

## CORONAVIRUS RESOURCE CENTER

## Insights on Virtual Trials

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**Introduction.** Perhaps the most rapid change to litigation practice brought about by Covid-19 has been the shift to virtual trial formats in place of traditional in-person trials. Although arbitration proceedings have been conducted with virtual elements for some time, this has not been the case in litigation before English courts. Almost overnight, practitioners and courts have had to adapt to a new way of working.

The Debevoise team has now completed several virtual trials, including one trial which ran for three months without any delay to the trial timetable (*PJSC Tatneft v Bogolyubov & Ors* [2021] EWHC 411 (Comm)). Having had these experiences, we now share some of the key lessons we have learned about how to make sure virtual trials run smoothly. Virtual trials encompass a range of formats, ranging from entirely online trials to trials where some participants are online and others in person (known as a “hybrid” trial).

**Lesson 1: Communication Is Key.** The best way to make sure virtual trials run smoothly is to communicate effectively with other parties and the court.

Establishing a good working communication stream with opponents throughout the course of lengthy litigation can be challenging. However, in order to effectively plan for a virtual hearing, matters such as the trial timetable, the trial bundle and ancillary services such as interpreters and a virtual hearing platform need to be settled as early as possible. These arrangements require the cooperation of all parties, and we found better progress was made in a series of conference calls than in the exchange of correspondence. The parties must be flexible and approach logistical matters in the spirit of cooperation for virtual trials to run smoothly.

It is likely that whichever judge is hearing your case will have their own preferences for whether the trial is conducted in a wholly virtual or hybrid arrangement. In our

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experience, judges have generally respected the wishes of the parties and given preference to arrangements agreed between them where possible. As with a normal trial, prompt communication with the court is essential for any special arrangements which may be needed, such as, for example, an extension of sitting hours to accommodate a witness in a different time zone.

**Lesson 2: Planning Prevents Poor Performance.** A virtual trial includes all of the elements of an in-person trial, with the additional complication of members of the counsel team, solicitors, witnesses and experts being based in different locations. The restrictions in place as a result of Covid-19 can shift rapidly, with little notice. Accordingly, it is necessary to plan on the basis of a number of different scenarios, which range from a standard in-person trial to a completely virtual trial and everything in between.

Smaller trials are relatively straightforward to conduct virtually. The level of planning for a virtual trial increases alongside the number of sitting days, as more witnesses and experts need to be accommodated in the trial timetable and in their own locations/time zones.

Some of the key elements to include in the plan are:

- **Location of counsel and solicitor teams:** Will the counsel team be sitting together in one room or in separate locations? Will solicitors be sitting with counsel or in a separate location? How will counsel and solicitors communicate with one another throughout the trial if they are not sitting together? Is training required for team members to use the chosen electronic messaging platform?
- **Physical space:** Do you have a meeting room with sufficient space to accommodate the counsel and/or solicitor teams in a socially distanced arrangement? If not, could you use an external facility (such as, for example, the International Arbitration Centre)?
- **Technology:** Identify the key participants in your team, who will need to speak during the trial. What is the preferred device and screen setup for each participant? Do any members of your team require training on any of the technology in use?
- **Key documents:** How will the trial bundle be made available to counsel teams and the court? Will it be feasible to arrange hard copies in addition to the electronic trial bundle? How will hard copies be updated in the event updates are needed? What protocol will parties follow for the uploading of documents to the electronic trial bundle?

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- **Testing:** All elements of the setup should be tested ahead of the trial. This includes the strength of internet connections, the quality of audio streams and the camera positions in each hearing location.
  - **Observation of witnesses and experts:** Where will witnesses of fact and expert witnesses be during their testimony? Do you have in-person resources available in each location to observe the witness and/or expert testimony?
  - **Interpreters:** If interpreters are needed, do you intend to use simultaneous or consecutive interpretation? Can your chosen hearing platform support simultaneous translation? Is your audio quality of a sufficiently high standard to permit interpretation or will additional technology such as headsets be required?

**Lesson 3: Try to Read the Room.** There were both positive and negative consequences as a result of the lack of physical proximity. Witnesses seemed less nervous giving evidence by video. There were, however, times where witnesses and counsel spoke over one another, and problems with technology and audio quality interrupted their evidence. For counsel and solicitors, however, perhaps the biggest downside was the lack of physical proximity to the judge.

Normally, when sitting in a courtroom and participating in proceedings, parties can get a sense of the judge's thoughts or feelings about how the trial is proceeding. Whether they ask questions, change their facial expression or ask counsel to move on during a lengthy cross-examination, judges give cues as to matters of particular interest/disinterest throughout the hearing. Interpreting these cues has always been a favourite pastime of litigators and counsel teams during breaks and when the day ends.

During a virtual trial, however, it is more difficult to gauge the judge's interest in particular subjects. Screens are impersonal and do not convey facial expressions or body language in the way that physical presence does. Further, during a virtual trial, the judge must take a further step and unmute their microphone in order to ask a question of counsel. In our view, it seemed that the judges in our virtual trials asked fewer questions than judges in standard trials might.

**Conclusion.** Virtual trials have created a range of new hurdles for litigation lawyers and parties to litigation. There have been, however, some unexpected benefits arising out of virtual trials. These include:

- increased client involvement and decreased disruption to client business, as clients are able to view the livestream of a trial directly from their home or office without needing to travel to London;

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- greater cooperation between the parties in respect of matters such as the trial bundle, trial timetable and other logistical arrangements; and
  - better adherence to the trial timetable, likely because rearranging virtual trial matters would require more effort than rearranging in-person hearing days.

Given the uncertainty of the changes wrought by Covid-19, and the extensive delays already caused to hearing dates as a result of the pandemic, it seems clear that virtual trials are here to stay in one form or another. It will be up to practitioners to adapt to the new challenges, and there is no doubt that new lessons will be learned along the way.

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For more information regarding the legal impacts of the coronavirus, please visit our [Coronavirus Resource Center](#).

Please do not hesitate to contact us with any questions.

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