

COMBAR Guidance Note on Remote hearings

12 May 2020

A. Introduction

1. The Covid-19 pandemic has led to a rapid expansion in the use of remote hearings in the Commercial Court. In parallel a plethora of anecdotal information and guidance has emerged.¹
2. The following note provides basic guidance for COMBAR members on best practice for remote hearings in the Commercial Court. It is provided at a time when the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“the Coronavirus Regulations”) remain in effect, with consequential restrictions on movement and gatherings.²
3. This note does not attempt to identify or prescribe the types of case for which a remote hearing is appropriate. Suffice it to say that there is a strong public interest in the continuation of the administration of justice during the Covid-19 pandemic. The current Protocol Regarding Remote Hearings (“the Protocol”) confirms that it will normally be possible for short, interlocutory, or non-witness, applications to be heard remotely.³ The position is different in respect of trials, but the Protocol identifies that some witness cases will also be suitable for remote hearings.⁴
4. This note should be read together with the Commercial Court Guide (“the Guide”), which continues in effect during the pandemic, and the specific coronavirus advice and guidance issued by the judiciary.⁵ The note will be updated from time to time, so please check that you are using the most current version.

¹ Much of this is conveniently identified at the www.remotecourts.org website.

² Regulation 6(2)(h) acknowledges participation in legal proceedings as affording a reasonable excuse for a person to leave the place where they are living.

³ https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf at para 12.

⁴ *Ibid.*

⁵ See: <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance>.

B. The effect of Covid-19 and the Coronavirus Regulations on participants

5. It is appreciated, of course, that the pandemic will have differing impacts on individual hearing participants, in particular those with caring responsibilities and/or without access to a sufficiently quiet or neutral location in which to participate in the hearing.
6. If you or your client are affected by these issues and they are likely to interfere with your ability (or the ability of other hearing participants) to participate in the hearing, you should raise them as soon as practicable. In the case of an interlocutory matter that is listed for hearing, the issues should be raised straightaway by contacting Commercial Court Listing at comct.listing@Justice.gov.uk giving precise details of the case and the hearing date. Listing will then put the matter before a Judge at the earliest opportunity. In the case of a trial, please do the same. If there is a forthcoming pre-trial review, the Judge may decide to deal with the matter then. COMBAR is confident that the Judges of the Commercial Court appreciate the need for these matters to be treated with sensitivity.

C. Interlocutory hearings

7. As noted at paragraph 3 above, during the pandemic most interlocutory hearings will be undertaken remotely, either by telephone or by video conference.
8. Telephone hearings are typically only appropriate for relatively short interlocutory hearings.⁶ The majority of significant interlocutory hearings will be conducted by video conference using one of the platforms described at Section F below. Indeed, typically the considerations that we address at Sections D and following below will apply as much to interlocutory hearings as to trials. Nevertheless, it is convenient to mention two specific points at the outset.
9. First, COMBAR members will need to test the functioning of any applicable video conferencing platform on their computer set-up in good time ahead of any

⁶ Ordinarily, in accordance with Practice Direction 23A para 6.2, telephone hearings would only be advised for *inter partes* hearings of less than 1 hour.

interlocutory hearing. It will generally be sensible to undertake a “dummy run” of the relevant platform with instructing solicitors 48 hours prior to the hearing to ensure that the relevant technological requirements for the hearing can be met. In addition, a dummy run should be arranged with the clerk to the Judge hearing the case.

10. Second, a decision should be made as to whether the application bundles are to be prepared in hard copy or whether the bundles will be produced only electronically in good time ahead of the dates specified in paragraphs F5.4 and G6.4 of the Guide. It will be useful to liaise with the clerk to the Judge ahead of the hearing as to whether the Judge would specifically prefer hard or electronic copies (or both).

11. If the bundles are to be produced electronically, it is essential that appropriate thought is given to the use of those bundles at the hearing. In particular (taking account of guidance issued by the Supreme Court), the following approach is recommended in all cases in which .pdf bundles are proposed.⁷ Adoption of this approach will take time and may make the default dates for production of bundles in paragraphs F5.4 and G6.4 inappropriate:
 - a) only essential documents should be included in the electronic bundles;
 - b) the electronic bundle should (unless unusually voluminous) be a single .pdf file which is capable of being word-searched;
 - c) the .pdf file should be prefaced to by an index which contains hyperlinks to the relevant documents and, where appropriate, relevant parts of documents;⁸
 - d) the electronic bundle should be paginated from first to last page, regardless of whether multiple documents have been combined together (and inclusive of any indices);
 - e) the default display size of all pages must always be 100%;

⁷ Where a .pdf bundle will be used in a hearing, advocates should consider obtaining and using .pdf management software enabling search and personalised highlighting, annotation, bookmarking and indexing of the .pdf bundle. Pdf management software solutions, with features relevant to the creation of .pdf bundles including pagination and bookmarking, are available for purchase: Examples include Adobe Acrobat Pro DC (for MacBooks and Windows machines) and PDF Expert version 7 (for MacBooks and iPads). Please note that all Judges of the Commercial Court have the basic version of Adobe Acrobat which allows for searching, selecting, and highlighting text. They do not have Adobe Acrobat Pro.

⁸ For example, if a small number of pages of a large report or specific clauses of a Contract are most pertinent to the issues in dispute, it is useful to include hyperlinks to the pages on which that relevant material is to be found.

- f) wherever possible, text on all pages of the .pdf must be capable of being selected and highlighted. Pages of text should not be formatted as images;⁹
- g) the “bookmarks” function must be used to delineate the location of different documents within the .pdf file. The bookmarks should be labelled both to identify the relevant document and to show the page number. Bookmark labels should be neutral and descriptive only;
- h) the resolution on the bundle should be reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another;
- i) to the extent possible, hyperlinks should be used within the electronic bundle and between skeleton arguments and the bundle;
- j) where both hard copy and electronic bundles are produced, identical pagination should be used in both bundles. This may mean in the hard copy bundles, paginating indices etc that appear at the beginning of the bundle.

D. Trials

- 12. Many Commercial Court trials will have been listed for hearing at a time prior to the effect of the pandemic being appreciated. In those cases, frequently a pre-trial review will also have been listed at which consideration will have to be given to whether the hearing should proceed remotely. If matters have been listed for trial prior to the pandemic without provision for a pre-trial review, it is likely to be prudent now to propose a pre-trial review prior to the substantive hearing.
- 13. The standard PTR checklist at Appendix 2 to the Commercial Court Guide does not address many of the characteristics affecting the suitability of matters for remote hearing or necessary to ensure that a remote hearing is conducted effectively.
- 14. Accordingly, we have prepared a draft specimen supplement to the PTR checklist raising questions that are specific to remote hearings and necessary to ensure that any trial can proceed effectively by video conference. At sections E to I below we provide some commentary on each of the sub-headings in this specimen checklist. The

⁹ This may require scanned documents and images within a PDF to be processed using appropriate Optical Character Recognition (OCR) software before the final version of the PDF bundle is saved. Some PDF management software solutions come with OCR capabilities inbuilt.

Protocol requires the Court and the parties and their representatives to be more proactive in relation to all forthcoming hearings.¹⁰

15. Following the PTR, we envisage that one party, typically the Claimant, should be responsible for liaising with the Court on the technical issues relating to the remote hearing. That party will be responsible for providing all of the other parties with the details required to attend the remote hearing as soon as they are available.

E. Introductory issues

16. It is important, during the pandemic, that at any PTR the Court is able to gauge the suitability of the matter for remote hearing. It is recognised that not every matter will be suitable for remote hearing. However, in most cases hearings in person are presently impractical. The question of whether to direct a remote hearing is an exercise in judicial discretion in which the disadvantage engendered by postponing trial dates will have to be weighed against the difficulties arising from proceeding with a hearing remotely.
17. The difficulties that arise from proceeding with a hearing remotely include the matters described in Section B above (which are addressed in questions 2 and 24 of the draft specimen supplement to the PTR checklist), but are likely to be exacerbated in circumstances where the case raises issues of dishonesty/fraud, requires the examination of very complex materials or gives rise to particular issues of confidentiality. These factors can and should be highlighted to the Judge hearing the PTR.

F. Video conferencing technology

18. The current guidance from HMCTS is that Skype for Business or the Courts' cloud video platform (if available) should be used for remote hearings.¹¹ Microsoft Teams is also acceptable.¹²

¹⁰ See the Protocol at paragraph 10.

¹¹ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.

¹² See <https://www.microsoft.com/en-gb/microsoft-365/microsoft-teams/group-chat-software>

19. A number of alternative video conferencing platforms are available, but only if the Court is prepared to approve their use in advance. These include (in no particular order) Zoom, BlueJeans, Lifesize, GoToMeeting, WebEx, Starleaf and others. Details of the technical requirements for these products can be found as follows:¹³
- a) Zoom: <https://zoom.us>;¹⁴
 - b) BlueJeans: <https://www.bluejeans.com>;
 - c) Lifesize: <https://www.lifesize.com>;
 - d) GoToMeeting: <https://www.gotomeeting.com/en-gb>;
 - e) WebEx: <https://www.webex.com/video-conferencing>;
 - f) Starleaf: <https://www.starleaf.com>.
20. In each case, where it is proposed to use video conferencing technology it is necessary to ensure that the video conferencing platform can be operated by every participant in the trial.
21. As a result, confirmation should be sought from the Court about its ability to use the particular platform. Those enquiries should extend to an enquiry as to whether the Court will need to be provided with additional hardware (e.g. a standalone laptop). Enquiries of this kind should be directed to the clerk to the Judge who will hear the case. Similar confirmation should be sought of every other participant in the hearing. If and to the extent that there are any issues with any participant's operation of the platform, these should be identified at the PTR.
22. Effective operation of any video conferencing platform will depend upon the users' internet bandwidths (both their upload and download speeds). The required bandwidth for videoconferencing varies from platform to platform and may also vary depending

¹³ Convenient guidance on the operation of Skype for Business, Microsoft Teams, Zoom and Lifesize has been published by the Family Law Bar Association and may be located at <https://bit.ly/3aZl6ar>.

¹⁴ The host of a Zoom meeting can allow Skype for Business access to that Zoom meeting in the 'advanced meeting options' tab. Access to a Zoom meeting using Skype for Business from a HMCTS DOM1 laptop is then possible - the Skype for Business user should click on 'Contacts', then search for the Zoom meeting ID number using the format [meeting ID with no spaces] @lync.zoom.us e.g. 12345@lync.zoom.us. Clicking on the resulting video button in the contacts search results will open the Zoom meeting in Skype for Business. However, it is suggested not to propose Zoom as it is not recommended for Judges' use at the moment and Judges are therefore unlikely to adopt it.

upon the number of concurrent users of the platform. The speed of any individual's broadband connection (i.e. the bandwidth available to that user) will depend on factors including the time of day and the number of people in the relevant household using the internet at the same time.

23. It is recommended that the operability of the relevant video-conferencing platform should be tested prior to the PTR with each participant (including counsel, solicitors and factual and expert witnesses). The test should be conducted with an equivalent number of users to those expected at the hearing and at the time of day at which the hearing is expected to take place. A dummy run must then be arranged with the clerk to the Judge.
24. No specialist technical knowledge is required to host a video-conference on a standard platform; that can be done in principle by either the court or one of the parties. In a substantial case, the parties may, however, wish to engage third-party IT consultants, who can provide services such as: selecting and setting up the platform, hosting the meeting, controlling access, checking sound and video quality, and dealing with any technical problems that may arise during the hearing. Consultants can also advise on and source appropriate hardware and provide e-document management tools. Of course, that creates an additional cost for the parties which may not be proportionate in a short hearing.
25. Adoption of video-conferencing technology may give rise to concerns under the GDPR. The guidance received by the Bar Council from the Information Commissioner suggests that during a video conference it is the data controller who is responsible for ensuring that personal data is being processed securely and in compliance with data protection legislation. For hearings arranged by the Court the data controller is likely to be the court, rather than the barristers who have been invited to participate in the hearing as guests.¹⁵

¹⁵ <https://www.barcouncilethics.co.uk/wp-content/uploads/2020/04/Video-conferencing-and-data-protection-FINAL.pdf>.

F. Documents

26. The success of a remote hearing is heavily dependent upon the relative ease with which the participants can refer to documents at the hearing.
27. In a case of any size or complexity, there are likely to be many hundreds (if not thousands) of pages of documents in the hearing bundles. In circumstances where there are multiple participants in different locations, it is unlikely to be appropriate for all of those documents to be made available at each location in hard copy.
28. Electronic bundles will therefore be the norm. However, it would be sensible also for the Judge and counsel to have available to them hard copy bundles of the pleadings, witness statements and expert reports and in addition the core bundle should normally be produced in hard copy for the Judge and counsel. Any hard copy bundles must be identically paginated to any electronic copies of the same bundles. The parties should liaise with the Judge's clerk in good time before the hearing regarding the delivery of any hard copy bundles.
29. The requirements of Appendix 7 to the Commercial Court Guide will apply to any hard copy or electronic bundles, but careful consideration needs also to be given to ensuring that each participant can quickly locate any document to which reference is being made. That may necessitate the appointment of a dedicated external document management provider that is able to prepare the electronic bundle and locate and display any document to which reference is made at the hearing across each participant's screen. Where an external provider is used the timescales in J4.5 to J4.7 of the Commercial Court Guide might not be appropriate.
30. Where the volume of documents to be considered is relatively small and it is thought preferable that the documents should be provided in electronic form only, the considerations to which reference is made at paragraph 11 above will apply save that, to enable side-by-side reference to documents, it will be preferable for separate .pdf files to be created for each bundle and for bookmarks to be used to create dividers or tabs within each bundle.

31. Consideration will also need to be given to the number of screens that should be available to each participant. Where documents are being controlled by an external document management provider, it is likely that the principal participants will require a “slave” screen (controlled by the provider) to view documents, as well as a separate screen connecting the participant to the video feed, in addition to any other screens required for access to the transcript and/or documents.
32. From time to time during the hearing additional documents (for example, new authorities) may need to be handed up. Where that is the case, those documents should be absorbed at the end of each day into a single separate bundle. Where the documents have been provided only in .pdf format, the documents should be absorbed into a single .pdf file, with each addition separately identified by a bookmark.

G. Witnesses

33. The taking of evidence from factual witnesses by video link is addressed by the Practice Direction to CPR Part 32. Amongst other things, this required that *“examination of the witness at the remote site should follow as closely as possible the practice adopted when a witness is in the courtroom. During examination, cross-examination and re-examination, the witness must be able to see the legal representative asking the question and also any other person (whether another legal representative or the judge) making any statements in regard to the witness's evidence”*.¹⁶
34. Where the witness is abroad, the following specific considerations arise:
 - a) *“It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of [video conferencing (“VCF”)]. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (Legalisation Office) sopenquiries@fco.gov.uk with a*

¹⁶ PD32 para 21.

view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level.”¹⁷

- b) *“Time zone differences need to be considered when a witness abroad is to be examined in England or Wales by VCF. The convenience of the witness, the parties, their representatives and the court must all be taken into account.”¹⁸*
- c) *“Some countries may require that any oath or affirmation to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in England and Wales. The VCF arranging party must make all appropriate prior inquiries and put in place all arrangements necessary to enable the oath or affirmation to be taken in accordance with any local custom. That party must be in a position to inform the court what those inquiries were, what their outcome was and what arrangements have been made. If the oath or affirmation can be administered in the manner normal in England and Wales, the VCF arranging party must arrange in advance to have the appropriate holy book at the remote site. The associate will normally administer the oath.”.*

35. The Practice Direction to CPR Part 32 was not, however, designed for the taking of evidence from witnesses based abroad where the entire hearing is conducted remotely. It assumes that the public or other parties will be able to attend the location from which the witness is giving their testimony. In countries which are adhering to social distancing measures, this may not be possible and so it may be appropriate to ask the witness during examination-in-chief to confirm under oath/affirmation that they are alone in the room and that they are not receiving assistance from any third parties during the course of the hearing. In other cases, it may be sensible to ensure that there is more than one camera available in the location from which the testimony is being provided to ensure that impermissible reference to notes, prompting etc. is not taking place. Witnesses may also need to be forewarned that they are being recorded and/or that their evidence is being livestreamed, and that references may be made to the video recording of them giving evidence.

¹⁷ PD32 para 4.

¹⁸ PD32 para 5.

36. The standard PTR checklist (at Appendix 2 to the Commercial Court Guide) already contains at question 5 an enquiry as to the need for interpreters. Any interpreter will require the same access to the documents and video feed that is available to the witness whose evidence is being interpreted.

H. Skeleton arguments

37. Experience to date suggests that skeleton arguments have taken on increased importance in remote hearings. That being so, it may be appropriate in some cases to depart from the typical page limits that apply under paragraph J6.5 of the Commercial Court Guide and/or to ensure that the written submissions are provided earlier than the dates prescribed in paragraph J6.2 of the Commercial Court Guide.

I. Considerations for the hearing itself

38. It has been observed that “*remote hearings remain court hearings and the solemnity of the occasion should be observed as closely as it is in a courtroom. Within this context, and insofar as is possible, the decorum of a court hearing should be maintained commensurate with the gravity and seriousness of the issues being decided in a formal legal arena. Steps should be taken to avoid matters that detract from the ordinary gravitas of a court hearing*”.¹⁹
39. In keeping with these requirements, advocates should dress as if they were attending Court, should ensure (to the extent possible) that the background visible on screen is appropriate for a Court hearing and should ensure that they are not interrupted or distracted during the course of the hearing. The use of in-ear headphones is permitted and encouraged if they assist with audibility.
40. Useful guidance on advocacy at remote hearings (and as to common technological mistakes) has been published by the Inns of Court College of Advocacy.²⁰ In particular, barristers that are not speaking at any particular time during the hearing

¹⁹ <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>.

²⁰ <https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>.

should ensure that their microphone is muted. Barristers should ask solicitor and client representatives present at the hearing to take similar steps.

41. Technical issues may arise in remote hearings. To the extent possible, steps should be taken ahead of the hearing to agree how notification is to be provided of the occurrence of a technical issue. For example, it may be agreed that the participants and the Court will be alerted to the problem by telephone, text or email.
42. It is common for a live transcript to be prepared of Commercial Court trials. A live transcript may be of particular utility in remote hearings, where access to the transcript might mitigate difficulties caused by interruptions to any participant's connection to the hearing.²¹ The arrangements for any live transcript should be addressed ahead of the PTR.
43. Judges and other participants have observed that using technology to conduct hearings is unusually tiring. In addition, participant may have caring or other responsibilities that may create difficulty in attending during normal court hours. Careful thought should, therefore, be given to the appropriate timing and length of each hearing day and to the breaks that are required throughout the day. It will normally be sensible to take a short break mid-morning and mid-afternoon – and it will be necessary to do this where stenographers and/or interpreters are involved.
44. Counsel will need to be able to maintain a separate line of communication with other members of the counsel team and their instructing solicitors. The manner in which this is done is not a matter of concern for the Court, but care will need to be taken to ensure that the method of communication does not interfere with the hearing (for example, through noisy notifications) and that the communications are kept confidential. Counsel should also ensure that their separate line of communication does not result in “*unauthorised transmission of an image of, or sound made by, another person while the other person is viewing or listening to a broadcast*” of a

²¹ If any key participant to the hearing (whether the Judge, counsel or witness) loses connection to the hearing, this should be identified as soon as possible.

remote hearing, contrary to Section 85B of the Courts Act 2003 (as amended by the Coronavirus Act 2020).

45. Finally, remote hearings present particular issues for open justice. Schedule 25 of the Coronavirus Act 2020 has amended the Courts Act 2003 so as to permit video proceedings to be broadcast for the purpose of enabling members of the public to see and hear the proceedings and to enable a recording to be made of the proceedings. The steps that are to be adopted to enable any remote hearing to be heard in public should be discussed at the PTR. Options include providing for the video proceedings to be accessible in a designated courtroom, providing for the hearing to be livestreamed or enabling media representatives to access the proceedings remotely.
46. If it is proposed that the proceedings should be livestreamed or otherwise accessible to the public outside a courtroom, steps should be taken to ensure that an appropriate warning is given on the relevant webpage that it is an offence to make or attempt to make an unauthorised recording or transmission of images or sounds from such a broadcast.²²

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²² See Sections 85B and 85C of the Courts Act 2003.

Specimen PTR checklist for remote hearings in the Commercial Court

Introductory issues

1. Do you agree to the trial being conducted using video conferencing technology?
2. Are all participants able and ready to attend the remote hearing, taking into account health, care responsibilities, and space requirements?
3. Are there any particular characteristics of the dispute that militate against holding a remote hearing?

Technology

4. Which form of video conferencing technology do you propose for use at the trial?
5. What hardware is required for the Court and each participant in the hearing?
6. Has the Court confirmed in principle that it is able to use your proposed form of video technology?
7. Do you propose that the video conference be hosted by the Court, by one of the parties or by a third party?
8. Have you confirmed by testing that each of the participants in the trial is able to use the video conferencing technology that you propose?

Documents

9. What is the likely volume (in pages) of documentary material that will be included in the hearing bundle?
10. Which documents (if any) do you propose be provided to the Court in hard copy?

11. Which documents (if any) do you propose be provided to the Court only electronically? In what electronic format will those documents be provided (e.g. .pdf or using an electronic document platform) and what steps do you propose to ensure an efficient navigation of the electronic documents?
12. Do you propose any revisions to the requirements of paragraphs J4.5 to J4.7 and Appendix 7 of the Commercial Court Guide?
13. Have you made arrangements for the documents to be available to all relevant participants at the trial?
14. Have you made arrangements to deal with documents that would (in a non-remote hearing) have to be handed up during the hearing?

Witnesses (factual and expert)

15. In which countries will each witness that you intend to call be located when they give their evidence?
16. Have you made enquiries with a view to ensuring that any foreign country from which the evidence is to be taken raises no objection at diplomatic level?
17. From what precise location will each witness that you intend to call give their evidence?
18. Are the public and/or representatives of the parties able to be present at that location when the witness is giving evidence? If not, what (if any) measures will be taken to ensure the integrity of the manner in which testimony is given?
19. What arrangements have been made to enable interpreters to translate the evidence of any witness?

20. What form of oath or affirmation will be required and have appropriate steps been taken to have the appropriate holy book at the place from which the witness of fact gives evidence?

Hearing

21. Do you propose any revisions to the requirements of Section J.6 of the Commercial Court Guide?
22. Do you propose to use a live transcription service?
23. Will any adjustment be required to normal Court sitting times?
24. Do any adjustments to the format of the hearing need to be made in order to accommodate any participants?
25. Have you made arrangements for what is to happen should there be an interruption in any participants' connection to the hearing?

Open justice and other issues

26. What arrangements have been made to ensure that, so far as possible, members of the public and the press can attend the trial?
27. Is there any other issue which might affect the overriding objective/access to justice that should be considered?