



INSIGHTS

by ML CHAMBERS

Testifying From Outside Singapore
– the Video Link Exception in
Multi-Jurisdictional Disputes

(+65) 6860-0360

contactus@mlclaw.com.sg

www.mlclaw.com.sg

Mark Lee Chambers Law Corporation

ABOUT

Where multi-jurisdictional disputes have become increasingly common place in Singapore, the simple (or what used to be) issue of having all witnesses testify at trial (in Singapore) physically in-person becomes an increasingly vexed one. Whilst there are instances where a witness may genuinely have to testify through video link from outside Singapore, there are also no lack of adventurous foreign litigants who attempt to game the system by instituting “proxy” fights in Singapore but refusing to ever step foot on local soil.

In a matter handled by our Mr Mark Lee and Ms Sarah Yeo, this issue became a particularly hotly contested one. Our directors acted for the majority shareholder (Australian national) and corporate group (across Asia Pacific) in a contest over the legal and beneficial ownership of ordinary shares of the Singapore incorporated headquarters of that corporate group. As the matter approached trial, an application was made by the counterparty (a Chinese national) to testify at trial through video link from China pursuant to Section 62A of the Evidence Act (Cap. 97), claiming that he was allegedly “unable” to travel to Singapore due to certain unrelated China court orders made against him.

In this article, we bring readers through the general principles and considerations factored by the Singapore courts in deciding whether or not to exercise its discretion to receive oral evidence by video link in civil proceedings.

INTRODUCTION

In Singapore, the “default position” is that a witness must be physically before the court in order to testify or to give oral evidence.

Section 62A of the Evidence Act (Cap. 97), provides an exception to the “default position”, where a witness may testify in Singapore civil proceedings via video link. Needless to say, such an exception is not granted as of right and permission / leave from the courts must be sought. (see *Anil Singh Gurm v J S Yeh & Co* and another [2020] SGCA 5 and *Wang Xiaopu v Koh Mui Lee* [2022] SGHC 54)

IMPORTANCE (OR NOT) OF PHYSICAL ATTENDANCE

The underlying principles for such an emphasis on the physical attendance of witnesses at trial are thought to be well settled. In *Bachmeer Capital Ltd v Ong Chih Ching and others* [2018] 4 SLR 29, for example, the court made clear the following:-

“18 Whilst many meetings in the business world now take place by video conference, as did many of the Case Management Conferences in this case, courts and international tribunals still attach importance to being able to see and assess the demeanour of the ...

witness as part of the assessment of the credibility of the witness's evidence. Equally, there is a degree of disadvantage for a party in carrying out cross-examination of a witness by video link, compared to the witness being present in court. Although video links allow the witness to be seen and heard, there is still a degree of detachment between the court and the witness where evidence is given by video link, which is not there when the witness is present in the court. Whilst that is not of such concern where the witness's evidence does not go to a central issue, it is preferable for the court to have the witness physically present where the evidence is of importance to a central issue."

That said, in *Wang Xiaopu v Koh Mui Lee* [2022] SGHC 54, the High Court (citing *Anil Singh Gurm v J S Yeh & Co* and another [2020] SGCA 5) whilst ultimately not granting leave in that case and noting that "the perspective of the litigants, who come to court seeking justice, should not be forgotten" and "their perception of how the trial unfolds is also important", adopted a slightly more nuanced view with regards to the importance of one's physical attendance at trial:-

- the court's assessment of a witness's credibility seldom hinges on their demeanour when on the stand, whether the witness testifies remotely or in person, makes little difference as to the court's assessment of their credibility;
- it is also unclear whether witnesses are necessarily more inclined to tell the truth when testifying in person than when testifying via video link

APPLICABLE PRINCIPLES FOR PERMISSION

The case law makes it clear that the courts have a "broad discretion" to receive oral evidence by video link and is not constrained in the factors that it may take into account in determining whether or not to grant such permission.

The following principles, however, are clear:-

- An application for a witness to testify via video link applies in a situation if that witness is "unable" to testify in Singapore and not merely because he / she is merely "unwilling" to.
- "The plain and ordinary meaning of the word "unable" implies a lack of choice on the witness's part. As such, the reason given by the witness for not travelling to Singapore must be one relating to circumstances outside his or her control."
- An inability to travel to Singapore ought to be borne out of a "physical or legal inability" (i.e. a medical condition, travel restrictions or real and substantial threats to personal safety).
- A lower threshold for granting leave applied to "non-party witnesses" who are ordinarily not "obliged to give evidence" (as opposed to an actual "party to the litigation").

- Where the courts are dealing with a “party to the litigation”, it is “incumbent upon [that party] to make the necessary arrangements to testify at trial”. Ultimately, a party (or witness) who desires the fruits of a litigation brought in a particular forum should generally be expected to attend proceedings in the court of that forum to obtain justice.

CONCLUSION

It suffices to state that the line between the “default position” and “exception” is by no means a clear one. The “broad discretion” that the courts have to depart from the “default position” ultimately makes it harder to predict with any degree of certainty where the court’s decision would fall.

In *Anil Singh Gurm v J S Yeh & Co and another* [2020] SGCA 5, for example, it was undisputed both in the High Court and on appeal that the witness in question “was not unable to give evidence in Singapore but was merely unwilling to do so ... It was undisputed that the sole reason why he did not want to travel to Singapore was to avoid possible prosecution ...”. Even so, after taking into account all the circumstances of the case, it was ultimately still decided that it was appropriate for permission to be granted for that witness to give oral evidence by video link from outside Singapore.

In practical terms, therefore, it would bode well for parties to strategize the issue of their witness line-up well ahead of time and not mistakenly assume that all witnesses would naturally be made to attend trial in Singapore. Particularly for multi-jurisdictional disputes, parties must anticipate the need for co-operation with foreign based counsel to conduct watching briefs and invigilate video-linked testimonies, amongst other administrative arrangements.

For more information on the article, or if you wish to learn more about the topics discussed, please contact:-



Mark LEE

Managing Director
mark.lee@mlclaw.com.sg



Sarah YEO

Director
sarah.yeo@mlclaw.com.sg

Mark Lee Chambers Law Corporation is a boutique litigation and arbitration firm specialized in high stakes complex litigation with a particular focus in corporate law, joint ventures, shareholder and boardroom related matters.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by ML Chambers Law Corporation. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval.