

Witness Testimony via Video-conferencing Facilities

As a result of severe COVID-19 pandemic, the use of video-conferencing facilities (“VCF”) is a growing trend to replace the face-to-face meeting. The court also adopted VCF on some court hearings which had been extended to trials. This explanatory note briefly discussed three recent decisions handed down by the Hong Kong Court of First Instance that appear to suggest the rationale of the court when it determines as to whether leave for witness to give evidence via VCF in a trial is granted.

Tsang Woon Ming v Lai Ka Lim [2020] HKCFI 891

The first decision was handed down by Hon. Anthony Chan J on 20 May 2020. Leaves to use VCF for three witnesses respectively residing in Taiwan, Macau and Shenzhen were applied for.



The applications of the first two witnesses were rejected given that the only reason therefor was that they were unwilling to interfere their business commitments with the quarantine.

Further, the application of the third witness who resided in the Mainland, was granted since she was subject to travel restrictions and unable to obtain a visa to come to Hong Kong. The court also recognized the feasibility for the parties to have an observer.

Taishin International Bank Co., Ltd. v QFI Limited [2020] HKCFI 938

This second decision was made by Deputy High Court Judge MK Liu on 25 May 2020, with respect to a witness residing in Shanghai. The trial has been scheduled to commence on 15 June 2020.

The court allowed the application, noting that the outbreak of COVID-19 is an unprecedented event and the transmission risk in air travel is a legitimate concern of a reasonable person nowadays. The court was aware that it is in a position to make arrangements to ensure the safety of everyone participating in the trial insofar as practicable. The court was also satisfied that the other party is entitled to instruct a Mainland lawyer as an observer to make sure

everything is in order while the witness is giving evidence via VCF. In return, the court had also given the same privilege to the witness of the opposing party to give evidence via VCF if so wished. This was considered to be unusual and the trial judge, Deputy High Court Judge, Paul Lam SC had expressed his concern about this unusual arrangement. In the trial, the Deputy High Court Judge, Paul Lam, SC had indicated that he was minded to revise the direction to the opposing party to give evidence by VCF given by Deputy High Court Judge MK Liu.

[Au Yeung Pui Chun v Cheng Wing Sang \[2020\] HKCFI 1940](#)

The third judgement was handed down by Hon. G Lam J on 10 August 2020 in relation to two witnesses aged 68 and 56 residing in Switzerland. The trial is set down to commence on 20 August 2020.

The court noted that the situation in both Hong Kong and Switzerland seem to have unpredictable infection rates. Nevertheless, the court did not lose sight of the fact that solemnity of court proceedings is an important context contributing to the administration of justice.

[Summary](#)

Pursuant to the decisions made by the court as above, below is a summary of what the court will take into account in VCF application:-



1. [VCF as an exception](#)

It was repeatedly articulated that the atmosphere of the court is an important context contributing to the administration of justice. The court will be deprived of the opportunity to observe the witness giving evidence in person under a solemn atmosphere. In addition, the likelihood of interruptions of the evidence due to quality of the audio or video is probable and it will prejudice in the cross-examination. Giving evidence with VCF is not the general rule and will only be permitted if the court considers it is best calculated to achieve a just result for both parties after taking into account all circumstances.

2. Transmission risk

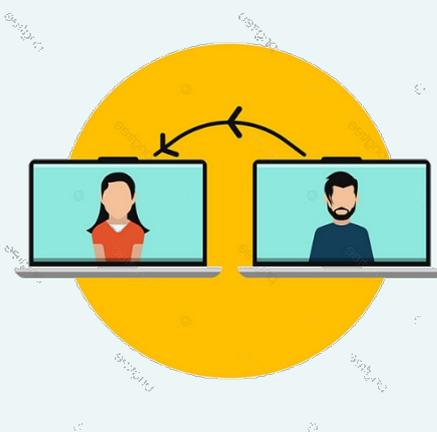
The court accepted that there were grounds for real concern for transmission risk. In particular, transmission risk occurs when a person is required to travel by a long-haul flight in the midst of the coronavirus outbreak.

3. Inconvenience and work commitments

In the case of Tsang Woon Ming, unwillingness to fulfil the obligation to attend the trial due to business commitments is not satisfied by the court as a sufficient ground. The trial was fixed long ago and it is a matter of the witnesses to manage their affairs to ensure their availability for the trial. Putting their business interest on the top of priority is not a good or sound reason for such application. As the court in Taishin case agreed that the inconvenience a witness may have to face to give evidence in Hong Kong may not constitute a convincing reason to justify VCF evidence.

4. Late application

Late application means little time is left to the parties to try to agree the appropriate “neutral” venues for witnesses to give evidence. In addition, it is not possible for the other party to arrange for the attendance by a representative of his solicitors to observe the witness giving evidence remotely.



5. Directions on technical and logistic arrangement

The court in Taishin case set out detailed arrangements to ensure the interests of justice and there is an effective cross-examination despite the difficulties imposed by VCF. The other party is at liberty to engage an agent as an observer at the “neutral” place where the witness would give evidence (i.e. a place with no connection with the witness, the party or the party’s legal representative). The ruling in Au Yeung case expects robust testing of all technical arrangements to be carried out so as to ensure the quality and reliability of both video and audio communications.

6. Balanced treatment

In Taishin case, during the application for VCF, one of the grounds raised by the opposing party was that if a party were to give evidence in courtroom while another party could give evidence via VCF, there would be an imbalance of treatment between the parties. In addressing the issue of the imbalance treatment, the Deputy High Court Judge, MK Liu granted leave to allow the witness (who is available in Hong Kong) to give evidence by way of VCF out of court as well as the Shanghai witness for the sole purpose of ensuring equal treatment between the parties in the Trial.

The trial judge of Taishin case, the Deputy High Court Judge, Paul Lam, SC had reservation on the decision to allow the witness in Hong Kong to give evidence out of court by way of VCF who found that a witness should be permitted to give evidence via VCF if and only if it is not reasonably practicable for him or her to give evidence in court. He also found that any “imbalance” caused by the witness giving evidence out of the courtroom is a matter that professional judges should and would be able to take into account in assessing the credibility of the witnesses.

Should you have any question, please contact our Mr. Lawrence Yeung on (852) 2854 3070 or by email at lawrence.yeung@ycylawyers.com.hk.

This explanatory note is not, and should not be regarded as, legal advice. Should you have any enquiries, please seek specific advice from legal advisers.

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