

**Bills Committee on
Evidence (Miscellaneous Amendments) Bill 2002**

**Response by the Administration to issues raised by members at the
meeting on 14 February 2003
on Part II of the Bill**

This paper is a response to the following issues raised at the Bills Committee meeting on 14 February 2003, namely:

- a. to explain whether the same threshold specified in proposed section 79I(2) of the Criminal Procedure Ordinance (“CPO”) would apply to both civil and criminal proceedings in respect of the giving of evidence by way of live television link, and if not, what were the differences;
- b. to provide the number of cases (both civil and criminal) in the past three years where a party had requested to obtain the evidence of an overseas witness;
- c. to address members’ concern about the rights and immunities of overseas witnesses giving evidence via live television link and how to ensure that adequate safeguards were provided to such witnesses;
- d. to provide information on the scope of the rules to be made by the Chief Justice under the proposed section 79L of the CPO.

Threshold for granting permission for giving evidence via live TV link in civil and criminal proceedings

The use of live TV link in civil proceedings

2. Live TV link can be used for the taking of evidence from a witness outside Hong Kong in civil proceedings in Hong Kong. The

basis for the admission of overseas evidence obtained via live TV link is set out in Order 38, rule 3 of the Rules of High Court and section 47 of the Evidence Ordinance.

3. Order 38, rule 3 of the Rules of the High Court provides that:

“(1) Without prejudice to rule 2, the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at the trial-

- (a) by statement on oath of information or belief, or
- (b) by the production of documents or entries in books, or
- (c) by copies of documents or entries in books, or
- (d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact.”

4. According to the English case *Garcin v. Amerindo Investment Advisors Ltd* [1991]1WLR1140, the court has power under rule 3 of Order 38 of the UK’s Rules of the Supreme Court to determine the manner in which evidence was to be given provided that the evidence concerned was legally admissible. Order 38, rule 3 of the UK’s Rules of the Supreme Court is identical to the Order 38, rule 3 of the Hong Kong’s Rules of the High Court.

The Garcin’s case

5. The witness in the *Garcin’s case* was in the United States. The issue of the case was whether the court has power under rule 3 of Order 38 of the Rules of the Supreme Court to order that evidence of a witness in the United States be given by means of a television linkage. The question was whether the evidence of a witness given in this manner was legally admissible.

6. The English court held that, under section 2 of the Civil Evidence Act 1968, if the witness made an oral statement in the United

States, the statement would be admissible if it could be proved by a person who heard it. Further, under section 10 of the Civil Evidence Act 1968, any video tape of the examination and cross-examination would be similarly admissible as a document in which the statement was made. Therefore, evidence given by live TV link was admissible in evidence.

Hong Kong's Evidence Ordinance

7. Before the coming into effect of the Evidence (Amendment) Ordinance 1999, Ord. No. 2 of 1999, the Hong Kong equivalence to sections 2 and 10 of the Civil Evidence Act 1968 were sections 47 and 55 of the Evidence Ordinance. By the 1999 amendment, sections 46 to 55 of the Evidence Ordinance were repealed and replaced by a new part in order to abolish the hearsay rules in civil proceedings. However, having considered the reasoning of the *Garcin's case*, the 1999 amendment did not affect the admissibility of overseas live TV link evidence in civil proceeding.

Comparison of the relevant provisions in the Evidence Ordinance before and after the amendment in 1999

Sections 47 and 55 of Evidence Ordinance before the 1999 amendment / sections 2 and 10 of the Civil Evidence Act 1968 (the provisions considered by the <i>Garcin's case</i>)	Evidence Ordinance after the 1999 amendment
<p>Section 2 of the Civil Evidence Act 1968 provides that “a statement made, whether orally or in a document by any person, whether called as a witness in [civil] proceedings or not shall be admissible as evidence of any fact stated therein.....”</p> <p>Thus, an oral statement made by a witness in the United States would be admissible under section 2 of the Civil Evidence Act 1968 if proved by the one who heard it.</p>	<p>Section 47 provides that “evidence shall not be excluded on the ground that it is hearsay” The new provision enlarges the scope of hearsay evidence that is admissible. Therefore, for the present purpose, the position remained unchanged. The person who heard the evidence can still prove the oral statement made by the witness abroad.</p>

Because of section 10 of the Civil Evidence Act 1968, video tapes of the examination and cross-examination would be similarly admissible as a document in which the statement was made.	The definition of “document” in section 46 is wide enough to cover a video tape. Video tape, as hearsay evidence, is admissible under section 47 of the Evidence Ordinance.
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A copy of the *Garcin’s case* and sections 2 and 10 of the Civil Evidence Act 1968 is enclosed at **Annex A** for reference.

8. The reason that live TV link can be used as an option in civil proceedings for the taking of evidence is that the evidence is itself admissible. There are no specific statutory rules adopted for this purpose. The permission is granted as a matter of the general discretion of the court. The Administration considers that since the option of live TV link already exists in the civil regime and the existing arrangement works, it may not be desirable to change the law in respect of the use of live TV link in civil proceedings. Therefore, Part II of the Bill does not apply to civil proceedings.

Live TV link in criminal proceedings

9. The above rationale for civil cases cannot apply to criminal proceedings as the rules of evidence for criminal and civil proceedings are very different. The hearsay rule under section 47 of the Evidence Ordinance does not apply to criminal proceedings nor does the court have the general power under rule 3, Order 38 of the Rules of the High Court. Therefore, for criminal proceedings, there is a need to make specific provisions to enable such evidence to be admissible.

10. Given the differences of the evidential rules, it is inappropriate for criminal cases to follow the law that applies to civil cases. The Administration therefore considers it more appropriate to enact a new set of procedures and criteria for criminal proceedings. Each application will be considered by the court on its own merits for the purposes of conducting a fair and effective trial.

Number of cases (both civil and criminal) in the past three years where a party had requested to obtain the evidence of an overseas witness

11. The Department of Justice does not keep a comprehensive record of the number of cases where a party had requested to obtain the evidence of an overseas witness. As far as we are aware, the figures are as follows:

a. *Criminal cases*

Year	Number of requests made by the prosecution	Number of prosecution witnesses actually came to Hong Kong
2000	78	78
2001	60	56
2002	53	50

b. *Civil cases*

During the past 3 years, there were at least 10 witnesses outside Hong Kong coming to Hong Kong to give evidence in cases where the HKSAR Government was a party. Live TV link was not used in those cases.

Rights and immunities of overseas witnesses giving evidence via live television link and how to ensure that adequate safeguards were provided to such witnesses

12. Under the proposed section 79J of the Criminal Procedure Ordinance (clause 16 of the Bill), the place from which a witness outside Hong Kong is giving evidence will be deemed to be part of the courtroom in Hong Kong. A witness giving evidence in the overseas location will enjoy the same privilege and will be subject to the same rules of procedure as a witness physically giving evidence in a Hong Kong courtroom.

13. The court is given a general discretion as to whether an application for evidence to be given via live TV link should be granted. It is expected that the court will only exercise its discretion in a manner that is in the interests of justice and not prejudicial to the defendant's right to a fair trial.

Information on the scope of the rules to be made by the Chief Justice under the proposed section 79L of the CPO

14. A proposal for the rules is enclosed at **Annex B** for members' information.

Department of Justice
March 2003

#64085

*GARCIN AND OTHERS v. AMERINDO INVESTMENT
ADVISORS LTD. AND OTHERS

[1988 G. No. 2903]

1991 June 6, 7

Morritt J.

Evidence—Witness—Examination abroad—Plaintiffs seeking transmission of evidence of overseas witness by video conferencing—Whether jurisdiction to order television evidence in civil action—R.S.C., Ord. 38, r. 3

The plaintiffs brought an action against the defendants claiming payment of sums due under an investment management agreement under which the plaintiffs' portfolios were held by a firm of investment brokers in New York. In the course of the action the plaintiffs alleged that the defendants had made false representations about the value of the portfolios and that the third defendant had provided a bogus statement purporting to come from the brokers, created by cutting out of the original document the parts which showed the liabilities on the account, and photocopying it so as to show an apparently complete account disclosing only the assets. The officer of the brokers who had been concerned in the preparation of the original document was not willing to come to England to give evidence in the action. The defendants therefore applied to the court for an order under R.S.C., Ord. 39 that letters of request be sent to the appropriate judicial authority in New York seeking his examination on oath in New York. The plaintiffs opposed the defendants' application and proposed that the evidence be received by the examination of the witness on oath in New York with counsel in London examining him by means of a video link. The defendants maintained that the court had no jurisdiction to make an order allowing the receipt of evidence by live television link in a civil action.

On the defendants' application for the grant of letters of request and on the plaintiffs' application under R.S.C., Ord. 38, r. 3¹ for an order that the evidence be given by television linkage:—

Held, granting the plaintiffs' application, that since the oral evidence of an overseas witness recorded on video tape would be admissible as a document under sections 2 and 10 of the Civil Evidence Act 1968 the transmission of such evidence by television fell squarely within the wording of R.S.C., Ord. 38, r. 3, and the court had jurisdiction to make an order allowing its receipt; and since the receipt of the evidence in that manner was cheaper and more expeditious than the procedure by letters of request and did not preclude recourse to other means if it proved unsatisfactory, the court in the exercise of its discretion would make the order sought by the plaintiffs (post, pp. 1142d-f, 1143f-g, 1145d-e).

No cases are referred to in the judgment or were cited in argument.

APPLICATION

In an action against the defendants, Amerindo Investment Advisors Ltd., Amerindo Management Ltd. and Albert Vilar, the plaintiffs,

¹ R.S.C., Ord. 38, r. 3: see post, p. 1142b-c.

A Alberto Garcin, Lorenza Garcin and Garveral Inc., claimed (1) repayment of sums due to the plaintiffs pursuant to the terms of an investment management agreement between the first and second plaintiffs and the first and second defendants made on 17 February 1984; (2) damages; (3) an account; (4) payment of all sums due pursuant to such account; (4A) payment of a specific sum put by the plaintiffs at between U.S.\$700,000 odd and U.S.\$1.4m. odd; (4B) repayment of U.S.\$395,694 odd alleged to have been converted by the defendants and/or of which the defendants were said to be constructive trustees for the plaintiffs; and (4C) repayment of U.S.\$150,000 odd allegedly overpaid by the first and second defendants for a quantity of shares bought for the plaintiffs' account.

The plaintiffs, inter alia alleged that the third defendant, Mr. Vilar, at a meeting in Guadalajara in October 1986, in order to induce the plaintiffs to maintain their investments with the first and second defendants, falsely represented to the plaintiffs that the M1 account held by Merrill Lynch Prencce Fenner & Smith Inc. was worth a total of U.S.\$2.4m. odd when the true position was that the account was worth only some U.S.\$300,000, in that, although the stocks held to the credit of the account were indeed worth some U.S.\$2.4m. the account was leveraged to the extent of about U.S.\$2.1m. The plaintiffs contended that in support of this false representation the third defendant presented to the first and second plaintiffs a bogus statement purportedly emanating from Merrill Lynch for the period from 30 August 1986 to 26 September 1986, which showed the overall value of security positions in the account but omitted to show the leverage thereon. The plaintiffs alleged that that document was not a genuine Merrill Lynch statement for the period but a composite copy of selected parts of the two pages of the relevant Merrill Lynch statement for the relevant period. The provenance and/or genuineness of the one page Merrill Lynch statement for the period from 30 August 1986 to 26 September 1986 for the M1 account was of central importance in the case.

The defendants applied under R.S.C., Ord. 39 for letters of request addressed to the competent judicial authority of the United States District Court for the Southern District of New York, in the State of New York, U.S.A. for the examination on oath of Merrill Lynch and Robert St. Angelo, a satisfactory spokesman for Merrill Lynch and the manager concerned with the making of the original document. The plaintiffs objected to the grant of the letters of request on the ground that the procedure would necessitate an adjournment of three to four months. They therefore sought an order under R.S.C., Ord. 38, r. 3 that the evidence of Mr. St. Angelo be given by television linkage.

The facts are stated in the judgment.

A. D. Colman Q.C. and Jeffrey Gruder for the plaintiffs.
Jonathan Marks for the defendants.

MORRITT J. The first question for my decision is whether R.S.C., Ord. 38, r. 3 gives me jurisdiction to order that evidence of a particular fact or facts may be given by a particular witness in the United States by means of a television linkage between him in the United States and this court. If I conclude that I have such jurisdiction, the question will then arise whether I should exercise it.

The general rule, as reproduced in Ord. 38, r. 1 is that any fact required to be proved at the trial by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court. But that requirement is subject to any other provision of the Rules of the Supreme Court, the Civil Evidence Acts 1968 and 1972 and any other enactment relating to evidence. Ord. 38, r. 3 provides:

"(1) Without prejudice to rule 2, the court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial, in such manner as may be specified by the order. (2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at the trial (a) by statement on oath of information or belief, or (b) by the production of documents or entries in books, or (c) by copies of documents or entries in books, or (d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact."

Thus the court has power to determine the manner in which evidence is given but does not, as it seems to me, have power to enlarge the evidence which may be given beyond that which is legally admissible, except possibly in the particular categories set out in paragraph (2).

Accordingly the first point to consider is whether evidence given by a witness abroad by means of a television linkage is admissible at all. Such evidence would be given by the witness in the place where he made his oral statement; namely, the United States. As such, it would be admissible under section 2 of the Civil Evidence Act 1968 if proved by one who heard it. Moreover, any video tape of the examination and cross-examination would be similarly admissible as a document in which the statement was made: see section 10. Thus, if both parties and the witness co-operate, a video tape of the examination and cross-examination of a witness overseas would be admissible in evidence in proceedings in England. Moreover, in such a case, the evidence so obtained would be of greater weight than the ordinary Civil Evidence Act statement, because the witness would have been cross-examined and the judge would have had some opportunity to observe the demeanour of the witness.

But the defendants do not consent to such a procedure. They contend that I have no jurisdiction to make the order sought. First, they point to the provisions of section 32 of the Criminal Justice Act 1988 which came into force in November 1990 in relation to certain classes of prosecution. Subsections (1) and (3) provide:

"(1) A person other than the accused may give evidence through a live television link on a trial on indictment or an appeal to the Criminal Division of the Court of Appeal or the hearing of a reference under section 17 of the Criminal Appeal Act 1968 if— (a) the witness is outside the United Kingdom . . . (3) A statement made on oath by a witness outside the United Kingdom and given in evidence through a link by virtue of this section shall be treated for the purposes of section 1 of the Perjury Act 1911 as having been made in the proceedings in which it is given in evidence."

Subsections (4) and (5) authorise the making of rules necessary or expedient for the purposes of the section.

A From those provisions the defendants derive two propositions; namely, that it is for Parliament to decide whether to introduce a similar alteration to the general principle that evidence is given orally and in court in the case of civil proceedings. Secondly, they contend by reference to section 32(3) of the Act of 1988 and section 1(1) and (5) of the Perjury Act 1911, that there is no sanction under English law for a knowingly false answer to the question. I do not think either of those points requires me to hold that R.S.C., Ord. 38, r. 3 does not confer the necessary jurisdiction.

B Prior to the Criminal Justice Act 1988 there was no provision applicable to criminal trials comparable to Ord. 38, r. 3. Thus, the fact that section 32 of the Criminal Justice Act 1988 was confined to criminal proceedings does not indicate a lack of jurisdiction in civil proceedings. C If anything, it suggests the opposite. Similarly, the fact that section 1 of the Perjury Act 1911 would impose no sanction for knowingly false answers does not indicate a lack of jurisdiction, because there is no such sanction in respect of a statement made by a person overseas which is admissible under section 2 of the Civil Evidence Act 1968.

D The defendants also relied on the fact that Ord. 38, r. 3 does not enable this court to compel a witness overseas to give evidence or, if he is prepared to do so, to compel him to answer questions put to him which under English law he could be required to answer. This is true, but it does not seem to me to go to jurisdiction under Ord. 38, r. 3 so much as the exercise of my discretion, if I have one, and the weight to be given to the evidence so obtained if I exercise it. An order under Ord. 38, r. 3 does not have to specify that the evidence must be given by a particular witness or that the evidence of a particular fact must be given in the manner specified in the order to the exclusion of all other evidence relevant to that fact. E

F I was told that facilities for a television linkage have existed for about 10 years but, except in an arbitration the details of which could not be recalled, no counsel was aware of any case in which an attempt had been made to use those facilities in conjunction with Ord. 38, r. 3 to obtain evidence from a witness abroad. There may be many reasons for this, but it is not in my judgment any ground for denying jurisdiction under Ord. 38, r. 3 if the words of the rule fairly admit it. Given that the evidence of the overseas witness is admissible, then its transmission to the court by means of the television linkage is, in my judgment, a manner in which such evidence is given so as to fall squarely within the words of Ord. 38, r. 3. I conclude therefore that I have jurisdiction to make the order sought. G

H In the action, the plaintiffs claim payment of sums due to them by the defendants as their discretionary investment managers. Their money and investments were held by a subsidiary of Merrill Lynch and from time to time accounts were provided by Merrill Lynch to the defendants and were produced by the defendants to the plaintiffs. The defendants claim that they have already repaid to the plaintiffs all money due to them. The plaintiffs claim that this is not so according to the accounts the defendants have produced, which they contend are binding on the defendants as a matter of law.

I In relation to that issue, it is the allegation of the plaintiffs that the third defendant on his own behalf, and as agent for the other defendants, produced to the first plaintiff an account apparently emanating from Merrill Lynch, which he knew to be false. The document so produced is

a photocopy said to have been created by the defendants by cutting out from the original Merrill Lynch account the parts which showed the liabilities on the account and pasting the rest together and photocopying it so as to show in an apparently complete account only the assets. This allegation was made for the first time in the opening speech by counsel for the plaintiffs, who accepted that the defendants must have an adequate opportunity to deal with it.

The defendants response was to refer to two other comparable "short form statements" obtained from Merrill Lynch under subpoena from Merrill Lynch in New York, and to apply for letters of request addressed to the appropriate authority in the State of New York for the examination of Mr. Robert St. Angelo, an officer of Merrill Lynch, and the production of all Merrill Lynch's files relating to all accounts of the plaintiffs with Merrill Lynch. The topics on which the letter of request seeks the examination of Mr. St. Angelo are described in paragraph 19 in the following terms:

"The court is interested in whether or not the one page Merrill Lynch statement for the period from 30 August 1986 to 26 September 1986 for the Merrill Lynch account is a genuine document emanating from Merrill Lynch and in all matters concerning the provenance and making of that document. There are two other statements in similar form before the court, a statement for the period from 1 January 1986 to 31 January 1986 for the M1 account and a statement for the period from 28 June 1986 to 25 July 1986 for the G2 account. The court is therefore interested in all matters concerning the provenance and making of those documents, in whether or not other such documents exist and, if so, in their number and whereabouts and all matters concerning their provenance and making."

I was told that if I made the order the defendants sought it would necessitate an adjournment of the trial for about three or four months. The application for an order for such letters of request was opposed by the plaintiffs. They are resident in Mexico and have come to England to prepare to give evidence and attend the trial at no little expense. They contended that the order was not necessary for the purposes of justice, at least at this stage, because Mr. St. Angelo is prepared to give oral evidence on oath in New York, transmitted by the television linkage to this court, but is not prepared to attend the trial here. Accordingly, they seek an order under R.S.C., Ord. 38, r. 3.

On the question of discretion, as on jurisdiction, the defendants relied on the fact that Mr. St. Angelo could not be compelled to answer a question put to him, and that there would be no sanction under English law to reinforce the oath he is apparently prepared to take. They point to the fact that the information they have received from counsel in New York for Merrill Lynch as to what Mr. St. Angelo would say is materially different from the information similarly obtained by the plaintiffs. They are concerned that the procedure suggested by the plaintiffs will not compel Merrill Lynch to produce the documents they seek, so that, as they suggest, the search for them will not be as thorough as it would otherwise be. There is no doubt that the procedure suggested by the plaintiffs will be much cheaper and more expeditious

A than the procedure suggested by the defendants, or the alternative possible procedure raised this morning, namely, the appointment of a commissioner.

B So far as documents are concerned, I have no reason to think that which the defendants want, and the question of what searches have been made could be pursued in the examination of Mr. St. Angelo. If, as I am told, Mr. St. Angelo is prepared to give evidence on oath, I should not assume at this stage that the lack of sanction would lead him to give false answers which he would not have given if he gave oral evidence here. Nor should I assume now, given his apparent willingness to give evidence, that when the television linkage is set up he will then refuse to answer. Moreover, as the plaintiffs accepted, if I make the order sought by them, and Mr. St. Angelo's evidence in the event turns out to be unsatisfactory in a manner which might be overcome by making the order for letters of request or for evidence on commission sought by the defendants, then the defendants can at that stage renew their application. With some slight redrafting, paragraph 19 of the letters of request can be used to set out the particular facts required by Ord. 38, r. 3 to be contained in any order I make.

D In all these circumstances, it seems to me that the opportunity provided by Ord. 38, r. 3 to obtain the evidence of Mr. St. Angelo by means of modern technology should be seized. It would be much cheaper than letters of request or evidence on commission. It will not now and may never be necessary to have a substantial, if any, adjournment, and if in the event it proves to be an unsatisfactory method of obtaining evidence from Mr. St. Angelo it will not preclude an order for letters of request or for evidence on commission hereafter. Accordingly, I will make an order under Ord. 38, r. 3, in a form to be considered with counsel, for the evidence of Mr. St. Angelo on the particular facts referred to in paragraph 19 of the letters of request to be given by television linkage.

F I refuse at this stage to make an order for letters of request as sought by the defendants, but without prejudice to a renewal of that application hereafter, or alternatively for an application hereafter for evidence to be given on commission.

Order accordingly.

G Solicitors: Howard Kennedy; Lovell White Durrant.

S. W.



Civil Evidence Act 1968

1968 CHAPTER 64

An Act to amend the law of evidence in relation to civil proceedings, and in respect of the privilege against self-incrimination to make corresponding amendments in relation to statutory powers of inspection or investigation.
[25th October 1968]

B HE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

HEARSAY EVIDENCE

- 1.—(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.
- (2) In this section "statutory provision" means any provision contained in, or in an instrument made under, this or any other Act, including any Act passed after this Act.
- 2.—(1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall be admissible to this section and to rules of court; of any fact stated therein of which direct oral evidence by him would be admissible.

PART I

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement—

(a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except—

(i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

(ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

(3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it:

Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal), it may be proved in any manner authorised by the court.

3.—(1) Where in any civil proceedings—

(a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865; or

(b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be

Witness's previous statement, if proved, to be evidence of facts stated.
1865 c. 18.

PART I

made evidence in those proceedings; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

4.—(1) Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement—

(a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

5.—(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

PART I
1959 c. 22.

Judicature (Consolidation) Act 1925, section 102(2) of the County Courts Act 1959 or any other enactment restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court with respect to any matter mentioned in the foregoing provisions of this section or the operation of any rules of court made with respect to any such matter.

Admissibility
of certain
hearsay
evidence
formerly
admissible at
common law.

9.—(1) In any civil proceedings a statement which, if this Part of this Act had not been passed, would by virtue of any rule of law mentioned in subsection (2) below have been admissible as evidence of any fact stated therein shall be admissible as evidence of that fact by virtue of this subsection.

(2) The rules of law referred to in subsection (1) above are the following, that is to say any rule of law—

- (a) whereby in any civil proceedings an admission adverse to a party to the proceedings, whether made by that party or by another person, may be given in evidence against that party for the purpose of proving any fact stated in the admission;
- (b) whereby in any civil proceedings published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated therein;
- (c) whereby in any civil proceedings public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein; or
- (d) whereby in any civil proceedings records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated therein.

In this subsection "admission" includes any representation of fact, whether made in words or otherwise.

(3) In any civil proceedings a statement which tends to establish reputation or family tradition with respect to any matter and which, if this Act had not been passed, would have been admissible in evidence by virtue of any rule of law mentioned in subsection (4) below—

- (a) shall be admissible in evidence by virtue of this paragraph in so far as it is not capable of being rendered admissible under section 2 or 4 of this Act; and
- (b) if given in evidence under this Part of this Act (whether by virtue of paragraph (a) above or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down;

PART I

and, without prejudice to paragraph (b) above, reputation shall for the purposes of this Part of this Act be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed.

(4) The rules of law referred to in subsection (3) above are the following, that is to say any rule of law—

- (a) whereby in any civil proceedings evidence of a person's reputation is admissible for the purpose of establishing his good or bad character;
- (b) whereby in any civil proceedings involving a question of pedigree or in which the existence of a marriage is in issue evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of the marriage, as the case may be; or
- (c) whereby in any civil proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing.

(5) It is hereby declared that in so far as any statement is admissible in any civil proceedings by virtue of subsection (1) or (3)(a) above, it may be given in evidence in those proceedings notwithstanding anything in sections 2 to 7 of this Act or in any rules of court made in pursuance of section 8 of this Act.

(6) The words in which any rule of law mentioned in subsection (2) or (4) above is there described are intended only to identify the rule in question and shall not be construed as altering that rule in any way.

10.—(1) In this Part of this Act—

"computer" has the meaning assigned by section 5 of this Act;

"document" includes, in addition to a document in writing—

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

Interpretation
of Part I, and
application to
arbitrations,
etc.

PART I

"film" includes a microfilm;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In this Part of this Act any reference to a copy of a document includes—

(a) in the case of a document falling within paragraph (c) but not (d) of the definition of "document" in the foregoing subsection, a transcript of the sounds or other data embodied therein;

(b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;

(c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and

(d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not,

and any reference to a copy of the material part of a document shall be construed accordingly.

(3) For the purposes of the application of this Part of this Act in relation to any such civil proceedings as are mentioned in section 18(1)(a) and (b) of this Act, any rules of court made for the purposes of this Act under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 shall (except in so far as their operation is excluded by agreement) apply, subject to such modifications as may be appropriate, in like manner as they apply in relation to civil proceedings in the High Court:

1925 c. 49.

1959 c. 22.

Provided that in the case of a reference under section 92 of the County Courts Act 1959 this subsection shall have effect as if for the references to the said section 99 and to civil proceedings in the High Court there were substituted respectively references to section 102 of the County Courts Act 1959 and to proceedings in a county court.

(4) If any question arises as to what are, for the purposes of any such civil proceedings as are mentioned in section 18(1)(a) or (b) of this Act, the appropriate modifications of any such rule of court as is mentioned in subsection (3) above, that question shall, in default of agreement, be determined by the tribunal or the arbitrator or umpire, as the case may be.

PART II

MISCELLANEOUS AND GENERAL

Convictions, etc. as evidence in civil proceedings

11.—(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(5) Nothing in any of the following enactments, that is to say—

(a) section 12 of the Criminal Justice Act 1948 (under 1948 c. 58. which a conviction leading to probation or discharge is to be disregarded except as therein mentioned);

**The scope of the subsidiary legislation to be made under
section 79J of the Criminal Procedure Ordinance (Cap. 221)**

The proposal

1. It is proposed that the “Live Television Link (Overseas Witnesses) Rules” (“the Rules”) be made under section 79L of the Criminal Procedure Ordinance (“CPO”).

2. The Rules will be made by the Chief Justice and come into operation on the day when Part II of the Evidence (Miscellaneous Amendments) Ordinance 2002 comes into operation.

3. Although the option of live television link is available at all levels of court, the Rules will only deal with those hearings that are within the scope of Part IIIB of the CPO, i.e. those before magistrates, the District Court and the Court of First Instance.

4. An application for the examination of a witness via live television link should be given to the Registrar of the High Court, the Registrar of the District Court or the First Clerk of the magistracy, depending on where the proceeding is to take place. The application will be in a prescribed form. For this purpose, a form modelled on Schedule 1 to the Live Television Link and Video Recorded Evidence Rules (Cap. 221, sub. leg. J) will be adopted and annexed to the Rules. The form should contain the grounds for evidence to be given via live television link.

5. The other party to the proceedings concerned will be given an opportunity to oppose the application. The court will decide the application in a hearing. If there is no opposition from any other party concerned, the court may determine the application without a hearing.

6. The court should notify all parties concerned of its decision regarding the application. If leave is granted, the court should state in the notification the country in which the witness will give evidence, the place (if known) where the witness will give evidence, the name of the witness (only

when the witness is a prosecution witness, expert witness or alibi witness) and any conditions which the court may wish to specify.

7. Since the witness is physically out of the courtroom, it is desirable for the court to exercise some control, or at least to be informed of anything at the overseas location that may affect the quality of the evidence. It is proposed that the court may, as a condition of the grant of leave, specify a person who is to be present at the overseas location where evidence is being given. The court may at any time during the hearing require that person to answer on oath the circumstances in which the evidence is being given.

8. An application should be made within a time limit. However, flexibility will be needed for various reasons. It is proposed that an application may be made after the expiry of the time limit for the application, subject to the leave of the court.

9. As documents may be put to a witness during a trial, it is necessary to provide for the way in which a document will be transmitted between the courtroom in Hong Kong and the overseas location. If the original of a document is at the place where the witness is giving evidence, the court will only have a transmitted copy. In most circumstances, the transmitted copy is as good as the original and, for the expediency of the trial, the transmitted copy should be admitted into evidence instead of the original. For this purpose, a provision will be added to displace the best evidence rule (a rule that prevents the admission of evidence where better evidence, i.e. the original, is available) and to make sure that the authenticity of the transmitted copy will not be questioned on the mere ground that it is a transmitted copy.

CRIMINAL PROCEDURE ORDINANCE

(Cap 221)

Notice of Application for Leave to Use

Television Link under Section 79B

- An application should be made within 28 days after the date of the committal for trial of the defendant, the consent to the preferment of a bill of indictment in relation to the case, the order of transfer under section 88 of the Magistrates Ordinance (Cap 227) or the setting down of the case for trial before a magistrate. This form may also be used where an extension of time has been granted for the making of this application.
- A copy of this form must be given at the same time to the other party or parties to the case.

Case Details

The Court Case Number:

Date of: committal for trial*: *Delete as appropriate

consent to preferment of bill of indictment*:

order of transfer*:

setting down of case for trial before magistrate*:

Defendant(s): State the name(s) of the defendant(s) to whom this application relates

Application

Name of Applicant:

Name of Applicant's Solicitor:

Address of Solicitor:

Reference:

Charges

Give brief details of those charges to which this application applies

Witness-Please read the Notes beside this section before completing it.

Date of Birth:

Note:

If an application has been made to tender in evidence a vide recording of testimony from the witness, state the date and (if known) result of that application:

An application by the defence for evidence to be given through live television link need not disclose who that witness is except to the extent that the disclosure is required by section 65D of the Criminal Procedure Ordinance (Cap 221) or section 75A of the District Court Ordinance (Cap 336) (alibi) nor need it disclose the name of the person proposed to accompany the witness if this could lead to the identification of the witness. The witness will normally be accompanied by a court usher while giving evidence. If it is proposed that another person be present, give details.

If the Applicant is the prosecutor enter the name of the witness (otherwise leave blank):

Grounds for applying for evidence to be given by television link:

Name of the person who is proposed to accompany the witness:

Occupation of this person:

Relation to the witness of this person (if any):

Grounds for believing this person should accompany the witness:

.....

Signature of applicant

Date

or

applicant's solicitor

Application for leave to use television link after admission of a video recording.

Form