



Technology has become an integral part of legal systems in most jurisdictions in the world. Its role is now increasingly significant in view of the prevailing COVID-19 pandemic. Prior to the pandemic, the Malaysian judiciary has already put in place various systems such as the E-Filing System and E-Review Module in the courts through the application of technology. These systems provide great convenience to legal practitioners without being physically present in court.

During the pandemic, the Malaysian courts were closed due to the implementation of the MCO. All court proceedings save for certain criminal proceedings and urgent civil cases came to a halt.

In April 2020, to ensure continuous access to justice in the wake of the pandemic, the Court of Appeal carried out its first online hearing on 23 April 2020 which was live-streamed for public viewing. While the unprecedented use of technology by the Malaysian judiciary to live-stream an online hearing during unprecedented times is commendable, the validity of online hearings remains to be seen.

Is online hearing legitimate?

The provisions in the Courts of Judicature Act 1964 do not expressly provide for the manner of conducting hearings. It is unclear whether the courts are empowered to hold proceedings by way of online or virtual hearing.

The issue of legitimacy or validity of online hearings was briefly discussed by the High Court in the recent case of *SS Precast Sdn Bhd v. Serba Dinamik Group Sdn Bhd* [2020] 1 LNS 316. The court held that it would be able to exercise its discretion to hold online hearing pursuant to the existing Rules of Court 2012, which according to the learned judge, is consistent with the fundamental right of a party enshrined under Article 5(1) of the Federal Constitution, to have access to justice. The High Court also considered the “overriding interest of justice” as provided in the Rules of Court 2012.

The provisions invoked by the High Court are applicable to online hearings in chambers. They can be argued as not applicable to trials and proceedings to be held in open court. Interestingly, these provisions relate to general discretion of the court and perhaps not envisaged to cover online hearings when they were drafted.

As the law stands now, proper amendments to the principal statutes as well as the relevant rules governing the courts are necessary if Malaysia intends to push for online or virtual hearings in the courts.

Is online hearing feasible?

There are pros and cons to having online hearings. The advantages are obvious, such as accessibility, convenience and cost and time saving. On the other hand, there are drawbacks to conduct hearings online, including:

- Not all users of Court are technology savvy.
- For trials and other proceedings involving witnesses, the demeanour of witnesses may not be easily evaluated by judges on screen.
- The possible lack of the “grilling factor” adopted by counsel to cross examine witnesses in court.
- Increased chances of evidence tampering or witness coaching.
- Witnesses could easily turn off or control their online connection to escape further “grilling” by counsel.

Due to COVID-19 pandemic and possible future public health concerns, the move towards online hearings is inevitable. With the implementation of proper measures, the shortcomings of online hearings may be effectively reduced. Therefore, a well-thought out legislative framework or guidelines must be devised to ensure fair and effective online hearings and trials.

A group of legal practitioners in Malaysia have recently drawn up a *Remote Hearing Protocol*, setting out the proposed practice and procedures on how to conduct online hearings. It touches on, among others, proceedings involving witnesses, navigation of court documents and the general conduct of parties during online hearings.

Conclusion

Although online hearing raises many questions and concerns, it is generally recognised that the advantages far outweigh the disadvantages when travel bans or movement restrictions are in place for public health and safety concerns. It is the only viable option for people to access justice. In fact, courts in various common law jurisdictions such as the UK, Australia, Singapore and India have also embraced online hearings during the pandemic. With the advent of technology and permanent lifestyle changes post-COVID-19, online hearing is expected to be the “new normal” in court proceedings.

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