

# Singapore High Court Sounds Caution Against Citing COVID-19 Pandemic to Avoid Testimony in Person at Trial

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Reiterating the importance for trials to be seen as fair by all litigants in an action, the General Division of the Singapore High Court (“**High Court**”) has issued guidance to witnesses overseas who cite the COVID-19 pandemic as the reason for not giving evidence in person at trial, and who instead seek to testify *via* video link. The High Court emphasised the need for a holistic assessment of all the circumstances of the case and, in particular, the precise grounds advanced in support of any claim that the witness is unable, as opposed to unwilling, to travel to Singapore to give evidence: *Wang Xiaopu v Koh Mui Lee and others* [2022] SGHC 54 (“*Wang Xiaopu*”).

## Our Comments

Under section 62A of the Evidence Act 1893 (“**EA**”) (“**Section 62A**”), a person may give evidence *via* live video or television link with the leave of court. This is an exception to the general rule requiring a witness to be physically in court to testify and be cross-examined at trial.

With the outbreak of the COVID-19 pandemic and the implementation of travel restrictions worldwide, many have grown accustomed to working and conducting business remotely. The use of virtual hearings has likewise gained traction in Singapore, and this poses the question of whether video-link evidence should now serve as the new norm, rather than the exception.

The decision in *Wang Xiaopu* answered this question in the negative.

Among other things, the High Court cautioned parties against simply citing the COVID-19 pandemic as the reason for being unable to physically attend and testify at trial, especially since the pandemic has already stabilised since its early stages. The High Court observed that “*generalisations about travel disruptions*” caused by the COVID-19 pandemic or a “*substantial risk of contracting COVID-19*” would not be sufficient justification for the court to grant leave under Section 62A, as these factors only indicated an unwillingness (as opposed to an inability) to testify in person.

The High Court also emphasised the importance of the perception of the litigants in the conduct of a trial, and ensuring that the litigants themselves see that justice is being done. Where the witness concerned in an application under Section 62A is the plaintiff herself, who has chosen to institute the action and would have been aware of the trial dates fixed by the court, it is all the more incumbent on the plaintiff to make the necessary arrangements to testify at trial.

This update examines the High Court’s decision.

## Background

The plaintiff, a national of the People's Republic of China, was ordinarily resident in Guangzhou. She had previously obtained judgment against a debtor and commenced the present action against the debtor's family members, claiming that the debtor had transferred and/or acquired various assets or properties in the defendants' names so as to put them out of reach of his creditors.

The plaintiff applied under Section 62A for leave to give evidence *via* live 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 if she were to travel to Singapore, and the onerous requirements she had to fulfil to travel from Guangzhou to Singapore.
- (b) She would be "severely prejudiced" if she was made to travel to Singapore to give evidence.
- (c) The defendants would not be prejudiced if she were to give evidence *via* video link as they would still have an opportunity to cross-examine her, and she was, in any case, not a material witness.

The defendants objected to the application, arguing that:

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

## The High Court's Decision

Dismissing the plaintiff's application, the High Court held that it was inappropriate to grant leave for the three reasons set out below.

### *(a) The plaintiff was not "unable" to travel to Singapore to give evidence*

- (i) Under Section 62A(2)(a) of the EA, a witness being "unable" to give evidence in Singapore implies a lack of choice and circumstances outside his control. Here, there were no circumstances outside the plaintiff's control which prevented her from travelling to Singapore. Even accepting that there were dynamic and evolving travel conditions and restrictions due to the COVID-19 pandemic, this simply meant that travel from Guangzhou was difficult, but not impossible.
- (ii) The situation regarding air travel had stabilised. Close attention must be paid to the precise facts explaining exactly why the witness is unable to travel – mere generalisations about travel disruptions caused by the pandemic are insufficient.

- (iii) The substantial risk of contracting COVID-19 simply meant that the plaintiff was unwilling, but not unable, to travel to Singapore. Such a risk might have been relevant if it was shown she had health-related issues that put her at risk of serious complications if she contracted COVID-19. But there was no such evidence before the court.
- (iv) Safety issues *per se* must be considered in their proper context and are not determinative of whether leave should be granted. The court will not countenance any attempt by parties to manipulate the prevailing situation to their advantage and compromise a fair hearing.
- (v) A plaintiff's unwillingness to travel would carry little weight in an application under Section 62A, unlike in an application involving a witness over whom the plaintiff has little control.
- (vi) Here, it was the plaintiff who had chosen to institute the action in Singapore. Given that the trial dates were known well in advance, the plaintiff's argument that responsibilities at work meant that she would be unable to travel overseas due to a long quarantine period carried little weight. There was sufficient time to make travel and work arrangements to attend the trial.

*(b) The defendants, not the plaintiff, would be substantially prejudiced*

- (i) The question of unfair prejudice is an overriding concern when determining whether leave should be granted under Section 62A. As the plaintiff is electing to give evidence, it is all the more incumbent on the plaintiff to make the necessary arrangements to testify at trial.
- (ii) It is not only important that justice be done, but that the litigants themselves see that justice has indeed been done. Litigants' perception as to how the trial is conducted is a consideration that can, and should, be taken into account in deciding whether leave should be granted.
- (iii) The plaintiff would not be unfairly prejudiced if she were required to travel to Singapore to testify. The reasons given as to why she would suffer unfair prejudice did not relate to the presentation of her case, but to the inconvenience and potential health risk she would face.
- (iv) By contrast, the defendants would be unfairly prejudiced if the plaintiff was allowed to testify remotely. There were at least two matters which the defendants wished to cross-examine the plaintiff on, and they, being the parties taken to court by the plaintiff, should not be deprived of the opportunity to confront the plaintiff and cross-examine her in person.

*(c) No evidence of necessary technical and administrative facilities for remote testimony*

- (i) While it was sufficient to state in the 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 would not be unduly burdensome on the parties to provide more evidence to show that the necessary administrative and technical arrangements have been made for the witness for remote testimony.

- (ii) Here, the plaintiff proffered no evidence that the necessary technical and administrative arrangements for her to testify remotely were already in place. Even if such arrangements were adequate in this case, this would not have affected the balance of the competing considerations.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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