

The impact of COVID-19 (coronavirus) on witness testimony

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Introduction

On February 11, 2020, the World Health Organisation (WHO) officially adopted the name "COVID-19" for the new strain of coronavirus afflicting the world. Since then, the spread of the virus has caused disruption to travel and the closure of schools, universities and other public buildings, with events changing on a daily basis. At the time of writing, the disruption may be such that conventional court and arbitration hearings become impossible owing to necessary public health measures aimed at containing the spread of the virus.

The day after COVID-19 was named, nearly 6,000 kilometres away from the epicentre of the outbreak, the court of the Dubai International Financial Centre (DIFC) granted only its third order in its 11-year history to permit a witness to give evidence at trial by way of a video link.¹ The DIFC Court has adopted cutting-edge technology for these purposes. The hearing on February 12, at which the Order permitting witness evidence by video conference was given, was itself conducted by video conference, with the judge sitting in Sydney, counsel for the applicant in London and other parties being in meeting room in the DIFC's Dispute Resolution Authority's offices. The technology permitted the hearing to proceed seamlessly.

The court provisions permitting the use of video conferencing

Applications of this nature may well become a necessary requirement to ensure that cost and time are not wasted on abandoned trial dates over the coming weeks and months. That order was granted for reasons unrelated to the outbreak, but the judgment in that case demonstrates that the court is now ready to accept technological remedies to enable hearings to proceed even when international travel would otherwise prevent the physical attendance at hearings. Indeed, hearings by video conference may well be the only practical alternative for the wholesale postponement of cross-border hearings in both courts and arbitrations as the situation develops in the coming weeks and months.

It has long been commonplace in the DIFC for both judges and advocates to attend hearings by video-conferencing when, with the court's permission, it is considered appropriate to do so. More controversial is the issue as to whether factual and expert witnesses should also be permitted to give evidence by the same means. DIFC law provides that the DIFC Court may, for the purposes of any proceeding, direct or allow testimony to be given by video link, telephone, electronic device or other appropriate means.² This is given effect to in the DIFC Court Rules (RDC) which adopts essentially the same test.³ The RDC⁴ provides extensive guidance on the use of video conferencing facilities in the DIFC Courts and acknowledges that while it is not as ideal as having the witness physically present in court; it has practical benefits including considerable savings in time and costs and the efficient, fair and economic disposal of the litigation.

¹ *KBC Aldini Capital Limited v David Baazov & others CFI-002/2017* - February 18 2020

² DIFC Law 10 of 2004 - The DIFC Court Law - Section 51(1)

³ Rules of the DIFC Court - Part 29 [Evidence] Rule 29.14 [Evidence By Video Link Or Other Means]

⁴ Rules of the DIFC Court - Part 23 [General Rules about Applications for Court Orders] - Schedule B [Video-Conferencing Protocol]

The test

In deciding whether video conferencing “will be likely to be beneficial to the efficient, fair and economic disposal of the litigation”⁵, the Court will perform an assessment in considering the possible prejudice that each party may suffer if the use of a video link is or is not permitted. In assessing the existence of prejudice, the DIFC court has adopted the same test as the English courts,⁶ namely that there must be “a real, rather than a fanciful, risk” of prejudice.

Opposition to the use of video conferencing is usually focussed on the perceived inability of a party effectively to cross-examine the witness who is attending by video-link, and if so whether the trial judge is able to assess that witness's demeanour in court. It now appears settled that the modern approach to cross-examination by English courts is that trial judges will place little weight on factors such as witness “demeanour”. In *McGlinn v Waltham Contractors Ltd and others*, the court rejected the notion that:

“the order sought causes or could cause any significant prejudice to the defendants. They can cross-examine the claimant effectively over a video link. Whilst, of course, that is never quite as satisfactory as direct cross-examination, no real prejudice to the defendants has been or, in my judgment, could be identified as a consequence of this...[even when the defendant’s] credibility was directly in issue and where the circumstances of his cross-examination were therefore of the greatest significance. I accept that giving evidence at a video suite may be less stressful than being in the witness box but that, it seems to me, is a matter which the court can take into account when it comes to the evaluation of all of the witnesses in the case.”

⁵ Rules of the DIFC Court - Part 23 [General Rules about Applications for Court Orders] - Schedule B [Video-Conferencing Protocol] Paragraph 2.

⁶ *McGlinn v Waltham Contractors Ltd and others* (No 2) [2006] EWHC 2322 (TCC) 108 ConLR 43

⁷ *SS (Sri Lanka) v. SSHD* [2018] EWCA Civ 1391 per Leggatt LJ at [33]-[43]

⁸ It is commonplace in DIFC Court that advocates and judges are not permanently resident in the UAE. It would be understandable if they express apprehension about traveling in circumstances where restrictions may be imposed at short notice.

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In short, the English authorities makes clear that the use of evidence be given by video link should not be reserved for exceptional circumstances and the assessment of factors such as the demeanour of a witness should not be overstated.⁷

To date, much case law presupposes that the use of video-conferencing is embraced by one party only, and looks to balance with competing interests of that party with the other parties to the proceedings. In the present crisis, where parties, counsel, judiciary⁸ and court staff may all be faced with same difficulties in attending a physical hearing, the use of video conferencing may be adopted consensually, or by direction of the court, as the only practical option to ensure that hearing can proceed. Certainly, any recalcitrant party can expect little sympathy from the court if it seeks to use the current crisis as an excuse to postpone hearings that could otherwise take place using technology. On the basis of recent case law, it is difficult to identify many circumstances where video-conferencing would obviously be inappropriate.

Conclusion

The current crisis will cause inevitable disruption to dispute resolution. Video-conferencing is available to mitigate some of that disruption while causing minimal prejudice to the parties. The law provides for it and technology makes it possible. The only thing that remains is for parties to embrace its use and dispel the perceptions of its inadequacy.

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