

ZOOMING INTO A NEW AGE OF COURT PROCEEDINGS

Perspectives from the Court, Counsel and Witnesses

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I. Introduction

1 It has been said that in the pantheon of professions, only the clergy are more cautious about technological change than lawyers.² Yet, even for a profession “steeped in tradition and contained by precedent”,³ as Chief Justice Sundaresh Menon opined in 2017: “[T]he day of reckoning can no longer be put off, because dramatic [technological] developments will force us to rethink entire areas of practice.”⁴

2 The coronavirus disease 2019 (COVID-19) pandemic has brought that day right to our doorsteps. With countries implementing lockdowns and social distancing being the new norm, it is nigh on impossible for the profession, as a whole, to continue as before.⁵ This is reflected even in Singapore where,

1 This article was written with input from Justice Lee Seiu Kin, Chou Sean-Yu and Gregory Vijayendran (together with their respective teams and expert witnesses), Sui Yi Siong and Joshua Foo. The author is also grateful for the views and assistance of Gladys Ng, Claire Lim, Arthur Chin, Leanne Cheng and Kim Bumsoo. All errors remain the author's.

2 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at p 4, citing research summarised generally in Richard Susskind & Daniel Susskind, *The Future of the Professions* (Oxford University Press, 2015).

3 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at p 4.

4 Sundaresh Menon CJ, “Response by Chief Justice Sundaresh Menon, Opening of The Legal Year 2017” (9 January 2017) at para 15.

5 For examples of such changes, see Remote Courts Worldwide <<https://remotecourts.org/>> (accessed 21 September 2019). See also Jane Croft, (cont'd on the next page)

during the “circuit breaker” period from 7 April 2020 to 1 June 2020, most court hearings had to be adjourned, save for essential and urgent matters.⁶

3 The above speaks volumes of the impact that COVID-19 has had, even for a jurisdiction that has long invested in its legal technology capabilities,⁷ with immense support from various stakeholders.⁸ It is, however, a testament to such forward thinking that Singapore was able to swiftly pivot to using remote hearings, at all levels of courts, even *before* the “circuit breaker” measures were implemented.⁹ The use of remote hearings during the “circuit breaker” was well received as being “convenient, cost and time-efficient”,¹⁰ paving the way for further use as we entered the “Safe Re-opening” and “Safe Transition” phases.

4 In July 2020, Justice Lee Seiu Kin presided over one of the first completely virtual trials in Singapore, with court officers, counsel, transcribers, witnesses and experts tuned in to the

“Courts Test Their Online Future, from Dress-down Lawyers to Witness Appearance” *Financial Times* (23 April 2020); Jane Croft, “Pandemic Speeds Up Lawyers’ Adoption of Technology” *Financial Times* (17 June 2020).

- 6 “Supreme Court, State Courts and Family Justice Courts to Hear Only Essential and Urgent Matters from 7 April to 4 May 2020” *Supreme Court* (5 April 2020); Lydia Lam, “COVID-19: Most Court Hearings in the Next Month to be Adjourned Except Urgent, Essential Cases” *Channel NewsAsia* (5 April 2020); “Message from the Chief Justice: The Judiciary’s Response to the Extension of the ‘Circuit Breaker’ Period” *Supreme Court* (24 April 2020).
- 7 See Viva Dadwal & Mark Beer, “What We Can Learn from Asia’s Courts of the Future” *World Economic Forum* (2 November 2018). Initiatives include the Singapore Academy of Law’s Legal Technology Vision.
- 8 The Chief Justice has also constantly sounded the need for technological improvements. See “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2020” (6 January 2020); “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2019 (7 January 2019); “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2018 (8 January 2018); “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2017” (9 January 2017); The Honourable The Chief Justice Sundaresh Menon, “Advancing Justice: Expanding the Possibilities”, keynote address at the State Courts Workplan 2017 (17 March 2017). For academic support, see The Honourable Justice Lee Seiu Kin, “e-Discovery” and Bryan Ghows, “Technology and Advocacy” in *Modern Advocacy: More Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC and The Honourable Justice Vinodh Coomaraswamy gen eds) (Academy Publishing, 2019).
- 9 “Message from Chief Justice Sundaresh Menon: The Singapore Judiciary’s Response to COVID-19” *Supreme Court*.
- 10 “Message from the Chief Justice: The Judiciary’s Response to the Exit of the ‘Circuit Breaker’ Period” *Supreme Court* (29 May 2020).

virtual court¹¹ via Zoom from multiple locations in Asia. This article compiles the collective experiences and insights of the attendees, with input from Lee J, counsel (Gregory Vijayendran and Chou Sean-Yu, along with their respective teams) and expert witnesses (James Nicholson and Jenny Teo).

5 The purposes that this article hopes to achieve are two-fold: first, that it will in some way ameliorate the difficulties that undoubtedly will arise in a new age of court proceedings by drawing on the experiences of court users thus far;¹² and second, that this provides a foundation that future discussions on online hearings can build upon.

II. Guidelines in the light of COVID-19

6 The COVID-19 (Temporary Measures) Act 2020¹³ (“COVID-19 Act”) was passed by Parliament on 7 April 2020. The COVID-19 Act addressed a wide-range of reliefs and measures, with s 28 of the COVID-19 Act allowing for a wider use of remote communication in court proceedings.¹⁴ In the main, s 28 provides as follows:

Conduct of court proceedings and Syariah Court proceedings using remote communication technology

28.—(1) Despite any written law or rule of law requiring the presence of any accused person or any witness in any court proceedings (whether a trial, inquiry, appeal or other court proceedings) or the giving of evidence in person, a court may, if all the conditions specified in subsection (2) are satisfied, by order in those proceedings require an accused person or a witness —

11 It is noted that there are multiple definitions of the term “virtual court” or “online court”. This paper adopts the general conception put forth by Richard Susskind of a system that leverages the advantages of technology to extend the court’s reaches beyond its traditional remits: see Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at pp 5–6.

12 As Mr Vijayendran eloquently termed the “tears and fears” that may arise.

13 Act 14 of 2020.

14 “Second Reading Speech by Senior Minister of State for Law, Mr Edwin Tong, on the COVID-19 (Temporary Measures) Bill 2020” *Ministry of Law* (7 April 2020) at para 30.

(a) to give evidence by means of a live video or live television link that is created using a remote communication technology approved by the Chief Justice; or

(b) if the accused person or witness makes an appearance (other than to give evidence) in those proceedings, to so appear by means of a live video, live television link or live audio link that is created using a remote communication technology approved by the Chief Justice.

(2) The conditions mentioned in subsection (1) are —

(a) in the case of an accused person, he or she makes an appearance or gives evidence —

(i) during the specified period; and

(ii) from a place within a court or a prison in Singapore, using the remote communication technology;

(b) in the case of a witness (whether in Singapore or elsewhere), he or she makes an appearance or gives evidence during the specified period from a place specified by the court using the remote communication technology, but only if he or she —

(i) is an expert witness; or

(ii) is a witness of fact and the parties to the proceedings consent to the use of the remote communication technology; and

(c) the court is satisfied that --

(i) sufficient administrative and technical facilities and arrangements are made at the place where the accused person or witness is to make an appearance or to give evidence; and

(ii) it is in the interests of justice to do so.

...

7 Three notable safeguards, in place to ensure the propriety of such hearings, should also be highlighted. First, where a witness making an appearance virtually is a witness of fact, parties must first consent to the witness testifying by way of

remote communication. This requirement of parties' consent, however, does not apply to expert witnesses.

8 Second, fairness of the proceedings and the interests of justice still remain the overriding concerns,¹⁵ as seen in s 28(2)(c)(ii) of the COVID-19 Act. This is also reflected in s 28(7) of the COVID-19 Act, which states that:

(7) The court or the Syariah Court is not to make an order under subsection (1) or (3) (as the case may be) or include a particular provision in such an order, if to do so would be inconsistent with the duty of the court or the Syariah Court to ensure that the proceedings are conducted fairly to the parties to the proceedings.

9 Third, the usual rules against the unauthorised recordings of proceedings remain in place. This is explicitly provided for in s 28(11) of the COVID-19 Act:¹⁶

(11) For the purpose of section 5(1)(a) of the Administration of Justice (Protection) Act 2016 (Act 19 of 2016), a reference to the use in court, or to bringing into court, of any audio recorder, electronic device or other instrument for audio or visual recording or both includes a reference to the use in or bringing of such instrument into any place in Singapore from where —

- (a) a judge conducts court proceedings during the specified period using a remote communication technology approved by the Chief Justice;
- (b) an accused person or a witness makes an appearance or gives evidence during the specified period using such remote communication technology; or
- (c) any person participates in, views or listens to the court proceedings conducted during the specified period using such remote communication technology.

10 It thus can be seen that the ability go virtual extends to *any* court proceedings, including trials. Appearances and

15 “Second Reading Speech by Senior Minister of State for Law, Mr Edwin Tong, on the COVID-19 (Temporary Measures) Bill 2020” *Ministry of Law* (7 April 2020) at para 33(c).

16 Similar provisions are made under s 12 of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) in relation to ss 54A(1) and 54A(4) of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed).

evidence given by way of remote communication are also taken as if they were given in person and form part of the record of proceedings.¹⁷ The court may also exercise its jurisdiction or the powers conferred on it as if the proceedings were being heard *physically* in “a court house” or any other place required by written law.¹⁸

11 Alongside the COVID-19 Act, a series of Registrar’s Circulars were released as guidance and updates on the measures relating to COVID-19.¹⁹ The following points are critical for counsel to bear in mind during virtual hearings:

(a) Unauthorised recordings of hearings are strictly prohibited, in accordance with s 5 of the Administration of Justice (Protection) Act 2016.²⁰ The court may require an undertaking that no such recording will be made.

(b) All court rules and practices on dress and etiquette continue to apply to virtual hearings, except that:

(i) it is not necessary to stand and/or bow to the court at the start or end of the hearings;

(ii) in relation to the wearing of a gown:²¹

(A) where open court proceedings are conducted solely through the live video or live television link and *do not take place*

17 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 28(8).

18 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 28(10).

19 Registrar’s Circular No 3 of 2020, “Information on Measures and Other Matters Relating to COVID-19 (Coronavirus Disease 2019) for Court Users and Visitors to the Supreme Court” *Supreme Court* (27 March 2020); Registrar’s Circular No 4 of 2020, “Updates on Measures Relating to COVID-19 (Coronavirus Disease 2019) from 7 April 2020 to 4 May 2020” *Supreme Court* (5 April 2020); Registrar’s Circular No 5 of 2020, “Updates on Measures Relating to COVID-19 (Coronavirus Disease 2019) for the period from 5 May 2020 to 1 June 2020” *Supreme Court* (24 April 2020); Registrar’s Circular No 6 of 2020, “Updates on Measures Relating to COVID-19 (Coronavirus Disease 2019) after 1 June 2020” *Supreme Court* (29 May 2020); Registrar’s Circular No 8 of 2020, “Court Dress for Open Court Proceedings Conducted Through Live Video or Live Television Link” *Supreme Court* (9 July 2020).

20 Act 19 of 2016.

21 Supreme Court Practice Directions (Amendment No 2 of 2020); Registrar’s Circular No 8 of 2020, “Court Dress for Open Court Proceedings Conducted Through Live Video or Live Television Link” *Supreme Court* (9 July 2020).

in any courtroom, a gown need not be worn; but

(B) if one or more judges hear the *proceedings in a courtroom*, unless the court directs otherwise, every advocate and solicitor in the proceedings will wear the usual attire for open court;

(C) when appearing before the judge or registrar in chambers, the attire for an advocate and solicitor will be the same as for open court, except that a gown need not be worn.

(c) Where physical attendance is appropriate, no more than two lawyers or litigants *per* party may appear at the hearing.

(d) Practice trainees, interns, legal executives and other assistants should not be in attendance. A party requiring additional attendees should write to the court to request for an exemption for the named additional attendees, no later than one working day before the hearing date.

12 These measures ensure both the safety of court users and that the administration of justice in Singapore does not “grind to a complete halt” during these trying times.²²

III. The technical aspects

13 A recent survey conducted by the UK Civil Justice Council on the impact of COVID-19 measures found, amongst other things, that most court users felt that video hearings made dialogue less fluent and that video platforms frustratingly suffered from

22 “Second Reading Speech by Senior Minister of State for Law, Mr Edwin Tong, on the COVID-19 (Temporary Measures) Bill 2020” *Ministry of Law* (7 April 2020) at para 36.

technical failures.²³ Such teething (or indeed, in some instances, recurrent) problems are similarly to be expected as Singapore begins to expand its usage of Zoom for trials.

14 As a starting point, courts users may look to useful material such as the Supreme Court's guide on the use of video and telephone conferencing,²⁴ which usefully sets out the fundamentals of using Zoom for hearings. Guidance may also be gleaned from Justice Aedit Abdullah's "7 Tips for Online Advocacy".²⁵ Beyond these resources, this section also shares additional tips in relation to the (a) set-up for counsel; (b) presentation of evidence; and (c) preparation and attendance of witnesses.

A. The set-up for counsel

15 For counsel, the set-up for a Zoom trial includes a certain amount of preparation and procurement of equipment. Counsel preparing for such hearings should bear in mind the following: (a) the choice of venue; (b) the equipment necessary; (c) conducting a test run before the trial; and (d) document preparation.

(1) Choice of venue

16 Where it is possible to do so, it is recommended that a dedicated room be set aside to provide a centralised setting for counsel to conduct the virtual trial from. This allows counsel to consolidate all necessary documents and equipment ahead of time. It also avoids the hassle of dismantling and setting up again, as well as the technical hiccups that may arise from having to shift venue and/or constantly reassembling the technical equipment.

23 Dr Natalie Byrom, Sarah Beardon & Dr Abby Kendrick, *The Impact of COVID-19 Measures on the Civil Justice System: Report and Recommendations* (May 2020) at para 5.78.

24 "Guide on the Use of Video Conferencing and Telephone Conferencing & Video Conferencing for Hearings Before the Duty Registrar" *Supreme Court* (27 March 2020).

25 Singapore Academy of Law, "7 Tips for Online Advocacy" (13 April 2020).

17 A centralised setting also allows the entire team of counsel, where necessary, to gather during the course of the trial. Naturally, safe-distancing measures must be observed and may pose some minor inconveniences. However, the feedback from counsel was that this provided a superior team experience, as opposed to all team members dialling in from different locations. In their view, this greatly minimised the issues with communicating and co-ordinating with one another in real time.

18 In the event that circumstances do not allow for such a venue to be acquired or utilised, there are other measures that may be implemented to deal with the difficulties that accompany remote in-trial communication. For example, instant messaging platforms such as WhatsApp and Telegram today offer instant *group* messaging functions. Litigation teams can leave such chat windows open on a separate computer screen during trial to maintain constant communication.

19 Finally, when choosing the venue, it is also crucial that an Internet connection that is reliable and of sufficiently high bandwidth is available. Where possible, it is also recommended that a LAN or Ethernet cable connection be used for the Zoom feed utilised by lead counsel as this provides greater reliability and speed, reducing the chances of interruption during the hearings. Where Wi-Fi is used, the router should be located in the room to ensure a strong and stable Internet connection.

(2) *The equipment*

20 Beyond a stable Internet connection, the equipment utilised also greatly aids in the smooth conduct of trial. Based on counsel's experience before Lee J, four areas are highlighted. First, in order to comply with safe-distancing measures, it is ideal for counsel to have their own laptops, and to tune in to the Zoom hearing on their individual devices. It is, however, not necessary for all counsel to have their videos turned on in so far as they are not speaking; having too many videos turned on may be an unwanted distraction for the others involved. Additionally, it is critical that counsel who are not speaking switch their

microphones to “mute” as this will cut off distracting sounds and prevent acoustic feedback.

21 Second, it is suggested that lead counsel have at least more than one screen to allow toggling between documents and the Zoom proceedings. Mr Chou and Mr Vijayendran both shared that they each utilised at least three screens – one for the live transcription; one for the Zoom hearing in progress; another to review, track or display the trial bundles; and finally, one centralised projector screen or giant/wide-screen monitor to display the Zoom feed for the rest of the room²⁶ (see Annex A). As noted above, having additional screens also allows for online communication with one’s team during the trial if the lawyers are not present at the same venue. The use of multiple screens was also recommended by Lee J, who shared that he too had utilised four screens, as seen in Annex B below.

22 Third, the camera quality should be good enough to transmit a feed that is clear, with no lag, and is able to accurately capture facial expressions. The camera should ideally be placed at the speaker’s eye level, and at an angle that does not capture any distractions in the background. Where a laptop’s built-in camera is insufficient, an external webcam may prove to be a better solution. If a virtual background is used (firms may wish to have their own standard backgrounds), this should ideally be coupled with a green screen, otherwise it may result in a distracting visual image with occasional distortion of counsel’s face. If a green screen is not available, it is better not to use a virtual background.

23 Lastly, a single shared external microphone is recommended, so long as safe-distancing measures are complied with. This overcomes the problem of acoustic feedback mentioned above where multiple counsel are present in the same room with unmuted microphones. In the absence of such a microphone, headsets are recommended in order to be clearly heard.

26 This final screen is unnecessary if all counsel have their own personal laptops.

24 Acoustic feedback may sometimes occur even if the non-speaking lawyers' microphones are muted. For this reason, in certain cases, it is preferable for all present in the same room (assuming multiple laptops are used) to listen in using headphones or earphones, lest the problem of an acoustic feedback loop arises. Put simply, the feedback loop occurs when the audio loudspeakers of the non-speaking lawyers' computers feed noise into the microphone of the speaking lawyer's computer (that noise may be the speaker's own voice). The noise fed into the microphone is then fed back out from the same non-speaking lawyers' computers and back again into the speaker's microphone; the loop repeats infinitely. The result is a shrill high-pitched noise that keeps increasing in volume – indeed, such noises have been observed in multiple Zoom hearings. The problem is resolved by having every lawyer present in the room wear headphones or earphones, or by having dedicated video-conferencing microphones (eg, cardioid microphones which receive sound directionally, or shared conference microphones, as noted in the previous paragraph).

(3) *The test run*

25 It is prudent for counsel to conduct several test runs of the video-conferencing systems before the trial, as well as on the morning of the trial before proceedings begin. Additionally, counsel should dial in earlier (possibly 15–30 minutes) before the start of the hearing each day and after every lunch break to conduct a test run of the technical systems.

26 All test runs should also be conducted from the location in which parties intend to conduct the trial, so that any potential issues (in particular relating to Internet connection, noise, lighting and background) can be detected and dealt with beforehand. If parties intend to use a transcription or translation service, such service providers should also be present at (at least) one of the test runs prior to trial.

(4) Document preparation

27 In the lead up to this particular trial, parties agreed to have the bundles prepared as soft copy documents and submitted to the court via a DropBox link.²⁷ This was highly useful and obviated the need for submission of hard copies of the documents. Additionally, to aid in document navigation, counsel should consider co-ordinating with one another to create an omnibus folder on the DropBox for the agreed or core bundle of documents where necessary. It is also critical, perhaps more so than in a regular non-virtual trial, that counsel standardise the organisation and labelling conventions for the documents.²⁸

B. Presentation of evidence

28 The use of technology within the Singapore courts is not new. Since the introduction of electronic filing of documents in 2000, a whole suite of measures have been implemented, from the Digital Transcription System to the Opus 2 Magnum Software.²⁹ Virtual trials are now providing us with a new forum in which we can develop and improve the presentation of evidence in court.

29 A primary example is the screen-sharing function available on Zoom, which allows any party to easily display documents on a common screen (see Annex C for an example). This is extremely helpful where the witness is unable to locate the document expeditiously, or to ensure that all parties are looking at the same part of a document. A common complaint when utilising this function is that the camera feeds of attendees are relegated to the side or top of the screen. This causes the camera feeds to become significantly smaller, thus obscuring counsel's and the

27 Google Drive may be a viable alternative.

28 Mr Chou suggests the usage of two folders for the Trial Bundle: a Plaintiff's bundle – with documents tagged as "P1", "P2" and so on – and a Defendant's bundle – with the tags "D1", "D2" – for ease of identification, unless these can be merged in advance of the trial.

29 Bryan Ghows, "Technology and Advocacy" in *Modern Advocacy: More Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC and The Honourable Justice Vinodh Coomaraswamy gen eds) (Academy Publishing, 2019) at para 04.059; Justice Chua Lee Ming, "Technology in the Singapore Courts", speech at the 2nd China-ASEAN Justice Forum (8 June 2017).

court's view of the witness giving evidence. With a large enough screen, however, this problem can be mitigated by clicking on the viewing option of "side-by-side", allowing both the shared screen and the camera feeds to be displayed at more visible sizes (see Annex D). The use of a second monitor is also a good solution. A further point that should be noted by counsel electing to share their screens was raised by Mr Nicholson as follows:

There was some difference in the use of documents and written evidence during the trial – because these were on screen, they appeared more quickly than if participants were finding references in document bundles (a plus), but *for those documents etc that I had not printed out, I lost the ability to see easily the context of particular passages*. In this particular case that had little impact, but it could be an issue in other cases. [emphasis added]

30 It would thus be prudent for counsel to take their time and explain the exhibits in greater detail when referring to them. When utilised effectively, screen-sharing can help reduce the length of trials and the corollary costs.

31 Other methods of improving the trial process may be discovered in future hearings. For now, counsel should ensure that the document and page references should be clearly and precisely stated during the proceedings so that all parties can navigate to the correct document, and so that the references can be captured on the transcript, for instance: "page 5 of 20 of P-2". It would also be prudent for counsel to confirm that the witness has the right document before proceeding with the cross-examination. If multiple documents need to be referred to simultaneously, all the references should be given first so that parties can retrieve the relevant documents before the cross-examination on those documents commences. Indeed, while all these are practices that counsel often already implement in the course of regular non-virtual trials, their significance comes even further to the fore in online trials.

C. Preparation and attendance of witnesses

32 Witnesses are the final piece of the technical puzzle in ensuring that virtual hearings run smoothly. Mr Chou and

Mr Vijayendran offer helpful insights into the handling of witnesses, which comprises two key stages.

33 First, in the lead up to trial, the following key points may be considered:

(a) **Aide memoire.** Counsel may consider providing a standardised, written *aide memoire* setting out the general court process and responsibilities of a witness. Special attention should also be given to the conduct of virtual hearings and the various processes.

(b) **Oath or affirmation.** Counsel should confirm with their witnesses whether they will be making an affirmation or swearing an oath. If the witness is giving evidence on oath, a Bible should be made available.

(c) **Location.** Counsel should confirm the locations from which their witnesses will be dialling in. The witness should be reminded to seek out an enclosed room to minimise the risk of unauthorised parties being present during the proceedings. If necessary, the witness may be asked to pan the camera across the room for the court and counsel to view its layout.

(d) **Time zones.** Counsel should also confirm the jurisdictions in which witnesses may be located, taking note of the different time zones. Where the time difference is significant, it would be prudent for counsel to work with the court in reconfiguring the order of witnesses or trial times so that each witness is able to give his evidence at a reasonable time from his time zone as far as possible.

(e) **Equipment.** Counsel should also share with witnesses their advice and insights relating to the choice of equipment, as elaborated on above.³⁰ Ideally, every witness should have at least two screens in order to view the documents and the Zoom feed simultaneously. The witness should also have a good quality speaker, microphone and camera.

30 See paras 13–16 above.

(f) Documents. Parties should agree to provide witnesses with the soft copy documents (or the suggested virtual folder or core bundle) ahead of the trial, so that witnesses have sufficient time to download the documents and flag any technical issues beforehand.

(g) Dry run. As with the set-up for counsel,³¹ a dry run should also be conducted with the witness to ensure that his equipment functions properly and that the witness is able to access and navigate the documents with ease. Counsel may also consider ensuring alternative means of contacting witnesses, and a back-up plan in the event of disruptions to video or sound quality.

34 Second, during the virtual hearings, the following points are critical and should be communicated to the witness in advance:

(a) Prior to giving evidence, witnesses should be asked to confirm or undertake: (i) the particular location from which evidence is given; (ii) that there is no one else in the room where evidence is given and, if necessary, the witness should be prepared to pan the camera across the entire room; (iii) that all documents (hard or soft copies) that were filed by the parties for the hearing, and that will be referred to during the hearing, are cleaned and unmarked; and (iv) that there is no other material, notes or external communication devices that could prejudice the fair conduct of the trial or hearing.

(b) Witnesses should adopt a neutral and plain background during the hearings as far as possible. Virtual backgrounds should not be used as this may obscure unauthorised individuals in the room.

(c) The usual warnings should be administered during breaks in the cross-examination, to remind the witnesses not to discuss their evidence with any of the parties.

31 See paras 17–18 above.

(d) Witnesses should not have access to live transcription or the transcripts until they have been released from the stand. This avoids the risk of witnesses picking up on points, such as counsel's submissions or various objections, when they were intended to have been excluded from the hearing.³²

35 At the end of the day, virtual hearings should simulate physical hearings as closely as possible. This naturally extends to ensuring the integrity of witnesses and their evidence. Two further suggestions in this regard have been raised by Mr Vijayendran. First, although this did not arise in the hearings before Lee J, the potential for witnesses to “game” the system still exists. This includes witnesses having notes with them or intentionally disconnecting in order to give themselves more time to answer questions. Counsel should remain vigilant against such potential transgressions and flag them to the court at the earliest instance. Secondly, prior to the hearing, parties may wish to reach a consensus on any parameters or voluntary protocols relating to areas such as witness coaching, communication, referring to notes and witnesses being alone at the relevant locations.

IV. Substantive concerns over online trials

36 Judges and lawyers have long become accustomed, and in some way attached, to the familiar conception of dispute resolution through physical courts.³³ A shift towards online court hearings inevitably raises concerns as to whether the courts will be able to deliver the same quality of justice. In this section, two such areas of concern are addressed: (a) the securing of open justice; and (b) the impact on the quality of justice.

32 This is one technological area that should be explored by service providers, possibly to redact portions from the witness record or to provide a separate record for the witnesses.

33 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at p 207.

A. Open justice

37 A fundamental tenet of the rule of law is that courts and other bodies discharging functions of a judicial nature should conduct their proceedings in public.³⁴ It is traditionally argued that this ensures a fair trial by allowing parties to “know the full case against [them], and the right to test and challenge that case fully”.³⁵ At the same time, it is also essential that justice should not only be done, but should *be seen to be done*.

38 In this vein, Singapore’s courts have always allowed the public to attend all hearings, save for those involving questions of law or of a sensitive nature that are heard in judges’ or registrars’ chambers. The Supreme Court website even helpfully lists items such as directions to the court, instructions on accessing the list of hearings and the etiquette when attending such hearings.³⁶

39 This has not changed with the move to online courts. Although safety measures to reduce the risk of transmission have been implemented,³⁷ the courts still remain open to members of the public who wish to attend open court hearings. This was the case during the online hearings before Lee J: the public gallery of the courtroom remained open for individuals to view the online trial on large monitors (see Annex E for photographs).

40 In this manner, the Singapore courts have seemingly seamlessly dealt with what was identified by Lord Briggs as the “most challenging” aspect in the move towards online courts.³⁸ It is also notable that other aspects such as the publication of information and recording of outcomes have also been implemented on the Supreme Court website, even before the

34 Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 2002) at p 1.

35 *Bank Mellat v Her Majesty’s Treasury* [2013] UKSC 38 at [64].

36 “Visitor Guide” *Supreme Court* <<https://www.supremecourt.gov.sg/services/visitor-services/visitor-guide>> (accessed 22 September 2020).

37 “Message from Chief Justice Sundaresh Menon: The Singapore Judiciary’s response to COVID-19” *Supreme Court*.

38 Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report by Lord Justice Briggs* (December 2015) at para 4.26.

onset of COVID-19.³⁹ These measures that had been already implemented certainly augur well for a further transition to virtual courts.

B. *The quality of justice*

41 In most conversations with practitioners regarding the shift to online courts, an area of concern that was constantly raised was whether such a shift would affect the quality of justice that was obtained. In particular, the concerns revolved around: (a) the art of cross-examination; and (b) maintaining the “majesty” of the courts.

(1) *The art of cross-examination*

42 Cross-examination is lauded as the “greatest legal engine ever invented for the discovery of truth”.⁴⁰ When deployed effectively as a tool at trial, it allows the skilled practitioner to test the credibility of the witness and the veracity of the claim. The concern therefore is whether cross-examination in an online court is in any way deficient.

43 Such possible deficiencies arise in two main aspects. First, it is argued that a virtual environment renders confrontation between parties more difficult.⁴¹ Without such a “frontal encounter”, the “expressive advantage” from cross-examination is thus lost.⁴² This concern was similarly alluded to by Lord Briggs who remarked that online courts would “mark a radical departure ... by being less adversarial, more investigative, and by making the judge his or her own lawyer”.⁴³ Second, it is also argued that the unreliability of video-conferencing software may over- or

39 The Supreme Court website provides information on hearing lists, judgments, sheriff’s sales, unclaimed funds, etc.

40 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown and Co, 1905) at para 1367.

41 Doron Menashe, “A Critical Analysis of the Online Court” (2018) 39(4) U Pa J Int’l L 921 at 946.

42 Doron Menashe, “A Critical Analysis of the Online Court” (2018) 39(4) U Pa J Int’l L 921 at 947.

43 Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report by Lord Justice Briggs* (December 2015) at para 6.15.

under-emphasise details, resulting in an inaccurate assessment of the credibility of witnesses during cross-examination.⁴⁴

44 It is suggested, however, that with the state of technology today, these concerns can be *significantly* mitigated. Parties can benefit greatly from capitalising on the various functions available on the Zoom platform. For instance, users of the platform can toggle between various views, depending on their preferences:

(a) The initial view displayed at the beginning of Zoom sessions includes all parties that are tuned in to the session (see Annex F).

(b) One also has the option to show only participants who have turned on their videos (see Annex G). This can be done by choosing to “hide” non-video participants by right-clicking on the ellipses that appear at the top right-hand corner of a non-video participant’s box.

(c) A further option would be to “spotlight” the video of a specific participant or of the participant speaking at that particular time (see Annex H).

45 These options provide counsel and/or the judge with the ability to get up close and personal, in high definition, to an individual’s face. Indeed, in his evidence before the UK Constitutional Select Committee,⁴⁵ Prof Susskind testified that:

The difference between looking at me as, frankly, *a postage stamp on the screen, as opposed to my filling the entire screen, is manifest*. What is coming through—again, this is a global experience from remote courts worldwide—is that many attorneys from the United States and *lawyers from around the world are reporting that, actually, they find it remarkably effective*. They can *get nearer to the whites of the eyes—actually, not just metaphorically—than in a court room*. [emphasis added]

44 Russell Kostelak, “Videoconference Technology and the Confrontation Clause” (2014) Cornell Law School JD Student Research Papers, Paper 33 at 4; Doron Menashe, “A Critical Analysis of the Online Court” (2018) 39(4) U Pa J Int’l L 921 at 949–950; Anne Bowen Poulin, “Criminal Justice and Videoconferencing Technology: The Remote Defendant” (2004) 78 Tul L Rev 1089 at 1108–1109.

45 House of Lords, Select Committee on the Constitution, “Corrected Oral Evidence: Constitutional Implications of Covid-19” (3 June 2020) at p 10.

46 Similarly, following the virtual hearings before Lee J, Mr Nicholson remarked as follows:

By having the active participants at any one time all on screen, there was little loss from my perspective in the nuances of facial expressions *etc* that are sometimes said to be lost during video trials. In fact, because participants tend to sit close to their cameras, it is perhaps easier to see facial reactions than from across a court room.

47 These technological and mindset adjustments go a long way towards simulating the physical trial experience and maintaining the standards for the forensic examination of evidence. In this light, the problems with virtual cross-examination (as propounded by sceptics or those unfamiliar with the new medium) may be more apparent than real.

48 Additionally, in preparing for cross-examination, and indeed online hearings in general, parties should take great care to ensure that the technical aspects (as discussed above in Part III) are dealt with. It is also helpful for all parties to constantly bear in mind the three main limitations of video conferencing, as identified by Prof Anne Poulin:⁴⁶

(a) First, the camera angle fixes what the courtroom sees, so the choice of shot (panoramic or a close headshot) may result in either too many distractions or a loss of important bodily features.

(b) Second, nonverbal cues, such as facial expressions, gazes, postures and gestures may be distorted by video streams experiencing lag or bad latency, or the framing of the video.

46 Russell Kostelak, "Videoconference Technology and the Confrontation Clause" (2014) Cornell Law School JD Student Research Papers, Paper 33 at 4, citing Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant* (2004) 78 Tul L Rev 1089 at 1108–1109; Similar concerns were also raised in Dr Natalie Byrom, Sarah Beardon & Dr Abby Kendrick, *The Impact of COVID-19 Measures on the Civil Justice System: Report and Recommendations* (May 2020) at para 5.78 that it was "less easy to gauge reactions and respond appropriately".

(c) Third, video-conferencing technology may not replicate eye contact of court participants, affecting our perceptions of truthfulness.

49 It is acknowledged that risks still exist – for instance, of counsel being unable to identify body signals of witnesses.⁴⁷ In the short term, it may therefore be wise to confine the use of video technology to civil trials,⁴⁸ and even then to those trials that rely largely on documentation. In the long term, however, it is likely that video technology can be employed consistently across the full spectrum of legal hearings. This will be made possible as lawyers and judges adapt to read the signals available with the possible help of technology or “specialist coaches”,⁴⁹ and as research is conducted into the effectiveness of such technology.

(2) *The “majesty” of the courts*

50 The second concern as to quality of justice is that in the move to a virtual courtroom, the atmosphere and solemnity of the proceedings are diminished as traditions are abandoned and court users operate in the comfort of their own homes or offices. As a result, it is thought that court attendees may treat proceedings with less respect, even to the extent of lying on the stand.

51 This leads back to the phrase “majesty of the courts”, taken from Lord Briggs’ interim report where he stressed the need to incorporate the “majesty of the court” during a transition

47 House of Lords, Select Committee on the Constitution, “Corrected Oral Evidence: Constitutional Implications of Covid-19” (3 June 2020) at pp 10–11 (response to Q22).

48 This point was presciently noted by Sui Yi Siong, a prominent member of the criminal bar as follows: “Since oral evidence-in-chief remains the norm and any discovery provided by the Prosecution is far less than what would be provided in a civil trial, key evidence usually emerges only at trial. This means that defence counsel often need to confer closely with their clients in the course of evidence-in-chief as well as before and during cross-examination. Again, it would be difficult to do so over a video-link, and inability to take full instructions can be said to be prejudicial to the Defence.”

49 This is a possible measure suggested by Danny Ong to “help lawyers interpret witnesses’ body language”: see Jane Croft, “Pandemic Speeds Up Lawyers’ Adoption of Technology” *Financial Times* (17 June 2020).

to virtual courts.⁵⁰ This point was again taken up by both Prof Susskind⁵¹ and Andrew Langdon QC, with the latter stating:⁵²

Most of us –lawyers or not –instinctively understand the solemnity or as it is sometimes put, the ‘majesty’ of the law. The historic prominence of a court building in the municipal setting demonstrates that our ancestors understood it also. Whereas no-one wants court users to be overborne or intimidated, neither will it be helpful if respect for those who administer the law is diminished by the very fact that those who come before the court are only in the virtual presence, rather than the actual presence of judicial authority.

52 It is to be noted that Prof Susskind and Langdon QC were arguing, respectively, in favour of and against the transition to virtual courts. That included debates of whether the authoritativeness and respect that the *system itself* generated was sufficient, such that the majesty of the physical courtroom was irrelevant.⁵³ With the COVID-19 pandemic, however, the question is no longer whether such concerns are valid enough to *discourage the use* of virtual courts. Instead, the focus today is how such concerns may be alleviated *during the use* of virtual courts.

53 It is true that certain practices have been done away with in the move to virtual courts: a buzzer no longer sounds when the judge “enters” the courtroom; attendees no longer rise to their feet or bow; submissions are made with all parties seated; counsel no longer move to see the judge in chambers but instead wait for other participants to be placed in the “waiting room”, just to name a few. All of these, together with the obvious impact of not actually being in the physical courts, may contribute to a sense of informality during the proceedings. This was picked up by Jenny Teo, another expert involved in the hearings before Lee J. In her feedback, she noted that the Zoom trial was “no different

50 Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report* by Lord Justice Briggs (December 2015) at para 1.8.

51 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at pp 208–210.

52 Andrew Langdon QC, inaugural address to The General Council of the Bar (14 December 2016) at p 10.

53 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at p 209.

from being ‘live’” in court, save that it was “less intimidating ... given the perceived ‘distance’ between parties”.

54 It is clear that it falls upon lawyers, court personnel and judges to be the first line of defence in maintaining the majesty of the courts. Decorum and procedures that are normally observed in court should be adhered to as far as practicable. The smaller details matter as well. For instance, Lee J had conducted the Zoom hearings with a virtual background showing the Singapore crest, simulating the background in the physical courtrooms. Similarly, counsel had adopted clean backgrounds in their offices, which maintained the professionalism of the hearings (see Annex I).

55 It may also be said that, at the end of the day, it is incumbent on the members of the legal profession to continue upholding the high standards that have been set and upheld for decades and centuries past. The apparent “comfort” of not having the judge just a few metres away ought not to lull any into lackadaisical behaviour, still less disrespectful or irreverent conduct. If counsel exhibit unacceptable behaviour in an online setting, there should be little doubt that disciplinary action can and will be taken by the relevant authorities.

56 In the longer term, it may be worth exploring solutions geared towards the design of the platform and the settings in which parties attend Zoom hearings. As Prof Susskind proposes, design-thinking should be employed to “infuse the values and principles of the justice system” into virtual courts and at the same time, differentiate the courts from private systems of online dispute resolution.⁵⁴ The task of seeking such solutions should, of course, not rest solely upon the public system: the development of robust and value-adding operating procedures will require constant feedback and a concerted effort from all stakeholders in the Singapore legal system.

54 Richard Susskind, *Online Courts and The Future of Justice* (Oxford University Press, 2019) at p 209.

V. Conclusion

57 Overall, it is common ground between all parties involved in the trial, including Lee J himself, that the virtual courtroom experience was a positive one. It is likely that the quality of such Zoom trials will only continue to improve as the court, counsel and service providers continue to adjust and innovate in the process.

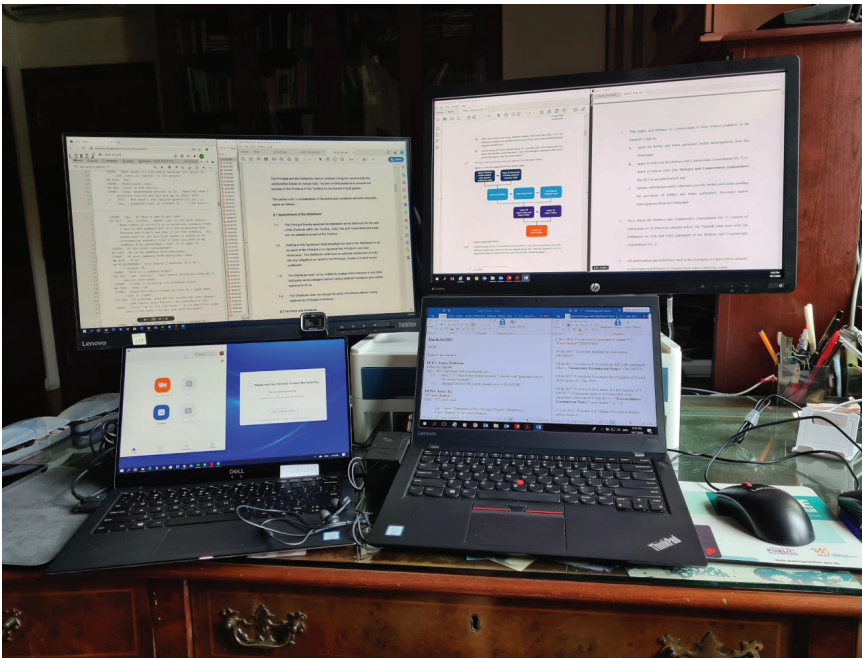
58 For now, it is heartening to witness the speed at which the Singapore legal community has been able to adapt in the face of the COVID-19 pandemic; and it is anticipated that the use of such online platforms will continue, albeit on a reduced scale, even beyond the sunset clauses contained within the COVID-19 Act.

Annex A



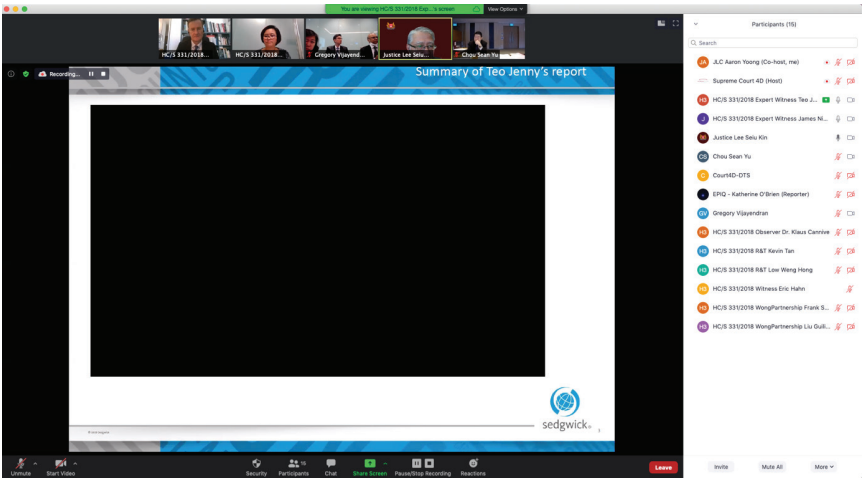
An example of the set-up utilised by Mr Chou Sean-Yu's team during the trial

Annex B



Justice Lee Siu Kin’s set-up at home, with multiple screens to aid in document management

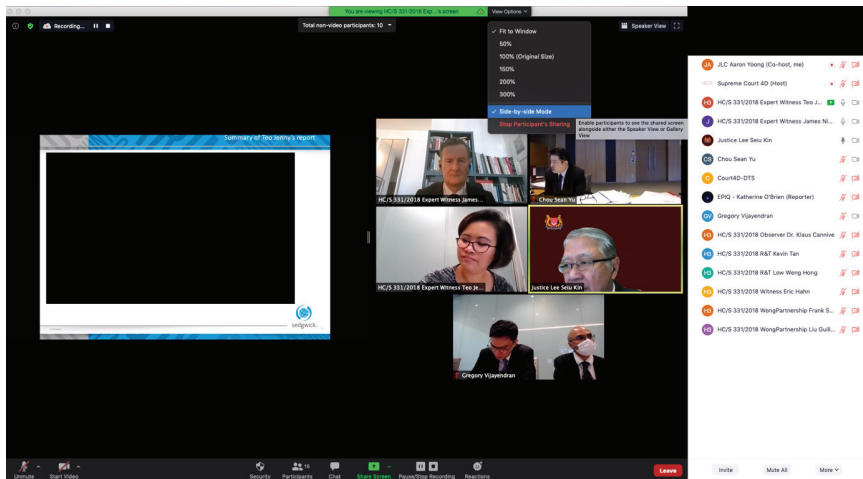
Annex C



An example of what the screen-sharing function looks like

Zooming into a New Age of Court Proceedings

Annex D



An example of how to utilise a “side-by-side” option together with a share screen function

Annex E

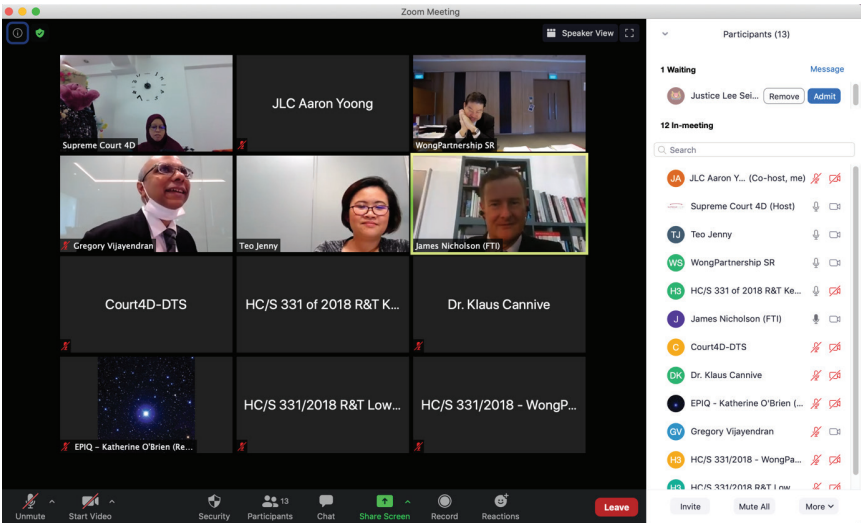




The courts remain open for the public to view the proceedings

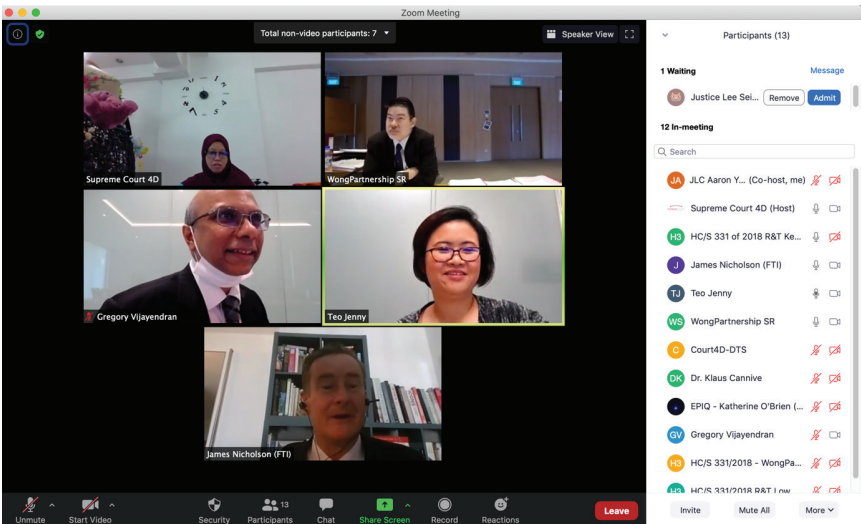
Zooming into a New Age of Court Proceedings

Annex F



A typical view at the beginning of Zoom sessions

Annex G



Viewing only participants who have turned on their video displays

Annex H



View option to spotlight the particular speaker

Annex I



Example of professional backgrounds and virtual background
(Justice Lee Seiu Kin's)