

# International risk team



## “Tech, lies and video-conferencing”: The Court’s implementation of remote hearings

Perhaps very few legal practitioners would have thought that an establishment so rooted in 19th century custom and tradition would be so willing to adopt comparatively modern means of navigating the logistical challenges brought about by the COVID-19 pandemic. However, as RPC reported last week, the English Courts/civil justice system has responded remarkably quickly and effectively to the closure of the Courts by embracing, amongst other things, remote hearings via live video-link.

As anyone that has spent time stalking the oak-panelled corridors of the Royal Courts of Justice waiting to interrupt a becloaked “Master of the Queen’s Bench” will attest – little has changed at the High Court over the last 100 years. It is, therefore, to the Court’s enormous credit that it has taken the progressive steps it has to ensure that justice continues to be administered during this pandemic.

However, contrary to popular belief, the English legal system was an early adopter of technology. In 1995 Jerry Garcia, the lead singer of the US hippy rock band, The Grateful Dead, passed away aged 53 in a San Francisco drug rehabilitation clinic. He had been a heroin addict for more than 20 years and had suffered from various chronic health conditions. Nevertheless, The Grateful Dead were still a hugely popular band in the US who regularly filled stadiums. Their promoters, Polygram, placed a death and disappearance policy on Garcia’s life with the Lloyd’s contingency market. The policy contained a good health warranty. Garcia was never in good health and it was obvious to everyone who knew him. Despite that, Polygram made a claim under the Policy. Insurers denied the claim for breach of the warranty. The case went to trial in the English Commercial Court and insurers adduced evidence from a number of witness who knew Jerry well. They all

testified that Jerry was a physical wreck. Amongst those witnesses was a journalist from Rolling Stone magazine – who gave evidence via video link from California. He sipped coffee from a “Dunkin-Donuts” mug during his cross-examination! Insurers won the case [*Gerling-Konzern v PolyGram* [1998] 2 Lloyd’s Rep 544. Leigh Williams was junior counsel for insurers].

That was exactly 22 years ago – as one of the authors of this article remembers well. So the English Commercial Court has now been using remote video-conferencing technology in trials for more than two decades. Of course, the technology has improved considerably over that time – which is a good thing because now the courts must use it, not just to hear evidence, but to conduct entire hearings.

In parallel with the Court’s adoption of video-hearings, the business world has seen a huge increase in the usage of

video-conferencing facilities (through applications such as Zoom, Skype, etc). It has now become normal to talk with clients, experts, and dear colleagues through a web-cam. In the current climate, it is now routine for interviews, proposals, negotiations, and group decisions to take place remotely by video – from people’s spare bedrooms!

Aside from the usual technical issues (such as connectivity, lag, interruptions, sound quality etc) and the passive-aggressive pleas for “everyone not talking to please mute themselves”, users of video conferencing facilities will appreciate that there are more serious issues with communication via video as compared to the equivalent engagement face-to-face.

Chief amongst these is the loss of some non-verbal indicators in the form of facial expressions, posture, and eye contact. This non-verbal communication is ordinarily processed subliminally by the recipient and used by that recipient to determine the communicating party’s understanding and sincerity. The importance of non-verbal communication is particularly acute in circumstances where there is a disjunct between the communicator’s verbal communication (ie what they’re saying) and their non-verbal communication (ie how it is being communicated). In other words, non-verbal communication gives us an insight into the communicator’s actual belief – it allows us to detect whether the communicator believes what they’re saying.

In a 1997-study conducted by Ferrán-Urdaneta and Storck, the researchers instructed test subjects to try to determine whether an interviewee was lying/trying to deceive them. The experiment was conducted face-to-face and then over a video-feed. The study found that the test subjects required 44% more mental effort to detect deception when the interview was conducted over

video. In other words, it was harder to detect deception over video than it was in person.

Summarising the findings of a number of similar studies into the efficacy of video-conferences, in his paper “On the Media Effects of Immigration and Refugee Board Hearings via Videoconference”, Dr Mark Federman (of the University of Toronto) concludes that videoconferencing tends to enable and favour deception on the part of the communicator. Dr Federman states that it is almost impossible for adjudicators or recipients of a deception to assess accurately and fairly the veracity of that communication during video-conferencing (particularly when compared with an equivalent in-person communication). These findings may not be particularly surprising, but they are pertinent in the context of the English Court’s broader adoption of video hearings.

Aside from concerns about the increased risk of deception, other challenges include the fact that (i) witnesses tend to perform worse over video than in person, (ii) the cross-examining barrister is less able to interact with the witness, (iii) outside the formality and order of the courtroom environment the witness will tend to take the exercise less seriously (iv) the witness may become self-aware or distracted and (v) the technology can fail.

The problems with video-conferencing showed themselves during the recent *Brillante Virtuoso* scuttling trial with which many carriers will be familiar [*Suez Fortune Investments Ltd & Anor v Talbot Underwriting Ltd & Ors* [2019] EWHC 25]. The crucial cross-examination of the Master was constantly interrupted by the failure of the video connection with Manilla, from where the Master gave evidence supposedly for his own safety. The situation became so bad, the

Master had to fly to Singapore to resume giving his evidence but the problems continued there too. The judge noted these short-comings in his judgment: “The master, Captain Gonzaga, gave evidence over a period of four to five days. He is alleged to have been party to the conspiracy to scuttle the vessel by allowing intruders to board the vessel pretending to be pirates and then to set fire to the vessel. He denied the allegation. In cases of this type it is inevitable that the cross-examination of the master will take a substantial period of time. The master gave his evidence by video link, initially from the Philippines and then from Singapore. He did so between 18.00 and midnight, his time. The video link was not initially ideal because it depended on a wi-fi connection in the Philippines which was not as efficient as it ought to have been. The picture quality was often poor. The master spoke English but his diction and/or accent meant that it was often difficult to be sure that one had understood the entirety of his answer. Counsel therefore spent time, very properly, checking that his answer had been correctly understood. In order to get a better video link the master was moved to Singapore. The link was better, but from time to time the screen froze.”

It is clear that the English Courts are alive to the limitations of video hearings. The Civil Procedure Rules (at Annex 3 of the practice direction Part 32) acknowledge that evidence provided via video link is “inevitably not as ideal as having the witness physically present in court”. The Court’s recent adoption of video-hearings during the COVID-19 pandemic therefore represents a compromise. This is a recognition that it is better to have an operational (albeit slightly impaired) justice system than no operating justice system at all.

It is also clear that the English Courts recognise that the authenticity of a witness' evidence, or the truthfulness/reliability of a witness, is best assessed by those that saw that evidence first hand. It is for that reason that appeal judges largely accept a lower court's finding about a witnesses' factual evidence (even despite the availability of full transcripts of the exchanges with the witness). The judge/Court that saw and heard the witness give evidence is generally best placed to make determinations about the weight and credibility that the factual evidence should be afforded. However, where witness evidence is provided over video-link, the question arises whether the Court (and any appellate Court) ever truly “heard and saw” the witness giving evidence – as the non-verbal communication is limited (and with it, the ability to detect deception).

Having said all of the above, it is important not to over-emphasise the importance of oral evidence, or indeed, oral submissions, in the context of the majority of commercial disputes, including insurance disputes. The outcome of a case rarely turns on purely oral evidence. Over the last 25 years the proliferation of written means of communication (email, instant messaging, WhatsApp etc) means that there is normally a contemporaneous “electronic paper trail” in respect of any important issue in a case especially where the issue arises in a corporate context. Any judge will tend to focus primarily on that paper trail and will have regard to the oral evidence mainly as a cross-check where the paper trail is incomplete or ambiguous. Oral evidence often tends to be no more than a commentary on the “paper trail”. It is also frequently infused with lawyer-driven submission and narrative informed by the desired litigation outcome, which is not especially helpful

to the resolution of any dispute. The main technique used in oral cross-examination is to point to inconsistencies between what a witness says in his statement and what the underlying contemporaneous documents say. This reflects the fact that the contemporaneous documents are almost invariably the most reliable evidence and that is how a judge will see it. The same observations apply to oral submissions. In most commercial dispute cases, the purpose of oral submissions is principally to highlight particular points in the written submissions, which often run to hundreds of pages. If a submission cannot be reduced to writing because doing so reveals its incoherence, it is not a good submission, however attractive the advocate's oral presentation skills. Ultimately the judge is going to have to produce a judgment, which is also a written document, and so only analysis and arguments that can be expressed coherently in written form are going to find their way into a judgment.

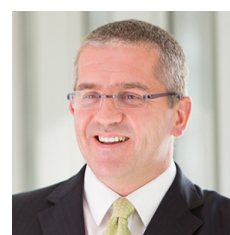
In summary, the English Courts should be applauded for facilitating remote hearings in order to keep the wheels of justice turning but there are risks associated with video conferencing as a means of adducing evidence in a dispute. However, the courts are alive to those risks because video evidence has been used in courts for most than two decades and also the quality of video-conferencing facilities will continue to improve. More fundamentally, it is also important to recognise that in a commercial/corporate dispute context (which includes commercial insurance) the most reliable evidence will tend to be contemporaneous documentary evidence, rather than what a witness says in a court room years later in the teeth of litigation, whether in person or over a video-link.



**William Jones**  
Senior Associate

+65 6422 3051

[william.jones@rpc.com.sg](mailto:william.jones@rpc.com.sg)



**Iain Anderson**  
Partner

+65 6422 3050

[iain.anderson@rpc.com.sg](mailto:iain.anderson@rpc.com.sg)



**Leigh Williams**  
Partner

+44 20 3060 6611

[leigh.williams@rpc.co.uk](mailto:leigh.williams@rpc.co.uk)

## The RPC international risk team

Energy | Power | Marine | Construction | Mining | Heavy Industry | Cyber | Political Risk |  
Political Violence | Trade Credit | Specialty | Facultative & Treaty | First Party and Liability



**Iain Anderson**  
Partner  
+65 6422 3050  
[iain.anderson@rpc.com.sg](mailto:iain.anderson@rpc.com.sg)



**Richard Breavington**  
Partner  
+44 20 3060 6341  
[richard.breavington@rpc.co.uk](mailto:richard.breavington@rpc.co.uk)



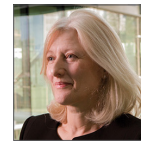
**Mark Errington**  
Partner  
+65 6422 3040  
[mark.errington@rpc.com.sg](mailto:mark.errington@rpc.com.sg)



**Dorothy Flower**  
Partner  
+44 20 3060 6481  
[dorothy.flower@rpc.co.uk](mailto:dorothy.flower@rpc.co.uk)



**Carmel Green**  
Partner  
+852 2216 7112  
[carmel.green@rpc.com.hk](mailto:carmel.green@rpc.com.hk)



**Catherine Percy**  
Partner  
+44 20 3060 6848  
[catherine.percy@rpc.co.uk](mailto:catherine.percy@rpc.co.uk)



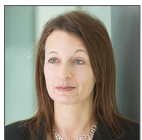
**Antony Sassi**  
Partner  
+852 2216 7101  
[antony.sassi@rpc.com.hk](mailto:antony.sassi@rpc.com.hk)



**Toby Savage**  
Partner  
+44 20 3060 6576  
[toby.savage@rpc.co.uk](mailto:toby.savage@rpc.co.uk)



**Victoria Sherratt**  
Partner  
+44 20 3060 6263  
[victoria.sherratt@rpc.co.uk](mailto:victoria.sherratt@rpc.co.uk)



**Naomi Vary**  
Partner  
+44 20 3060 6522  
[naomi.vary@rpc.co.uk](mailto:naomi.vary@rpc.co.uk)



**Leigh Williams**  
Partner  
+44 20 3060 6611  
[leigh.williams@rpc.co.uk](mailto:leigh.williams@rpc.co.uk)



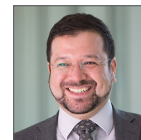
**Gerald Yee**  
Partner  
+65 6422 3060  
[gerald.yee@rpc.com.sg](mailto:gerald.yee@rpc.com.sg)



**Paul Baker**  
Legal Counsel  
+44 20 3060 6031  
[paul.baker@rpc.co.uk](mailto:paul.baker@rpc.co.uk)



**Prakash Nair**  
Director  
+65 6422 3061  
[prakash.nair@rpc.com.sg](mailto:prakash.nair@rpc.com.sg)



**Alex Almaguer**  
Senior Associate  
+44 20 3060 6371  
[alex.almaguer@rpc.co.uk](mailto:alex.almaguer@rpc.co.uk)



**Damon Brash**  
Senior Associate  
+44 20 3060 6247  
[damon.brash@rpc.co.uk](mailto:damon.brash@rpc.co.uk)



**Chris Burt**  
Senior Associate  
+44 20 3060 6593  
[chris.burt@rpc.co.uk](mailto:chris.burt@rpc.co.uk)



**Samuel Hung**  
Senior Associate  
+852 2216 7138  
[samuel.hung@rpc.com.hk](mailto:samuel.hung@rpc.com.hk)



**William Jones**  
Senior Associate  
+65 6422 3051  
[william.jones@rpc.com.sg](mailto:william.jones@rpc.com.sg)



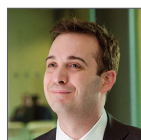
**Jonathan Lim**  
Senior Associate  
+65 6422 3062  
[jonathan.lim@rpc.com.sg](mailto:jonathan.lim@rpc.com.sg)



**Summer Montague**  
Senior Associate  
+65 6422 3042  
[summer.montague@rpc.com.sg](mailto:summer.montague@rpc.com.sg)



**Hugh Thomas**  
Senior Associate  
+44 20 3060 6025  
[hugh.thomas@rpc.co.uk](mailto:hugh.thomas@rpc.co.uk)



**Gary Walkling**  
Senior Associate  
+44 20 3060 6165  
[gary.walkling@rpc.co.uk](mailto:gary.walkling@rpc.co.uk)



**Rebecca Wong**  
Senior Associate  
+852 2216 7168  
[rebecca.wong@rpc.com.hk](mailto:rebecca.wong@rpc.com.hk)



**Leah Wood**  
Associate  
+44 20 3060 6203  
[leah.wood@rpc.co.uk](mailto:leah.wood@rpc.co.uk)

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