

LEGISLATIVE COUNCIL BRIEF

Evidence (Miscellaneous Amendments) Ordinance 2003
(23 of 2003)

LIVE TELEVISION LINK (WITNESSES OUTSIDE HONG KONG) RULES AND RULES OF THE HIGH COURT (AMENDMENT) (NO. 2) RULES 2015

INTRODUCTION

Section 17 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (“**Principal Ordinance**”) has, among others, introduced a new section 79L of the Criminal Procedure Ordinance (Cap. 221) (“**CPO**”). The new section 79L of CPO¹ empowers the Chief Judge of the High Court to make rules or give directions respecting the giving of evidence by way of a live television link under Part IIIB of the CPO. The Chief Judge of the High Court has exercised his power under the new section 79L of the CPO and made the Live Television Link (Witnesses Outside Hong Kong) Rules (“**LTVL(WOHK)R**” at **Annex A**).

A

2. The High Court Rules Committee² has also made the Rules of the High Court (Amendment) (No. 2) Rules 2015 (“**Amendment Rules**” at **Annex B**) under section 54 of the High Court Ordinance (Cap. 4).³

B

¹ The original new section 79L as inserted by section 17 of the Principal Ordinance had named the Chief Justice as the rule making authority. However, this was subsequently amended by section 19 of the Statute Law (Miscellaneous Provisions) Ordinance (Ord. No. 10 of 2005) which substituted the Chief Justice with the Chief Judge of the High Court.

² The High Court Rules Committee is constituted under section 55 of the High Court Ordinance (Cap. 4) which may make rules of court regulating and prescribing the procedure and the practice to be followed in the High Court (see also section 54(1) of the High Court Ordinance). The Committee is chaired by the Chief Judge and comprises, among others, barristers nominated by the Hong Kong Bar Association and solicitors nominated by the Law Society of Hong Kong.

³ Section 28(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that, “[w]here an Ordinance confers power on a person to make subsidiary

JUSTIFICATIONS

3. The Principal Ordinance was passed by the Legislative Council on 25 June 2003, and gazetted on 4 July 2003.

4. Part II of the Principal Ordinance relates to the use of live television link in criminal proceedings, and certain sections in that part of the Principal Ordinance namely, sections 12 to 19, 23 and 24 (“**Pending Sections**”) have not yet come into operation, pending finalization of the LTVL(WOHK)R and the Amendment Rules (collectively as the “**Rules**”).

5. The reasons for making the Rules are to set out the relevant rules for operation of the Pending Sections, and also to help bring the latter into operation as soon as practicable.

BACKGROUND

6. Section 1(2) of the Principal Ordinance provides that “Part II shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.”

7. Part II of the Principal Ordinance comprises sections 12 to 26 of the Principal Ordinance which amend the relevant sections of the Evidence Ordinance (Cap. 8), the Criminal Procedure Ordinance (Cap. 221), the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the Crimes Ordinance (Cap. 200), the Magistrates Ordinance (Cap. 227) and the Mutual Legal Assistance in Criminal Matters Regulation (Cap. 525 sub. leg. A) to facilitate the use of live television link in criminal proceedings.

8. Sections 20, 21, 22, 25 and 26 in Part II of the Principal Ordinance, which principally relate to requests to Hong Kong made by an appropriate authority from a place outside Hong Kong for taking evidence in Hong Kong for a criminal matter in that place under the Mutual Legal Assistance in Criminal Matters Ordinance, came into operation on 3 March 2006. As mentioned in paragraph 4 above, the remaining sections in Part II of the Principal Ordinance, namely the Pending Sections, have not yet come into operation, pending finalization of the Rules.

legislation ... (c) [the] subsidiary legislation may at any time be amended by the same person and in the same manner by and in which it was made”.

THE RULES

THE LTVL(WOHK)R

9. At present, the CPO does not provide for the taking of evidence from witnesses outside Hong Kong by live television link for the purposes of criminal proceedings in Hong Kong. Section 17 of the Principal Ordinance (being one of the Pending Sections) has introduced a new Part IIIB to the CPO which allows the court to permit a person, other than the defendant, to give evidence for Hong Kong criminal proceedings by way of live television link from a place outside Hong Kong. The LTVL(WOHK)R sets out the procedures in respect of the giving of evidence by way of live television link under the new Part IIIB of the CPO. The main provisions of the rules in the LTVL(WOHK)R are as follows:-

- (a) rule 1 provides that the LTVL(WOHK)R will come into operation on the day on which section 17 of the Principal Ordinance comes into operation;
- (b) rule 2 provides for the definitions of “court”, “live television link” and “officer of the court”. In particular, the definition of “live television link” follows the same meaning of the term under the new section 79H of the CPO as introduced by section 17 of the Principal Ordinance;
- (c) rule 3 sets out the procedure for making an application for the court’s permission for a witness to give evidence by live television link from a place outside Hong Kong under the new section 79I of the CPO;
- (d) rule 4 provides that other parties to the proceedings may oppose the application;
- (e) rule 5 provides that the court may determine an application under rule 3. In particular, it provides for the circumstances in which the court may determine the application without a hearing. It also provides that if the court decides to conduct a hearing in respect of the application, the hearing must, unless the court considers it necessary in the interests of justice to conduct all or parts of the hearing in camera, be conducted in open court;
- (f) rule 6 provides that the court may impose conditions for granting an application under rule 3, including that the witness is to give evidence in the presence of a person who is able and willing to answer under oath any question that the court may put as to the circumstances in which the evidence is given;
- (g) rule 7 provides for the putting of documents to witnesses who give evidence via a live television link;

- (h) rule 8 provides for the application for an extension of the period in which an application under rule 3 may be made, and an application for an extension of the period in which an opposition under rule 4 may be made; and
- (i) rule 9 provides that the court may, on the application of a party to a proceeding, abridge the time limit for the making of an application or opposition as specified in rule 3 and rule 4, if the court considers it fair and reasonable to do so.

THE AMENDMENT RULES

10. Whilst sections 20, 21, 22, 25 and 26 in Part II of the Principal Ordinance came into operation on 3 March 2006 to allow evidence be taken by way of a live television link from a person in Hong Kong,⁴ these sections are generally confined to the situations where a request to Hong Kong is made by an appropriate authority from a place outside Hong Kong for taking evidence for a criminal matter in that place under the Mutual Legal Assistance in Criminal Matters Ordinance. It remains that there is no general authority at present for Hong Kong courts to give assistance to a court or tribunal outside Hong Kong (“**requesting court**”) by ordering the examination of a witness via a live television link before a Hong Kong court for the purposes of criminal proceedings in the requesting court. When the Pending Sections come into operation (more specifically, sections 12 to 16 of the Principal Ordinance), the Court of First Instance will be able to give such assistance. To this end, the provisions in Order 70 of the Rules of the High Court (“**Order 70**”)⁵ would have to be amended for setting out the procedures for giving such assistance. The main proposals in the Amendment Rules for amending Order 70 are as follows:-

- (a) substituting references to “foreign court and tribunal” in Order 70 by “requesting court” in order to achieve consistency with Part VIII of the Evidence Ordinance (Cap. 8) in which the term “requesting court” is used;
- (b) amending rule 4(2) of Order 70 to make clear that it does not apply where examination of a witness is taken by way of a live television link by the requesting court. In parallel, a new rule 4(2A) to Order 70 is inserted to provide for the situation where examination of a witness is taken by way of a live television link by the requesting court;

⁴ See paragraph 8 above.

⁵ Order 70 sets out the detailed rules for “Obtaining Evidence For Foreign Courts, Etc.”

- (c) amending rule 6(1) of Order 70 to make clear that it does not apply where a witness is giving evidence to the requesting court by way of a live television link;
- (d) inserting a new rule 7 to Order 70 to provide for the drawing up, certification and transmission of minutes upon conclusion of an examination of a witness in Hong Kong by way of a live television link; and
- (e) making necessary consequential amendments to the rules in Order 70.

11. As regards the proposed amendment as stated in paragraph 10(b) above, the current arrangement under rule 4(2) of Order 70 is designed to facilitate the taking of written deposition evidence in Hong Kong by an examiner for subsequent transmission and use at trial in a foreign jurisdiction. The arrangement is not suitable for the contemporaneous examination of a witness in Hong Kong by way of a live television link by the requesting court. Accordingly, the Amendment Rules propose to amend rule 4(2) and to add a new rule 4(2A) to Order 70 to deal with the examination of a witness in Hong Kong by way of a live television link by the requesting court.

12. At present, rule 5 of Order 70 requires, among others, the examiner before whom an examination was taken to send the deposition to the Registrar who must certify it for use out of jurisdiction. Again, such provisions making reference to depositions are not suitable for the contemporaneous examination of a witness in Hong Kong by way of a live television link by the requesting court. Accordingly, the Amendment Rules propose to renumber rule 5 of Order 70 as rule 5(1) of Order 70, and to add a new rule 5(2) to Order 70 which makes clear that the renumbered rule 5(1) does not apply where examination of a witness is taken by a live television link by the requesting court. Instead, the Amendment Rules propose to introduce a new rule 7 of Order 70 to provide, in respect of such situation, inter alia, the following:-

- (a) the person before whom an examination is taken must draw up and certify minutes upon conclusion of the examination and cause the certified minutes to be sent to the Registrar; and
- (b) the Registrar must, if the request is sent to the Registrar by the Chief Secretary for Administration, send the minutes to the Chief Secretary for Administration or, if the request is sent to the Registrar by some other person in accordance with a Civil Procedure Convention, send the minutes to that other person respectively.

CONSULTATION

13. We attended before the Legislative Council Panel on Administration of Justice and Legal Services (“**Panel**”) to consult the Panel on the proposed Rules on 24 November 2014 (the “**Panel Meeting**”). At the Panel Meeting, the Panel did not raise any objection to the introduction of the Rules to the Legislative Council for negative vetting.

14. We have also consulted the Hong Kong Bar Association (“**Bar**”) and the Law Society of Hong Kong (“**LS**”) over the course of our preparation of the Rules. The Bar’s representative informed the Panel at the Panel Meeting that the Bar had no objection to the Rules. On the other hand, the President of LS informed the Panel that LS maintained its general objections to the Rules as previously expressed to us. Those objections are set out in LS’ written submission to us dated 12 February 2010 and 31 March 2011, and we have replied to LS on 19 August 2010 and 24 June 2011 respectively. These exchanges between DoJ and LS have been disclosed to the Panel by way of attachments to LC Paper No. CB(4)853/13-14(01). After hearing LS’ representations at the Panel Meeting, the Panel did not raise any objection to the introduction of the Rules to the Legislative Council.

IMPLICATIONS OF THE PROPOSAL

15. The Rules are in conformity with the Basic Law, including the provisions concerning human rights.

PUBLICITY

16. A press release will be issued and a spokesperson will be available for answering media enquiries.

LEGISLATIVE TIMETABLE

17. The legislative timetable is as follows:-

Publication in the Gazette	3 July 2015
Tabling at the Legislative Council for negative vetting	8 July 2015

18. The LTVL(WOHK)R will come into operation on the day on which section 17 of the Principal Ordinance comes into operation, and the Amendment Rules will come into operation on the day on which section 13 of the Principal Ordinance comes into operation. To this end, we aim to bring the Pending Sections (which include sections 13 and 17 of the

Principal Ordinance) into operation as soon as practicable after negative vetting of the Rules.

ENQUIRIES

19. Any enquiry on this brief can be addressed to Ms Adeline Wan, Senior Assistant Solicitor General at telephone number 2867 2847 or Mr Christopher Ng, Senior Government Counsel at telephone number 2867 4903.

Department of Justice
June 2015

#434102-v8B

Live Television Link (Witnesses outside Hong Kong) Rules

(Made by the Chief Judge under section 79L of the Criminal Procedure Ordinance (Cap. 221))

1. Commencement

These Rules come into operation on the day on which section 17 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) comes into operation.

2. Interpretation

In these Rules—

court (法庭) includes the District Court and a magistrate;

live television link (電視直播聯繫) means a system in which 2 places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time;

officer of the court (法院人員) means—

- (a) in relation to proceedings in the High Court, the Registrar of the High Court;
- (b) in relation to proceedings in the District Court, the Registrar of the District Court; or
- (c) in relation to proceedings before a magistrate, the first clerk of the magistracy.

3. Making applications

- (1) An application under section 79I of the Ordinance for permission for a witness to give evidence by way of a live television link from a place outside Hong Kong must be made

by giving a notice in the form specified by the Chief Judge to—

- (a) the officer of the court; and
 - (b) all other parties to the proceedings.
- (2) If the application is made for a witness to give evidence for a preliminary inquiry before a magistrate in respect of a charge, the application must be made within 42 days after the following date—
- (a) the date on which the defendant elects, or is deemed to have elected, under section 80C of the Magistrates Ordinance (Cap. 227) to have the charge heard at a preliminary inquiry; or
 - (b) the date on which the defendant elects under section 77A(5) of the District Court Ordinance (Cap. 336) to have the charge heard at a preliminary inquiry.
- (3) If the application is made for a witness to give evidence for a trial in the Court of First Instance in respect of a charge, the application must be made within 42 days after the following date—
- (a) if the charge has been heard at a preliminary inquiry before a magistrate, the date on which the defendant was committed for trial under section 85(2) of the Magistrates Ordinance (Cap. 227) in respect of the charge;
 - (b) if the defendant does not elect, and is not deemed to have elected, to have the charge heard at a preliminary inquiry before a magistrate—
 - (i) the date on which the defendant is committed for trial under section 80C(4) of the Magistrates Ordinance (Cap. 227) in respect of the charge; or

- (ii) the date on which an order of transfer of proceedings to the Court of First Instance is made under section 77A of the District Court Ordinance (Cap. 336) in respect of the charge;
 - (c) if an indictment is preferred under section 24A(1)(b) of the Ordinance by the direction or with the consent of a judge in respect of the charge, the date on which the judge gives the direction or consent;
 - (d) if the proceedings against the defendant are transferred to the Court of First Instance under an order made under section 4 of the Complex Commercial Crimes Ordinance (Cap. 394), the date on which the order is made;
 - (e) if the defendant is committed for trial in the Court of First Instance under an order made under section 79F(5) of the Ordinance, the date on which the order is made.
- (4) If the application is made for a witness to give evidence for a trial in the District Court in respect of a charge, the application must be made within 42 days after the following date—
- (a) if the proceedings against the defendant are transferred to the District Court under an order made under section 88 of the Magistrates Ordinance (Cap. 227), the date on which the order is made;
 - (b) if the proceedings against the defendant are transferred to the District Court under an order made under section 65F of the Ordinance, the date on which the order is made.
- (5) If the application is made for a witness to give evidence for a trial before a magistrate in respect of a charge, the application must be made within 42 days after the following date—

- (a) if the case is referred back to the magistrate by the Secretary for Justice under section 10 of the Ordinance, the date on which the Secretary for Justice refers the case back to the magistrate;
- (b) if the proceedings against the defendant are transferred before the magistrate under an order made under section 77A of the District Court Ordinance (Cap. 336), the date on which the order is made;
- (c) if the proceedings against the defendant are transferred before the magistrate under an order made under section 65F of the Ordinance, the date on which the order is made;
- (d) in any other case, the date on which the case is set down for trial before the magistrate.

4. Parties may oppose applications

A party who is given a notice under rule 3(1) may, within 14 days after the date on which the notice is given, oppose the application concerned by—

- (a) notifying the officer of the court and all other parties to the proceedings in writing of the opposition; and
- (b) giving reasons for the opposition in the notice of opposition.

5. Determination

- (1) The court may determine an application under rule 3 without a hearing if the officer of the court is not notified of any opposition to the application under rule 4 in the period within which the opposition may be made.
- (2) If the court determines the application without a hearing, the officer of the court must notify all parties to the proceedings of the determination.

- (3) If the court grants the application without a hearing, the notification under subrule (2) must state—
- (a) the country or territory in which the witness will give evidence;
 - (b) if known, the place from which the witness will give evidence;
 - (c) the name of the witness if—
 - (i) the witness is to give evidence for the prosecution (except where section 65DA(3) of the Ordinance applies); or
 - (ii) the witness is to give evidence for the defendant, and disclosure is required by section 65D or 65DA of the Ordinance or section 75A of the District Court Ordinance (Cap. 336); and
 - (d) the conditions, if any, imposed by the court under rule 6.
- (4) If the court decides to conduct a hearing in respect of the application (whether because an opposition is received or otherwise), the officer of the court must notify all parties to the proceedings of the time and place of the hearing.
- (5) The hearing must be conducted in open court unless the court, where it considers it necessary in the interests of justice, orders that all or part of the hearing is to be conducted in camera.

6. Court may impose conditions

- (1) If the court grants an application under rule 3, it may impose conditions on the permission given.
- (2) Without limiting subrule (1), the court may impose a condition that the witness is to give evidence in the presence of a person who is able and willing to answer under oath any

question the court may put as to the circumstances in which the evidence is given, including any question about—

- (a) any person who is present when the evidence is given; and
- (b) any matter which may affect the giving of the evidence.

7. Putting documents to witnesses

- (1) If it is necessary to put a document to a witness when the witness is giving evidence by way of a live television link from a place outside Hong Kong, the court may—
 - (a) if the document is at the courtroom in Hong Kong, permit—
 - (i) the transmission by any means of a copy of the document to that place; and
 - (ii) the putting of the copy so transmitted to the witness; and
 - (b) if the document is at that place, permit—
 - (i) the putting of the document to the witness; and
 - (ii) the transmission by any means of a copy of the document to the courtroom in Hong Kong.
- (2) If a document or a copy of it is put to a witness in accordance with subrule (1), the transmitted copy of the document is, until the contrary is proved, to be presumed to be a true copy of the document and to be admitted in evidence without further proof.

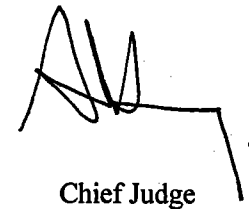
8. Extension of time

- (1) The court may—

- (a) extend the period of 42 days specified in rule 3(2), (3), (4) or (5) on the application of a party to the proceedings, either before or after its expiry; or
 - (b) extend the period of 14 days specified in rule 4 on the application of a party who is given a notice under rule 3(1), either before or after its expiry.
- (2) The application must—
- (a) be made in writing;
 - (b) specify the grounds on which it is made;
 - (c) in the case of an application under subrule (1)(b), be made within 28 days after the date on which the notice under rule 3(1) is given; and
 - (d) be given to—
 - (i) the officer of the court; and
 - (ii) all other parties to the proceedings.
- (3) The court may determine the application with or without a hearing.
- (4) If the court determines the application without a hearing, the officer of the court must notify all parties to the proceedings of the determination.
- (5) If the court decides to conduct a hearing in respect of the application, the officer of the court must notify all parties to the proceedings of the time and place of the hearing.
- (6) The hearing must be conducted in open court unless the court, where it considers it necessary in the interests of justice, orders that all or part of the hearing is to be conducted in camera.

9. Abridgement of time

The court may, on the application of a party to the proceedings, abridge the period of 42 days specified in rule 3(2), (3), (4) or (5), or the period of 14 days specified in rule 4, if it considers that it is fair and reasonable to do so in the circumstances of the case.



Chief Judge

5th June 2015

Explanatory Note

These Rules set out the procedure respecting the giving of evidence to the court by way of a live television link from a place outside Hong Kong under Part IIIB of the Criminal Procedure Ordinance (Cap. 221).

Rules of the High Court (Amendment) (No. 2) Rules 2015

(Made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4))

1. Commencement

These Rules come into operation on the day on which section 13 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) comes into operation.

2. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in rules 3 to 8.

3. Order 70 heading substituted

Order 70—

Repeal the heading

Substitute

“Order 70

Obtaining Evidence for Requesting Courts”.

4. Order 70, rule 3 amended (application by Law Officer (International Law) in certain cases)

(1) Order 70, rule 3(a)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

(2) Order 70, rule 3(b)—

Repeal

“a court or tribunal in the foreign country”

Substitute

“the requesting court”.

5. Order 70, rule 4 amended (person to take and manner of taking examination)

(1) Order 70, rule 4(2)—

Repeal

“Subject to rule 6 and to any special directions contained in any order made in pursuance of this Order for the examination of any witness”

Substitute

“If the examination of a witness is to be taken other than by way of a live television link by the requesting court, subject to rule 6 and to any special directions contained in any order made under this Order for the examination”.

(2) Order 70, rule 4(2)—

Repeal

“rules 5 to 10 and 11(1) to (3)”

Substitute

“rules 5, 6, 7, 8, 9, 10 and 11(1), (2) and (3)”.

(3) Order 70, after rule 4(2)—

Add

“(2A) If the examination of a witness is to be taken by way of a live television link by the requesting court, subject to

any special directions contained in any order made under this Order for the examination, Order 39, rules 5, 6, 7, 8, 9, 10, 11(1), (2) and (3) and 14 apply with any necessary modifications.”.

- (4) Order 70, rule 4(3), after “a witness”—

Add

“(other than by way of a live television link by the requesting court)”.

6. Order 70, rule 5 amended (dealing with deposition)

- (1) Order 70—

Renumber rule 5 as rule 5(1).

- (2) Order 70, rule 5(1)(b)—

Repeal

everything after “transmission to the”

Substitute

“requesting court.”.

- (3) Order 70, after rule 5(1)—

Add

“(2) Paragraph (1) does not apply if the examination was taken by way of a live television link by the requesting court.”.

7. Order 70, rule 6 amended (claim to privilege)

- (1) Order 70, rule 6(1), after “witness”—

Add

“(other than a witness who is giving evidence to the requesting court by way of a live television link)”.

- (2) Order 70, rule 6(3)(c)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

- (3) Order 70, rule 6(3)(d)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

- (4) Order 70, rule 6(3)(d)—

Repeal

“that court or tribunal”

Substitute

“the requesting court”.

- (5) Order 70, rule 6(3)(d)—

Repeal

“court or tribunal’s”

Substitute

“requesting court’s”.

8. Order 70, rule 7 added

Order 70, after rule 6—

Add

“7. **Minutes of examination taken by way of live television link (O. 70, r. 7)**

- (1) If an order made under this Order is for the examination of a witness by way of a live television link by the

requesting court, the person before whom the examination is taken must be present at the place where the witness is present during the examination and must on the conclusion of the examination—

- (a) draw up minutes indicating—
 - (i) unless otherwise directed by the order, the identity of the witness;
 - (ii) the date on which, and the time at which, the examination is taken;
 - (iii) the place where the examination is taken; and
 - (iv) whether or not an oath or affirmation has been administered to the witness;
 - (b) certify that the minutes were drawn up by the person; and
 - (c) cause the minutes so certified to be sent to the Registrar.
- (2) The Registrar must, after receiving the minutes sent under paragraph (1)(c), cause the minutes to be sent—
- (a) if the request was sent to the Registrar by the Chief Secretary for Administration, to the Chief Secretary for Administration; or
 - (b) if the request was sent to the Registrar by some other person in accordance with a Civil Procedure Convention, to that other person.”

Made this 5th day of June 2015.

The Hon. Mr. Justice Andrew CHEUNG
Chief Judge of the High Court

The Hon. Mr. Justice Johnson LAM V.P.

The Hon. Mr. Justice Thomas AU

Stewart WONG, S.C.

Liza Jane CRUDEN

Nigel FRANCIS

Brian GILCHRIST

Herbert LI

LUNG Kim-wan
Registrar, High Court

Explanatory Note

These Rules amend Order 70 of the Rules of the High Court (Cap. 4 sub. leg. A) to provide for the procedure respecting the taking of evidence by way of a live television link by a court or tribunal exercising jurisdiction in a country or territory outside Hong Kong. These Rules also amend references to “foreign court or tribunal” and other similar references to “requesting court” to achieve consistency with Part VIII of the Evidence Ordinance (Cap. 8).