

Case Bulletin: 2020/08

Hong Kong Courts Refused to Rubber Stamp U.S. Court's Letters of Request

The Court of Appeal affirmed a Court of First Instance's decision in refusing to accede to two Letters of Request issued by the United States District Court, Western District of Washington at Seattle under the Hague Evidence Convention, in the matter concerning the *Evidence Ordinance* (Cap. 8) (the "EO") [2020] HKCA 766 (CACV 410/2019).

Whilst the Court of Appeal accepted that Hong Kong courts must give due weight to the assessment of the requesting courts on the question of necessity and relevance to the trial of the evidence to be procured, it was decided that whether the request constituted fishing must be a matter for the judge in Hong Kong.

I. Background

1. Two judgment creditors of the Washington Federal Court were also appointed as collection agent by the Washington State Court. They successfully obtained two Letters of Request from the Washington Federal Court against two entities (SSG and VTC) that were not parties to the proceedings in the Washington courts, and they have no place of business in Washington. Hence, the Washington courts did not have personal jurisdiction over them.
2. Pursuant to the Letters of Request, the judgment creditors successfully obtained an examination order in Hong Kong to examine the directors of SSG, who applied to set aside the examination order.
3. The Court of First Instance held that (i) the expert evidence on U.S. laws adduced by the judgment creditors were inadmissible by reason of non-

compliance with the Rules of High Court as the evidence did not contain the requisite expert declaration and the expert was unable to give such declarations (due to his position as the general counsel of the applicant), (ii) the evidence was not obtained for the purposes of civil proceedings either have been instituted or is contemplated, and (iii) the proposed examination is a fishing exercise and the court was prohibited by Section 76(3) of the EO from making the examination order.

4. The Court of Appeal considered a number of common law cases on impermissible discovery against non-party witness, and upheld the first instance judge's decision to set aside the examination order primarily on the basis of Section 76(3) of the EO.

II. Key Points

1. There are substantial differences in the permissible scope of discovery in the U.S. law and those permissible in Hong Kong.
2. *"Fishing arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence."*¹
3. Hong Kong has no pre-trial discovery against non-party witness other than those falling within the limited scope of *Norwich Pharmacal* discovery. Also, there is no procedure under the Hong Kong system for examination of non-party witness to aid the execution of judgment.
4. Section 76(3) of the EO directs the courts in Hong Kong to consider if the request demands steps to be taken are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order. If they are not, Section 76(3) precludes the making of the order for examination. Thus, it is plain that the matter has to be tested by the courts in Hong Kong by reference to Hong Kong laws instead of U.S. laws.
5. It is a matter of substance rather than form. The difference is between the obtaining of evidence for use in proceedings and the procurement of

¹ *In re Norway's Application* [1987] 1 QB 433 at 482C-F

information for investigatory purposes.

6. As a matter of discretion, a request for oral testimony should not be acceded to if the intention were to obtain information rather than to obtain evidence for use at the trial.
7. In respect of non-party witnesses, so long as the request is not for the purpose of obtaining evidence to be used by the requesting court for determining issues before it but to obtain information for investigation, the objection is engaged.

III. Findings

1. The Court of Appeal found that on the facts and circumstances of the case, it was crystal clear that the purpose of the proposed examination was investigatory as opposed to the obtaining of evidence for use in the Washington Federal Court to assist it in determination of any live issues.
2. The courts in Hong Kong are therefore precluded by Section 76(3) of the EO from acceding to the request.

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