

**Response of the Hong Kong  
Special Administrative Region  
of the People's Republic of China  
to the Questionnaire on the  
Hague Convention of 18 March 1970  
on the Taking of Evidence  
Abroad in Civil or Commercial Matters  
(the "Convention")**

Unless otherwise stated, the information given below relates only to the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong") to which the Convention has been applicable since 1978.

1. Do you have at your disposal recent precedents delivered pursuant to the 1970 Convention and which would be relevant for the Special Commission? If so, can you provide them to us? Insofar as the text of the ruling is drafted in a language other than English or French, a summary in the English or French language of the facts and grounds for the ruling would be very helpful.

In the recent case of *Kwan Chi On v Kwan Tit On Daniel* (2002)<sup>1</sup>, the Hong Kong Court of Appeal held that the court's power to issue letters of request to the courts of foreign States does not derive from statute or the Rules of the High Court. The power is based on the inherent jurisdiction of the court, and whether or not to exercise such a power is a matter of the court's discretion, to be exercised according to the particular circumstances of the case. In that case, the Court of Appeal sanctioned an Order for a letter of request to be issued to Macao which, at that time, did not apply the Convention.

2. Do you have at your disposal statistics relating to the number of requests to obtain evidence addressed to your State from different States Party to the Convention?

The number of requests to obtain evidence addressed to Hong Kong from different State Parties to the Convention for the years 2001 to 2003 (up to 23 September 2003).

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<sup>1</sup> full text of the judgment dated 13 December 2002 is available at <http://www.hklii.org.hk/cgi-hklii/disp.pl/hk/eng%5fjud/HKCA/2002/20021213%5fCACV000194%5f2002.html>

<u>Year</u>	<u>No. of Requests</u>
2001	19
2002	14
2003 (up to 23.9.2003)	8

3. Have you encountered practical difficulties connected with application of the Convention?

The practical difficulties encountered at the execution of the requests are:-

(1) there is often no translation for certain requests not made in either of the official languages of Hong Kong (Chinese and English);

(2) the appointment of agents to execute the request has not been clearly specified even though that is often the intention of the requesting party.

4. In light of the terminology used in the Practical Handbook for the Service Convention, do you have at your disposal precedents determining whether the Convention is considered as "mandatory" by your State? Do you have at your disposal case-law determining whether the Convention is considered as "exclusive" by your State?

As far as we are aware, there has been no case law in Hong Kong addressing the issue of whether the Convention is mandatory. Whilst the case mentioned in the response to question 1 does not discuss the exclusiveness or the mandatory nature of the Convention, the reasoning of the Court, which was based on the inherent jurisdiction of the court, would seem to suggest that the Convention would not be regarded as having mandatory effect as between Hong Kong and a party to the Convention. It is also to be noted that the language used in Article 1(1) of the Service Convention is not used in the Convention.

5. If your State has stated a reservation under Article 23 of the Convention, has that reservation been asserted to deny performance of requests to obtain evidence from abroad?

A reservation under Article 23 has been made on behalf of Hong Kong but we are not aware of any instances in which requests for

obtaining evidence from Hong Kong have been denied on the basis of the reservation. As far as we are aware, requests for “discovery” have not been made to the Hong Kong courts.

6. At the Special Commission of 1989, it was recommended that priority be granted to the procedures provided for under the Convention for their requests to obtain evidence located abroad, and that States having made or proposing to make the reservation under Article 23 should limit its scope. Do you consider this recommendation to have been helpful? Has it been applied in practice?

We are not aware of the recommendation made in the Special Commission of 1989. In any event, the Hong Kong legal infrastructure implementing requests for taking of evidence from other jurisdictions excludes “discovery” altogether.

7. Have you had occasion to deal with such requests to obtain evidence in the course of arbitration proceedings?

Hong Kong has not received any request for taking of evidence by an arbitration panel.

Do you share the view of the Permanent Bureau?

Yes. Based on Hong Kong case law defining/interpreting “foreign court” as used in the relevant local legislation, we agreed with the Permanent Bureau’s view that an arbitration panel cannot be regarded as a judicial authority for the purposes of the Convention.

8. What is the average time elapsing between receipt of the request to obtain evidence and its performance?

The time taken to process a request differs. In uncomplicated cases, it could be about three months. On average, the time elapsing between receipt of the request to obtaining of evidence and its performance is around 6 months.

9. Do you allow the representatives of a requesting Court to take part in the execution pursuant to Article 8 of the Convention?

If the hearing of witnesses takes place before a judicial officer of the Court of First Instance, Hong Kong law does not provide for the

participation by judicial officers of the requesting court in the conduct of examination. It is not unusual, however, for a foreign court to nominate its own judicial officer as examiner to conduct the hearing. In such cases, the Hong Kong court will then appoint such examiner to sit outside the limits of the Court of First Instance. The solicitor, being agent of the requesting party, will be informed of the hearing and is usually present. The witnesses will be ordered to appear before the examiner so appointed.

10. Do your Central Authorities accept to receive requests by electronic means to obtain evidence from abroad?

No.

11. Have your authorities received or forwarded requests to obtain evidence requiring the use of new information technology? If so, were these requests fulfilled?

No. The Judiciary in Hong Kong will give favourable consideration to a request to take evidence by video link.

12. Would you consider it useful to have a recommendation adopted for the promotion of the use of modern communication technologies? Do you consider that development of a new instrument ought to be considered in order to deal more specifically with these issues?

Yes. It would be useful if evidence may be taken by judicial officers of the requesting court through video link provided that such evidence is admissible under its law (*lex fori*). There is no court rule in Hong Kong against taking of evidence by electronic means by an examiner appointed by the court as they are sitting outside the limits of the Hong Kong courts. The requesting party should make it clear in the request to the authority in Hong Kong that it wishes to use this special method of taking evidence. Finally, the use of video link services is subject to the Rules, Practice Directions and fees imposed by the jurisdiction in which such services are required.

A recommendation will serve as a reminder that State Parties to the Convention should actively consider the ways and means of applying the Convention in a more effective and efficient manner, including the use of electronic media.