

Virtual Hearing in China's Smart Court

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Mr Ting Liao, PhD candidate at the Wuhan University Institute of International Law, published a note on the Chinese Smart Court, which attracted a lot of interest and attention. We have responded a few enquires and comments, some relating to the procedure and feasibility of virtual/remote hearing. Based on the questions we have received, this note provides more details on how the virtual hearing is conducted in China.

1. Background

The fast development of virtual hearing and its wide use in practice in China are attributed to the Covid-19 pandemic. The pandemic causes serious disruption to litigation. China is a country that has adopted the toughest prevention and controlling measures. Entrance restriction, lockdown, quarantine and social distancing challenge the court process and case management. In the meantime, this challenge offers the Chinese courts a chance to reform and modernize their judicial systems by utilizing modern technology. Since suspending limitation period may lead to backlog and delay, more Chinese courts favour the virtual proceedings. This strategy improves judicial efficiency and helps parties' access to justice in the unusual circumstances.

Before the pandemic, Chinese courts have already started their exploration of online proceedings. In 2015, the Provisions of the SPC on Several Issues Concerning Registration and Filing of Cases provides the People's courts should provide litigation services including online filing.[1] In the same year, the SPC published the Civil Procedural Law Interpretation, which states that the parties can make agreement on the form of hearing, including virtual hearing utilizing visual and audio transfer technology. The parties can make application and the court can decide whether to approve.[2] Although online trial from filing to hearing is permitted by law, but it was rarely used in practice due to the tradition and social psychology. The adoption of virtual proceedings for cases with large value was even rarer. The relevant procedure and technology were also taking time to progress and maturase.

Because the pandemic and the controlling measures make serious disruption to traditional form of litigation, online trial becomes more frequently used and develops to a more advanced stage. The SPC provides macro policy instructions that Chinese courts should actively utilize online litigation platform, such as China Movable Micro Court, which allows the parties to conduct litigation through mobile, and Litigation Service Website to carry out comprehensive online litigation activities, including filing, mediation, evidence exchange, hearing, judgment, and service of procedure.[3] While more administrative and technological efforts have been put in, and the pandemic made no better alternatives, more trials were done online. For example, between Feb and Nov 2020, 959 hearings (16.42%) and 5020 mediations were carried out online in the Qianhai Court. Between Feb and July 2020, courts in Beijing conducted average 1,300-1,500 virtual hearings per day.

Some important cases were also tried online. For example, *Boa Barges As v Nanjing Yichun Shipbuilding* concerned a dispute worth nearly \$50,000,000.[4] The contract originally included a clause to resolve disputes in London Court of International Arbitration (LCIA) and to apply English law. However, the pandemic outbreak in the UK in March 2020. The parties entered into a supplementary agreement in May 2020 to submit the dispute to Nanjing Maritime Court and apply Chinese law. Chinese commentators believe the change of chosen forum and governing law demonstrates the parties' trust on Chinese international judicial system and courts' capacity. Nanjing Maritime Court followed the SPC instruction by allowing the foreign party to postpone submitting authorization notarization and authentication, and conducted online mediation. In China, mediation is part of the formal litigation procedure. The parties settled by mediation within 27 days.

In 2021, the SPC published the Online Litigation Regulations for the People's Courts, including detailed rules for how online litigation should be conducted.[5] This Regulations provides five principles for online litigation, including fairness and efficiency, freedom of choice, protection of rights, convenience and security.[6] This Regulations provides further clarification of certain key procedural issues and provide unified micro-guidance which helps the local courts to operate in the same standards and according to the same rule.

2. Initiation of virtual hearing

Virtual proceedings may lead to several controversies. Firstly, how are the virtual proceedings initiated? Could the court propose by its own motive, or should the parties reach agreement? What if a physical trial is not possible due to the pandemic control, both the court and the claimant want a virtual trial, but the defendant refuse to consent? In such a case, would a virtual trial in the absence of the defendant an infringement of the defendant's due process right and should not be enforced abroad? What if the defendant and the court agree to go ahead with a virtual trial, but the claimant refuses? Would a default judgment in the absence of the claimant infringe the claimant's due process right?

The Online Litigation Regulations provides clear guidance. Online litigation should follow the principle of freedom of choice. In other words, parties should give consent to the online procedure and cannot be forced by the court.[7] If a party voluntarily chooses online litigation, the court can conduct litigation procedure online. If all the parties agree on online litigation, the relevant procedure can be conducted online. If some parties agree on online litigation while others not, the court can conduct the procedure half online for parties who give consent and half offline for other parties.[8] However, what if a party cannot physically participate in the offline litigation because of the pandemic, and this party also refuses online litigation? This party certainly can apply for suspension or postponement of procedure. However, if this party has no legitimate reason to refuse online litigation like technical problems or the lack of computer literacy, would not the court consider such a refusal unreasonable? Does it mean a person may use the refusal rights to delay otherwise legitimate procedure to the detriment of the other party? Would the refusal turn to be a torpedo action? Does this strict autonomy approach meet the purpose of good faith and judicial efficiency? Although the freedom of choice is important, would it necessary to provide some flexibility by allowing the court to assess special circumstances of a case? It seems that this strict consent condition is based on the traditional attitude against online litigation. This attitude makes offline litigation a priority and online litigation an exception, which will only be used by parties' choice. This approach does not provide online litigation true equal footing as offline litigation, and still reflect the social psychological concern over the use of modern technology in the court room. Although the pandemic speed the development of online litigation in China, it is treated as an exceptional emergency measure and the emphasis on it may fade away gradually after the pandemic is ending, unless the social psychology is also changed after a longer period of successful use of

online litigation.

3. Public hearing

Would virtual hearing satisfy the standard of public hearing? Certainly, there is no legal restriction preventing public access to the hearing.[9] Furthermore, the Online Litigation Regulations provides that online litigation must be made public pursuant to law and judicial interpretation, unless the case concerns national security, state secrets, individual privacy, or the case concerns a minor, commercial secrets and divorce where the parties apply for the hearing not be made public.[10] However, how to make online hearing public is a technical question. If the virtual hearing is organised online, without an openly published “link”, no public will be able to access the virtual court room and the trial is “secret” as a matter of fact. This may practically evade the public hearing requirement.

Chinese online litigation has taken into account the public hearing requirement. Both SPC litigation service website and the Movable Micro Court make open hearing an integral part of the platform. The public can register and create an account for free to log in the platform. After log in, the public can find all available services in the webpage, including Hearing Livestream. After click in, the public can find the case that they want to watch by searching the court or browse the “Live Courtroom Today”. There are also recorded hearing for the public to watch. In contrast to traditional hearing, the only extra requirement for the public to access to the court is registration, which requires the verification of ID through triple security check: uploading the scan/photo of an ID card, verifying the mobile number via security code and facial recognition.

It shows that Chinese virtual hearing has been developed to a mature stage, which meets the requirement of due process protection and public hearing. Chinese virtual hearing has been systematically updated with the quick equipment of modern technologies and well-established online platform. This platform is made available to the local courts to use through the institutional power of the centre. Virtual hearing in China, thus, will not cause challenge in terms of public hearing.

4. Evidence

Although blockchain technology can prove the authenticity of digital evidence,

many original evidence exists offline. The parties need to upload an electronic copy of those evidence through the “Exchange evidence and cross-examination” session of the smart court platform, and other parties can raise queries and challenges. During trial, the litigation parties display the original evidence to the court and other parties through the video camera. If the court and other parties raise no challenges in the pre-trial online cross-examination stage and in the hearing, the evidence may be admitted. It, of course, raises issues of credibility, because electronic copy may be tempered with and the image displayed by video may not be clear and cannot be touched, smelled and felt for a proper evaluation. Courts may adopt other measures to tackle this problem. For example, some courts require original evidence to be posted to the court if the court and other parties are not satisfied of the distance examination of evidence. Other courts may organise offline cross-examination of the evidence by convening a pre-trial meeting. However, in doing so, the value of the online trial will be reduced, making the trial process lengthier and more inefficient.

The practical difficulty also exists in witness sequestration. Article 74 of the “Several Provisions of the Supreme People’s Court on Evidence in Civil Litigations” provides witnesses in civil proceedings shall not be in court during other witnesses’ testimony, so they cannot hear what other witnesses say.[11] This is a measure to prevent fabrication, collusion, contamination and inaccuracy. However, in virtual hearings, it is difficult for judges to completely avoid witnesses from listening to other witnesses’ testimony online. There is no proper institutional and technical measure to address this problem and it remains one of the fallbacks in the virtual litigation.

[1] Provisions of the SPC on Several Issues Concerning Registration and Filing of Cases, Fa Shi [2015] No8, Art 14.

[2] The SPC Interpretation of the Application of the PRC Civil Procedure Law, Art 295.

[3] Notice of the SPC about Strengthening and Regulating Online Litigation during the Prevention and Controlling of the Covid-19 Pandemic, Fa [2020] 49, Art 1.

[4] The Supreme People's Court issued the sixth of ten typical cases of national maritime trials in 2020: BOABARGESAS v Nanjing Yichun Shipbuilding Co., Ltd. Ship.

[5] SPC, Online Litigation Regulations for the People's Court, Fa Shi [2021] No 12.

[6] Art 2.

[7] Art 2(2).

[8] Art 4.

[10] Art 27.

[11] Fa Shi [2019] 19.