



Hong Kong courts' latest guidance for remote hearings for civil cases

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Introduction

A third guidance note on the use of remote hearings for civil proceedings took effect on 2 January 2021. The guidance note (representing Phase 3) provides for wider use of videoconferencing facilities and telephone hearings in all levels of civil courts in Hong Kong (including, the Competition, Labour and Small Claims Tribunals).

Phase 3 is more comprehensive and provides more options for connecting with the courts' videoconferencing facilities – for example, in addition to the use of the courts' hardware or software videoconferencing options (under Phases 1 and 2), Phase 3 now provides for a lower cost "browser-based" videoconferencing option.

Background – Phase 1 and 2 Guidance Notes

Phase 1 was an important development in the courts' adoption of more IT for civil business. It took effect as a result of the COVID-19 public health emergency on 3 April 2020 – during the general adjourned period, when the courts were generally closed save for urgent and essential court business. The general adjourned period came to an end on 3 May 2020.

Phase 1 was limited in scope, generally restricting the use of videoconferencing facilities for civil hearings to interlocutory applications or certain appeals in the Court of First Instance and the Court of Appeal. Such hearings tended to be limited to those matters that could be disposed of by oral submissions within approximately two hours. Under Phase 1, videoconferencing was limited to hardware videoconferencing facilities that were compatible with the courts' facilities.

Phase 2 provided for remote hearings using expanded videoconferencing and telephone facilities and took effect on 15 June 2020. Under Phase 2 (in addition to Phase 1 videoconferencing facilities), where suitable the courts could use videoconferencing facilities to determine some first instance civil

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trials, or parts of those trials, and some interlocutory applications and appeals to the Court of Appeal (where the oral submissions could be concluded within one day).

Phase 2 extended the courts' use of videoconferencing facilities to all of the principal civil courts in Hong Kong. In addition to the Court of First Instance (judges and masters) and the Court of Appeal, the use of remote hearings was therefore extended to the Competition Tribunal (presided over by a High Court judge), the District Court (judges and masters) and the Family Court.

The guidance note for Phase 2 also gave more detail on the necessary technical specifications for remote hearings. These identified the type of IT equipment needed to participate in remote hearings, including a videoconferencing unit, laptop computer, display unit, camera, speaker system and microphone. The technical specifications set out the standard functional requirements for each piece of IT equipment.

As from 15 June 2020 (under Phase 2), it became possible to connect to the courts' videoconferencing facilities using both hardware or software options. Phase 2 also gave details of the type of matters that may be suitable for disposal using remote telephone hearings.

Phase 3

Phase 3 represents the most recent, and potentially significant, stage in the courts' promotion of remote hearings for suitable civil proceedings.

Effective from 2 January 2021, under Phase 3 some of the more important developments are as follows:

- the courts' videoconferencing facilities allow an additional third technical option – namely, a browser-based option. This is stated to be “a more user-friendly and low-cost mode of connection” to the courts' videoconferencing facilities. The other two options remain, namely a hardware option and a software option. As its name suggests, under the hardware option court users can continue to connect to the courts' videoconferencing facilities using hardware videoconferencing units that meet specified technical specifications. Under the software option, court users can continue to connect to the courts' videoconferencing facilities using normal desktop or laptop computer devices, provided that their software meets the technical specifications. The browser-based videoconferencing option no opens up videoconferencing for hearings to those using Microsoft Windows 10 or MacOS Version 10.15.6 or above operating systems, and Google Chrome Version 84 or above, Microsoft Edge and Safari Version 11.1 or above browsers
- “End-to-end” encryption will be used for the browser-based option, controlled at the videoconferencing server system of the judiciary administration. Participants must use a unique login ID and passcode provided to them for authentication
- in short, the browser-based option is a lower-cost option that will allow authorised participants to connect to the courts' videoconferencing facilities, using only a computer (not a mobile device) with a camera function that captures a “participant's facial and other views to facilitate the conduct of remote hearings”
- the use of videoconferencing hearings now extends to all levels of the civil courts, including the Labour and Small Claims Tribunals – two busy tribunals in Hong Kong that are situated at separate locations from the High Court
- the Judiciary has also provided guidance for a situation where legal representatives (advocates) wish to attend a remote hearing from outside Hong Kong. Such “remote attendance” must first be approved through an application to the court. The guidance note states (at paragraph 35) that:

“Permission will unlikely be granted unless the advocate can show exceptional events beyond his or her control which cause real practical difficulties for attending the hearing in Hong Kong, or for being physically in Hong Kong at the time of the hearing.”

Comment

The Phase 3 guidance note is a significant development. Consistent with Phases 1 and 2, the Phase 3 guidance note makes it clear that the courts' approach to the adoption of IT to promote the use of remote hearings is incremental. The Judiciary administration should be given credit for trying to make the courts' services more readily available during the ongoing COVID-19 pandemic (as Hong Kong experiences a “fourth wave” of reported infections).

The guidance note also states (at paragraph 4) that:

“In any event, improvements in technology will permit greater use of videoconferencing facilities irrespective of the public health situation.”

This is a positive statement that will generally be welcomed by different stakeholders and court users, including litigants in person (to whom specific reference is made in the guidance note, at paragraphs 36 and 37).

The guidance note also stresses the need for flexibility – for example, the type of civil court business that is suitable for remote hearings might change and the courts will continue to assess whether a case is suitable on its own merits. It remains the position that in the first instance the courts decide whether to use a remote hearing, although the parties may apply.

Given lockdown restrictions in some jurisdictions and entry/quarantine requirements on entering Hong Kong (from most jurisdictions, currently requiring 21 days' mandatory hotel quarantine), it is hoped that the courts will allow meritorious applications by advocates seeking to attend a remote hearing taking place in Hong Kong while they are physically located in another jurisdiction.

The public health situation means some logistical issues remain a work in progress. The broad presumption is that court hearings in Hong Kong are open to the public and the media can attend. However, given the public health restrictions that remain in place, there are limitations on space and seating in courtrooms from which remote hearings will be conducted (although these restrictions should not normally prevent a hearing taking place). The parties and their legal representatives will now be able to use a web-based system to attend the hearing at appropriate remote locations (usually, in Hong Kong).

There is still work to be done, though, both on the part of the Judiciary and parties.

For now, in Hong Kong, judges physically sit in court for remote hearings. This contrasts with some courts in other jurisdictions where judges are able to sit from home, with each judge using their own camera, microphone, etc. Where two or more judges preside over a remote hearing in Hong Kong (for example, for an application for leave to appeal or a civil appeal) using a single camera can lead to practical difficulties for other participants (such as the advocates). For example, sometimes there are difficulties seeing the judges or hearing the questions being asked.

Many parties and their legal representatives are still getting to grips with the different preparations required for remote hearings and the different dynamics before and during remote hearings. In particular, the interaction between the court and advocate is often not as smooth, instantaneous and clear as during a physical hearing. This can cause confusion and result in a longer hearing compared to in-person physical hearings. As noted, this can be exacerbated when the hearing is before more than one judicial officer, especially when the court in question uses only a single camera.

There also remains the question of costs. While using IT can result in cost savings, in more complex cases, that are often document heavy, the preparation time can still result in considerable litigation costs. The costs of a remote hearing and related services (such as real-time reporting and transcription) form part of the costs of the proceedings. Their recoverability will fall to be determined by the courts, applying their discretion based on general principles applicable to orders for costs.

Contact us

Please contact us if you have any queries regarding the issues raised in this article, or if you wish to consider any commercial dispute resolution matters in Hong Kong.

Note

The "Guidance Note for Remote Hearings for Civil Business in the Civil Courts (Phase 3: Wider Video-Conferencing Facilities and Telephone)", 15 December 2020, and the "Technical Specifications of the Judiciary's Video Conferencing Facilities for Remote Hearings for Civil Business" (Judiciary Administration, December 2020) are published on the judiciary's [website](#).

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