

STEWARTS

Lessons from the first virtual trial in the Commercial Court



LEXOLOGY® Webinars



THE TEAM



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BACKGROUND

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1. (1) National Bank of Kazakhstan (2) Republic of Kazakhstan -v- (1) Bank of New York Mellon NV/SA London branch (2) Anatolie Stati & Ors Claim No FL-2018-000007

 2. A claim relating to whether c. \$530m of cash deposits held by BNYM in the name of NBK are subject to a “*protective garnishment order*” made by a Belgian court in favour of the Stati Parties in respect of the enforcement of an arbitral award against RoK.

 3. Trial:
 - 4 days;
 - 1 witness of fact;
 - 4 foreign law experts.

THE ADJOURNMENT APPLICATION

1. On 19 March 2020, Mr Justice Teare heard the Stati Parties' (informal) application to adjourn the trial.
2. It was argued that it was in the interest of justice to have an adjournment and that the current circumstances would impact the "*fair disposal of the issues at trial*".
3. The English Court has a duty to manage cases which pursuant to CPR 1.4(1) means:
 - (j) "dealing with the case without the parties needing to attend at court";
 - (k) "making use of technology"; and
 - (l) "giving directions to ensure that the trial of a case proceeds quickly and efficiently".

Practical considerations:

1. Number of witnesses.
2. Location of witnesses.
3. Size of the trial bundle.
4. Hardware requirements.
5. Type of claim and seriousness of the allegations.
6. Client expectations and requirements – (i) important to ensure that the clients' requirements are met; (ii) it is key for the clients and their representatives to be able to follow the trial in the same way as they would have if they had attended in person; and (iii) establish clear lines of communication.

IMPLEMENTING A VIRTUAL TRIAL

Challenges:

1. Identifying a platform.
2. Testing participants and resolving any technical issues.
3. Ensuring access to the trial bundle.
4. Establishing lines of communication.

Identifying a platform:

1. Mature platform with proven resilient infrastructure.
2. Ability to connect to a wide range of devices, operating systems and ability to run through browser.
3. Skilled IT support.
4. Servers located worldwide.
5. Ability to deliver content to the general public.

Platforms which we investigated and reached out to: Zoom, Starleaf, Skype for Business (Microsoft) and Webex.

Zoom's recent security issues:

1. Lack of end-to-end encryption;
2. A security vulnerability within the application itself; and
3. The possibility that a third party might be able to generate the unique Zoom conference room identifier and attempt to join uninvited.

Testing participants:

1. Decide who should participate.
2. Ensure robust testing - we provided a list with all participants to Sparq.

The trial bundle:

1. We opted for a hard copy bundle with a soft copy in the form of a PDF for each volume of the bundle.
2. Mr Justice Teare was provided with a separate Surface Pro, a monitor and with hard and soft copies of the trial bundle.
3. With the benefit of hindsight:
 - Zoom's content pushing capability (insofar as used) worked well but it does reduce the size of the image of the participants in the video conference;
 - A digital bundle being shown in a separate browser is probably a better solution for virtual trials/court hearings, however, it would ideally require a larger single screen or two small ones.

Establishing lines of communication:

1. Vital to ensure direct lines of communication within the legal team and between the legal team and the clients.

2. Our solution was using WhatsApp because:
 - It provides instant messaging;
 - It offers end-to-end encryption;
 - It is widely used and easy to install;
 - The app can also be accessed on a computer via <https://web.whatsapp.com/>;
 - Rather than adding people manually – a link can be sent which automates joining;
 - The app allows for any chat to be exported and then saved in any document format.

THE VIRTUAL TRIAL

Issues and how we resolved them:

1. Livestreaming – last minute changes.
2. A participant's microphone silencing another participant.
3. Issues with internet connection.
4. Witnesses and interpreters joining too early.

THE VIRTUAL TRIAL: COUNSEL'S PERSPECTIVE

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1. Remote advocacy – what are the differences?
 2. Cross-examination – is it as effective as the “real thing”?
 3. Can you trust a remote witness?
 4. The remote judge.
 5. Taking advantage of the technology.
 6. Post-COVID – will hearings change?

Questions?