THE LAW REFORM COMMISSION

OF HONG KONG

REPORT ON

HEARSAY RULE IN CIVIL PROCEEDINGS

(TOPIC 3)

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REPORT

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CONTENTS

Introduction

Terms of reference

1. A reference was made to the Law Reform Commission in July 1980 that required it to consider the law and practice relating to evidence in civil proceedings. An interim study suggested that the terms of the original reference were too wide and that the subject should be divided into a number of topic areas, including hearsay. After considering the findings of the interim study, the Commission reframed the reference in August 1982, to limit the study to an examination of the law and practice in relation to the hearsay rule in civil proceedings.

Hearsay: a definition and a brief historical overview

2. Evidence is described as being hearsay where a witness proposes to testify to a particular fact on the basis of what he has been told by another, whether that communication was made to him directly or indirectly (for example, by way of information in a document)[1]. In practice such evidence is treated with caution; before reliance is placed upon it, the law normally requires certain safeguards be established.

3. In the criminal trial, hearsay evidence may be received in certain circumstances, but the emphasis in that process is on evidence of what a witness has actually perceived[2]. In contrast, hearsay evidence in civil proceedings, particularly evidence in documentary form, plays a much more important part and its use is commonplace.

4. Historically, the common law treated hearsay evidence with suspicion, developing a rule by which it was excluded subject to a number of exceptions. These exceptions were developed by judges to cover circumstances where long experience suggested that there was good reason to rely upon such evidence. Some statutory exceptions were also created. It eventually became clear, however, that the scope for refinement and revision of the law by the judiciary was severely limited. Consequently the common law and its exceptions were replaced in England and Wales by a comprehensive statutory system, the Civil Evidence Act 1968, which considerably relaxed the strict rule of exclusion. This Act was adopted in Hong Kong in 1969 as Part IV of the Evidence Ordinance (Cap 8).

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1 A more precise definition of hearsay is put forward below in Chapter 1, at para 1.1.

2 The use of hearsay evidence in criminal cases is governed by a separate body of rules: see, in particular, Part III of the Evidence Ordinance (Cap 8). The law relating to the receipt of public documents and business records in criminal proceedings is, in broad terms, quite similar to the rules governing the civil process found in Part IV of the same Ordinance.

5. Following these developments, the area regulated by the 1968 Act was expanded in England and Wales in the Civil Evidence Act 1972 to cover statements of opinion as well as statements of fact. This Act was adopted in Hong Kong in 1973 as Part V of the Evidence Ordinance.

The English Law Commission's Consultation Paper

6. In November 1990 the English Law Commission completed a study of the operation of the rule against hearsay in civil proceedings as modified by the Civil Evidence Acts 1968 and 1972 and published their findings shortly thereafter in Consultation Paper No 117, entitled *The Hearsay Rule in Civil Proceedings* ("the English Consultation Paper"). The paper reviewed the law and practice in England and Wales. It also provisionally recommended that the rule excluding hearsay evidence should be abolished, subject to safeguards against any abuses of the power to adduce hearsay. A number of safeguards were discussed and comment was invited on this basic proposal.

7. Those who responded to the English Consultation Paper generally supported the Commission's provisional conclusions. The general view was that the current statutory regime was unwieldy, and that the relevant law was unnecessarily difficult to understand and in some cases outdated.

The Hong Kong Consultation Paper

8. In August 1992, the Hong Kong Law Reform Commission published a Consultation Paper ("our Consultation Paper"). The paper, which was circulated to interested parties for comments, examined the current law in Hong Kong on hearsay evidence in civil proceedings. It also described the English experience in the practical application of the Civil Evidence Acts 1968 and 1972, which are the English equivalents of Parts IV and V of the Evidence Ordinance (Cap. 8). Hong Kong's experience with the application of Parts IV and V of the Evidence Ordinance and the strengths and weaknesses of the current law were also discussed.

9. Our Consultation Paper put forward two options for reform, following those in the English Consultation Paper. The first option was to refine the existing legislation. The second option was to do away with the hearsay rule in civil proceedings altogether.

The English Law Commission's Report

10. In September 1993, the English Law Commission published their final report on the subject, *The Hearsay Rule in Civil Proceedings, (Law Commission No. 216)* ("the English Report"). In the report, the English Law

Commission recommended the abolition of the exclusionary rule, subject to certain procedural safeguards[3], such as a duty to give notice of hearsay evidence where reasonable and practicable to do so, and a power given to a party to call a witness for cross-examination on his hearsay statement. Unlike the existing rule, the English Law Commission recommended that failure to give notice or adequate notice should not affect the admissibility of the hearsay statement but would go to the weight to be attached to it or lead to costs sanctions being imposed. The *Civil Evidence Act 1995* was enacted in November 1995 to implement the recommendations of the Law Commission. Its provisions follow closely those contained in the draft Bill appended to the English Report.

Our approach to the subject under study

11. We have approached the subject by considering the recommendations contained in the English Report in the light of the public comments on our Consultation Paper. We have considered whether the English Law Commission's recommendations (and the Act which flowed from it) are applicable in the Hong Kong context.

12. We have also looked at the approach adopted in Scotland under the *Civil Evidence (Scotland) Act 1988*. That Act abolished the hearsay rule in civil proceedings in Scotland and removed any requirement for prior notification of hearsay evidence.

13. In making our recommendations, we have also considered the observations and recommendations made by the law reform bodies in Northern Ireland, Ireland, New Zealand, Australia, Canada and the United States of America on the law of hearsay.

[3] These procedural safeguards are discussed in detail in Chapter 5 below.

Chapter 1

The Current Law in Hong Kong

A definition of hearsay evidence

1.1 The rule against hearsay at common law has been variously defined. The English Report adopted Cross's formulation:

> *"an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted"1.*

It should be noted that this formulation excludes not only assertions by persons who do not give evidence, but also previous statements by persons who give evidence at trial. Any assertion, whether made orally, in writing, or by conduct[2], if made for the purpose of proving a fact, was inadmissible at common law unless it fell inside one of a number of recognised exceptions.

Hearsay: the rationale for the rule of exclusion

1.2 The rule against hearsay appears to have emerged at the beginning of the seventeenth century, at around the same time as the foundations of the adversarial process of trial were put in place[3]. The rationale for the rule was that a court would not receive and a jury should not consider evidence from a person who had not been tested by cross-examination. The maker of such a hearsay assertion would not have been bound by a solemn oath to tell the truth, and the jury had not had the benefit of seeing the witness and observing his or her demeanour. Thus, the jury would be incapable of weighing the evidence in the same fashion as for a witness who had appeared before them.

1.3 The rule against hearsay also coincided with another fundamental rule: that the court would insist on the best evidence being adduced of any fact alleged (the "best evidence" rule). This rule against weaker forms of proof would exclude attempts to adduce an assertion of a fact other than by calling the maker of that assertion.

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1 *Cross on Evidence* (7th ed, 1990) 42-43.

2 In *Chandrasekera v R* [1937] AC 220, the victim of a murderous attack described her attacker to witnesses with signs as she lay dying. This is hearsay and would have been inadmissible had there not been a statutory exception to render it admissible.

3 The development of the rule and the rationale behind it is outlined in the English Consultation Paper: see paras 2.3 to 2.5, and Part III.

1.4 The rule against hearsay incidentally gave the benefit of shortening the hearing: without such a rule, additional sources of evidence might have led to much lengthier trials.

Exceptions to the rule

1.5 Exceptions to the rule of exclusion evolved from cases where judicial experience demonstrated that evidence was sound, despite the taint of hearsay, and where circumstances necessitated reliance on a source that might otherwise be excluded[4]. These common law exceptions are still relevant today[5]. The English Consultation Paper neatly summarised the exceptions:

> *"In broad terms, the exceptions cover certain statements of deceased persons, namely declarations against interest, declarations in the course of duty, declarations as to public or general rights, pedigree declarations, dying declarations and statements by testators concerning the contents of their wills. Statements in public documents are generally admissible evidence of the truth of their contents. ... [Wilton and Co v Philips (1903) 19 TLR 390]. ... Admissions and voluntary confessions adverse to the maker's case are received as proof of the truth of their contents. ... [McKewen v Cotching (1857) 27 LJ Ex 41, 6 WR 16]. ... Testimony on former occasions, previous statements of witnesses, evidence through interpreters, evidence of age, ancient documents and reputation have all, in some circumstances, been recognised as justifying common law exceptions to the hearsay rule."*[6]

Part IV of the Evidence Ordinance (Cap 8)

1.6 Until 1969 the hearsay rule in civil proceedings in Hong Kong was governed by the common law, with the addition of several statutory exceptions based upon English legislation[7]. The Evidence (Amendment) Ordinance (Ord 25 of 1969) added Part IV to the main Ordinance, thereby

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4 Lord Reid made the following comment on the rule against hearsay and the common law's exceptions in *Myers v Director of Public Prosecution* [1965] AC 1001, at page 1020: *"Many reasons for the rule have been put forward, but we do not know which of them directly influenced the judges who established the rule. The rule has never been absolute. By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exceptions came to be recognised. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle."*

5 See para 1.24 below.

6 Para 2.13 of the English Consultation Paper.

7 Part III of the Evidence Ordinance contains provisions dealing with, *inter alia*, the admissibility and means of proof to be adopted for banker's records, documents of a public nature and official documents.

replacing the common law rule by statutory rules. The amending Ordinance followed the wording of the English Civil Evidence Act 1968. It came into operation in Hong Kong on 1 December 1970 for the purposes of civil proceedings in the Supreme Court and District Court and other civil proceedings to which the strict rules of evidence apply[8]. (Part IV of the Evidence Ordinance and Part V to which it is related are reproduced in the Appendix.)

The common law superseded

1.7 Section 46 of the Evidence Ordinance states:

> *"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 or any other Ordinance or by agreement of the parties, but not otherwise."*

The words "but not otherwise" emphasise that Part IV has superseded the common law rule and the common law exceptions to it[9]. It is also important to note that hearsay evidence may be adduced where the parties agree. Consequently, where there is consent (either express, or implied by the lack of any objection), there is no need to comply with the notification procedures discussed below.

The exclusionary rule relaxed

1.8 Section 47 is the heart of Part IV:

> *"(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, subject to this section and to rules, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.*
>
> *(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-*

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8 See LN 154/1970.

9 Note however that certain exceptions to the hearsay rule at common law have been expressly preserved by s 54 of the Ordinance (eg - admission adverse to a party to the proceedings).

(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), 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 authorized by the court."

1.9 Section 47(1) appears to be very wide, but it must be read with section 47(3): where the statement is oral or in some non-documentary form, subsection (1) is restricted to "first-hand hearsay"[10]. By implication, "second-hand hearsay" and "multiple hearsay" is admissible if adduced in a documentary form, or in a form that otherwise complies with the terms of Part IV. [11] It should also be noted that the admission of these out-of-court

[10] By "first-hand hearsay" lawyers usually mean a statement made by A which is proved by a witness who heard him make that statement. A witness may also swear that A told him what B had said. That is "second-hand hearsay", and so on.

[11] That is the implication which the authors of the English Consultation Paper read into s 2(3): see para 2.26. They rely on *Cross on Evidence* (7th ed, 1990) at 542. This appears to be an error as the author of Cross clearly states that s 2 is limited to first-hand hearsay. See *Ventouris v Mountain (No. 2) The Italia Express* [1992] 3 A11 ER 414 at 421-422 and 425 where the court disapproved Professor Cross's views as to the meaning of s. 2 of the 1968 Act.

statements is also subject to "rules", the Rules of the Supreme Court ("RSC"), which are described in detail below[12].

1.10 Section 47(2) permits a witness who is giving evidence in any civil proceedings to repeat a previous statement made by him, but only when the court gives leave, and only after examination in chief has concluded. This is meant to discourage the use of superfluous evidence by needless repetition. The two additional minor exceptions permit flexibility allowing evidence to be given in a natural fashion if the circumstances of the case so require.

The conduct of examination at trial

1.11 Section 48 states:

> *"(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 12, 13 or 14; 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 Part or Part VI 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 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."*

1.12 This section provides fundamental rules on the conduct of examination and cross-examination of witnesses at trial as to:

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[12] In Part IV, "rules" means the Rules of the Supreme Court made under s 54 of the Supreme Court Ordinance (Cap 4): see s. 55(1) of the Evidence Ordinance. Originally the power to make the Rules was contatined in s 53 of the Evidence Ordinance.

- admitting contradictory or inconsistent statements for the purpose of challenge in cross-examination;

- permitting the admission without leave of a statement proved for the purpose of rebutting a suggestion of fabrication;

- the admission of a document used by a witness to refresh his memory which is then employed in the cross-examination of that witness.

Documentary records other than records produced by computer

1.13 Section 49 deals with the admissibility of certain documentary records as evidence of the facts stated in those records. (In contrast, section 50 deals with statements produced by computers and treats them in a different fashion.) Section 49 states:

> *"(1) Without prejudice to section 50, in any civil proceedings a statement contained in a document shall, subject to this section and to rules, 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-*
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> *(a) 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*
>
> *(b) 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-*
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> *(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), shall not without the leave of the court 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."

1.14 Section 49 overlaps with section 47 and is also subject to the rules described below[13]. "Document" is very widely defined (in section 55 of the Ordinance) and can include photographs and sound and video recordings. Section 49(2) corresponds to the treatment of a previous consistent statement admitted under section 47. While this section is available to admit a wide variety of business and other records, including those from government offices, it is not available to deal with such records stored exclusively on a computer with no corresponding manual record. (Nor does section 49 permit proof of the non-occurrence of an event which should have been recorded if it had occurred.)

Statements produced by computers

1.15 Section 50 provides for the admission of a document produced by a computer. Section 50(1) states:

"(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules, 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) are satisfied in relation to the statement and computer in question."

Unfortunately, the conditions in section 50(2) are quite elaborate, requiring regular use of the computer over the period in question, regular supply of information to the computer, proof that the computer was operating properly and that the information supplied to the computer was derived from information provided in the ordinary course of any activities regularly carried on over the relevant period[14]. Notwithstanding these safeguards, section 50(2) does *not* refer to possible errors in the collection of or input of

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[13] In one way, s 49 is narrower than s 47 in that there is a requirement that the compiler be acting under a duty. In another sense, it is wider in that it clearly permits multiple hearsay to be related after passing through a number of people before being recorded.

[14] The whole of Parts IV and V are reproduced in the Appendix to this paper.

information to the computer, nor does it take account of possible errors in the computer's software.

Rules of the Supreme Court

1.16 The categories of hearsay statement described in sections 47, 49 and 50 are not made unconditionally admissible: the sections require compliance with the rules, specifically the Rules of the Supreme Court ("RSC") made under section 54 of the Supreme Court Ordinance (Cap 4)[15]. The rules governing the admission of hearsay statements in civil proceedings are found in Order 38 rules 20 to 34[16]. Subject to the District Court Civil Procedure (General) Rules, the RSC also apply to proceedings in the District Court[17].

The hearsay notice

1.17 The broad thrust of these procedural requirements is as follows: any party wishing to adduce a hearsay statement which is admissible in evidence by virtue of sections 47, 49 or 50 of the Evidence Ordinance must serve a notice on all other parties of his intention to do so[18]. This notice must be served not later than 21 days before application is made to set down for trial. A copy of any documentary hearsay statement is required to be served with the notice. If the statement is non-documentary hearsay, admissible under section 47 of the Evidence Ordinance, the party who proposes to adduce it must give particulars of the maker and the substance of the statement. Reasons must be stated where the adducer of hearsay cannot call the maker of the statement, or where the adducer for some other reason proposes not to call him[19].

1.18 There are additional procedural requirements for adducing hearsay statements contained in records not produced by a computer, which require the notice to specify the circumstances under which the record was compiled in terms of the requirements of section 49[20]. As for hearsay statements contained in computer records, particulars relating to the

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15 The Rules of the Supreme Court are a form of delegated legislation made by the Rules Committee constituted under s 55 of the Supreme Court Ordinance (Cap 4). The rule-making powers previously contained in s 53 of the Evidence Ordinance were removed from the Hong Kong legislation by the Evidence (Amendment) Ordinance (Ord 65 of 1980).

16 The relevant rules are reproduced in the Appendix to this paper.

17 See the District Court Ordinance (Cap 336) ss 17 and 72; and rr 9 and 10 of the District Court Civil Procedure (General) Rules.

18 RSC O 38, r 21.

19 RSC O 38, r 25 lists the reasons for not calling a person as a witness on the grounds that he is unavailable because: he is dead; beyond the seas; unfit by bodily or mental condition to attend as a witness; or, that despite the exercise of reasonable diligence, it has not been possible to identify or find him, or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement. If the reason set out in O 38 r 25 is correct, the court has no discretion to exclude the hearsay evidence: *Cluett HK Ltd t/a Six Continents v Hercules Knitters Ltd* [1986]HKLR 1112, 1116C.

20 RSC O 38, r 23.

circumstances in which computer records are produced must be specified in the notice[21].

The counter-notice

1.19 Should the opposing party require the maker of the hearsay statement to attend court, the opposing party must serve a counter-notice within 21 days after service of the hearsay notice described above[22]. If the party seeking to adduce the statement will not be calling the maker of the statement for one of the reasons specified in Order 38 rule 25, the other side must challenge that reason if he wishes to serve a counter-notice. If such a counter-notice has been served, the party proposing to adduce the hearsay statement has no right to use it in evidence unless the adducer satisfies the court that the maker cannot or should not be called as a witness. The matter may be resolved in a pre-trial hearing before a Master. Otherwise, the adducing party must rely on the court's residual discretion to admit evidence in Order 38 rule 29.

Residual discretion to admit hearsay

1.20 The operation of these detailed rules is subject to a residual discretion in the court to allow a hearsay statement which is admissible under section 47(1), 49(1) or 50(1) of the Ordinance to be given in evidence despite the fact that the rules have not been complied with[23]. This discretion is exercisable when the court considers it just to do so[24]. Additionally, the discretion may be exercised in favour of admission despite non-compliance where refusal to admit the evidence might otherwise compel one side to call the opposing party or his servant or agent[25].

Impeaching credibility

1.21 It is important to note that if the maker of a statement is not called by a party, his credibility may still be impeached by the other party in a similar manner as if he had given evidence. Section 52 of the Evidence Ordinance permits any evidence otherwise admissible to destroy or support

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21 RSC O 38, r 24.

22 RSC O 38, r 26.

23 RSC O 38, r 29.

24 The discretion is a very wide one, though some guidance exists as to the way it should be exercised. In *Ford v Lewis* [1971] 1 WLR 623, the English Court of Appeal deprecated the avoidance of the rules for the purpose of preserving the element of surprise. The rules should not be avoided for tactical reasons. The discretion is meant to be exercised to overcome the party's inadvertance or inability to comply. See also *Chan Hoi Yan v Arctic Trading Co Ltd*, unrep, Civil Appeal No. 140 of 1987.

25 See RSC O 38, r 29(2). The rules take account of the possibility that the servant or agent will favour his employer. This is also a ground for arguing that a maker of a hearsay statement should not be called under O 38, rr 22 and 23.

the credibility of a maker as a witness if he had been so called[26]. Evidence of inconsistent statements may also be called in the same manner as if the maker had been called[27], even if such statements are themselves hearsay[28].

Weight of evidence

1.22 Section 51 of the Ordinance provides guidance as to the weight to be accorded to hearsay evidence. The court is required to have regard to all the circumstances from which an inference can reasonably be drawn, and, in particular, whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and whether or not the maker (or, for records, the first supplier of the information or other person concerned with compiling and keeping the records) had an incentive to conceal or misrepresent the facts[29].

The costs factor

1.23 A needless challenge to the adducing of hearsay evidence may be penalised in costs. The court has a discretion to disallow or award costs against a party who unreasonably insists by way of a counter-notice on the attendance of a witness who is the maker of a statement that is admissible as a hearsay statement[30].

Common law exceptions preserved

1.24 The reforms introduced by the 1968 Act removed the need for many of the old common law exceptions. Nonetheless, section 54 of the Evidence Ordinance retains certain long established rules governing admissibility of hearsay evidence formerly admissible at common law, in a fashion that preserves the existing case law and allows it to develop[31]. The retained exceptions fall into two categories: those where none of the provisions of the Ordinance regarding notice, etc, apply[32] and a second category of exceptions which are regulated by the procedural safeguards mentioned above as far as possible[33]. The first category is much more significant and consists of

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26 As with the admission of hearsay, the challenge to credibility is subject to rules which ensure that this right of challenge is not abused - for example, by a challenge to credibility without a challenge to the hearsay notice: see RSC O 38, r 30.

27 If a party wishes to call evidence of an inconsistent statement he must serve notice of his intention to do so, though the Court may waive compliance: see RSC O 38, r 31.

28 See s 52(3).

29 See s 51(3), paras (a), (b) and (c).

30 See RSC O38, r32.

31 See s 54(1) and (3)(a).

32 See s 54(2).

33 See s 54(4).

- admissions adverse to a party to proceedings;
- published works dealing with matters of a public nature;
- public documents and records.

Proceedings to which Part IV applies

1.25 Section 68(1) of the Evidence Ordinance defines "civil proceedings" in Part IV as including, "in addition to civil proceedings in any court -

> *"(a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and*
>
> *(b) an arbitration or reference, whether under an enactment or not,*
>
> *but does not include civil proceedings in relation to which the strict rules of evidence do not apply."*

1.26 However, by the Evidence (Amendment) Ordinance (Commencement) Notice 1970, Part IV is applied only to the following civil proceedings[34] -

> *"(a) proceedings (other than proceedings in bankruptcy) in the Supreme Court and the District Court;*
>
> *(b) proceedings before any tribunal, other than a court, to which the strict rules of evidence apply;*
>
> *(c) arbitrations and references to which the strict rules of evidence apply;*
>
> *(d) applications and appeals arising out of the proceedings mentioned in sub-paragraphs (a) to (c)."*

1.27 Part IV is excluded from proceedings "to which the strict rules of evidence do not apply". In such proceedings a more relaxed, less formalistic view of the hearsay rule may be taken, recognising the informal nature of specialist jurisdictions[35]. Accordingly, a tribunal may accord a higher priority

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[34] LN 154/1970. Thus bankruptcy proceedings and proceedings in the magistrates' courts are not subject to Part IV.

[35] It was the view of the Franks Committee on Administrative Tribunals and Enquiries (1957, Cmnd 218), that it would be a mistake to introduce the strict rules of evidence into the majority of tribunals. This report acted as a catalyst in producing the modern system of statutory tribunals which are such a marked feature of English law. The report also had a profound

to helping to discover the truth rather than acting as a passive umpire, as is required in adversarial litigation in the High Court[36].

1.28 The English equivalent of the proviso to section 68(1) of the Evidence Ordinance[37] relaxes the rule for certain proceedings before the High Court and County Court. This is of considerable significance in wardship proceedings where the court takes a paternal role and the paramount consideration is the welfare of the child concerned. The court may therefore order that any appropriate enquiry be made into matters relevant to the child's welfare[38].

1.29 It would appear that wardship proceedings in Hong Kong are subject to the strict rules of evidence. In England the law has been further relaxed in relation to other proceedings relating to the upbringing, maintenance and welfare of children[39]. The position in Hong Kong, however, is not clear[40].

Part V of the Evidence Ordinance : evidence of opinion and expert evidence

1.30 At common law, consistent with the rule against hearsay, witnesses were limited to giving evidence about facts within their knowledge. Generally speaking, witnesses other than expert witnesses, were not permitted to give evidence of opinion in their testimony. Even in the case of expert witnesses the opinion of the expert would necessarily incorporate elements of hearsay as his opinion would draw on many sources of information, some identifiable and some not. Part V of the Evidence Ordinance, modelled on the English Civil Evidence Act 1972, extends Part IV beyond statements of fact to cover also statements of opinion and expert evidence[41].

1.31 Sections 56 and 59(2) to (5), modelled on the 1972 Act, came into operation in Hong Kong on 1 July 1979 for the purpose of any civil

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effect on the development of statutory tribunals in Hong Kong and in other Commonwealth jurisdictions.

36 For example, in the small claims jurisdiction. S 23 of the Small Claims Tribunal Ordinance (Cap 338) disapplies the rules of evidence: the tribunal may receive any evidence which it considers relevant.

37 i.e. the proviso to s 18 of the 1968 Act.

38 In *Re K* [1965] AC 201, at 242, Lord Devlin said "An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it".

39 Following the decision of the English Court of Appeal in *H v H; K v K (Minors) (Child Abuse: Evidence)* [1989] 3 WLR 933 (where the Court ruled that proceedings under the 1973 Matrimonial Causes Act were governed by the 1968 Act) reform followed swiftly. S 96 of the Children Act 1989 enabled the Lord Chancellor to make an order disapplying the hearsay rule in proceedings relating to the upbringing of children. An order followed shortly after the Act came into operation.

40 The matter is discussed below at para 2.38.

41 It accomplishes this by applying Part IV (with the exception of s 50 (computer statements)) to statements of *opinion* as they would apply in relation to statements of *fact*, with any necessary modifications: see s 56 of the Ordinance.

proceedings (other than proceedings in bankruptcy)[42]. "Civil proceedings" is broadly defined as including :

> *"in addition to civil proceedings in any court-*
>
> *(a) civil proceedings before any tribunal, being proceedings in relation to which the strict rules of evidence apply; and*
>
> *(b) an arbitration or reference, whether under an enactment or not,*
>
> *but does not include civil proceedings in relation to which the strict rules of evidence do not apply"[43].*

1.32 The admission of expert evidence is also subject to the Rules of the Supreme Court, but a different procedure is adopted to that applicable to statements of fact. The court is given extensive powers to determine whether to receive and to control the circumstances in which expert opinion is received in evidence, including steps in the pre-trial process[44]. Disclosure of experts' reports is encouraged and there is provision for meetings between experts on a "without prejudice" basis. In the usual case no expert evidence is adduced unless it has been disclosed in a manner ordered by the court. If both parties employ an expert, disclosure is normally ordered on a mutual basis. The aim of these rules is to avoid surprise and to narrow areas of dispute before expert witnesses are called at trial.

Related rules of practice and procedure

1.33 *Affidavit evidence*. The Rules of the Supreme Court anticipate the resolution of civil disputes at trial, and give detailed guidance for the preparation and conduct of the trial. The general rule is that witnesses at trial are to be examined orally in open court[45]. Nonetheless, there is provision for evidence to be received at trial by affidavit if the court thinks it reasonable to so allow[46]. Such proof by affidavit is not common in civil proceedings begun by writ, but is common in civil proceedings begun by originating summons and in judicial review applications. It is also usual to use affidavit evidence in the pre-trial process, for example, in support of interlocutory applications.

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42 See LN 155/1979. Sections 57, 58, 59(1) and 60 come into operation on 1 October 1973: LN 160/1973.

43 S 60(1) of the Ordinance.

44 See RSC O 38, rr 35 to 44. Hong Kong's rules are quite similar to the English RSC, though differences occur in the treatment of expert evidence in actions for personal injuries, see RSC O 38, r 37. Whether there is any significant difference between English and Hong Kong practice is not clear.

45 RSC O 38, r 1.

46 RSC O 38, r 2. There is also provision for the taking of a deposition from a witness (that is, an examination on oath) before a trial: see RSC O 38 r 9 and O 39. In this case the usual rules of evidence apply to the taking of that deposition. Unlike an affidavit the deposition is not hearsay.

1.34 Similar rules of evidence apply to affidavit evidence as to evidence given on oath at trial in court: an affidavit may contain only such facts as its maker is able of his own knowledge to prove[47]. There are, however, important exceptions to this rule, the most important in practice being that affidavits used in interlocutory proceedings may contain statements of information or belief if the sources and grounds are stated[48].

1.35 Concern has been expressed as to whether the provisions dealing with affidavits are consistent with the policy underlying Part IV of the Evidence Ordinance[49]. For example, if one party proposes to use an affidavit at trial, filing the affidavit presumably removes the need to comply with the notice requirements that would otherwise apply to the evidence of the witness[50]. The affidavit is supposed to be taken as notice. The same rule also requires compliance with another rule, which impliedly excludes any hearsay content from the affidavit[51]. This requirement stands in the way of the employment at trials of affidavit evidence[52] which contain hearsay.

1.36 *Exchange of witness statements*. Recent amendments to the Rules of the Supreme Court, following the English example, promise to alter radically litigation practice. The court's powers to order exchange of all experts' evidence prior to trial[53] and to order the prior exchange of witness statements have been strengthened[54]. The change is designed to promote greater openness in pre-trial procedure[55], as the exchange of such statements is now mandatory[56]. The service of a witness statement under the new rule is treated as a notice under the Evidence Ordinance if it is expressly so stated by the serving party. It is at least arguable that, where statements of witnesses and experts have been so exchanged, hearsay notices should be modified or even dispensed with as the dangers of surprise have been to some extent avoided.

1.37 This change in procedure appears to have met a mixed reception in England and Wales. Mr Justice Millet, a visiting English Chancery judge, expressed the view that a witness statement could not be a

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47 RSC O 41, r 5(1).

48 RSC O 41, r 5(2). A similar exception is made for summary proceedings under RSC O 14 and O 86.

49 See the English Consultation Paper, paras 2.79 and 2.80.

50 RSC O 38, r 21(4).

51 RSC O 38, r 21(4) specifically refers to rule 5 of O 41, which requires that it contains only such facts as the deponent is able of his own knowledge to prove.

52 The party proposing to use an affidavit containing hearsay at trial could, presumably, seek an order under RSC O 38, r 3.

53 RSC O 38 rr 37 and 38.

54 RSC O 38, r 2A. "This rule empowers the High Court to direct any party at any stage of the proceedings to serve on the other parties the written statements of the oral evidence which that party intends to lead on any issues of fact to be decided at the trial": see para 38/2A/1 of the *Supreme Court Practice* (1995) (the English "White Book").

55 The change follows on from recommendations made in the Report of the "Civil Justice Review" (Cmnd 394) published in June 1988. A critical assessment of the civil justice process is made in the Review, whose authors make numerous recommendations aimed at reducing "delay, cost and complexity".

56 See *Richard Saunders and Partners v Eastglen Ltd* [1989] 3 ALL ER 946. See also paras. 2.35 and 2.36.

substitute for oral evidence-in-chief[57]. A witness statement could not be regarded as "pre-packaged testimony": it was more the product of the lawyer who prepared it than the witness who signed it. The learned judge acknowledged that cross-examination was the essential safeguard, but this was not by itself a complete substitute for testimony-in-chief. It was not yet apparent that this change had promoted settlements, the strongest argument in favour of the reform. In his view, the new procedure, on the other hand, certainly added to the costs of proceedings.[58]

1.38 *Evidence by video link or video recording*. There has long been provision for the examination of witnesses abroad by means of a letter of request[59]. The process is well established, but rather long-winded and expensive. There is recent English authority that suggests a quick and convenient means of obtaining evidence for trial by using section 2 of the 1968 Act (section 47 of the Evidence Ordinance). In *Garcin v Amerindo Investment Advisors Ltd*, Morritt J granted the plaintiff's application for evidence to be given by video conference link. He made his order under Order 38, rule 3. His reasoning is worth recording [60]:

> *"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 a witness in a 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 of a witness overseas would be similarly admissible as a document in which the statement was made: see section 10. Thus, if both parties and the witness cooperate, 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."*

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57 The learned judge delivered a lecture entitled "Recent Changes in English Civil Procedure" on 12 March 1992 as part of the 1992 Law Lectures for Practitioners series. Despite his criticisms of the new procedure, the learned judge concluded that the change was "here to stay".

58 See also *A. Jack, "Radical Surgery for Civil Procedure"* (1993)143 NLJ 891 and *I. Grainger, "Witness Statements - a new privilege?"* (1995)145 NLJ 961, 1000 and 1062.

59 Affidavits for use in pre-trial proceedings may be prepared overseas: RSC O 41 r 12. Letters of request concern the means by which a witness abroad may be examined and cross-examined under oath. See RSC O 39, rr 2 and 3.

60 [1991] 1 WLR 1140, at 1142. Considered in *Ventouris v Mountain (No 2) The Italia Express* [1992] 3 All ER 414 CA.

Chapter 2

Practice

The litigation process

2.1 Civil litigation in the adversarial system involves a number of distinct phases.

- Commencement. The plaintiff commences proceedings, normally by issuing a writ.

- Pleading. This is a process whereby the parties set out in writing the basis of their respective claims and defences.

- Interlocutory proceeding. This is a pre-trial process under the supervision of the court, the primary purpose of which is preparation for an eventual hearing in open court.

- Trial. This is essentially an oral process. The oral nature of the proceedings is emphasised by the actual attendance of witnesses for examination and by the manner in which argument is made by counsel. This is in contrast to the pre-trial process, which is usually conducted in written form, normally involving only the attendance of the parties' legal representatives before a Master.

- Judgment and enforcement of orders.

2.2 In practice, very few civil actions proceed to trial[1]. The vast majority of claims settle or conclude in consent judgments, without resort to trial. Litigation is an uncertain business and the more advanced the process, the more expensive it becomes. Parties are ever mindful of compromise. The consideration of the evidence and determining the part that hearsay evidence might play in the litigant's case should take place at about the time of the summons for directions stage, the final interlocutory stage after which the matter can be set down for trial.

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[1] The Hong Kong Judiciary does not maintain extensive records or statistics for civil actions in the High Court or District Court which actually go to trial. In any event, civil proceedings can become very protracted and last well beyond the year of commencement. Some measure of the number of trials may be found in English statistics: about 1% of personal injury actions (a major part of the business of the court) went to trial in 1986 : see the 1988 Civil Justice Review (Cm 394).

2.3 *The summons for directions*. In the typical High Court action in Hong Kong a hearing takes place following the issue of a summons for directions. There is a standard form of summons which lists a number of matters which may require a ruling by the court. The hearing is intended to provide "a thorough stocktaking relating to the issues in an action"[2], to review preparations to date and to provide directions for any further preparation necessary for trial.

2.4 The standard form contains a direction that the case be set down for trial within a certain period of time and provides for an estimate of the length of the trial[3]. On the hearing of the summons for directions, it is usually the case that the paragraph to set the matter down for trial is completed as "adjourned to a date to be fixed". Subsequently, once a party is in a position to set the case down for trial, the legal representative for that party (usually the plaintiff) will arrange to restore this paragraph of the summons for directions.

2.5 A hearing is then held before the Listing Judge. Except where the parties are unrepresented, appearances before the Listing Judge should be by barristers or by the solicitor who handles the case or who is familiar with the case. The Listing Judge will require the barrister or solicitor to confirm that he can comply with the "checklist" of steps to be taken prior to the granting of leave for the case to be set down for trial. The current checklist employed in the courts includes a question: "Have all hearsay notices or counter-notices been served? If not, when will they be served?" Save in exceptional circumstances, the Listing Judge will not grant leave to set the case down for trial unless the case is in every respect ready. Hence, the Listing Judge may sometimes refuse to set the case down for trial even if both parties indicate that they will serve any requisite notices, in particular if the case is to be fixed in the Running List.

2.6 *Hearsay notices: theory and practice.* If the parties' cases have been meticulously prepared and the respective counsel have advised on evidence, then notice could be served before application is made to set down for trial, in the manner specified and within the time frame required by the Rules of the Supreme Court. Experience in England suggests that parties are rarely able to fully comply with the rules; a similar situation was revealed in our initial consultation in Hong Kong[4].

2.7 Moreover, several responses to our Consultation Paper indicated that the notice procedures are often not observed in Hong Kong,

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2 See the White Book and the first paragraph of notes on O 25, r 1. The Hong Kong rules are very similar.

3 The application to set the case down for trial should provide particulars in the form required by the current practice direction (see the 1990 Practice Directions). This form has been extended into a lengthy proforma covering any of the usual orders necessary before trial.

4 In late 1991, initial consultation was made in Hong Kong by way of a letter from the Law Reform Commission addressed to some members of the judiciary, the Secretaries of the Bar Association and the Law Society, government lawyers engaged in civil litigation and to a small number of solicitors' firms with experience of practice in Hong Kong. The contents of that letter were based upon the observations made in the English Consultation Paper and posed a series of similar questions.

partly due to their complexity and inconvenience. The Bar, for example, commented that deficient hearsay notices, which are no more than repetition of the documents enumerated in the list of documents, are sometimes served. There are also cases, said the Bar, in which the necessary hearsay notices are not served and the opening day of the trial is taken up by the defaulting party applying for the court's discretion to admit the hearsay evidence.

The English experience

2.8 *The complexity of the 1968 Act and the rules*. In England and Wales the "single loudest complaint against the 1968 Act is that the notice provisions which it contains and the rules of court made under those rules are so complex that practitioners have avoided using them"[5].

2.9 Criticism was not so much directed at the need for notification, but at the inconvenience and difficulty of correctly categorising in advance evidence of a hearsay nature[6]. There was a particular problem with foreseeing oral hearsay in sufficient time to give the required notice. The effort of identification and classification of hearsay was costly in legal time. This was the case even where much of the hearsay evidence, in particular business records, was unlikely to be controversial.[7]

2.10 The response on consultation had led the English Law Commission to the conclusion that there was widespread dissatisfaction with the complexity of the rules and compliance with them "may have become the exception rather than the rule, with the parties relying on the discretion of the court to admit the hearsay evidence".[8]

2.11 *Gaps in the law.* A significant gap in the treatment of records by the 1968 Act is the way in which it deals with computer records. Documents and other evidence stored on or generated by computer play an increasingly significant part in litigation, as many businesses place their records directly onto a computer or retain hard copies of records only for a brief period. It is possible that section 5 of the 1968 Act[9] fails to deal with such records because section 5 "does not build in the element required of other categories of permitted, reliable, second-hand hearsay, namely personal knowledge of the information put in, which is the area most easily recognised as the source of inaccuracy of computer-held information"[10].

2.12 The English Consultation Paper also recorded other concerns which had been expressed regarding the treatment of computer records:-

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5 English Consultation Paper, para 3.50.
6 Ibid, para 3.52.
7 Ibid, paras 3.57 and 4.16.
8 English Report, para 3.7.
9 The equivalent provisions in Hong Kong can be found in s 50 of the Evidence Ordinance.
10 English Consultation Paper, para 3.64.

- a failure to recognise the original element in computer records, as distinct from information which is merely collated and stored[11];

- the fact that section 5 dealt with possible errors in the hardware rather than possible errors in the software that handled the information[12];

- the conditions of admissibility were outdated. The safeguards belonged to another era when computers were novel, large and attended by scientists, rather than common-place tools in every aspect of business[13];

- the 1968 Act did not deal at all with evidence entirely generated by computer[14];

- the provisions of section 5 were said to have confused the issues of admissibility with authentication[15]. Computer generated documents should require clear authentication proving that they had originated from the proper source and had not been tampered with.

2.13 *Records too widely defined.* Three further failings in the treatment of records were identified by practitioners and commentators:

- that the category of "records"[16] dealt with under section 4 of the 1968 Act[17] was too wide. Apparently experience had shown that business records were reliably and accurately kept, but that there was less confidence in other forms of records[18]. It was also possible that there was a need to demonstrate the competence and accuracy of the supplier and compiler of non-business records;

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11 Ibid, para 3.61.

12 Ibid, paras 3.62 and 3.63, and 3.65 to 3.68.

13 Ibid, paras 3.62 and 3.63.

14 Ibid, paras 3.65 to 3.68. This does not necessarily mean to say that such evidence is inadmissible. It is probably admissible in the same way as evidence by any other complex machinery: see *Castle v Cross* [1984] 1 WLR 1372, a criminal case involving an "intoximeter" breath test device.

15 Para 3.69 of the English Consultation Paper.

16 "Records' typically include business records, hospital records, even a police officer's notebook. Records do not include a file of letters, nor do they include an article published in a professional journal. See *H v Schering Chemicals Ltd* [1983] 1 WLR 143: a record for the purposes of section 4 of the Civil Evidence Act 1968 was either a document that gave effect to a transaction or a contemporaneous register of information supplied by those with direct knowledge of the facts. In that case the documents sought to be introduced (summaries of research and articles published in medical journals) were a digest of records which existed or had existed, and were therefore not records.

17 The equivalent provisions in Hong Kong can be found in s 49 of the Evidence Ordinance.

18 Paras 3.56 and 3.57 of the English Consultation Paper.

- it was suggested that for business records it was unnecessary to impose conditions relating to the reliability of the supplier, or compiler, or to require that the compiler act under a duty[19];

- the absence of an entry in a record was not evidence of the non-occurrence of an event which, in the normal course of events, would have been recorded had it occurred[20].

2.14 Consultees in England took the view that the rules relating to records were based on an old fashioned view of business methods and office procedure, where records were kept manually and where overall responsiblity could be attributed to individual record keepers.[21] Nowadays, as record keeping has been taken over by technology, the requirement to identify a person with a duty to compile the information is often unrealistic.

2.15 *Inappropriateness of strict rules in some cases.* The English Consultation Paper made the case for excluding the strict rules of evidence from any court proceedings involving issues concerned with the welfare of children[22]. There was also a case for relaxing the strict rule in all matrimonial proceedings[23].

2.16 *H v H and K v K*. Reform had been prompted in England and Wales by the decision in *H v H and K v K (Minors)*[24]. These were appeals from judgments at first instance where the court had partly relied on findings of fact that sexual abuse had occurred on the basis of statements made by young children to social workers, who were not at the time court welfare officers appointed to prepare court reports[25]. The English Court of Appeal held that matrimonial proceedings under the Matrimonial Causes Act 1973 were subject to the 1968 Act.

2.17 The Court of Appeal found that, unlike in the wardship jurisdiction, matrimonial proceedings were adversarial and the rule against hearsay evidence had to be observed unless waived by the consent of the other party. Furthermore, in civil proceedings the unsworn evidence of a young child was inadmissible and therefore statements made by the child could not be admitted under section 2(1) of the 1968 Act.

2.18 The decision caused great concern: if welfare reports were unavailable the court might not be able to act. Even if such reports were available, the evidence of another person who received a statement had to be

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19 Ibid, para 3.57.

20 Ibid, para 3.59.

21 English Report, para 3.12.

22 English Consultation Paper, paras 2.61 to 2.64 and 3.30 to 3.35.

23 *Ibid*, paras 3.36 to 3.47.

24 [1989] 3 WLR 933.

25 If the social workers had been seeking information in preparation of a welfare officer's report then evidence they had collected would have been admissible. This is because a welfare officer is an officer of the court when he or she acts in that capacity. The report is not constrained by hearsay and may contain any relevant but otherwise inadmissible material. See Butler-Sloss L J in *H v H and K v K* [1989] 3 WLR 933, at 955.

conveyed indirectly through a welfare officer's report[26]. The situation was corrected when the Lord Chancellor made orders under section 96(3) of the Children Act 1989 disapplying the hearsay rule in the High Court and a county court in civil proceedings concerning the upbringing, maintenance or welfare of a child[27].

2.19 The English Consultation Paper advanced the view that a strict application of the hearsay rule is probably incompatible with the court's functions when dealing with the welfare of children[28]. These functions are exercised in wardship proceedings, proceedings under the matrimonial causes legislation, or care proceedings in the juvenile courts. Rules of evidence and court practice should, if possible, be uniform when dealing with similar subject matter. To a large extent this uniformity was achieved in England and Wales with the full implementation of the Children Act 1989, which allows transfer of children's proceedings between different levels of courts according to the complexity of the proceedings[29]. With strict rules disapplied, the evidence of a child recorded on video could itself be admitted into evidence[30].

2.20 The English Consultation Paper suggested that it was artificial in some family proceedings to distinguish a child's welfare from that of his family[31]. It might be impractical and difficult to separate child welfare from other issues to which the 1968 Act might apply. Child welfare shared a characteristic with other issues encountered in family proceedings: the need for the court to look to the future. For this role to be adequately fulfilled the court required flexibility. Thus, it might be preferable if the hearsay rule were abrogated in all family proceedings[32]. The authors of the English Consultation paper commented:

> *"Justiciable issues may often take second place to the role of the court in exercising discretion in the granting of relief, based on an assessment of the likely future developments and of best interests. The character and personalities of the people*

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26 Though Butler-Sloss L J appeared to endorse the usefulness of video recordings to record the complaints of a child of tender years: see *ibid*, at 948 to 989.

27 See the Children (Admissibility of Hearsay Evidence) Order 1990. A similar order was also made for family proceedings in the magistrates' courts. It should also be noted that section 96(2) of the Children Act made provision for courts in civil proceedings to hear the unsworn evidence of a child despite his lack of understanding of the nature of the oath.

28 Para 3.40 of the English Consultation Paper.

29 The Act was fully implemented on 14 October 1991. The Children (Admissibility of Hearsay Evidence) Order 1991, SI 1991 No 1115, revoked and replaced the 1990 Order, and came into force with the full implementation of the 1989 Act. In civil proceedings before the High Court or a county court, and in family proceedings in a magistrates' court, evidence given in connection with the upbringing, maintenance and welfare of a child shall be admissible notwithstanding any rule of law relating to hearsay. This 1991 Order has now been superseded by a new Order which extends the substance of the provisions of the 1991 Order to civil proceedings under the Child Support Act 1991 (SI 1993, No 621).

30 In *Re W (Minors) (Wardship: Evidence)* [1990] FLR 203 the court received a video recording of a child relating allegations of abuse as direct testimony. This was in the court's wardship jurisdiction, where the 1968 Act does not apply. The evidence could have been given through a third party, but with obvious room for error or distortion. For further discussion see *Clarke, Hall and Morrison on Children* (10th ed) at 1 [605] to [610].

31 Para 3.43 of the English Consultation Paper.

32 *Ibid*, paras 3.43 to 3.47.

concerned are often relevant to the exercise of this discretion in a way which is seldom if ever encountered in other types of litigation"[33].

2.21 *Magistrates' courts*. The provisions of the Civil Evidence Act 1968 do not apply to magistrates' courts. The Law Reform Committee, whose recommendations lead to the 1968 Act, have stated:

> *"For lay magistrates to have to apply different rules of evidence according to the kind of case which they were trying would, we think, be confusing for them and might give rise to difficulties and errors in both criminal and civil cases"*[34].

The Committee also considered that the procedural safeguards and the element of judicial discretion could not readily be adjusted to fit into the scheme of summary proceedings. There was a need to avoid complex rules where parties were often unrepresented. Notwithstanding the Committee's observations, there is power to extend the 1968 Act to magistrates' courts in section 20(4) of that Act, but it has yet to be employed.

2.22 In England and Wales magistrates have an extensive civil jurisdiction. It includes the collection of local taxes, licensing and a matrimonial jurisdiction. The system works, but its shortcomings are apparent:-

- the Evidence Act 1938[35] applies to civil proceedings in the magistrates' courts, providing for the admission of certain documents. It does not apply to oral hearsay. It is also not appropriate to deal with computerised records[36];

- in the exercise of their licensing jurisdiction the magistrates do not consider themselves bound by strict rules of evidence and are prepared to receive hearsay. There is little authority for this practice other than that it is of long standing[37]. Licensing could not proceed on strict rules as it is essentially an inquisition into the suitability of a candidate for permission to do what is otherwise forbidden;

- in domestic and care proceedings in the magistrates' courts, when the 1938 Act does not apply, the court should apply the

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33 *Ibid*, para 3.44.

34 See Law Reform Committee 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd 2964, para. 50.

35 See s 2. Ss 3, 4 and 5 of the 1938 Act still survive in the Evidence Ordinance, as ss 42, 43 and 44. S 44 is little used, but appears to offer a means of proof by affidavit that would be useful in civil proceedings in the Magistracy.

36 See *Camden London Borough Council v Hobson and Mather* The Independent, 28 January 1992.

37 The English Consultation Paper noted the paucity of authority. It cites a decision of Lord Denning MR in *Kavanagh v Chief Constable of Devon* [1974]1 QB 624. He concluded on an examination of the history of the licensing jurisdiction that magistrates may receive any material which is logically probative even though it is not strictly evidence in a court of law.

common law[38]. A 1990 Order under the Children Act 1989 has removed the injustice of the strict hearsay rule in care proceedings. This 1990 Order has been replaced by a 1991 Order which provided that hearsay evidence in connection with the upbringing, maintenance or welfare of a child should be admissible in family proceedings in a magistrates' court.[39]

2.23 *An appraisal of the 1968 Act.* The English Consultation Paper made the following appraisal of the overall performance of the 1968 Act:

> *"Despite the criticism of the notice procedures, the 1968 Act with its procedural safeguards and judicial discretion has in practice regulated the admissibility of hearsay evidence in a way which has not provoked complaints of injustice ... the 1968 Act was successful in simplifying to a considerable degree the confusion of the common law rule. It remedied most of the practical problems that had been experienced under the common law rule and rendered irrelevant arguments as to whether evidence was admissible under other rules of evidence, for example as res gestae or as a self-serving statement. It provides clarity by its express provision describing the evidence of a hearsay nature which needs to be regulated."*[40]

2.24 The criticism of the notice procedures was directed at their complexity and the cost of strict compliance, and not at the need for prior notice which was seen as giving benefits to both parties to the dispute.[41]

2.25 Little or no critical comment appears to have been directed at the 1968 Act's safeguards whereby evidence may be introduced to challenge the credibility of the maker of a hearsay statement. The existing provision of cost penalties and the residual discretion to admit evidence also appear to be well accepted by practitioners[42].

2.26 Two factors appear to play a role in permitting the 1968 Act to operate without giving rise to complaints of injustice:-

- much hearsay evidence is admitted by consent, either informally in negotiation between solicitors for the parties, or by counsel in the course of trial. Against a background of judicial opposition to technical objections, a possible penalty in costs, and the profession's acceptance of greater openness in litigation,

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38 *Bradford City Metropolitan Council v K (Minors)* [1990] 2 WLR 532 confirmed the applicability of common law hearsay rules to care proceedings. This contributed to the making of the Children (Admissibility of Hearsay Evidence) Order 1990 (SI 1990, No. 143). Before the decision, and the decision in *H v H* above, the United Kingdom Government had announced its intention of applying the 1968 Act to all civil proceedings in magistrates' courts.

39 See SI 1991, No. 1115. The 1991 Order has now been superseded by the 1993 Order (SI 1993, No. 621) which extends the substance of the provisions of the 1991 Order to proceedings under the Child Support Act 1991.

40 Paras 4.12 and 4.13 of the English Consultation Paper.

41 *Ibid*, paras 3.52, 4.14 and 4.16 to 4.17.

42 *Ibid*, para 4.10.

objection is only likely to be taken to hearsay when it involves a critical issue[43];

- professional common sense demands that a party call the maker of a statement if that witness can be made available. If a case turns on certain evidence and it were possible to produce the witness, lawyers would not care to run the risk of the evidence being accorded less weight than it might be given if it were tested by cross- examination[44].

Hong Kong's experience with Parts IV and V of the Evidence Ordinance

2.27 *An overall appraisal.* The overall responses to our Consultation Paper indicated that the present notice requirements are unduly complex and wasteful of resouces and time. Because of their complexity and the inconvenience in complying with them, the hearsay rules and practice are very often not observed.

2.28 *The complexities of the notice provisions.* It is acknowledged that the rules specifying the contents of and the manner in which notices and counter-notices are to be exchanged are complex. Those commenting on our Consultation Paper pointed out that the main complaints are directed not so much at the difficulty of compliance with the notice procedure but rather at the unnecessary inconvenience caused by the procedure. Practitioners have reacted to the inconvenience by serving deficient hearsay notices which simply repeat the documents enumerated in the List of Documents.

2.29 Hearsay notices are often met with counter-notices objecting to all the documents set out in the hearsay notices. The whole matter is then left to be decided by the trial judge. The procedure for admission of hearsay evidence is not in practice simplified by the notice procedure.

2.30 Many practitioners serve defective notices. Some practitioners avoid using the rules altogether, relying on consent from the other party or the exercise of the judge's discretion to admit hearsay. Categorising evidence by reference to its hearsay characteristics is time-consuming and costly. Furthermore, it does not appear to be possible to anticipate completely oral hearsay.

2.31 *Complying with time limits.* Practitioners have problems complying with the time limits on the service of notices and counter-notices. There may be several reasons for this, but two reasons were commonly cited. They are interconnected:

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[43] *Ibid*, paras 2.42, 2.44, 2.46 and 4.34.

[44] Ibid, paras 4.36 to 4.37. See also an instructive passage in O'Hare and Hill, *Civil Litigation* (5th ed, 1990) at 444 to 445.

(a) time limits which used to run from the date at which the matter was set down for trial were regarded as arising too early in the process to permit compliance. This is especially so since the time for serving a hearsay notice was amended in 1993 to at least 21 days before application is made to set down the case for trial.

(b) notices could only be prepared after counsel had advised on evidence and this might not take place until sometime after the matter had been set down.

2.32 The experience of those commenting on our Consultation Paper shows that hearsay notices are often served late and it is necessary to deal with them on the first day of trial. Moreover, practitioners sometimes fail altogether to serve any necessary hearsay notices. As a result, the first day of trial is taken up by application for the court's leave under its residual discretion to admit the hearsay evidence.

2.33 A member of the Judiciary commenting on our Consultation Paper succinctly described the present situation by saying, "The frequency of applications to serve hearsay notices out of time or to dispense with such notices make a mockery of the present rules. I do not believe the present rules achieve anything, nor is there any further justification for their retention."

2.34 *Computer records.* The comments on our Consultation Paper in general indicated that section 50 and the rules relating to it are not wholly appropriate. The Bar Association pointed out that the legislation is essentially flawed because it does not assist on the issues critical to the weight to be attached to such records, namely errors in the collection and input of information and errors in the computer's software. Furthermore, the legislation fails to distinguish between original evidence generated by computers and hearsay evidence stored by computers.

2.35 *Exchange of witness statements.* Order 38 rule 2A of the RSC was introduced in Hong Kong in May 1988. It empowered the Supreme Court to order the pre-trial disclosure of written statements of witness evidence for the purpose of disposing fairly and expeditiously of the cause or matter and saving costs. Exchange of experts' reports is quite well-established in practice, but exchange of witness statements was uncommon prior to the introduction of the new rule. The new rule was intended to make the exchange of witness statements the norm rather than the exception.[45] A new set of rules under Order 38 rule 2A were enacted in 1995 replacing those old rules first introduced in 1988.[46] Under the new rules, at the hearing of a summons for directions, the court "shall" order the parties to make pre-trial

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[45] See *Richard Saunders and Partners v Eastglen Ltd* [1989]3 ALL ER 946. See also an article on current practice in England" McConnell, "Exchanging witness statements" (1992) Sol Jo, 24 Jan.

[46] The new Order 38, rule 2A of RSC was made by the Rules of the Supreme Court (Amendment)(No. 3) Rules 1995, (see L.N. 223 of 1995).

exchange of written statements of the "oral" evidence which they intend to adduce at the trial.

2.36 There were some comments that practitioners have no enthusiasm for witness statements being exchanged as there is in Hong Kong a well-established legal culture of trial by "ambush". In order to make it a norm for the parties to exchange witness statements before trial, the Masters had taken the initiative to make orders under the old Order 38 rule 2A of RSC at the first hearing of the Summons for Directions unless the parties could persuade them that they would be prejudiced, or that the order for disclosure would not save time or costs. Objections to the making of an order had been made by litigants on the ground that proofs of evidence were obtained, if at all, at a very late stage. Such objections did not find favour with the Masters as the judicial view was that the solicitors should obtain full proof of evidence as soon as possible after the pleadings had been closed and discovery had been made. Under the new Order 38 rule 2A of RSC, however, it is obligatory for the Court to order pre-trial exchange of witness statements.

2.37 *The strict rule or otherwise.* The strict rules of evidence (that is, compliance with Parts IV and V of the Ordinance) do not seem to be applied in any proceedings involving the welfare of children in the High Court or District Court. This appears to be the case whether it be in wardship proceedings, proceedings under the Matrimonial Causes Ordinance (Cap 179) or the Guardianship of Minors Ordinance (Cap 13)[47]. Strict rules do not seem to be favoured by judges in any matrimonial proceedings.

2.38 *Arbitrations and tribunals.* By an amendment in 1989, section 14(3A) was added to the Arbitration Ordinance (Cap. 341). Section 14(3A) provides that:

> *"An arbitrator or umpire may receive any evidence that he considers relevant and shall not be bound by the rules of evidence."*

The law is therefore that arbitration proceedings are not bound by the hearsay rule. Moreover, the overall response is that arbitration proceedings in practice operate satisfactorily without the hearsay rule.

2.39 The nature of tribunals and the procedure they adopt is very varied. Whether the strict rules of evidence have any application will depend upon the terms of the legislation establishing the particular tribunal. The law does not require tribunals to apply strict rules, though procedural fairness may require great care to be taken when evidence from a hearsay source is considered[48]. It is notable that Commissions of Inquiry appointed under the Commissions of Inquiry Ordinance (Cap 86) are empowered

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47 S 17 of the Guardianship of Minors Ordinance provides means for overcoming the limitations of hearsay and other rules of evidence when hearing applications for custody or supervision of a minor.

48 See generally Chapters 3 and 4 of Clark, Lai and Luk, *Hong Kong Administrative Law - A source book* (1st ed, 1989) and, in particular, the cases cited and examples described at 154. The Court of Appeal in Re an application for judicial review by *Lo Wing-tong* [1990]1 HKLR

"to receive and consider any material whether by way of oral evidence, written statements, documents or otherwise, notwithstanding that such material would not be admissible as evidence in civil or criminal proceedings"[49].

325 held that the rules of evidence, including those against hearsay evidence, do not apply in administrative proceedings.

[49] Commissions of Inquiry Ordinance (Cap 86) s 4(1)(a).

Chapter 3

The Strengths and Weaknesses of the Current Law

The strengths of the current law: Parts IV and V of the Evidence Ordinance

3.1 *An overall assessment*. Proponents of the existing law argue that it works reasonably well in achieving its objectives without giving rise to any significant injustice. Cross described the principal objects of the reforms embodied in Part IV of the Evidence Ordinance (and the rules that flesh out the legislation) thus:

> *"to ensure that all first-hand hearsay statements are admissible provided certain conditions are fulfilled; to allow second-hand hearsay statements to be received if contained in a record; to prevent the party against whom the statement is being tendered from being taken by surprise by its adduction at the trial; and to give the court a wide inclusionary discretion but, except where the maker of the statement is called as a witness, no exclusionary discretion"*[1].

3.2 *Relaxation of the exclusionary rule.* In the Evidence Ordinance's favour it can be said that the common law rule is relaxed considerably. Most evidence previously regarded as hearsay may be admitted, provided of course that the rules are complied with. In addition, Parts IV and V are well established in practice. The practical consequences of the law are clear and reasonably well understood. The value of a familiar system should not be underestimated.

3.3 *The need for notification.* The requirement of prior notification not only prevents the other side from being taken by surprise but also saves the party attempting to adduce evidence from unnecessary cost: his opponent may not challenge the reason advanced for not calling the maker of the statement, or he may consent to it because the statement is not seriously challenged. Hearsay notices and counter-notices may be served out of time, or possibly be defective, but they do at least promote the objects of avoiding surprise and unnecessary cost.

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[1] *Cross on Evidence* (7th ed, 1990) at 541. But note that this statement has since been criticised by the Court of Appeal in *Ventouris v Mountain (No. 2)* [1992] 3 All ER 414, at 421 to 422. The statement that one of the objects of the 1968 Act is *"to allow second-hand hearsay statements to be received if contained in a record"* would appear to be invalid.

3.4 Removing the possibility of surprise allows the other party a fair opportunity to prepare himself to meet a hearsay statement. The obvious safeguards that permit the other party to impeach the credibility of the maker of the statement or to give evidence of a previous inconsistent statement would be gravely undermined if there were no (or no sufficient) notice.

3.5 *An inclusionary discretion.* The court's wide inclusionary discretion is significant in that it allows a balance to be struck. The judge will probably not wish to see overly technical arguments advanced to exclude evidence, neither will he wish to deny himself otherwise relevant evidence. He may also keep in mind that inadvertence and error should not be punished if the other side is not greatly prejudiced. However, it is suggested that no judge will allow the rules to be used for tactical purposes or to achieve surprise. An English judge recently described the role of the court thus:

> *"In my view, as a general proposition, the court should not exclude evidence unless it is satisfied that real prejudice has been caused or unless it is clear that a deliberate attempt has been made to take the other side by surprise, a practice which it is the exact purpose of the rules to prevent"*[2].

3.6 *A limited exclusionary discretion.* The exclusionary discretion mentioned by Cross was intended primarily to exclude previous statements by a witness called to give evidence. It avoids needless repetition. It could also be argued that excluding a witness statement prepared by or with the assistance of a lawyer is desirable as the statement might be regarded as more the product of the professional than the witness himself[3]. Another reason for limiting the exclusionary discretion is that an exclusionary discretion causes uncertainty amongst the parties: they could not be sure what evidence would be admitted and therefore would probably compensate by more extensive and costly preparations[4].

3.7 *Expert evidence.* Current law and practice regarding expert evidence appears to work satisfactorily well. The law and the rules emphasise the role of the court in the pre-trial stage, encouraging both sides to co-operate in keeping expert evidence to a minimum. Little or no criticism is offered in the English Consultation Paper of the operation of the 1972 Act, nor has the Law Reform Commission received any contra-indications concerning the operation of its equivalent, Part V of the Evidence Ordinance.

3.8 *Shaping the attitudes of professionals.* Parts IV and V have helped to shape the attitudes of the judges and those who appear before them[5]. The interaction of the legislation and the rules with the personnel of the law has created a working system:

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2 *Per* Harman J in *Rover International Ltd v Cannon Film Sales Ltd* [1987]1 WLR 1597, approved by the Hong Kong Court in *Technalloy Chemical Corporation v International Merona Ltd*, unrep, Civil Appeal No 107 of 1992, at p. 9.

3 Para 4.55 of the English Consultation Paper.

4 Para 4.38 of the English Consultation Paper.

5 Mr Justice Millet, a visiting English Chancery judge, made the following observation about the hearsay provisions of the Civil Evidence Act 1968 on 12 March 1992 when delivering a lecture

- consent to the admission of hearsay is likely to be forthcoming unless the evidence is crucial;

- professional common sense dictates that the use of hearsay is not abused because judges probably give greater weight to the assertion of a witness who attends court and because they will not allow tactical use of the legislation;

- both parties can make use of the legislation to reduce costs, for example, by agreeing evidence following disclosure by way of hearsay notices;

- each party will appreciate an allowance for unforeseen errors or inadvertence.

The weaknesses of the current law

3.9 Before gathering together the detailed complaints that have been made it may be worthwhile to re-examine the overall approach taken in the current law: that its foundation is still an exclusionary rule. The authors of the English Consultation Paper saw this as the great weakness of the 1968 Act. They advance an option which favours abolition of this rule:

> *"Our provisional view is that the weaknesses of the exclusionary rule against hearsay cannot be remedied just by way of a clearer explanation of the present law: the present law is irremediably difficult to understand and explain to the wide audience that is expected to comply with it. Secondly, we consider that there is a role for judicial discretion in the application of rules of evidence and that reform of the hearsay rule must retain this flexibility, despite the cost in terms of certainty which it does entail. Thirdly, we also consider that it is not justifiable to exclude relevant evidence solely because it is of a hearsay nature and that the interests of justice may be better served by providing the court with all the relevant information necessary to make an informed decision"*[6].

3.10 The exclusionary rule embodied in Part IV of the Ordinance (and the 1968 Act) is still the hearsay rule, albeit in a much relaxed form. The reason for the exclusionary rule is the importance accorded in the adversarial system to the right to cross-examine.

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entitled "Recent Changes in English Court Procedure" at the 1992 Law Lectures for Practitioners series: "The general rule is sound, though the procedural rules are cumbersome and impractical ... It works because judges are unwilling to exclude relevant admissible evidence purely because of some breach of procedure".

[6] Para 5.4 of the English Consultation Paper.

3.11 *A list of shortcomings.* The shortcomings in Parts IV and V of the Ordinance may be listed as follows (the order is not meant to be significant and the reference in brackets is to earlier discussion in the text):

- the rules of the court are so complex that many practitioners have avoided using them (paragraphs 2.7 and 2.30);

- full compliance with the rules requires meticulous examination of the party's evidence at a relatively early stage in the proceedings (paragraphs 2.9 and 2.30);

- the present law and rules regarding the admissibility of records stored on a computer are wholly inappropriate (paragraphs 2.11 and 2.34);

- the rules regarding the use of hearsay in affidavit evidence are possibly contradictory (paragraphs 1.33 to 1.35);

- there may be duplication of the notice requirements under the Ordinance if witness statements are exchanged before trial (paragraph 1.36);

- the category of records made admissible under the legislation may be too wide (paragraph 2.13);

- the legislation does not permit proof of the non-occurrence of an event by the absence of an entry in a record (paragraph 2.13);

- a further category of unavailability may be needed to take account of the vulnerability of certain witnesses[7];

- strict rules of evidence are inappropriate in proceedings which require the Court to take an investigative role as, for example, in cases involving a child's welfare (paragraphs 2.15 to 2.19);

- strict rules may be inappropriate where the proceedings do not depend essentially on the weight of evidence which each side puts forward as, for example, in most matrimonial proceedings (paragraph 2.20);

- strict rules may be inappropriate where parties are commonly unrepresented as, for example, in the magistrates' courts (paragraphs 2.21 and 2.22);

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[7] The English Consultation Paper referred to a Paper prepared by the New Zealand Law Commission which reviewed the question of possible expansion of the categories of unavailability to cover witnesses who are old, young children, and children who have been the subject of sexual abuse. They would be treated as "unavailable" because of their vulnerability. See para 3.70 of the English Consultation Paper and paras 21 and 53-56 of the New Zealand Law Commission Preliminary Paper No. 10, "Hearsay Evidence" (June 1989).

- strict rules may be inappropriate to hearings involving licensing (paragraph 2.22)[8].

The case for reform

3.12 This list of short-comings has drawn us to the view that there is a strong case for reform. Our views are shared by the majority of those who commented on our Consultation Paper.

3.13 The English Report pointed out that whilst the value of accepted practice and familiarity with an existing body of law cannot be underestimated, there is widespread dissatisfaction with many aspects of the current system.[9] Like the English Law Commission, we do not consider that the advantage of a familiar system is a justifiable objection to reform given that the existing system is so unsatisfactory in practice.

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[8] Hong Kong's licensing laws differ from the English model. In England the magistrates are the licensing authority for many of the most commercially important licences. There are also a number of specific licensing boards. In Hong Kong the comparable licensing authority corresponding to the magistrates' court is the Commissioner of Police. It is only on appeal that civil proceedings proper are commenced.

[9] English Report, para. 3.37.

Chapter 4

Options for Reform

Major options for reform

4.1 In seeking options for reform we have examined the approaches adopted by the major common law jurisdictions including the United States. A brief description of the present law and reform proposals of different common law jurisdictions is contained in Appendix IV. This chapter will examine the pros and cons of the following three options for reform:

(a) abolition of the hearsay rule subject to safeguards;

(b) retaining the hearsay rule but refining existing legislation; and

(c) creation of a wide judicial discretion to admit.

We shall also express our view on the best reform option for Hong Kong taking into account experience elsewhere and views on consultation.

The first option: abolition of hearsay rule subject to safeguards

4.2 This is the option favoured by the Scottish Law Commission, the Law Reform Advisory Committee for Northern Ireland, the English Law Commission and the New Zealand Law Commission.[1]

4.3 The basic principle of this reform option is that evidence should not be rejected simply because it is hearsay. The general rule for determining the admissibility of evidence should be its relevance to the matters at issue rather than its hearsay nature. Subject to safeguards, all relevant evidence, including hearsay evidence, whether it is oral or documentary and first-hand or second-hand, should generally be admitted for what it is worth. The provision of safeguards is intended to prevent possible abuses arising from the abolition of the hearsay rule.

[1] A brief outline of their proposals could be found in Appendix IV.

4.4 *Arguments against abolition of the rule against hearsay*[2]

(a) Hearsay is not the best evidence of a fact. Out-of-court statements are not made on oath. It is not uncommon for a person to lie or make ill-considered statements which are inaccurate when he talks behind another person's back. The greater the number of times a statement is repeated, the more likely that there is an error in the transmission process. Hearsay statements are therefore less likely to be true.

(b) The memory or power of observation of the maker of the hearsay statement may be defective. Such weaknesses cannot be revealed if he is not subject to examination and cross-examination. The party affected will also be deprived of the opportunity to assess the reliability of the statement by observing the witness's demeanour while giving evidence. To admit hearsay would therefore be unfair to the opposing party.

(c) The exclusionary rule limits the range of materials that may be brought before the court. It prevents the court from being flooded with evidence which is unreliable or which raises collateral issues. It therefore reduces the cost and length of trials.

(d) The rule provides predictability to the process of preparing for trial. The detailed exceptions to the rule enable the parties to decide in advance whether particular matters which are relevant to their case can be proved in court.

(e) If the rule were abolished, the courts would be left with no guidance as to how to assess the reliability of hearsay evidence. The result would be a greater degree of uncertainty and unpredictability in the outcome of the proceedings.

(f) Juries may be thought to be incapable of making a proper assessment of hearsay evidence.

(g) The hearsay rule is familiar to judges and lawyers.

(h) The litigants are able to get round the complex rules and procedure by waiving or ignoring them or by relying on the

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[2] See New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), paras 1.2.2-1.2.17; Scottish Law Commission, *Research Paper on the Law of Evidence of Scotland* (1979), paras 19.03-19.16; Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Scot Law Com No 100, 1986), paras 3.15-3.21; Australian Law Reform Commission, *Evidence Reference, Research Paper 9: Hearsay Law Reform - Which Approach?* (1982), ch 3; Australian Law Reform Commission, *Evidence* (Report No 26, Interim, 1985), vol 1, ch 13 and paras 661-675; English Law Reform Committee, *13th Report, Hearsay Evidence in Civil Proceedings* (1966), paras 7-10; English Law Commission, *Consultation Paper No 117: The Hearsay Rule in Civil Proceedings* (1991), paras 3.2-3.21; New Zealand Law Commission, *Preliminary Paper No 15: Evidence Law: Hearsay - A discussion paper* (1991), ch II.

court's inclusionary discretion. It is rare that reliable evidence is excluded solely on the ground that it is hearsay and the courts have been reluctant to uphold objections to admission of hearsay evidence which are unduly technical.

4.5 *Arguments for abolition of the rule against hearsay*

(a) The hearsay rule can result in the exclusion of evidence of statements made shortly after the event. Since the accuracy and completeness of recollection decreases rapidly as time passes, an out-of-court statement made soon after an event is likely to be more reliable than the testimony of the maker of the statement given years later. "Apart from its lack of staleness, it is much less likely to be affected by interest, by the heat of litigation, or by the fact that the legal advisers of the side calling him may have repeatedly interviewed him and consciously or unconsciously forced him into a particular story of which he has no actual memory."[3] A strict application of the best evidence rule may therefore result in the courts being required to rely on evidence which may be less accurate than the hearsay evidence available. The better view is that any question of reliability of hearsay statements could be taken into account in the weight to be attached by the court to the evidence instead of having the statements excluded altogether.

(b) The need to call direct instead of hearsay evidence may add to the cost of the proceedings and cause inconvenience to the maker of the statement and other persons with whom he deals. Where the hearsay evidence does not fall within one of the recognised exceptions and a party cannot be sure that the evidence will be admitted, it may go to great lengths to ensure that direct evidence is available to prove the fact in issue. However, the expense and trouble involved may be out of proportion to the importance of the point at issue. In such cases, abolition would contribute to savings in expense and time. The number of witnesses required to be called would also be reduced if more documentary hearsay evidence were allowed to be admitted in evidence.

(c) If the hearsay evidence is of sufficient probative value, to exclude the evidence on the ground that it is hearsay would be unfair to the party who wishes to adduce it. In the majority of cases, a party would adduce hearsay evidence only if it is the best evidence available. Thus although hearsay is not the best conceivable evidence, it may be the best evidence that a party can find. Indeed some hearsay may be so convincing as to shorten the trial.

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[3] New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), para 1.2.5.

(d) The rule prevents the court from weighing all the available sources of information which are relevant to the facts at issue. It conflicts with the principle that all relevant evidence should be admissible unless there is a good reason to exclude it. Abolition would therefore allow a wider range of relevant materials to be admitted in evidence and the court would be better informed to make a rational judgement.

(e) Abolition would not result in the court being flooded with evidence of low probative value because direct evidence will always be called in preference to hearsay evidence whenever the former is available and more reliable than the latter and whenever failure to do so is likely to attract adverse judicial comment. The leading of hearsay evidence where direct evidence is available will only weaken a party's case. In any event, superfluous evidence and evidence of marginal probative value would be discounted or even ignored. This approach would be more in line with the decision-making process in private life and in the business world.

(f) As the judiciary places more and more emphasis on pre-trial case management, the role of the exclusionary rule in controlling the quality of evidence tendered before the court is no longer as significant as before.

(g) The Evidence Ordinance gives the courts a discretion to admit a hearsay statement where the notice requirements have not been complied with. This has led to many parties trying to overcome the difficulties and inconvenience of complying with the requirements by simply ignoring them and relying on the court's discretion to admit. The Ordinance therefore fails to give the parties sufficient certainty as to what evidence would be admissible before the trial.

(h) Jury trial in civil cases is extremely rare. In any event, juries in Hong Kong are more sophisticated and better educated than those current in England when the hearsay rule was first created. They are already entrusted with the difficult task of assessing the weight of large amounts of hearsay evidence admitted without objection, by agreement or under the many exceptions provided for by the Ordinance. The judge can also give directions to the jury on the question of weight if necessary.

(i) The hearsay rule is complex and technical. Its scope and operation are imperfectly understood by some lawyers. For instance, it is confusing that the rule only applies where a party seeks to rely on a statement to prove the truth of the matters stated therein but does not apply where he merely seeks to prove that the statement was made. It is also difficult to analyse the combination of different forms of hearsay which may exist in

one single statement. The result is that a trial may be unnecessarily lengthened and become more costly.

(j) Our laws should be simple and capable of being easily understood by lawyers and litigants alike. Very often, points of evidence which arise during a hearing have to be resolved on the spot without a thorough examination of the relevant authorities.[4] Abolition would therefore remove such difficulties.

(k) Judges and lawyers may experience difficulties in applying the complex rule in the court. This would give rise to opportunities for errors and appeals.

(l) The arguments often centre around whether a recognised exception applies to the particular facts of the case rather than whether the hearsay evidence should be excluded as a matter of principle.

(m) If the hearsay rule were abolished, witnesses giving evidence would not be interrupted for technical breaches of the rule. The court would be able to focus on the substantive issues as opposed to evidential matters.

(n) Abolition would avoid the need to categorise new exceptions to the rule so as to allow hearsay which ought not be excluded to be received in evidence. Since the House of Lords have held that no further common law exceptions could be developed by the courts,[5] each and every reform to the rule and its exceptions requires the approval of the legislature. This is hardly a practical and effective way to deal with the problems.

(o) It is not a tenable argument to say that reform is not necessary because the rule is often waived or ignored. To place too much reliance on the court's discretion to admit hearsay is also undesirable because admission of evidence should not depend on the whim of a particular judge.

(p) The worry that the courts would be left with no guidance as to how to assess the reliability of hearsay evidence is groundless because the judges in Hong Kong are well able to evaluate evidence of all kinds, including hearsay evidence admitted by agreement of the parties or under the many exceptions to the rule.

(q) If the rule were abolished, the role of the judge would be limited to excluding irrelevant evidence and evidence of low probative value. Abolition can thus contribute to greater certainty and predictability in the trial process.

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4 English Criminal Law Revision Committee, 11th Report (1972), para 25.

5 *Myers v Director of Public Prosecutions* [1965] AC 1001.

(r) The hearsay rule has no application to arbitrations to which the strict rules of evidence do not apply. Although the nature of such proceedings is different from that of court proceedings, it is worth pointing out that the Arbitration Ordinance "appears to be operating satisfactorily even in the most complex of cases".[6] So far, there have been no complaints that arbitration proceedings are unfair.

The second option: retaining the hearsay rule but refining existing legislation

4.6 We have considered whether it is feasible to reform the law by creating piecemeal statutory exceptions to the rule as occasion demands. This would be easy to implement. It preserves continuity with the common law and allows the law to be reformed as it is practised. The constantly revised set of exceptions would continue to provide detailed guidance to the judges in dealing with hearsay evidence. This option, however, would increase the complexity of the hearsay rule. It would result in a lengthy list of overlapping exceptions which is developed merely to meet particular difficulties and discloses no consistency in approach.[7]

4.7 Although the English Law Commission had finally recommended the abolition of the hearsay rule, it had also explored the reform option of refining the exclusionary rule in the course of its study of the subject. In its consultation paper, the English Law Commission said if the exclusionary rule was to be retained, reform should primarily go by way of improving the notification procedures.[8]

4.8 The English Law Commission said that a simplified procedure would need to have the following elements:

(a) Duty to notify the other side of the intention to adduce hearsay evidence, giving particulars.

(b) Duty to notify the other side of the intention to oppose the use of hearsay evidence, giving particulars.

(c) In the case of oral hearsay, the power of the opposing party to require the attendance of the person to give direct evidence should be retained where his attendance is "reasonable and practicable".

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6 Letter from Hong Kong International Arbitration Centre to Secretary, Law Reform Commission of Hong Kong, dated 25 Nov 1992.

7 The US Rules of Evidence listed 27 specific exceptions and 2 general exceptions.

8 *The Hearsay Rule in Civil Proceedings,* The Law Commission Consultation Paper No. 117, paras 4.5 to 4.9.

4.9 The aims of notice procedure should be to ensure that hearsay statements are made known to the other parties "sufficiently in advance of the trial to provide the other party with a fair opportunity" to decide whether to require the maker to be called. With such aims in mind, the contents of the notice can be simplified.

4.10 *Refinements required* The following refinements, *inter alia*, may need to be considered if this reform option is adopted:[9]

(1) relaxation of the rules governing admissibility of business records;

(2) removal of the special provisions relating to computerised records;

(3) need to provide for the admissibility of evidence generated entirely by computer or other sophisticated processes;

(4) provision for the admissibility of hearsay evidence of the absence of a record;

(5) elaboration of the statutory guidelines on weight of hearsay evidence;

(6) review of the existing categories of unavailability excusing the attendance of the maker of the hearsay statement;

(7) examination of the possible duplication between the notice requirements and the new provisions for prior exchange of experts' evidence and witness statements; and

(8) review of the rules relating to the use of hearsay in affidavits.

4.11 *Advantages of the second option*

(a) It preserves the basic scheme of the Evidence Ordinance which is familiar and accepted and which has been successful in simplifying to a considerable degree the confusion surrounding the common law rule.

(b) It maintains the benefits of prior notification.

(c) It is possible to simplify notification procedures and to modernise the rules governing business records and computer evidence without losing these advantages.

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9 *Ibid*, para 4.20.

4.12 *Disadvantages of the second option*

(a) The court's modern approach is to prefer to have all relevant information before it and then to judge its weight. Relevant evidence should not be rendered inadmissible by a rule of law simply because it is of a hearsay nature.

(b) The rules providing for the exchange of witness statements have obviated the need for a formal and detailed notice safeguard.

(c) The notice procedure requires a cumbersome task of classification of hearsay. The rules of notification are unavoidably complex.

The third option: wide judicial discretion to admit

4.13 This approach had been examined by the Australian Law Reform Commission.[10] Under it, the judges could admit hearsay evidence after considering certain conditions of a general character. The exclusionary rule would be maintained. However, in place of numerous specific exceptions, the court would be authorised to admit hearsay evidence provided the following requirements were established to the satisfaction of the court:

(a) The evidence was likely to be reliable. The statute could give an indication of the content of "reliability". Factors might include:

(i) whether the statement was made at a time when the facts referred to in it were fresh in the memory of the person making it;
(ii) if the statement is contained in a document, whether the document was prepared as part of an organised system for preparing and keeping documents.

(b) The evidence was more probative than any other evidence which the proponent could procure through reasonable efforts.

(c) It would be fair and in the interests of justice to receive the evidence, after taking into account the arguments for and against admission of the evidence. The statute could give an indication of the considerations that should be taken into account. Factors might include:

(i) recognition of the principle that a party should have an opportunity to test by cross-examination or otherwise evidence admitted against him;

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[10] Australian Law Reform Commission, *Evidence Reference, Research Paper 9: Hearsay Law Reform - Which Approach?* (1982), paras 20-25.

(ii) whether the matters stated in the statement are genuinely in dispute;

(iii) whether the maker of the statement is called;

(iv) reasons for not calling the person who made the previous statement;

(v) whether notice was given of the intention to adduce the evidence and, if so, whether such notice was sufficiently in advance of the trial to permit the party affected a fair opportunity to meet it and whether the other side has objected or not;

(vi) the effect on the expedition of the trial; and

(vii) the importance of the issue in the case.

(d) There was no countervailing reason of law or public policy that required the rejection of the evidence.

Advantages of the third option

4.14 This approach would ensure that the admissibility of hearsay evidence would be determined on the basis of sound principles such as reliability, best evidence, procedural fairness and justice. It is simple and easy to understand. It would also avoid detailed categorisation of exceptions to the rule by which some evidence which ought to be admitted may be excluded if it does not fall within any of the exceptions. All forms of hearsay, whether first-hand and more remote hearsay, and all types of records and statements would be covered under one rule.

Disadvantages of the third option

4.15 The Australian Law Reform Commission has identified the following disadvantages:

(a) If the existing detailed rules were to be substituted by conditions of general character, the judges and lawyers who are brought up in the traditions of the hearsay rule might revert to the old rules for guidance in the exercise of discretion.

(b) Legislation which is based on broad concepts such as reliability, fairness and justice is likely to result in a lack of uniformity. To provide detailed criteria to back up such concepts would reintroduce complexity.

(c) It would be difficult to predict in advance of the trial whether hearsay evidence would be admitted. Parties would have to have available all witnesses who might need to be called. This would inhibit pre-trial settlements and lead to delays and extra costs.

(d) The courts would be swamped by evidence of marginal probative value. The deliberate creation of evidence would also be encouraged.

(e) As any party could object to the admissibility of any hearsay, there is a potential for delay and frequent interruption. This would increase the power of well off litigants to protract hearings inordinately by arguing the admissibility of each piece of opposition hearsay evidence at length.

(f) As all hearsay evidence would be subject to the risk of exclusion, evidence presently admissible might be excluded.

(g) It would increase the points of objection available to parties and thus the grounds of appeal.

Views on consultation

4.16 The responses to our Consultation Paper in general supported the abolition of the hearsay rule in civil proceedings. Those who supported the abolition of the rule included Judges, the Bar and the Law Society.

4.17 A minority of those who responded from the Judiciary inclined towards retention of the existing exclusionary rule. Others who favoured the retention of the existing rule included the Hong Kong Federaton of Women Lawyers and the Registrar General.

4.18 The responses in Hong Kong coincided with those received by the English Law Commission. In England, a large majority of consultees also favoured the view that reform should proceed by abolition of the exclusionary rule.[11] Like Hong Kong, there were some consultees in England who expressed their support for the retention of the exclusionary rule. The views of the English and the Hong Kong Bar differ on the exclusionary rule, however. The Hong Kong Bar favoured the abolition of the rule, whilst the Law Reform Committee of the English Bar Council supported its retention.[12]

4.19 The comments reveal that the particulars set out in the hearsay notice are often deficient and the requirements in the Rules of the Supreme Court are usually ignored. It seems that the practice has been largely either the adoption of an informal approach or the omission to serve hearsay

[11] English Report, para 3.44.
[12] English Report, para 3.45.

notices altogether. Where the parties fail to comply with the notice requirements, they rely on the discretion of the court to admit hearsay evidence and do not warn the other parties of their intention to use hearsay evidence.

4.20 The view of the Law Society is that the existing rules give rise to additional and unnecessary expense in the conduct of litigation.[13] They are of the opinion that abolition would merely reflect the reality of the present situation and would dispense with the need for what are generally regarded as artificial procedural requirements.

4.21 The Bar Association commented that the notice requirements are (a) unnecessarily complex and outdated, (b) wasteful of resources,[14] (c) time consuming to observe, and (d) unnecessarily inconvenient to comply with. According to them, "strict compliance with the rules is wasteful of legal costs and failure to do so results in adjournments, wasted costs and delay where informal consent is not forthcoming".

Our view

4.22 We are aware of the concerns of those who prefer the retention of the exclusionary rule, but the majority of Judges and practitioners are in favour of its abolition. Moreover, the modern trend of civil litigation is to place all relevant evidence before the court and to let the court decide the weight to be attached to it. In Hong Kong, it is rare, if ever, that civil trials are heard before a jury. The usual mode of civil trial is before a Judge who is professionally trained to decide on the question of weight. Professional judges are well aware that direct evidence is preferable to hearsay evidence. We believe that there is little risk that litigants will endeavour to present extensive hearsay evidence when direct evidence is available.

4.23 In the light of the weaknesses in the current system regarding civil hearsay evidence and the strong views expressed on consultation for wholesale rather than piecemeal reform, we take the view that reform must be by way of the abolition of the general exclusionary rules.

4.24 In the next chapter, we examine the reform proposals in other common law jurisdictions and make our recommendations for reform in Hong Kong. The English and Scottish approaches are examined in detail as they both involve the abolition of the hearsay rule. Moreover, as our current law relating to the hearsay rule in civil proceedings is modelled on the English law, it is only natural and sensible that any English reforms should be closely studied. On the other hand, we have gathered informally from Scottish practitioners that civil litigation in Scotland has been conducted smoothly since the hearsay rule was abolished by the Civil Evidence (Scotland) Act

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13 Eg there is an overlapping of preparation work and the production of additional copies of documents used to support an application under RSC Order 38.

14 Particularly in relation to the need to categorise the hearsay evidence and the need to furnish copies of all documents.

1988. It is therefore worth also looking at the Scottish approach as useful alternative.

Chapter 5

Recommendations for Reform

General admissibility of hearsay evidence in civil proceedings

5.1 In making proposals for reform, the English Law Commission proceeded on the basis of two guiding principles:[1]

(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.

(2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.

5.2 We share the view of the English Law Commission in adopting these guiding principles. However, the presumption underlying Part IV of the Evidence Ordinance that hearsay should be inadmissible unless it falls within one of the recognised exceptions conflicts with the second principle. In our opinion, relevant evidence should not be excluded solely on the ground that it is hearsay. Hearsay is something which should go to weight and not admissibility. As suggested by the Scottish Law Commission, in general, and subject to certain safeguards, all relevant evidence should be admitted for what it is worth.[2] Both the Civil Evidence (Scotland) Act 1988 and the Civil Evidence Act 1995 (England) now provide that in any civil proceedings, evidence should not be excluded on the ground that it is hearsay.

5.3 We have therefore decided to reform the law by way of abolishing the hearsay rule instead of refining Part IV of the Evidence Ordinance. We suggest that there should be general admissibility of hearsay evidence in civil proceedings. However, in order to avoid possible abuses, the general relaxation of the hearsay rule must be subject to proper safeguards to be discussed later in this chapter.

5.4 The English Law Commission recommended that not only first-hand or simple hearsay, but also multiple hearsay, should be admissible.[3] Under the Civil Evidence Act 1995, hearsay of whatever degree shall be admissible in civil proceedings. Similar reform has also been effected in Scotland by virtue of the Civil Evidence (Scotland) Act 1988. The Law Reform Advisory Committee for Northern Ireland also held the view that the preferred

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1 English Report, para 4.2.

2 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986), para 3.36.

3 English Report, para 4.6.

option of abolishing the hearsay rule subject to safeguards should encompass second-hand hearsay and oral as well as documentary hearsay.[4]

5.5 Some members originally had reservations about the general admission of multiple oral hearsay.[5] As pointed out by the New South Wales Law Reform Commission, the probative value of such evidence is usually small. There is always the danger of mishearing, exaggeration, unclear reporting, and general inaccuracy through repetition. Besides, the general admission of multiple hearsay is a radically different step from admitting first-hand hearsay:

> *"If A tells the court what B said, then even though B cannot be cross-examined as to his means of knowledge and reliability, A can be cross-examined **both** about his own reliability **and** about his view of B's reliability. Though this is inferior to a cross-examination of B, it gives some assurance that B's reliability can be tested. But if A tells the court what B told him C said, there is not even this indirect check on C's reliability."*[6]

The honesty and accuracy of recollection of B is a necessary link in the chain upon which the probative value of C's statement depends. It is impossible to assess the strength of that link unless B is called as a witness. It is thus argued that the court does not have the material upon which the weight to be attached to C's statement can be assessed.

5.6 However, the absence of the best evidence or the party's failure to account for its absence may be the subject of comment by the other side. The judge may also draw inferences on the strength or weakness of a party's case from his failure to call evidence. The inferior evidence may be slighted or even ignored on the grounds that it lacks weight.[7]

5.7 The Scottish Law Commission considered that the problem of distortion through repetition is better dealt with by permitting the court to consider what weight is to be attached to the hearsay rather than by simply excluding hearsay altogether. A witness giving evidence on hearsay will normally be able to give some explanation as to the source of the information and the circumstances in which it was transmitted. This would provide the court with material on which to judge its weight.[8]

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4 Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 1: Hearsay Evidence in Civil Proceedings* (1990), para 5.38.

5 Section 47(3) of the Evidence Ordinance imposes restrictions upon the way in which multiple hearsay can be adduced in evidence only if the underlying first-hand hearsay was contained in a statement made orally. The policy of Part IV of the Evidence Ordinance has been to permit multiple hearsay in all other cases. The rationale for this limited restriction on the adduction of multiple hearsay is that evidence of a statement made orally is inherently more unreliable than evidence of one made in a document: *Ventouris v Mountain (No 2) The Italia Express* [1992] 3 All ER 414 at 422, *per* Lord Donaldson MR. Cf *Re Koscot Interplanetary (UK) Ltd; Re Koscot AG* [1972] 3 All ER 829 at 833-4.

6 New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), paras 1.3.7 and 2.3.2.

7 *R v Francis* (1874) LR 2 CCR 128, at 133 *per* Lord Coleridge CJ.

8 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986), para 3.17.

5.8 The opinion of the Federal/Provincial Task Force on Uniform Rules of Evidence in Canada was that:

> *"the trier of fact is quite capable of taking into account the circumstances surrounding the making of the statement in assessing what weight it should be given, and accordingly the dangers involved in receiving hearsay are outweighed by the advantage of having a great deal of additional relevant evidence upon which to base a decision. A bonus of such a reform would be that it would simplify the law and expedite the trial process."*[9]

5.9 We are confident that the judges in Hong Kong are capable of assessing the weight to be attached to multiple hearsay whether they are oral or documentary. At present, where hearsay is admitted under the Evidence Ordinance or by agreement or because no party objects to its admissibility, the judges are able to evaluate the weight of such evidence. As the Law Reform Advisory Committee for Northern Ireland pointed out,

> *"It might be said that depriving parties of a chance to cross-examine vital available witnesses is unfair to the parties. But it is difficult to see where the unfairness lies if judges are capable of giving due weight to the evidence despite the absence of vital witnesses and the inability of opposing parties to cross-examine them."*[10]

5.10 We appreciate that the general admission of hearsay evidence carries with it the risk that the parties may be caught by surprise and the risk of evidence being fabricated. This is particularly so where the hearsay statement was made orally. To meet this criticism, we shall recommend below that a party should have a power to call and cross-examine a witness whose statement has been tendered as hearsay when the party tendering the evidence refuses to call him. This would enable the party against whom it is led to test the evidence.

5.11 With regard to the argument that the witness giving hearsay evidence or the original maker of the hearsay statement is likely to concoct, the Scottish Law Commission have the following to say:

> *"if the suggestion is that the witness reporting the hearsay is likely to concoct, the answer, we think, is that he is neither more nor less likely to concoct in relation to a report of hearsay than he is in relation to any other matter on which he is giving evidence. If the suggestion is that it is the original maker of the statement who would concoct, ... in some instances a statement*

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9 *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) 150-151. The Task Force nevertheless recommended that the hearsay rule be retained and only first-hand hearsay be admissible where the witness was unavailable.

10 Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 1: Hearsay Evidence in Civil Proceedings* (1990), para 4.17.

made outwith the context of a litigation is perhaps less likely to be concocted than one made within that context."[11]

5.12 In a research paper prepared for the Scottish Law Commission, Sheriff MacPhail says:

> *"It is thought that considerations of tactics and expense would continue to impel advocates to call only the most convincing evidence, and therefore to call direct evidence in preference to hearsay whenever direct evidence is reasonably available. A party's failure to call reasonably available direct evidence would be likely to cause a judge to infer that such evidence, if called, would have been unfavourable to that party; and in a jury trial he should be entitled to comment in that sense to the jury. On the other hand, there may be cases where the most convincing evidence is hearsay, and the leading of that evidence would shorten rather than lengthen the proceedings and simplify the task of the judge or jury."*[12]

5.13 The Irish Law Reform Commission was of the opinion that restricting the categories of hearsay evidence which are admissible would inevitably result in cases where valuable evidence is excluded. Although they conceded that the general admission of multiple hearsay may have the effect of admitting rumour, unsubstantiated statements of unidentifiable witnesses and other evidence of little or no probative value, it did not consider this a real danger because confusion is unlikely to assist the party creating it.[13] Both the Scottish Law Commission and the Irish Law Reform Commission have come to the conclusion that no line should be drawn between first-hand and multiple hearsay and their recommendations do not make any distinction between oral and documentary hearsay.

5.14 We see no good reason why first-hand and multiple hearsay should be treated differently in determining their admissibility when our objective is to bring all relevant evidence before the court and let the judge assesses its weight. We therefore agree that the general admissibility of hearsay evidence should apply to multiple hearsay as well as first-hand hearsay and no distinction should be made between oral and documentary hearsay.

Proceedings held before a judge with a jury

5.15 In making the recommendation that, subject to safeguards, the hearsay rule should be abolished, we have considered whether civil cases

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11 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986), para 3.20.

12 Scottish Law Commission, *Research Paper on the Law of Evidence of Scotland* (1979), para 19.08.

13 Irish Law Reform Commission, *The Rule Against Hearsay in Civil Cases* (LRC 25, 1988), pp 7 and 8.

which are tried with a jury should be treated differently. It was argued that juries were unable to evaluate a large amount of hearsay evidence properly.

5.16 Firstly, the number of civil cases tried with a jury is extremely small.[14] At present, where a case is tried before a civil jury, the jury is entrusted with the task of evaluating the weight of the large amount of hearsay evidence admitted by agreement, without objection or under the various exceptions prescribed by the Evidence Ordinance. "Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can."[15]

5.17 Compared with the juries of the seventeenth and eighteenth centuries in England when the hearsay rule was created, modern juries in Hong Kong are better educated and are more likely to be able to weigh properly different varieties of hearsay evidence. The judge will continue to filter the hearsay evidence presented by the parties. He may, in exercise of his general power to comment on the facts, direct the jury as to the considerations they should bear in mind when deciding what weight they should give to the evidence. Any worry which one might have on the ability of the juries in assessing hearsay evidence is therefore likely to be exaggerated. As pointed out by two authors:

> *"Concern at the ability of jurors to adequately assess hearsay evidence reflects a lack of confidence in the ability of modern juries to appreciate issues of relevance and weight. To some extent, such a view is overly patronising and insulting to the intelligence and integrity of modern jurors. It is difficult to see why one can safely trust juries on the overall issue of guilt or innocence and yet not be satisfied as to their competence to decide particular evidentiary issues given appropriate directions from the judge."*[16]

5.18 We therefore decide that our reform proposals should apply to all civil proceedings regardless of whether such proceedings are held before a jury or not.

5.19 **We recommend that, subject to safeguards, in civil proceedings whether held with or without a jury, evidence should not be excluded on the ground that it is hearsay and that both first-hand hearsay and multiple hearsay should be admissible.**[17]

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14 A claim in respect of libel, slander, malicious prosecution, false imprisonment or seduction may be tried with a jury: Supreme Court Ordinance (Cap 4), s 33A.

15 Criminal Law Revision Committee, 11th Report (1972), para 247.

16 Stevens and Olsen, "*Law Commission Preliminary Papers 13-15 - A commentary on the proposed reform of the law of evidence*", NZLJ, January 1992, at 34.

17 Civil Evidence Act 1995, s 1.

Hearsay evidence admissible under legislation other than the Evidence Ordinance

5.20 Legislation other than the Evidence Ordinance renders hearsay admissible as evidence. For example, section 4 of the Registration of Persons Ordinance (Cap 177) provides that a certified copy of records kept by the Commissioner of Registration shall be admissible in evidence in criminal or civil proceedings without further proof. The Evidence Ordinance expressly preserved the effect of these other ordinances which enable the admission of hearsay evidence. Section 46 of the Evidence Ordinance provides that hearsay evidence is admissible in all civil proceedings by virtue of the Evidence Ordinance itself "or any other Ordinance".

5.21 As it is our objective that all relevant evidence should be admissible, our recommendations for reform should not affect the operation of the existing statutory provisions rendering hearsay admissible. The Civil Evidence Act 1995 also provides that these existing statutory provisions should not be affected by the proposed reform.[18] **We therefore recommend that the existing statutory provisions making hearsay evidence admissible should not be affected by our reform proposals.**

Safeguards against abuse

5.22 In order to avoid possible abuses of the suggested general admission of hearsay evidence, we take the view that some safeguards are necessary.

Notice of intention to adduce hearsay

5.23 The opinion of the English Law Commission was that the major safeguard should be found in a new, simplified notice provision. They noted that, despite the existence of discovery and prior service of affidavits and witness statements, the giving of notice serves the crucial purpose of confirming that a party actually intends to rely on the hearsay statements. In their opinion, the move towards greater exchange of witness statements cannot be a substitute for the clear identification of the intention to rely on hearsay evidence, particularly in more complex cases which involve substantial numbers of documents. They do not believe that the current informal practice can serve the purpose of notice, namely, that sufficient time should be afforded to the parties to allow them to mount an effective challenge to contentious evidence and to bring about a timely identification of the material issues.[19]

5.24 The English Law Commission therefore aimed at formulating a policy which would ensure advance notification without re-introducing undue

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[18] Civil Evidence Act 1995, s 1, English Report, para 4.7.

[19] English Report, paras 3.5-3.7.

complexity or rigidity.[20] They recommended that subject to any agreement, or any rules of court, to the contrary, parties intending to rely on hearsay evidence should be under a duty to give notice of that fact to other parties wherever it is reasonable and practicable in the circumstances to enable those parties to deal with any matters arising from its being hearsay. This would put the onus on the receiving parties to demand such particulars as they require in order to be able to make a proper assessment of the weight and cogency of the hearsay evidence and to be in a position to respond adequately to it. As the exchange of witness statements is mandatory in the High Court, they considered that the most convenient means of satisfying the notice requirement would be by attaching the hearsay notice to the bundle of exchanged documents. They further recommended that failure to comply with this safeguard should not affect the admissibility of the evidence but may be taken into account by the court in considering the exercise of its power with respect to the course of proceedings and costs[21] and as a matter adversely affecting the weight to be given to the evidence. The Civil Evidence Act 1995 follows the approach recommended by the Law Commission.[22]

5.25 The new notice provision in the Civil Evidence Act 1995 represents an improvement on the existing notice procedure. Firstly, the new procedure only requires the notice to state the fact that a party is proposing to adduce evidence and nothing else. It is a much simpler notice requirement than the existing one under the Evidence Ordinance and the current rules of court. Under the existing notice procedure, a copy of any documentary hearsay statement must be served with the notice. Moreover, if the statement is in non-documentary form, particulars of the maker, the time, place and circumstances of its being made and the substance of the statement must be given. Also, where the maker of the statement cannot be called, the reasons for not calling him must be specified in the hearsay notice.[23] This contrasts with the notice provision contained in the 1995 Act which requires that particulars of the hearsay be given only upon request by the other parties. Moreover, the particulars of hearsay to be given is limited to what is "reasonable and practicable in the circumstances" for the purpose of enabling the other parties "to deal with any matters arising from its being hearsay".

5.26 Furthermore, under the existing notice procedure, failure to comply with its detailed requirements will render the hearsay statement inadmissible, unless the court exercises its residual discretion to admit the hearsay. On the other hand, failure to comply with the notice provision in the 1995 Act would not affect the admissibility of the hearsay but would only attract costs or other sanctions. Hence, practitioners would no longer need to expend time and effort on meticulous examination of the evidence to identify the hearsay elements because failure to give notice of hearsay statements would not make them inadmissible, though the party may be penalised in

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20 English Report, paras 4.9-4.13.

21 Eg the power to grant an adjournment to allow the receiving party time to deal with the effect of late notification, or to compel a party to perfect an inadequate notice.

22 Civil Evidence Act 1995, s 2.

23 RSC, O38, r 22.

costs or other sanctions. Moreover, it is often difficult to completely anticipate oral hearsay. The proposed notice provision would make any unanticipated oral hearsay admissible, though at the expense of costs or other sanctions.

5.27 The notice provision in the 1995 Act also has the merit of allowing for the possibility that in some circumstances it would be unreasonable and impracticable for any notice to be given at all. The English Law Commission cited the examples of courts in which hearings are often arranged urgently, and of circumstances where advance notification carries a real risk of danger to the witness or some other person.[24]

5.28 The Scottish experience is also worth mentioning. The Scottish Law Commission recommended that the parties intending to rely on hearsay without leading the maker of the statement as a witness may serve notice of their intention on all other parties and the latter may serve a counter-notice of objection in response. The purpose of this procedure is simply to enable a party to ascertain in advance the attitude of his opponent and so, perhaps, save unnecessary trouble, expense and delay. It operates on a voluntary basis. If both a notice and counter-notice are served, the court would decide whether the hearsay should be admitted without the maker of the statement having been called as a witness as if no notice had been served though the court might penalise a party in expenses if his attitude in relation to a notice was unreasonable. If a counter-notice is not served, this would be equivalent to an agreement that the hearsay evidence could be led without calling the maker of the statement as a witness. The Commission also proposed that the court should have a power to refuse to admit hearsay evidence if the party wishing to rely on the evidence fails to convince the court that it is not reasonable or practicable to bring along the maker of the statement to give evidence.[25]

5.29 The United Kingdom Government did not adopt the proposal because they believed that it would lead to the reintroduction of hearsay rule by another route, would be complicated and would make the reform not worth following through.[26] In the end, the Civil Evidence (Scotland) Act 1988 adopts the direct approach of simply abolishing the rule against hearsay and provides that evidence cannot be excluded solely on the ground that it is hearsay. This leaves untouched other means whereby evidence might be regarded as inadmissible, for example on the ground of irrelevance. Moreover, as the court is able to consider and evaluate all evidence put before it whether it is hearsay or not, the court has a power to attach due weight to the hearsay evidence. Where the original maker of the statement or anyone in the chain of transmission is available but is not called, the other party could draw to the attention of the court the fact that the best available evidence had not been relied upon. The court would then be entitled to make such adverse inferences as it sees fit.[27] Under the 1988 Act, a party taken by

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24 English Report, para 4.10.

25 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986), paras 3.43 to 3.52.

26 *Hansard* (House of Commons) 16 May 1988, col 743.

27 *Hansard* (House of Commons) 21 June 1988, col 49.

surprise can also call additional witnesses before the commencement of the closing submissions in order to secure the attendance of the maker of the statement as a late witness.[28]

5.30 The Law Reform Advisory Committee for Northern Ireland also had reservations with the proposal put forward by the Scottish Law Commission. They preferred not to prescribe any formal procedure for giving notice of intention to lead hearsay evidence. But they thought it desirable to make it clear that where hearsay evidence is adduced without notice, the court may adjourn the hearing of any matter where it is satisfied that a party cannot reasonably be expected to proceed with the trial. On such adjournment, the party leading such evidence would normally be subject to the penalty of payment of the costs thrown away where the court considers that no notice or insufficient notice was given to the other party in advance. In their opinion, such a voluntary and informal procedure might suffice to meet the requirements of fairness in most cases, and would avoid the need to prescribe complex rules which would not be properly observed.[29]

5.31 The New Zealand Law Commission held the same views as the Law Reform Advisory Committee for Northern Ireland:

> *"In civil litigation disclosure of each party's case by way of exchange of briefs of evidence or affidavits is now becoming increasingly common. That alone makes any hearsay notice requirement less important. In cases where there has been no exchange of evidence, considerations such as the conclusion which the judge might draw as to weight provide some incentive to notify informally. Moreover, in civil cases a costs sanction is effective. In instances where informal notification should have been given but was not, a case may occasionally have to be adjourned. A considerable incentive to notify is created if, in those cases where failure to notify compels an adjournment (or even abandonment and a new hearing in, say, a civil jury trial), the full costs of any adjournment or abandonment are imposed on the party offering the hearsay."*[30]

5.32 The New Zealand Law Commission therefore concluded that only two specific safeguards are necessary: the power to require available declarants to be called as a witness and the ability to call further witnesses. These safeguards would be additional to costs sanctions and the power of the court to exclude hearsay evidence on the grounds of unfair prejudice, misleading or confusing effect or time-wasting. In their opinion, the costs

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28 Civil Evidence (Scotland) Act 1988, s 4. See Field, *Civil Evidence: A Quantum Leap*, SLT, 2 December 1988, 349 at 352.

29 Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 1: Hearsay Evidence in Civil Proceedings* (1990), para 5.35.

30 New Zealand Law Commission, *Preliminary Paper No 15, Evidence Law: Hearsay, A discussion paper* (1991), para 55.

sanction will ensure the development of informal notice procedures in cases where a party decides to offer important hearsay evidence.[31]

5.33 In recent years, the judges in Hong Kong have been encouraged to take an active role in "judicial case management"[32] and the "cards-on-the-table" approach has gradually found favour with the judiciary. To assist us in determining whether the notice provisions should be retained if the rule against hearsay were to be abolished, we set out hereunder the main objectives of the current notice provisions:

(a) that all questions concerning the giving of hearsay evidence at the trial should, so far as practicable, be dealt with before trial so that the trial could proceed smoothly without unnecessary objections relating to such hearsay evidence, and

(b) that there should be no surprises at trial.[33]

5.34 Two recent developments in the area of "pre-trial case management" have led us to believe that the above objectives could be achieved without the need to retain the existing notice procedure. The first one relates to the exchange of witness statements. It is now mandatory for the court to direct every party to serve witness statements on the other parties at the hearing of a summons for directions in an action begun by writ.[34] The court has held that a witness statement should contain the whole of the witness' evidence "in the detail in which the witness would have given it if his evidence had been elicited by oral questions at the trial". Anything less than that prevents the statements from serving the purposes which they are intended to achieve, i.e. saving time, eliminating any element of surprise in the witnesses' evidence, enabling the parties to know the full strength of the case they have to meet, and enabling counsel to prepare a crisp and effective cross-examination.[35] The service of a witness statement containing hearsay will be treated as a hearsay notice under the Evidence Ordinance if the party serving it expressly stated as such. Where such a notice is served, a counter-notice is deemed to have been served under the Rules of the Supreme Court.[36] As particulars of oral hearsay will normally be disclosed through the exchange of witness statements, the risk of other parties being taken by surprise is minimised and the importance of the hearsay notice is much diminished as a result. Although unanticipated oral hearsay will still be introduced at the trial, no notice provisions could eliminate the element of surprise in such cases.

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31 New Zealand Law Commission, *Preliminary Paper No 15, Evidence Law: Hearsay, A discussion paper* (1991), para 58.

32 See Cameron, "*Case Management in Hong Kong - Judges Take Charge*", Hong Kong Lawyer, May 1995, p 20 and the cases cited therein.

33 *The Supreme Court Practice* (Eng) (1995), para 38/20/2.

34 RSC, O 38 r 2A as amended by LN 223 of 1995. The court also has power to order exchange at any other stage of the action.

35 *Ng Kam-chun v Chan Wai-hing* [1994] 2 HKLR 89, at 90.

36 RSC, O 38 r 2A(9).

5.35 The second development relates to the procedure to be followed on an application to set down a civil case for trial. At present, all directions for setting down of trials in the Running and Fixture Lists are adjourned to the Listing Judge who is in charge of the listing of trials in the High Court.[37] At the hearing of an application for leave to set down a civil case for trial in either of the two lists or under a summons for directions, the Listing Judge will go through a check-list which is drawn up by him for use during the applications. In that check-list, the solicitor or counsel will have to declare, amongst other things, whether all hearsay notices and counter-notices have been served and how many witnesses will be called.[38] If hearsay notices and counter-notices were no longer required to be served, the solicitor or counsel attending the listing application may be asked to declare whether any of the makers of the hearsay statements disclosed in the witness statements is required to be called as a witness and cross-examined as to the contentious evidence. Such a practice would dispense with the need for serving counter-notices and allow questions concerning the giving of hearsay evidence at the trial to be dealt with before trial.

5.36 In our view, the requirement for exchange of witness statements and a strict enforcement of the requirement for full discovery by exchange of lists of documents effectively put all parties on notice of any documentary and oral hearsay evidence. The objective of eliminating any element of surprise at the trial as to the substance of the hearsay evidence intended to be adduced can thus be achieved without any formal notice procedure. The mandatory exchange of witness statements and a stricter control of the pre-trial process would also ensure that all the issues arising out of the adduction of hearsay evidence could be dealt with before trial. Where the court is of the opinion that informal notification should have been given but was not, the court has the power to take this into account in considering the exercise of its power with respect to the control of proceedings and costs. The judge may, for instance, exercise his discretion to adjourn a case so as to provide an opportunity for the party taken by surprise to consider and deal with any unexpected evidence.[39] We therefore conclude that it is not necessary to retain any formal notice procedure as a safeguard and the issue as to whether notice of adduction of hearsay evidence should be given should be left to the informal arrangement between the parties.

5.37 **We recommend that no special provision should be made for the giving of notice of intention to adduce hearsay evidence and the issue as to whether such a notice should be given should be left to informal arrangement between the parties.**

Power to call and to cross-examine additional witnesses

5.38 The Civil Evidence (Scotland) Act 1988 provides for a power to call additional witnesses as a safeguard against the possibility that a party

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37 The Supreme Court of Hong Kong, *Practice Directions*, 6.5.

38 The Law Society of Hong Kong, Circular 369/94 (PA).

39 *Phipson on Evidence* (14th ed, 1990), para 11-09.

might be taken by surprise. This is not necessary in Hong Kong because a party has always been able to call additional witnesses before the close of his case. In addition, the court has a discretion, to be exercised in the interests of justice, to allow further evidence to be led during the course of counsel's final speeches.[40]

5.39 The Civil Evidence Act 1995 provides that where a party adduces hearsay evidence of a statement made by a person but refuses to call that person as a witness, the other party may, with the leave of the court, call that person as a witness and cross-examine him on the hearsay statement. This safeguard is intended to ensure that a witness whom it is reasonable and practicable to call is in fact called if his hearsay statement is challenged.[41] The Act provides for a power to cross-examine the witness because a party who challenges the hearsay evidence of the other party would want to call the maker of the hearsay statement to give oral evidence and to cross-examine him as to the accuracy of the statement and his credibility as a witness.[42] Under the present law, a party calling a witness cannot cross-examine the witness as to such matters unless he has been proved to be an "adverse" or "hostile" witness[43].

5.40 We think this new power to call and cross-examine a witness is necessary in the local context. We mentioned earlier that the court may impose costs sanctions if informal notice should have been given but was not. However, whilst costs sanctions can be an effective tool for regulating the trial itself, they are not always effective in the case of interlocutory proceedings. The Registrar of the Hong Kong Supreme Court, while commenting on our Consultation Paper, pointed out that the Masters had tried to use costs as a sanction for many years but had found this to be ineffective. The Registrar suspected that its ineffectiveness lay in the fact that the taxed costs of an interlocutory matter before a Master were insignificant in the overall costs of a High Court action. We therefore think it necessary to provide for a power to call and examine a witness in order to safeguard against the possibility that a party may be unfairly surprised by hearsay evidence at trial. Indeed, if the circumstances warrant it, the judge may indicate to a party that unless he calls oral evidence or cross-examines the person whose evidence has been tendered as hearsay, his case is likely to fail.[44]

5.41 **We recommend that rules of court should be made to allow a party to call a witness whose evidence has been tendered as hearsay by another party, and to enable that party to cross-examine that person on the statement.**[45]

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40 *Neigut v Hanania* (1983) Times, 6 January: such a discretion is not confined to cases where a party has been taken by surprise or has been misled.

41 The English Law Commission gave this as the underlying reason for recommending this new power to call and to cross-examine witnesses. See para 4.14 of the English Report.

42 English Report, para 4.15.

43 See s 12 of the Evidence Ordinance.

44 *Tay Bok Choon v Tahanson Sdn Bhd* [1987] 1 WLR 413 (PC).

45 Civil Evidence Act 1995, s 3.

Statutory guidelines on weight of hearsay evidence

5.42 The Civil Evidence Act 1995 provides for statutory guidelines to assist the courts in assessing the weight they should attach to hearsay evidence. The Scottish Law Commission, in contrast, did not favour such an approach and doubted whether this would always achieve a useful result[46]. The Civil Evidence (Scotland) Act 1988 accordingly does not contain any such provisions. The Australian Law Reform Commission also thought that little could be gained from such provisions because they do not do any more than stating the obvious and may discourage considerations of other matters which ought to be considered in assessing the evidence.[47] The New Zealand Law Commission was inclined to agree with the views of the Scottish and Australian Commissions.[48] The Hong Kong Bar Association commented that it is not necessary to create any statutory formula to assist the court in assessing the value of such evidence.[49]

5.43 We are in favour of the English approach for a number of reasons. Firstly, the provision of statutory guidelines on weight of evidence is not something new. Section 51 of the Evidence Ordinance contains guidelines on the weight to be attached to hearsay statements admitted under the provisions of the Ordinance. Therefore, the courts are accustomed to the use of guidelines in assessing weight of hearsay evidence.

5.44 Secondly, as we have suggested that all hearsay will be admitted into evidence, we think it necessary that litigants should know the criteria adopted by the courts in attaching weight to hearsay. Without objective guidelines as to weight, litigants would be unsure as to the weight of the hearsay evidence adduced by other parties until the time of the trial. The prudent litigant might therefore spend extra pre-trial efforts on challenging hearsay which, had there been objective guidelines, we would have known would have been of little weight. Such unnecessary challenge to hearsay could be avoided by the adoption of objective criteria.

5.45 Thirdly, it is important that parties are deterred from abusing the abolition of the rule. We think such guidelines would reduce the likelihood of a party relying on hearsay evidence instead of calling a dubious witness to give direct evidence.

5.46 The English Act provides that, in estimating the weight, the court should have regard to "any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence". It further provides that regard should be given to the following considerations where relevant:[50]

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46 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay, and Related Matters in Civil Proceedings* (1986), para 3.38.

47 Australian Law Reform Commission, *Evidence* (Report No 26, Interim, 1985), vol 1, para 714.

48 New Zealand Law Commission, *Preliminary Paper No 15, Evidence Law: Hearsay, A discussion paper* (1991), para 57.

49 HK Bar Association's submission to the Law Reform Commission of HK, dated 3 December 1992.

50 See paragraph 4.19 of the English Report and section 4 of the Civil Evidence Act 1995.

- whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

- whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

- whether the evidence involves multiple hearsay and whether any person involved had any motive to conceal or misrepresent matters;

- whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

- whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

5.47 We are of the view that the guidelines contained in the English Act can, apart from providing courts with the criteria by which to attach weight to hearsay, prevent possible abuses of the abolition of the exclusion rule. **We recommend that statutory guidelines incorporating the points in paragraph 5.46 should be laid down to assist courts in assessing the weight they should attach to hearsay evidence.**

Competence of statement maker

5.48 Under the Evidence Ordinance, hearsay statements are admitted subject to the overriding requirement that "direct oral evidence would be admissible". The effect of the phrase "of which direct oral evidence by him would be admissible" in section 47 of the Evidence Ordinance is that a statement which is inadmissible as evidence of any fact stated therein because it is irrelevant or falls to be excluded on grounds of public policy or privilege does not become admissible because it is of a hearsay nature falling within the provisions of the Ordinance.[51] Such statements will continue to be ruled inadmissible because under our recommendations, evidence shall not be excluded *solely* on the ground that it is hearsay and this would leave untouched other grounds of inadmissibility.

5.49 The phrase also means that the maker of any hearsay statement made admissible by the Evidence Ordinance must be competent to give evidence of the matter. Such a requirement is retained in Scotland after the reform of the hearsay rule in civil proceedings.[52] The Civil Evidence Act

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[51] Keane, *The Modern Law of Evidence* (3rd ed, 1994), pp 247-248. Evidence which is hearsay upon hearsay have also been held to be inadmissible: *Re Koscot Interplanetary (UK) Ltd; Re Koscot AG* [1972] 3 All ER 829 at 833-4. Cf *Ventouris v Mountain (No 2) The Italia Express* [1992] 3 All ER 414 at 421-2.

[52] Civil Evidence (Scotland) Act 1988, s 2(1)(b).

1995 also provides that hearsay evidence is not admissible if the hearsay statement was made by a person who was not competent as a witness. We are of the opinion that the competence requirement in relation to the admission of hearsay should be retained. The competence requirement is important in that it can exclude the evidence of witnesses who are potentially unreliable because of personal characteristics. For example, persons of unsound mind are not normally competent to give evidence.[53]

5.50 Although the Scottish Act provides for the competence requirement, it fails to specify a date at which the maker of the hearsay statement ought to have been competent to give direct oral evidence. The relevant date may be the date of the proceedings or the date on which the statement was made. The Scottish Law Commission suggested that the date of the proceedings should be the relevant date.[54] This causes problems because a person may be competent to give evidence at the relevant proceedings but have been mentally unsound when the statement was originally made. On the other hand, a person may make a statement at a time when he was competent to give evidence, but may become incompetent to do so at the proceedings. The Civil Evidence Act 1995 provides that the date should be the date on which the statement was made.[55] We are of the view that this is the correct approach.

5.51 **We recommend that the requirement that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence should be retained. We further recommend that the date on which the statement was made should be the date on which the statement maker is required to be competent to give direct oral evidence.**

Credibility of witness not called

5.52 Under the Evidence Ordinance, where a hearsay statement is admitted and the statement maker is not called as a witness, evidence is admissible to destroy or support his credibility as a witness, or to prove that he made a previous or subsequent inconsistent statement.[56] The English Law Commission suggested that the current position under the equivalent provisions in the 1968 Act should be preserved.[57] Because his evidence is not subject to cross-examination, we think it sensible to allow evidence to be put in to impugn or support the credibility of the maker of a hearsay statement who is not called as a witness.

5.53 **We recommend that evidence should continue to be admissible to impugn or support the credibility of the maker of a hearsay statement who is not called as a witness, and evidence tending**

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53 Section 3 of the Evidence Ordinance provides that persons of unsound mind who appear incapable of receiving just impressions of the facts or of relating them truly shall be incompetent to be a witness.

54 Scottish Law Commission, Memorandum No 46 (1986), para T.08.

55 Civil Evidence Act 1995, s 5(1).

56 Evidence Ordinance (Cap 8), s 52(1).

57 English Report, para 4.29.

to show that such a person made previous or later inconsistent statements, should also continue to be admissible.[58]

Previous consistent or inconsistent statements of witness

5.54 Previous consistent or inconsistent statements of a person called as a witness are, under the existing provisions of the Evidence Ordinance, admissible as evidence of any fact stated in the statements.[59] The English Law Commission proposed to preserve this position.[60] They did not propose, however, to retain the existing provisions that prevent such evidence from being given before the conclusion of the examination in chief of the witness save in specified cases.[61] The reason for that is, according to the English Law Commission, that witnesses do not now necessarily give oral evidence in chief where witness statements have been exchanged before trial, and as the practice of judges in dealing with such evidence may vary, it would not be appropriate for this to be prescribed in primary legislation.[62]

5.55 We agree that previous consistent or inconsistent statements of a person called as a witness should continue to be admissible. It is the guiding principle of our proposed reform that all relevant evidence should be admissible. Previous consistent or inconsistent statements are relevant evidence that can assist courts in assessing the credibility of a person who is called as a witness. Such statements are, of course, self-serving by nature. But as civil trials are mostly heard before judges without a jury, there is little danger of a lay jury being misled by self-serving statements.

5.56 **We recommend that previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated.**[63]

Hearsay evidence formerly admissible at common law

5.57 Section 54(2) of the Evidence Ordinance preserves the admissibility of certain categories of hearsay evidence formerly admissible at common law, namely, admissions adverse to a party, published works dealing with matters of a public nature, and public documents and records. The English Law Commission recommended that the common law rules preserved by the Civil Evidence Act 1968 concerning the admissibility of published works dealing with matters of a public nature, and public documents and records should continue to have effect.[64] The rationale was that some of the statutory provisions which should not be affected by their

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58 Civil Evidence Act 1995, s 5(2).
59 Evidence Ordinance (Cap 8), ss 47 and 48.
60 English Report, para 4.30.
61 The specified exceptions are stated in sections 47(2)(b)(i) and (ii) of the Evidence Ordinance (Cap 8).
62 English Report, para 4.31.
63 Civil Evidence Act 1995, s 6.
64 Civil Evidence Act 1995, s 7(2).

proposals presuppose the existence of common law rules about public registers. They then cited section 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 and section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963.[65]

5.58 By virtue of section 11 of the Evidence Act 1851 which is applicable to Hong Kong, a document which is admissible in evidence in an English court without proof of the seal or signature authenticating the same or of the official character of the signatory is admissible in evidence in the courts of the British colonies. Section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 further provides that if the United Kingdom Government is satisfied that:

(a) there exist in a country public registers kept under the authority of the law and recognised by the courts of that country as authentic records, and

(b) the registers are regularly and properly kept,

it may, by Order in Council, make such provisions as are specified in section 1(2) of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933.

5.59 Under the 1933 Act, the Order in Council may provide that:

(a) the foreign registers specified in the Order shall, in the United Kingdom, be deemed to be public registers kept under the authority of the law and recognised by the courts of the foreign country as authentic records, and to be documents of such a public nature as to be admissible as evidence of the matters regularly recorded therein;

(b) the matters specified in the Order and recorded in the public registers shall be deemed to be regularly recorded therein; and

(c) a document purporting to be an official copy of an entry in any such register and purporting to be authenticated in the manner specified in the Order shall, without any proof, be received as evidence in the United Kingdom that the register contains such an entry.

5.60 The effect of all these provisions is that the foreign public registers specified in the Orders in Council made under the 1963 Act are admissible in the Hong Kong courts by virtue of section 11 of the Evidence Act 1851. Although section 5 of the 1963 Act operating in conjunction with section 1 of the 1933 Act provide for the admissibility in evidence in the United Kingdom courts (and therefore in the Hong Kong courts because of section 11 of the 1851 Act) of foreign public registers specified in the Orders in Council, these provisions do not have any direct effect in Hong Kong. As

[65] English Report, para 4.32; Civil Evidence Act 1995, s 14(3).

far as Hong Kong is concerned, only section 11 of the 1851 Act and the Orders in Council made under the 1963 Act are relevant. But such provisions are not dependent on any common law rules about public registers. As we have proposed to abolish the rule against hearsay, all the common law exceptions preserved by section 54(2) of the Evidence Ordinance could be superseded by our proposed statutory provisions.

5.61 **We recommend that adverse admissions, published works dealing with matters of a public nature, and public documents and records, which are now admissible under section 54 of the Evidence Ordinance, should be admissible under our recommendation in paragraph 5.19.**

Evidence of reputation or family tradition

5.62 The Evidence Ordinance also preserved certain common law exceptions to the hearsay rule under which evidence of reputation or family tradition may be received. Section 54(3)(a) of the Evidence Ordinance provides that a statement tending to establish reputation or family tradition is admissible "by virtue of this paragraph *in so far as* it is *not capable of being rendered admissible under section 47 or 49*". That is to say, evidence of reputation or family tradition is primarily admissible under section 47 or 49. Only if it does not meet the admissibility requirements of section 47 or 49 will section 54(3) come into play.

5.63 Section 47 relates to the general admissibility of statements of *facts* in civil proceedings. Section 49 provides for the admissibility of statements contained in records compiled by a person acting under a duty from information which was supplied by a person who had personal knowledge of the matters as evidence of any *fact* contained in the statements. Statements admissible under section 47 or 49 are subject to the notice and weighing provisions in the Evidence Ordinance and the rules of court. In most cases, evidence of reputation or family tradition consists of a multiplicity of hearsay statements rather than statements of *facts.* In order to facilitate compliance with the notice provisions and to avoid the difficulties of identifying the statements as first-hand or multiple hearsay, section 54(3) specifically provides that reputation shall "be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed." Evidence of reputation or family tradition is, therefore, rendered admissible under section 47 or 49 and are made subject to the notice and weighing provisions.

5.64 As hearsay evidence shall be admissible under our recommendations whether the statements are first-hand or multiple hearsay and their admissibility shall not be dependent on compliance with any notice requirements, there is no longer any need for reputation or family tradition to be treated as a fact. We therefore propose that this common law exception be superseded by our recommendations.[66]

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[66] Cf English Report, para 4.34.

5.65 **We recommend that evidence of reputation or family tradition should be admissible under our recommendation in paragraph 5.19.**

Proof of documents and copies of documents

5.66 Under the Evidence Ordinance, a hearsay statement contained in a document can be proved in civil proceedings by the production of the document itself or by the production of a copy of the document (or of its material part), authenticated in such manner as the court may approve.[67] Copies of documents can therefore be received into evidence provided that they are authenticated in an approved manner. However, it is not clear whether a copy of a copy is admissible.[68]

5.67 In the business world today, it is common to use copy documents and even copies of copies. To require the original documents to be brought before court may cause undue disruption to the proper functioning of daily business. Sometimes, routine business documents are microfilmed for easy storage and the originals are destroyed after a specified period of time. In such cases, it is impossible to produce the original documents as proof.

5.68 We therefore think that the current rules which allow proof by the production of the original or copies of documents should be preserved. The English Law Commission also held the same view.[69] In Scotland, the Civil Evidence (Scotland) Act 1988, while preserving the admissibility of copy documents, requires copy documents to be authenticated by "a person responsible for the making of the copy"[70], instead of in a manner approved by the court. We do not intend to follow the authentication requirements in Scotland. We prefer instead to leave this to the court's discretion, enabling the court to take account of the particular circumstances of the case. We note in addition that "a person responsible for the making of the copy" may not be a person holding a responsible position in an organisation. It is more often than not a junior member of staff who is assigned to make copies of documents. Our approach follows that of the Civil Evidence Act 1995, which provides that a hearsay statement in a document may be proved by the production of a copy of that document "authenticated in such manner as the court may approve".[71]

5.69 The English Law Commission suggested that, contrary to existing common law rule, copies of copies should be received in evidence, subject to authentication in manners approved by the court.[72] The 1995 Act

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67 S 51(1) of the Evidence Ordinance (Cap 8).
68 *Cross on Evidence* (7th edition, 1990), p.684.
69 English Report, para 4.37.
70 Civil Evidence (Scotland) Act 1988, s 6.
71 Civil Evidence Act 1995, s 8(1).
72 English Report, para 4.37.

reflects that approach and provides that it is immaterial how many removes there are between a copy and the original for the purpose of proving a hearsay statement in the document.[73] We believe that that is a sensible approach, as it is not uncommon to use copies of copies in the business world. Copies are often made, for example, from copy documents stored in microfilms.

5.70 **We recommend that where a statement contained in a document is admissible as evidence in civil proceedings, it should be capable of being proved, either by the production of that document, or by the production of a copy of that document, authenticated in such manner as the court might approve. It should be immaterial how many removes there are between a copy and the original.**

Business, computerised and other records

Records of business or public authority

5.71 Under the existing Evidence Ordinance, a business or other statement is admissible if it is contained in a document which forms part of a record compiled by a person acting under a duty from information which was supplied by a person who had personal knowledge of the matters dealt with in that information.[74]

5.72 The current rules governing admissibility of business and other records are, in our view, outdated and do not meet the requirements of the modern automated office. Nowadays, business and other records are often prepared by automated means rather than manually by people with specific duty to compile records. It is therefore often difficult to identify a person with a duty to compile the records. Moreover, it is unrealistic to expect the supplier of information always to have personal knowledge of the matters concerned. The supplier of information may well be another electronic office machine rather than a human being. For example, electronic sensors may be used to collect automatically source information and pass it on to other electronic devices for processing.

5.73 We therefore take the view that business and other records should be admissible generally without the requirement that the compiler acting under a duty or the supplier of information have personal knowledge. This is also the position taken in the Civil Evidence Act 1995.

Means of admitting business or other records in evidence

5.74 Under the current rules, the record has to be produced in evidence by a witness. The English Law Commission criticised this

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[73] Civil Evidence Act 1995, s 8(2).

[74] S 49(1) of the Evidence Ordinance (Cap 8).

requirement as being artificial.[75] The English Law Commission thought that steps should be taken to make it easier to admit business or other records in evidence. They suggested that documents certified by an officer of a business or public authority should be receivable in evidence without further proof and the form and content of certificates might be set in the rules of court. The Civil Evidence Act 1995 implemented this proposal by providing that a document which forms part of the records of a business or public authority may be received in evidence without further proof and a document should be taken to form part of such records if the party is able to produce a certificate to that effect signed by an officer of the business or authority.[76] We share the same view as the English Commission because it is often difficult to find a witness who can give evidence of the compilation of the records, given that many records are compiled by electronic or automated means. We think it wasteful of time and resources to require a witness to attend court merely for the purpose of formally producing the records into evidence.

Definitions of "business" and "officers"

5.75 The Civil Evidence Act 1995 provides that "business" includes "any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual". The reasoning is that "it is the quality of regularity that ensures the reliability of a business record, not the existence of a profit motive or the juridical nature of the person carrying on the activity". The Act also defines "officer" as including "any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records" because a business as defined in the Act may not have "officers" in their strict sense.[77] We agree with the reasoning behind the two definitions and will adopt them in our proposals.

Proof of absence of an entry in a record

5.76 The current rules governing the admissibility of records are based on the assumption that there is a person who supplied the information contained in the record. Problems may arise when it is sought to prove the absence of an entry from the records. The current rules only recognise the evidence of the supplier of the information contained in the records, but there cannot be a supplier of information where what is in issue is the absence of entries in the record. The Civil Evidence Act 1995 therefore provides that the absence of an entry in a record may be proved by affidavit of an officer of the business or authority.[78] We note in contrast that under the Civil Evidence (Scotland) Act 1988, such evidence may be given orally or by the affidavit of

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75 English Report, para 4.39.
76 Civil Evidence Act 1995, s 9(1) and (2).
77 English Report, para 4.39, Civil Evidence Act 1995, s 9(4).
78 Civil Evidence Act 1995, s 9(3), English Report, para 4.40.

an officer of the business or undertaking.[79] We favour the greater flexibility of the Scottish approach on this and recommend its adoption.

Court's discretion to disapply certification requirements

5.77 The Civil Evidence Act 1995 provides for a specific discretion allowing courts to disapply all or any of the certification provisions, having regard to the circumstances of the case.[80] We think such a discretion is desirable as it can provide for flexibility in cases where strict application of the proposed certification provisions would not be workable.

Computerised records

5.78 The responses to our Consultation Paper, generally pointed to a consensus opinion that the current rules governing the admissibility of computerised records are out-dated and cumbersome. The Bar Association commented that the present rules do not assist in determining an issue critical to the weight to be attached to computerised records, namely, the likelihood of a mistake being made during the manual input of information, or errors in software. They also commented that the present rules do not distinguish between computer generated original evidence and computer stored hearsay evidence.

5.79 In the light of the criticisms of the present rules, the English Law Commission recommended that no special provisions should be made in respect of the manner of proof of computerised records. They suggested that computerised records should be made admissible in general but subject to the ordinary notice and weighing provisions.[81] In Scotland, computerised records are already admissible generally under the Civil Evidence (Scotland) Act 1988. We share the views of the English and Scottish Commissions that computer-generated information should be treated similarly to other records as regards its admissibility. The present rules are, in our view, cumbersome and do not afford any real protection against abuse. They should be replaced by a simpler regime as in the case of other records and no notice provisions should be made specifically for computerised records.

5.80 **We recommend that documents, including those stored by computer, which form part of the records of a business or public authority, should be admissible as hearsay evidence under our recommendation in paragraph 5.19.**

5.81 **We recommend that unless the court otherwise directs, a document, including a document stored by computer, should be taken to form part of the records of a business or public authority if it is certified as such by an officer of the business or authority and should**

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79 Civil Evidence (Scotland) Act 1988, s 7.

80 Civil Evidence Act 1995, s 9(5), English Report, para 4.42.

81 English Report, para 4.43.

be received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records.

5.82 **We recommend that the definition of "records" should cover records in any form, and should include computer-generated records.**[82]

5.83 **We recommend that the absence of an entry should be capable of being formally proved by the oral evidence or affidavit of an officer of the business or public authority to which the records belong.**

5.84 **We recommend that an "officer" of a business or public authority should include any person occupying a responsible position in relation to the relevant activities of the business or authority or in relation to its records.**

The meaning of "civil proceedings"

Tribunals

5.85 Section 60 (1) of the Evidence Ordinance defines "civil proceedings" to include civil proceedings before any tribunal, being proceedings to which the strict rules of evidence apply. We suggest the retention of that definition so that our proposals will affect only tribunals to which the strict rules of evidence are applicable. As it is our objective to simplify procedure, we should not extend our proposed procedural safeguards to tribunal proceedings which are not subject to the current provisions in the Evidence Ordinance. The English Law Commission also suggested that the strict rules of evidence should be retained as the criterion for the application of the proposed reform.[83]

Arbitrations

5.86 Section 60 (1) of the Evidence Ordinance defines "civil proceedings" to include an arbitration, but does not include civil proceedings in relation to which the strict rules of evidence do not apply. So, under the current rules, the applicability of the strict rules of evidence is the overriding criterion for determining whether an arbitration is "civil proceedings". We intend to retain that current position in order not to add procedural burdens where they do not exist.

5.87 Section 14(3A) of the Arbitration Ordinance (Cap. 341) provides that "an arbitrator or umpire may receive any evidence that he considers relevant and shall *not be bound by the rules of evidence*". Hence, arbitration

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82 Civil Evidence Act 1995,s 9(4).

83 English Report, para 4.44.

proceedings are not subject to the strict rules of evidence and, as such, will not be covered by our reform proposals. It is worth mentioning that the Chartered Institute of Arbitrators (Hong Kong Branch) has commented that arbitration operates satisfactorily without the hearsay rule. Moreover, the Hong Kong International Arbitration Centre has commented that the Arbitration Ordinance is already operating satisfactorily even in the most complex of arbitration cases. We therefore think it unnecessary for us to extend our proposals to cover arbitration proceedings.

5.88 **We recommend that our reform proposals should apply to all civil proceedings to which the strict rules of evidence apply.**[84]

Rule-making powers

5.89 Our reform proposals only set out the main framework of a new system of civil evidence rules. The detailed implementation of the system must be a matter for rules of court. **We therefore recommend that there should be power to make rules of court to make such provisions as are necessary for putting our recommendations into effect.**[85]

Savings

5.90 There are various provisions in the rules of court which set conditions on the admissibility of certain classes of evidence. For example, no plan, photograph or model can be receivable in evidence unless the other party is given an opportunity, at least 10 days before the trial, to inspect it and agree to its admission.[86] These restrictions on admissibility are made on grounds other than that the evidence is hearsay. We take the view that parties should not be allowed to evade the restrictions on admissibility by taking advantage of our proposed reform and tendering the evidence as hearsay.

5.91 **We therefore recommend that the exclusion of evidence on grounds other than that it is hearsay under any statutory provision or common law rule should not be affected by any of our recommendations.**[87]

The meaning of "statement"

5.92 Section 55(1) of the Evidence Ordinance defines a "statement" to include any representation of *fact*, whether made in words or otherwise. That definition applies only to Part IV of the Evidence Ordinance. However,

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84 Civil Evidence Act 1995,s 11.
85 Civil Evidence Act 1995,s 12.
86 See RSC, O 38, r 5.
87 Civil Evidence Act 1995,s 14.

subject to necessary modifications, Part IV also applies to statements of opinion as it applies to statements of fact.[88] In civil proceedings, it is common to put in opinion or expert evidence in the form of hearsay. So, in line with our recommendation to make all relevant hearsay evidence admissible, the definition of "statement" should cover also representation of opinion.

5.93 **We recommend that a "statement" should mean any representation of fact or opinion, however made.**[89]

Power to exclude repetitious and superfluous evidence

5.94 Some members raised the concern that if multiple hearsay were to be admissible, there is a risk that the parties would call an excessive amount of hearsay evidence as well as direct evidence. The court would be swamped by repetitious and superfluous evidence and the proceedings would be lengthened and become more costly. They argued that although the courts appear to have power to exclude such evidence under their inherent jurisdiction to control their proceedings, an express statutory provision giving the courts a discretionary power to the same effect would discourage the adduction of evidence of little or no probative value.

5.95 The Irish Law Reform Commission favoured the use of a judicial discretion to exclude hearsay evidence if it is of insufficient probative value or its admission would operate unfairly against a party.[90] As for the Law Reform Advisory Committee for Northern Ireland, they thought that the problem of proliferation of multiple hearsay is unlikely to be a problem in practice as the greater admissibility of hearsay evidence in England since the implementation of the Civil Evidence Act 1968 does not appear to have created any insuperable difficulties. In any case, little would be gained by giving the judge a discretion to exclude hearsay evidence of low probative value because such evidence will not be given any significant weight in any event.[91]

5.96 Generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.[92] Evidence which would give rise to many collateral issues would also be ruled inadmissible on the ground that it is insufficiently relevant.[93] This is to avoid the danger that such evidence will give rise to a multiplicity of issues and that it might have been manufactured.

5.97 A piece of evidence which is relevant may nevertheless be excluded on other grounds. *Best on Evidence* stated that evidence may be

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88 Evidence Ordinance, s 56.

89 Civil Evidence Act 1995,s 13.

90 Irish Law Reform Commission, *The Rule Against Hearsay* (Working Paper No 9, 1980), pp 6 and 21.

91 Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No. 1: Hearsay Evidence in Civil Proceedings* (1990), paras 5.29 and 5.36.

92 *Hollington v Hewthorn* [1943] 2 All ER 35 at 39, *per* Goddard LJ.

93 *Hollingham v Head* (1858) 27 LJCP 241; *Agassiz v London Tramway Co* (1872) 21 WR 199.

excluded if its production would cause "needless vexation, expense, or delay".[94] There is a maxim that "excess in law is reprehended".[95] Thus,

> *"while the liberty of adducing evidence to support his cause ought to be most freely conceded to every litigant, ... that liberty might be so grossly abused as to stop the administration of justice; and a power in all tribunals to restrain it within due bounds is consequently as essential to the proper discharge of their functions as the right of expunging surplusage in forensic documents, and restraining prolixity, in pleading. ... Accordingly, in the judicial practice of this country, a commission or mandamus to examine witnesses will be refused, or terms will be imposed on the party making the application, if the judges think, in their discretion, that the application for it is made with a view to vexation or delay, or with any other sinister or improper motive. So a power (to be exercised with great caution, no doubt) is vested in every tribunal, of refusing to hear evidence obviously tendered for such purposes."*[96]

Phipson on Evidence also states that relevant facts are often rejected:

> *"There are facts which, though logically relevant, would consume an undue period of time or would raise issues of equal or greater difficulty than those actually in dispute or would increase the risk of mistake or fraud. ... facts which, though not wholly irrelevant, tend merely to create* ***prejudice, confusion of issues****, or* ***waste of time****, may, and generally will, be rejected."*[97]

5.98 By virtue of its inherent jurisdiction, the court has power to control its own process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process.[98] The court needs such power in order to maintain its character as a court of justice. This inherent jurisdiction exists as a separate and independent basis of jurisdiction apart from statute or rules of court. The definition of the inherent jurisdiction of the court as given by Jacob is as follows:

> *"the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*[99]

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94 (12th ed, 1922), para 47.

95 Ie *Excessivum in jure reprobatur.*

96 *Best on Evidence* (12th ed, 1922), para 47.

97 (14th ed, 1990), paras 7-03 and 7-07. Cf. *Lai Sau King v Lam Charp Fat,* unrep, Civil Appeal No 117 of 1995.

98 Jacob, "*The Inherent Jurisdiction of the Court*", (1970) Current Legal Problems, 23 at 32 et seq; *Phipson on Evidence* (14th ed, 1990), paras 8-26 to 8-29.

99 Jacob, "*The Inherent Jurisdiction of the Court*", (1970) Current Legal Problems, 23 at 51.

5.99 In *Metropolitan Bank v Pooley*,[100] Lord Blackburn said:

> *"from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had an inherent power to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing."*

5.100 The court may therefore intervene when its process is being used for indirect or improper objects.[101] Similarly, although a party may issue a subpoena for the examination of a witness at any stage of an action, the court may disallow cross-examination if it is used simply to oppress and not for the purposes of justice.[102] A party may also be prevented from calling an undue multiplicity of witnesses.[103]

5.101 The authority to regulate the practice and procedure of the court is now vested in the Rules Committee of the Supreme Court.[104] But subject to any statutory rules, the judges of the High Court still have, in their inherent jurisdiction, power to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides.[105] In the areas of procedure which are not directly regulated by rules of court, the court may also seek to regulate its proceedings by means of Practice Directions. The object of such Practice Directions is to increase the efficiency and productivity of the courts "by improving the methods for the more convenient and speedy despatch of the business of the courts and by reducing time, effort and expense in the process of litigation".[106]

5.102 Notwithstanding the wide scope of the inherent jurisdiction, these powers are seldom invoked by the court to exclude prolix, repetitious or superfluous evidence. The English Law Commission observed that this may be due to the existence of the rule against hearsay, the diminishing importance of the best evidence rule and the view that the judge's function is to be a "passive umpire".[107]

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100 [1881-85] All ER Rep 949 at 954.

101 *R v Baines* [1909] 1 KB 258 at 261. In that case, the court set the subpoena aside on the ground that the writs of *subpoena ad testificandum* had been issued not *bona fide* for the purpose of obtaining relevant evidence and that the witnesses named therein were in fact unable to give relevant evidence.

102 *Raymond v Tapson* (1882) 22 Ch 430. In *Re Mundell; Fenton v Cumberlege* (1883) 48 LT 776, the court refused to allow an affidavit witness to be subpoenaed for cross-examination on the ground that the object was either to get rid of her solicitor or to injure her for employing that solicitor.

103 *R v Rusby* (1800) 170 ER 241. The court in that case reaffirmed the maxim that witnesses are not to be counted but weighed: *ponderantur testes, non numerantur.*

104 Supreme Court Ordinance (Cap 4), s 54. See also District Court Ordinance (Cap 336), s 72. Section 55B(1) of the Supreme Court Ordinance further provides that such rules may regulate the means by which particular facts may be proved and the mode in which evidence thereof may be given.

105 *Connelly v DPP* [1964] 2 All ER 401 at 409 and 438 (HL); *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 at 295. Cf *Corby District Council v Holst & Co Ltd* [1985] 1 All ER 321 at 326c.

106 Jacob, "*The Inherent Jurisdiction of the Court*", (1970) Current Legal Problems, 23 at 34-35.

107 English Report, paras 4.53-4.55.

5.103 The English Law Commission did not recommend any statutory provision which would give the courts a discretionary power to exclude repetitious and superfluous evidence as one of the safeguards where hearsay evidence is adduced. The following are their reasons:[108]

(a) A statutory discretionary power to exclude repetitious and superfluous evidence could not sensibly be limited to evidence of a hearsay nature. Such a power has an effect on evidence whether or not it is of a hearsay nature. It raises policy issues which are not within the terms of reference of the hearsay project.

(b) If repetitious and superfluous evidence is a problem, it is best dealt with by stricter control of trial processes.

(c) The power to exclude repetitious and superfluous evidence already exists. It resides both in the court's ability to exclude insufficiently relevant evidence and in the High Court's inherent jurisdiction to regulate its proceedings. These powers are adequate to deal with the problem.

(d) If it is thought that any further articulation of this power is desirable, taking into account the modern approach to civil litigation generally, it is better dealt with by amendment of the Rules of Court.

5.104 We wish to stress that our courts have not experienced any difficulty in dealing with repetitious and superfluous evidence, whether hearsay or not. In this connection, we respectfully adopt the following views put forward by the Scottish Law Commission:

> *"we do not consider that the risk [of the courts being swamped by superfluous evidence] would be any greater in relation to hearsay than it is in relation to other types of evidence. Hearsay which is superfluous will be dealt with by the courts in the same way as superfluous non-hearsay evidence. A party who has wasted time has to bear the expense of doing so if he is unsuccessful and may be penalised in expenses even if he is successful."*[109]

5.105 We have therefore decided not to recommend any statutory provision which would give the courts a discretion to exclude repetitious and superfluous evidence on the following grounds:

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108 English Report, paras 4.22-4.24.

109 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986), para 3.19.

(a) The greater admissibility of hearsay evidence since the implementation of Parts IV and V of the Evidence Ordinance has not created any problem in practice.

(b) The court has power to exclude irrelevant or insufficiently relevant evidence.

(c) The court has power to exclude repetitious and superfluous evidence under its inherent jurisdiction to regulate its proceedings and to prevent the abuse of process.

(d) The adduction of evidence of low probative value is futile because such evidence will not be given any significant weight.

(e) Costs sanctions will act as an effective deterrent to the adduction of repetitious or superfluous evidence.[110]

(f) The Rules Committees of the Supreme Court and the District Court have power to make rules of court regulating the practice and procedure to be followed in the courts. If the court's inherent power to exclude repetitious and superfluous evidence should be expressly provided for, it should be done by way of rules of court[111] instead of primary legislation.

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110 If anything done has caused unnecessary delay in the proceedings or was calculated to occasion unnecessary costs, the court may impose costs sanctions under RSC O 62 r 7. A solicitor may also be personally liable for costs under RSC O 62 r 8 if costs have been "incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default". The English Law Commission suggested that "misconduct" for the purpose of the English RSC O 62 r 10 may include the adduction of superfluous or repetitious evidence. See English Report, para 4.63.

111 Or, perhaps, by Practice Directions.

Chapter 6

Summary of Recommendations

6.1 Subject to safeguards, in civil proceedings whether held with or without a jury, evidence should not be excluded on the ground that it is hearsay and that both first-hand hearsay and multiple hearsay should be admissible. *(Paragraph 5.19)*

6.2 The existing statutory provisions making hearsay evidence admissible should not be affected by our reform proposals. *(Paragraph 5.21)*

6.3 No special provision should be made for the giving of notice of intention to adduce hearsay evidence and the issue as to whether such a notice should be given should be left to the informal arrangement between the parties. *(Paragraph 5.37)*

6.4 Rules of court should be made to allow a party to call a witness whose evidence has been tendered as hearsay by another party, and to enable that party to cross-examine that person on the statement. *(Paragraph 5.41)*

6.5 Statutory guidelines should be laid down to assist courts in assessing the weight they should attach to hearsay evidence. *(Paragraph 5.47)*

6.6 The requirement that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence should be retained. The date on which the statement was made should be the date on which the statement maker is required to be competent to give direct oral evidence. *(Paragraph 5.51)*

6.7 Evidence should continue to be admissible to impugn or support the credibility of the maker of a hearsay statement who is not called as a witness, and evidence tending to show that such a person made previous or later inconsistent statements, should also continue to be admissible. *(Paragraph 5.53)*

6.8 Previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated. *(Paragraph 5.56)*

6.9 Adverse admissions, published works dealing with matters of a public nature, and public documents and records, which are now admissible

under section 54 of the Evidence Ordinance, should be admissible under our recommendation in paragraph 6.1. *(Paragraph 5.61)*

6.10 Evidence of reputation or family tradition should be admissible under our recommendation in paragraph 6.1. *(Paragraph 5.65)*

6.11 Where a statement contained in a document is admissible as evidence in civil proceedings, it should be capable of being proved, either by the production of that document, or by the production of a copy of that document, authenticated in such manner as the court might approve. It should be immaterial how many removes there are between a copy and the original. *(Paragraph 5.70)*

6.12 Documents, including those stored by computer, which form part of the records of a business or public authority, should be admissible as hearsay evidence under our recommendation in paragraph 6.1. *(Paragraph 5.80)*

6.13 Unless the court otherwise directs, a document, including a document stored by computer, should be taken to form part of the records of a business or public authority if it is certified as such by an officer of the business or authority and should be received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records. *(Paragraph 5.81)*

6.14 The definition of "records" should cover records in any form, and should include computer-generated records. *(Paragraph 5.82)*

6.15 The absence of an entry should be capable of being formally proved by the oral evidence or affidavit of an officer of the business or public authority to which the records belong. *(Paragraph 5.83)*

6.16 An "officer" of a business or public authority should include any person occupying a responsible position in relation to the relevant activities of the business or authority or in relation to its records. *(Paragraph 5.84)*

6.17 Our reform proposals should apply to all civil proceedings to which the strict rules of evidence apply. *(Paragraph 5.88)*

6.18 There should be power to make rules of court to make such provisions as are necessary for putting our recommendations into effect. *(Paragraph 5.89)*

6.19 The exclusion of evidence on grounds other than that it is hearsay under any statutory provision or common law rule should not be affected by any of our recommendations. *(Paragraph 5.91)*

6.20 A "statement" should mean any representation of fact or opinion, however made. *(Paragraph 5.93)*

Appendix 1

Sections 18 to 21 of the Evidence Ordinance, Cap 8

PART III

ADMISSIBLE DOCUMENTS

18. Copy of document of public nature

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no enactment exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in the court, provided it is proved to be an examined copy or extract or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, on payment of a reasonable sum for the same, not exceeding 50 cents for every folio of 72 words.

(Amended 51 of 1911; 63 of 1911 Schedule; 9 of 1950 Schedule; L.N. 54 of 1989)

[cf. 1851 c. 99 s. 14 U.K.]

19. Official documents

Whenever, by any enactment, any certificate, official or public document, or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding is receivable in evidence of any particular in the court or before the Legislative Council or any committee thereof, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the enactment, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

(Amended 51 of 1911; 63 of 1911 Schedule)

[cf. 1845 c. 113 s. 1 U.K.]

Note: As to Admissibility in United Kingdom of certain Hong Kong public registers, see S.I. 1962 No. 642.

19A. Certificate in criminal proceedings in respect of foreign documents

(1) Any document purporting to be signed by the Chief Secretary and certifying that any foreign document attached thereto has been received by him in connexion with any criminal proceedings shall be admitted in evidence in those proceedings together with the document attached thereto, on production without further proof, as prima facie evidence of the facts contained in such documents.

(2) In this section "foreign document" means a document purporting to be-

(a) a true copy or extract from-

(i) any record, book or document of a public nature kept or maintained in any place outside Hong Kong; or

(ii) any document filed in or issued out of an office kept or maintained in any place outside Hong Kong for the purpose (whether the sole purpose or not) of registering companies or business names or the ownership of property; and

(b) signed and certified as a true copy of or extract from any such record, book or document by a person having custody or control thereof.

(3) In relation to a document tendered in evidence under this section and purporting to be signed and certified as a true copy of or extract from any record, book or document by a person having custody or control thereof, it shall be presumed, unless the contrary is proved, that such record, book or document is-

(a) a record, book or document of a public nature kept or maintained in a place outside Hong Kong; or

(b) a document filed in or issued out of an office kept or maintained in a place outside Hong Kong for the purpose of registering companies or business names or the ownership of property,

if there is endorsed on the document a statement purporting to be signed by that person to that effect.

(4) Unless the court otherwise orders, a document shall not be admitted in evidence under this section unless 14 days' notice in writing of the intention to tender such document in evidence, together with a copy thereof and of the certificate of the Chief Secretary in respect thereof, has been served-

(a) where the document is tendered by the prosecution, on the defendant (or, if more than one, on each defendant) or his solicitor;

(b) where the document is tendered by a defendant, on the Attorney General,

but nothing in this subsection shall affect the admissibility of a document in respect of which notice has not been served in accordance with the requirements of this subsection if no person entitled to be so served objects to its being so admitted.

(Added 37 of 1984 s. 4)

*19AA. Evidence of signature or fiat, etc.

Where the fiat, authorization, sanction, consent or authority of the Governor or any other public officer is necessary before any prosecution or action is commenced, or for any purpose whatsoever in connection with any proceeding, any document purporting to bear the fiat, authorization, sanction, consent or authority of the Governor, or such public officer, as the case may be, shall, until the contrary is proved, be received as evidence in any proceeding without proof being given that the signature to such fiat, authorization, sanction, consent or authority is that of the Governor or such public officer.

19B. Certificate in criminal proceedings of designation of foreign bank

(1) The Financial Secretary may, for the purposes of any criminal proceedings, designate any body formed or established outside Hong Kong which carries on the business of banking outside Hong Kong, and a certificate purporting to be signed by the Financial Secretary and certifying that any such body described therein has been designated by him under this section for the purposes of those proceedings shall, on its production without further proof, be admitted in those proceedings as prima facie evidence of the facts contained therein. *(Amended 67 of 1986 s. 2)*

(2) The power conferred by subsection (1) may be exercised in respect of any body formed or established outside Hong Kong notwithstanding that it has ceased to carry on the business of banking or is being or has been wound up or dissolved. *(Added 67 of 1986 s. 2)*

(Added 37 of 1984 s. 4)

*This provision previously appeared in s. 91 of Cap. 1. By virtue of 89 of 1993 s.27, it was re-enacted as s. 19AA of this Ordinance

19C. Privilege relating to sections 19A and 19B

The Chief Secretary or the Financial Secretary shall not be compelled to attend as a witness in any criminal proceedings in which a certificate purporting to have been signed by him is tendered in evidence under section 19A or 19B, as the case may be, if the matter in respect of which his attendance is required relates solely to that certificate.

(Added 37 of 1984 s. 4)

20. Copy of entry in banker's record

(1) Subject to this section, a copy of any entry or matter recorded in a banker's record shall, on its production without further proof, be admitted in any proceedings as prima facie evidence of the matters, transactions and accounts therein recorded if-

(a) it is proved-

(i) that such entry was made or matter recorded in the ordinary course of business; and

(ii) that such record is in the custody or control of the bank; and

(b) except in the case of a copy made by any photographic process and subject to subsection (3), it is proved by some person who has examined the copy with the original entry, that the copy has been examined with the original entry and is correct.

(2) A bank or officer of a bank shall not, in any proceedings other than proceedings instituted by or against the bank, be compelled to produce any banker's record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions or accounts therein recorded, except-

(a) in civil proceedings, by order of a judge made for special cause;

(b) in criminal proceedings, by order of the court of trial.

(3) In the case of a banker's record kept by means of a computer, it shall not be necessary to prove the matters referred to in subsection (1)(b) in relation to a document produced by the computer which is tendered in evidence under this section as a copy of a matter recorded therein if (subject, in the case of civil proceedings, to any rules of court made under section 54 of the Supreme Court Ordinance (Cap. 4) with respect to this subsection) it is proved-

(a) that the document was so produced under the direction of a person having practical knowledge of and experience

in the use of computers as a means of storing, processing or retrieving information;

(b) that during the period when the computer was used for the purpose of keeping such record, appropriate measures were in force for preventing unauthorized interference with the computer; and

(c) that during that period, and at the time that the document was produced by the computer, the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents,

and for the purposes of this subsection "computer" has the same meaning as in section 22A.

(4) In any proceedings, the matters referred to in subsection (1)(a) and (b) and subsection (3)(a), (b) and (c) in relation to a banker's record may be proved, orally or by affidavit, by any officer of the bank, and any such affidavit shall, on its production without further proof, be admitted in evidence and may include an explanation of the contents of the copy of any entry or matter recorded in such banker's record which is tendered in evidence or any abbreviations, symbols or other markings appearing in such copy that may be relevant in the proceedings, and a description of the banker's record, its nature and use, and the procedures followed in keeping it; and for the purposes of this subsection it shall be sufficient for a matter referred to in subsection (1)(a)(i) or (3)(c) to be stated in an affidavit to the best of the knowledge and belief of the person making the affidavit.

(5) In relation to any criminal proceedings-

(a) this section shall apply to any document or record used in the ordinary business of a body designated by the Financial Secretary under section 19B(1) for the purposes of such criminal proceedings as it applies to a banker's record, and a reference in this section to a bank shall, in its application to such document or record, be construed as a reference to the body so designated; but *(Amended 67 of 1986 s. 3)*

(b) this section shall not apply to any document or record used-

(i) by a deposit-taking company or restricted licence bank which is a company registered under Part I or IX of the Companies Ordinance (Cap. 32);

(ii) by a deposit-taking company or restricted licence bank which is a company to which Part XI of that

Ordinance applies if such document or record is used in its ordinary business in Hong Kong,

and for the purposes of this paragraph "deposit-taking company or restricted licence bank" means a company which is required by the Banking Ordinance (Cap. 155) to be authorized thereunder as a deposit-taking company or restricted licence bank. *(Amended 27 of 1986 s. 137; 3 of 1990 s. 55; 49 of 1995 s. 53)*

(Replaced 37 of 1984 s. 5)

20A. Application of section 20 to banks that have ceased business

(1) Section 20 shall apply to a copy of an entry or matter recorded in a record used in the ordinary course of business of a former bank which is tendered in evidence in criminal proceedings as it applies to a copy of an entry or matter recorded in a banker's record, but with the following modifications-

(a) subsection (1)(a)(ii) thereof shall be construed as if for "the bank" there were substituted "any person duly authorized in that behalf or otherwise responsible for administering the affairs of the former bank"; and

(b) a reference therein to an officer of a bank shall in relation to the former bank be construed as a reference to any person who is, or is an officer of, a person responsible for administering the affairs of the former bank.

(2) Section 20 shall apply to a copy of an entry or matter recorded in a record used in the ordinary course of business of a body designated by the Financial Secretary under section 19B(2) for the purposes of criminal proceedings which is tendered in evidence in those criminal proceedings as it applies to a copy of an entry or matter recorded in a banker's record, but with the following modifications-

(a) a reference therein to a bank shall be construed as a reference to any person responsible for administering the affairs of that body;

(b) a reference therein to an officer of a bank shall be construed as a reference to any person who is, or is an officer of, a person responsible for administering the affairs of that body.

(3) For the purposes of subsection (1) "former bank" means a bank which is being or has been wound up or dissolved or has otherwise ceased to carry on business as a bank.

(Added 67 of 1986 s. 4)

21. Court or judge may direct copies of entries in banker's record to be taken

(1) On the application of any party to any proceedings, the court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings. *(Amended 37 of 1984 s. 6)*

(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the same is to be obeyed, unless the court or judge otherwise directs.

(3) The costs of any application to the court or judge under or for the purposes of this section, and the costs of anything done or to be done under an order of the court or judge made under or for the purposes of this section, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by default or delay on the part of the bank.

(4) Any such order against a bank may be enforced as if the bank were a party to the proceeding.

[cf. *1879 c. 11 ss. 7 & 8 U.K.]*

Parts IV and V (sections 46 to 60) of the Evidence Ordinance, Cap 8

PART IV

HEARSAY EVIDENCE IN CIVIL PROCEEDINGS

46. Hearsay evidence to be admissible only by virtue of this or any other Ordinance or by agreement

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 or any other Ordinance or by agreement of the parties, but not otherwise.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 1 U.K.]

47. Admissibility of out-of-court statements as evidence of facts stated

(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, subject to this section and to rules, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(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

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Note: Section 45 and Part IV came into operation on 1 December 1970 for the purposes of the following civil proceedings –

(a) proceedings (other than proceedings in bankruptcy) in the High Court and the District Court;
(b) proceedings before any tribunal, other than a court, to which the strict rules of evidence apply;
(c) arbitrations and references to which the strict rules of evidence apply;
(d) applications and appeals arising out of the proceedings mentioned in paragraphs (a) to (c).

(*See L.N. 154 of 1970)*

(b) without prejudice to paragraph (a), 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 authorized by the court.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 2 U.K.]

48. Witness's previous statement, if proved, to be evidence of facts stated

(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 12, 13 or 14; 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 Part or Part VI 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 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.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 3 U.K.]

49. Admissibility of certain records as evidence of facts stated

(1) Without prejudice to section 50, in any civil proceedings a statement contained in a document shall, subject to this section and to rules, 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-

(a) 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

(b) 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), shall not without the leave of the court 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.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 4 U.K.]

50. Admissibility of statements produced by computers

(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules, 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) are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1) are-

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) was regularly performed by computers, whether-

(a) by a combination of computers operating, over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part as constituting a single computer, and references in this Part to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3), in this Part "computer" means any device for storing and processing information, and any reference to

information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 5 U.K.]

51. Provisions supplementary to sections 47 to 50

(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 47, 49 or 50 it may, subject to any rules, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 47, 49 or 50, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 47, 48, 49 or 50 regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular-

(a) in the case of a statement falling within section 47(1) or 48 (1) or (2), to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;

(b) in the case of a statement falling within section 49(1), to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and

(c) in the case of a statement falling within section 50(1), to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied thereto, contemporaneously with the occurrence or existence of

the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.

(4) For the purpose of any enactment or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated-

(a) a statement which is admissible in evidence by virtue of section 47 or 48 shall not be capable of corroborating evidence given by the maker of the statement; and

(b) a statement which is admissible in evidence by virtue of section 49 shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.

(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 50(4) wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for 2 years.

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 6 U.K.]

52. Admissibility of evidence as to credibility of maker, etc. of statement admitted under section 47 or 49

(1) Subject to rules, where in any civil proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 47-

(a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and

(b) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person has contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Subsection (1) shall apply in relation to a statement given in evidence by virtue of section 49 as it applies in relation to a statement given in evidence by virtue of section 47, except that references to the person who made the statement and to his making the statement shall be construed respectively as references to the person who originally supplied the information from which the record containing the statement was compiled and to his supplying that information.

(3) Section 48(1) shall apply to any statement proved by virtue of subsection (1)(b) of this section as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in section 48(1)(a).

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 7 U.K.]

53. *(Repealed 65 of 1980 s. 2)*

54. Admissibility of certain hearsay evidence formerly admissible at common law

(1) In any civil proceedings a statement which, if this Part had not been enacted, would by virtue of any rule of law mentioned in subsection (2) 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) 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 facts, 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 the Evidence (Amendment) Ordinance 1969 (25 of 1969) had not been enacted, would have been admissible in evidence by virtue of any rule of law mentioned in subsection (4)-

(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 47 or 49; and

(b) if given in evidence under this Part (whether by virtue of paragraph (a) or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down;

and, without prejudice to paragraph (b), reputation shall for the purposes of this Part 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) 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 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) In so far as any statement is admissible in any civil proceedings by virtue of subsection (1) or (3)(a), it may be given in evidence in those proceedings notwithstanding anything in sections 47 to 52 or in any rules. *(Amended 65 of 1980 s. 3)*

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

(Added 25 of 1969 s. 6)
[cf. 1968 c. 64 s. 9 U.K.]

55. Interpretation of sections 46 to 54 and application to arbitrations, etc

(1) In this Part, unless the context otherwise requires-

"computer" has the meaning assigned by section 50;

"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, tape or other device in which visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"rules" means the Rules of the Supreme Court (Cap. 4 sub. leg.) made under section 54 of the Supreme Court Ordinance (Cap. 4); *(Added 65 of 1980 s. 4)*

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

(2) In this part, any reference to a copy of a document includes-

(a) in the case of a document falling within paragraph (c) but not paragraph (d) of the definition of "document" in subsection (1), a transcript of the sounds or other data embodied therein;

(b) in the case of a document falling within paragraph (d) but not paragraph (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;

(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 in relation to any such civil proceedings as are mentioned in section 68(1)(a) and (b), any rules made under section 54 of the Supreme Court Ordinance (Cap. 4) or Part VI 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. *(Amended 65 of 1980 s. 4)*

(4) If any question arises as to what are, for the purposes of any such civil proceedings as are mentioned in section 68(1)(a) and (b), the appropriate modifications of any such rule as is mentioned in subsection (3), that question shall, in default of agreement, be determined by the tribunal or the arbitrator or umpire, as the case may be.

(Added 25 of 1969 s.6)
(cf. 1968 c. 64 s. 10 U.K.]

PART V

EVIDENCE OF OPINION AND EXPERT EVIDENCE

56. Application of Part IV to statements of opinion

(1) Subject to the provisions of this section, Part IV, with the exception of section 50, shall apply in relation to statements of opinion as it applies in relation to statements of fact, subject to the necessary modifications and in particular the modification that any reference to a fact stated in a statement shall be construed as a reference to a matter dealt with therein.

(2) Section 49, as applied by subsection (1) of this section, shall not render admissible in any civil proceedings a statement of opinion contained in a record unless that statement would be admissible in those proceedings if made in the course of giving oral evidence by the person who originally supplied the information from which the record was compiled; but where a statement of opinion contained in a record deals with a matter on which the person who originally supplied the information from which the record was compiled is (or would if living be) qualified to give oral expert evidence, the said section 49, as applied by subsection (1) of this section, shall have effect in relation to that statement as if so much of subsection (1) of that section as requires personal knowledge on the part of that person were omitted.

(49 of 1973 s. 2 incorporated)
[cf. 1972 c. 30 s. 1 U.K.]

57. Rules with respect to expert reports and oral expert evidence

(1) If and so far as rules so provide, section 47(2) shall not apply to statements (whether of fact or opinion) contained in expert reports.

(2)-(6) *(Repealed 65 of 1980 s. 5)*

Note: Section 56 (formerly section 2 of the Civil Evidence Ordinance 1973) came into operation on 1 July 1979 for the purposes of any civil proceedings (other than proceedings in bankruptcy). *(See L.N. 155 of 1979)*

(7) References in this section to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

(8) *(Repealed 65 of 1980 s. 5)*

(49 of 1973 s. 3 incorporated)
[cf. 1972 c. 30 s. 2 U.K.]

58. Admissibility of expert opinion and certain expressions of non-expert opinion

(1) Subject to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence. *(Amended 65 of 1980 s. 6)*

(2) Where a person is called as a witness in any civil proceedings a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section, "relevant matter" includes an issue in the proceedings in question.

(49 of 1973 s. 4 incorporated)
[cf. 1972 c. 30 s. 3 U.K.]

59. Evidence of foreign law

(1) A person who is suitably qualified to do so on account of his knowledge or experience is competent to give, in civil proceedings, expert evidence as to the law of any country or territory outside Hong Kong, irrespective of whether he has acted or is entitled to act as a legal practitioner there.

(2) Where any question as to the law of any country or territory outside Hong Kong with respect to any matter has been determined (whether before or after the commencement of this Part) in any such proceedings as are mentioned in subsection (4), then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country or territory with respect to that matter)-

(a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose

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Note: Section 59(2) to (5) (formerly section 5(2) to (5) of the Civil Evidence Ordinance 1973) came into operation on 1 July 1979 for the purposes of any civil proceedings (other than proceedings in bankruptcy). *(See L.N. 155 of 1979)*

of proving the law of that country or territory with respect to that matter; and

(b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country or territory with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:

Provided that paragraph (b) shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings.

(3) Except with the leave of the court, a party to any civil proceedings shall not be permitted to adduce any such finding or decision as is mentioned in subsection (2) by virtue of that subsection unless he has in accordance with rules given to every other party to the proceedings notice that he intends to do so.

(4) The proceedings referred to in subsection (2) are the following, whether civil or criminal, namely-

(a) proceedings at first instance in the High Court or in the Supreme Court of England as constituted by section 1 of the Courts Act 1971 (1971 c. 23 U.K.);
(b) appeals arising out of proceedings as are mentioned in paragraph (a);
(c) proceedings before the Court of Final Appeal. (*Amended 79 of 1995 s. 50)*

(5) For the purposes of this section a finding or decision on any such question as is mentioned in subsection (2) shall be taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if that question had been a question as to the law of Hong Kong, could be cited as an authority in legal proceedings in Hong Kong.

(49 of 1973 s. 5 incoporated. Amended 37 of 1984 s. 11)

[cf. *1972 c. 30 s. 4 U.K.]*

60. Interpretation, application to arbitrations etc. and savings

(1) In this Part, unless the context otherwise requires, "civil proceedings" includes, in addition to civil proceedings in any court-

(a) civil proceedings before any tribunal, being proceedings in relation to which the strict rules of evidence apply; and

(b) an arbitration or reference, whether under an enactment or not,

but does not include civil proceedings in relation to which the strict rules of evidence do not apply.

(2) In this Part, unless the context otherwise requires-

"court" does not include a court-martial, and, in relation to an arbitration or reference, means the arbitrator or umpire and, in relation to proceedings before a tribunal (not being a court), means the tribunal;

"legal proceedings" includes an arbitration or reference, whether under an enactment or not; *(Amended 65 of 1980 s. 7)*

"rules" means the Rules of the Supreme Court (Cap. 4 sub. leg.) made under section 54 of the Supreme Court Ordinance (Cap. 4). *(Added 65 of 1980 s. 7)*

(3) For the purposes of the application of sections 57 and 59 in relation to any such civil proceedings as are mentioned in subsection (1)(a) or (b), any rules made under section 54 of the Supreme Court Ordinance (Cap. 4) 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. *(Amended 65 of 1980 s. 7)*

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

(5) Nothing in this Part shall prejudice-

(a) any power of a court, in any civil proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion;

(b) the operation of any agreement (whenever made) between the parties to any civil proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings.

(49 of 1973 s. 6 incorporated)
[cf. 1972 c. 30 s. 5 U.K.]

Appendix 3

Order 38 of the Rules of the Supreme Court of Hong Kong

ORDER 38

EVIDENCE

I. GENERAL RULES

1. General rule: witnesses to be examined orally (O. 38, r. 1)

Subject to the provisions of' these rules and of the Evidence Ordinance (Cap. 8) and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

2. Evidence by affidavit (O. 38, r. 2)

(1) The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.

(2) An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

2A. Exchange of witness statements (O. 38, r. 2A)

(1) The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before

it, and saving costs, having regard to all the circumstances of the case, including (but not limited to)-

(a) the extent to which the facts are in dispute or have been admitted;
(b) the extent to which the issues of fact are defined by the pleadings;
(c) the extent to which information has been or is likely to be provided by further and better particulars, answers to interrogatories or otherwise.

(2) At the hearing of a summons for directions in an action commenced by writ the Court shall direct every party to serve on the other parties, within such period of the hearing as the Court may specify and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial.

The Court may give a direction to any party under this paragraph at any other stage of such an action and at any stage of any other cause or matter.

Order 3, rule 5(3) shall not apply to any period specified by the Court under this paragraph.

(3) Directions under paragraph (2) or (17) may make different provision with regard to different issues of fact or different witnesses.

(4) Statements served under this rule shall-

(a) be dated and, except for good reason (which should be specified by letter accompanying the statement), be signed by the intended witness and shall include a statement by him that the contents are true to the best of his knowledge and belief;
(b) sufficiently identify any documents referred to therein; and
(c) where they are to be served by more than one party, be exchanged simultaneously.

(5) Where a party is unable to obtain a written statement from an intended witness in accordance with paragraph (4)(a), the Court may direct the party wishing to adduce that witness's evidence to provide the other party with the name of the witness and (unless the Court otherwise orders) a statement of the nature of the evidence intended to be adduced.

(6) Subject to paragraph (9), where the party serving a statement under this rule does not call the witness to whose evidence it relates, no other party may put the statement in evidence at the trial.

(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial-

(a) except where the trial is with a jury, the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;

(b) the party may not without the consent of the other parties or the leave of the Court adduce evidence from that witness the substance of which is not included in the statement served, except-

(i) where the Court's directions under paragraph (2) or (17) specify that statements should be exchanged in relation to only some issues of fact, in relation to any other issues;

(ii) in relation to new matters which have arisen since the statement was served on the other party;

(c) whether or not the statement or any part of it is referred to during the evidence in chief of the witness, any party may put the statement or any part of it in cross-examination of that witness.

(8) Nothing in this rule shall make admissible evidence which is otherwise inadmissible.

(9) Where any statement served is one to which the Evidence Ordinance (Cap. 8) applies, paragraphs (6) and (7) shall take effect subject to the provisions of that Ordinance and Parts III and IV of this Order.

The service of a witness statement under this rule shall not, unless expressly so stated by the party serving the same, be treated as a notice under that Ordinance; and where a statement or any part thereof would be admissible in evidence by virtue only of that Ordinance, the appropriate notice under Part III or IV of this Order shall be served with the statement notwithstanding any provision of those Parts as to the time for serving such a notice. Where such a notice is served, a counter-notice shall be deemed to have been served under rule 26(1).

(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court.

(11) Where a party serves a witness statement under this rule, no other person may make use of that statement for any purpose other than the purpose of the proceedings in which it was served-

(a) unless and to the extent that the party serving it gives his consent in writing or the Court gives leave; or

(b) unless and to the extent that it has been put in evidence (whether pursuant to a direction under paragraph (7)(a) or otherwise).

(12) Subject to paragraph (13), the judge shall, if any person so requests during the course of the trial, direct the Clerk of Court to certify as open to inspection any witness statement which was ordered to stand as evidence in chief under paragraph (7)(a).

A request under this paragraph may be made orally or in writing.

(13) The judge may refuse to give a direction under paragraph (12) in relation to a witness statement, or may exclude from such a direction any words or passages in a statement, if he considers that inspection should not be available-

(a) in the interests of justice or national security;
(b) because of the nature of any expert medical evidence in the statement; or
(c) for any other sufficient reason.

(14) Where the Clerk of Court is directed under paragraph (12) to certify a witness statement as open to inspection he shall-

(a) prepare a certificate which shall be attached to a copy ("the certified copy") of that witness statement; and
(b) make the certified copy available for inspection.

(15) Subject to any conditions which the Court may by special or general direction impose, any person may inspect and (subject to payment of the prescribed fee) take a copy of the certified copy of a witness statement from the time when the certificate is given until the end of 7 days after the conclusion of the trial.

(16) In this rule-

(a) any reference in paragraphs (12) to (15) to a witness statement shall, in relation to a witness statement of which only part has been ordered to stand as evidence in chief under paragraph (7)(a), be construed as a reference to that part;

(b) any reference to inspecting or copying the certified copy of a witness statement shall be construed as including a reference to inspecting or copying a copy of that certified copy.

(17) The Court shall have power to vary or override any of the provisions of this rule (except paragraphs (1), (8) and (12) to (16)) and to give such alternative directions as it thinks fit.

(L.N. 223 of 1995)

3. Evidence of particular facts (O. 38, r. 3)

(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. Limitation of expert evidence (O. 38, r. 4)

The Court may, at or before the trial of any action, order that the number of medical or other expert witnesses who may be called at the trial shall be limited as specified by the order.

5. Limitation of plans, etc., in evidence (O. 38, r. 5)

Unless, at or before the trial, the Court for special reasons otherwise orders, no plan, photograph or model shall be receivable in evidence at the trial of an action unless at least 10 days before the commencement of the trial the parties, other than the party producing it, have been given an opportunity to inspect it and to agree to the admission thereof without further proof.

6. Revocation or variation of orders under rules 2 to 5 (O. 38, r. 6)

Any order under rules 2 to 5 (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order of the Court made at or before the trial.

7. Evidence of finding on foreign law (O. 38. r. 7)

(1) A party to any cause or matter who intends to adduce in evidence a finding or decision on a question of foreign law by virtue of section 59 of the Evidence Ordinance (Cap. 8) shall-

(a) in the case of an action to which Order 25, rule 1, applies within 14 days after the pleadings in the action are deemed to be closed, and

(b) in the case of any other cause or matter, within 21 days after the date on which an appointment for the first hearing of the cause or matter is obtained,

or in either case, within such other period as the Court may specify, serve notice of his intention on every other party to the proceedings.

(2) The notice shall specify the question on which the finding or decision was given or made and specify the document in which it is reported or recorded in citable form.

(3) In any cause or matter in which evidence may be given by affidavit, an affidavit specifying the matters contained in paragraph (2) shall constitute notice under paragraph (1) if served within the period mentioned in that paragraph.

8. Application to trials of issues, references, etc. (O. 38, r. 8)

The foregoing rules of this Order shall apply to trials of issues or questions of fact or law, references, inquiries and assessments of damages as they apply to the trial of actions.

9. Depositions: when receivable in evidence at trial (O. 38, r. 9)

(1) No deposition taken in any cause or matter shall be received in evidence at the trial of the cause or matter unless-

(a) the deposition was taken in pursuance of an order under Order 39, rule 1, and

(b) either the party against whom the evidence is offered consents or it is proved to the satisfaction of the Court that the deponent is dead, or beyond the jurisdiction of the Court or unable from sickness or other infirmity to attend the trial.

(2) A party intending to use any deposition in evidence at the trial of a cause or matter must, a reasonable time before the trial, give notice of his intention to do so to the other party.

(3) A deposition purporting to be signed by the person before whom it was taken shall be receivable in evidence without proof of the signature being the signature of that person.

10. Supreme Court documents admissible or receivable in evidence (O. 38, r. 10)

(1) Office copies of writs, records, pleadings and documents filed in the Supreme Court shall be admissible in evidence in any cause or matter and between all parties to the same extent as the original would be admissible.

(2) Without prejudice to the provisions of any enactment, every document purporting to be sealed with the seal of any office or department of the Supreme Court shall be received in evidence without further proof, and any document purporting to be so sealed and to be a copy of a document filed in, or issued out of, that office or department shall be deemed to be an office copy of that document without further proof unless the contrary is shown.

11. Evidence of consent of new trustee to act (O. 38, r. 11)

A document purporting to contain the written consent of a person to act as trustee and to bear his signature verified by some other person shall be evidence of such consent.

12. Evidence at trial may be used in subsequent proceedings (O. 38, r. 12)

Any evidence taken at the trial of any cause or matter may be used in any subsequent proceedings in that cause or matter.

13. Order to produce document at proceeding other than trial (O. 38, r. 13)

(1) At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.

(2) No person shall be compelled by an order under paragraph (1) to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter.

II. WRITS OF SUBPOENA

14. Form and issue of writ of subpoena (O. 38, r. 14)

(1) A writ of subpoena must be in Form No. 28 or 29 in Appendix A, whichever is appropriate.

(2) Issue of a writ of subpoena takes place upon its being sealed by an officer of the Court.

(3) Where a writ of subpoena is to be issued in a cause or matter in the Court, the appropriate office for the issue of the writ is the Registry.

(HK)(5) Before a writ of subpoena is issued a praecipe for the issue of the writ must be filed in the Registry together with a note from a judge or master authorizing the issue of such writ and the sum of $500 shall be deposited in the Registry, in addition to any fee payable in respect of such issue, as a deposit in respect of the witness' reasonable expenses; and the praecipe must contain the name and address of the party issuing the writ, if he is acting in person, or the name or firm and business address of that party's solicitor and also (if the solicitor is the agent of another) the name or firm and business address of his principal.

(HK)(6) In any proceedings, whether in chambers or in court, the Court may order the reimbursement by one or more of the parties to a witness who has been served with a writ of subpoena in respect of any expenses reasonably and properly incurred by that witness.

(HK)(7) Any expenses so ordered by the Court to be paid shall be assessed by the Court making the order or, if no such assessment is made by the Court, shall be taxed (if not agreed) and paid by the party ordered to make such payment.

(HK)(8) A witness whose expenses have been ordered to be paid may, if the party ordered to make such payment is the party who made the deposit on issue of the writ of subpoena, recover such expenses, after assessment, agreement or taxation, from the said deposit and look to the party liable to make such payment for the balance, if any.

(HK)(9) The deposit (or such part of it as shall remain after payment to the witness under rule 14(8)) shall be refunded to the party that paid the deposit if-

(a) that party was not ordered to pay the costs of the witness; or

(b) that party was ordered to pay the costs of the witness and has effected payment of such costs after assessment, agreement or taxation.

15. More than one name may be included in one writ of subpoena (O 38, r. 15)

The names of two or more persons may be included in one writ of subpoena ad testificandum.

16. Amendment of writ of subpoena (O. 38, r. 16)

Where there is a mistake in any person's name or address in a writ of subpoena, then, if the writ has not been served, the party by whom the writ was issued may have the writ re-sealed in correct form by filing a second praecipe under rule 14(5) endorsed with the words "Amended and re-sealed".

17. Service of writ of subpoena (O. 38, r. 17)

A writ of subpoena must be served personally and, subject to rule 19, the service shall not be valid unless effected within 12 weeks after the date of issue of the writ and not less than four days, or such other period as the Court may fix, before the day on which attendance before the Court is required.

18. Duration of writ of subpoena (O. 38, r. 18)

Subject to rule 19, a writ of subpoena continues to have effect until the conclusion of the trial at which the attendance of the witness is required.

19. Writ of subpoena in aid of inferior court or tribunal (O. 38, r. 19)

(1) The office of the Court out of which a writ of subpoena ad testificandum or a writ of subpoena duces tecum in aid of an inferior court or tribunal may be issued is the Registry, and no order of the Court for the issue of such a writ is necessary.

(2) A writ of subpoena in aid of an inferior court or tribunal continues to have effect until the disposal of the proceedings before that court or tribunal at which the attendance of the witness is required.

(3) A writ of subpoena issued in aid of an inferior court or tribunal must be served personally.

(4) Unless a writ of subpoena issued in aid of an inferior court or tribunal is duly served on the person to whom it is directed not less than 4 days, or such other period as the Court may fix, before the day on which the attendance of that person before the court or tribunal is required by the writ, that person shall not be liable to any penalty or process for failing to obey the writ.

(5) An application to set aside a writ of subpoena issued in aid of an inferior court or tribunal may be heard by a master.

III. HEARSAY EVIDENCE

20. Interpretation and application (O.38, r. 20)

(1) In this Part of this Order "the Ordinance" means the Evidence Ordinance (Cap. 8) and any expressions used in this Part and in Parts IV and V of the Ordinance have the same meanings in this Part as they have in the said Parts IV and V.

(2) This Part of this Order shall apply 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 in relation to the trial or hearing of a cause or matter**.**

21. Notice of intention to give certain statements in evidence (O. 38, r. 21)

(1) Subject to the provisions of this rule, a party to a cause or matter who desires to give in evidence at the trial or hearing of the cause or matter any statement which is admissible in evidence by virtue of section 47, 49 or 50 of the Ordinance must-

(a) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into court, not later than 21 days before application is made to set down or to adjourn into court, or within such other period as the Court may specify; and *(L.N. 99 of 1993)*

(b) in the case of any other cause or matter, within 21 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 on every other party to the cause or matter notice of his desire to do so, and the notice must comply with the provisions of rule 22, 23 or 24, as the circumstances of the case require.

(2) Paragraph (1) shall not apply in relation to any statement which is admissible as evidence of any fact stated therein by virtue not only of section 47, 49 or 50 of the Ordinance but by virtue also of any other statutory provision within the meaning of section 46 of the Ordinance.

(3) Paragraph (1) shall not apply in relation to any statement which any party to a probate action desires to give in evidence at the trial of that action and which is alleged to have been made by the deceased person whose estate is the subject of the action.

(4) Where by virtue of any provision of these rules or of any order or direction of the Court the evidence in any proceedings is to be given by affidavit then, without prejudice to paragraph (2), paragraph (1) shall not apply in relation to any statement which any party to the proceedings desires to have included in any affidavit to be used on his behalf in the proceedings, but nothing in this paragraph shall affect the operation of rule 5 of Order 41, or the powers of the Court under rule 3 of this Order.

(5) Rule 9 of Order 65 shall not apply to a notice under this rule but the Court may direct that the notice need not be served on any party who at the time when service is to be effected is in default as to acknowledgment of service or who has no address for service.

22. Statement admissible by virtue of section 47 of the Ordinance: contents of notice (O. 38, r. 22)

(1) If the statement is admissible by virtue of section 47 of the Ordinance and was made otherwise than in a document, the notice must contain particulars of-

(a) the time, place and circumstances at or in which the statement was made;
(b) the person by whom, and the person to whom, the statement was made; and
(c) the substance of the statement or, if material, the words used.

(2) If the statement is admissible by virtue of section 47 of the Ordinance and was made in a document, a copy or transcript of the document, or of the relevant part thereof, must be annexed to the notice and the notice must contain such (if any) of the particulars mentioned in paragraph (1)(a) and (b) as are not apparent on the face of the document or part.

(3) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.

23. Statement admissible by virtue of section 49 of the Ordinance: contents of notice (O.38, r. 23)

(1) If the statement is admissible by virtue of section 49 of the Ordinance, the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain-

(a) particulars of-

(i) the person by whom the record containing the statement was compiled;
(ii) the person who originally supplied the information from which the record was compiled; and
(iii) any other person through whom that information was supplied to the compiler of that record,

and, in the case of any such person as is referred to in (i) or (iii) above, a description of the duty under which that person was acting when compiling that record or supplying information from which that record was compiled, as the case may be;

(b) if not apparent on the face of the document annexed to the notice, a description of the nature of the record which, or part of which, contains the statement; and

(c) particulars of the time, place and circumstances at or in which that record or part was compiled.

(2) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.

24. Statement admissible by virtue of section 50 of the Ordinance: contents of notice (O.38, r. 24)

(1) If the statement is contained in a document produced by a computer and is admissible by virtue of section 50 of the Ordinance, the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain particulars of-

(a) a person who occupied a responsible position in relation to the management of the relevant activities for the purpose of which the computer was used regularly during the material period to store or process information;

(b) a person who at the material time occupied such a position in relation to the supply of information to the computer, being information which is reproduced in the statement or information from which the information contained in the statement is derived; and

(c) a person who occupied such a position in relation to the operation of the computer during the material period,

and where there are two or more persons who fall within sub-paragraph (a), (b) or (c) and some only of those persons are at the date of service of the

notice capable of being called as witnesses at the trial or hearing, the person particulars of whom are to be contained in the notice must be such one of those persons as is at that date so capable.

(2) The notice must also state whether the computer was operating properly throughout the material period and, if not, whether any respect in which it was not operating properly or was out of operation during any part of that period was such as to affect the production of the document in which the statement is contained or the accuracy of its contents.

(3) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.

25. Reasons for not calling a person as a witness (O. 38, r. 25)

The reasons referred to in rules 22(3), 23(2) and 24(3) are that the person in question is dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or that despite the exercise of reasonable diligence it has not been possible to identify or find him or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates.

26. Counter-notice requiring person to be called as a witness (O. 38, r. 26)

(1) Subject to paragraphs (2) and (3), any party to a cause or matter on whom a notice under rule 21 is served may, within 21 days after service of the notice on him, serve on the party who gave the notice a counter-notice requiring that party to call as a witness at the trial or hearing of the cause or matter any person (naming him) particulars of whom are contained in the notice.

(2) Where any notice under rule 21 contains a statement that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness for the reason specified therein, a party shall not be entitled to serve a counter-notice under this rule requiring that person to be called as a witness at the trial or hearing of the cause or matter unless he contends that that person can or, as the case may be, should be called, and in that case he must include in his counter-notice a statement to that effect.

(3) Where a statement to which a notice under rule 21 relates is one to which rule 28 applies, no party on whom the notice is served shall be entitled to serve a counter-notice under this rule in relation to that statement, but this provision is without prejudice to the right of any party to apply to the Court under rule 28 for directions with respect to the admissibility of that statement.

(4) If any party to a cause or matter by whom a notice under rule 21 is served fails to comply with a counter-notice duly served on him under this rule, then, unless any of the reasons specified in rule 25 applies in relation to the person named in the counter-notice, and without prejudice to the powers of the Court under rule 29, the statement to which the notice under rule 21 relates shall not be admissible at the trial or hearing of the cause or matter as evidence of any fact stated therein by virtue of section 47, 49 or 50 of the Ordinance, as the case may be.

27. Determination of question whether person can or should be called as a witness (O. 38, r. 27)

(1) Where in any cause or matter a question arises whether any of the reasons specified in rule 25 applies in relation to a person, particulars of whom are contained in a notice under rule 21, the Court may, on the application of any party to the cause or matter, determine that question before the trial or hearing of the cause or matter or give directions for it to be determined before the trial or hearing and for the manner in which it is to be so determined.

(2) Unless the Court otherwise directs, the summons by which an application under paragraph (1) is made must be served by the party making the application on every other party to the cause or matter.

(3) Where any such question as is referred to in paragraph (1) has been determined under or by virtue of that paragraph, no application to have it determined afresh at the trial or hearing of the cause or matter may be made unless the evidence which it is sought to adduce in support of the application could not, with reasonable diligence, have been adduced at the hearing which resulted in the determination.

28. Directions with respect to statement made in previous proceedings (O. 38, r. 28)

Where a party to a cause or matter has given notice in accordance with rule 21 that he desires to give in evidence at the trial or hearing of the cause or matter-

(a) a statement falling within section 47(1) of the Ordinance which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal); or

(b) a statement falling within section 49(1) of the Ordinance which is contained in a record of direct oral evidence given in some other legal proceedings (whether civil or criminal),

any party to the cause or matter may apply to the Court for directions under this rule, and the Court hearing such an application may give directions as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved.

29. Power of Court to allow statement to be given in evidence (O.38, r. 29)

(1) Without prejudice to sections 47(2)(a) and 49(2)(a) of the Ordinance and rule 28, the Court may, if it thinks it just to do so, allow a statement falling within section 47(1), 49(1) or 50(1) of the Ordinance to be given in evidence at the trial or hearing of a cause or matter notwithstanding-

(a) that the statement is one in relation to which rule 21(1) applies and that the party desiring to give the statement in evidence has failed to comply with that rule; or

(b) that that party has failed to comply with any requirement of a counter-notice relating to that statement which was served on him in accordance with rule 26.

(2) Without prejudice to the generality of paragraph (1), the Court may exercise its power under that paragraph to allow a statement to be given in evidence at the trial or hearing of a cause or matter if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial or hearing an opposite party or a person who is or was at the material time the servant or agent of an opposite party.

30. Restriction on adducing evidence as to credibility of maker, etc. of certain statements (O. 38, r. 30)

Where-

(a) a notice given under rule 21 in a cause or matter relates to a statement which is admissible by virtue of section 47 or 49 of the Ordinance; and

(b) the person who made the statement, or, as the case may be, the person who originally supplied the information from which the record containing the statement was compiled, is not called as a witness at the trial or hearing of the cause or matter; and

(c) none of the reasons mentioned in rule 25 applies so as to prevent the party who gave the notice from calling that person as a witness,

no other party to the cause or matter shall be entitled, except with the leave of the Court, to adduce in relation to that person any evidence which could otherwise be adduced by him by virtue of section 52 of the Ordinance unless

he gave a counter-notice under rule 26 in respect of that person or applied under rule 28 for a direction that that person be called as a witness at the trial or hearing of the cause or matter.

31. Notice required of intention to give evidence of certain inconsistent statements (O. 38, r. 31)

(1) Where in a cause or matter a person, particulars of whom were contained in a notice given under rule 21, is not to be called as a witness at the trial or hearing of the cause or matter, any party to the cause or matter who is entitled and intends to adduce in relation to that person any evidence which is admissible for the purpose mentioned in section 52(1)(b) of the Ordinance must, not more than 21 days after service of that notice on him, serve on the party who gave that notice, notice of his intention to do so.

(2) Rule 22(1) and (2) shall apply to a notice under this rule as if the notice were a notice under rule 21 and the statement to which the notice relates were a statement admissible by virtue of section 47 of the Ordinance.

(3) The Court may, if it thinks it just to do so, allow a party to give in evidence at the trial or hearing of a cause or matter any evidence which is admissible for the purpose mentioned in section 52(1)(b) of the Ordinance notwithstanding that that party has failed to comply with the provisions of paragraph (1).

32. Costs (O. 38, r. 32)

If-

(a) a party to a cause or matter serves a counter-notice under rule 26 in respect of any person who is called as a witness at the trial of the cause or matter in compliance with a requirement of the counter-notice; and

(b) it appears to the Court that it was unreasonable to require that person to be called as a witness,

then, without prejudice to Order 62 and, in particular, to rule 10(1) thereof, the Court may direct that any costs to that party in respect of the preparation and service of the counter-notice shall not be allowed to him and that any costs occasioned by the counter-notice to any other party shall be paid by him to that other party.

33. Certain powers exercisable in chambers (O. 38, r. 33)

The jurisdiction of the Court under sections 47(2)(a), 47(3), 49(2)(a) and 51(1) of the Ordinance may be exercised in chambers.

34. Statements of opinion (O. 38, r. 34)

Where a party to a cause or matter desires to give in evidence by virtue of Part IV of the Ordinance, as extended by section 56 of the Ordinance, a statement of opinion other than a statement to which Part IV of this Order applies, the provisions of rules 20 to 23 inclusive and 25 to 33 inclusive shall apply with such modifications as the Court may direct or the circumstances of the case may require.

IV EXPERT EVIDENCE

35. Interpretation (O. 38, r. 35)

In this Part of this Order a reference to a summons for directions includes a reference to any summons or application to which, under any of these rules, Order 25, rules 2 to 7, apply, and expressions used in this Part of this Order which are used in the Evidence Ordinance (Cap. 8) have the same meanings in this Part of this Order as in that Ordinance.

36. Restrictions on adducing expert evidence (O. 38, r. 36)

(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence-

(a) has applied to the Court to determine whether a direction should be given under rule 37 or 41 (whichever is appropriate) and has complied with any direction given on the application, or

(b) has complied with automatic directions taking effect under Order 25, rule 8(1)(b), or

(c) has complied with the automatic directions, or any other directions ordered by the master under Order 37, rule 1(1A). *(L.N. 363 of 1990)*

(2) Nothing in paragraph (1) shall apply to evidence which is permitted to be given by affidavit or shall affect the enforcement under any other provision of these rules (except of Order 45, rule 5) of a direction given under this Part of this Order.

(L.N. 363 of 1990)

37. Direction that expert report be disclosed (O. 38, r. 37)

(1) Subject to paragraph (2), where in any cause or matter an application is made under rule 36(1) in respect of oral expert evidence, then, unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the Court may specify. *(L.N. 404 of 1991)*

(2) Nothing in paragraph (1) shall require a party to disclose a further medical report if he proposes to rely at the trial only on the report provided pursuant to Order 18, rule 12(1A) or (1B) but, where a party claiming damages for personal injuries discloses a further report, that report shall be accompanied by a statement of the special damages claimed and, in this paragraph, "a statement of the special damages claimed" has the same meaning as in Order 18, rule 12(1C). *(L.N. 404 of 1991)*

38. Meeting of experts (O. 38, r. 38)

In any cause or matter the Court may, if it thinks fit, direct that there be a meeting "without prejudice" of such experts within such periods before or after the disclosure of their reports as the Court may specify, for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

39. Disclosure of part of expert evidence (O. 38. r. 39)

Where the Court considers that any circumstances rendering it undesirable to give a direction under rule 37 relate to part only of the evidence sought to be adduced, the Court may, if it thinks fit, direct disclosure of the remainder.

41. Expert evidence contained in statement (O. 38, r. 41)

Where an application is made under rule 36 in respect of expert evidence contained in a statement and the applicant alleges that the maker of the statement cannot or should not be called as a witness, the Court may direct that the provisions of rules 20 to 23 inclusive and 25 to 33 inclusive shall apply with such modifications as the Court thinks fit.

42. Putting in evidence expert report disclosed by another party (O. 38, r. 42)

A party to any cause or matter may put in evidence any expert report disclosed to him by any other party in accordance with this Part of this Order.

43. Time for putting expert report in evidence (O. 38, r. 43)

Where a party to any cause or matter calls as a witness the maker of a report which has been disclosed in accordance with a direction given under rule 37, the report may be put in evidence at the commencement of the examination in chief of its maker or at such other time as the Court may direct.

44. Revocation and variation of directions (O. 38, r. 44)

Any direction given under this Part of this Order may on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.

Appendix 4

Hearsay in other common law jurisdictions

Scotland

The Scottish Law Commission published a report on corroboration and hearsay in civil proceedings in 1986.[1] The main recommendations touching on hearsay evidence in civil proceedings are summarised as follows:

(a) The rule against hearsay should be abolished and any out-of-court statement should be admissible as evidence of any matter contained in the statement which could competently have been given by that person in direct oral evidence. This provision should apply to multiple as well as to simple hearsay.

(b) Where the court considers it reasonable and practicable for one or more of the makers of the statement and any statements from which that statement is derived to be led as witnesses and examined in relation thereto by the party intending to use the statement as evidence, the court should have power, on the application of a party, to hold the statement not to be admissible of any matter contained therein unless and until such one or more of the makers of the statement has been led as a witness and examined by the party.

(c) The court should have no power as is mentioned in (b) above where (i) the maker of the statement has been called as a witness and examined in relation thereto; or (ii) notice of intention to lead hearsay has been served and the opposing party has not served a counter-notice.

(d) A notice procedure should be introduced under which (i) parties intending to rely on hearsay without leading the maker of the statement as a witness may serve notice of their intention on other parties, and (ii) parties in receipt of such notice may serve a counter-notice objecting to the leading of such evidence within the specified period.

(e) Notices of intention to lead hearsay should be served not less than 28 days in advance of the date fixed for the proof or hearing and any counter-notice should be served within 7 days of the date of service of the relevant notice.

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[1] Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Scot Law Com No 100, 1986).

(f) The court should have power to allow a witness to be recalled or an additional witness to be called at any time before the commencement of closing submissions.

2. Consequent on the report by the Scottish Law Commission, the UK Government enacted the Civil Evidence (Scotland) Act 1988. The Act has the following features:

(a) The rule against hearsay is abolished and evidence shall not be excluded solely on the ground that it is hearsay. Both first-hand and multiple hearsay are admissible under the Act.

(b) Assertive conduct as well as oral and documentary hearsay are covered by the Act.

(c) There is no requirement of notification of intention to use hearsay evidence.

(d) The court does not have power to exclude evidence solely on the ground that it is hearsay, nor could a party insists that an available witness whose statement is challenged should attend and give direct oral evidence.

(e) The court has power to allow a witness to be recalled or an additional witness to be called before the commencement of closing submissions. This would ensure that a witness may be called to give evidence if his hearsay statement is challenged.

(f) No statutory guidelines are given to the courts to assist them in assessing the weight of the hearsay evidence.

(g) No special provisions are made for computer records.

(h) Statements by witnesses which are consistent (or inconsistent) with their evidence in court shall be admissible for the purpose of supporting (or challenging) the witnesses' credibility, and statements proved for such purpose shall also be admissible as evidence of any matter contained therein.

3. The UK Government was of the view that to allow the courts to refuse to admit hearsay evidence if the associated notice procedure had not been complied with could have the effect of reintroducing the hearsay rule.[2] If a party is taken by surprise, it could ask that the witness involved be called. If the witness is available but not called, it would be taken account of by the court in assessing the weight of the evidence.

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[2] *Hansard* (House of Commons), 16 May 1988, col 743-4.

England and Wales

4. The following is a summary of some of the recommendations made by the English Law Commission in 1993:[3]

(a) Evidence should not be excluded on the ground that it is hearsay. Multiple hearsay as well as simple hearsay should henceforth be admissible.

(b) Existing statutory provisions making hearsay evidence admissible should not be affected by the proposals.

(c) Parties intending to rely on hearsay evidence should be under a duty to give notice of that fact to other parties wherever it is reasonable and practicable in the circumstances to enable those parties to deal with any matters arising from its being hearsay. This duty should be subject to any agreement, or any rules of court, to the contrary. Failure to comply with this duty should not affect the admissibility of the evidence but might attract costs or other sanctions at the court's disposal.

(d) A party should be allowed to call a witness whose evidence has been tendered as hearsay by another party, and to cross-examine him on the statement.

(e) Statutory guidelines should be provided for the courts to assist them to assess the weight they should attach to hearsay evidence.

(f) The requirement that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence should be retained, and that the date on which the statement was made should be the date on which the statement maker is required to satisfy this condition.

(g) Evidence should continue to be admissible to impeach or support the credibility of a person not called as a witness, and evidence tending to show that such a person made previous or later inconsistent statements should also continue to be admissible.

(h) Previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated.

The Civil Evidence Act 1995 was enacted in November 1995 to implement the recommendations of the Law Commission.

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[3] Law Commission, *The Hearsay Rule in Civil Proceedings* (Law Com No 216, Cm 2321, 1993).

Northern Ireland

5. The courts in Northern Ireland recognise the rule against hearsay. The main statutory exceptions to the rule can be found in (a) the Evidence Act (NI) 1939, the terms of which are almost identical to those of the Evidence Act 1938 (Eng), and (b) the Civil Evidence Act (NI) 1971 which provides for the admissibility of statements contained in documents which form part of a record and statements produced by computers.

6. The option for reform preferred by the Law Reform Advisory Committee for Northern Ireland in 1990 is abolition of the hearsay rule subject to safeguards. It should encompass second-hand hearsay, oral as well as documentary hearsay, and opinion evidence. The Committee considers that only one safeguard is required - that hearsay evidence should not normally be admissible where it is reasonable and practicable for the maker of the relevant statement to be called as a witness. In such a case, the maker of the statement should give evidence himself and be available for cross-examination by the other party.[4]

7. The Committee suggested not to prescribe any formal procedure for giving notice of intention to lead hearsay evidence. However, it would be desirable to provide that where hearsay evidence is adduced without notice, the court may adjourn the hearing of any matter if it is satisfied that a party cannot reasonably be expected to proceed with the trial. In such event, the court may impose costs sanctions on the party who has adduced such evidence.[5]

8. The Committee does not favour the approach implemented in the Civil Evidence (Scotland) Act 1988 on the grounds that (a) it is a breach of the basic principle that a party is entitled to insist on the production of the best reasonably available evidence against him and (b) it does not safeguard the right of a party to cross-examine the direct source of the hearsay evidence. In their opinion, the Act does not provide sufficient safeguards.[6]

Ireland

9. There is no equivalent of the English Evidence Act 1938 or 1968 in Ireland but many statutory exceptions have been created for particular records.

10. The Law Reform Commission of Ireland published a report on the rule against hearsay in civil cases in 1988.[7] They recommended that the

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4 Law Reform Advisory Committee for Northern Ireland, *Discussion Paper No 1: Hearsay Evidence in Civil Proceedings* (1990), para 5.38.

5 *Ibid,* para 5.35.

6 *Ibid,* paras 5.39-5.41.

7 See Irish Law Reform Commission, *The Rule Against Hearsay - Working Paper No 9* (1980) and *The Rule Against Hearsay in Civil Cases* (LRC 25, 1988).

exclusionary rule should be retained as a general statement of principle but large exceptions to the rule should be created. The following are some of their recommendations:

(a) An out-of-court statement should be admissible as evidence of any fact therein if (i) the witness is unavailable, (ii) the other parties are notified in advance (unless the court exercises its discretion to waive this requirement), and (iii) the statement is proved by the best available evidence.

(b) A statement should be defined to include any oral or written utterance and conduct which is intended to be assertive.

(c) No distinction should be drawn between first-hand and multiple hearsay.

(d) The court should have discretion to exclude an out-of-court statement if it is of insufficient probative value or its admission would operate unfairly against any party.

(e) An out-of-court statement of a witness should be admissible as evidence of any fact therein. However, unless the court gives leave, no such statement should be given in evidence before the conclusion of the examination-in-chief of the witness who made it.

(f) Prior inconsistent statements of a witness should be admissible as evidence of the facts stated without any requirement that advance notice should be given to the other parties.

(g) Special provisions should be made for business and administrative records:

    (i) An out-of-court statement contained in such a record should be admissible as evidence of any fact therein, provided no person concerned in the making of the record has any recollection of the facts stated therein.

    (ii) Whenever a fact is sought to be proved by reference to a statement contained in such a record, whether the information was collected or processed by any mechanical or electronic device, evidence must be given by a responsible person as to the reliability of the system of compiling those records and notice of such evidence given to the other party.

    (iii) The absence of a record should be evidence that an event did not happen where in the course of business a system has been followed to make or keep a record of the happening of events of a given description.

(h) A party should be entitled to give in evidence against another party an adverse admission made by that other party without giving notice and notwithstanding the fact that that other party does not testify, provided such an admission is proved by the best available evidence.

(i) It should be permissible to give evidence of any matter impugning the credibility of the maker of an out-of-court statement proved in any proceedings if the matter could have been put to him in cross-examination for the purpose of impugning his credibility had he testified.

As yet, no legislative reform measures have been introduced to implement the above recommendations.

New Zealand

11. The Evidence Amendment Act (No 2) 1980 provides for the admissibility of hearsay evidence in civil proceedings. An oral hearsay statement is admissible as evidence of the fact asserted if the maker of the statement had personal knowledge of the matters dealt with in the statement and is unavailable to give evidence.

12. In the case of documentary hearsay evidence, the Act provides that a statement made in a document is admissible as evidence of the fact or opinion in issue if:

(a) the maker of the statement had personal knowledge of the matters dealt with in the statement and is either (i) unavailable to give evidence, or (ii) undue delay or expense would be caused by obtaining his evidence; or

(b) the document is a business record, and the person who supplied the information cannot with reasonable diligence be identified, is unavailable to give evidence, or cannot reasonably be expected to recollect the matters dealt with in the information he supplied.

13. The Act also contains an overriding provision that the court in a jury trial may exclude otherwise admissible hearsay evidence on the basis that its prejudicial effect would outweigh its probative value, or if the court is otherwise satisfied that it is not necessary or expedient in the interests of justice to admit the statement.

14. The provisional conclusion of the New Zealand Law Commission in 1991 is that the hearsay rule should be effectively abolished subject to two safeguards: the power to require available declarants to be called and the ability to call further witnesses or to recall earlier witnesses. In

their opinion, the costs sanction will ensure the development of informal notice procedures and the assessment of hearsay evidence will be a matter of weight. Where necessary, the parties can rely on the general power of the court to exclude hearsay evidence on the grounds of unfair prejudice, misleading or confusing effect or time-wasting.[8]

United States of America

15. The first attempt to codify the evidence law began with the publication of the Model Code of Evidence by the American Law Institute in 1942. The Code failed and was not adopted in any jurisdiction in the United States. In 1953, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence which was based on the Model Code. The Uniform Rules had influenced the development of evidence law in several states. The US Congress then enacted the Federal Rules of Evidence in 1975. The Federal Rules are based on the Model Code and the Uniform Rules and are applicable in the federal courts. More than 30 states have adopted codes of evidence which are modelled on the Federal Rules and a revised version of the Uniform Rules.

16. The Federal Rules of Evidence affirms the rule against hearsay and lists the recognised exceptions by reference to whether the declarant is available as a witness.

Exceptions where availability of declarant as a witness is immaterial (Rule 803)

1. statements describing a present sense impression;
2. excited utterance;
3. statements of the declarant's then existing mental, emotional or physical condition;
4. statements for purposes of medical diagnosis or treatment;
5. records made by the witness when the matter was fresh in his memory;
6. records of regularly conducted activity;
7. absence of entry in records of regularly conducted activity;
8. public records and reports;
9. records of vital statistics, such as records of births, deaths or marriages;
10. absence of public record or entry;
11. records of religious organisations;
12. marriage, baptismal and similar certificates;
13. family records;
14. records of documents affecting an interest in property, if the records are records of a public office;

[8] New Zealand Law Commission, *Preliminary Paper No 15: Evidence Law: Hearsay- A discussion paper* (1991), paras 19 and 58.

15. statements in documents affecting an interest in property;
16. statements in documents in existence 20 years or more;
17. market reports and commercial publications generally used and relied upon by the public;
18. learned treatises or periodicals;
19. reputation concerning personal or family history;
20. reputation concerning boundaries or general history;
21. reputation as to a person's character;
22. judgement of previous conviction;
23. judgement as to personal, family or general history, or boundaries;
24. other exceptions of equivalent circumstantial guarantees of trustworthiness.

Exceptions depending on unavailability of declarant as witness (Rule 804(b))

1. former testimony;
2. statements under belief of impending death;
3. statements against declarant's interest;
4. statements of personal or family history;
5. other exceptions having equivalent circumstantial guarantees of trustworthiness.

17. The two general exceptions in Rule 803(24) and Rule 804(b)(5) above are in similar terms. They provide for the admissibility of statements of equivalent circumstantial guarantees of trustworthiness, where the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts, and (c) the purposes of the federal rules of evidence and the interests of justice will best be served by admission of the statement into evidence, provided that notice has been given to the adverse party sufficiently in advance of the trial.

18. The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party.[9]

19. A "statement" is defined as (a) an oral or written assertion, or (b) non-verbal conduct of a person if it is intended by him as an assertion. Multiple hearsay is not excluded if each part of the combined statements falls within a recognised exception.[10]

20. The Federal Rules maintain continuity with the common law. Since they cover most of the circumstances under which hearsay evidence is

[9] Rule 403.
[10] Rule 805.

likely to be tendered, it gives a measure of certainty and predictability. It also provides a framework within which further exceptions can be developed.[11]

21. However, the code has been criticised for being too complex. There are 27 specific exceptions and two general exceptions. The Scottish Law Commission were of the view that codification on the American model would not reduce but would in fact increase the complexity of the law.[12] The New South Wales Law Reform Commission also thought that the American approach is conservative and "retain far too much of the technicality and distortion-riddled quality of the present law".[13]

Canada

22. Several provinces in Canada have created statutory exceptions to the hearsay rule which are similar to those contained in the Evidence Act 1938 (Eng). Such legislation recognise exceptions for documentary records such as business records, medical records and public documents. The courts have held that hearsay evidence which does not fall within any of the recognised exceptions but is logically probative of some facts in issue would be admitted if it meets the test of necessity and reliability.[14]

23. The Law Reform Commission of Canada published a proposed Evidence Code in 1975. They proposed that the exclusionary rule should be maintained and a list of exceptions should be recognised by statute. This attempt at codification failed. In 1977, the Uniform Law Conference of Canada created the Federal/Provincial Task Force on Uniform Rules of Evidence to make recommendations on the law of evidence. The Task Force accompanied its report with a draft Uniform Evidence Act which was proposed for enactment in all Canadian jurisdictions.[15] In 1982, a bill was introduced into Parliament to implement a version of the Uniform Evidence Act at the federal level. This bill was withdrawn by the Government after the second reading. It was reported that no similar legislation was introduced at the federal and provincial level since then.

24. The Task Force was against codifying the law of hearsay evidence but agreed with the Law Reform Commission that the hearsay rule should be maintained subject to statutory exceptions. Under the proposed Uniform Evidence Act, evidence of a business record or statement would be admissible simply if the declarant were unavailable without the proponent's deliberate effort. It covered all records made in the ordinary course of

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11 See the comments in Australian Law Reform Commission, *Evidence Reference, Research Paper 9: Hearsay Law Reform- Which Approach?* (1982), paras 32 and 33.

12 Scottish Law Commission, *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Scot Law Com No 100, 1986), para 3.30.

13 New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), Appendix B, para 1.5.

14 The Supreme Court of Canada adopted the minority view in *Myers v Director of Public Prosecutions* [1965] AC 1001 that the boundaries of the exceptions to the hearsay rule are not closed and that the courts are able to create new exceptions to meet modern conditions themselves: *Ares v Venner* [1970] SCR 608; 14 DLR (3d) 4.

15 *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982).

business, governmental and banking activities. However, it was different from other business records statutes in Canada and the United States in that it was not a condition of admissibility that the record was of the kind usually forming part of the ordinary course of the business.

25. The draft Act also provided that the judges may create new hearsay exceptions "if the criteria for the exception sufficiently guarantee the trustworthiness of the statement". There was no discretion to exclude admissible hearsay. Although the Task Force suggested the provinces to take steps to minimise surprise, it did not recommend that there should be any statutory notice requirements.

Australia

26. Prior to 1995, the Australian States and Territories had legislation which were identical or substantially similar to the Evidence Act 1938 (Eng). There were also statutory exceptions relating to business records and computer evidence.

27. The Evidence Act 1995 (Australia), which seeks to implement the recommendations of the Australian Law Reform Commission,[16] applies to all proceedings in the Federal Court or an Australian Capital Territory court. The following are some of the main features of the 1995 Act:

(a) The exclusionary hearsay rule is retained.

(b) (i) First-hand hearsay is admissible if the maker of the "previous representation" is unavailable as a witness and reasonable notice has been given to the other side and no objection is taken, or the court grants leave.

(ii) Where the maker is available, first-hand hearsay is admissible without calling the maker as a witness if reasonable notice has been given and no objection is taken, or the court grants leave.

(iii) Where the maker is available and is called as a witness, the hearsay rule does not apply to the first-hand hearsay evidence if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the maker. If the representation is in a document, it may not be tendered before the conclusion of the evidence in chief of the maker without the court's leave.

[16] Australian Law Reform Commission, *Evidence* (Report No 26, Interim, 1985), ch 13 and 32, and *Evidence* (Report No 38, 1987), ch 10. The New South Wales Law Reform Commission recommended that the recommendations of the Australian Law Reform Commission be adopted in full as the basis for state legislation: see New South Wales Law Reform Commission, *Evidence* (LRC 56, 1988), paras 2.35-2.42. As to their views on abolition of the hearsay rule, see New South Wales Law Reform Commission, *Report on the Rule Against Hearsay* (LRC 29, 1978), para 1.3.3.

(c) Other exceptions to the hearsay rule include:

(i) previous representation made in a document which is part of the records of a business, provided the representation was made by a person who had personal knowledge of the asserted fact, or the representation was made on the basis of information supplied by such a person;

(ii) tag or label attached to, or writing placed on, an object in the course of a business for the purpose of describing the object;

(iii) representation contained in a document recording a message transmitted by electronic mail, fax or telex so far as the representation relates to the identity of the sender or receiver or to the date and time of the message;

(iv) representation made by a person that was a contemporaneous representation about the person's health, sensations, or state of mind;

(v) reputation concerning personal or family history;

(vi) reputation concerning public or general right; and

(vii) adverse admissions.

(d) There are no provisions for computer-generated information because hearsay is defined in the Act as "evidence of a previous representation made by *a person*".

(e) Where the occurrence of an event of a particular kind is in question, and in the course of a business a system has been followed of making and keeping a record of the occurrence of all events of that kind, the hearsay rule does not prevent the admission of evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(f) The court may, on the request of a party, order that the person who made the previous representation be called as a witness. It may, on application, direct that evidence in relation to which the request was made is not to be admitted if the order is not complied with.

(g) In a jury trial, if there is evidence of a kind that may be unreliable and a party requests a warning, the judge is under a duty to warn the jury that the evidence may be unreliable, and

warn them of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(h) (i) The court has a discretion to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time.

(ii) The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party, or be misleading or confusing.

(iii) Evidence that was obtained improperly or in contravention of the law is not admissible unless the desirability of admitting the evidence outweighs the undesirability of admitting the same.