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RESEARCH ARTICLE

Asian Courts in Times of COVID: Virtualization and the New Normal

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Abstract

The unprecedented COVID-19 pandemic has caused restrictive measures to be established in many sectors including the legal and judicial sector; an example is the use of electronic litigation systems and video-conferencing facilities for trials. With the implementation of changes in the legal and judicial sector to adapt to restrictions arising from the pandemic, there is the question of whether the current rules governing civil-court proceedings are designed to accommodate these changes. This article seeks to explore the measures taken by courts in response to the pandemic with a focus on Asia, notably Singapore. The article will outline the legal basis for the use of live video links for the purpose of witness evidence-taking under Singapore law and the possible implications will be reviewed taking Singapore's civil proceedings as an example in comparison with other jurisdictions.

Keywords: COVID-19; Singapore; virtual; trial; video link

1. Introduction

Since the outbreak of the Novel Coronavirus 2019 ("COVID-19") at the end of December 2019, the situation has escalated to an unprecedented pandemic within a short span of time. It has required many countries to adopt drastic measures, including the closing of borders, travel restrictions within the community, and social-distancing measures, in order to prevent the transmission of the virus.

Many sectors of society have been heavily affected by these restrictive measures, and the legal and judicial sector was no exception. Courts have transformed to comply with such restrictive measures while striving to continue with business as usual, to the extent possible. A typical example would be the increasing use of an electronic litigation system and video-conferencing facilities for trials. Practitioners are expected to adapt quickly to this changed environment and the demand for close co-operation between the court and counsel is greater than ever. Owing to all stakeholders' collective efforts to continue business without major disruption, a number of changes have been implemented within a very short span of time, amounting to what many would view as a significant shift in the legal and judicial sector.[1]

Amidst this shift, most of which changes had been initially adopted as "*temporary*" measures, a question arises as to whether the current legal systems—especially the rules governing civil-court proceedings—are designed in a way that could accommodate these changes without friction. This article briefly explores the measures taken by courts in response to COVID-19 with a focus on Asia, especially Singapore. It will outline the legal basis for the use of live video links for the purpose of witness evidence-taking under

[1] Salyzyn (2020).

Singapore law. Possible implications following from this change will then be reviewed, taking Singapore's civil proceedings as an example in comparison with other jurisdictions.

2. Measures taken by courts in Asia in response to COVID-19

Courts in various jurisdictions have adopted nationwide measures to reduce the transmission of the virus from the very early stage of the COVID-19 outbreak.

On 29 January 2020, cases in the national courts of Hong Kong began to be suspended in what has been referred to as the General Adjourned Period, during which time all court and tribunal hearings would be postponed unless they were urgent or deemed "*essential business*." In a statement released by the Chief Justice of the Court of Final Appeal, the judiciary provided some insight into the steps being taken by the courts to increase court services without compromising health and safety. Aside from simple steps of proactive case management, the courts had actively considered expanding the scope of hearings (beyond just urgent or essential matters) by hearing submissions by telephone, video-conferencing, or similar means of visual aid and generally making use of technology.[2]

In February 2020, the Supreme People's Court of China ordered courts at all levels to guide litigants to file cases or mediate disputes online, encouraging judges to make full use of online systems for litigation, including those for filing cases and delivering rulings, to ensure that litigants and their lawyers get better legal services and protection. The Supreme People's Court has promoted the use of a "*mobile micro court*" on the social media platform WeChat in a number of provinces and cities to help courts conduct trials via the Internet.[3]

On 24 February 2020, the Supreme Court of Korea advised all national courts to consider administering cases in accordance with the court vacation period. Although the implementation was at the discretion of each presiding court or judge, most of the courts and judges adjourned, postponed, or rescheduled the pending trials pursuant to the recommendation, except for cases requiring urgency such as hearings for interlocutory applications, stay applications, or reviews of the legality of arrest and initial detention.

On 10 March 2020, the Supreme People's Court of Vietnam issued Directive No. 02/2020/CT-CA and instructed the (1) temporary suspension of the direct receipt of petitions and other documents at the court; (2) temporary suspension of the direct service of court's summons, notices, and other documents; and (3) refrainment from opening court meetings and hearings.[4]

In Singapore, since 3 February 2020, due to COVID-19, all practitioners, court users, and visitors have been required to complete a travel and health declaration form before they are permitted to enter the court building. The judges, judicial officers, and staff of the Supreme Court, family justice courts, and state courts were physically segregated into two teams. As part of this segregation measure, judges from different teams have been hearing Court of Appeal matters from different courtrooms, with some judges joining by way of video-conferencing. To ensure safe distancing, the number of representatives (including counsel) per party allowed into courtrooms and chambers for hearings were also controlled.[5]

As the situation escalated, the Supreme Court announced Registrar's Circular No. 3 on 27 March 2020 and instructed that, with effect from 1 April 2020 until further notice, (1) selected hearings in the Supreme Court will be conducted by video-conferencing or, where appropriate, telephone-conferencing; and (2) where the court determines that physical attendance before the court is appropriate, no more than two lawyers/litigants per party

[2] Hong Kong Judiciary (2020a); Hong Kong Judiciary (2020b).
[3] Supreme People's Court of the People's Republic of China (2020).
[4] Supreme People's Court of Vietnam (2020).
[5] Supreme Court of Singapore (2020a).

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may appear at the hearing.[6] To provide more clarity, the Supreme Court has even given directions on the appropriate attire when conducting a trial through live video link.[7]

Ancillary measures have been simultaneously adopted in the adjacent parts of the legal sector. For example, notary publics have started notarizing documents via video conference and the Singapore Academy of Law has adopted measures to authenticate such notarizations done via video conference. Commissioning of affidavits has also been done by way of video-conferencing, by affirming or taking oath in the virtual presence of the Commissioner of oath. This was unprecedented. As Singapore practitioners have already been using the e-litigation system in the ordinary course of business for the past few years, the filing and service (within Singapore) of documents has been done relatively smoothly, whereas extra attention is now sought in terms of scheduling logistics (e.g. preparing and dispatching a hard-copy bundle of documents for the witnesses prior to the trial).

3. Virtual trial and taking of evidence via video link

3.1 Issues

As a result of the restrictive measures taken by the courts around the globe, the conventional mode of witness examination (i.e. witness testimony in a physical courtroom) was rendered unavailable or highly impractical. Courts in many jurisdictions have thus turned to conducting trials using remote communication technology such as live video or live television links (i.e. virtual trials or hearings).

While this sudden conversion has challenged practitioners to find practical solutions in many aspects,[8] it poses, amongst others, two important legal questions. The first question is how to reconcile such a changed form of trial or evidence-taking with the traditional concept of the "open-court principle" or "principle of open justice." Considering that public trial (which permits closure only in narrow circumstances) has long been the default mode of trial in many jurisdictions,[9] the taking of witness evidence in a physical or virtual

[6] Supreme Court of Singapore (2020b).

[7] Supreme Court of Singapore (2020c):

"The Honourable the Chief Justice has directed that for open Court proceedings conducted through a live video or live television link:

(a) if the proceedings are conducted solely through the live video or live television link and do not take place in any Courtroom:

(i) a Judge need not wear a robe when hearing the proceedings; and
(ii) an advocate and solicitor need not wear a gown when appearing in the proceedings; but

(b) if one or more Judges hear the proceedings in a Courtroom, unless the Court directs otherwise, every Judge or advocate and solicitor in the proceedings will wear the usual attire for open Court proceedings."

[8] Evidently, conducting trials using remote communication technology is not without logistical difficulties. Reliable IT infrastructure (e.g. secure Internet access) is a prerequisite and a well-established e-litigation system is a huge benefit. Seamless co-ordination between the court, counsels, and witnesses is paramount to the successful virtual trial. A UK law firm that acted in one of the high court's first virtual trials summarized the challenges it faced during the preparation for the virtual trial as follows:

"The key issues to be addressed were:

1. Identifying the video conferencing platform to be used and how the use of that platform would be managed;
2. Ensuring that all trial participants had access to the necessary hardware and software and that this was set up and functioning properly;
3. Dealing with various other issues occasioned by this being a virtual trial, such as ensuring the participants' access to documents, evidence being given via an interpreter and the respective legal teams being able to liaise confidentially with each other and;
4. Meeting the requirement of public access to the hearing." (https://www.stewartslaw.com/news/the-challenges-faced-by-stewarts-acting-in-one-of-the-high-courts-first-virtual-trials/)

[9] Lederer (1999), p. 840.

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place where public access is not available could potentially undermine the open-court principle. The second question is whether the new mode of trial and evidence-taking has the potential to infringe other states' sovereignty. While the act of evidence-taking is often considered as an exercise of a state's judicial sovereignty, if one country's court or counsel were to take evidence within another country's territory through video-conferencing, then the country in which the evidence is located may find it an infringement of its sovereign power.

3.2 *Legal basis*

Even before the onset of COVID-19, Singapore had an existing practice in place that enabled lawyers to make applications by video link. Singapore courts have held that, if a material witness cannot attend a hearing because he is in another jurisdiction, reasonable efforts should be made to arrange for him to testify by video link if such a facility is available in the foreign jurisdiction. In *Asia Hotel Investments Ltd v. Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50 ("*Asia Hotel*"), the high court of Singapore noted that "[g]iven the present state and prevalence of video conference technology and the state-of-the-art facilities in the Supreme Court, the practice of foreign witnesses providing testimony by way of video-link has become fairly commonplace in the Singapore High Court."[10] In *Asia Hotel*, the high court further warned that if a proposed witness fails to make himself available for cross-examination, then his affidavit of the evidence-in-chief would be disregarded pursuant to Order 38, rule 2(1):[11]

> The Singapore International Commercial Court ("SICC") has embraced virtual hearings before COVID 19 as well. Since 2019, there have been 25 cases in which at least one case management conference or hearing in the SICC was conducted at least partially through video conference. 3 cases or originating summons hearings have been conducted at least in part via video conference.[12]
>
> There are strict provisions under Singapore's legislation including Sections 61 and 62 of the Evidence Act (Cap 97, 1997 Ed) which require witnesses to attend open court in person to give evidence.[13]
>
> Section 62A of the Evidence Act however allows the Singapore court a discretion to permit witnesses to give evidence through live video or live television links.[14] s 62A

[10] *Asia Hotel Investments Ltd v. Starwood Asia Pacific Management Pte Ltd* [2007] S.G.H.C. 50, at [73].

[11] *Ibid.*, at [74].

[12] SICC News (June 2020).

[13] The majority of the Evidence Act does not apply to arbitration proceedings by virtue of s. 2 of the Act (save for certain provisions on bankers' books).

[14] See s. 62A of the Evidence Act:

"Evidence through live video or live television links

62A.—(1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if—

(a) the witness is below the age of 18 years;
(b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
(c) the witness is outside Singapore; or
(d) the court is satisfied that it is expedient in the interests of justice to do so.

(2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:

(a) the reasons for the witness being unable to give evidence in Singapore;

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allows the courts to grant leave for witness evidence be given by video link under the following conditions:

(a) The witness is below the age of 18 years;
(b) It is expressly agreed between the parties to the proceedings that evidence may be so given;
(c) The witness is outside Singapore; or
(d) The court is satisfied that it is expedient in the interests of justice to do so.

However, the above conditions are not by themselves sufficient. If the witness due to give evidence is outside Singapore, the courts must also consider the following circumstances:

(a) The reasons for the witness being unable to give evidence in Singapore;
(b) The administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
(c) Whether any party to the proceedings would be unfairly prejudiced.

The same discretion is vested with the courts under s 8A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed, "SCJA").[15]

However, it is unclear whether section 62A of the Evidence Act was intended for the situation in which no physical trial is being held at all. The legislators of section 62A are likely to have envisioned the situation in which witnesses give evidence through live video link while an in-person hearing is being held in a courtroom in the physical presence of other concerned parties (e.g. trial judge, counsel, gallery, etc.).

3.2.1 Registrar's Circulars and the COVID-19 (Temporary Measures) Act 2020

Parliament and the Supreme Court of Singapore have acted quickly to provide clarity as to the mode of hearings and the evidence-taking under these unprecedented circumstances by passing the COVID-19 (Temporary Measures) Act 2020 ("COVID-19 Act") and issuing a series of Registrar's Circulars, respectively.

Registrar's Circulars are issued by the courts to supplement the Rules of Court ("ROC") by regulating court practice and procedure.[16] In view of the escalation of the COVID-19 situation in Singapore, the Supreme Court issued Registrar's Circular No. 3 on 27 March 2020 and directed that "[w]ith effect from 1 April 2020 until further notice, selected hearings in the Supreme Court will be conducted by video conferencing or where appropriate, telephone conferencing." The types of hearings that may be conducted by video-conferencing or telephone-conferencing include different stages of civil hearings before a high court judge or the Court of Appeal (see examples in Tables 1 and 2).

(b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
(c) whether any party to the proceedings would be unfairly prejudiced."

[15] See s. 8A of the SCJA:

"Court may conduct hearing through electronic means of communication

8A.—(1) Without limiting section 8, the court may conduct the hearing of any matter or proceeding through a live video link, a live television link or any other electronic means of communication.

(2) Subsection (1) does not affect the operation of section 62A of the Evidence Act (Cap. 97) and section 281 of the Criminal Procedure Code (Cap. 68)."

[16] See the description by the Supreme Court of Singapore (https://www.supremecourt.gov.sg/rules/practice-directions/supreme-court-practice-directions).

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Table 1. Hearings before the Court of Appeal

Type of hearing	Mode of hearing
Case management conferences conducted by a registrar	Video-conferencing will be the default option for solicitors, unless otherwise directed For hearings that are to be conducted by video-conferencing, telephone-conferencing may be available to solicitors, where appropriate Video-conferencing will be available to litigants in person Directions may be given by correspondence instead of at the case management conference
All hearings (other than case management conferences conducted by a registrar)	The court will issue directions for appropriate matters to be heard by video-conferencing For hearings that are to be conducted by video-conferencing, telephone-conferencing may be available to solicitors, where appropriate Video-conferencing will be available to litigants in person Certain matters may be dealt with without hearing oral arguments Directions may be given by correspondence

Table 2. Hearings before a high court judge

Type of hearing	Mode of hearing
Civil pre-trial conferences	The court will issue directions for appropriate matters to be heard by video-conferencing For hearings that are to be conducted by video-conferencing, telephone-conferencing may be available to solicitors, where appropriate Video-conferencing will be available to litigants in person Directions may be given by correspondence instead of at the pre-trial conference
Civil hearings (other than trials and hearings involving the examination of witnesses)	The court will issue directions for appropriate matters to be heard by video-conferencing Video-conferencing will be available to litigants in person Certain matters may be dealt with without hearing oral arguments Directions may be given by correspondence
Civil trials and hearings involving examination of witnesses	The court may order that the entire trial or hearing, or part of a trial or hearing, be conducted by video-conferencing (e.g. where only certain witnesses will appear by video-conferencing)

As outlined above, Registrar's Circular No. 3 is envisioning the circumstances in which the entire trial or hearing is conducted by video-conferencing. However, notwithstanding what is provided in the Registrar's Circular, each court retains the ultimate discretion to decide: (1) whether to conduct any hearing by video-conferencing; and (2) whether to conduct any hearing with one or more parties attending by video-conferencing and any other party attending physically in court (with the exception of the case management conferences conducted by a registrar before the Court of Appeal).

In parallel with the directions of the Supreme Court, Parliament has also passed the COVID-19 Act. Section 28 of the COVID-19 Act (commenced as of 7 April 2020) specifically provides for the conduct of court proceedings using remote communication technology in

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the time of COVID-19. While section 28 of the COVID-19 Act reiterates some of the basic requirements under section 62A of the Evidence Act regarding the taking of witness evidence through live video or live television links,[17] it also introduces some new provisions. For example, subsections 10 and 11 of section 28 provides as follows:

> (10) Despite any written law or rule of law requiring the exercise of the jurisdiction or power of a court ... in a court house or any other place, a court ... may exercise its jurisdiction and have the powers conferred under any written law if—
>
> (a) in the case of court proceedings, such proceedings are conducted during the specified period using a remote communication technology approved by the Chief Justice; or
>
> [...]
>
> (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.

[17] See s. 28 of the COVID-19 Act:

"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—

(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—

[...]

(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."

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These new provisions aim to have the existing laws—which are drafted under the assumption that court proceedings are primarily conducted in person—adapt to the changed environment in which full virtual trials are required.

3.3 Issue 1: Reconciliation with the open-court principle

3.3.1 The principle

The open-court principle is a common-law principle that requires courts to administer justice in public. The recognition of the principle dates back to 1913. In the decision of *Scott v. Scott* ("*Scott*") in 1913, the House of Lords affirmed that the right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity."[18]

The philosophy behind the principle is well captured in the famous quote by Lord Hewart C.J. in the decision of *R. v. Sussex Justices; Ex parte McCarthy* in 1924 that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[19] The famous words of Jeremy Bentham, "[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity,"[20] are cited by judges and counsels in many cases to defend the open-court principle. The principle of open justice is central to the rule of law within a common-law system, in that it promotes public confidence in the administration of justice.[21]

While it is often linked to an individual's basic human rights (i.e. freedom of expression or freedom of press), the open-court principle has gained constitutional status in some jurisdictions. For example, Article 109 of the Constitution of Korea provides that "[t]rials and decisions of the courts shall be open to the public" and Article 27(3) reaffirms this general principle with respect to criminal trials.[22]

3.3.2 Statutory recognition of the open-court principle in Singapore

The principle of open justice is statutorily enshrined in Singapore through section 8(1) of the SCJA:[23]

> "Sittings *in camera*
>
> 8.—(1) The place in which any court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access."

Order 38, rule 1 of the ROC deals with the open-court principle with respect to witness examination:

> "Witnesses to be examined (O.38, r.1)

[18] *Scott v. Scott* [1913] A.C. 417, 438.

[19] *R. v. Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256, 259.

[20] Bentham (1843), p. 115; *Scott*, *supra* note 18, p. 477.

[21] *GCP (a Minor) (Suing by Her Father and Litigation Representative, GCQ) and others v. GCS* [2020] S.G.D.C. 122, at [8].

[22] See Arts 109 and 27(3) of the Constitution of the Republic of Korea:

"Article 109

Trials and decisions of the courts shall be open to the public: Provided, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision.

Article 27

(3) All national shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary."

[23] See also s. 7(1) of the State Courts Act ("SCA").

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> 1. Subject to these Rules and the Evidence Act (Chapter 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court."

According to Order 38, rule 1 of the ROC, the default means for a witness to give evidence is through witness examination in open court, which is compliant with the fundamental principle that justice be administered in open court so that it may be seen to be done (see *Scott v. Scott* [1913] A.C. 417; *McPherson v. McPherson* [1936] A.C. 177; *Stacey H v. Diamond Metal Products* [1935] M.L.J. 249).[24]

A departure from this principle, therefore, would be justified where "the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament had made some statutory derogation from the rule."[25] If the court finds that such circumstances exist and it is appropriate that proceedings be held in private, the court may hear proceedings *in camera*. Under the laws of Singapore, the courts have relatively broad discretion in deciding which proceedings (or any part thereof) should be heard *in camera*, namely whether it is expedient in the interests of justice, public security, or property, or for other sufficient reason to do so.[26]

Therefore, section 62A of the Evidence Act may be perceived as an exception to the general principle set forth in Order 38, rule 1 of the ROC.[27] The underlying assumption of section 62A(1)(a) is that, under normal circumstances, the person concerned should personally attend the trial and any departure from this principle (i.e. the person's absence) should be clearly justified to the court. In the same vein, the Registrar's Circulars and section 28 of the COVID-19 Act would also be regarded an exception to the open-court principle.

The question arises as to how these provisions should be interpreted and applied in light of the open-court principle as well as the current extraordinary circumstances.

3.3.3 Singapore courts' practice

While section 62A of the Evidence Act, section 28 of the COVID-19 Act, and Registrar's Circular No. 3 grant the courts wide discretion in terms of the conduct of court proceedings using remote communication technology (in particular, the taking of witness evidence through a live video link), Singapore court practice does not include any measures that would warrant the public and media's access to the trial conducted virtually.

For example, prior to the trial, the court corresponds with counsel via the Supreme Court Legal Registry. The correspondence includes detailed instructions on how to access the virtual-hearing room hosted on the video-conferencing platform Zoom, as well as the personal link name and password specifically assigned to the said trial. Since the correspondence is addressed to the counsel of the parties, it does not include any instructions as to how the public may be allowed access to observe the trial. Quite the contrary: the parties are advised not to share or otherwise disclose the access information (i.e. password) to any third party. The correspondence also prohibits any recording, photography, and dissemination of the hearings in any form.[28]

[24] Pinsler (2018), p. 1248.

[25] *Attorney-General v. Leveller Magazine Ltd* [1979] A.C. 440, at [450] (cited at [9] of *GCP*, *supra* note 21).

[26] See s. 8(2) of the SCJA and s. 7(2) of the SCA.

[27] Pinsler, *supra* note 24, p. 1248.

[28] Extract from the correspondence: "At or before the appointed date/time of the hearing please connect via Zoom and when prompted with 'Join with meeting ID', please select 'Join with personal link name' instead. *The Personal Link Name (case sensitive) for this hearing is xxxxxx and the password for this hearing is* ******. When prompted

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In order for a member of the public to attend a virtual hearing, they would have to specifically contact the registry officer in charge of the case to request the above-mentioned instructions. However, this is not common knowledge to the public and, so far, there has been no explicit direction from the Supreme Court or state courts granting the public virtual access to the ongoing trials. At the same time, public access to physical hearings has also been greatly restricted so as to comply with safe-distancing rules, with only ten persons allowed in the public gallery.

3.3.4 Other countries

The use of telephone or video link for court hearings poses challenges for the principle of open justice and public access to courtrooms. Again, the approach to when and how the public or the media get access to virtual hearings will differ from court to court.

In the UK, broadcasting a hearing from any court in England and Wales was generally prohibited under the Criminal Justice Act 1925 and the Contempt of Court Act 1981,[29] save for some exceptions (e.g. live-streaming of the Supreme Court cases and some selected cases from the Court of Appeal[30]). Accordingly, in 2019, the UK court declined to authorize live-streaming of a hearing, finding that any exceptions to the current statutory regime should be in the form of primary legislation.[31]

As the UK passed the Coronavirus Act on 27 March 2020, a further temporary exception was introduced in the interests of open justice, empowering the courts to permit the broadcasting of hearings conducted wholly as video hearings. Since then, a number of high-profile cases have proceeded on this basis.[32] The UK court has recently confirmed that the court's power to permit the broadcasting of hearings under the Coronavirus Act includes a power to permit remote attendance of the hearing from outside England and Wales.[33] However, under the Coronavirus Act, courts may grant permission to broadcast a hearing only when it is "conducted wholly as video proceedings."[34] As such, it is not permissible under the Coronavirus Act to broadcast hybrid hearings (i.e. the mode of hearing in which some participants attend in person while others join remotely). Considering hybrid hearings are gaining popularity with the easing of domestic travel restrictions, this could be a problem, especially in international disputes in which the party representatives are often based overseas, as they would likely be still under international travel restrictions. The UK court recently confirmed in *Gubarev and Another v. Orbis Business Intelligence Ltd and Another* [2020] EWHC 2167 (Q.B.) that the exceptions provided under the Coronavirus Act are not applicable to hybrid hearings, as they are not conducted "wholly

(after you key in the Personal Link Name), please enter the password (case sensitive) accordingly. Parties are not to share this password with any unauthorised party. Parties are also to keep the password in a secure location and avoid any inadvertent disclosure to third parties. [. . .]

"*The recording, photography and dissemination of Zoom hearings in video, audio and/or any other form is strictly prohibited.* In appropriate cases, the Court may require an undertaking that no such recording will be made. Attention is drawn to sections 4 and 5 of the Administration of Justice (Protection) Act 2016 (Act 19 of 2016) read with section 28(11) of the COVID19 (Temporary Measures) Act 2020 (Act 14 of 2020) regarding contempt of court by disobedience of court order or breach of undertaking, and contempt of court by unauthorised audio or visual recordings."

[29] See s. 41 of the Criminal Justice Act 1925 and s. 9 of the Contempt of Court Act 1981.

[30] UK Supreme Court (2015); UK Courts and Tribunals Judiciary (2021).

[31] *R. (Spurrier) v. Secretary of State for Transport* [2019] EWHC 528 (Admin).

[32] Ballantyne (2020).

[33] *Huber and another v. X-Yachts (GB) Ltd and another* [2020] EWHC 3082 (T.C.C.). In this case, the claimants and many of the defendants' representatives were based out of the jurisdiction and unable to travel to the UK for trial due to COVID-19 situation.

[34] Schedule 25 ("Public Participation in Proceedings Conducted by Video or Audio") of the Coronavirus Act.

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remotely."[35] The Supreme Court of Canada began virtual hearings in early June 2020. The hearings take place through the video-conferencing platform Zoom and are live-streamed on the Supreme Court's website in order to allow members of the public to watch the hearings. According to the Supreme Court's media release, "observer spaces are being made available on Zoom to remain consistent with the spirit of the open-court principle, where members of the public can sit in the courtroom and watch a hearing in person."[36] It is the first time in Supreme Court history that the court has held hearings virtually.[37]

The Federal Court of Australia is allowing members of the public to request access to hearings, subject to the confidentiality obligations.[38] Some state courts of Australia, such as the district court of New South Wales, have introduced specific procedures for allowing media to request and obtain access to virtual hearings.[39] Generally, access to the virtual courtroom requires the approval of the court, even though it is expected to be granted in conformity with the principles of open justice—that is, access to the virtual courtroom will only be refused in circumstances in which the court would order that the public be excluded from a physical courtroom or if access would compromise the technical ability of the court to hold a virtual hearing.[40]

Article 145(4) of the Constitution of India provides that no judgment shall be delivered by the Supreme Court other than in open court.[41] Section 153-B of the Civil Procedure Code of India also mandates open-court hearings in all civil cases.[42] Recently, in 2018, the Supreme Court of India, while hearing a case on the issue of live-streaming of its proceedings, held that access to justice can never be complete without the litigant being able to see, hear, and understand the course of proceedings first-hand. The court also agreed that India's legal system subscribes to the concept of the universally accepted principle of open-court hearings and that live-streaming contributes to the affirmation of this principle.[43]

3.3.5 Remarks

The principle of open court is crucial to maintaining public confidence in the administration of justice. It is also true that the law leaves room for the court to permit some exceptions to this principle, by taking many different elements into consideration.[44] In the context of virtual trials and evidence-taking, more attention should be drawn to the court's duty to safeguard other important values such as the witnesses' privacy interest,

[35] See *Gubarev and Another v. Orbis Business Intelligence Ltd and Another* [2020] EWHC 2167 (Q.B.), at [21].

[36] Supreme Court of Canada (2020).

[37] Harris (2020).

[38] Federal Court of Australia (2021).

[39] District Court of New South Wales (2020).

[40] Ashurst, Dispute Resolution Update—Australia (2020).

[41] See Art. 145(4) of the Constitution of the Republic of India:

"145. Rules of Court, etc.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court."

[42] See s. 153-B of the Civil Procedure Code of the Republic of India:

"153B. Place of trial to be deemed to be open Court

The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them:

Provided that the presiding Judge may, if he thinks fit, Order at any stage of any inquiry into or trial of any particular case, that the public generally or any particular person, shall not have access to, or be or remain in, the room or building used by Court."

[43] *Swapnil Tripathi v. Supreme Court of India* (2018) 10 S.C.C. 628.

[44] Lederer (1999), *supra* note 9, p. 817. The examples mentioned by Lederer include the possibility of alteration and fabrication, and unfair prejudice.

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credibility assessments, and the participants' access to technology. In a case before the Federal Court of Australia, *Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd (Adjournment)* [2020] F.C.A. 539, the cross-examination of seven Chinese witnesses was not possible using audiovisual technology due to the operation of the Civil Procedure Law of the People's Republic of China (1991). Although the evidence-in-chief was available in affidavit form, it was anticipated that the parties would suffer severe prejudice if the hearing were to proceed. Therefore, the application to adjourn the virtual trial was granted.[45] The courts should therefore be alert to the potential impact that the conduct of virtual trials might have on the participants as well as on the outcomes of the case.[46]

Live-streaming all trials may seem to fully comply with the open-court principle but, in practice, it would be simply impossible or extremely impractical to live-stream all cases pending at court. Considering that the courts used to regulate the numbers allowed in the physical courtroom, the same principle could be applied to virtual-hearing rooms by limiting the number of participants who are given access the live video link. The video-conferencing platforms that are currently being used by the courts are equipped with functions that can easily accommodate the need of the court to control the balance between the idea of open court and the protection of privacy. For instance, Singapore courts have been utilizing the "waiting room" function provided in the video-conferencing platform to hold witnesses and/or party representatives when the judge and counsel have to speak in Chamber and requiring the attendees to register an account after verifying their identification. If the courts are to allow members of the public to attend the virtual hearing, this may be utilized to avoid any unexpected disruption of the trial and while maintaining or enhancing data security.

Although section 28 of the COVID-19 Act provides that "[d]espite any written law or rule of law requiring the presence of any accused person or any witness in any court proceedings," it should not be construed in a way that it is intended to completely override the open-court principle. It would also be premature to conclude that such an interpretation is the position of the Singapore court. Nonetheless, facing the possibility that the COVID-19 situation may be prolonged, more clarity should be given to this issue.

The issue relating to the open-court principle would not arise in arbitration proceedings. This is because of the confidential nature of arbitration, as a procedure that is fundamentally conducted in accordance with parties' agreements and private rules without the intervention of public powers such as the jurisdiction of courts.

3.4 Issue 2: Possible infringement of sovereignty

3.4.1 Taking of evidence as the exercise of sovereign right

In situations in which witnesses are outside the country in which the proceedings are taking place (i.e. the forum) and cannot travel to the said country to take the stand due to travel restrictions, the court will have to consider taking evidence within the country in which the witness is located via telephone or video link, unless it decides to postpone the

[45] *Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd (Adjournment)* [2020] F.C.A. 539, at [16]. Perram J. ruled as follows: "It is a question then of weighing these prejudices. I feel distinctly uneasy about commencing a hearing in which one possible outcome is the jettisoning of an important rule of cross-examination. Whilst this may be feasible, it is certainly novel and in a sense its implications are uncertain. Although I share Motorola's enthusiasm that the trial should proceed I do not think that I should risk embarking upon what may turn out to be a mistrial in the pursuit of a highly experimental procedural remedy. This has negative consequences for Motorola, I accept. However, on balance I think the scales favour Hytera. In reaching that conclusion I do not disregard the long procedural history of this case. But the current situation is not the result of that history and Hytera is not responsible for the circumstances which have arisen."

[46] Salyzyn, *supra* note 1.

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hearing. Certain countries may have objections to evidence given through live video-conferencing link by its citizens within the country, as this may be considered an infringement of their sovereignty.

Sovereignty is largely perceived as a territorial concept. It is generally accepted under international law that a state, as the holder of territorial sovereignty, enjoys full legislative jurisdiction over nationals and events within their territories. It follows from this that one state cannot exercise its sovereign power in another state. This creates some complex issues in certain jurisdictions in relation to the power of the courts to take evidence.

In common-law jurisdictions, the service of documents and taking of evidence are primarily the responsibilities of the parties. Thus, such activities take place at a private level and are not considered an exercise of public authority. Naturally, the courts in common-law jurisdictions tend not to see parties' taking of evidence in other states (without involving any measures of a compulsory nature) as an infringement of the sovereignty of such other state.

In *Garcin v. Amerindo Investment Advisors* [1991] 1 W.L.R., the defendants made an application for an order for Letters of Request to be issued to the appropriate judicial authority in New York to examine on oath a witness in New York who refused to go England to give evidence. Morritt J., dismissing the defendants' application, held that under Order 38, rule 3 of the English Rules of the Supreme Court, he had jurisdiction to make an order for the evidence to be given by live video link. Accordingly, he made an order that the evidence of the witness be given by the witness on oath in New York with counsel in London examining him by means of a live video link.[47]

In some civil-law jurisdictions, however, the taking of evidence is understood as the exercise of the judiciary power of the court (i.e. a public act). The right to administer oaths together with the complementary right to punish perjury are seen by some countries as sovereign rights, with the result that the exercise of those rights by foreign judicial or consular officers without the permission of the said countries is regarded as a violation of sovereignty.

For example, under Article 271 of the Swiss Criminal Code ("SCrC"),[48] it is a criminal offence to carry out an act reserved for a public authority in support of a foreign state within Swiss territory without obtaining the proper authorization from the relevant authority. The taking of evidence in support of foreign proceedings would fall squarely within the scope of an "act reserved to a public authority performed in favour of a foreign State." According to the Federal Office of Justice of Switzerland:

> [t]he act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures always constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is

[47] *Garcin v. Amerindo Investment Advisors* [1991] 1 W.L.R., p. 1140, at [G].

[48] See Art. 271 of the SCrC:

"Art. 271 (Unlawful activities on behalf of a foreign state)

(1) Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any person who carries out such activities for a foreign party or organisation, any person who facilitates such activities, is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

2. Any person who abducts another by using violence, false pretences or threats and takes him abroad in order to hand him over to a foreign authority, party or other organisation or to expose him to a danger to life or limb is liable to a custodial sentence of not less than one year.

3. Any person who makes preparations for such an abduction is liable to a custodial sentence or to a monetary penalty."

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> regarded as a violation of Swiss sovereignty whether or not the persons affected by these legal procedures are willing to cooperate.[49]

Swiss authorities do invoke Article 271 of the SCrC to prosecute a person who facilitated actions that are reserved for Swiss public authorities in aid of a foreign state in violation of the said provision. Recently, the Swiss Federal Supreme Court overturned the decision of the Swiss Federal Criminal Court in acquitting the chairman of a Swiss asset-management company who had been convicted by the Swiss Attorney General's Office ("OAG") under Article 271 of the SCrC.[50] In that case, the US Department of Justice ("DOJ") had requested the asset-management company to provide it with some information on certain US clients of the company. In doing so, the DOJ did not use the legal-assistance channel between the US and Switzerland. After obtaining two inconsistent legal opinions on the lawfulness of providing the requested information, the chairman of the company personally delivered the requested information to the DOJ without any approval from the Swiss authorities. Admitting the appeal of the OAG, the Federal Supreme Court disagreed with the Federal Criminal Court's finding that there was no criminal intent in the chairman's action, finding that he should have sought further information from the authorities.[51]

In such countries, the oath must be administered by a local officer (as opposed to foreign judicial or consular officers) or permission must be sought from the local judicial authorities before an oath can be administered by an official from the country hearing the witness's testimony.[52] As a result, if the taking of evidence is not conducted via the official channels of judicial assistance, it may result in the infringement of sovereignty.

The recent increase in the use of live video links for the taking of evidence from witnesses overseas may stimulate controversy. Due to the nature of the live video link, counsel and trial judges who are physically located in the country in which the proceedings are taking place ideologically attend the witness examination taking place in another country through real-time video transmission. In this process, if the trial judge administers an oath or addresses the witness with any question, then it results in the situation in which the relevant court is in effect exercising its jurisdiction in another country.

Some countries therefore call for caution from courts and practitioners in terms of taking of evidence by video link from overseas witnesses. For example, Practice Directions applicable to UK civil-court proceedings provide that

> [i]t should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (Legalisation Office) sopenquiries@fco.gov.uk with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level.[53]

3.4.2 Hague Evidence Convention

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention" or "Convention") was signed on 18 March 1970 to resolve this delicate issue.[54] Recognizing the differences among judicial systems with regard to the taking of evidence from a foreign country, the drafters of the Convention sought to

[49] Federal Office of Justice of Switzerland (2013), p. 20.
[50] *Bundesgerichts* (Federal Supreme Court) decision dated 4 December 2018 (Case no. 6B_804/2018).
[51] *Ibid*., at [3.3].
[52] Davies (2007), pp. 217–8.
[53] Annex 3 (Video Conferencing Guide) to Practice Direction 32 (Evidence), at [4].
[54] Permanent Bureau of the Hague Conference (2008).

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establish a method for taking evidence that would be both "tolerable" to the state in which the evidence is situated and "utilizable" in the forum state.[55] It establishes methods for a signatory state taking testimony and documents from another signatory state in which the evidence is located by means of: (1) Letters of Request (Chapter I); or (2) diplomatic or consular agents and commissioners (Chapter II).

As the Convention was first drafted in 1970 and does not specifically address the issue of taking evidence via live video links, a subgroup of the Experts' Group on the Use of Video-Link and Other Modern Technologies in the Taking of Evidence Abroad ("Experts' Group") prepared in 2017, with the assistance of the Permanent Bureau, a draft Country Profile Questionnaire pursuant to the mandate of the Council on General Affairs and Policy of the Hague Conference. The draft has been circulated to the Central Authorities[56] of each contracting state. The responses from the contracting states' Central Authorities to these questionnaires (i.e. the Country Profile) set out each contracting state's position with regard to the taking of evidence by video link, in particular in determining whether video link is permissible in a given jurisdiction.[57]

The position of the Central Authority of Singapore[58] (i.e. the Registrar of the Supreme Court) in relation to the use of video links for the taking of evidence in Singapore for use in foreign civil proceedings, which is explained in Singapore's Country Profile, can be summarized as follows:

1. Singapore allows a foreign court to directly take evidence by video link;
2. Article 9 of the Convention provides that the judicial authority that executes a Letter of Request shall apply its own law as to the methods and procedures to be followed;[59]
3. In this regard, section 4(1) of the Evidence (Civil Proceedings in Other Jurisdictions) Act of Singapore gives the General Division of the high court the power to order such provision for obtaining evidence in Singapore as may appear to the high court to be appropriate for the purpose of giving effect to the request; and
4. This includes the taking of evidence by video link in the high court.

Considering that Singapore has declared that the whole of Chapter II ("Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners") of the Convention shall not be applicable, the court of the other contracting state would need to issue a Letter of Request to the high court of Singapore to be able to take evidence within Singapore.[60]

For a Singapore court to be able to take evidence from a witness located in another contracting state through live video link for the use in Singapore civil proceedings, the

[55] Comment (1984), pp. 1464–5.

[56] "Central Authorities" means an authority designated by each contracting state of the Convention that will undertake to receive Letters of Request coming from a judicial authority of another contracting state and to transmit them to the authority competent to execute them (Art. 2 of the Convention).

[57] Hague Conference (2017a).

[58] Singapore signed the Convention in 1978 and has been a contracting state since.

[59] See Art. 9 of the Convention:

"Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. A Letter of Request shall be executed expeditiously."

[60] Art. 1 of the Convention; ss. 3 and 4 of the Evidence (Civil Proceedings in Other Jurisdictions) Act.

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Singapore court must first consider the specific protocols (i.e. relevant laws, regulations, practice, etc.) adopted by such a state.

For example, it is permissible for a voluntary witness located in the US to directly provide evidence by video link to a foreign court.[61] Although the US procedure allows an interested party to file a motion to request that a US district court should issue an order to compel a witness to provide evidence in aid of a foreign proceeding, it is unlikely that a US court will compel a witness to directly provide evidence by video link to a foreign court. The US does not permit the direct taking of evidence by video link under Chapter I of the Convention, but permits the direct taking of evidence by video link on a voluntary basis under Chapter II.[62] On the other hand, Germany[63] and Switzerland[64] do not allow foreign courts to directly take evidence in their states at all, even by video link.

Despite the practices of some US courts, it is often viewed that the Convention was intended to provide an "exclusive" or at least "primary" mechanism by which foreign evidence may be obtained, rather than a "suggested" mode for taking foreign evidence.[65] That is, between the contracting states, the taking of evidence from another country should be conducted by either of the two means provided for in the Convention. While the Convention does not specifically provide for the taking of evidence directly through live video links, it gives rise to the question as to whether the Convention is adaptable to the fast-evolving COVID-19 situation.

In practice, this would only be an issue where the witness is willing to give evidence through live video link, as the foreign court or counsel would still have to seek the assistance of the requested court (e.g. by a subpoena) to be able to compel an unwilling witness to give evidence.

3.4.3 Modernized interpretation of the Hague Evidence Convention

While the current draft of the Hague Evidence Convention has limitations in terms of allowing evidence to be taken directly from another contracting state via live video links, efforts have been made to address this issue through interpretation of the Convention.

A report drawn up by the Permanent Bureau of the Hague Conference in 2008, entitled "Taking of Evidence by Video-Link Under the Hague Evidence Convention," suggests certain interpretations of the Convention in the way in which it could accommodate the new modes of evidence-taking from another jurisdiction. However, these suggested interpretations remain very limited, as contracting states are still required to follow the two paths prescribed in the Convention.

3.4.4 Guide to good practice of the use of video link by the Hague Evidence Convention

The increasingly frequent use of video-link and video-conferencing technology has necessitated more detailed and more targeted guidance in this area. In this context, the Hague

[61] See 28 US Code § 1782(b):

"§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

[62] Hague Conference (2017d). The response from the Central Authority of the US makes it clear that the direct taking of evidence through live video links should remain at the private dimension (see the response at p. 4: "such arrangements must be arranged for privately and do not involve the United States Central Authority").

[63] Hague Conference (2017b).

[64] Hague Conference (2017c); Federal Office of Justice of Switzerland, *supra* note 49, p. 20.

[65] Comment, *supra* note 55, pp. 1475–83; Thomas (1987), p. 357; Bermann (1988).

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Conference prepared a "Guide to Good Practice of Use of Video Link by Hague Convention" ("the Guide") following the discussions of the Experts' Group.[66]

Although the Guide incorporates references to responses provided by the Central Authorities of contracting states responsible for the implementation of the Convention, it does not seem to address the availability of the use of live video links even in a situation in which strict compliance with the Convention is not available or impractical. Rather, the Guide simply notes that some contracting states in whose territory the witness is located may have concerns related to its sovereignty and, in such cases, the permission of the contracting state concerned may be required in order for the examination by video link to take place.[67]

The Guide further highlights that, in the situation in which evidence is taken in accordance with Chapter I, and if the requesting state administers the oath or affirmation (which is usually the case), the administration of foreign oaths and affirmations by such a requesting state may still be considered a violation of the sovereignty of the requested state.[68]

3.4.5 In practice

Although sufficient precedents have not yet been accumulated, two very recent decisions from the UK patent court can be indicative of how the courts and counsels should navigate their way through the potential infringement of sovereignty in a virtual-hearing situation.

In *Illumina Cambridge Ltd v. Latvia MGI Tech SIA & Ors* [2021] EWHC 57 (Pat) ("*Illumina*"), witnesses located in Germany and Switzerland were able to give evidence by video link from the respective countries, but only after the necessary arrangements were made under the EU Evidence Regulation[69] (for the witnesses in Germany) and the Hague Evidence Convention (for the witness in Switzerland). Birss J. briefly summarized the process at [21]:[70]

> Given the pandemic, the trial was conducted as a hybrid trial with the core legal teams in the physical court room along with me, and the rest of the legal teams working remotely. All bar one of the witnesses gave their evidence remotely. For the two witnesses giving evidence from Germany (Prof Dr. Marx and Prof Johnsson), suitable arrangements were made with the Amtsgericht Freiburg im Breisgau pursuant to Art. 17 of the Council Regulation (EC) No. 1206/2001 so that the witnesses could give their evidence by video link from Germany. For Prof Winssinger in Switzerland, arrangements were made with the Swiss Federal Dept of Justice and Police in the relevant Canton (Vaud) under Art. 17 of the Hague Convention (1970). I am grateful both to the Freiburg Court and the Swiss FDJP for their assistance in this matter. *The defendants' legal teams left it far too late to make these arrangements and it was only with the assistance and cooperation of those authorities (and the efficiency of the Masters of the Queen's Bench Division) that the arrangements were made in time* [emphasis added].

[66] The Hague Conference on Private International Law—Permanent Bureau (2020).

[67] *Ibid.*, at 40.

[68] For example, according to the Federal Office of Justice of Switzerland, "[t]he act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures always constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is regarded as a violation of Swiss sovereignty whether or not the persons affected by these legal procedures are willing to cooperate." See Federal Office of Justice of Switzerland, *supra* note 49, p. 20; see also Davies, *supra* note 52, pp. 217–8.

[69] Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[70] *Illumina Cambridge Ltd v. Latvia MGI Tech SIA & Ors* [2021] EWHC 57 (Pat), at [21].

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Birss J.'s comment on the conduct of the defendants is worth noting. While he did not provide any view on how the court would have handled the alternative situation (i.e. in which the defendant failed to make the necessary arrangements in time), the passage clearly shows the dissatisfaction of the court with the defendants' belated response and its willingness to avoid any delay in the proceedings.

In *Interdigital Technology Corp. and others v. Lenovo Group Ltd and others* [2021] EWHC 255 (Pat) ("*Interdigital*"), Hacon J. was faced with a similar situation. In this case, the parties had consented to the remote hearing of the trial. The claimants were due to present an expert witness, Dr Jon Moss, a British citizen living in Germany, and the preferred plan was for Dr Moss to travel to the UK to give his evidence by video link from the offices of the claimants' solicitors in London. However, due to the travel restrictions, the claimants proposed a backup plan, which was for Dr Moss to give his evidence by video link from Germany.

While the defendants did not object to this approach in principle, they did raise an issue that German law requires the permission of a German court before evidence can lawfully be given by video link from Germany in aid of a trial outside Germany. Each party presented its case on the question of whether the permission of the court for Dr Moss to give evidence by video link from Germany should be subject to the proviso that this is approved by the competent authority in Germany: the claimants argued that, considering the voluntary nature of the evidence, the court may grant permission without such a proviso, whereas the defendants argued that the permission of the court without such a proviso may be viewed as an interference with Germany's sovereign rights. Both parties have filed witness statements of their respective Germany law experts together with ample legal authorities.

After reviewing the parties' submissions, Hacon J. ruled in favour of the defendants and gave permission for Dr Moss's evidence to be given by video link from Germany, provided that the competent authority in Germany first gave permission. Key findings in this decision are summarized below:[71]

(a) The question of German law is a factual issue and it must be determined on the balance of probability;
(b) However, the overall question of whether the court should give permission for Dr. Moss to give evidence by video-link from Germany involves an exercise of the court's discretion;
(c) In exercising the discretion, the court should take into account the risk of resulting in a breach of German law in permitting Dr. Moss to give evidence by video-link from Germany, and taking that risk is not a trivial matter;
(d) On balance, the evidence of the defendants' German law expert is more persuasive: there is sufficient support for the proposition that German courts would regard the taking of video-link evidence from Germany by a court outside Germany as a matter of sovereignty, regardless of the distinction between voluntary and compulsory evidence;
(e) There is a real risk of breaching German law if the court were to give permission for evidence to be obtained by video-link from Germany without the permission of the German courts.

The permission of the German courts would have to be sought pursuant to the Hague Evidence Convention, as the Council Regulation (EC) No. 1206/2001 has no longer been applicable between the UK and the EU Member States since the expiry of the Brexit transition period (i.e. 31 December 2020).

[71] *Interdigital Technology Corp. and others v. Lenovo Group Ltd and others* [2021] EWHC 255 (Pat), at [34]–[45].

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3.4.6 Remarks

The taking of evidence through live video link is an example of the development of information and communication technology. However, due to the novelty of the means, it may be inconsistent or incompatible with some legal systems. This problem is mainly due to the fact that the participants in the evidence-taking process are physically located in two different jurisdictions but, at the same time, present in one virtual place.

It is evident that there exist some issues that cannot be resolved within the framework of the Hague Evidence Convention, in particular stemming from the tension between the sovereignty of the relevant states. As the global pandemic has affected the judicial administration of almost all states, there is a need for extensive discussions and subsequent legislation on a global level.

The sovereignty issue would not arise in arbitration proceedings, as the crux of this issue is that the taking of witness evidence is the exercise of jurisdiction of a national court, which is, by extension, the exercise of sovereignty of the country, whereas arbitration proceedings take place in a private dimension.

4. Conclusion

Beyond the utility of virtual trials as short-term emergency measures, there is reason to believe that this moment may well mark the start of a shift toward the increased use of virtual trials in the longer term.[72] Virtual trials may not replace the conventional way of conducting trials, but courts and practitioners are expected to become less reluctant to agreeing to conduct the whole or a part of the trial by way of video-conferencing, especially if the case involves cross-border elements. Due to its relative novelty in respect of court proceedings, however, soft landing in the existing legal system would require a great deal of discussion within the legal and judicial sector, and it may further require existing laws to be tailored.

Even with timely legislation, some legal issues remain unanswered, as can be seen from Singapore's experience. The consequences of any possible problems have yet to come. For example, if a case has been tried on a fully virtual basis without granting access to the public or in violation of the Hague Convention, it is unknown whether such circumstances would taint any judgment rendered and constitute a ground for the unsuccessful party to resist the recognition or enforcement before a foreign court in view of the public policy of such a country.[73]

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[72] Salyzyn, *supra* note 1.

[73] For example, see s. 14(c) of the Choice of Court Agreements Act 2016:

"Grounds on which General Division of High Court must refuse to recognise or enforce foreign judgment

14. The General Division of the High Court *must* refuse to recognise or enforce a foreign judgment, or must set aside an order (made pursuant to an application under section 13(1)) that recognises or enforces a foreign judgment, in any of the following circumstances, or in any other circumstances that the Minister may prescribe by regulations made under section 22:

[. . .]

(c) the recognition or enforcement of the foreign judgment would be *manifestly incompatible with the public policy of Singapore*, including circumstances where specific proceedings leading to the judgment would be *incompatible with fundamental principles of procedural fairness in Singapore*."

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