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**April 2020**

## **Remote Hearings in Hong Kong's High Court During COVID-19**

### **The Use of Technology in Court Proceedings**

Gall recently acted for the Plaintiff in Hong Kong's first telephonic hearing in *Cyberworks Audio Video Technology Limited v Mei Ah (HK) Company Limited & Ors* which was a milestone in the Judiciary's approach towards furthering the objectives of cost-effectiveness of practice and procedure, and expeditious dispute resolution. In this matter, Gall's senior partner Nick Gall and senior associate Felda Yeung acted for the plaintiff. Please refer to our article on this unprecedented approach to case management during GAP here.

In early April, the Judiciary came out with a Guidance Note on Remote Hearings for Civil Business in the High Court – Phase 1 (VCF) ("Guidelines") which proactively seeks to deal with challenges brought about by the General Adjournment Period ("GAP") of court proceedings caused by the COVID-19 situation.

While facilitating the use of technology in the administration of justice, the Guidelines recognise that there are some matters where "oral submissions are still necessary". The Courts in Hong Kong are known to use technology and videoconferencing for taking of evidence of witnesses when it is found just and in the interests of the parties. The Courts have the duty to further the underlying objectives by active case management and this includes encouraging the use of technology in the appropriate circumstances.

The Guidelines are a welcome step in the direction of active case management by the Courts and are in line with international judicial practices. In the United Kingdom, video-conferencing and audio proceedings can be directed by Courts and directions for recording may also be given. In Australia, the Court may direct testimony to be given or appearances and submissions to be made by video-conferencing. In Singapore, video conferencing and telephone conferencing with the help of Zoom technology is being encouraged in view of the COVID-19 situation.

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## The Guidelines: Key Considerations

The Guidelines explore the possibility of using alternative modes of hearing to maintain the continuity of judicial proceedings in civil cases in the High Court during the GAP. Some of the key considerations of the Guidelines include:

- a) a flexible application of the Guidelines on a “technology neutral basis”;
- b) video-conferencing facilities (“VCF”) are recommended in Phase 1 where oral hearings are necessary during the GAP;
- c) for the time being, the Court will decide which cases are suitable for disposal by remote hearings and application for the use of VCF will not be entertained;
- d) trials are not considered suitable for remote hearings. At present it is applicable to interlocutory applications or appeals in the Court of First Instance as well as final hearings dealt with on written evidence. In the Court of Appeal, all civil appeals and interlocutory applications including applications for leave to appeal are to be considered for remote hearing.

## Challenges in the Use of Technology for Remote Hearings

### *Privacy*

The Guidelines stipulate that “such hearings will require the use of equipment at the remote locations which is compatible with the Court’s VCF and meets the operational requirements of Court hearings”. The Guidelines also mention that normally, the proceedings will be recorded using DARTS and that no other person can record the hearing in any form. Apart from the technical specifications, that the equipment at the remote location are to comply with, no other guidelines have been provided yet.

Zoom is a videoconferencing platform which is widely being used across the world. While technical specifications may be taken care of, privacy issues remain as there has been concerns have been raised that Zoom is not securely encrypted.

### *Open justice*

The impact on the open justice principle has been addressed in the Guidelines as the Court needs to strike a balance when competing fundamental rights are engaged. A continued public dissemination of reasoned decisions is a solution suggested in the Guidelines.

## Practical Considerations

The arrangements for an effective remote hearing remain the responsibility of the persons participating (as directed by the Court). Generally, the solicitors would play an important role in facilitating a smooth hearing. The following practical considerations may be useful:

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- a) Use of technology and privacy: The equipment to be used must be tested in advance. The parties should be adequately trained for using technology. Only password protected and end-to-end encrypted online platforms should be used. In the event that Zoom is used the following points may be useful:
- i) the identity of the attendees should be verified at the beginning and access should be given to authenticated users only;
  - ii) the Zoom meeting link should not be posted publicly;
  - iii) the 'waiting room' setting should be enabled such that the host
  - iv) retains control of admitting participants;
  - v) the "Enable to join before host" option should be de-selected; screen sharing should be restricted;
  - vi) any unauthorised recording should be strictly prohibited.
- b) Use of e-bundles and focused submissions: The Guidelines encourage electronic lodging of documents and this would be facilitated by e-bundles. In fact, the parties in the telephonic ruling in the Cyberworks matter used digitised trial bundles. The submissions and evidence should be precise as VCF is considered more suitable for shorter hearings and it is important to ensure that the Court and the parties can easily access the correct documents during the remote hearing.
- c) Location: Given that working from home is prevalent, it is crucial that the remote location is disturbance free and there is stable internet connection which should be tested in advance.
- d) Flexible approach: The Guidelines have factored in technical difficulties that participants may face in setting up and conducting proceedings. Accordingly, the date and time of the hearings are subject to change. Therefore, a co-operative attitude and necessary preparation is encouraged.

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To conclude, the Judiciary has risen to the challenges presented by the GAP and promoted the use of technology in a phased manner to keep the wheels of justice moving. The success will largely depend on the co-operation of parties to ensure the effectiveness of practice and procedure without compromising the safeguards of conventional Court proceedings.