

VIRTUAL ROUND TABLE SERIES | DISPUTES WORKING GROUP 2020

Technology & Disputes: The impact of new technology on litigation and dispute resolution

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FOREWORD BY EDITOR, ANDREW CHILVERS

Technology & our legal future: Why COVID-19 is the tech tipping point for the legal sector

For the legal sector, COVID-19 has been a huge catalyst for change globally. Overnight, almost all legal advisors decamped en masse from their expensive mid-town and city offices to their homes to work. Personal meetings suddenly disappeared to be replaced by virtual meetings on Zoom or Microsoft Teams.

As the UK went into Lockdown only 2% of lawyers admitted they worked from home, according to a recent survey by RollOnFriday.com. Those attitudes have now changed radically as countries and territories around the world have gone into Lockdown and the vast majority of people have become home workers. Now almost 75% of legal advisors admit they would happily work from home three days a week and – amazingly – only 7% said they wanted to return to the office full time.

Above all, working remotely may have broken the longstanding links between office and work. Some 44% of respondents said in the long term they only wanted to return to the office for two days a week at the most. Many lawyers also believe working from home is good for their work / life balance. Elsewhere, many have said working remotely significantly improves efficiency, with less commuting time and disturbances around the office. In this virtual series legal members of IR Global gave a fascinating insight into this new world of working and how each jurisdiction has been handling their operations during Lockdown and the post-COVID-19 period.

For Katherine Evans, partner at Mirkwood Evans Vincent, her boutique law firm had a head start with technology. Indeed, when she set up her virtual legal model in 2008 it was considered years ahead of its time. By the time of COVID-19, she already had a number of clients she'd not actually met face to face. For this innovative approach, Mirkwood Evans Vincent was shortlisted for the most innovative law firm award in 2008, just a year after establishment.

Although Zoom and Microsoft Teams have been the solution when it comes to arranging meetings with fellow team members and clients alike, almost all the legal advisors admitted that nothing could replace meeting people or being in court. But as the pandemic spread across the world even small jurisdictions such as the Turks and Caicos Islands started to use technology for virtual meetings, carrying out video hearings and e-filings at the court.

Meanwhile, in Hong Kong as the pandemic eased the lawyers returning to work decided to split into teams – taking it in turns to work in the office. As a result, half the workforce have been working from home while the other half have been office based. Dominic Wai, partner at ONC Lawyers, said most civil cases can now be done remotely via audio or video conferencing, although criminal courts require people to go to court in person. His firm has even started using Zoom for the in-house team for their continuing professional development.

Over in the US, Doreen Hartwell, partner at Hartwell Thalacker, said civil trials are starting to back up and lawyers are now playing catch up by undertaking them remotely. American lawyers are also doing depositions remotely using Zoom, with the witness in one location while the lawyer is in another with the documents that are being steered electronically.

In Mexico, León Felipe Aguilar Jiménez, partner at Camya Abogados, said the legal sector had been forced to implement new technologies to ensure the continuation of the services – although legal service providers in the country have been skeptical about the convenience of using new technologies.

Despite reservations, technology is now considered to be a significant asset for law firms as they look forward, post COVID-19. In the US, a recent survey by MyCase reported that 70% of the lawyers considered technology as paramount for their firm's financial future. Many see technology adoption as key to the success of their firms and for the legal sector generally. Rather surprisingly, the majority of lawyers said this change was positive, with 52% agreeing technology used within law firms was good, while 54% said the same was true of courts. It's never easy to predict the future, but after talking to IR Global members and looking at the wider legal world, technology adoption will no doubt continue to rise as a result of the unpredictability caused by COVID-19.

In the following pages, IR Global members give their insights around working with technology and technology disputes in the age of the COVID-19 pandemic.



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View from IR



ENGLAND

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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

Featured Members



US – NEVADA

Doreen Hartwell

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Doreen Spears Hartwell formed Hartwell Thalacker, Ltd. in 2014 with Laura Thalacker, a friend and accomplished attorney with whom she worked for over 14 years at Nevada's then-largest law firm. Doreen has practiced in the area of business and commercial litigation in Nevada since 2000. Her litigation practice includes employment law, trade secret, non-compete claims, real estate, trust-probate matters and a wide range of other business-related disputes.

Doreen has successfully defended employers in cases involving wrongful termination, breach of contract, discrimination and/or harassment in violation of Title VII, the ADA, the ADEA and state employment statutes. She also has substantial experience in successfully bringing breach of contract, trade secret, non-compete and trust and probate claims on behalf of her clients.



ENGLAND

Katherine Evans

Senior Partner, Mirkwood Evans Vincent

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Katherine heads up our Telecommunications and Business Technology Law Group and is the Mirkwood Evans Vincent Senior Partner.

After graduating from the University of Cambridge, Katherine initially pursued a career in marketing and business development, before re-training to become a lawyer in her mid-twenties. After completing articles with Eversheds, she joined specialist shipping and international trade practice, Mills & Co. where she remained until joining the international law group of the US telecommunications giant, AT&T in 1997.

Katherine held a number of positions within the AT&T international legal group, including as lead lawyer for AT&T's international outsourcing business, before leaving to form Legal Hobbit at the end of 2006, the predecessor practice to Mirkwood Evans Vincent.

Featured Members *(continued)*



TURKS AND CAICOS ISLANDS

Tony Gruchot

Partner, GrahamThompson

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Tony Gruchot is a Partner in the firm's Litigation and Dispute Resolution Practice Group.

Tony's practice primarily focuses on complex corporate and commercial disputes in industries ranging from construction to banking to insurance, debt recovery, enforcement of security and judgments, and receivership appointments, shareholder disputes, corporate reorganizations and restructurings. His litigation practice crosses multiple practice areas, including admiralty litigation, marine cases and maritime law, professional liability, personal injury, product liability, family law including divorces, matrimonial disputes and child related matters, and employment.

In the Real Estate sector, Tony has worked on mortgages, private and commercial leases, landlord and tenant matters, strata titles and trespass claims with a special interest in boundary and easement and title disputes.



IRELAND

Larry Fenelon

Partner, Leman Solicitors

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Larry is a founder of Leman Solicitors and LexTech, a legal technology company. Larry has been at the heart of innovation in both entities. As managing partner of Leman Solicitors from 2007 to 2018, Larry oversaw the growth from start up to a mid-tier commercial law firm with €5m turnover and 40 employees. Larry was central to innovation in the law firm, including: paperless office, online client access and fixed fees. Larry also cultivated a dynamic culture for a modern law firm, with core values of: Bravery, Humanity and Excellence.

In 2017 Larry founded LexTech, a company which designs and implements solutions for digitising, automating and data capturing legal, compliance and regulatory processes.

His specialist expertise includes dispute resolution, construction litigation, professional indemnity, commercial and sports disputes.



GERMANY

Michael Prange

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Practice area:

German and EU Law on Unfair Competition and Anti-trust, Intellectual Property, Trademarks, Internet, Media, Telecommunication, Patent Litigation, Representation at the Office for Harmonisation in the Internal Market – EUIPO, World Intellectual Property Organisation – WIPO/OMPI (Geneva), German Patent- and Trademark Office (Munich), certified specialist lawyer in Information Technology Law.

Clients:

Department Stores, Mail-order Companies, Telecommunication Companies, Power and Gas Companies, Professional Organizations, Metal Manufacturing Industry, Service Enterprises, Management Consultancies; Pharmaceutical and Medical Services.



SPAIN

Roger Canals

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Roger has more than 15 years experience as a lawyer. He has developed his career in top Spanish law firms, providing legal advice to both Spanish and International companies operating in a wide range of areas such as life-sciences, retailing, construction, real estate, engineering, chemical industries, automotive and pharma.

His command of English, French and Italian, along with Spanish and Catalan, has allowed him to build up a substantial international practice, managing relevant international clients' interests in Spain, including ongoing legal advice and/or managing of Court cases and restructuring processes on their behalf.



MEXICO

León Felipe Aguilar Jiménez

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His professional practice has mainly focused on Civil, Commercial, Administrative, Agrarian and Constitutional Litigation. He has participated in cases related to shareholders conflicts, annulment of shareholders' resolutions, enforcement and execution of agreements, as well as insolvency proceedings. Mr. Aguilar has also participated in proceedings related to ownership and possession of land allegedly subject to agrarian regime.

Among the matters in which he develops his professional activity are special commercial proceedings (bonds, execution of guarantees, commercial competitions, among others), as well as controversies related to strict liability derived from the occurrence of commercial activities. Likewise, he has participated in litigation related to the ownership and possession of lands allegedly subject to the agrarian property regime, as well as in matters related to territorial limits.



HONG KONG

Dominic Wai

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Before joining the legal profession, Dominic worked in the banking sector and as well as in the Independent Commission Against Corruption (ICAC).

Dominic's practice focuses on advising clients on matters relating to anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering. He also handles cases involving corporate litigation, shareholders' disputes and insolvency matters, defamation cases, domestic and international arbitration cases, cybersecurity, data security and privacy law issues, competition law matters, e-Discovery and forensic investigation issues as well as property litigation.

SESSION ONE

What steps are you taking to adapt your services to the new remote working environment?

Larry Fenelon, Ireland

We are Ireland's first paperless office and have been for many years so we were well placed to adapt to a remote working environment. We were fortunate to have a seamless adaptation to a remote working environment as a consequence. Prior to the lockdown every team member received a home office package of hardware. Since lockdown MS Teams calls has become the mode of communication within teams, pretty much on a daily basis. Our marketing happens through social media such as Linked In, Twitter, Passle, Biteable videos and webinars. Client meetings take place via Zoom or MS Teams or in person.

Dominic Wai, Hong Kong

A lot of international law firms have been adopting work-from-home practices for a while, although they've largely been office based for most people. But with Lockdown and the recent spike in COVID-19, a lot of them have been going back to working from home. For us, we've been trying to go back to the office and have split into two teams – so one team will be in office and the other team will work from home. And because of that we have had to adopt a remote access mode of working and accessing our files and data.

In terms of liaising with clients, we try to use virtual meetings more often than before, although some clients might still come into the office. The virtual meetings on, say, Zoom also apply for our own in-house team for things such as continuing professional development. So one colleague might be in the conference room and everyone else will be in their own rooms or at home using Zoom to watch the presentation.

In terms of Hong Kong courts, we are gradually having hearings by way of audio conferencing and also video conferencing facilities. The courts are slowly adapting to the situation and using new technology. For criminal matters, however, they still require people to go to court in person.

Doreen Hartwell, US – Nevada

For the most part it has been business as usual for Hartwell Thalacker Ltd. despite COVID-19. In 2014, we decided to go cloud based for our firm management system. Thus, working remotely has been our firm's model for the past six years.

Since the pandemic, we have very few in-person meetings. For the clients who insist on meeting in person face masks are required and social distancing. As for the courts, Nevada has required attorneys to file documents electronically for many years. Prior to COVID-19, non-lawyers were able to file documents in person. Now, they are able to email their documents to the clerk of the court to be filed.

Similarly, proposed orders that normally would be dropped off at the court for signature are now required to be submitted via email. Finally, depositions are now done virtually. Zoom has been the most user-friendly videoconference software.

Michael Prange, Germany

In technical terms we didn't have to follow many steps to react to the global pandemic situation. We've been using a special legal software for many years, which deals with electronic files. If you're not in the office then each team member is able to connect with our server via a VPN-tunnel and thus have access to the electronic files. This way, you can easily work on team issues.

As a result, working remotely and virtually has not been a real problem for us regarding workflow issues.

Katherine Evans, England

At Mirkwood Evans Vincent, we have always done things a bit differently, preferring virtual working practices over a more traditional fixed office model with higher overheads and correspondingly higher client fees. In 2008, one year after the firm started, Legal Hobbit (as we were then called) was the only sole practitioner firm to make the Law Society's six firm shortlist of most innovative law businesses in the country, with our focus on new technology, remote working and alternative client pricing options. The firm has grown a bit since 2008 and changed our name to Mirkwood Evans Vincent, but we have kept our focus on being able to provide fully functional legal services to our international clients, anytime and anywhere, and independently of fixed bricks and mortar locations.

I was an in-house lawyer for an international US company for 10 years before I started Mirkwood Evans Vincent, and that experience acclimatised me to building relationships with clients all over the world, many of whom I never actually got to meet. I have some clients now who I have known for 15 or even 20 years but have still never actually met in person.

I guess for my firm, remote working is normal. My business partner is in a different part of the UK but we speak most days. I bought a house that I turned into a law office and I have another two lawyers who come in when they need to, but it's easy for them to work from home because all of our systems are in the cloud as they have been more or less since Day 1.

Since the arrival of COVID-19, we have even started getting used to doing court and tribunal hearings remotely. As a firm, we don't do a great deal of litigious work but because we act for a number of businesses as a virtual in-house counsel, litigious matters inevitably crop up in those businesses from time to time, making brushes with employment litigation, debt recovery actions and insolvency matters, occupational hazards. I think that the more lawyers become involved in remote hearings, the more they will prefer them as an alternative to travelling to court. I predict that with the possible exception of complex multi-day trials, video conference hearings for civil matters is likely to become the new permanent normal for the UK.

For law firms that are just starting to get involved with virtual technology, I would tell them to embrace the change. It is very liberating to be able to control your own day in a way that you can't do when you're spending multiple hours a week commuting between home and office, and your clients will appreciate that you can provide services seamlessly and across jurisdictions, when they need support and not just during local country office hours, when you have access to the facilities in a particular building.



Doreen Hartwell pictured at the IR Global Annual Conference in London, 2018

León Felipe Aguilar Jiménez, Mexico

As a consequence of the health contingency, Mexican authorities established several restrictions for office work. Therefore, the legal sector – which until that moment used to maintain its operation onsite – was forced to implement new technologies to ensure the continuation of the services. It is important to note that in the Mexican case, legal service providers were sceptical about the convenience of using technologies.

In that sense, as a result of sanitary restrictions, the sector related to the provision of legal services adopted technologies to facilitate remote communication. Among the tools adopted we can find several video conferencing apps such as Zoom, GoToMeeting, Cisco WebEx and Google Meet, among others.

As of August, Federal and State Courts have resumed their activities in person; however, they have sought to maintain social distancing by means of virtual proceedings, as well as the review of case files and filing of documents electronically.

At Camya Abogados, as of 2015, we have integrated a "virtual docket" (with the same content as judicial docket) for remote consultation, using tools such as Google Drive. With the above, in addition to immediate access to information, we have benefited our clients who have the facility to consult the status of their affairs directly, with this we keep our clients informed in "real time".

As consequence of the health contingency, without a doubt, there have been important changes in the way of litigating; however, we have the technology and personnel to respond to the new requirements.

Roger Canals, Spain

In Spain, authorities have ordered tough measures to help assist in the struggle against COVID-19, such as compulsory confinement at home for the whole population for two and a half months, and the lockdown of all the State Courts and administrative premises. Perhaps the only positive side of the issue has been that this has forced the whole of society to move forward in terms of remote working environment, which was previously just a topic of discussion.

But the whole country, and specifically law firms, have adapted surprisingly well to the situation. In terms of interaction with clients, traditionally they asked for face to face meetings, and now they've been forced to accept remote meetings and interactions (specially, through virtual platforms such as Zoom, Jitsy, Hangout, or similar). In turn, this has led to a major efficiency (avoiding travelling, which has been revealed as unnecessary and useless), and a cut in expenses. Paradoxically, those clients formerly requesting face to face meetings now request remote meetings.

To us, the crisis has accelerated a technological process which was already underway. Before the COVID-19 eruption, our law firm had already implemented remote working devices allowing full remote working of all our professionals. The pandemic has led to the generalised use of on-line working devices and platforms, and a less attendance to our offices/premises (to comply with restrictions imposed by the government). Overall, this has led to an improvement in many people's work-life balance and there have been marked increases in operational efficiency and productivity.

State and arbitration Courts and Tribunals have also showed dramatic changes in Spain over the last months. Until the COVID-19 eruption, remote hearings in Spain were just inconceivable. The full confinement has left no other alternative than implementing remote hearings to keep Courts and Tribunals running. To my personal experience, this has revealed to be an extraordinary positive; no doubt that, once the pandemic is gone, remote hearings will stay in Spain as a way to reduce Court backlog.

Tony Gruchot, Turks and Caicos Islands

Well, we do use a video suite that we set up in this office, which actually hadn't been used until the lockdown and we've now discovered Zoom and Microsoft Teams. Because of lockdown we are now getting face-to-face client meetings and mask wearing is compulsory. There's also been the introduction of remote hearings, video hearings and e-filing at the court. Along with all this, it's generally business as usual.

SESSION TWO

Virtual commissioning – are we there yet?

Larry Fenelon, Ireland

Virtual commissioning will become a reality in Ireland shortly. As matters stand no affidavits can be sworn remotely in Ireland. However, under new legislation, section.21 of the Civil Law and Criminal Law (Miscellaneous Provisions Act) 2020 introduces a ‘Statement of Truth’ which will replace affidavits and statutory declarations which require an independent solicitor to counter sign. The Statement of Truth when introduced under new Court Rules, due in months, will allow for the document to be signed digitally and without the necessity of a counter signature from an independent solicitor

Witnessing an e-signature in Ireland is satisfied when a witness is physically present when the signatory applies their electronic signature and the witness then applies their electronic signature underneath as witness.

Dominic Wai, Hong Kong

In Hong Kong, we can use electronic signatures on documents, but for Wills, Trusts, Power of Attorney, Mortgages, Affidavits, Statutory Declarations you can't do it by electronic signature. Consequently, there's a little bit of catching up for that; because for a time like this, for example, if you have a property transaction, you need someone to come to sign that mortgage or deed or an assignment document.

You need to have that person in the office to sign the document. But then, of course, these days, because of Lockdown and cross-border restrictions, it's very difficult for the client to come in. This is particularly true for clients in mainland China if, for instance, they have bought a property in Hong Kong and they need to come to Hong Kong to sign.

There are these types of problems occurring and I think we should change the law to allow for electronic signatures, but we haven't got to that yet. How are we going to solve this problem? We have to resort to the old ways of maybe finding a law firm that has someone who is qualified in Hong Kong, but who is based on the mainland. They can be the person who can witness the signature and ask the client to go to that particular law firm and sign the documents there. And that's the same for notarization. As a result, there's a lot of catching up to do to try to devise or amend the law to allow people to do electronic signatures – after all, this pandemic is going to last for a long time.

With much of this we just have to improvise at the moment and try to work out the best way to try to resolve various situations. But I'm just saying that the law needs to catch up with all of these situations.

Doreen Hartwell, US – Nevada

In Nevada, everything can be signed electronically with regards to court filings. In our state court system, documents that require signatures from both sides can also be signed with a typed signature with permission from opposing counsel as long as she / he is copied on the electronically submitted order. As a result of COVID-19, the federal court allows attorneys to electronically sign declarations on behalf of clients with the client's permission.

However, certain estate planning documents must be notarized and witnessed. Clients would need to sign either at the lawyer's office or before a mobile notary who will go to the client. Some colleagues who have clients come into the office for signings will have the notary witness the signing from the other side of a partition and through a window. Despite the pandemic, in person document signing is still common, but now with social distancing in most instances. There are different ways of handling in-person signings, but the courts have definitely relaxed the rules with regards to signatures for court documents.

As noted above, attorneys are required to electronically file all court documents. Attorneys are also required to accept electronic service of documents filed by opposing counsel. Non-attorneys representing themselves do not have the proper registration that allows access to the court's filing system and therefore are allowed to email their documents to the court clerk who processes the filing on behalf of the party. While procedures have been relaxed regarding litigation, not so much regarding transactional law.

Katherine Evans, England

In the UK, we have had a “best available copy” rule for contracts for a number of years, meaning that electronic authentication of contracts has been acceptable, as has been just signing a document in physical form and scanning that signature into an email for exchange with the other side. It is only where there has been an allegation of fraud that the evidence would have been further investigated in terms of the authenticity of the method of authorisation in a particular case.

In the UK court system, we have a situation where money claims can be filed online, so that whether you are a litigant in person or a company, it is possible to log into the online money claims system, and issue a claim by inserting the relevant details of the claim and paying the court issue fee. In terms of other court documents, and whether in relation to simple money claims or more complex litigations, these are typically sent to the court and inter-parte by email only. There is no requirement for physical documents to be exchanged, and where documents are emailed to the court, the court clerk will put them on the record for the attention of the judge in due course. There are some complexities around the authentication process for affidavits. They can be executed remotely using a video-conferencing application but both the individual swearing the affidavit and the witness both have to be online at the same as each other, so that the witness can validate the execution of the affidavit by the signatory and vice versa.

Historically, it has not been permissible in the UK to execute wills remotely, due to concerns that a person might be put under undue pressure to give away their worldly possessions in a way that they might not otherwise have chosen. This restriction became highly problematic with the arrival of the COVID-19 epidemic, particularly in cases where people in care homes were close to death and needed to sign their wills in front of a witness but could not get a solicitor out to the care home due to a ban on non medical/care home personnel visiting such locations. A limited relaxation of the rules around will execution has now been put in place for the term of the pandemic, so that solicitors can remotely witness wills by video conference.

It is not yet clear whether this relaxation will remain in place once the effects of the pandemic have subsided. At the moment, the guidance suggests that it may not.

A more permanent relaxation of the rules has taken place in the UK in 2020 in relation to the execution of documents relating to the transfer of land. The UK Land Registry has now put in place a new set of procedures for the acceptance of electronic signatures. Further details are available from the UK Land Registry website at www.gov.uk/government/organisations/land-registry

Michael Prange, Germany

Since 2018 German lawyers can use the so called special electronic lawyer mailbox. This is a program, to be used by lawyers in their communication, designed to ensure secure file transfer between lawyers and between lawyers and courts. Every lawyer is obliged to maintain such a mailbox. There is no obligation for active use at the moment but you must check the inbox.

For the signing of correspondence with other law firms and with the courts being transferred via the special electronic lawyer mailbox we use electronic special signatures. In this case the issuer must provide the electronic document with a qualified electronic signature in accordance with the German electronic signature act. What does it mean? A qualified electronic signature is a seal that is affixed to digital data. The seal is generated by a private signature key, which is combined with a public key provided with a signature key certificate of certification authority.

This is the wording of the legislator. What you need, in other words, is a token that means a chip combined with a PIN code or a software token in connection with a PIN code and by this you can electronically sign a document file into the court. For lawyers, this means qualified electronic signatures are issued and certificated by the German bar.

León Felipe Aguilar Jiménez, Mexico

Legislation for the use of technologies, specifically through the use of electronic signatures, is regulated by the Code of Commerce, whose scope corresponds to acts performed by people who are considered to be merchants in Mexico.

However, in terms of the provisions applicable to the validity of electronic signatures, the intervention of a third party acting as a certification authority is required. It is a reality that to date the use of electronic signatures has been limited to the private sphere.

It is important to consider that in Mexico's legal practice there has been an abuse of formalities in both private and public spheres, an issue that remains deeply rooted to this day and which, as a consequence, generates widespread skepticism regarding the usefulness, liability and certainty of electronic means.

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I agree with Tony (Turks and Caicos) that Microsoft Teams is not the most intuitive product available in the marketplace but I guess we will have to learn to live with it, for the time being at least.”

Katherine Evans, England

In addition, in Mexican Law there are certain legal acts which in order to be granted require the fulfillment of formalities, such as the subscription before a Notary Public, among others.

Based on the above, the celebration and / or subscription of legal or judicial acts through electronic means has been limited by the entrenchment of excessive formalities, as well as by the compulsory intervention of third parties.

Nevertheless, in the private sphere there is a tendency to accept the use of new technologies to simplify the celebration of acts (DocuSign, AdobeSign), which have been well received in the corporate area.

An additional aspect to be considered is the lack of judicial criteria in this matter, precisely due to the novelty of the technologies implemented. However, we consider that there are sufficient technical and legal elements to sustain the validity of those acts held through the use of these technologies.

Roger Canals, Spain

As with the rest of the EU jurisdictions, use of electronic signatures are allowed and widely spread to sign documents under private seal in commercial transactions. The EU Statute 910/2014, thoroughly regulates the use of electronic signatures to sign documents under private seal.

However, pursuant to Spanish legislation, a great deal of transactions require a signature before a public notary for them to be valid and enforceable. For instance, mortgages, real estate transactions and wills must be compulsory signed before a public notary, for them to be valid and enforceable in Spain. This signature before a public notary cannot be performed remotely or on-line, requiring personal attendance to the notaries' offices. All this has significantly affected economic transactions in Spain over the pandemic, as notaries offices have only been available between March 13th up to June 21st for very urgent matters (such as, for instance, to sign wills in cases of imminent decease risk).

Therefore, disruption caused by COVID-19 has revealed the urgent necessity of passing new legislation on the remote signatures of documents under public seal. The governments are already producing a draft regulating remote public signatures. However, its implementation will be remarkably difficult in Spain, as our system has been traditionally based in verification on the spot by public notaries of identity and legal capacity of the parties signing under public seal.

Tony Gruchot, Turks and Caicos Islands

No. That's the short answer. We are swearing affidavits, generally in person. There was a time during Lockdown when we were dealing with them remotely and then we had certain notaries that would notarize virtually. They would come on to a call, sign the documents, then the document would be sent across to them and they would then notarize it as being sworn.

Given the relaxations on Lockdown that we now have, this seems to have fallen by the wayside and we're generally swearing documents face to face.

We don't use e-signatures at all. The court started sending out documents with seals on and orders with the judges' signatures on but that seems to have taken a slight backtrack.

So, in essence, no. It is really still very much face-to-face here.

SESSION THREE

What is happening regarding online dispute resolution in your jurisdiction?

Larry Fenelon, Ireland

The Courts Service of Ireland have introduced remote or virtual hearings for procedural applications and appeals in the Court of Appeal and Supreme Court, where a re-hearing of witness evidence does not occur. The video conferencing technology used by the Courts Service is Pexip VMR (virtual meeting room). Participants are provided with log in details in advance. The Judges and Registrars may be in a Court room or attend remotely. Communications with the Courts Service is almost exclusively electronic and Court Orders and Judgments are now delivered digitally. The upside is that there is no need to waste time traveling to Court and wait in a Court room for your case to be called, so there is a significant time saving by logging in to the Court at a designated time. There is little or no online mediation being provided for the resolution of commercial disputes.

Dominic Wai, Hong Kong

As I mentioned, in Hong Kong the courts on civil matters are trying to adopt video conferencing facilities. And I think they need to do that because of the backlog of cases. In one recent case, in terms of the hearing date for an 11-day trial, the pre-trial review is November next year and the actual hearing is 2022. That's just one case, so you can imagine a lot of backlog of cases.

By doing it remotely or via videoconferencing facilities, that might solve the issue. In terms of online dispute resolution, before the pandemic in Hong Kong the Department of Justice had been developing a platform for that. I think that's mainly for the One Belt, One Road initiative. The government will be rolling this platform out maybe sometime this year, which might also help other parties if they choose to do so, if they want an earlier resolution. Say, for example, they know that they have a long time to wait for their trial. Maybe they can decide to go for mediation and then maybe even do it online, which is more cost effective and quicker.

All these types of platform tools are being developed and should be available for parties to choose but if they want to go for the usual way of going to the courts, then they just have to queue up and wait their turn.

Doreen Hartwell, US – Nevada

The state courts are using BlueJeans and it appears to work well. Most judges are in the courtroom with the court reporter and bailiff. The attorneys appear virtually, joining either by telephone or video. However, for depositions, Zoom seems to be the best technology according to the different court reporter services. I have taken document intensive depositions virtually and I must say it's definitely been a learning curve in terms of the most efficient way of sharing the documents with the deponent and opposing counsel.

The most effective way to conduct a deposition is with everyone in the same location. However, virtual depositions will remain the norm for the short term and may require much more

preparation. For document intensive depositions, one option is to provide all of your proposed exhibits to third-party deponents in advance. This allows the deponent to quickly review a document without the need to scroll through long documents on a shared screen. However, if the deponent is the opposing party, one may not want to give advance notice of all the exhibits. Regardless of whether the exhibits are provided to the deponent in advance, each exhibit should be a separate electronic document for easy access.

Katherine Evans, England

In the UK, all the courts have put procedures in place to facilitate online hearings. As the effects of the pandemic subside, it has become possible for larger trials to be held in a physical court setting, subject always of course to appropriate social distancing procedures being in place but there has been an increasing reliance on remote hearings at all levels of the justice system.

Regarding the applications being deployed by the courts to facilitate online hearings, the UK courts seem to have opted for Microsoft Teams as their preferred solution, I agree with Tony (Turks and Caicos) that Microsoft Teams is not the most intuitive product available in the marketplace but I guess we will have to learn to live with it, for the time being at least.

In terms of the approach to dispute resolution, there's always been a choice of virtual vs physical hearings in the UK. Since most of the mediations I become involved in concern international parties in more than one jurisdiction, it would be highly unusual for me to participate in a face to face mediation. They have almost invariably been held by video conference.

Michael Prange, Germany

Our code of civil procedure says that a hearing for all the arguments can be done by using images and sound transmissions, ie via video conference. I, myself, do a lot of litigation, but have never attended such a hearing, although several have taken place in the last few months in connection with COVID-19.

The practice for the most part in the first month of the pandemic was that in urgent matters the hearing took place at court in compliance with the rules of social distancing. You had to wear masks, plexiglass partitions were to be on the tables and the number of visitors was restricted. But the hearings took place. In other cases, being not urgent, the courts have been postponed until August or Autumn.

Most courts now have started normal proceedings, always in compliance with the said rules of social distancing.

Many lawyers file their cases by electronic means to the court, but the hearings take place in a normal way, if you can call it normal wearing a face mask.

León Felipe Aguilar Jiménez, Mexico

At the jurisdictional level, Mexico has developed various tools for the processing of online trials (both federal and state levels), which have made it possible for certain legal proceedings (especially those of an urgent nature) to continue during the period in which health restrictions were imposed.

At the federal level, there is a robust technological platform that allows the filing of lawsuits, attending trials and holding hearings remotely. In certain cases, the entire trial can already be conducted electronically through this platform. However, at the state level most states are at an early stage of developing or implementing platforms that allow the processing of online trials.

Due to health contingencies, judicial authorities have adopted the use of tools such as Google Meet or Zoom for the holding of hearings. In this regard, both judges and defendants have welcomed the implementation of such technologies because, in addition to reducing health risks, they help reduce excessive time spent on transport, as well as on hearings or court proceedings (it is to be noted that Mexico has a serious problem with public and private transportation, causing people to lose a considerable amount of time on rides from one place to another).

On the other hand, the implementation of remote hearings raises important questions regarding the effectiveness of the use of technologies, such as (i) the certainty and security of the proceedings developed through these means, (ii) conflict of evidence, (iii) witness credibility, and (iv) reliability and credibility of the parties, among many others.

Besides the issues arising from remote hearings per se, Mexico is a country with a high level of social and economic inequality, which implies that many sectors lack access to the Internet, not to mention computers or even electricity.

Roger Canals, Spain

COVID-19 has brought, in some ways, a sort of revolution in Spanish state Courts functioning. As previously mentioned, extreme confinement measures have forced to introduce virtual online hearings for the first time in Spain, through the use of virtual platforms such as Zoom, Jitsi or Hangout. Considering the previous lack of remote hearings, its implementation has functioned so far unexpectedly well. However, there is still much to improve, especially regarding documentary evidence (our Court system is significantly based on documentary evidence submitted by the parties).

Claims serving to the defendants are also causing problems in Spain. Claims have been traditionally served by Court bailiffs, by personally attending the defendants' domicile. This serving system has been significantly disrupted by measures implemented to fight against COVID-19, leading to delays in Court procedures. In its turn, this has revealed the necessity to introduce new ways of claims serving through electronic means, which are to date being analysed by the government.

Before the pandemic a public electronic platform already existed in Spain by which filing court claims could be done entirely online.

Tony Gruchot, Turks and Caicos Islands

Well, the court here is using Microsoft Teams. They seem to prefer that platform and as an acting magistrate I've done a number of trials, criminal and civil, remotely. How easy is that? Well, I prefer in-person hearings. The court made a decision recently that you ideally need to see the person. You need to be there with them to assess their credibility. Working remotely becomes very difficult with documents. If you have a document heavy case, then it's almost impossible and it depends on the equipment that everybody is using as well. You can share a screen so you can upload a document into Microsoft teams, but if someone is using a smartphone, for example, they can't see them. Different equipment has different facilities. It also becomes very difficult if the internet connections are not good.

If we have someone on another Island and their connection is poor, that can cause big problems to the point where you just simply can't function. What happens at that point? You just say, look, we can't we can't go ahead with this. We just have to adjourn to another day because for some bizarre reason, the Internet connection seems to fluctuate with the weather. If we have bad weather, the connection is appalling. You can't see anything.

The other issue is Zoom, which seems to work a lot better than Microsoft Teams when there are multiple microphones. With Teams there's a lot more feedback, so everyone has to be muted.

It's not ideal, but we get through it.



Katherine Evans pictured at the IR 'On the Road' Event in Tokyo, 2019

SESSION FOUR

Regarding the rise of technology, how much do you understand about blockchain for your clients?

Larry Fenelon, Ireland

We host an annual legal technology conference called the 'Future of Law'. In 2018 the event concentrated on Blockchain and how it could practically apply to the legal industry. It could certainly have application in the provenance of legal title in property transactions, however this requires a digital conveyancing platform overseen by the Property Registration Authority. Blockchain as a source of immutable evidence as a proof in Courts is a very attractive prospect for litigators. Ireland is positioning itself as a Blockchain development centre of excellence with many Blockchain companies operating out of Dublin. Blockchain is being adopted across public and private organisations, in supply chain and as part of technology infrastructure.

The Government and several Irish-based companies have also combined to establish Blockchain Ireland, an initiative led by IDA Ireland's Blockchain Expert Group, aimed at helping to promote and share information on Blockchain in Ireland.

Blockchain Ireland Week took place in May of this year, and Leman Solicitors hosted one of the events 'Blockchain for Lawyers' in their offices. The focus was on the impact of Blockchain on legal processes, such as smart contracts, and the tokenisation of property.

Dominic Wai, Hong Kong

I know about blockchain but I'm not sure I can profess to be someone who can tell you what it is. In some circumstances it can be used to confirm certain things, say, a smart contract. I do think that with the proper kind of setup and the product, blockchain has a use and we could save a lot of time trying to deal with bogus inquiries by using a blockchain.

Doreen Hartwell, US – Nevada

I have attended a couple of seminars regarding blockchain technology; I'm unfamiliar with its use in Nevada for any evidentiary purposes.

Katherine Evans, England

The UK is currently piloting blockchain as evidence at trials. I have no great confidence that the courts will be able to make this work in a cost-effective way. I act for some clients who design blockchains, and whilst their solutions have undoubtedly been extremely useful in terms of (for instance) putting in place validation methods to establish the origin of particular goods from gemstones to coffee beans to regional specific foods, it seems to me it should be possible to design a system for the filing of court documents using basic database construction methodologies, without the need to resort to the expense of designing a blockchain.

It seems to me that in a lot of senses it's being used because it's trendy and it's not necessarily the best way of getting your evidence chains in line. Whenever people mention it to me, I always say: "Why is this better than something else? Do you realise how expensive it's going to be to create this structure?"

Michael Prange, Germany

At present, the German code of civil procedure does not mention blockchain as a means of evidence, but maybe this might change in future. The federal government published in September 2020 a paper on the use of blockchain technology, and they want to push it. The paper deals with topics such as IT security, smart contracts and applications, and in this context using blockchain technology for the verification of contracting parties and the enforcement of smart contracts. But there's also an interesting aspect for litigators, as the federal government is considering recognising blockchain technology in the factoring of judicial evidence.

Maybe the German procedural codes might be supplemented by the legislator in this aspect. But this is in the very early stages and we have to wait and see whether it comes in effect.

León Felipe Aguilar Jiménez, Mexico

In the Mexican case, the understanding that litigants have with respect to blockchain is certainly limited.

In this regard, it is illustrative to note that only on January 1, 2020, commenced the processing of commercial trials in oral form in Mexico. This implies that up to 2019, most commercial trials were processed in written form. In that sense, in the judicial practice there is little to no knowledge of blockchain and the understanding and scope of it is an issue that is pending development in Mexico.

However, the use of blockchain technology in the judicial field could be linked to the development of online trials, a matter that would certainly help to generate more confidence regarding the acts performed in court (an aspect that is of great importance for litigants nowadays).

In Mexico, blockchain technology could benefit and simplify the collection of evidence on trials by eliminating the compulsory intervention of third parties in evidentiary processes; however, there are still many aspects to be advanced in this regard.

Roger Canals, Spain

So far, no specific legislation regulating the legal uses, applications, regime, and effects of blockchain has been passed by Spanish lawmakers. Neither is there a widespread use of blockchain technology for legal purposes. Therefore, blockchain technology cannot be used to date in Spain as a valid legal means to record transactions. In addition, and to the best of my knowledge, there is not any project of new regulation on blockchain and its legal uses as an application in Spain.

From a litigation perspective, there are not specific restrictions to use blockchain technology as a mean of evidence before Courts, to prove the existence or the contents of any given contract or transaction. However, this would have to be done through computing experts appearing before Court, who would certify either the existence of the transaction and its contents.

Tony Gruchot, Turks and Caicos Islands

My answer is going to be very little to nothing and it's certainly not something that the Turks and Caicos Islands is involved with.



IR Members at the Annual Conference in London, 2018

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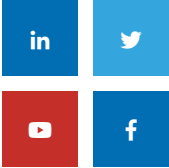
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Technology & Disputes: The impact of new technology on litigation and dispute resolution

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