

I suggest that, if Hong Kong implements similar changes to the hearsay rule, SI 1996 No 3219 rule 9 is not replicated.

I should emphasise, however, that experience of the changes effected by the 1995 Act is still relatively recent and relevant case law is still awaited.

Yours sincerely,

John L. Powell Q.C.
Chairman, Bar Law Reform Committee

1996 No. 3217 (C.101)

EVIDENCE

The Civil Evidence Act 1995 (Commencement No.1)
Order 1996

Made - - - - - *19th December 1996*
Coming into force *31st January 1997*

The Lord Chancellor, in exercise of the powers conferred on him by section 16(2) of the Civil Evidence Act 1995(a), hereby makes the following Order:-

1. This Order may be cited as the Civil Evidence Act 1995 (Commencement No.1) Order 1996.
2. Except for sections 10 and 16(5), the Civil Evidence Act 1995 shall come into force on 31st January 1997.

Mackay of Clashfern. C.

Dated 19th December 1996

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides that, except for sections 10 and 16(5), the Civil Evidence Act 1995 shall come into force on 31st January 1997.

1996 No.3219 (L.18)

SUPREME COURT OF ENGLAND AND WALES

The Rules of the Supreme Court (Amendment) 1996

<i>Made</i> - - - -	<i>19th December 1996</i>
<i>Laid before Parliament</i>	<i>20th December 1996</i>
<i>Coming into force</i>	<i>31st January 1997</i>

We, the Supreme Court Rule. Committee. having power under section 85 of the Supreme Court Act 1981(a) to make rules of court under section 60 of that Act and under section 84 of that Act for the purpose of regulating and prescribing the practice and procedure to be followed in the High Court and the civil division of the Court of Appeal, hereby exercise those powers as follows-

Citation, commencement and interpretation

1.—(1) These Rules may be cited as the Rules of the Supreme Court (Amendment) 1996 and shall come into force on 31st January 1997.

(2) In these Rules, an Order referred to by number means the Order so numbered in the Rules of the Supreme Court 1965(b) and a reference to Appendix A is a reference to Appendix A to those Rules.

Arbitration Act 1996

2. The Arrangement of Orders at the beginning of the Rules of the Supreme Court 1965 shall be amended, by substituting for the title to Order 73, the following “Applications relating to Arbitration”.

3. Order 11, rule 9(1) and (4)(c) shall be amended by omitting the words “Subject to Order 73, rule 7,”.

4. Order 59, rule 1A(7)(a)(d) shall be amended by inserting, after “1979”, the words “or under section 69(7) of the Arbitration Act 1996(e)” and rule 1A(7)(b)(iii) shall be amended by inserting, after “section 1(2)”, the words “or of section 69(7) of the said Act of 1996”.

5. For Order 73 there shall be substituted the following-

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- (a) 1981 c.54:section 85 was amended by the Courts and Legal Services Act 1990 (c.41), Schedule 18. paragraph 36(1).
- (b) S.I. 1965/1776:the relevant amending instruments are noted in footnotes to provisions in the body of the instrument.
- (c) Order 11. rule 9 has been amended by S.I. 1979/1716. 1980/629, 2000 and 1983/1181.
- (d) Order 59, rule 1A was added by S.I. 1988/1340 and amended by S.I. 1993/2133 and 1994/1975.
- (e) 1996 c.23.

- (4) The affidavit required by Order 71. rule 3. in support of an application for registration shall-
- (a) in lieu of exhibiting the judgment or a copy thereof, exhibit a copy of the award certified pursuant to the Convention; and
 - (b) in addition to stating the matters mentioned in paragraph 3(1)(c)(i) and (ii) of the said rule 3, state whether at the date of the application the enforcement of the award has been stayed (provisionally or otherwise) pursuant to the Convention and whether any, and if so what, application has been made pursuant to the Convention. which, if granted, might result in a stay of the enforcement of the award.
- (5) There shall be kept in the Admiralty and Commercial Registry under the direction of the Senior Master a register of the awards ordered to be registered under the Act of 1966 and particulars shall be entered in the register of any execution issued on such an award.
- (6) Where it appears to the Court on granting leave to register an award or an application made by the judgment debtor after an award has been registered-
- (a) that the enforcement of the award has been stayed (whether provisionally or otherwise) pursuant to the Convention, or
 - (b) that an application has been made pursuant to the Convention, which, if granted, might result in a stay of the enforcement of the award,
- the Court shall, or in the case referred to in sub-paragraph (b) may, stay execution of the award for such time as it considers appropriate in the circumstances.
- (7) An application by the judgment debtor under paragraph (6) shall be made by summons and supported by affidavit.

Registration of awards under the Multilateral Investment Guarantee Agency Act 1988(a)(b)

35. Rule 34 shall apply, with the necessary modifications, in relation to an award rendered pursuant to the Convention referred to in section 1(1) of the Multilateral Investment Guarantee Agency Act 1988 as it applies in relation to an award rendered pursuant to the Convention referred to in section 1(1) of the Arbitration (International Investment Disputes) Act 1966.”.

6. After Form No. 8 in Appendix A there shall be inserted the form in Schedule 1 to these Rules.

7. After Form No. 15 in Appendix A there shall be inserted the form in Schedule 2 to these Rules.

Hearsay evidence

8. For Order 38, rules 20 to 34, there shall be substituted the following-

“Application and interpretation

20.—(1) In this Part of this Order the “1995 Act” means the Civil Evidence Act 1995(c) and any expressions used in this Part of this Order and in the 1995 Act have the same meanings in this Part of this Order as they have in the Act.

(2) In this Part of this Order:

“hearsay evidence” means evidence consisting of hearsay within the meaning of section 1(2) of the 1995 Act;

“hearsay notice” means a notice under section 2 of the 1995 Act.

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- (a) 1988 c.8.
 - (b) Rule 35 restates Order 73. rule 9A which was added by S.I. 1988/1340.
 - (c) 1995 c.38.

(3) This Part of this Order applies in relation to the trial or hearing of an issue or question arising in a cause or matter and to a reference, inquiry and assessment of damages, as it applies to the trial or hearing of a cause or matter.

Hearsay notices

- 21.—(1) A hearsay notice must
- (a) state that it is a hearsay notice;
 - (b) identify the hearsay evidence;
 - (c) identify the person who made the statement which is to be given in evidence;
 - (d) state why that person will (or may) not be called to give oral evidence; and
 - (e) if the hearsay evidence is contained in a witness statement, refer to the part of the witness statement where it is set out.
- (2) A single hearsay notice may deal with the hearsay evidence of more than one witness.
- (3) The requirement to give a hearsay notice does not apply to
- (a) evidence which is authorised to be given by or in an affidavit; or
 - (b) a statement which a party to a probate action desires to give in evidence and which is alleged to have been made by the person whose estate is the subject of the action.
- (4) Subject to paragraph (5), a party who desires to give in evidence at the trial or hearing of a cause or matter hearsay evidence shall
- (a) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into Court, within 28 days after it is set down or so adjourned or within such other period as the Court may specify, and
 - (b) in any other case, within 28 days after the date on which an appointment for the first hearing of the cause or matter is obtained, or within such other period as the Court may specify.
- serve a hearsay notice on every party to the cause or matter.
- (5) Where witness statements are served under rule 2A of this Order, any hearsay notice served under this rule shall be served at the same time as the witness statements.

Power to call witness for cross-examination on hearsay evidence

- 22.—(1) Where a party tenders as hearsay evidence a statement made by a person but does not propose to call the person who made the statement to give evidence, the court may, on application, allow another party to call and cross-examine the person who made the statement on its contents.
- (2) An application under paragraph (1) shall be made on notice to all other parties not later than 28 days after service of the hearsay notice.
- (3) Where the court allows another party to call and cross-examine the person who made the statement, it may give such directions as it thinks fit to secure the attendance of that person and as to the procedure to be followed.

Credibility

- 23.—(1) If
- (a) a party tenders as hearsay evidence a statement made by a person but does not call the person who made the statement to give oral evidence, and
 - (b) another party wishes to attack the credibility of the person who made the statement;
- that other party shall notify the party tendering the hearsay evidence of his intention.
- (2) A notice under paragraph (1) shall be given not later than 28 days after service of the hearsay notice.

Powers exercisable in chambers

24. The jurisdiction of the Court under rules 20 to 23 may be exercised in chambers.”.

9. Nothing in rule 8 shall apply to proceedings
- (a) in which directions have been given, or orders have been made, as to the evidence to be given at the trial or hearing, or
 - (b) where the trial or hearing has begun

before 31st January 1997.

Miscellaneous amendments

10. Order 29, rule 11(2)(a)(a) shall be amended by substituting for the words “as insurer” the words “an insurer”.

*Mackay of Clashfern, C.,
Stephen Brown, P.,
Rattee, J.,
Colman, J.,
Bell, J.,
Jean Ritchie.*

Dated 19th December 1996

(a) Order 29, rule 11 was added by S.I. 1970/944 and amended by S.I. 1980/1010 and 1986/2892.

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules amend the Rules of the Supreme Court so as-

- (a) to substitute a new Order 73 (Applications relating to Arbitration) which provides for the bringing of applications under the Arbitration Act 1996 (*rules 2 to 7*);
- (b) to provide a procedure for giving hearsay notices under the Civil Evidence Act 1995 (*rules 8 and 9*);
- (c) to make a minor amendment to Order 29, rule 11(2) (*rule 10*).

Rogers, The Times, April 11, 1996; affirmed in the Court of Appeal, *The Times*, March 24, 1997, C.A.).

introducing s.85. Yet it is and of S.I. therefore a caution.

Editorial section 10 of damag

LITIGANTS IN PERSON (COSTS AND EXPENSES) ACT 1975

6181/1 *Insert new note:*

Litigants in person—rights of audience—Where a non legally qualified but experienced advocate sought leave to appear on behalf of a litigant in person and where the applicant was in need of skilled assistance but did not wish to apply for legal aid which could be provided by the proposed representative, the Court found that the Courts and Legal Services Act 1990 gave the Court a discretion that made it clear by its terms that the discretion was to be exercised only in exceptional circumstances. The assistance in the litigation process which was proposed was out of accord with the spirit of the Act, the application was refused (*D v S (Rights of Audience)*, *The Times*, January 1, 1997; *Chavhan v. Chavhan*, October 26, 1994, C.A., unrep., considered).

CIVIL EVIDENCE ACT 1995

6182A *Delete "Reminder" and substitute:*
[p.2061]

Civil Evidence Act 1995—The Civil Evidence Act 1995 received the Royal Assent on November 8, 1995, and with the single exception of section 10 (Ogden Tables), came into force on January 31, 1997 (S.I. 1996 No. 3217). Essentially, it:

- (1) Abolishes the principle excluding evidence on the ground that it is hearsay.
- (2) Creates provisions governing the receiving of such evidence.
- (3) Preserves certain Common Law rules relating to hearsay.
- (4) Provides for the manner of proving documents and records.
- (5) Applies to any civil proceedings in England and Wales to which the strict rules of evidence apply.
- (6) Does not apply to proceedings:
 - (a) in which directions have been given, or orders have been made, as to the evidence to be given at the trial or hearing, or
 - (b) where the trial or hearing has begun before January 31, 1997.
- (7) Repeals the Civil Evidence Act 1968, Pt. I.

Editorial comment—At present (February 1997) the Lord Chancellor has decided not to bring section 10 into force, pending consideration of the Court of Appeal's decision on the assessment of damages in personal injury cases in *Wells v. Wells*, and any appeal to the House of Lords.

Insert new note:

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- (2) Creates provisions governing the receiving of such evidence.
- (3) Preserves certain Common Law rules relating to hearsay.
- (4) Provides for the manner of proving documents and records.
- (5) Applies to any proceedings in England and Wales to which the strict rules of evidence apply.
- (6) Does not apply to cases started before January 31, 1997 (but see below, "Important note").
- (7) Repeals the Civil Evidence Act 1968, Pt. I.

Important note—Paragraph (6) of the above summary appears to be qualified by S.I. 1996 No. 3219, which provides that the new régime is not to apply to proceedings:

- (a) in which directions have been given, or orders have been made, as to the evidence to be given at the trial or hearing, or
- (b) where the trial or hearing has begun before January 31, 1997.

However, there is reason to doubt the effectiveness of this provision. The statutory instrument

introducing it was not made under the Act itself, but instead under the Supreme Court Act 1981, s.85. Yet it purports, at all events obliquely, to qualify the express terms both of the Act (at s.10) and of S.I. 1996 No. 3217, the commencement order made under the Act. A statutory conflict is therefore a real possibility, and litigants and their advisers should proceed with considerable caution.

Editorial comment—At present (August 1997), the Lord Chancellor has decided not to bring section 10 into force, pending consideration of the Court of Appeal's decision on the assessment of damages in personal injury cases in *Wells v. Wells*, and any appeal to the House of Lords.