



SIF_{CC}

THE STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS

**Delivering justice during the Covid-19 pandemic and the future
use of technology**

Memorandum

29 May 2020

1. Introduction

The Covid-19 pandemic has shown:

- (1) Justice has to be delivered in a way that accommodates “circuit breaking” or “safe distancing” or “social distancing” (which we will call safe distancing).
- (2) The emerging technologies can be successfully used to enable a significant part of the court system to operate to deliver fair and open justice whilst the pandemic continues. This has been most clear in relation to interlocutory hearings and commercial disputes.

There is a further point of context which urges that we proceed with a longer-term view towards technology in a justice system. The consequences of the pandemic will likely place longer term demands on and challenges for courts, and perhaps Commercial Courts in particular. This is in light of:

- a. lasting damage to economies;
- b. both increased defaults and changes in strengths within the business sector;
- c. increased use of technology by business itself as a result of the pandemic;
- d. the build-up of dispute backlog;
- e. damage at least to some parts of the legal profession;
- f. increased calls for better arrangements for access to justice for those without means.

2. The underlying principles for the fair and open delivery of justice

- (1) A functioning justice system is an essential part of any state and essential to the maintenance of the rule of law.
- (2) The justice system must function in a way that commands public confidence and the confidence of lawyers and litigants. Litigants and witnesses must feel they have had the opportunity of being heard. The trust, consent and commitment to the process, given by society, and by litigants in particular, requires particular attention as change of the nature that technology involves is made.
- (3) The justice system, including its use of technology, must function not only efficiently and effectively but also as cost effectively and economically for litigants as possible.
- (4) The administration of justice must be independent, open and transparent, yet have regard to the need to ensure that privacy and personal data are protected where required.
- (5) The system must provide for access to justice for litigants in person/ self-represented litigants, and this will include assistance with legal advice and with technology where

needed. This will require funding by the State and possibly use of other public buildings such as libraries.

- (6) The changes to court procedure must proceed in a manner carefully thought through by the judiciary. Procedural and other change must be clearly publicised to ensure awareness.
- (7) Some aspects of court procedure may require actual presence in a court room. It will be of the utmost importance to determine what aspects require actual presence. The determination will depend on experience but issues raised include:
 - a. cross examination;
 - b. the need for the parties to be able to confront each other;
 - c. the importance of assessment of demeanour by actual presence as opposed to observation on a high quality video link;
 - d. the wish of the judge to require the presence of the parties.
- (8) Special consideration needs to be given to jury trials.
- (9) The judiciary should aim to ensure that the use of IT provides “real hearings” online. Such hearings should not be characterised as virtual or remote. A true sense of reality is of high importance to trust and confidence.
- (10) Open justice must be maintained with full public access to hearings and decisions or judgments in a way similar to that which would have occurred if the proceedings took place in a courtroom.
- (11) Reliable video connections should be used and hearings by telephone should be used only for routine matters or where video links are not feasible.
- (12) Judicial case management has an important part to play in ensuring the successful preparation for and use of technology at an affordable cost in the conduct of the particular case¹.
- (13) Courts should be mindful of the difficult circumstances under which litigants and their lawyers may be working and listen with care to modest requests for extra time and for reasonable adjustments.

3. The use being made of technology

- (1) Before the Covid-19 pandemic many courts were beginning to use telephone and video hearings for interlocutory matters.

¹ SIFoCC’s General Presumptions for international best practice in Case Management, prepared by the First SIFoCC International Working Group, will shortly be published.

- (2) Courts were also, in certain circumstances, particularly where a witness was ill or unable to travel, receiving evidence over live video.
- (3) Some courts had or were implementing electronic case filing systems which permitted online filing of proceedings and applications. These systems permit judges and court staff to work remotely; to the extent that the contents of the electronic files are made public, they facilitate access by the press and public.
- (4) The need for safe distancing required courts either to adjourn all hearings, save for emergencies, or to test how the emerging technology could be used to maintain the delivery of justice in as near a state to normal as was possible. Some jurisdictions have used video technology for the first time and others proceeded first by audio.²
- (5) The use of technology has proved to be very effective in most areas, except where a jury is required. Detailed issues have arisen, as summarised in section 7 below, but these have generally proved surmountable.
- (6) It has been important for jurisdictions to develop the use of technology and its extension to different forms of online hearing (where persons are not present in a court room) at a pace with which the judiciary, the profession and the public are content and comfortable.
- (7) This has been particularly important to ensuring that there is trust and confidence that real justice is being fairly and openly delivered where the delivery of justice is, in many types of proceeding, online.
- (8) The current unprecedented acceleration in the use of technology will mean that issues will need to be returned to in due course. Integrating all that has been learned from this period into a longer term that maintains the trust, consent and commitment, or public confidence, referred to above will be a crucial challenge.

4. The sharing of experience

- (1) Some envisage that the use of online hearings will be a permanent change for many types of hearing in their state; for example, interlocutory hearings have proved the most readily suitable for hearing and determination online, and so too the delivery of reserved judgments and consequential argument.
- (2) Whether this occurs in some states but not in others will be for the decision of each state.
- (3) It is likely that more use will be made of online hearings in commercial cases than some other types of case because of the need to:

² See transcript of an ALI/Duke Law School webinar in mid-April 2020 on how the American courts are coping: <https://judicialstudies.duke.edu/episodes/how-courts-are-preserving-access-to-justice/>.

- a. deal with urgent commercial disputes which arise out of the disruption to the economy;
 - b. address the difficulties of international travel;
 - c. address the backlog of cases, including from potential increased future volume;
 - d. take account of the resources of the parties.
- (4) A great deal would be gained by Commercial Courts sharing their experience. A start has been made by the contribution of a number of judiciaries to developing this note as a first step. Work might then follow, using small working parties where appropriate, on specific issues. Some of the topics are identified at sections 5, 6 and 7 of this note. Addressing them should further inform the fundamental issues identified in section 2 of this note.
- (5) **Annex A** sets out a short summary from individual Commercial Courts, but this note summarises the overall issues and experience.
- (6) There are other available resources:
- a. <https://remotecourts.org/>. This site called “Remote Courts Worldwide” has been established under the leadership of Professor Richard Susskind. It does not yet contain information at a high level of detail.
 - b. The Commonwealth Magistrates and Judges Association has established an on-line forum at <https://cmja.biz/forum-introduction/>. It is for members only and password protected.
 - c. The IBA published on 20 May 2020 a booklet which summarises what is happening in some jurisdictions:
<https://www.ibanet.org/Document/Default.aspx?DocumentUid=E9A83AEF-6B17-4A54-815F-1C6E0D600163>

5. Assistance on the use of platforms

- (1) There appears to be little by way of comparison available.
- (2) The platforms used include:
 - a. **Cisco’s Webex**³
 - b. **Zoom**⁴
 - c. **Microsoft Teams**⁵
 - d. **Skype for Business**⁶
 - e. **Polycom Real presence**⁷

³ Used by the UK Supreme Court, by the Supreme Court of Victoria and by Brazil.

⁴ Used by Singapore, the Supreme Court of Victoria, Courts in New Zealand and some US jurisdictions. One issue raised about Zoom is its security: see <https://www.forbes.com/sites/kateoflahertyuk/2020/04/10/zoom-security-heres-what-zoom-is-doing-to-make-its-service-safer/#446555a030fc>

⁵ Used by some England and Wales Courts as well as Australian Courts and Courts in New Zealand.

⁶ Used by some England and Wales Courts as well as Australian Courts, Courts in Malaysia and some Courts in Kazakhstan.

⁷ Used by the Qatar International Court which also used WebEx.

- f. **Bespoke platforms, such as Kinly Cloud Video Platform⁸**
- g. **BlueJeans.**
- h. **PEXIP⁹**
- i. **TrueConf¹⁰**

(3) Whether any particular platform or platforms are to be regarded as suitable will require the following issues to be considered among others.

a. Strength of the system

- i. What hardware and software is used? Are both on the same platform and controlled by the same provider?
- ii. If a bespoke or customised solution is provided, who owns the IP?
- iii. How effective is customer service? How quickly can any outage be rectified?
- iv. If the system goes offline, what provisions exist for a backup system to kick in? Will it be seamless or will there be down time?
- v. How are upgrades managed? Can the system be easily enhanced without causing disruption to users?
- vi. Will the system provider be required to keep abreast of technological advancements and inform the court when new upgrades become available? What will the likely cost consequences of this be?
- vii. Does the system require downtime (e.g. for maintenance)? If so, what impact will/may this have on users?
- viii. What size platform is required? This goes to cost.

b. Security

- i. Where is the data centre or platform hosted? Is it in country or in a state where there are concerns about security?
- ii. How secure is the system? Is there end to end encryption?

c. Ability to deal with poor connections

- i. If a connection becomes unstable or poor (such as a connection to a lawyers' office), does the system adjust to compensate automatically?
- ii. Or does this have to be done manually (by for example shutting off the video) or will the hearing have to be paused while the connection is restored?

d. Integration with other systems

- i. Will the platform be used to provide a live streaming or web feed in hearings where the proceedings need to be made public or open to the media?
- ii. Will the system be capable of integrating with other systems used by the court?

⁸ Used by some England and Wales Courts. China has launched its Mobile Micro Court Electronic Litigation Platform. South Korea has a platform from VIDYO.

⁹ Used by Republic of Ireland.

¹⁰ Used by some Courts in Kazakhstan.

- iii. Does the system permit documents or videos held on other systems to be shared?
- e. *Separate links for judges during the hearing*
 - i. Does the system have a facility to allow judges to confer when a point arises during the hearing?
 - ii. Some systems provide separate rooms? Some systems enable judges to remain and move the parties to a separate area while the judges deliberate?
- f. *Ease of use*
 - i. How easy is the system for judges and lawyers and litigants to use?
 - ii. Does it need an operator to control the operation?
 - iii. Can any level of user assistance be managed automatically / internally (by the court), (e.g. password resets)?
 - iv. Does the system enable or work with arrangements for litigants to confer with their lawyers, and for private communication between parties?
 - v. What capacity does the system have to facilitate use by those with disabilities?

(4) The choice of system needs careful consideration. It is not desirable to switch from system to system in order to secure a minor gain. Once a system has carefully been chosen, it is desirable to stick with it to avoid fatigue amongst users of adapting to new systems.

6. Options for holding jury trials

- (1) Online hearings are taking place for pre-trial criminal work and for sentencing and some appeals; some jurisdictions have done this (or some element of it) for some time; others have adopted it as a result of the Covid-19 pandemic.
- (2) Trial by jury, whether civil or criminal, poses real difficulties. There are four broad options that are generally being considered as a consequence of the Covid-19 pandemic:
 - a. Adjourning cases until safe distancing is no longer required. This could involve an extended period with serious consequences in a civil case where business issues are time critical and in a criminal case where a defendant is remanded in custody.
 - b. Adapting courtrooms (or suitable larger public buildings) to provide safe distancing with a possible reduction in the size of the jury (say to 7) and fitting out a jury room that permits the jury to deliberate yet maintain safe distancing¹¹.
 - c. Using video technology more extensively. There are various options:

¹¹ England and Wales have restarted jury trials in criminal cases at 4 court centres utilising two or three rooms for the single trial that is held at each of the 4 court centres.

- i. Relaying the proceedings for press and public to an adjoining room; this gives rise to no issues of principle.
 - ii. Taking all or almost all evidence by video so that the courtroom has only the advocates, judge, jury and clerk.
 - iii. Having just the judge and the advocates or just the judge and the jury in the courtroom, relaying the proceedings to those not present.
 - iv. Doing everything online, including having members of the jury in their own homes. Justice, the UK charity, has carried out some work and issued a preliminary assessment of this in a criminal context.¹² Concerns have been expressed at allowing jurors to remain in their homes, in part because of the risk of distraction/discussions with others, in part because of the need to ensure that no technology issues arise and in part because of the need to enable the necessary discussion between jurors to take place at the appropriate time. Consideration is being given to bringing jurors together at a location that can more easily be adapted for safe distancing than a court.
- d. Permitting trial by judge alone, or by a judge and two lay magistrates¹³, where this is constitutionally permissible.

(3) While service as jurors may be compulsory as a duty of citizenship in many jurisdictions, it is highly dependent on persuading the public that they will serve under safe conditions. Every aspect of jury service must be carefully considered, including Covid-19 screening, temperature checks, social distancing at every step of service, adequate food service and safe transportation to and from the courthouse. The protections for jurors must be well communicated in advance in order to promote voluntary service.

7. Detailed issues that need to be addressed

(1) Delivery of online litigation

- a. Access by litigants in person/ self-represented litigants to the court file (so that they can file papers, review filed papers and pay fees) and to legal advice, and where needed assistance with technology and to procedural adjustments. There is emerging evidence that litigants in person are finding online hearings difficult without assistance.
- b. The quality and security of internet connections used by lawyers and litigants. This is a factor which will depend on the platform used. It also requires access by lawyers to suitable technology¹⁴. The need for lawyers and suppliers to certify to the court compliance with confidentiality and data protection standards should be addressed.

¹² <https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf>. There is more information at Justice's website: <https://justice.org.uk/our-work/justice-covid-19-response/>

¹³ This type of tribunal for criminal cases was recommended by Lord Justice Auld for moderately serious criminal cases in his report on Criminal Justice in England and Wales in 2001.

¹⁴ In Hong Kong a government funded Law Tech Fund has been established to provide grants to assist small and medium firms and chambers to procure and upgrade technology.

- c. Provision of training and technical help for judges/advocates. It is also necessary to consider good practice for court staff in organising and supporting online hearings.
- d. Time zones in cases involving e.g. the Far East and Australasia and the USA.
- e. Meeting the needs of those with disabilities and those without the means to access the necessary technology¹⁵. This must be addressed.

(2) Issues related to online hearings

- a. The identification of the types of proceedings (or parts of proceedings) which must take place in a courtroom. Should hybrid hearings, with one party in court and the other party online, be permitted? There is a strong view that this would compromise equality of arms and due process.
- b. Ensuring as far as possible that the use of IT provides “real hearings” online, rather than hearings that are seen as virtual or remote.
- c. The need for clear ground rules and etiquette¹⁶. The dignity, fairness and efficiency of the hearing is important to confidence in the use of this means as part of the administration of justice. This goes for all participants. As regards litigants in person in particular early experience has shown some do

¹⁵ It is becoming evident that some do not have the means to acquire proper technology or to pay the necessary “top up charges”.

¹⁶ Guides have been produced in some states – see for example Singapore: In the Singapore Supreme Court, there have been two Registrar’s Circulars (i.e. Registrar’s Circular No 3 of 2020: <https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-3-2020---information-on-measures-and-other-matters-relating-to-covid-19-for-court-users-and-visitors-to-the-supreme-court.pdf> and Registrar’s Circular No 4 of 2020: [https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-4-2020---updates-on-measures-relating-to-covid-19-\(coronavirus-disease-2019\)-from-7-april-to-4-may-2020.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-4-2020---updates-on-measures-relating-to-covid-19-(coronavirus-disease-2019)-from-7-april-to-4-may-2020.pdf)) and a Guide on the use of video conferencing and telephone conference & video conferencing for hearings before the Duty Registrar issued since the COVID-19 pandemic outbreak: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/2020-03-27---guide-to-telephone-conferencing-and-video-conferencing.pdf>.

Hong Kong: Guidance Note for Remote Hearings for Civil Business in the High Court (Phase 1 – Video-Conferencing Facilities). [2020] HKCFI 614.

In England and Wales in addition to practice directions, protocols and guidance from the judiciary (see generally: <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/> guidance and information has been published by the courts and tribunals service: https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak?utm_medium=email&utm_source=. In some Australian courts a guide has been produced for litigants on online hearings: <https://www.fedcourt.gov.au/online-services/online-hearings>. In Uganda, following two earlier Administrative Circulars, the Chief Justice has issued guidelines for the online hearing of cases by means of Office Instruction No 2 of 2020: <https://judiciary.go.ug/files/downloads/Guidelines%20for%20Court%20Online%20Hearings%20-%200-20200429175035.pdf>. The Supreme People’s Court of China issued a “Notice by the Supreme People’s Court of Strengthening and Regulating Online Litigation during the Period of Prevention and Control of the COVID-19”. In France, use of videoconferencing is governed by the Code of Judicial Organisation (CJO). The Supreme Court of South Korea made a new reform bill for Civil Procedural Rule for video conferencing.

not understand how to appear in cases online – examples include talking over each other, sometimes rudeness or apparent rudeness to the judge, difficulty or uncertainty over managing documents at the same time, participating from an unsuitable place or lack of a suitable place.

- d. The use of interpreters to provide independent simultaneous translation, including one of automated interpretation.
- e. The need for good electronic bundles which are easy to navigate and searchable, and any related arrangements for sufficient screens for judges and the parties.¹⁷ Consideration needs to be given to the software necessary for bundles to be conveniently marked or annotated privately by the judge and the parties. The feasibility of bundle-preparation requirements for litigants in person and the need to allow for reasonable adjustments should be considered.
- f. Formal evidential requirements, including for documents (and authentication of judgments), and the scope for reducing unnecessary formality.
- g. The effect on participants of online hearings; many find them more tiring. There is a differing view on whether online hearings take longer
- h. The need for a team of lawyers representing a party to be able to communicate confidentially during the proceedings (but observing safe distancing between themselves), and for experts to meet.
- i. Open justice – making live streaming available with safeguards as to unauthorised recording or filming and/or the use/misuse of data that can be obtained from the live streaming and from online documents; ready public access to decisions and judgments that follow a public hearing held online. Should there be a distinction as to what is made available to the media and what is made available to the general public?
- j. The need to ensure that when witnesses give their evidence, witnesses are not being aided or coached.

(3) Issues for the judiciary and judicial administration

- a. The need for a separate and secure link for judges (or juries) to deliberate.¹⁸
- b. Improving coordination of, alignment of and access to guidance across jurisdictions in a state.
- c. Use by the judiciary of emerging technologies, including block-chain and voice to text technologies.

¹⁷ Some Australian courts have requested that digital court books be provided via email, online sharing platforms or Microsoft Teams' 'sharing screen' function: <https://www.fedcourt.gov.au/online-services/online-hearings>.

¹⁸ In some Australian court appeals this has been achieved through a combination of Business Skype and Microsoft Teams.

- d. Optimum design of court rooms.

(4) Issues for ADR and mediation

- a. The potential for improved access to ADR in appropriate cases, including court annexed ADR and courts having their own panel of those who will assist with settlement or mediation¹⁹.
- b. The building of online platforms to co-ordinate mediation and litigation.
- c. Training for online mediation.
- d. The effectiveness of this method of mediation will need to be assessed. In the changed economic circumstances, litigants and their lawyers may need to be reminded of the cost of litigation.

8. Wider dimensions

- (1) This note does not address the separate dimension of technology that is about AI. This will however be among the subjects addressed at the Third SIFoCC Meeting in Singapore in March 2021. The objectives will include a focus on these points:
 - a. The problems that call for technology and AI.
 - b. The true scope for AI in an adjudicative setting, including mediation and other ADR – the role of the judge and the role of algorithms.
 - c. The ethical issues and values involved with AI in a justice system.
 - d. How to provide a legal and ethical framework.
 - e. The consequences for the legal profession and its regulation.
- (2) The Third SIFoCC Meeting will also look at capturing data and providing access to data in a justice system: by whom, to whom, for what purpose, and on what terms.

¹⁹ In some jurisdictions, including Pennsylvania and Qatar, courts have taken action in this respect.

SIFoCC

Standing International Forum of Commercial Courts

Rolls Building, London, EC4A 1NL

www.sifocc.org