

FUTURE OF DISPUTES

# Are virtual hearings here to stay?

Tuesday 10 November, 4.00 - 5.00 pm GMT

## Key Takeaways...

### from Baker McKenzie's Future of Disputes spotlight session

2020 has been a year of profound change for us all. Every aspect of our lives has been affected by the COVID-19 pandemic: the way we work, socialise, shop, and even the way we resolve disputes and administer justice have all been subject to significant change. 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<sup>1</sup>.

The crucial question is: are virtual hearings (and virtual mediations) really here to stay? Baker McKenzie and KPMG teamed up to run a survey considering that very question. The survey gathered observations on this topic from a range of viewpoints, including private practice practitioners, judges, counsel and clients<sup>2</sup>.

#### 1. Are virtual hearings here to stay?

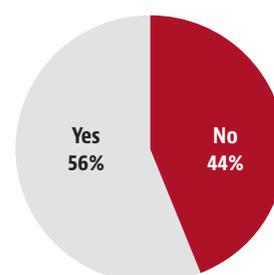
**Interim hearings:** Almost 70% of respondents said they would prefer a virtual format for interim applications in the next civil dispute they are involved in. Our experience demonstrates that applications for interim relief, which are often urgent, require little paperwork and rarely require cross-examination of witnesses, makes them perfectly suited to virtual hearings and we expect that such applications will continue to be heard virtually in the future.

	A virtual hearing	A hearing in person	A combination of both
Interim hearing Row %	69.8%	10.1%	20.1%
Final hearing trial Row %	16.8%	48.2%	35.0%

**Costs and convenience:** Virtual hearings can be advantageous from a costs perspective, especially because counsel, parties, experts and witnesses are no longer required to travel, which is particularly relevant in multi-jurisdiction disputes and facilitates a greater choice of counsel and experts.

**Access to justice:** One concern about virtual hearings is that they make it harder for the public to sit in and watch justice in action. Virtual hearings also require all participants to have access to a computer, camera and good Wi-Fi. Care will need to be taken to ensure such issues can be dealt with.

**Hybrid hearings:** More than 55% of respondents were in favour of so called "hybrid" hearings, which offer select participants the chance to be present in the court/hearing room whilst others participate by video or telephone conferencing. A key factor in ensuring such hearings are fair will be assessing which participants should be in court and which should appear virtually.



<sup>1</sup>Sir Geoffrey Vos, Chancellor of the High Court, "The new normal in the Business and Property Courts post Covid-19", Chancery Bar Association Zoom Talk (3rd June 2020). (<https://www.judiciary.uk/wp-content/uploads/2020/06/ChBA.NewNormal.ff.pdf> )

<sup>2</sup>The survey focussed primarily on users of civil and commercial courts and arbitrations and so is not reflective of other types of proceedings, such as criminal trials or family court proceedings.

## 2. Challenges of virtual hearings

**The “full” court experience:** The overwhelming majority of survey respondents (83%) 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”. Other possible explanations include ‘Zoom fatigue’, particularly for those final hearings lasting weeks or even months.

**IT infrastructure:** On the technology front, our experience of virtual hearings has been remarkably positive. However, approximately half of our survey respondents (46.5%) considered that IT issues are likely to disrupt virtual hearings. A similar number of survey respondents indicated that more investment in technology and training for the judiciary would be needed if virtual hearings were to remain commonplace.

**Seeing is believing – Cross-examination:** A crucial part of the final hearing process is cross-examination, a process which is made more challenging when done virtually. However, judges are trained to listen carefully to the evidence and focus on inconsistencies in the oral evidence being given. Non-verbal signals, such as body language, play a very limited role in the judicial assessment of evidence. However, the ability for witnesses to have access to notes, be coached through an

online chat function or through having unauthorised persons present in the room while giving evidence is certainly a risk and is likely to remain a key concern for court users and judges.

## 3. Are virtual mediations here to stay?

**The case for virtual mediations:** 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. Our own experience of virtual mediations has been broadly positive. It may be that the popularity of virtual mediation increases over time, as and when more litigants and practitioners try and test this method.

## 4. Concluding thoughts

Virtual hearings have played a crucial role in the administration of justice for commercial parties during the majority of 2020. Based on the results of our survey and our own experience, it appears that virtual hearings are very much here to stay for the long-run, in one form or another. Of course they will not be appropriate in every case but we expect to see virtual hearings continue to be used particularly for shorter, interim hearings that do not require significant or contentious witness evidence and large amounts of documentation.



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