



Hong Kong Courts

17 March 2020

In with the old and the new technology

Introduction

In *Re Cyberworks Audio Video Technology Ltd*,¹ the High Court of Hong Kong decided that it can, as part of its case management powers and of its own volition, order that a directions hearing take place by means of a telephone conference without the physical presence in court of the parties or their legal representatives. The court's decision is set against the background of the extraordinary measures adopted in Hong Kong to combat the coronavirus public health emergency. These measures include the closure of the courts from 29 January (immediately after the Chinese New Year holiday) to 22 March 2020 (on current estimates), save for urgent and essential court business. The decision is welcome and hardly surprising. It makes use of old technology at the time of a serious public health situation and provides a catalyst for the courts in Hong Kong to embrace new technology going forward. There are some plans afoot in this regard which need to be prioritised.

Background

In *Cyberworks*, the parties presented the court with a consent summons jointly seeking an order allowing one of the plaintiff's witnesses to give evidence at trial by video conferencing. This was not controversial and the courts have a wide case management discretion to

permit a witness to give evidence by use of video-link.² If permitted, the court would need to give appropriate directions for use of the facilities in the dedicated technology court.

However, as from 29 January 2020, all courts in Hong Kong have been closed, save for urgent and essential business, in what has become known as the general adjourned period ("GAP").³ This is part of the extraordinary public health measures taken to combat the spread of the coronavirus. So far, these measures appear to have been generally successful – at the time of writing, reported cases of infection are less than one hundred and seventy (in a population of approximately 7.5 million) and there have been few fatalities. Many people have been quarantined at government run quarantine sites or have had to self-quarantine or self-isolate. Without risking complacency, and contrary to some social media misinformation, Hong Kong has so far coped well in limiting the spread of the coronavirus (having also been the epicentre of the SARS virus in the spring of 2003). However, the situation is fluid and expected to last for a few months at least.

If the prevailing public health situation permits, it is hoped that the courts will reopen for business on 23 March 2020. Already some court registries have

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1. (In Compulsory Liquidation) [2020] HKCFI 347, 28 February 2020 (HCA 677, 678 and 2780 of /2006 and part of a long-running piece of litigation).
2. See, for example, Practice Direction 9.5 ("Evidence by way of live television link") and Practice Direction 29 ("Use of Technology Court").
3. See Hong Kong Judiciary website announcements from [28 January 2020](#) (to present), "[Notifications for Stakeholders about GAP](#)" from 8 February 2020 (to present) and "[Notification about general adjournment and staggered resumption of court business from 9 to 22 March 2020](#)".

reopened for administrative business and the judiciary administration has adopted a progressive and staggered approach to the courts' eventual reopening. Certain public health measures will stay in place and it will be sometime before these measures cease to be necessary.

It is against this background that the judge in *Cyberworks* took it upon himself to decide whether the application for directions should be determined by way of a telephone conference hearing – the issue for determination being whether this was permissible under the court rules. The issue assumed a greater importance because the case has been set down for a seventeen-day trial and the parties and their legal representatives required the court's guidance.

Decision

In a decision that evidences pragmatism and common sense, the court decided that it could give directions by way of a telephone conference hearing and it did so on or about 25 January. The judge was physically in his court room and the parties' legal representatives dialled-in and listened just as if they had been physically present. The entire conversation was recorded on the court recording system just as it would be had the legal representatives been physically present.

The court gave detailed written reasons for its decision. These included:

- there was no express provision in the court rules which required court hearings to be held with the physical attendance of the parties or their legal representatives
- the underlying objectives of the court rules and the courts' case management powers justified the use of telephone attendance. In particular, in exercising case management powers, the courts were obliged to consider (among other things) – “dealing with the case without the parties needing to attend at court”

and “making use of technology”.⁴ The courts also have a general power to “take any other step or make any other order for the purpose of managing the case ...”⁵

- while the Working Party on Civil Justice Reform (reporting before the civil procedure reforms adopted in Hong Kong in April 2009) had not, at the time, recommended pursuing telephone or video conferencing facilities for court hearings, based on limited anticipated cost savings in a relatively small geographical jurisdiction such as Hong Kong, that reasoning could be revisited in light of current developments – in any event, telephone hearings were different to video conferencing and legal representatives and parties had ready access to telephone conferencing facilities
- in other jurisdictions, such as England and Wales, provisions existed for telephone conference hearings and video-conferencing.⁶

The following passages from the court's decision sum-up its reasoning:

It cannot be in the interests of the administration of justice, or the maintenance of the rule of law in Hong Kong, for all work in the civil courts effectively to come to a halt simply because hearings normally require the kind of physical attendance which health considerations point against, where numerous court hearings can effectively, cost-effectively, expeditiously and fairly be dealt with over the telephone. (I ignore for present purposes the possibility of disposal on the papers.) Leaving aside the question of costs, there are clear benefits from conducting telephone hearings so as to continue management and disposal of cases, if circumstances would otherwise prevent that from happening.⁷

In this case, ... it can hardly be imagined that when the Court and the parties and their representatives were put under a positive duty actively to manage cases including by making use of technology,

4. Rules of High Court and District Court, Order 1A, Rule 4(2).
5. Rules of High Court and District Court, Order 1B, Rule 1(2)(l).
6. Practice Direction 23A (“Applications”) of the English Civil Procedure Rules (paragraphs 6.1-6.10 and 7). Indeed, the conclusions of the Working Party in Hong Kong in this regard now seem outdated, particularly bearing in mind that many respondents (and solicitors) at the time favoured greater use of telephone and video conferencing and that, with the passage of time, the technology has vastly improved and become more accessible.

that would somehow preclude the use of such (old) technology as the telephone in circumstances where the other underlying objectives are undoubtedly furthered by its use.⁸

Comment

The court's decision is welcome. Many jurisdictions already make widespread use of technology in their courts and telephone conferencing facilities are nothing new – as the court notes, the telephone is “old technology”.⁹

Even before the coronavirus outbreak, there was a general feeling in the dispute resolution community in Hong Kong that the courts' resources had become overstretched as evidenced by, for example, the prolonged waiting times for civil hearings or trial dates. This does not sit well with the government's and the legal profession's push to promote Hong Kong as a leading regional and international dispute resolution centre.

It is a good thing if technology can assist in reducing overall court delays and improving access to justice. These resourcing issues must be dealt with if Hong Kong is to cement its status as an international dispute resolution centre, in what are competitive and challenging times. The GAP (while understandable on public health grounds) has not helped with court delays and it is to be hoped that when the next public health emergency happens (as it will) lessons will have been learned – for example, as the court appears to note in passing in *Cyberworks*, greater use can be made of paper hearings for routine “workaday” matters where the parties do not object.¹⁰ Indeed, questions have been asked why such measures have not been put in place during the GAP (assisted by a skeleton administrative staff) – this could have helped assuage many concerns.

Hopefully, the GAP will increase the impetus for change and lead to the quicker adoption of new technology across all

courts in Hong Kong. The immediate priority is to get adjourned court hearings back on track.

Proposals (Hong Kong)

One of the biggest problems during the GAP has been the general inability to file routine court documents and the confusion that this has caused – for example, parties (or their legal representatives) have been generally able to serve court documents on each other but have not been able to file them with the court registries. The situation has improved to an extent now that some court registries have reopened. However, the widespread need for physical filing of court documents, and an overreliance on the use of drop and collection boxes and the like is outmoded (even in a geographically concentrated city like Hong Kong). Technology can assist in this regard and provide for alternatives.

Later this year the judiciary administration proposes to roll out a pilot programme for an integrated court case management system (“iCMS”). iCMS is part of the judiciary's information technology strategy plan that is being rolled-out in stages.¹¹ iCMS will allow for the alternative of electronic filing of court documents. All being well it will go into full operation sometime in 2021.¹²

The lessons of the GAP highlight how important this initiative and technology are. However, iCMS is only an electronic filing system and many jurisdictions (some less international and, arguably, less sophisticated than Hong Kong) embraced this sort of technology years ago. There is much more that the courts can do to embrace new technology and the coronavirus experience should be a catalyst for change. There is a growing realisation in Hong Kong that the old ways of doing things are not necessarily the best and will have to adapt, and that the workings of the court system should not be immune to this.

7. *Supra* note 1 at paragraph 31.

8. *Supra* note 1, at paragraph 35.

9. *Supra* note 8.

10. *Supra* note 7.

11. See – Court Proceedings (Electronic Technology) Bill.

12. Readers should also note developments with “e-BRAM”, for online dispute resolution by means of (for example) negotiation, mediation and arbitration [here](#).

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