



Virtual hearings interview series

Kirsten O'Connell and Kate Davies

January 2021

Kirsten

Good afternoon, I am here with my partner Kate Davies in London – I will ask Kate to introduce herself, just to give some quick background before we dive in.

Kate

Thanks Kirsten! Good afternoon or good morning depending on where you are in the world. I'm Kate Davies, I'm a partner in the international arbitration group in London and I'm here to talk about virtual hearings of which I've had the privilege of being involved in quite a few now. Privilege or misfortune, depending on your viewpoint.

Kirsten

That actually sets us up quite nicely, because there's a pretty big divide on that. One of the things we wanted to start with is your experience. Virtual hearings really kicked off in earnest, certainly for merits hearings, as a result of the pandemic and you have been involved in quite a few – would you tell us a bit about your experience with virtual hearings over the past year?

Kate

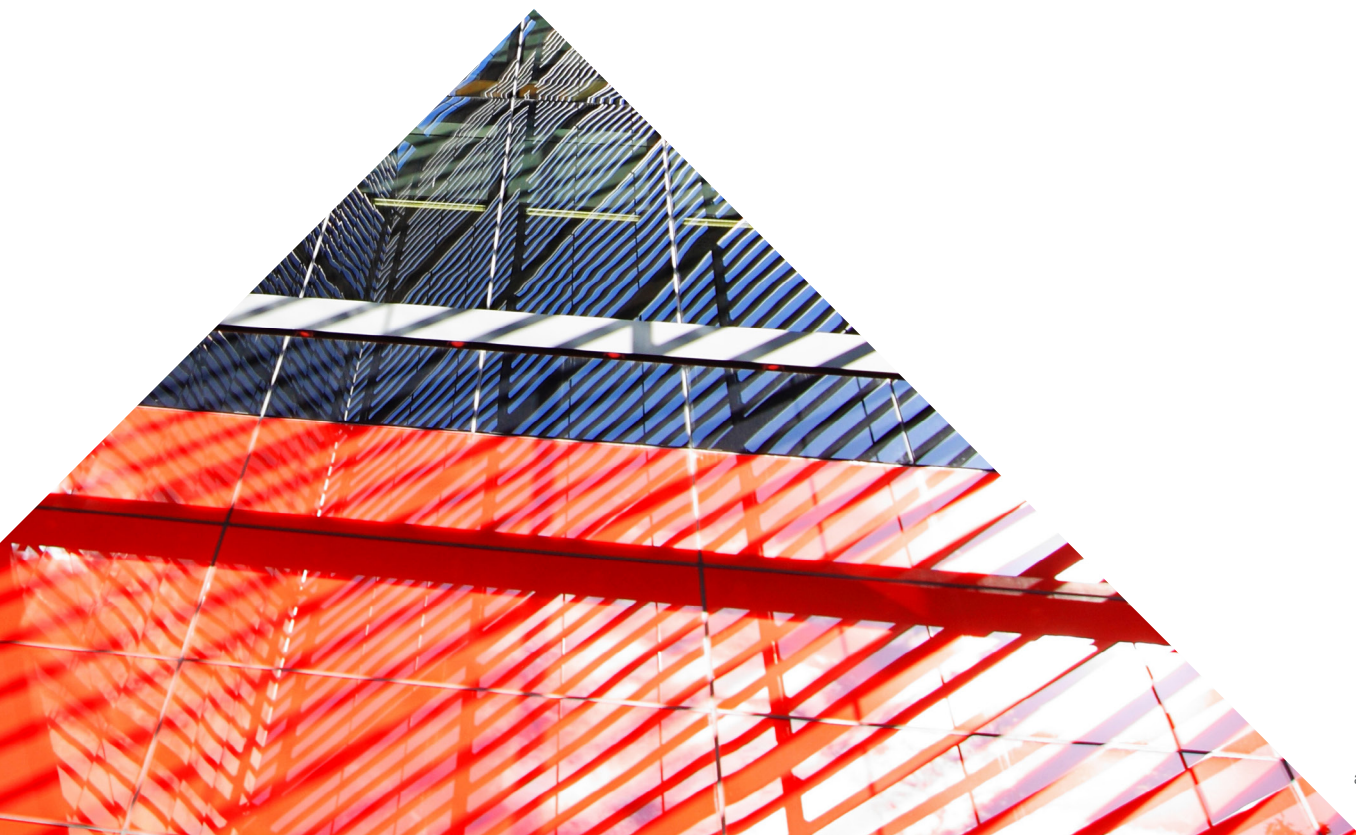
So I've done three merits hearings and I've lost count of the number of procedural virtual hearings that I've done over the course of the last year and, as you say, directly as a result of the pandemic. The two main merits hearings that I was involved in were both high-value, highly complex, very involved matters, involving a number of witnesses across a number of different jurisdictions. They both – I think interestingly, in relation to a number of the issues that seem to come up regarding virtual hearings – they both involved issues of fraud or bad faith which tend to be the sorts of issues that people say can only be dealt with and resolved in person. That was certainly something that was said to me many, many times over at the start of the pandemic. I think indeed a number of trials, both arbitration hearings and court trials, were deferred on the basis that the issues involved were fraud issues and therefore could only be dealt with in person as a matter of fairness. I think views have shifted on that pretty considerably and certainly in my experience.

Kirsten

Your hearings with those issues at stake, were the hearings held virtually on a consensual basis, were the parties in agreement that they should proceed?

Kate

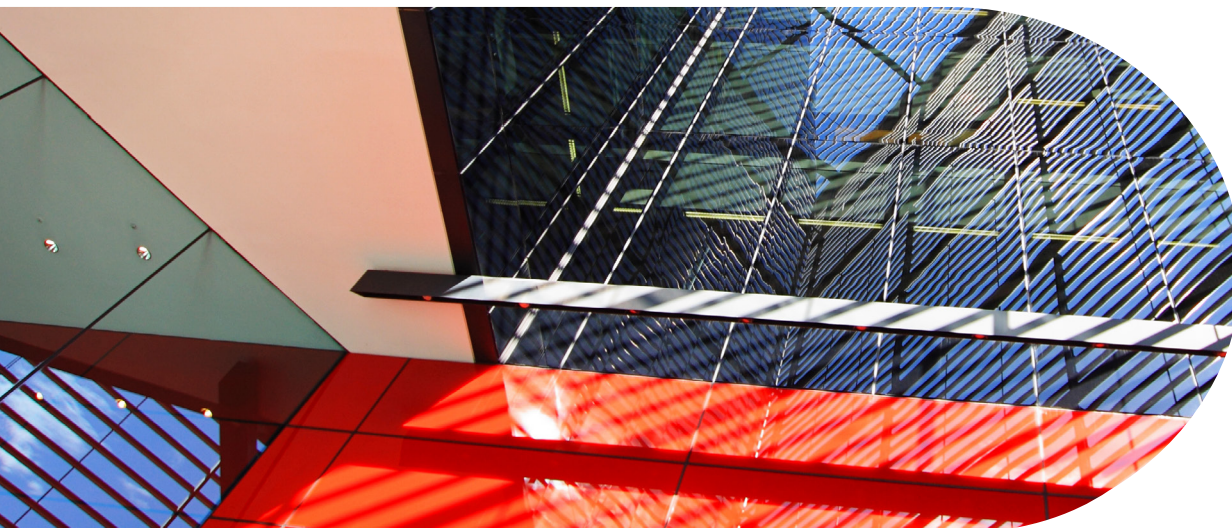
Yes, they were, although initially – and actually, this is something that really comes out of the survey that we did – initially both parties in both cases resisted the hearings going ahead as virtual hearings. In the first one, the hearing was due to start almost exactly at the time when the first lockdown was introduced in London. It was a London-based hearing with a London tribunal, although we had witnesses and experts from all over the globe, literally from every single corner of the globe from Australia to America and pretty much everything in between, so we covered all time zones. In that particular case, both parties resisted going ahead on a virtual basis. That was largely because the timescales involved just made the shift from a fully in-person hearing to a virtual hearing impossible to manage; there's an awful lot of preparation that needs to go into any hearing, and suddenly shifting from in-person to virtual and getting your head around that, as well as preparing for the actual hearing itself, was just too much. But the tribunal was pushing very hard for that to go ahead and one tribunal member who's a former court of appeal judge –

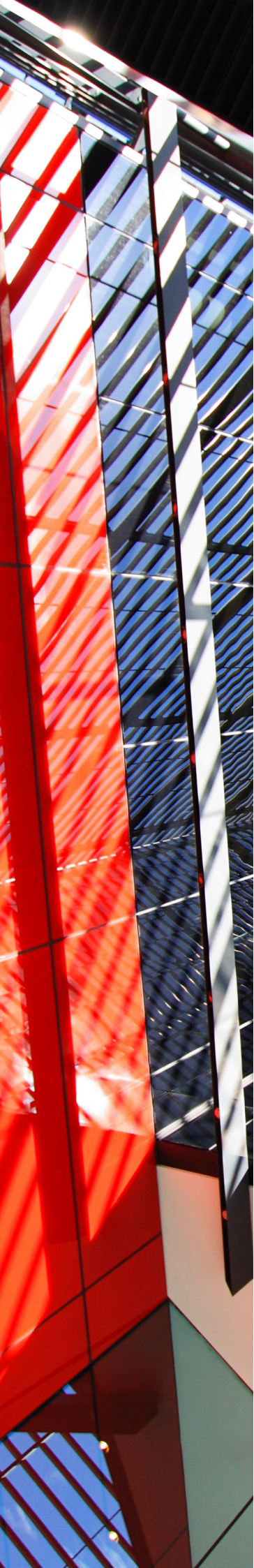


and this will always sit with me – said in the hearings that we had on this issue, ‘should it go ahead as a virtual hearing’, famously said – “you know we’re all going to have to get here at some point, because climate change in the future is going to drive this – we are all going to have to do virtual hearings, it is not going to be acceptable in future for people to be getting on aeroplanes from all over the world and flying to a single location with all of the carbon footprint issues that go with that so this is the future.” That really struck me, not least because of who it came from. So that hearing was put off in March but it was deferred until October. It was deferred by the tribunal on the basis that, if it couldn’t go ahead in October in person, then it would definitely go ahead virtually and the parties were given no option. So that hearing went ahead in October on a fully virtual basis. It was an eight-day hearing involving 15 witnesses, five experts as I say from all corners of the globe.

Kirsten

It’s interesting that the pressure was coming from the tribunal to move forward. I was similarly involved with a hearing that was supposed to take place in Paris, a merits hearing, in May so just as the lockdowns across the Middle-East and Europe were being put in place and there was no agreement on trying to push it back. From our perspective, the jurisdictions that we were in – Dubai, Paris and London – you weren’t allowed to leave your home. It felt incredibly difficult to ask witnesses and advocates and our team to effectively invite the tribunal into their home, and to be cross-examined in your home, all the while you were also dealing with getting to grips with a new way of working. So I completely agree with the position that we do need to get there – and it’s one of the things we’ll talk about in a little bit in terms of is this where we’re headed – but I think making parties get there in the context of the beginning of the pandemic, and grappling with all the additional factors...we did end up having our witnesses be cross-examined from their living rooms and I conducted cross-examination from my home office... it does happen, but I think it probably was a little bit of a big ask in the very beginning. It would be interesting to hear how you found it. Was the first virtual hearing you did in October?





Kate

Yes, the first merits hearing I did was in October. You're right there's an acclimatisation issue I think from a counsel perspective that tribunals don't have to overcome – tribunals are in receive mode, the arbitrators or the judges are in receive mode – as counsel you have a very singular focus on driving whatever thread it is that you've got for your story and your case at the hearing, and anything which distracts you from that, anything which is out of the ordinary, is frankly terrifying to have to overcome. So you're right, at the beginning I think people were very reluctant to overcome what seemed like an enormous barrier to achieving what we're all paid to achieve at these hearings, which is to drive your client's case and to do it in the most effective way possible. Anything that's new and new on such an enormous scale is scary, but I think as people became more used to working remotely and got into their stride and discovered that actually lots of opportunities arise as a result of working remotely – because instead of us all getting on phone calls, which is certainly the way procedural hearings that I've done in the past have been run, on a phone call – actually they can jump on WebEx, or Teams or Zoom or whatever it is and that completely changes the dynamic. It makes it much more personal, much more like having an in-person hearing and I think as people have become more comfortable with that, so it has become easier to contemplate doing a hearing virtually.

My October hearing was deferred from March, it was the first big hearing that I did and one of the biggest cases I've ever done. It was a very large case with a number of very complex issues. One witness, the key witness on the other side, whose evidence all went to this question of alleged bad faith, which is akin to fraud; that witness was probably going to be cross-examined for somewhere between eight and 12 hours – by me. So I was facing cross-examination for 12 hours; that's difficult in any situation, even in person because I've done it before, so doing it virtually seemed to be an enormous barrier. The thing that made the biggest difference for me in the October hearing was making the shift mentally from thinking that I had to do this in my home to thinking actually I could make it work by going into the office and doing it with AV people around me, my team (at least those based in London) around me; and that will give me something of the feeling of the drama that you have when you go into the courtroom or the arbitration hearing room that gives you that edge to get you started. Sitting in your home where you've just woken up half an hour ago and got out of your pyjamas, it's quite difficult to get into the headspace of doing a hearing. That was a really big decision for me, not least because I feel safe and secure in my home from the COVID perspective and suddenly I was contemplating getting

into a taxi, going into the office, 'what am I going to be exposed to'; but once I got myself through that barrier, that for me was the single biggest decision that made the biggest impact on how the hearing ran, was actually being in the office with all the facilities that the office provides and having at least some of the team in the office with me.

Kirsten

From your perspective, if you had been able to do anything differently, or if there's anything you would have wanted to know before you participated in the virtual merits hearing; what would that one thing be that you would want to highlight to a party that's about to participate in a virtual hearing for the first time?

Kate

It's a difficult one because if I'm completely honest, I had such a positive experience. I'm talking as counsel, so the advocate arguing the cases during openings, cross-examining all of the witnesses; my experience of it was so positive that I struggle to find anything really fundamentally different between a virtual hearing and an in-person hearing, such that I don't have any great insights – other than what I might consider to be the obvious ones. Make sure you get the technology right; choosing the right platform can make a very significant difference. The first hearing I did we did on Zoom; I was actually personally very reluctant to use Zoom because it doesn't have all of what we might think of as the 'confidentiality bells and whistles' around it, there was a perception about Zoom that it isn't as secure as other platforms. Actually it has very, very good functionality including down to the ability to organise your screen in a way that makes it the most effective possible for interacting as you would do in an in-person hearing. What do I mean by that? So, in Zoom you can ask anybody who is not speaking (other than the tribunal) to turn off their video, and you can then select a tile within Zoom that eliminates any of the [blank] squares on your screen that appear. So, at the moment, I'm looking at a screen with certain people who don't have a video but I still see a tile for them – that becomes quite distracting. In Zoom you can eliminate anybody whose video isn't on. So in the first hearing that I did, I had at all times only the three tribunal members and the person who I was cross-examining appearing on the screen – and obviously myself, although you can eliminate yourself as well.

Kirsten

You eliminated opposing counsel?

Kate

Yes, because I didn't want to see opposing counsel while I'm cross-examining their witness, the only people I want to see are the tribunal and the witness. There is lots that you can do in Zoom, contrasted with WebEx for example where you are much more limited in terms of how you see the screen. That makes a huge difference and I know that because the first hearing I did was with Zoom, and the second I did was with WebEx. The second one with WebEx, it was a huge hearing that went on for six weeks, there were 45 witnesses and experts again from all over the globe, it was a huge arbitration involving tens of millions of documents and there were 30 or 40 people on the call every time. It was very difficult to get rid

of them all and only see the people that I wanted to see, so I ended up having to get rid of the tribunal as well so I couldn't really see the tribunal. Which didn't matter so much, but you would want to be able to see the reactions of the tribunal and having the right technology to allow me to do that made a huge difference. On Zoom, I could see the tribunal's reactions. For example, there was one of our witnesses who answered a particularly silly question in what was I think probably the funniest answer I've ever heard in any arbitration that I've done in the last 20 years, and each of the tribunal members (who were on mute) were obviously snickering to themselves at the answer that our witness gave. Now I couldn't hear them, because they were on mute, but we could see them and the chair sat there with his hand over his mouth – but he couldn't hide his eyes and you could see that he was almost crying with laughter, because the question was so silly and the answer to the question was so funny. That was really valuable feedback, because that was on a USD120 million counterclaim and the answer that the witness gave went to the heart of that counterclaim – so we were able to sit there and say to the client, we think the tribunal might be with us. The ability to see and to read the tribunal is really important and whether you can do that will depend on the technology and the platform that you choose and how you organise that platform. All of that is just familiarity, that's not a barrier to doing things virtually; it's just becoming familiar with the differences between different types of technology and what you can do with them. So it's overcoming a fear, and fear generally comes from lack of knowledge, so that would be my one biggest tip – to get the technology right.

Kirsten

The example you've given in terms of the cross-examination you did of the witness and seeing the tribunal's reaction is particularly telling, because one of the most controversial aspects, based on the survey we've done, of virtual hearings is concern of the impact on oral witness evidence – but it sounds as though, from your experience, there hasn't actually been that much of a disruptive effect.

Kate

No, genuinely my experience in both hearings was that it had no impact at all on the veracity, credibility or weight of the oral evidence being given by witnesses. I remember having a conversation with one of my partners in Paris at the beginning of the pandemic, we were talking about what's going to happen, are we going to have to move to virtual hearings, how is that going to impact the way that we run cases. The argument went, in the discussion



that we had, that for example in a case of fraud, it is essential that you are able to read the body language of the witness – that you can smell the fear, that you can pick up on that tiny little tick in the room that gives away whether they’re telling the truth or not telling the truth. That was the conversation that we had and I imagine that conversation was repeated many times over between many counsel and many clients across the world, because that was the obvious thing that people thought would lack in a virtual hearing. Actually my experience – and remember both of the big substantial trials I did were both fraud cases – my experience was actually the opposite, again getting the technology right. The witness in the first case that I did who I cross-examined for nine and a half hours, who was the key witness on the bad faith, on the fraud, the other side’s key witness; I actually think I had better access to his body language as a result of the hearing being done virtually than I would have done in a hearing room. In a hearing room – let’s take room A30 at the IDRC on Fleet Street in London, I know that room intimately, I’ve done many, many hearings in it – I’m at least five or six metres from the witness who’s sitting at a table facing the tribunal, not me, because all witnesses are coached to give their answers to the tribunal not to me. One of the benefits of a virtual hearing is that that witness – again, because I’ve got the right technology which I can organise so that that witness fills one of my screens – that witness is actually sitting right in front of me, looking at me when giving their answers, head and shoulders. I’ve got a full frontal image which is less than a metre away from me of that witness and I can observe all of their reactions to the questions that I’m asking. So that’s the first thing. The second thing is, if a witness is being evasive or difficult or not answering questions directly, all of that comes out in the words that they use more than it does in the language of their body. Yes body language is important, yes that tells you something; but most studies into language and the use of language tell you that the most important thing is actually your tone and you still get tone at a virtual hearing. In the case of a witness, the words do matter – if I ask a straight-forward question, the obvious answer to which is either yes or no, and the witness decides not to answer yes or no and says “well you know actually what you’re missing is x, y and z and what you have to do is go back to...”, that’s obvious to everybody that the witness is trying to avoid the answer to the question. You don’t need to be there in person to know that that witness is being evasive. So my experience is you don’t actually lose anything material in terms of witness evidence, as long as you get the technology right, you don’t have connection issues, all of those things aside. I was lucky enough not to have any of those issues, but my experience was you don’t lose out just because you’re doing it virtually.

Kirsten

I completely agree. That was one of the biggest concerns about making the shift to virtual merits hearing was the witness evidence – the witness being alone in a room, what kind of documents will they have that we won’t know about and also you won’t be able to see the whites of their eyes when you’re asking the questions and seeing the answers. I agree in terms of the visibility you get of being up close with the witness virtually is actually a lot better; the concern is, is everyone watching? But I completely agree, it can be much better.

Kate

But to that point, is everybody watching; you have that problem in in-person hearings. How many times have you sat in an in-person hearing watching the third arbitrator sit there sleeping through it.

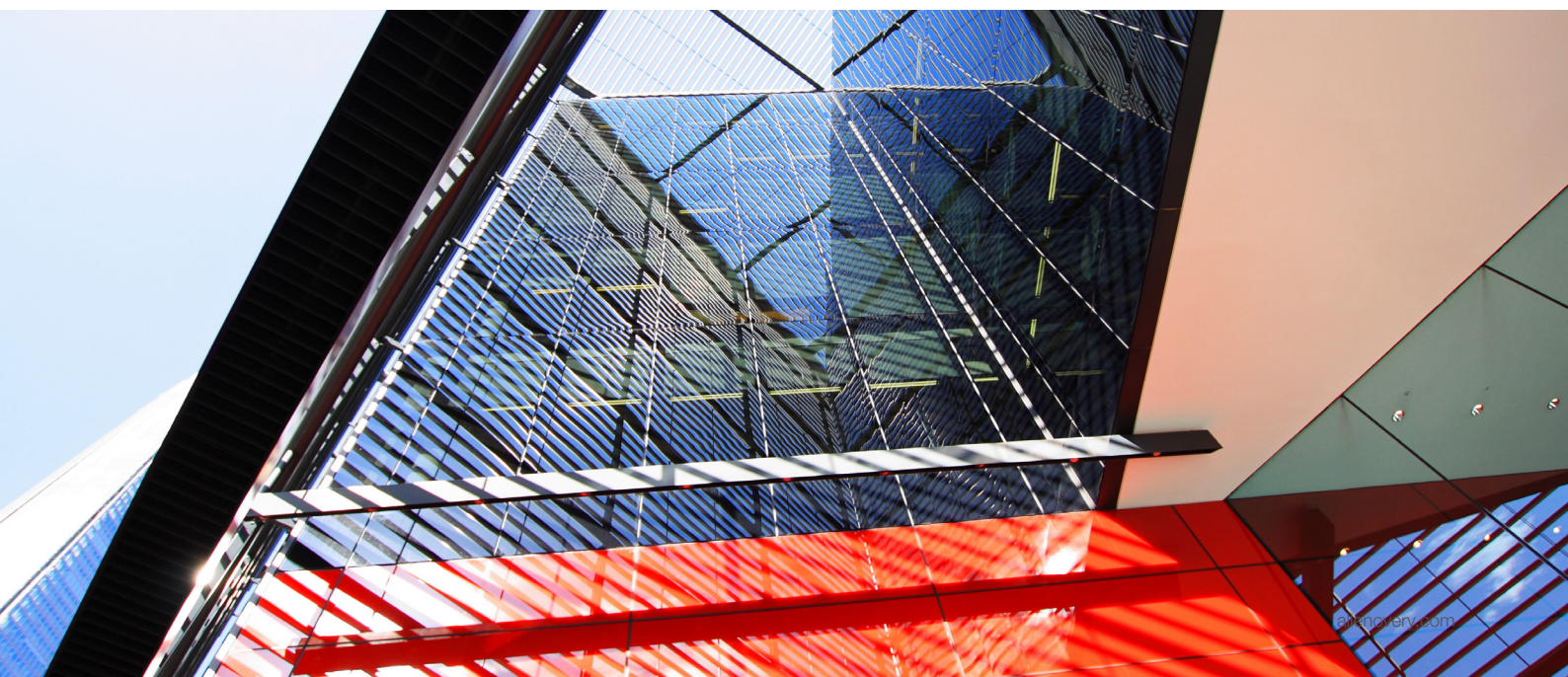
Kirsten Never! Absolutely never!

Kate Obviously never!

Kirsten Obviously never.

Kate ...and how many times in an in-person hearing do you sit there watching the tribunal reading the document that you're cross-examining the witness on, rather than looking at the witness. 'Hang on a sec, he just lifted his eyes to the ceiling, you should have seen that because you would have known that he's lying' – it doesn't happen, there are so few cases that really turn on that kind of minutiae of body language and the smell of fear on a person. It never happens, so few hearings turn on a smoking gun document, it doesn't happen. That's why, if you look at the survey results, there is a disconnect between on the one hand the biggest concern being, as you say, what's the impact on witness evidence going to be; and on the other hand, saying well actually the virtual hearing has had no impact on the outcome. That tells you everything you need to know, which is actually these disputes very rarely turn on witness evidence. As common law lawyers, we put perhaps a disproportionate amount of weight on witness evidence because we think it is so important but the reality is, and I say this sitting as an arbitrator as well as counsel, if you've got a document that addresses the topic that a witness is addressing you're going to rely on the document rather than the witness. There are very few disputes that turn on oral evidence only. The exception would be an agreement which arises out of a meeting, an alleged oral agreement where there are no documents for evidence – whatever it is that's been said – yes in that case, witness evidence is going to be very important but those cases are rare.

Kirsten You're absolutely right that in terms of the nuances with evasiveness, that is captured by the transcript. All of the other aspects that you would have in person, or even virtually, that has not been actually taken into account in the transcript – when at the end of the day you sit down with a transcript, you have just what



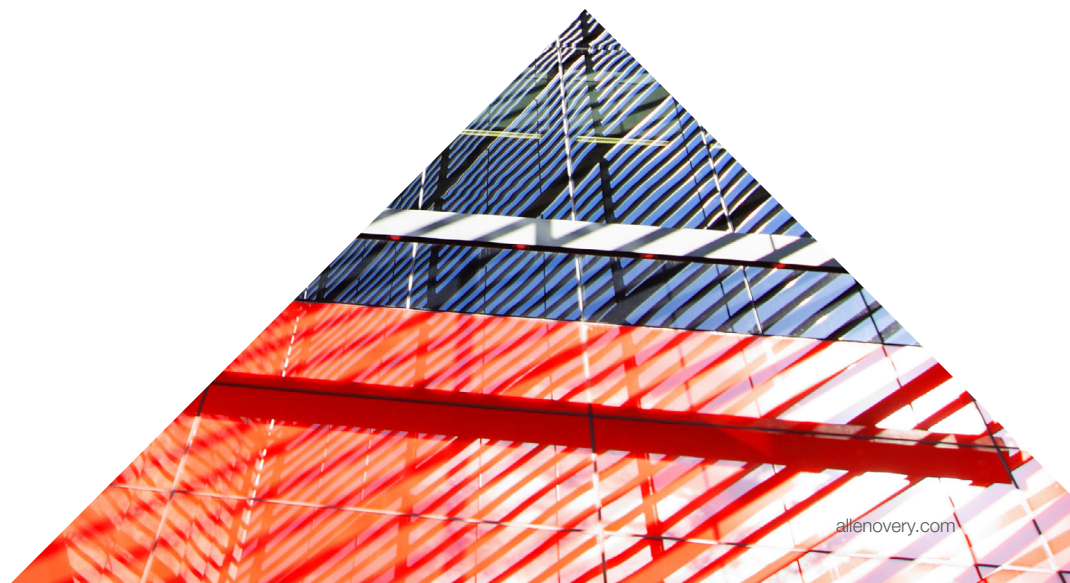
the witness said. All the impressions that as advocates we tend to think are so important and will really make the case or break it, at the end of the day don't appear in your transcript. You're absolutely right in terms of the survey, the sense that the outcome hasn't been affected or generally peoples response is that they don't think the outcome is affected, I found really interesting. Because for some of these, like the virtual merits hearings, some of the outcomes aren't yet known; so it'd be interesting to revisit in about a years' time when the awards start coming out to see if there's any change in that view.

The big final question is the future, and whether you think – are they here to stay? Are we looking at – provided we get the right technology and willingness on all sides – do you think this is where we are headed?

Kate

I think it is where we are headed but I think more importantly, I think it's where we should be headed.

I'm going to stick my neck out with a personal view and a personal belief. Pandemic aside, the single biggest challenge that we face as a race and as a planet – and I don't think it's too dramatic to say this, having spent a lot of time looking at climate change and following climate change litigation over the last five or ten years – the single biggest challenge we face as a race and a planet is climate change. We are all going to have to make dramatic changes to our lives if we want to avert the crisis and the threat, the real threat that is climate change and the way in which it's going to change our world. The pandemic, to me, has taught us that dramatic change is incredibly painful and human beings are unlikely to make that kind of dramatic change unless they are faced with something that's right in front of them that forces them to go through something that's quite painful, because otherwise we would shy away from it right? So, I actually think the pandemic in many ways has done us a favour in this regard, because it has brought about the kind of dramatic change that we can't as a race implement for ourselves because we're just incapable of putting ourselves through that amount of discomfort. I think it would be a massively wasted opportunity for us to come out of the pandemic, with all of the difficult changes that we've had to make, and just revert back to the previous status quo. Because the current status quo, where we are with virtual hearings, is going to help us to meet the next frankly far bigger, far greater challenge that we face, climate change. Yes, it may only be a small piece of it, but if every single arbitrator and every single general counsel and every single witness and tribunal member in an arbitration, instead of jumping on an aeroplane to travel to a hearing instead sits in their office, which they can walk to or bike to, or even



sits in their home, and conducts the hearing in that way; think of the carbon footprint savings that you're making. So I think over and above whether this is something that is here to stay, I think it should be something that's here to stay and I actually think we all have a responsibility to make it work. Yes there may be small things that we give away, although I have struggled to identify them based on my experience which is limited – I fully accept there are other people out there who've had a nightmare experience with virtual hearings for whatever reason. My experience was extremely positive, if you can get all of the technology and the connections and everything else right, in what were high-value, highly complex, difficult fraud cases. I don't think there is an enormous amount that we give away by holding hearings virtually and I think there's an enormous amount that we can gain in terms of the way we have to face the future.

Kirsten

Very persuasive. Thank you very much for talking about virtual hearings today. I think that has brought us to the end of questions.

Kate

Thank you Kirsten.



Contacts

Interviewer



Kirsten O'Connell
Partner, UAE

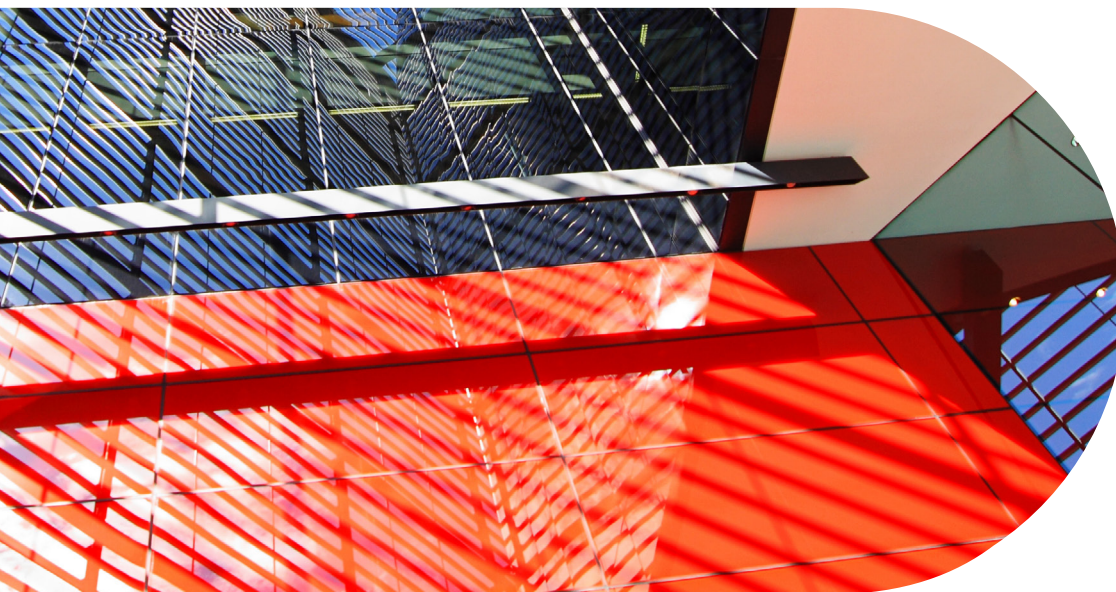
Kirsten is a Partner in the International Arbitration Group with experience in both institutional and ad hoc arbitrations in common and civil law jurisdictions. She has expertise in commercial disputes across a range of different industries, including the construction, energy, telecommunications, automotive, technology and defence sectors. She is also experienced in investor-state disputes, having acted on behalf of host States in ICSID proceedings, and having advised both States and investors in connection with potential claims.

Interviewee



Kate Davies
Partner, London

Kate is a Partner in the International Arbitration Group with extensive expertise in both international commercial and investment treaty arbitration. Kate has experience of both institutional (eg LCIA, ICC, PCA, VIAC, SIAC, ICSID) and ad hoc arbitrations sited in common and civil law jurisdictions. She has expertise in commercial disputes across a range of different industries and arising out of a number of bespoke and industry specific agreements, including joint venture, shareholder, licensing, distribution, technology transfer, patent and construction agreements. In the investment treaty and public international law sphere, Kate's instructions include acting in the Abyei Arbitration (which led to the independence of South Sudan) and representing the Islamic Republic of Pakistan in several investment treaty disputes.



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