

## CORONAVIRUS: DISPUTE RESOLUTION IN A 2D WORLD

Covid-19 has brought dramatic new challenges to parties seeking to resolve their disputes. The dynamics of in person persuasion, argument, even confrontation, have been replaced by virtual communications, where different approaches are needed, whether it be in the early stages of negotiation of a dispute, mediation or before a judge or arbitration panel.

### Initial escalation

When parties fall out, they will typically try to resolve matters before initiating proceedings. Commercial agreements sometimes provide for each party to appoint a senior representative to meet the other side to try to negotiate resolution. During the present pandemic, the English Court will likely still expect the parties actually to meet, even if they cannot do so in person. It might suit one party to defer meeting but we would expect the Court not to consider it reasonable for that to continue indefinitely – no one knows how long the pandemic will disrupt normal working life, but it could easily be six months or more. The Courts are carrying on business virtually when they can, and will expect commerce to do the same.

When parties meet virtually, the personal dynamic will be different because they will lose the benefits of physical proximity. It is possible, but more difficult, to develop empathy through the screen, even on the telephone. You will need to listen closely to what is being said, how it is said and to watch out for any clear body language signals. Those signals might sometimes be clearer on screen than they would be in person and could be rather telling. Some studies even suggest that it is easier to tell if someone is dissembling on the telephone than it is in person.

And listen out with greater attention than usual for what is *not* said. This can sometimes be more important than what is said expressly. Perhaps the other side will come across as less robust than they were in writing ahead of the meeting. What does that tell you about their real concerns and objectives?

Think about how you present your legal and commercial position in a 2D world. Sharing bits of paper with key points is out, but "sharing your screen" may work just as effectively. The key difference is that it will be harder to do many things *ad hoc*; good preparation is essential.

In a virtual world, honing your presenting and listening skills and developing an acute awareness of all that you can see on screen might make the difference between negotiating a successful outcome and failing to do so.

### Key issues

- In-person dynamics have dramatically changed now that we are all on screens
- Listen out for what is said but also for what is not said
- Prepare in advance any documents to be "shared on screen"

Without warning, we are all now locked into a virtual world of staring through the keyhole of the camera lens into each other's homes. We will rapidly need to adapt how we present, and how we listen to, what is being said in negotiations, mediation or in court – **Jeremy Kosky, Partner, Commercial Litigation, London.**

The English Courts will want to be seen to make use of virtual hearings to ensure that urgent hearings, e.g. for freezing injunctions, can go ahead and justice can continue to be done – **Matthew Scully, Partner, Civil Fraud, London**

## Mediation

The magic of mediation is that the relevant decision makers all invest time and money preparing for, and attending, a series of plenary and own-party meetings over the course of one or sometimes two days. That level of personal investment and engagement, coupled with a thoughtful and driven mediator can create a compelling environment for resolution of your dispute. Real world mediations often succeed, if not on the day, in the days or weeks afterwards.

So, what are your prospects of successful mediation in a world of social distancing? Early signs are not discouraging, although the impact of remote working on mediation will depend on the dynamics of the mediation and the relationship between the parties. We have seen parties readily accepting that virtual mediation is better than none at all.

We have also seen mediators grasping the nettle and using the available technology to replicate different rooms for plenary and own-party sessions. The technology is certainly there to make virtual mediation possible. Clearly, the parties are not locked into the process in quite the same way that they might be in a real world mediation but proponents of virtual mediation would suggest that that may not be a wholly bad thing. Parties will readily be able to work on other projects during the course of the mediation and will not feel that the whole day has been "lost" if there is no settlement at the end of it.

The process may also be cheaper – for instance, no travel costs. And advocates for virtual mediation point out that there will not be a sense of pressure to conclude the mediation at midnight, with no deal or a bad deal, for fear that the parties will not be able to meet again for a while. In a virtual world, if some progress is made on the day, senior executives will not be travelling and their diaries might be easier to navigate to convene follow up discussions to bring the process to a more satisfactory end.

But again, in a virtual mediation, all those listening and presenting skills which we mentioned under Initial Escalation will be at a premium. Moreover, certain disputes will present particular challenges, including those where there is a degree of ill-feeling between the parties that a face-to-face confrontation may actually help to address. And requiring parties to spend significant time at a common venue focusing on settlement free from distractions usually helps to prepare them to make the necessary concessions to achieve settlement. At the very least, the weight of expectation of settlement at the end of a one or two day summit tends to focus the mind: those travelling to a face-to-face mediation may push harder to reach settlement if they wish to avoid having to bring back the bad news that the mediation was a waste of time

Time will tell how successful virtual mediations are but the one certainty is that they involve a change in dynamics and parties will need to approach them differently.

## Courts and Arbitral Tribunals

If the parties cannot resolve matters themselves, how will the Courts and Arbitral Tribunals cope in a virtual world?

Two weeks ago, the Lord Chief Justice released a statement that "*it is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt*".

In the days that have followed, the Courts have issued a "*Protocol Regarding Remote Hearings*" (most recently updated on 20 March) and have even expanded the Civil Procedure Rules to include a new Practice Direction 51Y on "*Video or Audio Hearings During Coronavirus Pandemic*". On 26 March the Insolvency and Companies Court issued a statement indicating that "*all hearings are adjourned generally with liberty to restore on an urgent basis*". But, the Business and Property Courts show no signs of following suit, their cause lists show numerous hearings "remotely by Skype", "remotely via telephone conference" or similar, with little, if anything, taking place in person.

Parties and their advisers may try to adjourn their hearings until in person hearings return as the norm. But the judges are understandably not keen to let matters slide, at least in relation to hearings listed to take place imminently. Mr Justice Teare rejected an adjournment application recently, concluding that:

*"... it would not be right simply to adjourn the trial fixed for next week to some unidentified date in the future. The courts exist to resolve disputes... The default position now, in all jurisdictions, must be that hearings should be conducted with one, more than one, or all participants attending remotely ... It is the duty of all of the parties to seek to co-operate to ensure that a remote hearing is possible".*

Our early experience is that virtual hearings may be a viable substitute in some cases, especially when limited to advocates' submissions. It is likely to be more difficult where the parties are tendering witnesses and experts for cross-examination although even in these cases, the courts are keen to proceed wherever feasible.

During the course of in person trials, witnesses are sometimes tendered to give evidence by way of video link, but these tend to be the exception to the norm. If the issues involved in the case are sensitive or hostile (e.g. allegations of negligence or fraud), the ability to rebut evidence through cross-examination might be hampered if the cross-examiner, witness and judge are all in different places.

One of the challenges of the current approach to virtual Court hearings is how that sits with principles of open justice. Judges are working hard to find ways to deal with this too, with the result that we are aware of at least one trial being broadcast on YouTube.

The Courts may find the experience of the major arbitral institutes such as the LCIA and ICC helpful. The arbitration world has developed more extensive protocols than the courts to facilitate hearings by video-conference. The international nature of many of the disputes that go to arbitration, coupled with the more informal atmosphere in an arbitral tribunal, have meant that there is greater familiarity with remote working in arbitration. But in practice, it remains relatively uncommon for virtual hearings involving oral evidence from witnesses and experts.

And there is of course a significant difference between conducting a hearing remotely pursuant to a protocol among participants sitting in different professional offices and what we have now: individual communication from people's homes. First, there are varying levels of equipment in use and different levels of broadband/wifi performance. Secondly, safeguards are needed to ensure witnesses are not being assisted "out of shot". Thirdly, conferring amongst the team during the hearing is more difficult.

It is of course possible to overcome all of these logistical challenges but it is not straightforward.

It is open to parties to elect to arbitrate their disputes even if there was no express arbitration agreement at the outset of their commercial relationship (by agreeing an *ad hoc* submission, possibly retaining rights of appeal on points of law). However, as the Courts become more familiar with remote working, parties are likely to make that election on the basis of considerations other than receptiveness to hearings by video-conference, notably confidentiality and tribunals with specialist market experience.

### **After Covid-19**

The Courts and Tribunals Service is currently working on a £1 billion reform programme focused on incorporating new technology and modern methods into the administration of justice. One of the key aims behind this programme is to reduce demand for physical hearings.

Without much prior warning, we are all now locked into a virtual world of examining paperless bundles and staring through the keyhole of the camera lens into each other's homes. Parties are adapting fast to this new ecosystem. We have been impressed by the early adoption by the English courts of virtual hearings and the no-nonsense attitude of the judiciary to keep the wheels of justice rolling.

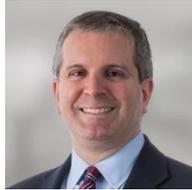
Outside the court room, parties will adjust to the challenges of virtual negotiations whether bilaterally or mediation-assisted. But they will need to adapt how they present and how they listen to what is being said in these new settings.

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