

Are virtual hearings here to stay?

In collaboration with:



STEVENS & BOLTON



One of the most significant impacts of the COVID-19 pandemic on the administration of justice has been the shift to virtual hearings and mediations. In mid-2020, Baker McKenzie and KPMG UK surveyed civil and commercial court users to explore their experience and perceptions of virtual hearings and mediations and to help answer a key question: are virtual hearings and mediations here to stay? A link to the survey findings can be found [HERE](#).

70% of the participants said they would prefer to have virtual interim hearings in the future, with over 65% in favour of all hearings of less than one day not involving cross-examination or very complex documentation being virtual. By contrast, less than 20% of survey participants were in favour of a final hearing being heard remotely (with 48% preferring an in person hearing).

With the benefit of several months of practical experience, and as part of London International Disputes

Week 2021, Baker McKenzie and KPMG UK teamed up with Stevens & Bolton and XXIV Old Buildings to explore three key questions: Are virtual hearings and mediations here to stay? What advantages might they have? What challenges do they present?

Due to their professional backgrounds, the panel was able to provide first-hand views from the perspectives of: the judiciary, clients, solicitors, advocates and experts. A summary of those perspectives is set out below.

"Virtual hearings have an important role to play in the administration of justice going forward. Their significance in terms of access to justice for vulnerable litigants in person cannot be underestimated.

Virtual hearings will be entirely appropriate in some situations and entirely inappropriate in others."

Amanda Brown QC

Benefits of virtual hearings

There are many benefits of virtual hearings that have been borne out by the panel's experience in the last year:



Interim/urgent applications are particularly well suited to the virtual hearing forum due to their often urgent nature and being less paper-heavy compared to other hearings.



Virtual hearings have an important role to play in the administration of and access to justice, especially for (vulnerable) litigants in person.



Costs savings due to the reduction in travel and waiting time.



In certain circumstances, virtual hearings can help reduce formalities and facilitate dialogue among participants.



E-bundles and associated software applications can offer greater efficiencies (if done well).

When not to go virtual

However, based on the panel's experience in the last 12 months, there is likely to be less appetite for virtual hearings (both from the judiciary and court users) when it comes larger commercial trials and complex/lengthy hearings, particularly where the following are involved:

- Cross-examination of witnesses
- translators
- significant amounts of documentation or legal submissions.

"Interim applications are often sought on an urgent or semi urgent basis, they often have less paperwork than a trial and rarely require the examination or cross examination of witnesses so, in my mind they are very well suited for virtual hearings."

Henry Garfield

Challenges

Based on the panel's experience in the last 12 months, a number of challenges with virtual hearings remain:



Issues with IT¹, infrastructure and software compatibility.



Keeping a record on who is attending the hearing.



Tracking the flow of confidential information during the hearing to avoid any leaks.



The slower pace of the hearing, often due to the loss of non-verbal cues and unexpected disruptions to the natural flow and rhythm of proceedings.



Confidentiality of proceedings is often a key reason for choosing arbitration, which is a potential area of difficulty in a virtual setting due to parties logging in on home networks, which may be more vulnerable to hacking and cyber-attack.



Witness testimony and giving evidence remotely raises a number of issues: (1) internet connection stability (2) ensuring that the witness is focused on the issues at hand; (3) ensuring the witness is able to be effectively cross-examined by counsel; and (4) ensuring the witness is not relying on notes or assistance.

¹ In relation to IT, this February it was reported in the Judicial Attitudes Survey that 95% of judges have access to reliable Wi-Fi in their courtrooms; the use of e-bundles rose from 42% to 55%, while usage of the e-Judiciary communication platform shot up from 55% to 99.8%.

Mediation

In the survey conducted in 2020, less than 65% of survey respondents were in favour of mediations being held virtually, yet only 21% of respondents had actually participated in a virtual mediation. However, as expected, the practical experience has been more positive. The panel's practical experience of remote mediations has largely been better than anticipated by the survey findings.

Virtual mediations are often more efficient as they allow participants to join from various parts of the world. However, there will continue to be cases where virtual




mediation is not appropriate, particularly in instances when aggrieved parties require face-to-face interaction to reach a favourable settlement.

"One of the downsides is that you lose the connection with the rest of the legal team and your client... it is much harder to replicate relationships that form out of face-to-face interactions.

However, virtual mediations offer greater flexibility and are much more adaptable."

Heather Murphy

Practical tips to address some of the challenges of remote hearings

	1. Plan ahead	Most IT-related challenges can be overcome with effective project management and planning. Ensure the tech integrates with other systems and software to avoid potentially costly last minute workarounds.
	2. Witness preparation	Witnesses require careful and specific preparation for virtual hearings, tailored to their specific needs. Keep a checklist of issues that may need to be addressed, for example: <ul style="list-style-type: none">- Does the witness have a stable internet connection;- are they in a different time zone - if so how will that be dealt with;- is there potential for distraction from the hearing e.g. construction and maintenance works, family members, etc.;- is it sensible to book a private room for the witness to give their evidence from; and- ensure the witness understands how to give evidence in a virtual setting (i.e. they should act as if they are sitting in the court room).
	3. Know your audience	If confidentiality is relevant/ important, ensure a roll call is taken each day so participants are aware of who is attending to avoid inadvertent confidentiality breaches.
	4. Safety first	Put in place effective systems and controls to help track the flow of confidential information e.g. use of passwords and encryption.
	5. Channels of communication	During the hearing, parties will need to communicate with counsel and their team members. Consider creating separate and distinct channels to communicate with your team e.g. a group chat (via a messenger app) or "break-out" rooms in the virtual platform.

"There was certainly a perception at the beginning of all of this that preparing for a virtual hearing would throw up almost insurmountable technical obstacles for a profession not widely known for its IT skills and knowledge! The reality is that a lot of the challenges can be overcome by meticulous preparation and project management."

Sarah Murray

Contacts

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"A key factor in ensuring hybrid hearings are fair is assessing which participants should be in court and which should appear virtually"

Charles Thomson

