process, it may be questioned how common it is for an arbitrator to deny a party an oral hearing if so requested. Furthermore, the validity of rules such as Article 33 of the Expedited Rules is questioned based on the opinion that parties cannot in advance agree to sacrifice their right to present their case.[58]

Moreover, Article 23, first paragraph of the SCC Arbitration Rules, affords the arbitrators considerable freedom in terms of how to conduct the arbitration:

> The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties.

Nothing in the SCC Arbitration Rules requires that a hearing in the traditional sense is held.

The SCC has published information and guidance relating to COVID-19 and encourages tribunals to 'to use alternative means such as audio- and visual meeting facilities'. Moreover, the SCC states that 'arbitral tribunals are expected to manage the proceedings in accordance with timetables previously established, or otherwise in accordance with Article 23 of the SCC Arbitration Rules'. In addition, pursuant to Article 2 of the SCC Arbitration Rules, the parties are 'expected to act in an efficient and expeditious manner throughout the proceedings and act in the spirit of the rules in all matters not expressly provided for therein'. The parties are, despite the outbreak of COVID-19, 'expected to live up to their obligations under the SCC Arbitration Rules and make efforts to keep established timetables by, when necessary and deemed possible, for example, transferring the arbitration to a fully digital environment, including using audio- and visual meeting facilities in the proceedings going forward'. The SCC also emphasizes that each party's contribution to the efficiency and expeditiousness of the arbitral procedure is assessed in light of the costs of the arbitration.[59]

54. Öhrström, *supra* n. 5, at 198; *See* also Ragnwaldh et. al., 106 with regard to Article 32(1) of the 2017 Arbitration Rules, *A Guide to the SCC Arbitration Rules* (Kluwer Law International B.V., 2020).
55. Cf. Lindskog's statement that the parties cannot in advance decide that no oral hearing shall be held; Lindskog, *supra* n. 4, at 691-692 and 695-696.
56. Georios Petrochilos, *Procedural Law in International Arbitration,* 150, para 4.92 (Oxford University Press 2004).
57. Article 33(1) in the SCC Rules for Expedited Arbitrations.
58. Lindskog, *supra* n. 4, at 691-692; Heuman, *supra* n. 6, at 274.
59. *See* the statement from the SCC dated 27 March 2020, Arbitration Institute of the Stockholm Chamber of Commerce, *Covid-19: Information and Guidelines in SCC Arbitration,* News 2020,

Arbitration institutes around the world have encouraged the use of audiovisual hearings in light of the pandemic. On 16 April 2020, the major international arbitration institutes issued a joint statement titled 'Arbitration and COVID-19: Institutions speak with one voice'.[60] It states that:

> [C]ollaboration is particularly important as each of our institutions looks to ensure that we make the best use of digital technologies for working remotely. We encourage parties and arbitrators to discuss any impact of the pandemic and potential ways to address it in an open and constructive manner. Arbitral tribunals and parties are asked to mitigate the effects of any impediments to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. In so doing, they are invited to use the full extent of our respective institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments. [61]

As emphasized by the SCC in the above-cited statement, the arbitral procedure shall be conducted expeditiously. The arbitrators must adhere to section 21 of the SAA which states that the 'arbitrators shall handle the dispute in an impartial, practical, and speedy manner'. The same follows from Article 21 of the SCC Arbitration Rules which stipulates that 'the Arbitral Tribunal and the parties shall act in an efficient and expeditious manner'. Should it prove impossible to hold a traditional hearing without causing significant delay to the arbitration, this gives rise to a conflict between the parties' right to fully present their case, on the one hand, and the right to an award within reasonable time, on the other. In this situation, the arbitrators need to balance the two conflicting interests, thus taking into account the potential delay of the case. However, the requirement concerning speed – in many instances one of the main reasons for selecting arbitration as a means for settling disputes – may not infringe on the principle of due process. It would appear sensible that a virtual hearing and the use of videoconferencing is acceptable since such a procedure is compatible with the adversarial principle which is an element in the right to a fair trial and due process according to Article 6 of the ECHR.

To sum up, considering the requirement of speed in arbitration and that there are no obstacles in the SCC Arbitration Rules, it seems that a reference to the SCC Arbitration Rules in the arbitration agreement does not affect the possibility to conduct a virtual hearing against the will of one party.

§15.09 VIRTUAL HEARINGS INTERNATIONALLY

It can be noted that internationally it is widely accepted to conduct a hearing virtual through the means of videoconferencing.

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https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/ (accessed 19 April 2021).

60. The statement is signed by the CRCICA, DIS, ICC, ICDR/AAA, ICSD, KCAB, LCIA, MCA, HKIAC, SCC, CIAC, VIAC and the IFCAI.
61. Arbitration Institute of the Stockholm Chamber of Commerce, *Arbitration and Covid-19: Institutions Speak with One Voice,* News 2020, https://sccinstitute.com/about-the-scc/news/2020/arbitration-and-covid-19-institutions-speak-with-one-voice/ (accessed 19 April 2021).

Article 26 of the International Chamber of Commerce (hereinafter the ICC) Rules of Arbitration, which entered into force on 1 January 2021, concerns hearings and has recently been amended to explicitly deal with the subject of videoconferencing. The article states, *inter alia*, that '[t]he arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication. 2) If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing'. The arbitral tribunal has thus been given explicit powers to decide if the hearing should be conducted virtually or not.

Further, the London Court of International Arbitration (hereinafter the LCIA) Arbitration Rules, which entered into effect on 1 October 2020, have been amended and now explicitly give the tribunal the power to decide whether the hearing should be conducted through means of videoconferencing. Article 19 of the LCIA Arbitration Rules states, *inter alia*, that 'the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)'.

The topic is also addressed in the IBA Rules on the Taking of Evidence in International Arbitration (both in the old version dated 2010 and in the new version dated 2020) which define an Evidentiary Hearing to also include a hearing held by videoconference. '"Evidentiary Hearing" means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence.' The IBA Rules dated 2020 also state in Article 8.1, regarding an Evidentiary Hearing, that 'At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing.' According to the definitions, a '"Remote Hearing" means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate.'

A case from the Austrian Supreme Court published on 28 September 2020 concerned the issue of whether a hearing held through videoconference against the objection of one party in an arbitration violated due process. The case is said to be the first case in the world from a national supreme court which addresses the issue of COVID-19 and videoconferencing.[62] The Austrian Supreme Court concluded that it lies

62. 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 October 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 19 April 2021).

within the arbitral tribunal's discretion to decide whether or not a hearing should be held by videoconference and that holding a hearing remotely over the objection of one of the parties does not constitute a violation of due process.[63]

§15.10 DIFFERENT WAYS TO CONDUCT VIRTUAL HEARINGS

The increased use of virtual hearings, whether in full or partial, has stirred up a debate as to whether or not such hearings are in line with due process. So, based on the above, can and does a virtual hearing live up to the requirements of due process in the same way that a traditional hearing does? And in terms of due process arguments, what are the differences between a traditional hearing and a virtual hearing?

A virtual hearing can be conducted in different ways and either fully virtually or virtually in part. At the far end of the spectrum, we have a scenario where all the participants, including the tribunal members, attend the hearing through means of videoconferencing. Another scenario is a hearing where the tribunal is physically present together with the parties in the hearing room, whereas witnesses and experts attend through videoconferencing. It may be desirable for the tribunal members to be together as this facilitates the handling of procedural matters as well as continuous discussion and deliberations throughout the hearing.

During a traditional hearing, the tribunal, parties, witnesses and experts are all physically present in the same room. The parties and the tribunal are thus afforded the opportunity to observe all persons in the room which provides a sense of intimacy at all times.[64] It is difficult to argue that such intimacy is not important when assessing, e.g., the behaviour of a witness, or the reactions of the tribunal in different situations. But is this impossible to achieve through the use of audiovisual equipment?

With modern-day technology, it is hard to imagine that a virtual hearing could not be just as good as a traditional hearing. A virtual hearing can include all elements of a traditional physical hearing, such as opening and closing statements, examination of multiple fact and expert witnesses, and matters of procedural nature. Can these elements of a hearing not be performed just as effectively through advanced audiovisual equipment as through a physical meeting?

The sense of intimacy connected with a traditional hearing where it is possible to observe the participants, their reactions and body language can be achieved also if the hearing is conducted virtually. The quality of the audiovisual equipment can pick up on subtle details such as the trembling hand of a nervous witness. However, one could argue that it may be less intimidating for a witness to be examined virtually than for the witness to physically sit face to face with the person in charge of the examination and the observing tribunal, thus making it more difficult for counsel to throw a witness off balance in cross-examination. Nonetheless, it should be recalled that even the examination of witnesses in criminal cases is considered to be in line with due process by the

63. Scherer, Schwarz, Ortner & Jensen, *supra* n. 62.
64. Lindskog, *supra* n. 20, at 293.

ECtHR.[65] As a result of the technological developments, it would appear that a virtual hearing can be just as good as a traditional hearing, allowing for a live adversarial exchange and thus meeting the standards of due process.[66]

If virtual hearings basically accord with the SAA, it may be asked if that includes asymmetrical virtual hearings, e.g., where one of the parties is physically present through counsel but the other party only virtually present. Or would this not be consistent with the principle of procedural equality and the equal treatment of the parties? As mentioned, the principle of equal treatment of the parties is fundamental in Swedish arbitration law and is expressed in section 21 of the SAA which states, *inter alia*, that the arbitrators shall handle the dispute in an impartial manner. The principle does entail not only that the arbitrators must be impartial but also that the parties must have equal access to procedural benefits.[67] Defining the contours of procedural equality could indeed prove difficult, as is the question of how the principle of procedural equality affects the possibilities of conducting a virtual hearing.

As elaborated above, a virtual hearing can be conducted in many different ways. There are few rules in the SAA regarding the procedure. If the parties are not in agreement as to procedural matters, it is an issue for the arbitrators to decide how to manage the proceedings.[68] Any such decision is, however, subject to the principle of equal treatment of the parties. This principle is, however, not absolute as the arbitrators may deviate from it when, e.g., adhering to the requirement of an appropriate management of the case.[69]

To be on the safe side and avoid the risk of a challenged award, tribunals should ensure that any virtual element of a hearing should be equally provided to both parties. For example, if claimant's witnesses are to be heard by videoconference, the same should be the case for respondent's witnesses. The aforementioned cases from ECtHR where the court assessed videoconferencing and its compliance with the ECHR seem to suggest that due process is not violated even though only one of the parties or one of the parties' witnesses attended the hearing audio visually, provided there was a good reason for this. However, such a procedure appears hazardous and exposes the award to challenge. Still, in order to save time and costs, it is sometimes necessary for certain witnesses or experts to be heard audio visually to facilitate the hearing. This should not automatically amount to a ground for challenge of the award on the basis that the parties have not been treated equally. The question is whether conducting witness examinations through videoconference is a procedural benefit. Even though the ECtHR has stated that physical presence is not an end in itself but serves the greater goal of

65. *Schatschaschwili v. Germany*, case no. 9154/10, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-159566%22]} (accessed 19 April 2021).
66. Erica Stein, 'Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings', 173, in Maxi Scherer, Niuscha Bassiri, et al. (eds*), International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020).
67. Heuman, *supra* n. 6, at 277.
68. Heuman, *supra* n. 6, at 279.
69. Heuman, *supra* n. 6, at 280.

securing the fairness of the proceedings,[70] it is difficult to see that physical presence is not an advantage compared to presence via videoconference.

Both section 21 of the SAA and Article 23 of the SCC Arbitration Rules contain provisions that require the arbitrators to handle the dispute in an expeditious manner. For obvious reasons, virtual hearings offer an easy way of satisfying this requirement, while also being cost-efficient as a bonus. Irrespective of this, there are views that the pandemic and the delays it has caused and is causing for arbitral proceedings do not constitute a valid reason to conduct an arbitration hearing virtually.[71] However, it has been expressed in Swedish arbitration law that witness examinations may be conducted by phone or videoconference[72] and that witness examination via videoconference may be allowed but must be considered an exception from the requirement for an otherwise physical hearing.[73]

This view may be questioned as the element of a hearing which would reasonably benefit the most from being conducted physically is indeed the witness examinations. Allowing virtual witness examinations as part of an otherwise physical hearing while not allowing a full virtual hearing is a view which seems to stem from an overly rigid interpretation of section 24 of the SAA. A more sensible approach could be inspired by the Swedish Code of Judicial Procedure pursuant to which the *general rule* is that the parties shall be physically present at the hearings, but the court is afforded the opportunity to decide to hold the hearing, when appropriate – fully or in part – through videoconferencing.

While this chapter might not provide any definite answers regarding virtual hearings in arbitrations seated in Sweden, a case pending before the Svea Court of Appeal at the time of writing will hopefully shed some light on the issue.[74] An arbitration award was challenged on grounds that the hearing was conducted virtually. The hearing took place with all counsel and witnesses present by means of videoconferencing. The challenge is based on, *inter alia*, the ground that the claimant had been deprived of its right to an oral hearing in accordance with both section 24 of the SAA and Article 32 of the SCC Arbitration Rules. If the Svea Court of Appeal were to come to the conclusion that virtual hearings fall outside the scope of section 24 of the SAA (and also Article 32 of the SCC Arbitration Rules), this would be somewhat of a surprise in light of recent international best practice. Internationally, the use of virtual hearings is less controversial than what appears to be the case in Sweden.

§15.11 CONCLUDING REMARKS

On the basis of the above and, *inter alia*, case law from the ECtHR, it would appear reasonable to assume that the parties may agree in advance to hold a virtual hearing

70. *Golubev v. Russia*, case no. 26260/02, http://hudoc.echr.coe.int/eng?i = 001-78357 (accessed 19 April 2021).
71. Lindskog, *supra* n. 20, at 8.
72. Lindskog, *supra* n. 4, at 727.
73. Lindskog, *supra* n. 20, at 6.
74. Case no. T 7158-20.

and that section 24 of the SAA permits this. Considering that the Swedish Code of Judicial Procedure explicitly permits remote hearings and the use of videoconferencing, it is difficult to regard virtual hearings in arbitration as denying the parties the right to a fair trial.

In order for a virtual hearing to comply with the fundamental principle of due process, it appears important that the virtual hearing, to the extent possible, mimics a traditional physical hearing. To facilitate this, it would be prudent that the hearing participants at a virtual hearing have access to several different video monitors, thus allowing them to view and observe all of the other participants at all times during the hearing without technical impediments. In this regard, it may be noted that, for example, the 'ICC guidance note on possible measures aimed at mitigating the effects of the pandemic'[75] contains a protocol on virtual hearings which may be helpful in meeting the requirements of due process.

The issue of whether a virtual hearing can be held against the objection of a party is yet to be tried under Swedish law in the case currently pending before the Svea Court of Appeal. Consequently, time will tell if a virtual hearing under such circumstances is compatible with section 24 of the SAA, or if it constitutes a ground for a successful challenge of the arbitration award.

75. International Court of Arbitration, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic,* 9 April 2020, https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf (accessed 19 April 2021).