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Returning to the "Norm" – Singapore High Court Issues Guidance on the Giving of Evidence via Video-link amidst COVID-19 Pandemic

Introduction

Amidst the COVID-19 pandemic, and with the advent of virtual hearings carried out over Zoom, the giving of evidence and/or cross-examination of overseas witnesses via video-link may not have seemed controversial. Indeed, during the early phases of the COVID-19 pandemic, where international borders were closed and air-travel severely restricted, it appeared that the only *plausible* way for examination of overseas witnesses was by way of video-link.

However, two years on, and with the stabilisation of the COVID-19 pandemic globally, does it still remain the case that the "default" mode of giving evidence and/or cross-examinations before the Singapore courts is by way of video-link?

The General Division of the Singapore High Court in *Wang Xiaopu v Koh Mui Lee and others* [2022] SGHC 54 ("**Wang Xiaopu**") recently issued guidance on applications for overseas witnesses to give evidence via video-link (under Section 62A of the Evidence Act 1893 ("**EA**")) in the context of the global recovery from the COVID-19 pandemic. Significantly, and as a signal of a return to the "norm", the Court in *Wang Xiaopu* cautioned against the "blind" citing of the COVID-19 pandemic as the reason why an overseas witness is unable to testify in person at trial before the Singapore courts.

In this Update, we explore the Court's reasoning in *Wang Xiaopu* as well as potential implications which litigants with overseas witnesses seeking to give evidence via video-link should be aware of.

Contribution Note: This Client Update was written with contributions from Wu Junneng, Senior Associate, from Shipping & International Trade.



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Brief Facts

The Plaintiff, Wang Xiaopu ("**Wang**"), was a national of the People's Republic of China ("**PRC**") who was ordinarily resident in Guangzhou, PRC. Wang had previously successfully obtained a judgment against a Dr Goh Seng Heng in *Wang Xiaopu v Goh Seng Heng and another* [2019] SGHC 284. The present action related to enforcement proceedings brought by Wang against Dr Goh's family members, whom Wang alleged had received various assets / properties from Dr Goh as part of a scheme to place Dr Goh's assets out of reach from his creditors.

In the present proceedings, Wang applied for leave to give evidence by way of video-link for the following reasons:

- (a) She was unable to travel to Singapore because of the uncertain travel climate, the real and substantial risk of contracting COVID-19 that she would be exposed to if required to travel to Singapore, and the onerous requirements she had to fulfil in order to travel from Guangzhou to Singapore;
- (b) She would be severely prejudiced if she was made to travel to Singapore to give evidence; and
- (c) The defendants would not suffer any prejudice if she were to give evidence via video-link as they would not be deprived of an opportunity to cross-examine her and she was, in any case, not a material witness.

On the other hand, the defendants argued that Wang's application should be dismissed for the following reasons:

- (a) Wang was not unable, but rather, unwilling to travel to Singapore to testify in person;
- (b) The defendants would suffer substantial prejudice if Wang was not present in court for their counsel to cross-examine her; and
- (c) Wang had not proved that there were adequate and sufficient technical arrangements for her to give evidence via video link from Guangzhou.

Holding of the General Division of the High Court of Singapore

The General Division of the High Court of Singapore (per the Honourable Justice Lee Seiu Kin) dismissed Wang's application for the following reasons:

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- (a) Under Section 62A(2)(a) of the EA, a witness must be "*unable*" to attend proceedings in Singapore (as opposed to being unwilling to), in the sense that there were circumstances *outside* of the witness's control for not being able to travel to Singapore. The dynamic and evolving travel conditions due to the COVID-19 pandemic only made it *difficult* for Wang to travel to Singapore from Guangzhou, but not impossible.
- (b) Although air travel was indeed hit during the early stages of the COVID-19 pandemic, the situation appears to have stabilised. Close attention must be paid to the precise facts as to why the witness is unable to travel – mere generalisations about travel disruptions brought on by the COVID-19 pandemic are simply insufficient. There was simply no evidence of travel restrictions resulting in Wang being *unable* to travel before the Court.
- (c) The substantial risk of contracting COVID-19 simply evinced that Wang was unwilling, but not unable to, travel to Singapore. In the same vein, Wang's argument that responsibilities at work meant that she would be unable to travel overseas due to the long quarantine period carried little weight. In particular, Wang being the plaintiff was well apprised of the trial dates and would have been able to make the proper arrangements to be present for the trial. Given that Wang had chosen to give evidence in support of her case, it was all the more incumbent upon her to make the necessary arrangements to testify at trial.
- (d) A plaintiff's unwillingness to travel would carry little weight in the consideration of an application for leave to give evidence via video-link under Section 62A of the EA, unlike in an application involving a witness over whom the plaintiff has little control.
- (e) Wang would not be unfairly prejudiced if required to travel to Singapore to testify. The reasons Wang gave as to why she would be unfairly prejudiced did not relate to the presentation of her case, but rather, the inconvenience and potential health risk she would face.
- (f) Finally, there was no evidence before the Court that the necessary administrative and technical facilities were in place for Wang to testify remotely.

Potential Implications

With Singapore's progressive treatment of COVID-19 as an endemic, *Wang Xiaopu* signals the return to the "norm" where litigants and witnesses are required, as a default position, to be physically present to testify before the Singapore courts. In this connection, given the gradual re-opening of international borders and the establishment of more vaccinated travel lanes (VTLs), it is anticipated that the Singapore courts will be less inclined to grant leave for witnesses to give evidence and/or be cross-examined via video-link.

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In the context of PRC witnesses, while the PRC government has imposed onerous travel-related restrictions for returning PRC citizens (such as lengthy quarantine period(s), multiple COVID-19 tests, and indirect flights to various parts of the PRC), such restrictions are *irrelevant* in an application for leave to give evidence before the Singapore courts via video-link (as *Wang Xiaopu* has demonstrated). Ultimately, the question is whether a witness is *unable* to travel to Singapore (in contrast with returning to PRC). If the restrictions are surmountable, it is unlikely that the Singapore courts will grant leave for evidence to be given by video-link.

However, it is noted in *Wang Xiaopu* that in an application for leave to give evidence via video-link, the Singapore courts may take into account health-related issues which would put one at risk of contracting COVID-19 if made to travel to Singapore to testify. While clarity in this regard would be preferred, it is not clear at this juncture whether an unvaccinated witness and/or witnesses with underlying chronic conditions (thereby making them more susceptible to developing severe illness from COVID-19) will be able to satisfy the Singapore courts that they are "unable" to travel to Singapore to testify.

In respect of unvaccinated witnesses, will the courts enquire into the reasons why they have chosen to remain unvaccinated in determining whether leave should be given for the witness to testify via video-link? Likewise for witnesses with self-professed underlying chronic conditions - will the courts require expert medical evidence to establish that they are thereby at a heightened risk of developing severe illness from COVID-19? The approach of the courts in this area remains to be seen.

In any case, even if an overseas witness is able to demonstrate that he/she is *unable* to testify before the Singapore courts, the administrative and technological arrangements that have to be put in place for a witness to give evidence via video-link must not be over-looked. As cautioned in *Wang Xiaopu*, while it may be sufficient to state in the applicant's supporting affidavit that the witness would testify from a venue "*equipped with the necessary video conferencing facilities, such as a web-camera, microphone, speakers and a stable internet connection*", it is suggested that the applicant should present cogent and convincing evidence to the courts that the necessary administrative and technological arrangements are *indeed* available and can be put in place for a witness to give evidence via video-link. This could involve *inter alia* the applicant adducing evidence that they are able to put together a video-hearing set up and/or that they have conducted trial runs of the video-hearing set up in their supporting affidavit to demonstrate that the witness will be able to effectively give evidence via video-link without hindrance.

Finally, it is also important to note the Court's reminder in *Wang Xiaopu* that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*". A timeless maxim it may seem, the Court in *Wang Xiaopu* has now clarified that this maxim, and in particular a litigant's opportunity to confront the opposing party physically in court, will be a relevant consideration in deciding whether leave will be granted for a witness to give evidence via video-link.

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Concluding Words

The giving of evidence via video-link has in the past two years been commonplace amidst the COVID-19 pandemic. However, given that the global COVID-19 pandemic is now stabilising, the time is ripe and indeed, the Singapore courts are now gradually returning to the "norm" of requiring litigants and witnesses to testify physically in court.

While the Singapore courts are rejecting the *carte blanche* citing of the COVID-19 pandemic as an excuse for witnesses to give evidence via video-link, it remains to be seen the extent of the evidence that an applicant is required to bring in order to satisfy the courts that it is "unable" to testify physically.

For further queries, please feel free to contact our team below. Please click [here](#) for our Firm's commentary of the Singapore High Court's decision in *Wang Xiaopu v Koh Mui Lee and others* in Chinese.

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