

DIGITAL DISPUTE RESOLUTION LAWYERS OF THE NEXT GENERATION



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The Dynamic of the digitised Courts

The world has changed over the course of a few months and, with changes in the world, come changes in law. The legal sector had to adapt in short order to the restrictions imposed by COVID-19. In England and Wales, as early as March 2020 courts were using technology to allow participants to attend remote hearings. With more limited virtual alternatives, this situation exacerbated an already overburdened legal justice system. The response of the legal profession was to leverage tech-based solutions to keep the wheels of justice moving, including online mediation. Advances in technology, brought to the foreground during and in the wake of COVID-19, reignite the debate about how such developments may remove barriers to access to justice.

The role of virtual courtrooms during and after COVID-19

The move towards a more digitised court environment has long been considered inevitable yet it was the 'real-life experience' of the pandemic that forced the imperative.

In 2016, Lord Justice Michael Briggs evaluated the potential for online courts, noting that the legacy IT systems at the time were in need of a makeover. That observation might now seem prescient.

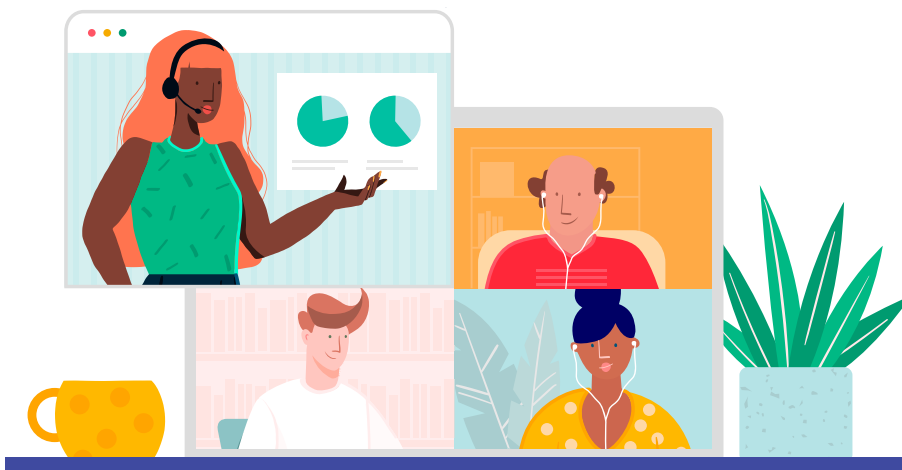
National Bank of Kazakhstan & Anor v The Bank of New York Mellon & ors [2020] EWHC 916 (Comm) is an early example of how technology was deployed in a virtual hearing. In anticipation of a lockdown, the parties were directed to attend a hearing on 19 March 2020 and against the defendants' submissions that the trial should be adjourned. This case is symptomatic of a 'no nonsense' approach to moving to full virtual trials, in appropriate circumstances.

Responses to the pandemic have tested the courts' digital preparedness. Even before the pandemic, the courts were using video links in appropriate circumstances which do not necessitate a physical hearing. However, there were concerns about the capacity of video links to meet increased demands, especially if they are being used for evidence.

The pandemic has seen the growth of comprehensive commercial virtual trial solutions of which the writer has experience, comprising services such

as video-conferencing, live streaming, e-bundling and transcription. Providers including Epiq Global, Opus2 and Sparq have developed their pre-pandemic offerings to cater for the increased demand. As yet, the courts in England and Wales have yet to declare a provider of choice. It may be anticipated that the emphasis will be on functional equivalence where factors such as reliability, security, confidentiality and comprehensiveness will govern technology choices.

The oral tradition in advocacy in England and Wales means that we are not yet seeing the 'mainstreaming' of virtual courtrooms for the foreseeable future. The pandemic has shown that technology can and does yield efficiencies which would have been scarcely credible only eighteen months ago and this is here to stay. The move to virtual environments is not a linear move to ubiquitous virtual hearings but, rather, a transition to a more hybridised courtroom with enhanced digitised functionality.



The role of virtual mediation in the wake of COVID-19

Significant agility has been shown by the judiciary and litigants in participating in video-hearings. More radical shifts are required to manage the impact on both existing and pipeline cases as the full effects of COVID-19 play out.

Mediation is an accepted method of dispute resolution and anecdotally enjoys a 4 in 5 success rate. It uses a neutral third party through a series of joint and individual meetings with parties to disrupt entrenched positions and reach settlements based on mutually converging interests.

Whilst modern technology has the potential to make virtual mediation as accessible and effective as its real-life form, mediators and advisors need to familiarise themselves with necessary protocols. The skills that they have honed in traditional forms of ADR in a physical environment will need to adapt as digitisation presents new opportunities.

Many of the disputes emerging from the crisis raise specific issues but others including B2C and some B2B disputes will have elements of uniformity. Mass claims dealing with common issues need to be dealt with in a way that provides quick, easy and cheap access to settlement. Business interruption insurance claims might be a prime candidate for bulk resolution. To translate this into practice, common issues or categories of mass claims can be identified and could be mediated through online panels. Similar programmes have found success in the US in the wake of natural disasters such as Storm Sandy and Hurricanes Katrina and Rita.

As social distancing measures in one form or another will be a fact of life or prudent for the foreseeable future,

in-person mediations will not always be the medium of choice. This puts the spotlight on virtual solutions while recognising that an element of training and openness to using technology will be required to equip mediators and advisors with the necessary skills to navigate a new platform.

The areas of growth and opportunity in legal disputes resolution

In addition to COVID-related disputes, other areas of law which were previously under-explored that may see growth are legal technology and social media regulation. There is an imperative to have digital solutions to deal with disputes with customers over cancellations and delays, employment disputes, education law disputes and with the inevitable economic hit, insolvency, mental health law and family law.

Government regulations aimed at flattening the COVID-19 inflection curve inevitably lead to businesses finding it impossible or extremely difficult to perform their contractual duties. Parties affected by the pandemic may find relief if their contractual agreements include “Force Majeure” clauses. In the absence of such protective clauses, many businesses find themselves in breach of their arrangements unless they can rely on general doctrines such as that of frustration.

The lockdown caused most if not all live entertainment and sporting events to be postponed or cancelled indefinitely. As political and social pressure mounted on organisations not to place staff on furlough or lay-off, there may be a greater push towards wage cuts. This has the potential to cause more disputes than are reported.

The virus has led to unprecedented peace-time restrictions on public liberty and enjoyment. The Coronavirus Act 2020 prohibited public gatherings, restrained free movement and allowed for enforced closure of businesses. It did so without directly compensating businesses for the ensuing economic losses, albeit other support schemes have been put in place to alleviate the economic burden.



While few would question the need for resolute action, the longer lockdown lasts, and with its iterative 'stop – start' nature, the more likely it is that these assumptions are to be challenged. Private groups and the Opposition decried a lack of an exit strategy within the earlier lockdown, which could conceivably have been used as a basis for a public law challenge. The appetite to challenge public bodies will have increased as a result of successes in cases arising from EU withdrawal.

The pandemic crisis is also a representation of how dynamic the judicial landscape is. The courtroom has seen a transition in the type of cases in the last years and the last few months suggest these trends are not relenting: cases of increased commercial disputes, cyber-fraud, financial services disputes, and data-privacy breaches are some visible changes which courtrooms can anticipate in a post-coronavirus world and which the writer anticipates are not a temporary aberration.

The role of AI and other advances in technology in legal dispute resolution

Artificial intelligence (AI) and other advances in technology has been used extensively in legal practice and provides opportunities to deliver and access legal services in ways previously unimaginable. These innovations represent the nearest that the legal world has come to a sci-fi drama.

An effective civil justice system is based on the rule of law, where the law must be fair, accessible and enforceable. There are well documented obstacles to accessing justice. In England and Wales the Legal Services Research Centre (LSRC) commissioned surveys between 2001 and 2011 involving more than 5000 participants to explore whether they had experienced problems in accessing justice. Cost is a major barrier.

Advances in technology have unleashed automated document generation or information provided via chatbots in order to provide free or cheaper access to legal information. There are practical limitations of chatbots regarding more complex areas of law.

Predictive analysis draws on big data to forecast the outcome of a case and advise clients whether to proceed, effectively substituting an individual lawyer's experience, assessment and intuition. Decisions predicated on such tools could result in cheaper outcomes than pursuing cases with limited prospects of success. Predictive analysis based on reported cases will cover a small subset of actual disputes given that over 90% of disputes do not see final judgment. This raises some doubts about the robustness of the data used and insights derived at least currently.

The Future of the Digitised Courtroom

Despite the exigencies of the pandemic, the courts of England and Wales have remained open for business, albeit in a more digitised form. This suggests some resilience not only in addressing the immediate situation of the pandemic, but some cause for optimism that the attractions of litigating in the jurisdiction will continue. While it may be difficult to contemplate, at least presently, that machines will replace lawyers, developments in technology have potential to reshape some parts of legal practice.

