

立法會

Legislative Council

LC Paper No. CB(4)161/15-16

Ref.: CB4/SS/15/14

Paper for the House Committee meeting on 6 November 2015

Report of the Subcommittee on Live Television Link (Witnesses outside Hong Kong) Rules and Rules of the High Court (Amendment) (No. 2) Rules 2015

Purpose

This paper reports on the deliberations of the Subcommittee on Live Television Link (Witnesses outside Hong Kong) Rules (L.N. 145) and Rules of the High Court (Amendment) (No. 2) Rules 2015 (L.N. 146) (collectively known as "the Rules").

Background

2. Before the Evidence (Miscellaneous Amendments) Ordinance 2003 (Ord. No. 23 of 2003) ("the Principal Ordinance") was enacted, the Criminal Procedure Ordinance (Cap. 221) ("CPO") does not provide for the taking of evidence from witnesses outside Hong Kong by a live television link for the purposes of criminal proceedings in Hong Kong. With the enactment of the Principal Ordinance by the Legislative Council ("LegCo") in July 2003, a new Part IIIB (sections 79H to 79L) was added to CPO by virtue of section 17¹ of the Principal Ordinance which allows the court² to permit a person, other than a person who is the defendant in the proceedings concerned, to give evidence to the court from a place outside Hong Kong by live television link.

The Rules

L.N. 145

3. L.N. 145, which was made by the Chief Judge under the new section 79L

¹ Sections 12 to 19, 23 and 24 in Part II of the Principal Ordinance have not yet come into operation, pending the finalization of the Rules.

² According to section 79H of CPO, *court* includes the District Court and a magistrate.

of Part IIIB of CPO³, sets out the procedures in respect of the giving of evidence to the court⁴ by a person, other than a person who is the defendant in the proceedings concerned, by way of a live television link from a place outside Hong Kong. The key provisions of L.N. 145 include rules which set out certain definitions, provisions in respect of an application for a witness to give evidence by a live television link from a place outside Hong Kong under section 79I of CPO, the determination of the application and rules in respect of the putting of documents to a witness who gives evidence via a live television link.

L.N. 146

4. 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 court⁵. Sections 12 to 16 of the Principal Ordinance amend certain sections of the Evidence Ordinance (Cap. 8) to facilitate the use of live television link in criminal proceedings. When sections 12 to 16 of the Principal Ordinance come into operation, the Court of First Instance will be able to give such assistance. The High Court Rules Committee has made L.N. 146 to amend the provisions in Order 70 of the Rules of the High Court (Cap. 4A)⁶ ("Order 70") to provide for the procedures in respect of the taking of evidence by way of a live television link before a Hong Kong court for the purpose of criminal proceedings in a requesting court. In addition, L.N. 146 adds certain provisions regarding the drawing up, certification and transmission of minutes upon the conclusion of a live television link examination.

Commencement of the Rules

5. L.N. 145 and L.N. 146 were gazetted on 3 July 2015 and tabled at the Council meeting of 8 July 2015.

6. L.N. 145 and L.N. 146 will come into operation on the days on which sections 17 and 13 of the Principal Ordinance come into operation respectively. The Administration has advised that it aims to gazette a commencement notice for the said sections of the Principal Ordinance around two months after negative vetting of the Rules.

³ The original 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.

⁴ According to section 2 of L.N. 145, *court* includes the District Court and a magistrate.

⁵ Whilst sections 20, 21, 22, 25 and 26 in Part II of the Principal Ordinance (which are already in operation) allow evidence be taken by way of a live TV link from a person in Hong Kong, these sections are confined to the situations where a request to Hong Kong is made by an appropriate authority of a place outside Hong Kong for taking evidence for a criminal matter in that place which is processed under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

⁶ Order 70 sets out the detailed rules in respect of "Obtaining Evidence For Foreign Courts, Etc."

The Subcommittee

7. At the House Committee meeting held on 9 October 2015, Members agreed that a subcommittee should be formed to study the Rules. The membership list of the Subcommittee is in the **Appendix**.

8. Under the chairmanship of Hon Dennis KWOK, the Subcommittee held one meeting on 22 October 2015.

9. To allow time for the Subcommittee to report its work to the House Committee, a motion was moved by Hon Dennis KWOK, on behalf of the Subcommittee, at the Council meeting of 28 October 2015 to extend the scrutiny period of the Rules to the Council meeting of 18 November 2015.

Deliberations of the Subcommittee

10. In the course of examination of the Rules, members have expressed concerns on the time taken to prepare the Rules, the objections from the Law Society of Hong Kong ("Law Society"), measures to ensure that witnesses give evidence without coercion, places that the Rules would be applicable, and the facilities available for taking of evidence by a live television link.

Time taken to prepare the Rules

11. Noting that the Principal Ordinance was enacted by the LegCo in July 2003 but the Rules were only gazetted on 3 July 2015, members have enquired why it took more than 12 years to gazette the Rules since the enactment of the Principal Ordinance. The Administration has advised that owing to the technical nature of the Rules, it has revised them a number of times over the years after consultation with the relevant parties, including the Judiciary Administrator and the professional bodies. In particular, certain rounds of discussions had been held with the Law Society to address its objections to the Rules.

Law Society's objections to the Rules

12. As to members' enquiry about the Law Society's objections to the Rules, the Administration has advised that the Law Society is concerned about various issues, including cost implications, quality of evidence, and that the giving of evidence by way of a live television link in criminal proceedings from overseas witnesses would tip the balance in favour of the prosecution side when comparing with the arrangement for overseas witnesses to come to Hong Kong to testify. As the Principal Ordinance has been enacted, the Administration does not support most of the Law Society's proposals, which, if implemented, would be ultra vires or the concerns raised by the Law Society should be dealt with by

the courts on a case-by-case basis. That said, the Administration has agreed to the Law Society's proposal to provide for an extension of time to oppose an application for the use of a live television link under L.N. 145.

Measures to ensure that witnesses give evidence without coercion

13. Members have expressed concern about how the Administration could ensure that overseas witnesses who give evidence by way of a live television link are not under coercion.

14. The Administration has advised that the newly added Part IIIB of CPO and L.N. 145 have provided a mechanism for the litigating parties concerned to apply for an overseas witness, other than a person who is the defendant in the proceedings concerned, to give evidence by way of a live television link. In considering an application, the court will conduct a hearing if an opposition is received from other parties to the proceedings. The court may also impose any condition as it considers appropriate in accordance with new section 79I(1) of CPO or rule 6 of L.N. 145. Under the new section 79I(2), the court shall not give permission to an application under certain conditions, which include measures to ensure that the person will be giving evidence without coercion cannot reasonably be taken, and it is not in the interests of justice to do so.

15. The Administration has further advised that the court may, under rule 6(2) of L.N. 145, 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 question about any person who is present when the evidence is given and any matter which may affect the giving of the evidence. Subject to the arrangement of an overseas court and to the laws of the place, Hong Kong courts may also request the overseas court to appoint a court officer (including a judge) to oversee the evidence taking process.

Places where the Rules are applicable

16. Members have enquired whether permission for a witness to give evidence for the criminal proceedings of Hong Kong by way of a live television link would only be confined to those foreign jurisdictions with which Hong Kong has signed bilateral mutual legal assistance in criminal matters agreements. The Administration has advised that the Rules will also be applicable to the taking of evidence in foreign jurisdictions which have not signed such agreements with Hong Kong. With the commencement of the remaining provisions of the Principal Ordinance and the Rules, the court could approve applications from parties of a criminal proceeding for a witness to give evidence from any place outside Hong Kong, including the Mainland, Taiwan and Macau, by a live television link. The processing of such requests is a matter for the

requested place and will be subject to the law of the requested place as well as the availability of necessary facilities in that place. The Subcommittee has further noted that presently, under the Evidence Ordinance (Cap. 8), Hong Kong courts could seek assistance from and render assistance to courts in the Mainland, Taiwan and Macau in obtaining evidence for criminal proceedings.

Facilities available for the taking of evidence by a live television link

17. The Chairman has expressed concern whether the District Court and the Magistrates' Courts have the necessary facilities to take evidence from witnesses outside Hong Kong by a live television link. The Administration has advised that the Technology Court in the High Court Building has the facilities for live television link. If the District Court or a Magistrate approves an application for a witness to give evidence by way of live television link for a case before these courts, they may use the facilities at the Technology Court.

18. At the request of the Chairman, the Administration has agreed to relay to the Judiciary the Subcommittee's concern that the District Court and the Magistrates' Courts may not have the facilities to take evidence from overseas witnesses by a live television link and it would be undesirable that the venue for taking live television linked evidence for the purpose of criminal proceedings at all levels of courts, in particular, the District Court, is limited to the Technology Court.

Recommendation

19. The Subcommittee supports the Rules and will not propose any amendment.

Advice sought

20. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on
Live Television Link (Witnesses outside Hong Kong) Rules and
Rules of the High Court (Amendment) (No. 2) Rules 2015**

Membership list

Chairman Hon Dennis KWOK

Members Hon Albert HO Chun-yan
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Paul TSE Wai-chun, JP

(Total : 4 members)

Clerk Anthony CHU

Legal adviser Miss Evelyn LEE