

June 2021

## Virtual hearings: here to stay?

### One year on

It has been almost a year since litigants, courts and tribunals were forced to adopt “virtual” hearings due to the COVID-19 pandemic, but the message from the Lord Chief Justice is clear: “*courts and tribunals must continue to function*”.<sup>1</sup>

In this article, we consider the reaction to the use of virtual hearings by the Courts of England and Wales and the response from arbitral institutions and trade associations. We also ask Max Lemanski, a partner in our offshore practice, to share his experience of virtual hearings during the pandemic and offer a view on whether there will remain a place for them in the post-pandemic world.

### The reaction from the Courts of England and Wales

The Courts have been determined to ensure that the administration of justice is maintained, and that hearings are tried in a manner that is as close to the pre-pandemic norm as possible.

Indeed, a little over a week after Prime Minister Boris Johnson’s statement on 16 March 2020 that people should avoid all non-essential contact, the Master of the Rolls and the Lord Chancellor signed Practice Direction 51Y to the Civil Procedure Rules. Amongst other things, the Practice Direction clarified that the Court could exercise the power to hold a remote hearing in private where it would not be possible for the hearing to be broadcast simultaneously in a court

building (i.e. the power to derogate from the principle of open justice).<sup>2</sup>

However, even when hearings have been made accessible to members of the public, the Courts have expected parties to act in a way that maintains public trust and confidence in the judiciary. For example:-

- (a) Notwithstanding that certain cases are being heard virtually, the law against the taking of photograph and video footage in Court has not changed.<sup>3</sup> As an example, the BBC was recently found to be in contempt of court and fined £28,000 for having recorded six seconds of video footage from a virtual hearing that it then broadcast on one of its television news programmes.<sup>4</sup>
- (b) In another case, a law firm was reprimanded for sending a video link to a virtual hearing to some of its clients abroad, without the Court’s permission and without any application having been made. In normal circumstances, a judge could see and hear everything that is going on in court, which enabled him or her to maintain order, discipline and control. Once live streaming or any other form of live transmission takes place, it is easy to see how the court’s ability to maintain control might be diminished.<sup>5</sup>

As to the technology employed, Courts have “[expected] *those involved to roll up their sleeves or to go the extra mile*” and to “*use imaginative and innovative methods of working...*”.<sup>6</sup> This far into the

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<sup>1</sup> <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/>

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<sup>2</sup> <https://www.judiciary.uk/announcements/practice-direction-on-video-or-audio-hearings-in-civil-proceedings-during-the-coronavirus-pandemic/>

<sup>3</sup> Section 41 Criminal Justice Act 1925

<sup>4</sup> *In re BBC, R (Finch) v Surrey CC* [2021] EWHC 170 (QB)

<sup>5</sup> *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)

<sup>6</sup> *Municipio de Mariana & Others v BHP Group Plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC)

global pandemic, Courts appear to have little tolerance of litigants' lack of technological know-how.

By way of recent illustration, in *BNM Parkstone LLP v Khazai*,<sup>7</sup> the High Court allowed an application for the adjournment of a 9-day trial fixed for October 2020 due to inadequacies in the claimant's electronic trial bundle. The lack of an easy system of navigating between documents referred to in witness and expert reports, among other things, cost the claimant delays in the trial date (it is not expected to be relisted until 2022) as well as a costs order being made against it.

### The response from arbitral institutions and trade associations

At the beginning of the pandemic several prominent arbitral institutions, including the LCIA, the ICC and SIAC, issued a joint statement explaining:

*"[t]he joint ambition of our institutions is to support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay...".*<sup>8</sup>

The LCIA and ICC have both issued new arbitral rules since then, with the former coming into force on 1 October 2020 and the latter on 1 January 2021. Both sets of rules now make explicit reference to the possibility that hearings may be conducted remotely using video conference facilities.<sup>9</sup>

SIAC is expected to release the seventh edition of its arbitral rules in the third quarter of 2021 and to this end, subcommittees have been established to consider new technology and new procedures.<sup>10</sup> In the meantime Katherine Yap, the Chief Executive of Maxwell Chambers (a dispute resolution complex in Singapore) commented recently that the use of virtual and hybrid hearing services had increased by more than 90 per cent in the six months up until October 2020.<sup>11</sup>

GAFTA (the Grain & Feed Trade Association) has also updated its arbitral rules (effective for contracts from

1 September 2020) to allow a possibility for virtual oral hearings in first tier and appeal arbitrations. It is interesting to note that this is reserved for "exceptional circumstances where ... the majority of the tribunal and board members are unable to travel to the designated place of hearing ...". This approach may be attributable to the fact that lawyers are not permitted to attend hearings unless the parties agree. The parties may be represented by a trade representative, however, and it is yet to be seen whether those individuals (as well as any witnesses and/or experts) would be entitled to attend virtually.

### Virtual hearings in practice

Max Lemanski, a partner in our offshore practice, had a week-long arbitration trial in June 2020, conducted under the LCIA Rules and hosted by the International Dispute Resolution Centre (IDRC) in London. We asked him to share his experience.

*Q: What technology did you use for the trial?*

A: We used a combination of the IDRC's own video-conferencing software, as well as LiveNote for transcription and Opus for trial bundles.

*Q: Was there resistance by any party to having a virtual hearing?*

A: Not really. The trial was originally fixed for April 2020 but we agreed with our opponents to postpone it to June 2020 in order to help everyone prepare and get accustomed to unfamiliar technology. I participated in some hearings at the beginning of the pandemic where there was some initial resistance (some parties alleged virtual hearings may prejudice a party's access to a fair hearing) but it wasn't as if parties had much other alternative, so the hearings went ahead.

*Q: How conversant was each party with the technology used at the trial?*

A: Everyone was fine with using the technology, including the tribunal, who had the IDRC assisting them with everything (we also made sure they had hard copy trial bundles).

What I would say is that no matter how conversant a party is with using the technology, it does have inherent weaknesses. For example, cross-examination is trickier and possibly, slightly less effective than if it had been carried out in person, as it is harder to "read" the witness and the tribunal.

<sup>7</sup> [2020] 9 WLUK 355

<sup>8</sup> <https://www.lcia.org/News/message-from-the-institutions-arbitration-and-covid-19.aspx>

<sup>9</sup> Article 19(2) of the LCIA Arbitration Rules, and Article 26(1) of the ICC Rules

<sup>10</sup> <https://www.siac.org.sg/69-siac-news/669-siac-announces-commencement-of-revisions-for-siac-arbitration-rules>

<sup>11</sup> <https://www.straitstimes.com/singapore/maxwell-chambers-turns-to-virtual-hearings-amid-covid-19>

*Q: Where were the parties based? Were there any issues with time zones?*

A: Fortunately, the other parties were based in Norway and the Netherlands, so there weren't any major issues with time zones.

*Q: Were there any technical hitches or problems?*

A: Not really. We did a lot of work in advance of the trial (for example to do with the trial bundles), but this is the sort of preparation you would need to carry out in advance of a hearing in-person in any event.

*Q: Do you have any tips or recommendations for parties in using virtual hearings?*

A: First, the preparation differs slightly and you need to make sure you establish suitable means of communication with your clients and the advocates in advance (for example WhatsApp doesn't work efficiently if everyone is using it). Secondly, you should expect that everything is going to take longer – people need to take more breaks and, as mentioned, it isn't as effective for the advocates.

*Q: When circumstances return to normal, do you think virtual hearings will still have a role to play?*

A: Virtual hearings are not as efficient as in-person hearings, especially when it comes to complex cross-examinations and getting a "read" on the tribunal and the other side, however they can offer significant cost savings, particularly if the attendees are attending internationally. On balance, I think people will prefer to travel to attend in-person hearings but there will be situations where having the option to have a hearing virtually will be very helpful. My guess is that when things return to normal in-person hearings will be more popular, but virtual hearings are here to stay.

## Here to stay?

As the saying goes, necessity is the mother of invention. Courts and tribunals, both here in England and internationally, have responded remarkably well in short order to adapt to the challenges posed by the COVID-19 pandemic. A question remains, however: what role will virtual hearings play when travel and contact restrictions are lifted?

It is possible that the judiciary will be in favour of retaining virtual hearings as a means of accelerating

smaller cases through the Courts, and reserving in-person hearings for larger trials.

Indeed, one of the advantages of virtual hearings is that it places less of a burden on the Courts or arbitration venues for physical space to conduct hearings. When coupled with its inherent flexibility, the technology could become very attractive for urgent hearings, such as injunctions.

At the same time, however, it is arguable that virtual hearings will never replace the "gold standard" of live, in-person cross-examination of witnesses and experts where, as mentioned, it is easier to get a "read" on the witness.

People have praised the possible benefits of virtual hearings in the fight against climate change and it's easy to see why: there is no need to fly all litigants, witnesses and their respective legal teams to a hearing venue. At the same time, with international arbitration comes the likelihood of international time zones, and the possibility of holding substantial hearings across two or more differing time zones brings its own challenges. Perhaps, therefore, virtual hearings will still be common, but for hearings with shorter time estimates and minimal factual witness evidence.

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