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# WAYS IN WHICH THE MALAYSIAN COURT SYSTEM HAS ADAPTED TO THE CHALLENGES POSED BY THE COVID-19 PANDEMIC

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**Abstract:** *It has been more than two years since the appearance of the COVID-19 pandemic which forced all physical operations, including those of the courts, to a halt in Malaysia. This article provides an insight into pre-COVID judicial practices, the state of the country during lockdown, and coping measures during and after the height of COVID-19. As the world had to resort to technological innovations to ensure the continuity of access to justice, Malaysia began with a head start given its numerous efforts to integrate technology into the judicial system through existing services such as e-Filing and e-Review. As adoption of technology became necessary, new regulations were needed. Malaysian laws were amended, specifically the Courts of Judicature Act 1964 and Subordinate Courts Act 1948 to, among others, introduce the concept of 'remote communication technology' in conducting proceedings. This, however, is subject to certain conditions and the discretion of the judges to ensure that holding hearings virtually will serve the interest of justice. Order 33A rule 4 of the Rules of Court 2012 governs witnesses in the remote medium, and Practice Direction 1 of 2021: Management of Civil Case Proceedings Conducted by Long-Distance Communications Technology for all Courts in Malaysia sets out a guideline for courts in considering whether to conduct civil matters by way of remote communication technology. In recent times, courts are shown to have taken a more favourable attitude towards remote practice. Despite the convenience provided, the introduction of such new systems raises new issues for the courts which all governments should work on for new solutions together.*

**Keywords:** COVID-19 pandemic – effects on court processes in Malaysia – innovation in the delivery of court services – law amendments to allow access to justice via remote communication – court administration – e-Justice – e-Courts

## PRE-COVID PRACTICE

Efforts to introduce virtual sittings in matters presided over by the judiciary in Malaysia can be seen as early as 2006. Virtual court attendance was first reported in the case of *Borneo United Sawmills Sdn Bhd v. Mui Continental Insurance Berhad* [2006] 1 LNS 372. The Court in this case had set out the practice of electronic case management by way of e-mail which was unheard of at that time. However, this practice was confined to the courts in the states of Sabah and Sarawak and was not adopted in Peninsular Malaysia. Practitioners in Peninsular Malaysia were still required to physically file court documents and attend cases physically.

The electronic filing system was introduced in the year 2011. It enabled practitioners and litigants alike to file their documents and cause papers remotely through an online repository, removing the need to deliver hard-copy versions of the same. The practice started with the civil courts in Kuala Lumpur and gradually moved to cover the whole of Peninsular Malaysia. This service was spearheaded by former Chief Justice Tun Dato' Seri Zaki Tun Azmi whose goal was to curb the lingering problem of case backlogs and missing physical files. Time taken for disposal of cases was substantially reduced as the system provides the advantage of recalling any document filed virtually. The backup feature with which the system is equipped prevents instances of lost files, be they due to genuine misplacement or actions based on malicious intentions; at the same time this prevents postponements due to the inability to locate certain files.

To ensure that everyone plays their part in the success of the system's usage, Order 63A Rule 72 of the Rules of Court 2012 was introduced to make electronic filing of documents using the above-described system compulsory. In

*Nur Ibrahim Masilami & Anor v Joseph Lopez* [2013] CLJ 1202, the High Court held that physical filing of a document is not equivalent to the official (electronic) filing of a document, as physical files are only for the judge's own reference, or as an alternative during occasions where the electronic case management system malfunctions. To assist members of the Bar, the court introduced the Service Bureau to help those who do not have e-filing facilities in place to e-file their documents. This service was later discontinued and remaining members who did not have such facilities have had to move forward with the times.

The court also introduced e-Review as a new function in the electronic filing system. This allows parties to conduct their case management virtually through the exchange of written messages for preliminary, interlocutory or procedural matters. E-review lessens the need for physical court attendances. Messages received will be visible to all parties and the court; they will be saved in the e-court system as 'Notes of Proceeding'.

As has been noted, video conferencing was a rarity prior to the advent of the COVID-19 pandemic. There was no provision governing the testimony of witnesses by way of video conferencing. Online trials did not exist. Counsel and witnesses were required to attend court physically, even if they were outside Malaysia. Nevertheless, the courts slowly began accepting testimony by way of video conferencing as Internet speed and video conferencing software were improving. This can be seen in the case of *Merck Sharp & Dohme Corp & Anor v Hovid Bhd* [2017] 1 LNS 53 where Justice Wong held that foreign expert witnesses could testify by way of Skype as both litigants had sensibly agreed to it. His Lordship added that with this approach, foreign witnesses were spared having to spend time and effort and incur expenses to travel to Malaysia solely to testify in court.

## THE LOCKDOWN

Like the rest of the world, Malaysia was put into lockdown after the first appearance of COVID-19. In the Malaysian case, this was done in three phases:

### First Phase: The Movement Control Order

In March 2020, travelling within and without the country was prohibited in Malaysia. All businesses except for those considered 'essential services' were not allowed to operate. Since the court system was not listed as an 'essential service', the judiciary was only able to exercise its role as an 'essential service' to the extent of hearing remand applications before the Magistrates' Court for the temporary detention of suspects for police investigation purposes. Trials and hearings were postponed to future dates as many practitioners could not travel to access their files.

### Second Phase: The Conditional Movement Control Order

In May 2020, restrictions were slightly relaxed. People were permitted to return to work, subject to compliance with strict operating procedures. However, court buildings remained closed to the general public.

### Third Phase: The Recovery Movement Control Order

During the third phase, national operations and almost all businesses were allowed to resume activities but were still subject to strict adherence to pandemic management procedures. Starting from 1 July 2020, the courts restored full operations, but nationwide COVID-19 restrictions still remained.

## STEPS TAKEN TO ENABLE ACCESS TO JUSTICE DURING THE PANDEMIC

As has been noted, the COVID-19 lockdown caused cases to pile up in court, as they were automatically postponed. When restrictions started to ease, the judiciary took measures to enable access to justice so that cases could start moving again. One of those measures was a move to have all civil cases heard virtually. The transition to virtual sittings was achieved very swiftly and smoothly as the court and many members of the Bar have all the facilities in place needed to enable them to hold civil trials virtually. They merely needed a virtual space and relevant legal provisions to conduct matters virtually.

However, the transition to virtual sittings was met with some resistance by some lawyers, notably senior lawyers. The Chief Justice commented that such lawyers preferred to have their matters postponed until physical attendance was allowed again. Due to this, many cases were pushed back until the fourth quarter of 2021. This went against the judiciary's self-imposed requirement for cases to be completed within nine months. The courts were initially agreeable to such adjournments, but soon mandated all civil cases to be heard virtually.

## REMOTE COMMUNICATIONS TO PREVENT THE DELAY OF JUSTICE

To have a more structured regulatory regime governing remote hearings, the Courts of Judicature Act 1964 and Subordinate Courts Act 1948 were amended by Parliament to, among others things, introduce the concept of 'remote communication technology' in court proceedings. This is defined as 'a live video link, a live television link or any other electronic means of communication'. This definition includes the current e-Review system and third-party video conferencing platforms such as Zoom, Skype and Microsoft Teams. Counsel are free to share their computer screens with the parties. Recordings of the online proceedings are also shared with the participants after a matter has been heard. In certain courts, recordings of such proceedings are shared with practitioners. However, there have not been any instances yet where cases were conducted through instant messaging applications such as WhatsApp.

Section 15A of the Courts of Judicature Act enabled the use of remote communication technology in the High Court and appellate courts.

The Subordinate Courts Act 1948, which is applicable to the subordinate courts, was also amended to introduce a similar amendment, *i.e.*, section 101B, to allow the same for the Sessions Court and Magistrates' Court.

Unlike the past where online hearings could only be conducted with the consent of all parties, it is now up to the court to decide if it is in the 'interest of justice' for a matter to be heard through remote communication

technology. This provision applies to trials and even criminal proceedings. However, the use of online trials for criminal proceedings is rare because criminal cases involve the liberty of the subject and streamlining initiatives are therefore treated more warily. The judiciary still generally considers the physical presence of the accused at his or her trial to be necessary. As such, for the time being, the judiciary discourages online hearings for criminal matters.

The Rules of Court 2012, which govern civil proceedings in Malaysia, were also amended to introduce Order 33A. The provisions are similar to those found in section 28 of the Singapore COVID-19 (Temporary Measures) Act 2020.

Order 33A Rule 4 of the Rules of Court 2012 provides that the court may direct certain persons to attend or give evidence in court through remote communication technology. Such an application may be made by way of a notice of application supported by an affidavit in support.

Order 33A Rule 3 of the Rules of Court 2012 provides that:

*[A]ny person, witness or prisoner as witness or party to any proceedings is allowed to attend the court and/or give evidence in those proceedings by means of remote communication technology. In cases of a person attending, a witness giving evidence and a prisoner as a witness or a party, attending or giving evidence, the Court or Registrar shall be satisfied that sufficient administrative and technical facilities and arrangements are made.*

Under both of these provisions (Rules 3 and 4), the court must be satisfied that the following conditions are met:

- a. remote appearances must be at a specified location at a specified time using approved remote communication technology; and
- b. sufficient administrative and technical facilities and arrangements are available at the place from which the person or witness is to make an appearance or to give evidence.

As for attendances or through remote communication technology in criminal proceedings, the court must be satisfied (in addition to the above) that:

- a. the person so attending is a witness or a party; and
- b. the parties and the Officer in Charge referred to under the Prison Act 1995 (Act 537) consent to the use of the remote communication technology.

Order 33A of the Rules of Court 2012 does not stipulate the particular requirements to be satisfied by an applicant seeking to have a witness testify by way of remote communication technology. The Order merely provides that the person shall use the remote communication technology and that sufficient administrative and technical facilities and arrangements are to be made at the place where the person or witness is to appear or to give evidence.

As many countries had closed their borders during the COVID-19 pandemic, many litigants wished to utilise remote technology communication to allow their witnesses to testify virtually. Therefore, the court had to formulate guidelines on when to allow witnesses to testify virtually or not.

In this regard, paragraph 5 of the Practice Direction 1 of 2021: Management of Civil Case Proceedings Conducted by Long-Distance Communications Technology for all Courts in Malaysia ('Practice Direction 1') sets out various factors for the court to consider when deciding whether to permit a civil matter to be conducted by way of remote communication technology. Paraphrasing and condensing Practice Direction 1, those considerations include:

- a. the type and complexity of proceedings (running from case management hearings through to trials and appearances to receive a decision);
- b. the duration of the proceedings;
- c. the urgency of the proceedings;
- d. any prescribed time limits set out in legislation, practice directions and the like;

- e. the anticipated time to completion of the proceeding;
- f. the anticipated time required to comply with court-ordered deadlines for document discovery, preparation of cross-indexed document briefs and the like;
- g. the potential for adjournments and the possible prejudicial effects of the same;
- h. the health and ability of witnesses to attend proceedings in person;
- i. the question of whether any party to proceedings are represented by counsel;
- j. the quality of available technological supports, including computer hardware and software, internet access speed, and the like;
- k. any mobility restrictions affecting parties and witnesses involved in proceedings;
- l. preservation of the parties' rights to a fair trial;
- m. any objections raised by any parties to proceeding by way of remote communications technology; and
- n. such other considerations as the court thinks are right and proper.

After considering the above factors, the court will direct that the proceedings be conducted through:

- a. remote communication technology;
- b. physical (in-person) means; or
- c. hybrid methods that combine the use of long-distance communication technology with physical (in-person) means.

Courts will determine the digital platform and designated location for remote proceedings and will issue any other relevant instructions.

In respect of the question of whether witnesses will testify through remote communication technology, the court may take into account further factors, some of which are listed below

(again, paraphrasing and condensing from Practice Direction 1):

- a. the ability to follow as closely as possible the usual rules that govern evidence given in proceedings in open court;
- b. whether any party will be prejudiced if evidence is given through remote communication technology;
- c. the level of control by the court over witnesses who are in a ‘remote location’ as compared to the control it has over witnesses who are physically present in court; and
- d. whether the witness is in the country or abroad and, where abroad, the reason or reasons given for the witness’s inability to give evidence in Malaysia.

The use of supervising solicitors has also expanded to include monitoring of witnesses when they testify remotely. This is because there is a danger that a witness may (for example) be tampered with, may refer to documents beyond what is filed in court or may obtain answers from third parties when giving evidence through remote communication technology. Having a supervising solicitor present is one of the methods for reducing or even eliminating such risks.

## POST LOCKDOWN

By January 2022, nationwide COVID-19 restrictions had been lifted in Malaysia. Notwithstanding the easing of restrictions, many lockdown practices remained in place and have become entrenched into Malaysian practice. Many courts are still operating virtually, and trials are still being conducted virtually. The civil appellate courts by January 2022 were fully virtual and paperless.

Based on recent reported cases, the courts generally favour proceedings to be conducted by way of remote communication technology. In *Pacific & Orient Insurance Co Berhad v Mohammad Hafizi Bahari & Anor*, [2021] 1 LNS 647, Justice Liza Chan rejected the defendant’s argument that ‘the usage of remote communication technology in a trial where the demeanours of the witnesses are of utmost importance to be observed by the trial judge

is limited’. Her Ladyship held that ‘[a] Zoom trial will still allow for observation’. In *ING Bank N.V. v Anish Resources Sdn Bhd*, [2022] 1 LNS 647—in deciding whether to grant a stay of proceedings on the ground of *forum non conveniens*—Justice Leong Wai Hong held that traditional factors favouring the grant of a stay of proceedings such as ‘convenience or expense and availability of witnesses’ are less compelling in view of the rules and facilities that enable courts to hear cases through remote communication technology.

In practice, it must be acknowledged that whether a court will allow a matter to be conducted by way of remote communication technology does largely depend on how the individual judge conducts his or her proceedings generally. There are judges who conduct their matters solely or largely by way of remote communication technology and others who do not. Hence, an order for a matter to be conducted by way of remote communication technology will normally be granted if that is the judge’s general preference. Another option is available, that being that a party may request that the trial be conducted in a hybrid manner, namely, with physical appearances of some counsel and witnesses in courtrooms combined with others appearing via remote communication technology.

Remote communication technology is now also a factor to be considered when deciding whether to transfer proceedings to another court at another location. In *Liziz Plantation v. Liew Ah Yong* [2020] 10 CLJ 94, Justice Su Tiang Joo held that with the experience gained in using remote communication technology in dealing with the Movement Control Order, Conditional Movement Control Order and the Recovery Movement Control Order and which were necessitated by the COVID-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court have become very much less important. The need for counsel, litigants and witnesses to physically travel to court for the hearing of their matters is thus diminishing. Hearings and meetings can now be done and, by reason of the COVID-19 pandemic, are encouraged to be done electronically via a variety of internet platforms such as Zoom or Skype; other platforms are available as well, including Google Duo, Google Hangouts, Microsoft Teams and

Adobe Connect. Given all of the above, the High Court held in *Lziz Plantation* that it would not be the interest of justice to allow the transfer application that was before it.

In an intellectual property dispute case styled *Muhammad Hafidz Bin Mohd Dusuki v. Hassan Bin Zulkifli* [2020] 1 LNS 1843, Justice Radzi Harun dismissed an application to transfer the proceeding to the Kota Bahru High Court, notwithstanding that, among others, one of the witnesses was of old age and would have had difficulty travelling due to the COVID-19 pandemic. His Lordship held that the court is cloaked with sufficient powers to allow flexibility in dealing with such witnesses by resorting to technology for his evidence taking.

As virtual proceedings are here to stay, the judiciary and the Malaysian Bar have jointly worked on a model protocol for civil matters. This model protocol was prepared to facilitate the conduct of trials, appeals and other hearings using remote communications technology. It covers practical aspects such as standards governing electronic document bundles, responsibilities of parties when calling witnesses and appointing supervising solicitors, steps to be taken before and during trial, and standards of transcribing and submitting audio or video recordings. As of the date of writing, the model protocol is pending final touches to be given to it by the judiciary and will be launched by the judiciary in due course.

## CONCLUDING OBSERVATIONS AND RECENT DEVELOPMENTS

With the lockdown having been lifted, the Malaysian economy restarted its engines and many new cases, which were put on hold due to the pandemic, were filed in court. Newer and newer issues are coming up for the court to decide when dealing with virtual settings. A few examples of recent developments follow.

In *Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin Bin Ramli*, [2022] 4 CLJ 381, the High Court was informed that a short video clip of its online court trial was being disseminated via WhatsApp. The video clip displayed four frames of three counsel and the High Court Judge. It was doctored to falsely portray that the learned judge had admonished one particular counsel in a loud voice during the trial for asking a question

on contractual interpretation, and asking the the court interpreter to record the time of the exchange so that he could lodge a complaint against that counsel to the Disciplinary Board. However, in actuality the learned Judge had addressed his admonition to a different counsel (whose video frame was deliberately omitted from the video clip). The learned judge was of the view that any reasonable person who had only watched the doctored video clip would form the view, opinion and/or belief that the court had unjustly dealt with the counsel by complaining to the Disciplinary Board about him, merely because he had asked the witness a question regarding the interpretation of a contractual provision. The learned High Court judge said that any person making such a video clip had breached the Court's order not to make any recordings of the online court trial. Any person who had abetted or assisted in the commission of the said act may be liable for contempt of court. Conduct of this kind amounts to scandalising the court. His Lordship also expressed the view that the making of the video clip was a criminal offence under numerous provisions of Malaysia's criminal law.

In the case of *Saw Shiuo Shyong @ Sonny Saw v. Pengarah Tanah Dan Galian Wilayah Persekutuan, Kuala Lumpur & Ors* [2022] 1 LNS 1325, the court had to consider whether it had the power to compel the other party to allow a supervising solicitor to be present when the other party's witness testified outside of Malaysia. The court held that it is not compulsory to have a supervising solicitor and additional safeguards can be employed to ensure that there is no witness tampering.

One of the more pressing issues concerns the question of what happens when a foreign witness, who is testifying by way of remote communication technology, is caught lying? Being a foreign citizen, the long arm of Malaysian law may not be able to deal with him. What would happen to the benefits obtained through a judgment that is obtained due to the lie? This is a problem that is not unique to Malaysia; court systems across the world are now relying more and more on testimony given by witnesses from outside jurisdictions. International cooperation will be required to address this and other by-products of the increasing reliance being placed upon the giving of testimony remotely.