

Insights

HONG KONG SAR COVID-19: HONG KONG COURTS EXPAND THE USE OF REMOTE HEARINGS FOR CIVIL CASES

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The remote hearing arrangement and its recent expansion

The recent COVID-19 pandemic and the General Adjourned Period encouraged the Hong Kong Courts to explore and expand the use of technology to conduct hearings. The Judiciary's first guidance note for remote hearings came into effect in early April 2020 (the [Phase 1 Guidance Note](#)), providing for the use of the Court's existing VCF for hearing interlocutory applications and civil appeals during the General Adjourned Period.

Although the General Adjourned Period came to an end in early May 2020, the remote hearing arrangement is here to stay. In the *Guidance Note for Remote Hearings for Civil Businesses in the Civil Courts (Phase 2: [Expanded Video-Conferencing Facilities and Telephone](#))*, which came into effect in mid-June 2020, (the Phase 2 Guidance Note), the use of remote hearings has increased significantly. Key expansions are as follows:

- a. Remote hearings are now available in the District Court and the Family Court in addition to the High Court.
- b. In addition to interlocutory applications and appeals, trials or parts of trials also may be considered for remote hearings.
- c. Users may now participate in remote hearings using the software and passcodes designated by the Court. Previously, users were required to access the Court's VCF through hardware connection.
- d. Under a new telephone hearing scheme, short interlocutory hearings listed before Masters may be carried out by way of telephone conference.
- e. Previously, the decision to conduct a hearing remotely lay exclusively with the Court. In Phase 2, parties may make an application for a remote hearing. However, the decision whether to order a remote hearing is a case management decision that remains at the discretion of the judge.

Guidance to parties applying for a remote hearing

The Phase 2 Guidance Note also provides helpful guidance by identifying the relevant factors for determining whether it is appropriate to hold a hearing remotely. Key factors include:

- a. Availability of VCF equipment.
- b. Subject matter of proceedings, such as the nature of the issue to be determined and the evidence to be heard.
- c. Fair and efficient disposal of proceedings, and any special need for urgency.
- d. The parties' ability to engage with and follow remote hearings in a meaningful way.
- e. Proposed length of the hearing.
- f. The prevailing public health situation.
- g. Available alternatives.

Parties applying for a remote hearing are expected to give early consideration to and address issues such as suitability of locations, technical compatibility of equipment, pre-testing and supply of documents and exhibits.

Live oral evidence from witnesses outside Hong Kong SAR

After the Phase 1 Guidance Note came into effect, there was some confusion and, occasionally, unrealistic expectations as to whether and when the Court would allow witnesses outside Hong Kong to give oral evidence over VCF.

For example, in *King's Glory Educational Centre Limited v Tsang Woon Ming and others* [2020] HKCFI 891, the Court rejected an eleventh hour application for three witnesses who resided in Taiwan, Macau and Shenzhen to give evidence by video link. The Court upheld a long line of pre-COVID authorities, ruling that the solemn atmosphere of the courtroom is highly important in the taking of evidence, and that evidence by VCF is not appropriate where the witnesses' credibility is at issue. In particular in that case, it was held that the witnesses' unwillingness to go through quarantine due to other business commitments was not a good reason to justify the application. The Court also criticised the applicant for failing to put forward a satisfactory proposal for the witnesses to give evidence in appropriate neutral venues.

The Phase 2 Guidance Note was issued after *King's Glory* and addresses some of the issues highlighted by that case. In particular, the guidance note clarifies the Court's expectations on parties making an application for witnesses to testify from a remote location:

- a. Make the application early and account for the greater lead time needed for processing the application and considering the proposal.

- b. Ensure that the remote location is suitable and appropriate for taking live oral evidence.
- c. Comply with PD 29 (“Use of the Technology Court”) where live oral evidence from witnesses outside Hong Kong is the only remote element of the hearing.
- d. supply the witness with documents relevant to the examination and ensure the uniformity of paper or electronic bundles.
- e. Provide the witness with an interpreter (if applicable).

BCLP perspective

The Judiciary’s expansion in the use of remote hearing for civil cases is encouraging and hopefully will assist the Courts in dealing with the backlog of the cases that has built up during the General Adjourned Period.

While the remote hearing arrangement has been extended to trials, we anticipate the uptake of VCF by trial judges to be gradual, likely starting with short trials that involve primarily oral legal submissions. Although there have been cases of witnesses testifying remotely due to travel restrictions that were in place, the Court likely will be cautious when dealing with applications for witnesses to give evidence from remote locations, especially in cases where the witness’s credibility is at issue.

It is expected that the Judiciary will continue to innovate and overcome issues and challenges involved in conducting remote hearings. However, such developments probably will be incremental. Further, the pace will depend on the favourable reception of remote hearings by both legal practitioners and judges, especially in terms of whether the remote hearings are carried out efficiently and without compromising the integrity of the hearing.

Key takeaways

For parties contemplating the use of remote hearings, the following points are worth bearing in mind:

- a. Check the technical specifications of the Courts’ VCF. Consult counsel, experts and witnesses (if applicable) to determine whether they have sufficient hardware, software, internet speed and reliability to join a remote hearing.
- b. Consider the appropriateness of the remote hearing. Address potential concerns or objections to hearing particular parts of the proceedings or items of evidence remotely.
- c. Parties applying to take live oral evidence from witnesses in a remote location should ensure that the remote location is suitable and appropriate. Case law suggests that this will likely involve

using a neutral venue, allowing party representatives to attend the venue during the evidence and making other arrangements to ensure that there is no foul play.

- d. Consult other parties to seek their agreement in using the Courts' VCF.
- e. Consider whether it is appropriate to use electronic bundles or the Courts' electronic Documentation and Exhibits Handling System in addition to the Courts' VCF.
- f. Make the application early. Ensure that there is sufficient time for testing and resolving technical issues that may arise.
- g. The final decision on remote hearing lies with the judge.

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