



## Virtual hearings interview series

# Jane Jiang and Sir William Blair

December 2020

**Jane**

Good morning, Sir William. Thank you very much for joining us today. I doubt an introduction of you is needed, but would you like to say a few words about yourself?

**Sir William**

Well firstly, good afternoon Jane; here in London it's great to be talking to you in Shanghai, and I hope you've had a good day – ours is just getting underway.

My background is as a commercial lawyer, I was in practice for quite a long time. My field of specialism is banking and finance, but I do a broader range of commercial work. I became a commercial judge here in London in 2008 and was on the bench for about ten years; since then I've been back in practice, both as an arbitrator and also have a professorship at London University and various other things I do with our central bank here in England, for example.

**Jane**

Thank you, Sir William; you have been very busy with your life, and you have many roles you have played that will be very interesting for this conversation. Just a quick introduction: I am Jane Jiang, a litigation partner at Allen & Overy based in Shanghai; so that's me.

As you know, Sir William, A&O conducted a survey on virtual hearings this summer; we reached out to about 200 internal respondents, and 100 external respondents, to get a sense of their experience of virtual hearings. The results of the surveys are quite interesting: we have sent the survey to you. I would really like to hear your take on some of the survey results.

First of all, could you perhaps give us an overview of what your experience has been with virtual hearings so far?



## Sir William

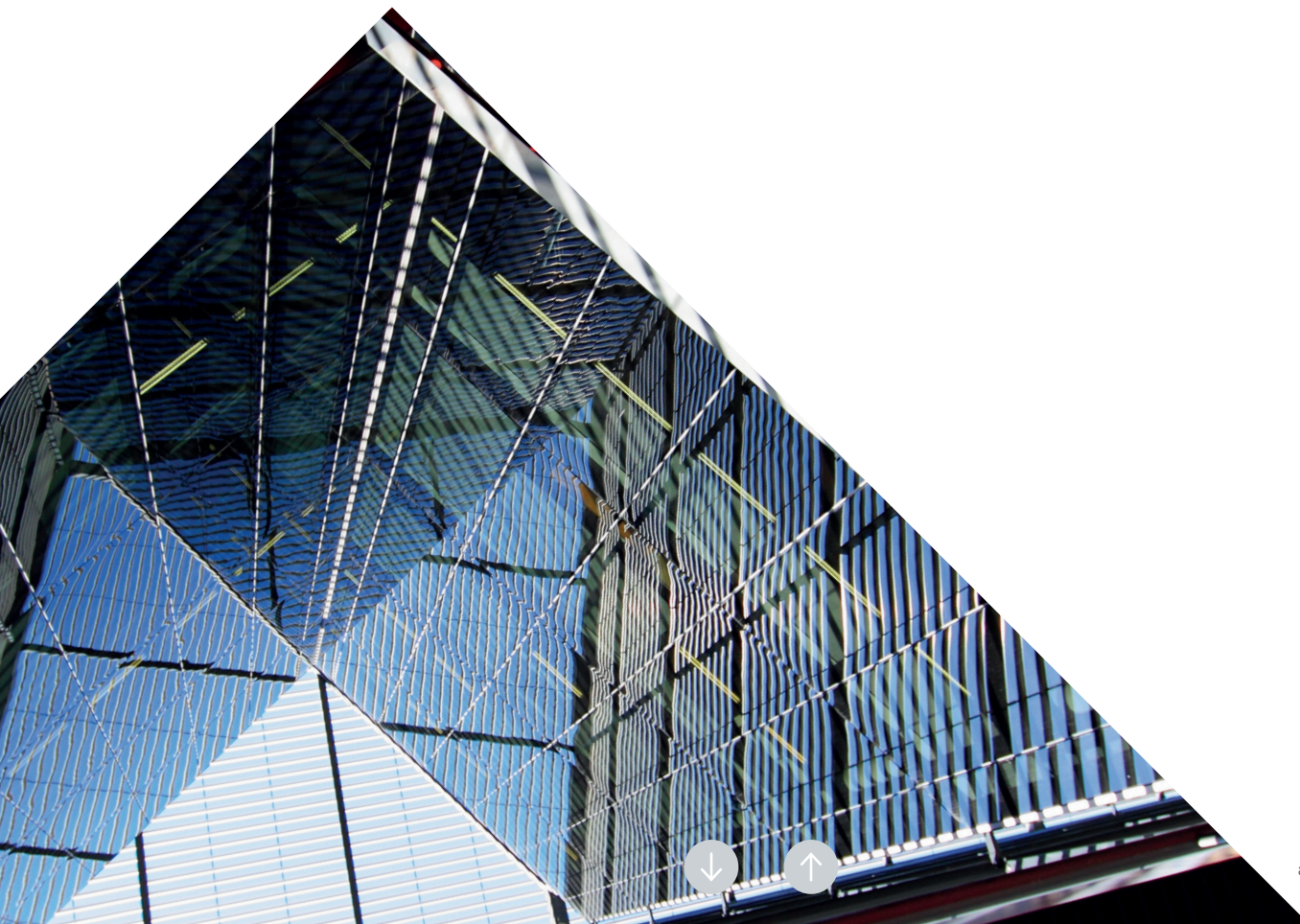
First of all, it's a very interesting survey that Allen & Overy has done. I think what's really useful about it is that it's broken down so much – so you can see responses not only by the type of practitioner that's being asked, but also subject-by-subject.

Let me go back a little bit and make this point. Virtual hearings didn't start in 2020. My experience is of telephone hearings over, really, quite a long period of time both in court context for urgent hearings, the arbitration context for procedural hearings, and in the regulatory context for procedural hearings as well, that tend to be short, but they were very common.

So what really changed in 2020 was that this became a complete experience, with the video aspect brought in as well; so this was what's new, if you like. My experience so far as 2020 is concerned is that I've had a number of hearings; they've been partly procedural, they've been partly substantive; they've been in the court context and they've been in the tribunal context; and they've been on a number of platforms, WebEx, Skype and Teams – I think Skype is gradually being phased out, and Teams is taking over.

## Jane

It sounds like you've had quite a lot of experience, I would bet were quite different experiences as well. As we can see, we had very different responses from our survey respondents. One thing that strikes me is that the majority of them, I think 112 survey respondents, feel that the fact that the hearing took place virtually as opposed to physically did not have any impact on the ultimate result of the hearing; only 14 respondents felt that the result was impacted. I mean, no matter what difficulties they've gone through, whether it's good or bad, they feel the result is not impacted. Sir William, what do you make of that? Does that mean that, in fact, in the end, that the justice is done? It doesn't impact or impair justice? What's your sense of that?





**Sir William**

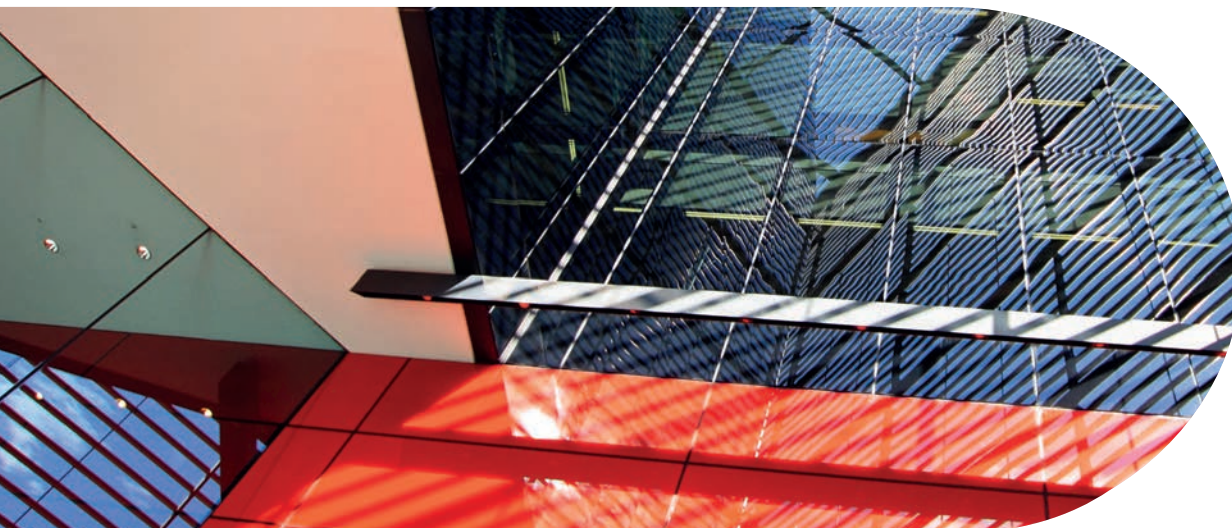
Yes, that's my take as well, Jane. I think it would be disappointing if we were in a place where we thought that the way that the hearing was delivered affected the result; so I think that's my experience too. Perhaps just one qualification though: you may be able to fit a smaller result into a virtual hearing than you might be able to do in a live arbitration room or a courtroom – there's perhaps less flexibility to add as you go along to the result; but yes, in principle that's been my experience as well.

**Jane**

You probably recall we asked the respondents about many aspects of virtual hearings, and how those aspects are affected by how the hearing was delivered. One of the most controversial aspects of virtual hearings seems to be the perceived impact on oral witness evidence, and the ability to read witnesses, judges or arbitrators. I think we have two-thirds of the respondents consider that their ability to read witnesses, judges or arbitrators was impacted by a virtual environment; that's quite a large percentage. Personally, I've heard from many advocates complaining about this aspect of virtual hearings. You've been an advocate, and a judge, and an arbitrator: what is your feeling about taking oral witness evidence?

**Sir William**

Right; so there are two important points there. Starting with oral witness evidence: it's quite important to bear in mind that this has been done by video long before 2020. In my experience as a judge, a commercial court judge, we quite frequently would take evidence by video; and if, for some reason, the witness was unable to fly to London, or sometimes there were visa problems, that kind of thing, the evidence would be taken by video. I don't really think, Jane, that there were any what I would call 'major' problems with that. There are certainly problems like coaching the witness, problems about making sure that the evidence is given with the proper integrity, that kind of thing. And there is always the problem for the witness of an unfamiliar environment: there's nobody there from the law firm, for example, to make the witness feel more comfortable – do you see what I mean? – so the witness is coming into an environment that is very unfamiliar, and I think that can be quite difficult...





**Jane** Intimidating.

**Sir William** Intimidating is exactly right. And you don't have the same opportunity as an arbitrator, or a judge, who is actually there to make the witness feel more at home; so there is that. But having said that, those are things that can be dealt with. It is true that counsel often say that cross-examination of a witness who is giving evidence by video is less effective and less easy, and that may be correct. But remember: there's much more to evidence than just cross-examination. The idea of oral evidence is that the witness gets an opportunity to tell his or her version of what happened, so far as relevant. I don't really think that that suffers, frankly, through coming over the video; I gather there's been problems, but as I say, relatively low-scale compared to the advantage you get of a witness being able to participate remotely and get the evidence that way.

**Jane** Absolutely.

**Sir William** So the other point you made though is a different one; and that goes to the reading the tribunal, or reading the judge, and that is an essential part of advocacy: all good advocates are very attentive to how their points are going down with the tribunal; and yes I think it is genuinely more difficult to do that. For one thing, in an arbitration it's harder to see the three faces on the screen at one time; it's easier if you're actually looking in their direction. I think it's fair to say it goes in the other direction as well – I'm speaking now as an arbitrator and judge – it's harder for us to read the advocate. Sometimes there is human messaging, we're all familiar with that, which doesn't quite translate exactly onto Zoom.

**Jane** Yes, that's right. I think at one point, one judge made a very interesting point: he said actually, for him, seeing people up close and personal on a screen [it] is much easier to read the person's expression, rather than the witness standing in a box far away. He said "my age is advancing, I can't really see what's really on his face" – so it cuts both ways. Also some advocates were saying they can't sense the room; I think it's the aggregation of the feeling from everybody, you kind of lose a little bit that aggregation.

**Sir William** They are both fair points. Although actually the witness box tends to be only a few feet away, so it's usually not that hard to see.





**Jane**

So, it looks like the oral witness evidence is the largest issue. But there are also other difficulties cited: for example the management of large volumes of documents, and the presentation of complex factual arguments. What do you think about them? Are they less challenging, or equally challenging?

**Sir William**

Actually I think the most challenging thing about remote hearings, or virtual hearings, is the documentation. In commercial cases, as you know very well, documentation is heavy and the main challenge now. We've come quite a long way on that, I think. There are now protocols for how documents are to be presented to tribunals; and of course the tribunal itself, in procedural orders, can give directions as to how documents are to be presented. But fundamentally, the position is straightforward: the documents have to be in a form that they're easily navigable, and they are searchable in the context of a hearing, where you can't have long breaks while people find documents; that's really important.

Here I think we've got things that we can learn from paperless hearings, which certainly courts have been doing for quite a long time – speaking anyway of the commercial court in London (not for every case, by the way). It's ideal really that, when parties refer to documents, they come up on the screen, so that the tribunal can see them, indeed everyone can see them. Also, when the transcript arrives at the end of the day, if links are put into the transcript to the documentation, then that saves the tribunal or the judge a lot of time when it comes to the award or writing the decision, because they can go straight to the document. That's not something you can very easily do in a live transcript; but it is something that can be done at the end of the day. I certainly think, Jane, that any hearing that doesn't have the documentation issues resolved in advance is going to struggle at times and these issues can in fact be dealt with now in a quite straightforward way.

**Jane**

I think so too. I mean with the technology now available and as long as people prepare in advance, and have an agreed set of protocols on how to present and how to call up documents, I think that's entirely a solvable problem. So hopefully it's like anything else: it's prepare, prepare and prepare – and that's the important part of going to a virtual hearing, I guess.

So, knowing that people are still trying to get used to it, a lot of them say to me "I'm looking forward to Covid-19 passing and then we can go back to the old days" – what do you think, what's your view of virtual hearings actually being 'the future', as opposed to being a short-term fix to the problem posed by Covid-19? Would you welcome it becoming a part of our future in the legal profession?



**Sir William**

I think that's really the big question, because Covid-19 will pass. Just as a matter of background: already technology was beginning to impinge in the legal process, but quite slowly, I think... That varied from country to country: [in] China, as you know very well, the judiciary has made a very big effort over recent years to introduce technology into the courtroom context, and that I think has been...

**Jane**

Yes.

**Sir William**

... quite successful. I think it's been a bit slower in arbitration, actually?

**Jane**

Yes – surprisingly.

**Sir William**

Surprisingly, I think, because people would say well I did it the same way last time, and the time before, so I'll do it the same way next time, and the time after.

What Covid-19 has done is really propel what was an existing trend into real overdrive: because the alternative to virtual hearings is backlog. It's very important to understand that. It applies [in] a slightly different way to arbitration and to the courts. It's the same kind of problem – that you end up at the end, say, of 2020, or indeed the end of 2021 or 2022 – and you're far behind with the courts, the docket, or for arbitrations, you know, hearings not taking place, awards not being given; this must be very bad. So it's really moved forward very well; I think the people are at the stage now of getting comfortable with the technology. You have to be prepared for mishaps – links going down, people suddenly disappearing, maybe in mid-sentence, and so on – that is going to be with us for quite a long time, because WiFi is not a perfect medium, it's a medium that gets interrupted. We're all much more relaxed I think now – if we suddenly disappear, okay, we come back again – that makes for a more relaxed environment.

But I think what the real heart of your question is, is it going kind of influence more than just delivery? Do you get to a place where the virtual hearing actually makes a contribution? Now I think that is the really interesting point, because if we can see this not just in that kind of negative sense of coping with the global shutdown that pandemics produce, but making our commercial dispute resolution better – particularly better for the people who really matter, who are the parties and their disputes and their commercial relationships, and all these things – then we're starting to move into positive territory, and that I think is really quite promising.



**Jane**

I agree. I think that one particularly interesting test is to ask the clients whether they are happy that a virtual hearing is available versus that we have to stick to physical ones; I think the survey really shows the vast majority of clients are happy, and this is demonstrating that the parties want to get the dispute resolved as quickly and as efficiently as possible. Maybe not as perfectly as their advocate or their solicitors wanted them to, but it's a result and that's important: they can move on with their lives, especially in the context of commercial disputes, I think this is something important to remember. As you said, a virtual hearing effectively contributes to the efficient resolution of a dispute.

**Sir William**

I very much agree with that. To go back to an earlier point that you made, of course the client, the party, can see more clearly what's happening. If you take the arbitration context then the parties are around the table and it's much more close-up; but a courtroom is different. What it does, in a way, is it brings a kind of equality; because everyone has got exactly the same view. So I think party satisfaction is important in the way you mentioned. Crucially, there are the two big complaints about international commercial arbitration that we all know about: one, the time it takes; and two, the amount it costs. I think we have to try to do a bit better than just saying, well we're saving on airfares – of course we're saving on airfares, but that's not a very ambitious goal. We should really be looking at the technology to see how we can draw it out to bring real gains, how we can draw it out to get things done more speedily, how we can draw it out to cut costs in a real sense. And I think here your point is very important, that the longer things take, really the less satisfactory the outcome for everyone.

**Jane**

Absolutely. As you are also speaking of other benefits, in our last interview it was also mentioned that potentially, if you could do a hearing virtually, you would have a larger talent pool to choose from in terms of expert witnesses, in terms of arbitrator availability, and it opens all sorts of possibilities and a bigger choice of people that you could work with for those hearings. I thought that is also an interesting point, especially being a female with children, I would think it would be something that is very welcome.

**Sir William**

Well first of all I think it would be very, very welcome to increase the pool of arbitrators in the way you mention. There has been a gender problem with international arbitration for a long time, a lot has been done to address it now, and this could help in that regard. I think also – we're now down to a purely practical thing – but anyone who has tried to fix a hearing date for an international arbitration runs into endless problems with availability, and if you don't have to take into account travel, then that actually makes a big practical difference. But there's another point as well and I think this goes to the substance of it: if we can use the technology to persuade people to make it all a bit shorter – so counsel, their submission is just a little bit shorter, the evidence is just a little bit briefer – so you concertina the hearing in a shorter timeframe, then it's easier to get heard and finished.





**Jane**

Absolutely; the survey respondents, they also quote screen fatigue for example as a challenge they're facing. I think the large majority of them would propose a two-hour hearing, or at least to take a break every two hours. So if you think of a two-hour section, then you can almost fit it into any day, and then the availability of a hearing slot potentially really grows.

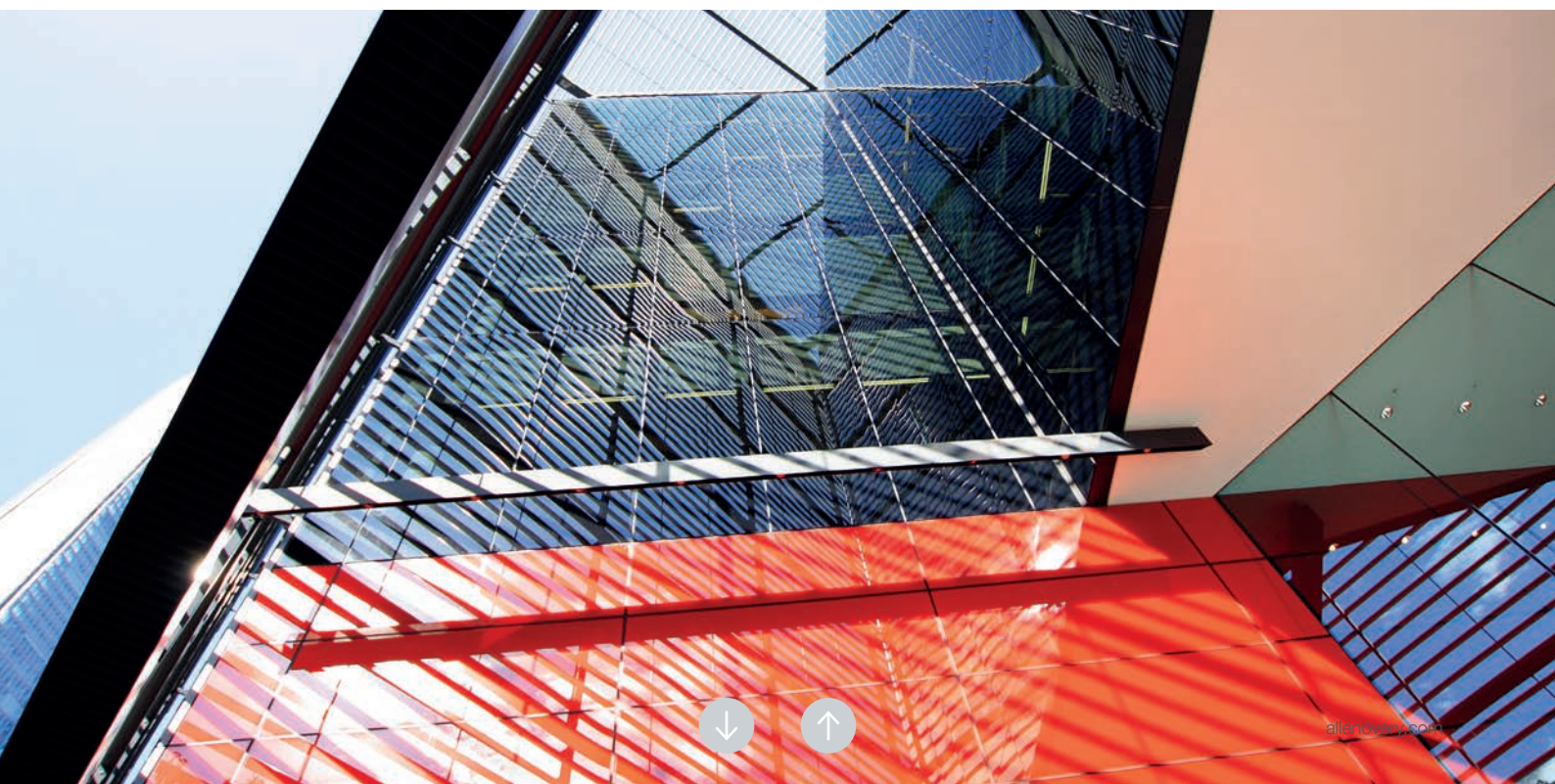
**Sir William**

Breaks have been quite common anyway, because transcribers need breaks. There again, the time can't be far off, Jane, where we have AI systems that give a near-perfect transcription in real time, and so you won't the break for that reason. But I agree with you: you certainly do need a break from sitting at a screen and I personally think that two hours is the absolute maximum; most experienced people who give webinars say that by an hour and a quarter most people have gone anyway. You can't leave a hearing in the same way just because you're getting tired, but it's not fair on people to chain them to the screen; they need to refresh themselves, they need a break. Even if you allow for all that, you can get more done.

One thing we haven't mentioned – but of course you're very much aware of it – is, we said at the beginning you're in a Shanghai evening, I'm in a London morning. It gets quite complicated if someone is in New York and someone is in Hong Kong (as I have had recently), because someone has got to get up very early and someone has got to stay up very late. The problem is not so much that people are not prepared, for example, to stay very late; but you do have to be a little bit careful that you don't overdo it, so that people aren't being asked to function in the middle of the night in a way that they can't properly function. These are issues we're all going to get so familiar with – we'll be able to sort them out and live with them.

**Jane**

Yes, absolutely. I have only one last question to ask you; I think we have covered it but just in case you have any other thoughts: based on your experience, can you call out one benefit of making more use of virtual hearings, moving forward, and one potential disadvantage? Do you have anything particular in mind, in addition to what we talked about just now?





**Sir William**

If I could put it the other way around and say “risk”. I think we’ve got to be a little bit careful we don’t fully miss the human element: justice is a very human thing, and it’s a very important thing for humans. So we must never allow the technology to take over: it always has to facilitate and the aim is to have better hearings, in the true sense of that word. So I think that’s the first point I’d make.

Now, just in terms of benefit, I’m going to make a point which perhaps may develop, but I hope that, as we think again about what we’re doing – not just tinkering, but in the post Covid world – start to ask ourselves serious questions about how we are doing the whole dispute resolution process. Because they’ve been doing that in other fields of life: this is going to affect the way life is done through the world. Commercial dispute resolution is just a tiny aspect of that; but I would say if we can come through this by placing more of an emphasis on conciliation at an early stage, so that – particularly parties, particularly parties with ongoing commercial relationships – do understand that conciliation is there, there is no need to get locked into a dispute if you don’t have to, and all the professionals involved try to create a climate to enable that; if we could reach for that, that really would be a big contribution.

**Jane**

Yes, absolutely. In the last interview, we were also talking about alternative dispute resolution [and that it] is going to be more popular; instead of going straight into court or into arbitration, people will think twice, think at least more about reconciliation and not because of the procedural difficulties and everything posed by Covid-19. So hopefully that is a good thing, to get people [to] start thinking, actually there is not one way to resolve a dispute; and that would be one thing good to take away from Covid-19.

Thank you very much Sir William. That’s all I have for today; and it’s really interesting to share all those experiences. I’m a little bit off the record now, but I think actually virtual hearings probably have less issues in China, because we don’t have such adversarial style court proceedings, and then you don’t have extensive witness cross-examination and the documents are not as heavy, I would say, without the process of disclosure. So I think it’s a lot easier for our system to sort of warm up to virtual hearings than your system. But hopefully all of us will catch up in due course.

**Sir William**

Thank you Jane, it’s been really nice talking to you.



# Contacts

## Interviewer



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Partner – Shanghai

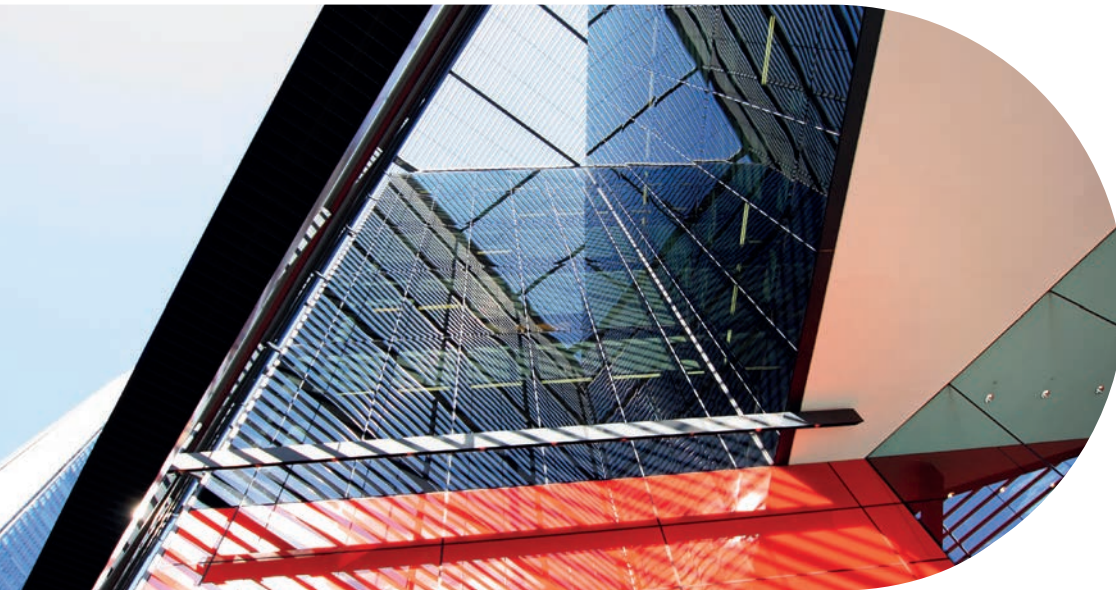
Jane Jiang is an accomplished litigator with extensive experience across international arbitration, litigation, debt restructurings and recovery, and disputes concerning financial products, in addition to regulatory investigations. Jane is well versed in the legal, regulatory and commercial environment in China and the general regulatory environment relevant to Chinese financial institutions and corporates around the world. This sensitivity to the cultural differences relevant to cross-border business transactions involving Chinese parties makes her a unique asset in the resolution of disputes with a Chinese nexus. Jane is qualified in England and Wales and has worked in A&O's London, Hong Kong, Shanghai and Beijing offices.

## Interviewee



**Sir William Blair**  
Professor of Financial Law and Ethics – Queen Mary University of London

Sir William Blair is a leading expert in commercial law and dispute resolution – he has served as Judge in Charge of the London Commercial Court, and is now an arbitrator member of 3 VB Chambers. Professor of Financial Law and Ethics at Queen Mary University of London, he is Chair of the Enforcement Decision Making Committee of the Bank of England. As well as arbitration, he sits as a judge in the Hong Kong SAR and Qatar, and is a member of the International Commercial Expert Committee of the Supreme People's Court of the People's Republic of China.



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