

JUSTICE IN THE TIMES OF COVID-19

Webinar hosted by the Judicial Integrity Network in ASEAN

28 May 2020

A very good morning to all of you.

First of all, I wish to thank the organizer for kindly inviting me to participate in this important seminar. I welcome the opportunity to share in brief with you the challenges faced and lessons learned by the Malaysian Courts in the times of Covid-19.

Following the Malaysian government declaration of the Movement Control Order, which is our version of a “lockdown”, and given the rapidly evolving situation, all Malaysian courts were closed starting from 18.3.2020. This has resulted in significant changes in the operation and administration of the justice system in Malaysia.

There was of course concern that the lockdown would impede justice, especially in criminal cases in the context of an accused person’s right to a speedy trial, some of whom were remanded in prison pending trial.

We decided that it is unrealistic and impossible for the Courts to operate in the usual way during the pandemic. Doing so will run

the risk of jeopardizing not only the health and safety of judges and lawyers, but also that of litigants, court staff including officers, clerks and other support staff. Hence our immediate step was to postpone all trials and hearings.

Nevertheless, the Malaysian Judiciary recognizes that the administration of justice cannot come to a grinding halt and that it needs to maintain continuous access to justice. To this end, a limited number of Courts continue to operate albeit with a more limited scope.

In maintaining law and order during the lockdown, the magistrate criminal Courts still hear remand applications and fresh charges. The High Courts criminal division also operated to hear urgent criminal revisions and appeals.

In respect of civil and commercial cases, fortunately for us, the two systems – E-Filing and e-Review – have been up and running by this time, so our operations did not grind to a complete halt. The E-Filing mechanism which has been in operation for nearly a decade and which enables the online filing of documents and cause papers continues to operate as usual for both civil and criminal cases.

Documents filed through the system are processed as usual during the lockdown.

To ensure hearings, where possible, can still proceed in the middle of this pandemic, like other jurisdictions, we were looking at solutions out of necessity. We subsequently expanded the use of the existing systems to conduct remote hearings for hearing civil matters. Like other jurisdictions we are looking at solutions out of necessity. Three routes were available to parties who apply:

- i. Exchange of emails;
- ii. E-Review system; or
- iii. Video conferencing.

As a start, remote hearings were confined to applications filed together with a certificate of urgency. Later it was extended to uncontested applications, brief interlocutory applications and hearing of interlocutory appeals.

These remote hearings were made subject to the parties' agreement and the court's discretion, as we do not have specific legislations to conduct remote hearings.

In terms of ICT infrastructure, the Malaysian Judiciary is ready to conduct remote hearings. The shift towards using technology in

court processes has been gradual, incorporating new innovations incrementally according to the times. The pandemic did not start this change; but created an urgent and immediate necessity for a more radical change to ensure hearing can still proceed during these unusual times. In the current challenges that we are facing it motivates us to move even faster in adapting technology to deal with the fallout of the pandemic.

For example, on 23.3.2020, for the first time, a Court of Appeal hearing of a civil appeal was conducted via video conferencing. We are turning Covid-19 crisis into opportunities. This pandemic has certainly changed the mindset of our judges. A few months ago, before Covid-19, it would have been out of the question replacing face-to-face appeal with video conferencing.

The legal practitioners appear some way from our readiness for remote hearings. Many times we are unable to persuade lawyers to have their matter heard via remote hearings. They need some time, I think, to adjust to this new normal.

Let me now say a few words about our experience and approach to reopening our courts. As the government begins to

gradually ease the lockdown, we have created a methodology by which our courts reopen gradually in three phases.

We are balancing open justice with public health concerns. It is a very delicate balancing act. Our priority was to get the judges, our staff and court users back to court safely. We have to balance between the need to resume open court justice and the safety and wellbeing of our judges and other users of the Court. At this moment we are not rushing back to trials in open courts. It will be a slow and cautious reopening.

With this in mind, we have drafted protocols to conditional opening of courts for restoring operation. This protocol is drafted with a view to achieving an acceptable level of physical distancing and to minimize too many individuals in the Court Complex and in individual courtrooms

The 1st phase of our reopening is with effect from 4 May 2020 a number of court services began to resume operations. Among these services are set to resume Registry of the Courts, One-stop Counter, and Commissioner for Oaths Counter, Power of Attorney Counter, and e-Filing Service Bureau Counter. Our immediate aim is to maintain a service to the public.

The 2nd phase is from 13 May 2020 until 31 July 2020. For this phase, we set a timetable for a phased reopening of the courts across the country in several stages. Our decision to reopen the courts did not mean we would operate at full capacity immediately. Initially only a limited number of courts were allowed to operate on a rotational basis. Judges were required to start their open court hearing at staggered times instead of everyone congregating at a particular time. For judges who were not sitting, they and their supporting staff were required to work from home and continue to conduct remote hearings, where possible.

The 3rd phase is less certain. But depending on how the Covid-19 situation then develops, in the 3rd phase, we hope that all the courts will be allowed to reopen with effect from 1 August 2020 subject to strict health management practices, a condition expected to remain for a long period of time until an effective vaccine is found.

The Courts we left before the lockdown were somewhat different when we returned on 13 May 2020. The reopening of the courts on that day saw a returning to a new normal. In a reminder that getting back to normality could not be easy, court users had to line up via a single entry point before entering the court building. They were required to fill up a form with their personal details,

reasons for entering the building and which courtroom they were heading to, before they were allowed in. For criminal cases, only one family member would be allowed to enter. Everyone had their hands sprayed with hand sanitizer and their body temperature checked at the entrance. With the social distancing rule being observed in the courtrooms, sitting arrangements had been reconfigured, lawyers were not seated right next to each other, instead there was one seat space between them. In the courtrooms, everyone was encouraged to wear protective facemasks. These are a few of the new normal that all have to grapple with.

On the bright side, the reopening of the courts amid heightened precautionary measures has been smooth so far. Early indications indicate that the court users are showing high compliance with the strict health standard operating protocols.

In closing I want to highlight some of the valuable lessons that we have learned from this Covid-19 crisis.

The first lesson we have learnt is that we must be better prepared for future disruptions. The sudden and an unpredictable nature of the Covid-19 crisis call for a rethink of how we deliver justice in such a situation. The pandemic could be long lasting. In this

respect, it is important for everyone to take heed the warning of the World Health Organization that the coronavirus may never go away and we have to learn to live with it just as we have the HIV. The virus may become just another endemic in our communities and this may never go away.

Secondly, the disruption from the Covid-19 outbreak has forced us to change the way we conduct our hearings and trial. In this new environment, digital transformation has never been more important now to prepare our courts for future crisis. Remote hearings are here to stay. Generally there is now recognition that court litigations can be resolved fairly by remote hearings. This may be the new norm brought on by the Covid-19 pandemic. While we acknowledge remote hearings are not suitable in all cases, for the foreseeable future I think the court will demand greater use of remote hearing.

Thirdly, the judiciary must continue to invest in new technology and equipment as we turn to technological advancement to conduct hearings remotely and ensure the wheels of justice continue to turn during a crisis such as the Covid-19 pandemic.

Fourthly, legal practitioners must sharpen their information technology skill and knowledge to conduct remote hearings and trials. They must equip their law firms to cover cloud computing, online research facilities or remote access to files and documents from home. During the lockdown many lawyers from the small sized firms were not ready with remote hearings as they did not possess the requisite infrastructure. It is necessary lawyers quickly adjust to this new normal and remain steadfast in adopting the available technologies.

And finally, the rollout of remote hearing could profoundly alter how we deliver justice. The spread of covid-19 – “viral” both in the literal and metaphorical sense necessitates an immediate sea change in the way court function. The change faced by the judiciary is not merely an ongoing technical one of digitizing the court processes. It involves a more fundamental change in the concept or perception of what is a court. As Professor Richard Susskind (*Online Courts and the Future of Justice* (Oxford: OUP, 2020)) asks: is the court a place or a service?

Thank you.