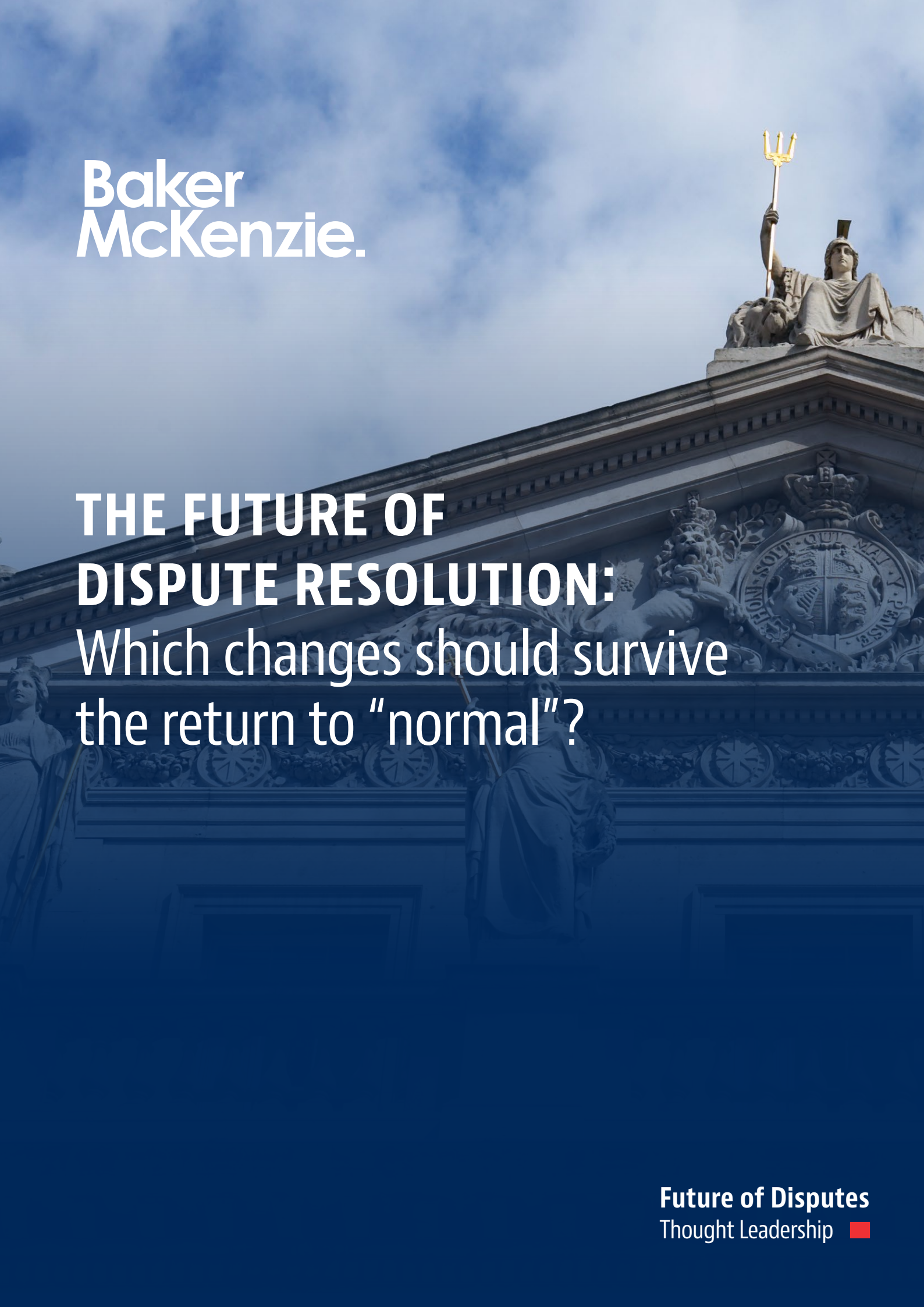

Baker McKenzie.

THE FUTURE OF DISPUTE RESOLUTION: Which changes should survive the return to "normal"?

Future of Disputes
Thought Leadership

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Introduction

The **COVID-19** pandemic will have long-lasting effects on our society and economy. It has already forced us to re-evaluate how we socialise, work and conduct business, and has fundamentally changed the way we resolve disputes and administer justice.

While the enforced, temporary changes to our lifestyle and the economy are likely to be reversed as soon as it is safe to do so, in our view, many of the changes made to the way we resolve disputes brought about by COVID-19 should not be reversed. Instead, the relevant authorities and the legal community should take the opportunity to make fundamental changes to the way disputes are resolved for the benefit of those who pay for and use dispute resolution processes: tax payers and litigants. The purpose of this piece is to advocate for such change where appropriate, and to set out potential ways to deal with the challenges arising from such change.

A growing momentum for change

The call for permanent change is already gathering momentum. Last month, England's most senior judge (the Lord Chief Justice Lord Burnett), appeared (virtually) before the House of Lords Constitution Committee to make his views clear: **"[t]here will be no going back to [the pre-COVID-19 era]"** (see here).

In a message to judges in March, the Lord Chief Justice explained that the "rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything" and that the default position is now that, where possible, **"hearings should be conducted with one, more than one or all participants attending remotely"** (see here). This was shortly followed by the Judiciary of England & Wales' Protocol Regarding Remote Hearings of 26 March 2020 (the "Protocol") (see here), which sets out guidance, to be flexibly applied, on fixing, preparing for and attending remote hearings. It explains that the current pandemic necessitates the use of remote hearings wherever possible to minimise the risk of transmission, and that the method by which all hearings, including remote hearings, are conducted is a matter for the judge(s), operating in accordance with applicable laws and rules. All court users are urged to be sympathetic to the technological and other difficulties experienced by others, be proactive and cooperative to ensure that the process runs smoothly.

The Protocol states that, wherever possible, the court will propose to the parties one of the following three solutions: (i) a remote hearing, (ii) normal court hearing with precautions taken to prevent transmission or (iii) adjournment, but only where a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time. The parties have the right to make submissions as to what other proposal would be more appropriate should they disagree. The judge will then make a binding determination on the issue.

Former members of the English judiciary and senior practitioners have echoed the Lord Chief Justice's call for permanent change. They advocate in favour of virtual hearings for interlocutory hearings and shorter civil trials, but have voiced concern and called for caution in respect of criminal trials and hearings where witnesses need to be cross-examined.

They point to the difficulty in analysing and assessing, through video conferencing, a witness' demeanour to determine the truth and accuracy of the account being given. This chimes with the Criminal Bar Association's recent message to its members, which explains that whilst **"a vast array of preliminary hearings [are currently] conducted both on paper and remotely… the real business of the criminal bar is conducted in court rooms".** Similarly, the Institute for Government's April 2020 report warns of unfair treatment in criminal cases heard remotely, and urges caution against adopting long-term policies in haste without proper research, evaluation and testing (see here).

That said, there is some force in the argument that, in some cases, it may actually be easier to test and verify a witness's account of facts during a virtual hearing, for instance by placing the camera up-close so that the witness's face may be closely monitored. This would not normally be possible in an ordinary court room. However, on balance, it seems likely that remote trials will prove to be a step too far at this time and a significant amount of caution will need to be exercised before they become the norm.

The position in other jurisdictions

The shift to virtual justice has also gained momentum in other jurisdictions, such as the United States, Singapore, Hong Kong and Australia. For example, in the US the wheels of justice continued to spin and cases ranging from bankruptcy to criminal law have been and continue to be determined remotely (see here).

The position has not been too dissimilar in Singapore. In March 2020, the Singapore judiciary set out its business continuity measures, which included measures directed at allowing more matters to be heard by video and telephone conferencing, with a preference for Zoom (see here). The Chief Justice of the Supreme Court explained, in his message dated 29 May 2020, that during the "safe re-opening" phase embarked on 1 June 2020, hearings for most cases will resume but will be held virtually, given the time and cost efficiencies, as well as the need to remain cautious and prevent spread of the virus (see here).

Things are also returning to normal in Hong Kong, where most courts are now physically open for business, but with the required preventative measures in place (see here).

Finally, the Federal Court of Australia announced, on 23 March 2020, that its **"counters [may be] closed, but [they are] still working"** (see here). In a note published on 7 April 2020, the Court explained that, absent exceptional circumstances, all of its hearings will be held remotely, or on papers with the possibility of making short oral statements, where considered appropriate (see here).

The above demonstrates that there is clearly a move towards online justice in a number of jurisdictions in an effort to keep the wheels of justice moving during the fight against COVID-19. We consider below in some detail whether and how that change should be maintained in a post-COVID-19 legal world.

The switch to remote dispute resolution

In our piece entitled **"COVID-19: Implications for the future of Dispute Resolution"** (see here), we predicted that virtual hearings would become the norm during the COVID-19 crisis and that, once it is clear that shorter hearings and applications can be heard very effectively and fairly over video conferencing or other remote means of communication, both the courts/tribunals and their users will expect such online/remote contact to become the norm.

That prediction has proven accurate. **Preliminary official estimates show that around 90% of hearings are currently being held remotely** (see here).

In a very short period of time, both courts and arbitral tribunals have shifted almost entirely to online hearings. To date, the shift appears to have proceeded remarkably smoothly. Following a four-day trial of a claim worth over US$ 500 million before the English Commercial Court held in April 2020 via a video conferencing platform, the judge (Teare J) commented that the **"hearing was conducted without any technical hitch and all parties co-operated to ensure that the hearing took place efficiently and fairly"** (see here for a copy of the judgment). In line with newly enacted legislation in the UK (the Coronavirus Act 2020) the hearing was available to watch on screen in a courtroom, as well as being made available for viewing online. The hearing involved both factual and expert witnesses, with participants from four different jurisdictions.

For our part, we have in the past few weeks represented clients in several remote hearings and settlements, including an application in the High Court of England and Wales for a without notice freezing and disclosure order, an interim application hearing held in the Cayman Islands, an ICC arbitration procedural hearing and two mediations. Each of these proceeded without a hitch and with tangible cost and time savings for the client.

The case for permanent change

In our view, the move to remote hearings brought about by the COVID-19 crisis should become a permanent feature in court systems, arbitration institutions and all forms of alternative dispute resolution.

Unless there is good reason not to do so in a particular case, all shorter hearings/negotiations/mediations (including appeals) of one day or less involving no cross examination of witnesses should be conducted remotely through a video conference platform. The Protocol echoes in support, stating that **"[I]t will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely"** (see here).

There are some obvious exceptions, including trials (both with a jury and without), in which there is a need to assess witness or expert evidence live. This is particularly so in respect of criminal proceedings and civil proceedings with a criminal angle to them, given the perhaps most serious types of wrongdoing and the higher standard of proof required in criminal cases. In such cases, we consider there is a risk that the judge and/or jury members may struggle in assessing a witness's demeanour when seeking to determine the truth and accuracy of the account given. As noted above, the Institute for Government's April 2020 report warns of unfair treatment in criminal cases heard remotely, and urges caution against hastily adopting long-term policies without proper consultation and trial. There is the added risk, in jury trials, of jury members being more easily distracted and the judge not being able to properly supervise jurors while evidence and submissions are being made to them, if they are not properly supervised. In such cases, we consider the interests of justice require the court/tribunal/jury to be able to assess the witness evidence and the witness's demeanour live.

The potential benefits of permanent change

There are clear benefits to be gained from such a change to the way we resolve disputes.

- **Saving of time and money i.e. cheaper resolution of disputes:** Relieving parties and their legal teams from the need to travel to and wait at court to be called to a hearing will have obvious time and cost-saving benefits. Currently, parties and their lawyers may have some distance to travel to court and, especially in the case of urgent hearings, may have to wait several hours at court before being heard.
- **Speedy justice:** Virtual hearings reduce the need for traditional court resources e.g. court rooms, room for storage of papers/files and offices/rooms for judges, counsel and litigants. Without the need to wait for a physical court room to become available, applications and other matters should be dealt with more quickly and efficiently. Freeing up this space will make more time and room for those trials and longer and more substantial hearings which can only be heard in person, meaning more complex matters will be heard and resolved more quickly. Further, in the virtual world we propose, judges will not need to physically travel to court (or even around the court building), which would provide greater flexibility in terms of their availability and could permit them to hear more matters on a given day. There will also be less need to factor in parties' (including counsel and the legal team) availability and ability to travel, sometime significant distances. These factors, among others, are likely to result in quicker listing of hearings and, consequently, in speedier justice for the users of courts and tribunals.
- **More focused hearings:** Our experience of virtual hearings to date suggests that they tend to be more focused than hearings in person as advocates strive to make their arguments over video as clear and concise as possible. As such, we expect that virtual hearings will likely result in more focused and shorter (and therefore more cost effective) hearings. This is likely to make the issues in dispute more readily defined and judgments shorter and simpler. In the context of mediation, our experience was that less time was wasted waiting while the mediator was with the other party, which is a feature of most mediations. On balance, this more than made up for some of the undoubted inefficiencies involved in conducting shuttle-diplomacy virtually.
- **Compact e-bundles:** We expect that absent a "physical" steer from counsel in a courtroom, judges will need and benefit from shorter and more compact hearing bundles, focusing only on the key documents and evidence. We consider this is likely to focus the judge's mind on the key documents and evidence and result in shorter (and therefore more cost effective) court bundles and potentially shorter and simpler judgments (which will also speed up the process of handing down judgments).
- **Diversity and attracting a broader pool of talent to the bench:** We expect that virtual hearings could and should be used as a means of increasing the diversity of the bench/arbitrators as it will enable selections to be made from individuals who do not reside in (or have the ability to travel frequently to) large urban areas where the bulk of in person court and tribunal hearings are held. The same is true of lawyers and advocates who appear in front of courts and tribunals. Diversity of the bench will also be improved as judges will be able to sit more easily for a few hours a day from home e.g. to fit within the school day or around other caring responsibilities.
- **Resilience to future lock-downs:** Finally, an increased use of virtual hearings will ensure that the dispute resolution institutions are better equipped to deal with any future pandemics or other similar events requiring public lockdown/ closure of physical court buildings.

6 issues to consider

We are conscious that there are very important issues to consider before these proposed changes could be made permanent.

1. Not suitable in all cases - As noted above, a virtual hearing will not be appropriate in all cases, including very complex matters involving multiple parties and witnesses, and certain long running trials involving the need for extensive cross examination. Further, due to their nature and/or participants, certain types of case may not lend themselves too easily to virtual hearings. For instance, those involving litigants in person, those in the family division where children's welfare may be at stake, or certain Court of Protection cases, may be less appropriate for remote hearing than commercial cases. Some of these issues are starker in the context of mediation, where the ability to build personal rapport (and ultimately bridges) is often crucial to reaching a settlement. However, our positive experience during the lockdown suggest that, particularly where parties would otherwise have to travel long distances to attend, the default position should be a virtual mediation unless there are compelling reasons to meet in person.

2. Access to / open justice: The ability of citizens to seek and obtain remedies via the courts and tribunals is a key element of any properly functioning justice system. It is vital that, where appropriate, as part of any full-time move online, the public should be able to access justice with ease and participate in remote hearings. On balance, we consider that virtual hearings are likely to increase the public's access to the courts as it makes it easier for the public to attend court hearings. Virtual hearings will also improve the openness of the justice system should hearings be made available on the internet via a link on the court's website, along with the listing of the hearing. This is already possible in respect of Supreme Court hearings, and there are benefits in replicating this, where appropriate, in respect of hearings before the lower civil and criminal courts. There are of course issues to consider of access for those without a computer or smartphone, but the potential public interest in any particular hearing or a matter is one issue that could be taken into account by a judge when considering whether to order an in person hearing. The interests of litigants in person would also need to be carefully considered.

3. Software security: Various jurisdictions currently rely on different online platforms providing video conferencing facilities. For instance, in the courts of England and Wales Skype appears to be more widely utilised, whereas in Singapore and the Cayman Islands Zoom has been the platform of choice. Each platform seemingly has its strengths and weaknesses, e.g. some offer break-out rooms, whereas others do not. We are aware that security concerns have been raised in respect of some platforms, which will need to be addressed before they are used for hearings. The Ministry of Justice will need to continue and upscale its investment in IT to ensure the smooth workings of an online justice system.

4. Judicial and legal industry embrace of technology: Appropriate steps will need to be taken to ensure that judges and lawyers fully embrace technology and are provided with the necessary hardware, software and training to enable them to fully embrace the move online. Of course there will be a cost associated with providing judges and tribunals with the technology required, but such cost pales into insignificance when compared with the cost savings to tax payers and court users of requiring physical court rooms to be available and maintained. Our proposed approach means that lawyers and law firms will also need to rethink how they approach disputes. They too will need to embrace technology and make the investments needed, including in software, hardware and the training staff. Lawyers will also have to develop and perfect the skill of effective advocacy via video-link, which brings unique challenges. For example, when making submissions via a video platform, an advocate will need to observe and analyse the judge and witness(es)'s body language and demeanour and elaborate on points not fully grasped or mould submissions and/or questions accordingly.

5. Possible increase in appeals: Remote hearings that are recorded may lead to an increase in the number of appeals on grounds of fact, as parties are more easily able to refer to the evidence before the judge and therefore use it as a means for challenging the decision of the judge, or on the grounds of procedural fairness. While this may be a positive factor for those appeals which have real merit, it could also further clog up the appellate bench, and therefore there may need to be revised guidance on the circumstances in which permission to appeal will be granted.

6. Rules around remote hearing procedures: Finally, the guidance and direction contained in the Protocol may need to be further fleshed-out in the form of a practice direction to ensure that the new system runs as effectively and efficiently as is possible, and also to provide some certainty and predictability for court users. The judge's clerk is likely to play a critical role in the process in ensuring that (i) the technology is "rehearsed" before the hearing with the parties' participation, (ii) the correct version of the e-bundle(s) is circulated with the judge and the parties, and (iii) that the proper management of the remote hearing by, for instance, controlling participation and muting non-speakers. The rules should make express provision in respect of these and other relevant factors as far as possible. The guidance may also include rules around positioning of cameras, which would be critical in the case of witnesses, and also important in respect of audibility of the judge and counsel.

Final thoughts

There have been a number of attempts by courts and arbitration bodies over the years to encourage the use of remote hearings, with arbitration arguably being more successful in doing so. For example, the digitalisation of justice has been on the agenda of the English judiciary for some time, with its most recent and notable action being the introduction of the Courts Electronic Filing system (CE-File) in 2014/15, a new electronic filing and case management system used by the High Court's Business and Property Courts, among others. CE-File has certainly assisted with the move to online justice brought about by the COVID-19 era.

The procedural rule changes brought about by the Woolf reforms and the Civil Procedure Rules (CPR) in the late 1990s sought to encourage the use of telephone hearings, and the CPR already provides for the express procedural infrastructure for appropriate hearings to be conducted by telephone. For example, allocation hearings, listing hearing, certain interim applications and case management conferences must be conducted by telephone, unless the court orders otherwise (see, CPR PD 23A, para 6). However, practice in the last 25-30 years has shown that the opportunity to free up courts and move hearings online has not been taken, despite the advance of technology enabling such virtual hearings to take place easily and cheaply. Prior to the current crisis, the default for hearings in the English courts remained in person hearings. Whether that has been caused by reluctance on the part of the judiciary or court users is an open question, though it is clear that the lack of investment in technology in the court system has played a central role in the slow progress.

COVID-19 has undoubtedly presented and will continue to present many challenges to all aspects of our personal and professional lives. However, the **challenges also provide a unique opportunity to rethink the way we resolve disputes, increase efficiency and save costs.** Practice in the last few months has shown that we now have the technology and skillset to enable us to make a real change.

Taxpayers, court users and the legal community should push for these changes to ensure that the gains of today are not swept aside tomorrow. Virtual hearings should be utilised as much as possible given the many benefits offered and the manageable risks. Doing so will produce a quicker, more cost effective and robust service for taxpayers and users of dispute resolutions services. It will produce a service that is properly fit for the 21st century. A detailed consultation process is very much needed to determine the changes that should stay with us when we return to "normal".

This is the second in a series of thought leadership pieces considering the future of Dispute Resolution both during and after the COVID-19 pandemic. Our first piece can be found here.

More on this topic will also be covered at our Annual Litigation Seminar hosted in the Autumn. For more information contact our Mariana Mancellos.

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