

Rules of Evidence (Civil Proceedings) in Hong Kong: Overview

by *Danny Leung* and *Sarah Kwong*, Bird & Bird

Practice note: overview | [Law stated as at 01-Mar-2022](#) | Hong Kong - PRC

A Practice Note providing an overview of the rules governing disclosure and the admissibility of evidence in civil proceedings. In particular, it looks at the rules on the disclosure obligations of the parties, admissibility of evidence, witness evidence, the burden and standard of proof, as well as issues that arise in gathering cross-border evidence.

Evidence is fundamental to the outcome of any civil litigation case. Usually, the facts in issue in a case must be proved by evidence, and the court will decide the case on the evidence adduced by the parties.

One of the most challenging aspects for any cross-border practitioner is to adapt to the differences in the rules of evidence taking in various jurisdictions. These differences are evident in the manner in which evidence is produced, the issues surrounding relevance and admissibility, the probative value attached by the courts to the various types of evidence and the principles of burden and standard of proof across jurisdictions. Further, such disputes often give rise to situations where one of the parties to the litigation is required to produce evidence located in a jurisdiction foreign to the forum of proceedings. These are important legal issues that a practitioner should be aware of since they largely determine the way litigation is conducted in all the major civil law and common law systems around the world and ultimately influence its result.

This Note provides an overview of the rules of disclosure and evidence in civil proceedings in Hong Kong. In particular, it looks at:

- The rules regarding the disclosure obligations of the parties.
- Admissibility of evidence.
- Witness evidence.
- Expert evidence and the role of experts (court hired independent experts and party hired experts) in civil proceedings.
- The rules regarding the burden of proof and standard of proof in civil proceedings.
- The rules regarding cross-examination.
- Issues that arise in gathering cross-border evidence, including:
 - the applicable international treaties, agreements, and regulations governing cross-border evidence;
 - how to obtain foreign evidence for use in Hong Kong civil proceedings; and
 - how to obtain evidence located in Hong Kong for use in foreign civil proceedings.

Rules of Evidence and Evidence in Domestic Proceedings

The main sources of the rules of evidence are:

- The Evidence Ordinance (Cap. 8) (EO).
- The High Court Ordinance (Cap. 4) (HCO) and the District Court Ordinance (Cap. 336) (DCO).
- The Rules of the High Court (Cap. 4A) (RHC) and the Rules of the District Court (Cap. 336H) (RDC).
- Practice Directions.
- Common law.

Obtaining Evidence

Disclosure or Discovery Obligations

A party has a continuing duty throughout the proceedings to disclose to the other parties all documents in its possession, custody, or power that relate to the matters in question in the proceedings, irrespective of whether such documents are favourable or unfavourable to its case.

This obligation covers any publication and any matter written, expressed, or described by means of letters, characters, figures, or marks, or by more than one of these means, including, without limitation, tape recordings, CDs/DVDs, video recordings, emails, films and film negatives, and computer storage media.

The RHC and RDC set out the relevant procedures for documentary disclosure in the course of proceedings.

Each party must prepare a list of all documents relevant to the issues in dispute which are in its possession, custody, or power (including privileged documents). Parties can then request that copies of all non-privileged documents are provided or made available for physical inspection. Privileged documents are not required to be produced.

The court can also order a party to disclose specific documents or classes of documents. This normally follows the application of a party for specific discovery, where those documents are relevant and discovery is necessary for either disposing fairly of the cause or matter, or for saving costs.

Role of the Courts in the Evidence-Taking Process

The court can, in circumstances where a party fails to meet its discovery obligations, make such order as may be just. The court may go as far as to dismiss the action, strike out the defence, or even make an order for committal for contempt.

It can also impose conditions on the inspection of documents that contain highly confidential information, such as trade secrets.

Other Mechanisms to Obtain Disclosure from an Adverse Party and Third Parties

A party can file a third-party notice joining a third party to the proceedings (*Order 16 rule 1(1)(c)*, *RHC/RDC* (as the case may be)). The party can require questions or issues as set out in the third-party notice to be determined between all the parties in the proceedings, therefore demanding that the third party provide disclosure.

For bank account information, a party can apply to the court for a disclosure order against a bank (*section 21, EO*). The court has the power to grant an order allowing a party to inspect and take copies of any entries in a banker's record for any of the purposes of the civil proceedings.

It is also possible to apply for a *Norwich Pharmacal* Order, made under the court's equitable jurisdiction, requiring a non-party (such as a bank) to provide certain documents or information to the applicant. It is typically used to identify an unknown third-party wrongdoer.

Standard of Proof and Burden of Proof in Civil Proceedings

The burden of proof in a civil action rests on the party who asserts the fact (that is, the party who makes an allegation must prove it).

Generally, a plaintiff (claimant) must prove its allegations against the defendant. If a defendant has any counterclaims, it will have the burden to prove its allegations against the plaintiff.

The standard of proof is on the balance of probabilities.

Failure to Give Evidence at Trial: Consequences

Parties must disclose all relevant documents (see [Disclosure or Discovery Obligations](#)). If a party fails to make discovery of documents or to produce any documents, the court has discretion to make an order as it thinks just. For example, the court can order that the action be dismissed, or that the defence be struck out and judgment be entered accordingly.

Under common law, a court can, in certain circumstances, draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. If the reason for the witness' absence or silence satisfies the court, no such adverse inference can be drawn. If a credible but not wholly satisfactory explanation is given, the potentially detrimental effect of the witness' absence or silence may be reduced or nullified.

An accused person in a criminal trial has the right to remain silent. An accused person and their spouse are competent witnesses for the defence, but they cannot be called as a witness for the defence except on the accused person's own application. The failure of an accused person or their spouse to give evidence must not be made the subject of any comment by the prosecution (*section 54(1), Criminal Procedure Ordinance (Cap 221)*). However, it has been held that where the accused person may be able to provide an explanation but does not do so, the court may more readily draw adverse inferences against them (*HKSAR v Choi Gin Ngon & Ors* [1998] 1 HKLRD 902 (CA); *HKSAR v Yeung Sze Sze* (CACC 306/00, unreported)).

Admissibility of Evidence

Challenges to the admissibility of documents can be made on one of the following bases:

- The evidence is not relevant.
- One of the exclusionary rules applies to the evidence.
- The documents are privileged.
- The evidence should be excluded under Order 1A of the RHC/RDC for case management reasons, taking into account the overriding objective to ensure that the case is dealt with expeditiously, and promote a sense of reasonable proportion and a fair distribution of the court resources (see [Discretion of Court to Exclude Evidence](#)).

For example, when a party contends that a witness statement contains inadmissible evidence, it can apply to the court to strike out those parts. The witness statement might be inadmissible because, for example, it is irrelevant or subject to an exclusionary rule. For striking out on the grounds that a witness statement contains without prejudice material, opinion, and comment, see *Re Jinro (HK) International Ltd, unreported, HCCW No. 1352 of 2001, 18 July 2002, [2002] H.K.E.C. 1164*.

When to Apply

Case law suggests that disputes over the admissibility of evidence in civil proceedings are best resolved by the judge at trial. This is to avoid separate preliminary hearings where the judge is less informed and which cause additional cost and delay (see *Stroude v Beazer Homes Ltd [2005] EWCA Civ 265 (cited in ### # ### [2011] HKCFI 1124)*).

However, recent civil justice reforms promote active case management, to ensure that cases are dealt with not only justly but at proportionate cost. This, combined with the enhancement of the courts' power to control evidence, means the courts also encourage early applications to resolve evidential issues in appropriate cases, as a matter of case management.

Exclusionary Rules of Evidence

The key exclusionary rules are, without limitation:

- The rule against hearsay evidence.
- The rule against non-expert opinion evidence.
- Legal professional privilege.
- Without prejudice privilege.
- Privilege against self-incrimination.
- Public interest immunity.

Evidence is not admissible, even if it is relevant, if it falls within one of the exclusionary rules.

Discretion of Court to Exclude Evidence

The court's discretion to exclude the admission of a document that is otherwise admissible is principally a case management power, under Orders 1A and 1B of the RHC and RDC.

There is no express limit on the court's discretion to manage evidence. However, any intervention must be exercised in light of the overriding objective of, in particular, ensuring that a case is dealt with expeditiously, promoting a sense of reasonable proportion, and a fair distribution of the resources of the court.

Witness Evidence: Oral and Written

A witness of fact must submit a written witness statement in advance and then gives oral evidence at trial (see [Oral Evidence in Support of Written Evidence](#)). The general rule is that written evidence of fact must be given orally and in open court (*Order 38, rule 1, RHC/RDC*).

However, this rule does not apply to any motion, petition, or summons or to any other proceedings except an action commenced by writ (*Order 38, rule 2(3), RHC/RDC*). Even in a writ action, the rule applies only to the trial itself, and not, for example, to any interlocutory proceedings in such an action.

The general rule still applies to trials of issues or questions of fact or law, references, inquiries, and assessments of damages. (*Order 38, rule 8, RHC/RDC*).

Requirements for the Content of Written Evidence (Witness Statement or Affidavit)

Written witness statements must:

- Be dated, signed by the witness (unless there is a good reason not to, which should be specified in a letter accompanying the statement), and verified by a statement of truth in accordance with Order 41A of the RHC/RDC.
- Sufficiently identify any documents it refers to.
- Be exchanged simultaneously, if they are served by more than one party.

(*Order 38 rule 2A(4), RHC/RDC*.)

In some circumstances, written evidence can be in the form of an affidavit sworn by the witness. The formal requirements for affidavit evidence are set out in Practice Direction 10.1, which include specific requirements on marking, binding, exhibits, and numbering.

The authors are not aware of any different requirements for non-trial submissions, such as for applications or motions.

Oral Evidence in Support of Written Evidence

Witnesses must submit a witness statement. If a witness statement has not been served beforehand, a witness is not allowed to give evidence at trial without leave of the court.

Witness statements are only accepted as evidence by the court when the witness confirms the contents to be true on oath at the trial. The court usually orders that the witness statement stands as the witness's evidence-in-chief at the trial, and the witness can be subject to cross-examination and re-examination.

Timing for Filing Written Witness Evidence

The timing for written witness statements is determined at a case management summons. The court directs each party to serve on the other parties written statements of the oral evidence that the party intends to adduce.

Evidentiary Value of Witness Evidence

Witness statements that have been exchanged are not put in evidence due to the exchange. They are only given evidentiary value if the witness makes the statement in public by verifying it on oath at the trial, at which point it has the same evidentiary value as contemporaneous documentary evidence.

Cross-Examination and Re-Examination

The court will generally direct that the witness statement stands as the witness's evidence-in-chief. The opposing party can then cross-examine the witness at the trial. The trial judge can also assist the cross-examination by rephrasing questions, if necessary.

After cross-examination, the witness can then be re-examined on matters arising out of the cross-examination.

Witness Unwilling or Unable to Provide Evidence or Attend Court

For legal proceedings in Hong Kong, a writ of subpoena can be issued by the Registry of the High Court or District Court to compel a witness to attend a hearing (*Order 38, RHC/RDC*).

An application for a writ of subpoena must be made on Form No. 28 or 29 in Appendix A of the RHC and RDC. Every writ of subpoena should be accompanied by a deposit to cover the witness's reasonable expenses.

Witness Immunity

The witness immunity rule protects witnesses in respect of evidence given by them in the course of legal proceedings, in the interests of the administration of justice. Where this rule applies, a civil action cannot be brought against the witness in respect of the evidence given, even if the evidence is false and malicious.

It does not make any difference whether the witness is a witness of fact or an expert witness.

However, the witness immunity rule does not apply to an action brought against a witness in the tort of malicious prosecution. In this case, the action "is not brought in respect of evidence given in court but is brought in respect of an alleged abuse of process of court" (*Roy v Prior* [1971] AC 470 at 477 to 478, per Lord Morris of Borth-y-Gest; see also *Martin v Watson* [1996] 1 AC 74 at 88, cited in *Sum Cheung Wai v Tsui Hin Yuet* [2016] 4 HKLRD 742 at §54).

Expenses

In any proceedings in the High Court or District Court, a judge or the Registrar (as the case may be) can order that a witness be reimbursed in respect of any expenses reasonably and properly incurred by that witness (*section 52, HCO* and *section 66B, DCO*).

Witnesses attending to give evidence are entitled to recover reasonable expenses, including loss of income, travelling, and accommodation. Each witness must be considered individually and a reasonable allowance made for the coming, going, and attendance at trial.

Expert Witnesses

Court-Appointed Experts

The court can, at any time and on the application of a party, appoint one or more independent court-appointed experts (*Order 40 rule 1, RHC/RDC*).

A court expert must, if possible, be a person agreed between the parties. If there is no agreement, the expert is appointed by the court.

Party-Hired Experts

A party seeking to adduce expert evidence must obtain the court's permission, usually at the case management conference, or seek agreement from all other parties.

Parties can appoint their own expert witnesses to present evidence in support of their case. The court can order the party-appointed experts to meet on a "without prejudice" basis to identify the parts of their evidence which are in issue. The experts can then prepare joint statements indicating their agreements and disagreements (*Order 38 rule 38, RHC/RDC*).

Parties can agree on the appointment of a single joint expert. If a single joint expert is to be appointed but the parties cannot agree on who should be appointed, the court can assist by selecting the expert from a list prepared by the parties or by directing that the expert be selected in a particular manner (*Order 38 rule 4A, RHC/RDC*).

Fees of Expert Witnesses

The court fixes the remuneration of a court-appointed expert, which includes a fee for their report and a proper sum for each day they are required to be in court or before an examiner.

Without prejudice to any order otherwise, the parties are jointly and severally liable to pay the court expert's fee. If the appointment of a court expert is opposed, the court can, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the expert as the court thinks fit (*Order 40 rule 5, RHC/RDC*).

Each party will pay their respective expenses if each party hires their own expert witness.

For the appointment of a single joint expert, the court can give directions on the payment of the expert witness's fees and expenses (*Order 38 rule 4A(3), RHC/RDC*).

Role of Party-Appointed and Court-Appointed Experts

The experts' role is to assist the court on matters within their expertise. Expert witnesses owe an overriding duty to the court to act impartially and independently. They owe no duty to the party who instructs them or who pays them.

Presentation of Expert Evidence

A court expert must send their report to the court, and the court registrar must send copies of the report to the parties or their solicitors (*Order 40 rule 2, RHC/RDC*). Any party can, within 14 days after receiving a copy of the court expert's report, apply for leave to cross-examine the expert on the report. On such an application, the court will make an order for the cross-examination of the expert by all the parties at the trial or before an examiner. Only in very rare circumstances will a court choose not to make such an order (for example, when it is against the interests of justice to do so).

The position for party-appointed experts is very similar to that for witness statements. If the court has given leave to appoint an expert, written expert reports must be served in advance. Generally, a party cannot adduce any expert evidence at trial without having first served a written expert report. An expert cannot give oral evidence at the trial or hearing of any matters the substance of which are not in the expert report (unless the court gives leave to do so).

Documentary Evidence: Certification of Documents

Documents listed in a list of documents (including electronic evidence, if an application for electronic discovery has been duly made under Order 24 rule 7 of the RHC/RDC) are deemed to be authentic (*Order 27 rule 4, RHC/RDC*). The authenticity of such documents need not be proved. A party which does not admit the authenticity of a document must serve a notice on the party serving the document of non-admission to that effect.

Documents exempted from the need for proof of due execution include:

- **Ancient documents.** There is a presumption of due execution for documents more than 20 years old (*section 43, EO*).
- **Public documents.** There are many statutory exemptions to proof of due execution and proof of the contents of public documents.
- **Records of a business or public authority.** Section 54 of the EO provides a simple way of proving that a document is part of the records of a business or public authority. A certificate to that effect signed by an officer can be received as evidence that the document forms part of the records of the business or public authority, without further proof.

Legal Framework Governing Cross-Border Evidence

Hong Kong is a party to:

- The Hague Evidence Convention.
- The Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region.

The Hague Evidence Convention

Central Authority

For contact details of the designated Central Authority and the additional authorities, see [Authorities, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters](#).

Reservations, Declarations, and Notifications

See [Status table, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters](#), for a complete list of reservations, declarations, and notifications made by Hong Kong in relation to:

- Language of letter of request (Article 4).
- Execution of letter of request in the presence of judicial personnel (Article 8).
- Evidence by diplomatic officers, consular agents, and commissioners (Articles 15-17).
- Pre-trial discovery (Article 23).

Request from Foreign Litigants

Time Frame

It generally takes a few months to execute a letter of request in Hong Kong. The exact time frame depends on various factors, including, among others, the complexity of the case, the number of cases that the Central Authority is handling, and the responsiveness of the foreign court in clarifying details of the letter of request.

Judicial Personnel at the Execution of Letters of Request

Hong Kong has not made the declaration under Article 8 of the Hague Evidence Convention.

Other Key Methods

Apart from the procedure set out under Procedure to Enforce Request for Witness Evidence, if the letter of request is not in English, a translation of the letter should be exhibited (*Order 70 rule 2(2), RHC*).

Procedure for Evidence to be taken through Diplomatic or Consular Agents or Commissioners

Only Articles 15 and 17 of the Hague Evidence Convention are applicable and there is [no declaration of applicability under Article 18 in Hong Kong](#). This means that a diplomatic officer or consular agent of a contracting party can, without compulsion, take evidence in Hong Kong from nationals of the state they represent.

Rules for Taking Depositions by Video

A court has summarised the principles for giving evidence by video conferencing facilities (*Tsang Woon Ming v Lai Ka Lim & Ors [2020] HKCFI 891*):

- Giving evidence by video conferencing facilities is an exception and sound reason is required for justification.
- The solemnity of court proceedings and its atmosphere must be upheld at all times. Unless there is a serious issue on credibility or relatively unimportant evidence, the court is more disposed to exercise its discretion to allow evidence by video conferencing for technical or purely factual evidence.

- Costs and convenience are also important considerations.
- This is a balancing test and the court will take into account all material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, promotion of a sense of reasonable proportion and procedural economy in the conduct of proceedings, any delay to the proceedings, and practical considerations like the availability of the facilities (see *Practice Direction 29*).

Domestic Requests

See [Obtaining Evidence from Another Jurisdiction](#).

Obtaining Evidence from Another Jurisdiction

General Requirements

Form or Application Along with the Documents

To obtain witness or documentary evidence abroad for use in a Hong Kong proceeding, an application is made by notice of application or originating summons with an affidavit in support.

For countries which are not party to the Hague Evidence Convention, a letter of request from the High Court to a foreign court is required to cause the evidence to be taken. The letter can ask for either:

- The interrogatories that accompany the letter to be put by the court examiner (the usual procedure in many foreign courts, where the court alone puts the questions).
- The witnesses to be examined orally on the matters in question.

For countries which are party to the Hague Evidence Convention, evidence can be obtained by either:

- A letter of request transmitted through the Hong Kong Chief Secretary for Administration, for execution by the foreign judicial authority. The foreign judicial authority then obtains the evidence, giving effect to any special procedure indicated in the letter of request.
- An officer of the Consul of the People's Republic of China, or some other fit and proper person nominated by the Hong Kong court as a special examiner.

Notice Requirements

As with other applications to obtain evidence, notice of an application to obtain evidence abroad should be given to the other party or parties to the proceedings.

Where the evidence is to be obtained by means of written questions, the questions to be asked on behalf of the applicant should be submitted to the other party so that they can frame questions for cross-examination. The

questions to be asked in cross-examination should in turn be submitted to the applicant to put further questions in re-examination.

On return of the evidence, it is filed at the Registry and notice given to the other party. Objection to the admission of any of the evidence can be made at the trial.

An originating summons must be served on each defendant by the plaintiff or their agent (*Order 10 rule 1, RHC/RDC*).

Grounds

Whether an order to issue a letter of request will be granted is at the Hong Kong court's discretion. It is not necessary for the recipient judicial authorities to be under an obligation to execute the letter. An established practice of the recipient judicial authorities executing such letters is sufficient for the Hong Kong court to exercise its discretion. It has been held that a letter of request ought not to be issued unless the evidence is directly material to an issue in the case and is necessary in the interests of justice.

Costs and Expenses

The Hong Kong court fee is HKD1,045 on sealing an originating summons (and any other originating document).

Application and Procedure Irrespective of the Applicable International Instruments (If Any)

The application and procedure set out above applies (see [Form or Application Along with the Documents](#)).

Admissibility of Overseas Evidence

Common law rules as to proof of foreign public documents apply (*Hong Kong Civil Procedure 38/10/3*). All documents legally and properly filed or recorded in any foreign court of justice or consulate according to the law and practice of such court or consulate, and all copies of such documents, are admissible in evidence in Hong Kong courts (*section 37, EO*).

Willing Witness (Unable to Travel)

The Technology Court has facilities to obtain evidence from willing witnesses who are unable to travel.

The Technology Court is available for use, where appropriate, on the application of one or more of the parties in relation to civil proceedings in the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the Competition Tribunal, the District Court, the Lands Tribunal, the Magistrates' Courts, the Coroner's Court, the Labour Tribunal, and the Small Claims Tribunal.

A formal application must be made at the level of court where the case is heard or tried. For example, if the case is to be heard or tried in the Court of First Instance, an application must be made to the judge in charge of the case. If no judge is allocated, an application must be made to the listing judge or, if the listing judge is unavailable, to the Chief Judge of the High Court.

When applying for use of the Technology Court, the applicant should, among others, be prepared to:

- Identify the features of the proceedings or particular issues or items of evidence that make use of the Technology Court desirable.
- Identify the particular facilities and equipment it wants to use in the Technology Court.
- Provide an estimate of the court time needed.

Video-Link, Teleconference, or Depositions

There are video conferencing facilities in the Technology Court, so that witnesses who cannot be physically present in court can give evidence (see *Willing Witness (Unable to Travel)*). Dual display monitors are installed in the courtroom to allow broadcast of document and video images simultaneously. Where witnesses are not based in Hong Kong, the availability of such facilities depends on the law of the jurisdiction in which they are based.

Obtaining Evidence in Support of Foreign Litigation

National Rules

There are no specific rules on the collection of evidence in Hong Kong in support of foreign litigation. If the witness is willing to give evidence, evidence can be taken from the witness in Hong Kong for use in proceedings in a foreign court without the intervention of the Hong Kong courts.

Direct Application

See *National Rules*.

Procedure to Enforce Request for Witness Evidence

Part VIII of the Evidence Ordinance sets out the circumstances in which the Hong Kong courts will render assistance to foreign courts (including those in countries that are party to the Hague Evidence Convention) by ordering the taking of evidence in Hong Kong. The application is made *ex parte* and supported by an affidavit exhibiting a letter of request and explaining the issues in the foreign proceedings and the evidence sought.

Grounds

The Hong Kong court must be satisfied that:

- The application is made to fulfil a request issued by or on behalf of a court or tribunal (the requesting court) exercising jurisdiction in a country or territory outside Hong Kong.
- The evidence to which the application relates is to be obtained for the purposes of civil proceedings which have been instituted before the requesting court or are intended to be instituted before that court.

(Section 75, EO).

The Hong Kong courts will usually give effect to such a request insofar as it is proper and practicable, and to the extent it is permissible under Hong Kong law.

Time Frame

Where no international instrument applies, the usual time frame within which a request for evidence is executed is determined on a case-by-case basis and there is no fixed time frame. It can typically take weeks or months, and largely depends on the urgency of the request and the court's availability.

END OF DOCUMENT
