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The Future of Disputes: Are Virtual Hearings Here To Stay?

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01 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.

With the implementation of mass vaccination hopefully around the corner, a return to “normal” looks like it may soon be possible. However, the question arises: what should that “normal” look like?

Figures show that more than 85% of hearings before the English Business and Property Courts were held virtually during the UK’s first nationwide lockdown.¹ However, 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, many question whether the resolution of disputes and the administration of justice should ever go back to the point where in-person hearings are the norm.

With that issue in mind, Baker McKenzie and KPMG teamed up to run a survey in September and October 2020 considering a crucial question: Are virtual hearings and mediations here to stay?

Respondents included private practice lawyers, judges, arbitrators, barristers and clients. While the survey focussed primarily on users of the English civil and commercial courts and international arbitrations, participants were based in a number of jurisdictions around the world. The survey excluded other types of legal proceedings, including criminal trials and family court proceedings.

The results formed the basis of a recent webinar of the same name by Baker McKenzie and KPMG, as part of Baker McKenzie’s Future of Disputes virtual series.

This report sets out some of the key outcomes from our survey, exploring whether digital justice is an innovation that will outlast the pandemic or merely one that will, in time, fall out of favour.



02 Overview of key observations

The key findings from our survey were as follows:



▪ **Virtual hearing experiences are generally positive:** The majority of respondents (~70%) had attended a virtual hearing since the COVID-19 pandemic began, and the vast majority of those respondents had a positive experience (only 5.8% had an unsatisfactory or very unsatisfactory experience).



▪ **Virtual hearings are preferred for interim applications:** A large majority of respondents (~70%) would prefer a virtual hearing for the next interim application in which they are involved, and 65% believed that all hearings of less than one day, not involving a jury or cross-examination, should be virtual.



▪ **In-person hearings are preferred for final hearings:** Only a small number of respondents (~15%) would prefer to have their next civil trial/hearing on the merits take place in person.



▪ **The concept of "hybrid" hearings is a popular one:** The majority of respondents (~55%) were in favour of "hybrid" hearings, which enable some participants to be present in the court/hearing room while others participate by video or telephone conferencing.



▪ **There is trepidation around virtual mediation:** The majority of respondents (~65%) were not in favour of virtual mediation, yet only 21% had participated in one. Of those respondents who had participated in a virtual mediation, most reported a positive experience.

03

Are virtual hearings here to stay?

In short, the survey results suggest that the answer is yes. In one form or another, virtual hearings are very much here to stay.

Experiences of virtual hearings

While significant investment was already being made by the English judiciary in technology and training to facilitate the conduct of virtual hearings, the COVID-19 pandemic has undoubtedly accelerated this process.

70.7% of respondents reported that they had participated in a virtual hearing since the onset of the COVID-19 pandemic, whereas only 44% had such experience in the pre-COVID era. For the vast majority of respondents, the virtual hearing experience was positive, with ~66% rating their experience as “good” or “excellent”. Cost effectiveness and efficiency are perceived as the key benefits of conducting hearings virtually. This is particularly the case in large multijurisdictional disputes as counsel, parties, experts and witnesses are no longer required to travel. 75% of survey respondents believed that virtual hearings are cheaper for the parties than face-to-face hearings.

Virtual hearings may also enable better advocacy, as remote platforms facilitate more interaction between counsel, solicitors and clients during the hearing through the use of live chat functions.

Are virtual hearings more suitable for interim applications?

Where virtual hearings were considered to be particularly useful was in the context of interim applications. The vast majority of survey respondents (~70%) would prefer a virtual hearing for the next interim application in which they are involved, and 65% considered that all hearings of less than one day not involving a jury or cross-examination should be virtual. This feedback echoes our own experience, which is that interim applications are an area where virtual hearings really come into their own, particularly where they concern commercial parties and urgent, or semi-urgent, applications, such as injunctions.

Not a “one-size-fits-all” approach

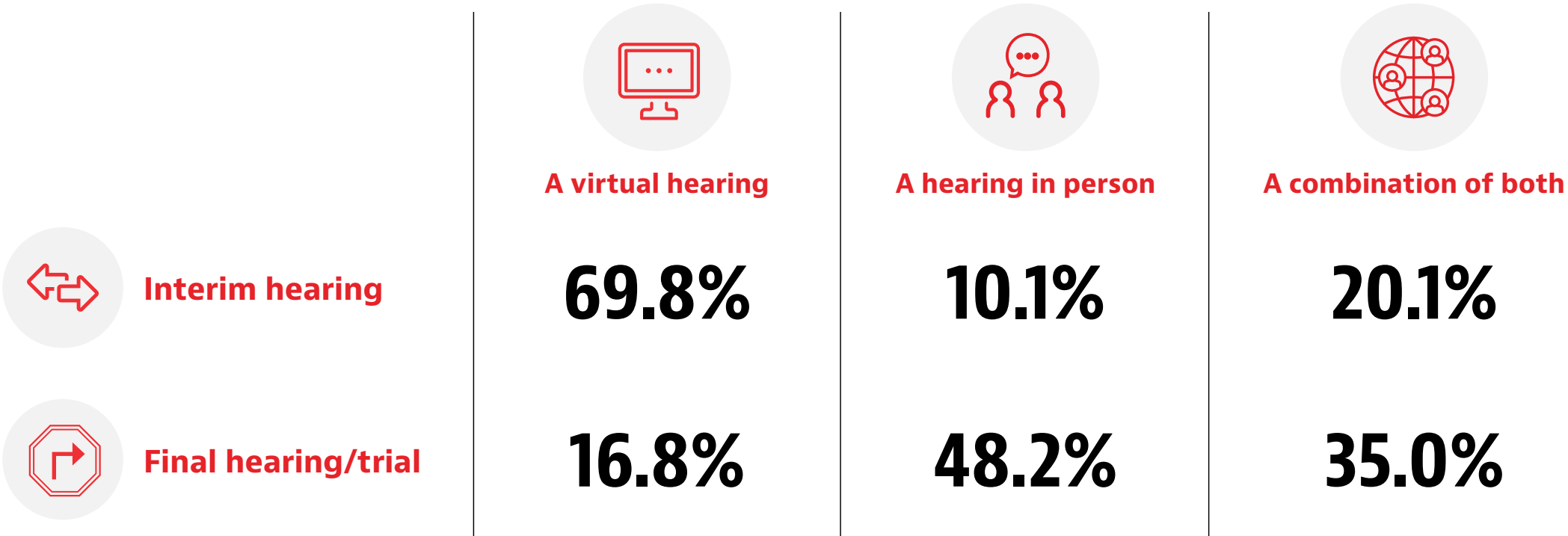
On the flipside, there appeared to be a general consensus that virtual hearings are not suitable for each and every hearing. Over 75% of respondents believed that a “one-size-fits-all” approach might not be applicable for virtual hearings, and only ~15% would prefer an entirely virtual format for a final hearing on the merits. It may be that virtual hearings work better in disputes involving technical or substantive legal issues (for instance, tax disputes) as opposed to disputes with a greater evidential content, where physical presence, e.g., for cross-examination of witnesses of fact, might take on more significance.

Popularity of hybrid hearings

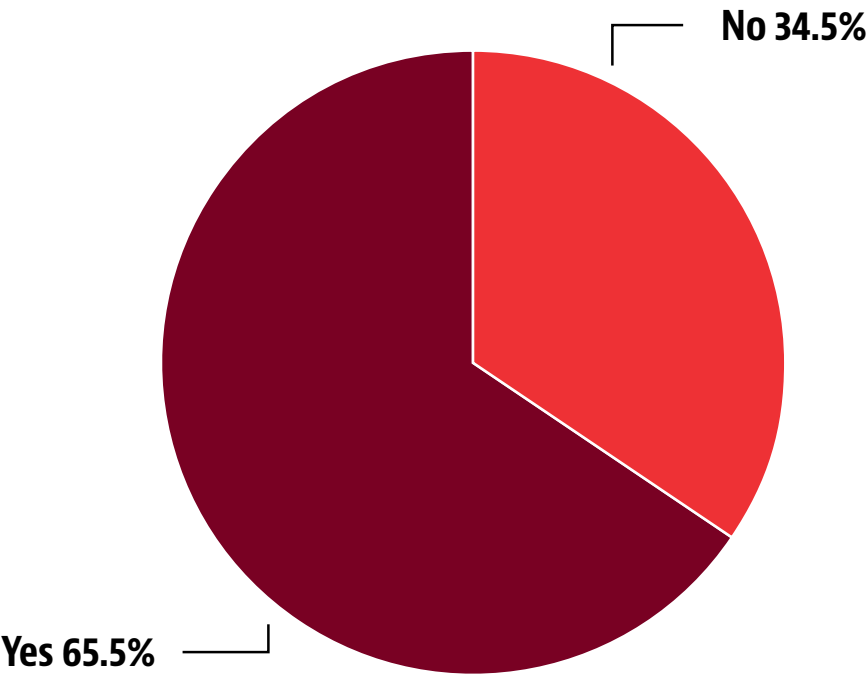
Interestingly, more than half of the survey respondents (~55%) were in favour of ‘hybrid hearings’, where some participants are in the court or hearing room and others join via video/teleconferencing. The concept of hybrid hearings is not entirely new; the cross-examination of witnesses or experts located in other jurisdictions by video-link was a relatively common occurrence in civil disputes before the English courts pre-COVID. However, the pandemic has shown that many more types of hybrid hearings are also possible.

While there are a number of reasons why a hybrid hearing may be more desirable, e.g., allowing counsel to make submissions in person and permitting some in-person cross-examination while allowing busy clients to attend remotely as needed, the concept of hybrid hearings does raise some questions around fairness and equal treatment. Close consideration will need to be given by both the judiciary and the parties themselves as to what form of hybrid hearing, if any, might be suitable for the particular dispute in question.

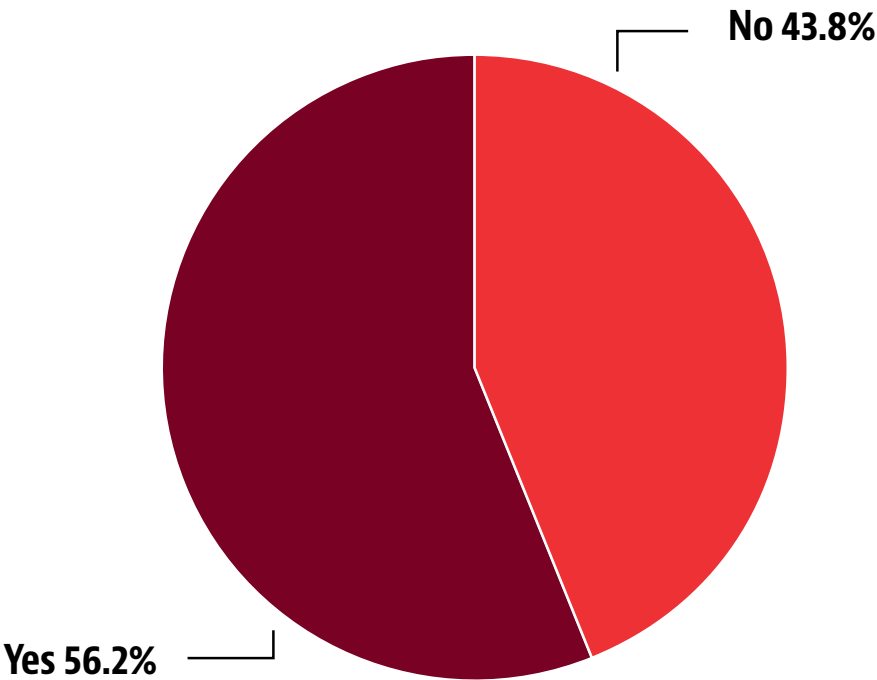
In relation to the next civil dispute you are involved in, if either option is available, would you prefer a virtual hearing or a hearing in person?



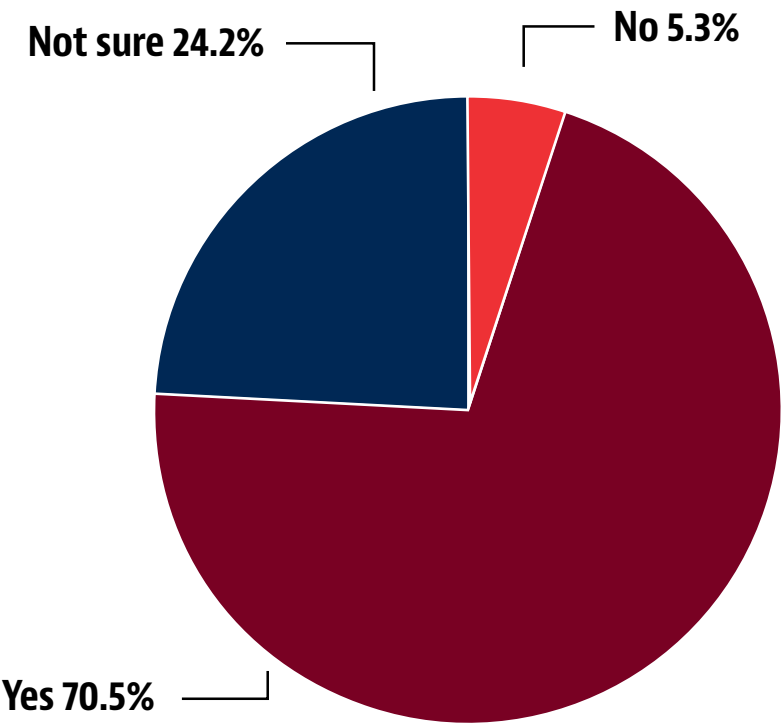
Do you agree with the following statement: “In the future, all hearings of less than one day duration, which do not involve a jury, the cross examination of witnesses or very complex documentation, should be virtual hearings?”



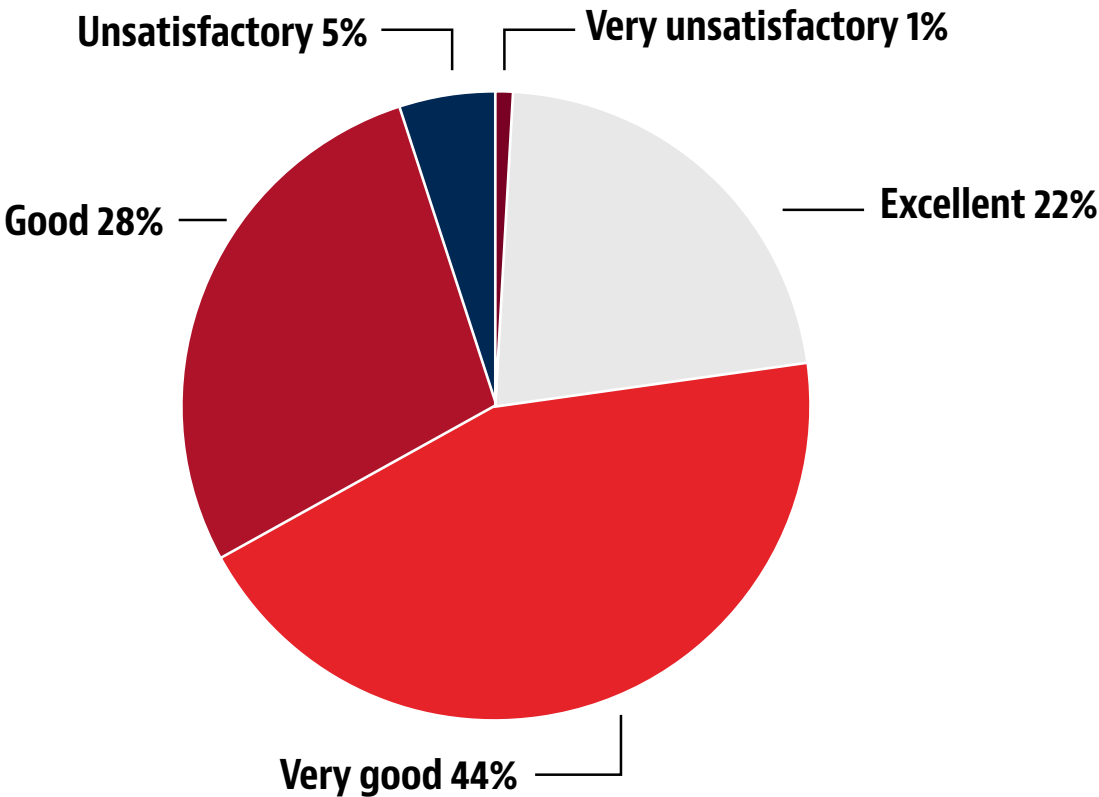
Are you in favour of “hybrid” hearings i.e. hearings where some of the participants are in the court/ hearing room and some participate by video or telephone conferencing?



Regardless of whether you have been involved with virtual hearings, do you consider that virtual hearings could accelerate dispute resolution and as a result be beneficial for your business?



How would you rate your overall experience of hearings conducted virtually?



04 Challenges of virtual hearings

We set out below some of the observations of survey respondents in relation to the challenges around virtual hearings.



46.5%

of respondents believe that it is harder to concentrate during a virtual hearing than during an in-person hearing



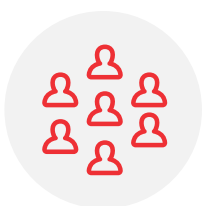
27.8%

of respondents believe that virtual hearings may be less secure/confidential



55.6%

of respondents believe that the impact of any witness cross-examination is diminished by virtual hearings



36.8%

of respondents believe that virtual hearings make it harder for the public to view court hearings



54.2%

of respondents believe that to facilitate wider use of virtual hearings, the court system will need to invest heavily in technology and training for judges



42.4%

of respondents believe that changes will be required to the civil procedure and arbitration laws in the UK if virtual hearings are to be widely used

It seems that virtual hearings present particular challenges that must be addressed and overcome in order to encourage and facilitate wider and more effective use of virtual hearings.

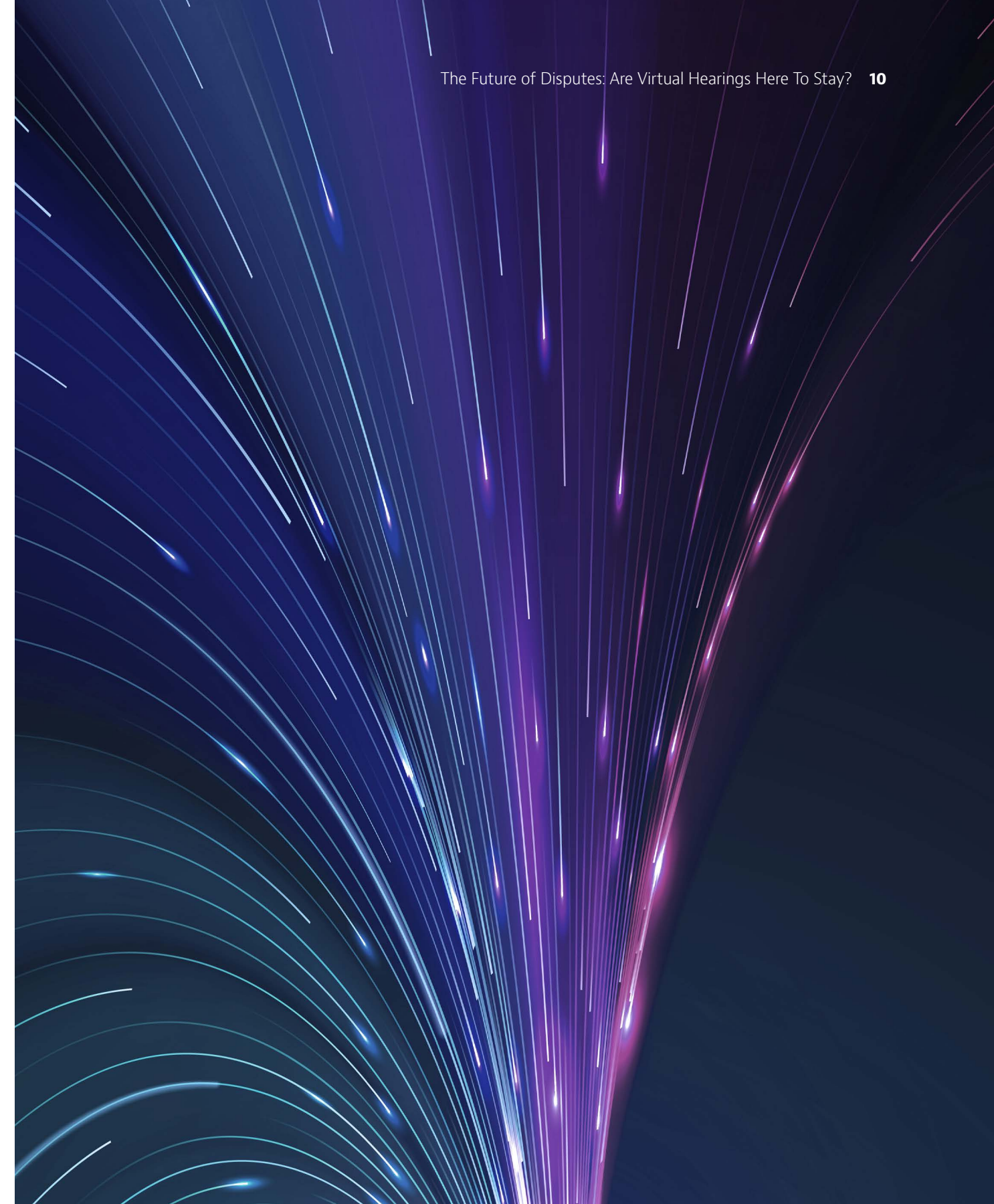
05 Rules and access to justice and open justice

42% of respondents believe that changes will be required to the civil procedure rules in the UK and arbitration rules generally if virtual hearings are to be widely used.

Clarity and consistency are key, and rules, or at least guidance, on important matters such as preferred hearing platforms, documents, the factors to consider in determining whether a virtual hearing is necessary or appropriate, and public access, can only improve the virtual hearing process.

Linked to this issue is the question of whether virtual hearings can provide the “full” court experience. As mentioned above, the overwhelming majority of survey respondents would opt for an in-person hearing for their next final hearing/trial. One explanation for this could be a desire for litigants to “have their day in court”, given the added gravity and sense of occasion that an in-person hearing provides.

Another concern about virtual hearings is that they make it harder for the public to sit in and watch justice in action. 36.8% of survey respondents believe that virtual hearings would make it harder for the public to view court hearings. Currently, the requirement for hearings to be open to the public is being met by granting press access to virtual hearings. However, this may not remain satisfactory in the long-term, particularly in cases where there is a large amount of public interest.



06 The mediation conundrum

Contrary to the overwhelming support for virtual hearings, the survey results for mediation tended to portray a different story, with respondents exhibiting a more circumspect attitude toward virtual mediation.

Given the choice, the majority of survey respondents (~65%) would prefer an in-person mediation to a virtual mediation. This is despite approximately half of survey respondents believing that online mediation is more cost-effective and efficient compared to in-person mediation.

Undoubtedly, virtual mediations share many of the same cost and efficiency benefits as virtual hearings, particularly in multijurisdictional disputes, and it does seem likely that they will continue to take place after the pandemic, albeit they may not be as popular as virtual hearings.

One important difference that should not be overlooked, however, is the fact that mediation is a voluntary process. Both parties will have to agree to a virtual mediation in order for it to take place, whereas this will not be the case for a virtual hearing, where the court or tribunal will likely make the ultimate decision. Therefore, the element of “get on board or get left behind” that exists in relation to virtual hearings is not necessarily so present in relation to virtual mediation.

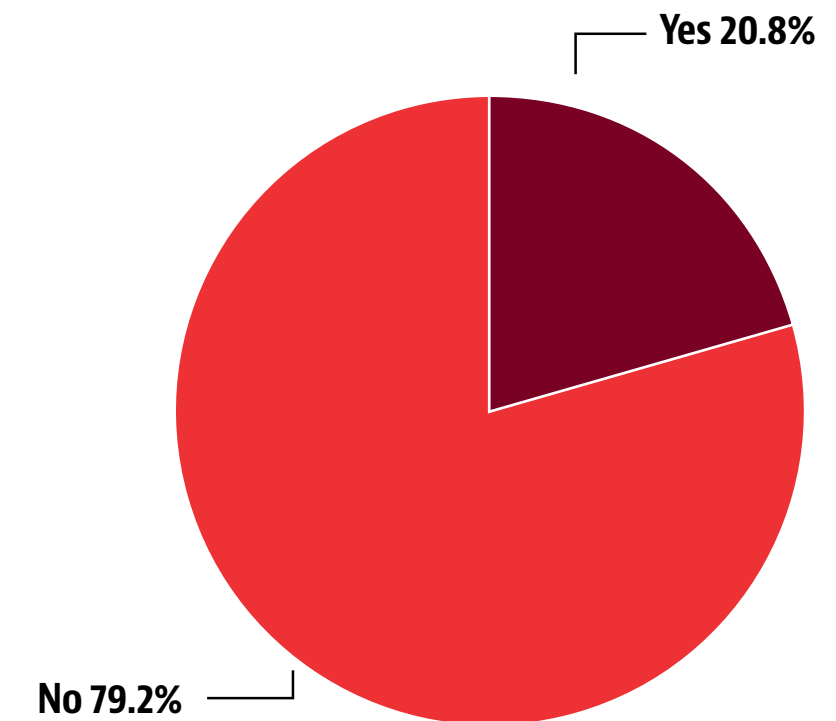
Furthermore, traditionally, mediation primarily relies on resolving disputes through persuasion and building a rapport both with the other side

and with the mediator, which may explain why the element of face-to-face interaction is viewed as imperative. Another reason for the reluctance in relation to virtual mediation appears to be the lack of appropriate resources/platforms to engage effectively in an online mediation.

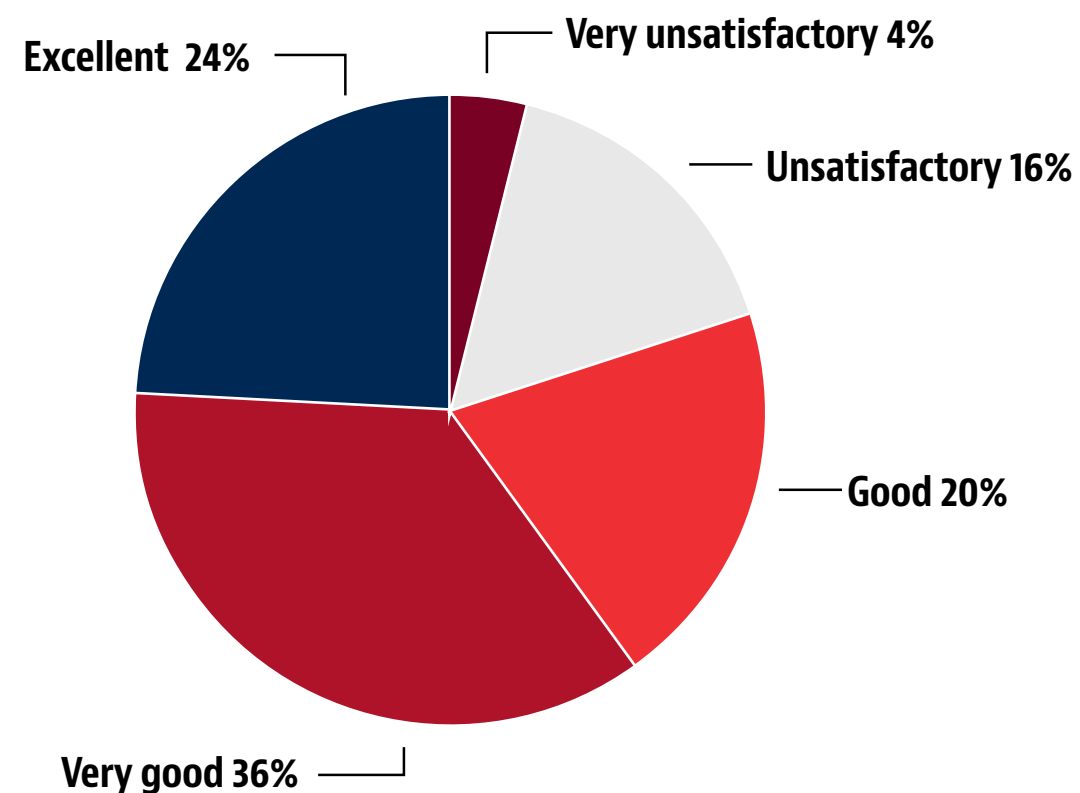
For example, only ~40% of respondents believed that they were adequately equipped to take part in one. Establishing appropriate platforms that can effectively incorporate an in-person element and increased familiarity in virtual mediation by the mediators themselves may go a long way in making virtual mediation more desirable.

Importantly, however, the trepidation surrounding virtual mediation appears to be driven by perception rather than experience, as only 21% of respondents had actually participated in a virtual mediation and, of those 21%, the majority reported having a positive experience. This matches our own experience of attending virtual mediations. Perhaps, as hands-on experience of virtual mediation increases, attitudes to the virtual mediation process will also improve, as we have seen for virtual hearings.

Have you had first-hand experience of participating in a virtual mediation?



How would you rate your overall experience of mediations conducted virtually from 1 to 5?



With which (if any) of the statements below do you agree?



Online mediation is just as effective as in-person mediation

18.6%



An online mediation is a more cost effective way of conducting mediations

48.5%



I would prefer to conduct a mediation face to face rather than online if given the option

63.9%



I currently feel adequately equipped to advise on/take part in an online mediation

39.8%

It seems that virtual hearings present particular challenges that must be addressed and overcome in order to encourage and facilitate wider and more effective use of virtual hearings.

07 The future of dispute resolution

Are we on the verge of a major reform of the English legal system? That remains to be seen. However, it seems likely to us that the pandemic will have a long-term impact on the way disputes are resolved, with virtual hearings remaining the default in the short term and, in certain circumstances, potentially the long term as well.

The ability to connect judges, arbitrators, counsel and witnesses from remote locations via a virtual set-up has allowed a level of flexibility that was previously unavailable. This flexibility, coupled with the twin benefits of cost effectiveness and efficiency, is likely to prompt more people to engage with the possibility of resolution or determination of disputes through a remote forum.

Our own experiences and the views of survey respondents tell us that virtual hearings are very much here to stay, in one form or another. Only

time will tell what precise form that will take and, if so, to what extent they might overtake in-person hearings as the “new normal”. As noted above, there still remain some key concerns with the virtual dispute resolution process to be addressed and improved.

Whatever the future may bring, it seems very unlikely that virtual hearings will be suitable for all types of hearing and dispute resolution mechanisms. There will remain times where face-to-face interaction will remain optimal, if not critical.



Further resources

If you missed our Future of Disputes webinars on virtual hearings and mediation, you may watch recordings or download the summary documents by clicking the relevant links below:

- **Are Virtual Hearings Here to Stay?: Webinar Recording**
- **Are Virtual Hearings Here to Stay?: Key Takeaways**

To view the materials from the other six topics in Baker McKenzie's Future of Disputes virtual series, [please click here](#).

Footnotes:

¹Sir Geoffrey Vos, Chancellor of the High Court, "The new normal in the Business and Property Courts post Covid-19", Chancery Bar Association Zoom Talk (3 June 2020). [Click here](#).

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