

The Hong Kong Bar Association's response to Proposed Legislative Amendments in relation to the Authenticity of Notarial Acts and Instruments

1. The Administration seeks the views of the Hong Kong Bar Association ("HKBA") on the Consultation Paper on *Proposed Legislative Amendments in relation to the Authenticity of Notarial Acts and Instruments* dated May 2012 ("the Consultation Paper").
2. The Consultation Paper seeks comments on the proposal to introduce legislative provisions to the following effect:

"Any notarial act or instrument of a notary public registered in Hong Kong may be received in evidence in civil proceedings without further proof as duly authenticated in accordance with the requirements of the law unless the contrary is proved." (the Proposal)
3. In particular, the Administration invites comments on-
 - (a) whether the Proposal should be adopted;
 - (b) if so, whether legislative provisions in paragraph 42(a)-(c) should be introduced.

Legislative amendments to implement the proposal

4. Paragraph 42(a)-(c) of the Consultation Paper suggests that the Proposal could be achieved by adding the following legislative provisions —
 - "(a) A new section 47(2A) of the Evidence Ordinance (Cap.8)***

Subject to sections 46 and 55A, the court may receive as evidence any notarial act or instrument of a notary public registered in Hong Kong as provided for by rules of court.
 - (b) A new sub-rule under Order 38, rule 20 of the Rules of the High Court (Cap.4A)***

A notarial act or instrument of a notary public registered in Hong Kong may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved.
 - (c) A new sub-rule under Order 38, rule 20 of the Rules of the District court (Cap.336H)***

A notarial act or instrument of a notary public registered in Hong Kong may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved.”

5. This response of the Bar will consider the matters set out in the Consultation Paper as well as the submission by the Hong Kong Society of Notaries on the Proposal.

Definitions

6. A notary public is defined under section 2 of the Legal Practitioners Ordinance, Cap.159 (“LPO”). The legislation and the case-law make it clear that reference is limited to a Hong Kong notary public. A notarial act is the act of a notary public, authenticated by the notary’s signature and official seal, certifying the due execution in the notary’s presence of a deed, contract or other writing, or verifying some fact or thing done of which the notary has certain knowledge.

The evidentiary status of notarial acts by Hong Kong notaries in Hong Kong courts

7. Since the common law rules were changed by amendment to the Evidence Ordinance, Cap.8 (“EO”) introducing a simpler regime for the admission of hearsay evidence, a notarial act by a Hong Kong notary may be admitted as hearsay evidence in accordance with the relevant provisions of the EO. Section 49 of the EO governs the weight to be given to hearsay evidence, including notarial evidence.

The admission as evidence of foreign notarial acts in Hong Kong

8. Generally, if documents executed in Hong Kong are required to be executed in the presence of a solicitor or commissioner for oaths, the same documents, executed outside the People’s Republic of China (including Hong Kong), should be executed in the presence of a notary public.
9. There is express provision for the admissibility of an affidavit sworn outside Hong Kong. Order 41, rule 12(2) of the Rules of the High Court, Cap.4A, provides that an affidavit sworn outside Hong Kong before, amongst others, a notary public may be used in the High Court of Hong Kong, in all cases where affidavits are admissible. Order 41, rule 12(3) further provides that the fact that an affidavit purports to have been sworn in the manner prescribed in rule 12(2) shall be prima evidence of the seal or

signature, as the case may be, of the person mentioned in it and of the authority of such person to administer oaths.

Perceived benefits of the Proposal

10. The Consultation Paper sets out the following grounds in support of the Proposal.

(a) Clarification of the law of evidence

11. The Consultation Paper states that if notarial acts executed by a notary public in Hong Kong are rendered admissible as evidence without further proof, subject to any evidence to the contrary, the Hong Kong courts would be able to place greater reliance on the acts of notaries public, particularly in relation to due execution of documents. It is also asserted that this would be a helpful clarification of the law of evidence relating to the admission of notarial acts. The HKBA to the contrary considers that the law is already clear. The Consultation Paper sets out the material statutory provision for admissibility and also for determining weight to be accorded hearsay evidence. The Proposal seeks to change and not merely clarify the law. The Proposal actually provides for prima facie admissibility, which may still be challenged. The degree of reliance to be placed will remain a question of weight for the courts.

(b) Enhancement of the status of Hong Kong notaries

12. The Consultation Paper states the Proposal would bring the standing of the Hong Kong notaries in the courts of Hong Kong at par with the status currently enjoyed by English notaries in the English Courts. The HKBA considers that enhancement of the status of Hong Kong notaries, is not of itself a reason to amend the law. It is only if the Proposal is in the public interest, including enhancing the expeditious and economic administration of justice, that such an amendment would be justified.

(c) Saving of costs and court's time in civil proceedings

13. It is asserted that there are increasing situations where a notary public in Hong Kong was not available to attend court. However, it is also acknowledged that there are no statistics on the number of instances or frequency with which Hong Kong notaries public are called to give evidence in civil proceedings in the courts of Hong Kong. The Proposal would permit Hong Kong courts to admit and accept a notarial act as evidence of the matters stated therein without further proof; but this would be subject to the

discretion of the courts to reject such evidence upon proof to the contrary. The Proposal would allow admission of the notarial documents. However, their legal effect would still depend upon weight. In turn that would often depend upon the cogency of the evidence demonstrating the efficiency of the system of recording adopted.

14. It is asserted that the Proposal would benefit the legal and judicial systems in Hong Kong since this would in general save the court's time and parties' costs in arguments over the admissibility of notarial evidence in civil proceedings. In the absence of any empirical data on the current instances and costs, whether and the extent to which there would in fact be the anticipated savings in time and costs, the assertion would appear to be a matter of speculation. If the Proposal is implemented a notarial act would be admitted but subject to evidential challenge. The issue of weight would remain. The practical effect in terms of costs saving in respect of any challenged notarial act may at best only be limited. The parties can still adduce evidence and make submissions as to both admissibility and weight. However, it is recognized that because the notarial act would prima facie be admissible the Proposal could potentially reduce the instances where a party challenged a notarial act without any evidentiary support, merely with the intent of putting the other party to proof of the notarial act it sought to rely upon.

(d) Trustworthy proof of acts performed by notaries in Hong Kong

15. The Consultation Paper refers to the requirements for qualifications for appointment of a notary public as being strict and statutory codes of conduct regulating their professional practice conduct and discipline as reasons for due reliance upon and evidential status being accorded to notarial acts performed by Hong Kong notaries. The HKBA considers that the code of conduct should first be reviewed for appropriate amendment before the Proposal is implemented.
16. If a notarial act of a notary public in Hong Kong is to be admissible without calling the notary to give evidence it is imperative that proper safeguards are in place and strictly applicable to the notary when performing the notarial act. The Notaries Public (Practice) Rules, Cap.159 (sub leg A), rule 3 provides that:

"A notary public must not, in the course of practicing as a notary public, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair any of the following—...

(c) his duty to act in the best interests of his client; ... ”

17. Were the Proposal implemented the rules in respect of a notary public’s conduct should be amended expressly to provide that the notary public’s paramount duty is to the court. While the position of an expert witness and a notary public is not in all respects the same they both owe analogous duties to the court of impartiality. Safeguards introduced by the Civil Justice Reform to reinforce an expert’s paramount duty to the court over that owed to a client are pertinent. The Bar would suggest that a similar high standard should expressly apply to the responsibilities of notaries public.
18. The Civil Justice Reform Final Report found there was overwhelming support for adopting measures aimed at countering lack of independence and impartiality, including declaring the supremacy of the expert’s duty to assist the court over the duty to the client or the person paying the fees. {Final Report section 20, page 321-322}. It is noteworthy that despite the fact that the principles underlying independence and impartiality of an expert were well known and established, it was nevertheless considered important and beneficial for those principles to be given greater prominence and emphasis and to be brought home individually to each expert every time an expert report was issued or expert testimony given. The recommendations were accepted and implemented by the provisions set out below.
19. Rules of the High Court, Cap.4A provide:
 - “(i) **Expert witness’s overriding duty to Court (O.38,r.35A)**
35A.— (1) *It is the duty of an expert witness to help the Court on the matters within his expertise.*
(2) *The duty under paragraph (1) overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid.*
 - (ii) **Expert report to be verified by statement of truth (O.38, r.37A)**
37A. *An expert report disclosed under these rules must be verified by a statement of truth in accordance with Order 41A.*
 - (iii) **Expert witness’s declaration of duty to Court (O.38, r.37C)**
37C.— (1) *An expert report disclosed under these rules is not admissible in evidence unless the report contains a declaration by the expert witness that—*
 - (a) *he has read the code of conduct set out in Appendix D and agrees to be bound by it;*
 - (b) *he understands his duty to the Court; and*
 - (c) *he has complied with and will continue to comply with that duty...*

(iv) ***Expert evidence contained in statement (O.38, r.41)***

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 22 inclusive shall apply with such modifications as the Court thinks fit. (L.N. 152 of 2008)

Effect of rule – *Unlike r.37 which relates to oral expert evidence, this rule applies to expert evidence contained in a statement which a party may wish to use because he is not able or does not wish to call the expert to give oral evidence at the trial. The effect of this rule is, accordingly, that the procedure contained in Part III of this Order, by virtue of which hearsay evidence of fact may be adduced at the trial, should be followed in respect of expert hearsay evidence with such modifications as the court may direct.*

Code of conduct for expert witnesses

20. The code of conduct for expert witnesses addresses the paramount duty to the court over the duty to client providing, inter alia:

“Application of code

- 1. This code of conduct applies to an expert who has been instructed to give or prepare evidence for the purpose of proceedings in the Court.*

General duty to Court

- 2. An expert witness has an overriding duty to help the Court impartially and independently on matters relevant to the expert’s area of expertise.*
3. An expert witness’s paramount duty is to the Court and not to the person from whom the expert has received instructions or by whom he is paid.
4. An expert witness is not an advocate for a party.

Declaration of duty to Court

- 5. A report by an expert witness is not admissible in evidence unless the report contains a declaration by the expert witness that—*
(a) he has read this code of conduct and agrees to be bound by it;
(b) he understands his duty to the Court; and
(c) he has complied with and will continue to comply with that duty.
- 6. Oral expert evidence is not admissible unless an expert witness has declared in writing, whether in a report or otherwise in relation to the proceedings, that—*
(a) he has read this code of conduct and agrees to be bound by it;
(b) he understands his duty to the Court; and
(c) he has complied with and will continue to comply with that duty.”

21. Although expert evidence contained in a statement which a party wishes to use without calling the expert to give oral evidence requires that the procedure contained in Part III of Order 34, by virtue of which hearsay evidence of fact may be adduced at the trial, should be followed in respect of expert hearsay evidence it was still considered beneficial for the overriding duty to the court to be given prominence and to be brought home individually to each expert every time an expert report was issued or expert testimony given. The need to emphasize the overriding duty of a notary public to the court would be all the more necessary if the Proposal is adopted.
22. Assistance may be found in the rules and practice governing the admission of expert evidence in civil proceedings for determining appropriate amendment to the rules or codes governing the duties of a notary public in Hong Kong.

A consequential effect of the Proposal

23. Section 10 of the Oaths and Declarations Ordinance, Cap.11 (“ODO”) provides that:
- “An oath, affidavit, affirmation and notarial act administered, sworn, affirmed, or done before a diplomatic or consular officer of the People’s Republic of China outside the People’s Republic of China shall be as effectual as if duly administered, sworn, affirmed or done by or before any lawful authority in Hong Kong”*
24. The effect is that a notarial act done before a diplomatic or consular officer of the People’s Republic of China outside the People’s Republic of China will be regarded as having the same effect as if administered before a notary public in Hong Kong and hence may be admissible as evidence in the courts of Hong Kong under the relevant provisions of the Evidence Ordinance, Cap.8.
25. As a consequence of the introduction of the legislative provisions under the Proposal, such notarial act referred to in paragraph 23 above pursuant to section 10 ODO may also then be received in evidence in civil proceedings without further proof as duly authenticated unless the contrary is proved. Views are sought on that proposition.
26. The HKBA does not support such a change or the Proposal in so far as a notarial act done outside Hong Kong before a notary public or diplomatic or consular officer of the People’s Republic of China is concerned. Although described as a mere

“consequential effect” of implementation of the Proposal, the intent of which is to make notarial acts done in Hong Kong before Hong Kong notaries prima facie admissible, the actual effect would be far reaching, substantial and more problematical than the stated purpose that the Proposal intends and seeks to achieve.

27. The Consultation Paper does not set out a case for a change of the law in respect of notarial acts done outside Hong Kong. The Administration provides no reason or justification for such a change. The Administration should conduct a thorough review and analysis including the implications of changing the law in relation to admissibility of notarial acts outside Hong Kong, in the event such a change is considered to be necessary and justified.
28. Different factors arise in such an event. For example, the implications for a Hong Kong notary public for breach of the rules and code of conduct include sanctions available to and which may be imposed by the Hong Kong court. The position of a notary public and diplomatic or consular officer of the People’s Republic of China outside Hong Kong is entirely different legally and constitutionally to that of a Hong Kong notary public. The HKBA believes that a full report by the Administration specifically and satisfactorily addressing the issue of foreign notarial acts would be required before stakeholders can properly be invited to comment and to be considered. The HKBA could only then give its considered views on the matter, including on extra-territorial implications and whether the HKBA would support any such change in the law.

Summary

29. In summary, the HKBA’s answers to the two questions posed at paragraph 44 of the Consultation Paper are:
 - (a) *Whether the Proposal should be adopted*
30. The HKBA supports in principle the Proposal that a notarial act or instrument of a notary public registered in Hong Kong and done in Hong Kong be received in evidence in civil proceedings without further proof as duly authenticated unless the contrary is proved. The HKBA is opposed to what the Consultation Paper describes as the consequential effect of the Proposal, namely that it would in addition cause acts done outside Hong Kong also to be admitted in a like manner.

(b) If so, whether legislative provisions in para.42(a)-(c) should be introduced

31. The HKBA considers the proposed legislative amendments should be revised to ensure any change in the law is limited to implementing the stated intent of the Proposal of providing for the admissibility of notarial acts by a Hong Kong notary public in Hong Kong and to prevent the consequential effect of admitting overseas notarial acts in the same manner. Further, the legislative changes should expressly provide for the paramount duty of the notary public to the court.

Hong Kong Bar Association

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