

Virtual trials in a coronavirus world: how it works in practice

23 March 2020



As we enter a period in which in-person trials may no longer be possible for some time, Linklaters is preparing for the prospect of a fully “virtual trial” in English Commercial Court proceedings involving factual and expert witnesses located across the globe, several of whom require an interpreter whilst giving their evidence.

This post examines the pragmatic attitude of judges to trials in light of Covid-19 and the practical steps the parties have taken so far to enable a remote hearing to take place. A further post will follow after the trial, with our reflections and tips on the process.

For further information on conducting arbitral proceedings remotely, please see our recent post on the Linklaters arbitration blog “*Conducting arbitration remotely in the wake of COVID-19: the Seoul Protocol on Video Conferencing in International Arbitration*”.

Background

Linklaters is representing a financial institution in substantial multi-party litigation in relation to sums of over half a billion USD. The seven day trial was listed to commence on 23 March 2020, and initially anticipated numerous factual and foreign law expert witnesses (located variously in the UK, US, Russia and Belgium) attending the Commercial Court in London.

However, the continued spread of Covid-19 across the globe and the various measures implemented by governments across the world has rendered the initially anticipated trial in person impossible. Travel restrictions and medical concerns have prohibited the witnesses from travelling to court in London and even, in some instances, from leaving their homes. Whilst the cross-examination of witnesses via video link is not new, Covid-19 raises the prospect of a novel fully “virtual” trial, with counsel and even the judge having to participate remotely should the court building no longer be open, or should a member of the counsel team or judge develop symptoms, or be required to self-isolate during the course of the trial. That prospect was very real in this case, with some members of one the parties’ counsel and trial team confirming that they had been exposed to confirmed cases of Covid-19 in recent days.

The judge’s approach

A case management hearing was held the week before the trial was initially scheduled to commence to discuss whether the case should be adjourned (as one party contended) or if it could proceed, and how.

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On 19 March 2020, and against a backdrop of increasingly disturbing events, Mr Justice Teare ruled that the hearing should proceed if it all practicable and that it would not be right simply to adjourn the trial fixed for next week to some unidentified date in the future. He gave short shrift to the argument that there would likely be insurmountable logistical and technical difficulties, in particular with the quality of sound and video connections, and expressed concern that long adjournments would create delays and backlogs in the court system. He cited the latest guidance on the coronavirus from the Lord Chief Justice (issued that very morning) that “*we have an obligation to continue with the work of courts as a vital public service*” and that “*final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage*”.

Teare J ordered a short adjournment of two days, until Wednesday 25 March, for the parties to cooperate to find a remote conferencing facility which would enable the hearing to take place and to make the necessary arrangements. He expressly acknowledged the possibility that technical issues may arise, and even the risk of counsel contracting the virus and being unable to appear for a number of days. Nonetheless, he made clear that a remote hearing should be arranged, and that these risks should be addressed if and when they materialise.

Teare J noted that in the current circumstances the Court must adopt an optimistic, rather than pessimistic, attitude. He also reminded the parties that it is the duty of all of the parties to seek to co-operate to ensure that a remote hearing is possible.

The practicalities of a remote hearing

It remains to be decided whether Teare J will be present in the court building or elsewhere, and whether counsel and solicitors on each team will be present in the court building (with the attendees socially distancing), or together in conference rooms, or individually from their homes.

However, in light of Teare J’s decision, the parties have been making arrangements for a fully remote trial, which has involved the following:

- > Finding a suitable video conferencing platform facility which provides sufficient functions to support, and ideally mimic, a court room hearing. The parties have agreed to set up a virtual “court room”, being a video conference in which each participant can see and hear each other. The participants in this video conference will be the judge, any counsel who intends to speak at the trial, witnesses, interpreters and transcribers. All other parties in attendance (such as clients, solicitors and any non-speaking counsel) will be able to stream the video conference via a weblink, but will not be able to be seen or heard by the virtual court room.
- > Ensuring the trial is open to the public to ensure open justice. To satisfy this, the trial will be recorded and live streamed, including possibly via YouTube, so that members of the public (including journalists) with an interest in the case will be able to follow the proceedings if they so wish.
- > Testing the software and hardware on each intended participant and observer’s devices prior to the trial, to iron out any issues with connections and ensure the quality of sounds and video is sufficient.
- > Ensuring each witness has access to the necessary hardware and trial bundle, ideally in hard copy and an electronic copy if needed.
- > Ensuring a separate means of communication for legal teams to discuss the trial as it proceeds (the equivalent of a virtual “break out” room, or virtual “post-it” note).

Whilst these processes are still underway, testing so far has been successful. Watch this space for further reflections on the process, and how it works in practice, as the trial progresses.

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