

Client Alert

15 May 2020

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Malaysia's First Full Virtual Trial

Introduction

Wong & Partners completed the first full virtual court trial in Malaysia today, marking a milestone in Malaysia.

The first full virtual court trial concerned a tax case before the Special Commissioner of Income Tax, wherein the taxpayer was represented by Dato' Arief Emran Arifin, Jason Liang, Kellie Allison Yap, and Jeff Sum of our Tax Disputes and Controversies team. During this virtual trial, the standard court rules continued to apply, and no additional procedural requirements were imposed. The trial lasted for two full days and involved four witnesses who gave evidence virtually via a video conferencing platform. It was ultimately very successful, and all parties concerned (including the Inland Revenue Board of Malaysia) significantly contributed to this important first step towards "virtualizing" court trials.

Although the virtual trial was supposed to replicate a "normal" trial proceeding, we quickly learnt that the virtual trial experience was not quite 'business as usual' and that some acclimatization was necessary. We are pleased to highlight and share some of the useful vital lessons we acquired from this experience.

Technological Tools

Notwithstanding the technological advancement in recent years to enable seamless video conferences, there are still potential glitches that may arise. For example, we encountered some minor latency issues (or "lag") during the trial attributable to bandwidth issues that, fortunately, did not disrupt the hearing. Unstable internet connection by any one party - whether the court, any of the counsels, or the witnesses - would have caused massive disruption to the trial proceedings. Therefore, investing in an internet connection of a higher bandwidth would be beneficial to all parties during the trial.

We also found that some stability issues may be attributable to the nature of wireless internet connections. A wired connection to our streaming computers resulted in a far smoother experience as it provides a more stable internet connection.

A good quality microphone, video camera, and sound system are also vital when conducting a virtual court trial. For example, we had noticed an apparent difference in the quality of sound between parties who had spoken into a high-quality external microphone placed closer to them and parties who had used the built-in microphone on their laptops. Counsels and witnesses who could be seen and heard more clearly were naturally more persuasive, as they made easy viewing and listening.





Hearing Platform

Before the trial, the lawyers should coordinate with the opponent, the court secretary, and the judge to determine the appropriate video conferencing platform. Given the availability of various video conferencing platforms such as Zoom, Skype, Microsoft Teams, and Blue Jeans, parties must agree on the same hearing platform beforehand. It is easy to assume that everyone would have access to all platforms when, in reality, some platforms are not allowed by specific organizations due to reasons of security, or even policy preference. Parties should avoid any last-minute scramble in looking for alternative platforms suitable and/or agreeable to everyone.

Some platforms may be more user-friendly or advantageous than others in terms of providing a more stable connection (less screen freeze). Therefore, it is worth investigating various video conferencing services to determine the most suitable platform before the trial hearing. It is useful for parties to conduct at least one round of trial run with the other parties three to four days before the actual day, to ensure smooth operations on the agreed-upon platform.

Another consideration for the lawyers conducting a virtual court trial is to determine beforehand an appropriate internal mode of communication - for example communications between senior and junior counsels. This could subtly be done in the standard court setting, as counsels would be near one another. However, during a virtual trial, you will not be able to do so with the same level of freedom given the presence of judges and witnesses on the same platform. Therefore, you and your team should adopt an alternative mode of communication to discuss strategy, line of questioning, and any other sensitive communication away from the virtual conferencing platform. Our team developed an efficient communication system to enable us to prompt and communicate critical points as cross-examination was ongoing, and would recommend that lawyers develop their respective systems suitable to their needs.

New Features

Despite the new challenges posed by virtual court hearings mentioned above, the new mode of virtual hearing has advantages. One of the common features available on video conferencing platforms is the ability to share screens with the participants. You will be able to project a specific page or document into a virtual space through the screen sharing function and highlight the relevant paragraph or wording using your cursor on the screen. This would allow the judge or tribunal to keep up with your line of questioning / arguments more quickly and save them from having to flip through the physical bundle of documents during the trial. Therefore, you should endeavour to digitally scan Bundle of Documents and familiarise yourself with these features on the video conferencing platforms to take full advantage of the technological tools made available to you.



Online Etiquette

The virtual court trial is likely to be a new experience for many lawyers who are used to seeing the judges with some distance in court, rather than close up on a virtual screen. Therefore, there are some new online etiquettes to be mindful of during the virtual court hearing.

Parties should naturally be dressed appropriately (court attire), and the surroundings should be tidy and non-distracting. For all participants, especially the witnesses, it is important to look directly at the screen or camera when speaking. This may appear to be a minor point, but we found that witnesses who can project their statements directly into the camera to be more credible. The video camera should provide a clear and full view of your upper body, rather than pointing overly upwards or downwards. Given the proximity of the camera, all participants should be mindful of their facial expressions and actions.

On a similar note, you should also be mindful of the noises that are likely to be made during the trial proceedings. These may range from flipping sounds when perusing the bundle of documents, background noise from a fan, or even sounds from outside your room (in a WFH environment). Counsels may be accustomed to certain noises in the usual court setting, but these same noises are easily picked up and amplified through your microphone. You should mute your microphones when not speaking and also be mindful of any background noises when you do.

As an extension to the pointer on "latency" earlier, it is easy to inadvertently speak over one another, which may result in chaotic moments during the trial / hearing. Do give sufficient space to witnesses and your fellow counsels to finish their sentences before you start talking.

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Recordings

The trial proceedings are likely to be recorded for transcriptions purposes and, therefore, would be available to the parties upon request. For lawyers in charge of the recordings, you should ensure sufficient hard disk space on your laptop or computer to accommodate these large files of video recordings. It is also advisable to break up the recordings into multiple files, rather than a single large file, to facilitate the sharing process later.

Conclusion

As the Malaysian courts progress with the completion of the first virtual court trial today, more virtual trials will likely be conducted soon. Participants of the process will learn more in days to come, and it is crucial to be aware that in addition to some old norms, newer norms would be introduced under the new platform that the world has chosen to adopt. We hope that these lessons will be helpful and relevant to counsels and the general public alike who may be appearing in online trials to come.

