

Dispute Resolution

Court Proceedings in New Normal: Successful Application for Leave for Both Foreign Factual and Expert Witnesses to Testify via Video-Link

Introduction

While Singapore has settled well into the present "new normal" of Phase Two of reopening the economy, travel restrictions and other preventative measures are still largely in place, and may continue to be in place for the foreseeable future. Yet the wheels of justice must continue to turn. Access to justice (fundamental to the rule of law) must continue to be provided by an agile legal system. In circumstances where foreign witnesses are unable to physically attend trial, what considerations will the courts take into account when deciding whether to grant leave for them to give evidence via video-link?

To put matters in context, giving evidence by video-link is, *per se*, not a new issue. Guiding principles have been established in legislation and earlier cases over the last three decades. However, how such principles are to be applied against the backdrop of the ongoing COVID-19 pandemic is a novel point. Necessity is the mother of invention, and so courts worldwide have devised creative but legally sound solutions that do not cause prejudice to any party.

In the lead up to a recent civil trial (currently part-heard and resuming in late October), conducted entirely remotely, Gregory Vijayendran SC, Kevin Tan, Devathas Satianathan, and Low Weng Hong from Rajah & Tann Singapore's dispute resolution team successfully obtained leave from the Singapore High Court for the Defendant's foreign factual and expert witnesses to give evidence by video-link in a contested application. This was despite the Plaintiff's strenuous objections. This Update elucidates the considerations that the Court took into account when granting such leave.

Background

The dispute at hand concerned factual and expert witnesses that the Defendant intended to call for trial ("**Foreign Witnesses**"). It was common ground between the parties that the evidence they were to give were of crucial importance.

The key relevant legal principles were as follows:

1. that Section 62A of the Evidence Act ("**Act**") conferred upon the Court a broad discretion to receive oral evidence by video-link in civil proceedings;



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2. that leave should not be granted if inconsistent with the Court's duty to ensure that the proceedings are conducted fairly to the parties; and
3. that the Court must have regard to all the circumstances of the case under Section 62A(2) of the Act, including the administrative and technical facilities and arrangements to be made, and whether any party would be unfairly prejudiced.

Plaintiff's Position

The Plaintiff opposed the Defendant's application for leave to enable them to testify from overseas. Its main reasons were:

1. the criticality of the Foreign Witnesses' evidence required that evidence be given in person, as there was a high likelihood that central issues would turn on the Court's assessment of their credibility.
2. the Plaintiff's cross-examination would be significantly impeded if testimony took place by video-link, resulting in unfair prejudice to the Plaintiff. In this regard, the Plaintiff argued:
 - a. it was difficult or impossible to put the necessary administrative and logistical arrangements to ensure that the proceedings would be conducted fairly. This included ensuring that the trial by video-link would be conducted without any interference from external parties not within camera view.
 - b. the Plaintiff would incur additional costs, as it wished to arrange for solicitors from both parties to be present with the Foreign Witnesses to ensure non-interference from external parties.
 - c. due to compressed timelines, the parties' ability to properly prepare for trial was prejudiced, thus making a postponement desirable.

Accordingly, the Plaintiff's primary position was that the trial should be postponed to enable foreign witnesses from both sides to give evidence in person.

Defendant's Position

Against the above, the Defendant submitted that:

1. It was precisely the criticality of the witnesses' evidence that would result in unfair prejudice to the Defendant if trial was afoot and the Foreign Witnesses were barred from giving evidence remotely (and therefore at all, given the prevailing COVID-19 measures). Such prejudice could not be remedied by an order for costs.

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- a. in *Anil Singh Gurm v J S Yeh & Co and another* [2020] 1 SLR 555, the Court had noted that the more important a witness' evidence to the main issues in a litigation, the more willing a court should be to grant leave for such witness to give evidence remotely.
 - b. with regard to assessing credibility, the Court of Appeal in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 had cautioned against relying excessively on witness demeanour at trial to assess their credibility. In any case, the Court would still be capable of observing the demeanour of the witnesses via video-link.
2. the Plaintiff's concerns could be suitably addressed as follows:
- a. the Defendant was able to facilitate the appropriate arrangements for testimony via video-link, including the provision of an isolated room with no external parties present during the cross-examination.
 - b. regarding costs, it was the Defendant who was making the arrangements and would bear the costs accordingly.
 - c. the compressed timelines were a factor in favour of allowing evidence to be provided by video-link as soon as possible, thus enabling parties to prepare for trial instead of adopting a wait and see approach that could lead to interminable and indefinite delay in access to justice given the extant travel restrictions.
3. The Defendant additionally highlighted Section 28 of the recent COVID-19 (Temporary Measures) Act 2020 ("**COVID-19 Act**") to the trial judge, submitting that it provided a separate juridical basis for the Court to allow its expert witness to give evidence via remote communication technology as long as:
- a. sufficient administrative and technical facilities and arrangements could be made; and
 - b. it was in the interests of justice to do so.

Decision of the High Court

The Honourable Justice Lee Seiu Kin granted the Defendant's application, directing that foreign witnesses from both sides (i.e. the Plaintiff and the Defendant), be allowed to give evidence via video-link. To address the risk of subsequent developments rendering the giving of evidence by video-link unsuitable (e.g. technological disruption), the Court gave liberty to both parties to apply at any stage of the proceedings to suspend or modify the order. This was a fair and reasonable counterbalance to ensure that if there were technological issues affecting the flow of evidence or other impediments to the administration of justice (presumably such as the risk of witness coaching, witnesses reading from notes, etc), the court could order a suspension or termination of the order. The trial judge ordered that costs be reserved to himself.

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Comments

Parties preparing for trials with foreign witnesses during our present pandemic period should consider the countenance of the Courts in (i) facilitating access to justice with continuation of court proceedings; and (ii) adopting a robust, practical and technological approach on the taking of evidence of the said witnesses. The overarching consideration on this is that there should be no unfair prejudice to any party. For example, valid concerns relating to logistical arrangements for the witness giving video-linked evidence may, in certain circumstances, prevent the Court from granting an application for leave for a witness to give evidence by video-link.

Parties should also note (as now set out in paragraph 56A of the Supreme Court Practice Directions):

1. There may be restrictions (such as those arising from the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, or domestic laws passed pursuant to the Convention) imposed abroad as regards the taking of evidence by a Singapore Court where the witness is physically in that foreign jurisdiction. These restrictions stem from sovereignty-related concerns. The party applying for leave must make all necessary enquiries, and take all necessary steps, to ensure that the foreign jurisdiction where the person is giving evidence raises no objection to the adducing of evidence in that country or territory for Singapore court proceedings.
2. An application for evidence to be given by video-link should be made generally no later than eight weeks before the commencement of the hearing.

A multifaceted, insightful perspective (Bench, Bar and witness) of the first tranche of the trial process may be accessed at [\[2020\] SAL Prac 19](#).

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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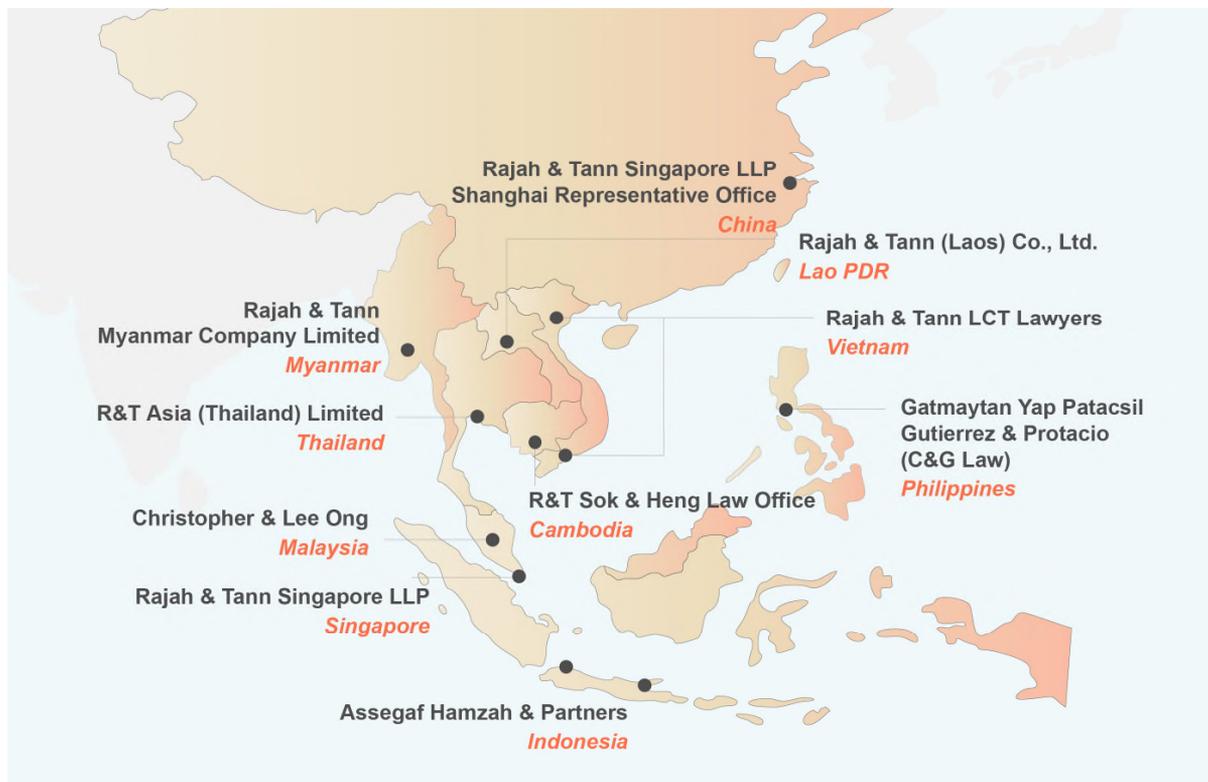
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Client Update: Singapore

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