

Accessing Hong Kong Courts from Abroad:

A Strategic Guide to Remote
Video Link for Migrant Workers



Justice Without Borders

ACKNOWLEDGEMENTS

This Manual was truly a team effort. Justice Without Borders (JWB) would like to sincerely thank the authors and editors who made this strategic work possible. These include Fabian RODAY (Dechert), Kylee ZHU (Dechert), Carmen CHUNG (JWB), Douglas MACLEAN (JWB), Joo Kim NG (JWB Senior Legal Volunteer), and a dedicated group of JWB Pro Bono Legal Fellows (in alphabetical order): Noah CHUNG, Brian FAN, Michele HO, Bridget HUANG, Justine LAM, Eugene LO, Stephanie LOK, and Jenna YUEN.

JWB would also like to thank Professor Mi ZHOU at the Law Faculty of the University of Hong Kong and her students Jennifer TRIDGELL, Julia MEIER, and Sophia MA for helping us develop the initial research. We also thank our partners at Dechert for their many hours of input, feedback and revision they provided over the course of the work. This work would truly not be possible without them. Additionally, we thank HELP for Domestic Workers (formerly Helpers for Domestic Helpers) and Mission for Migrant Workers for generously sharing their extensive experience with the Labour Tribunal. Their insights helped inform the strategies laid out in this Manual.

Finally, JWB is very grateful to Herbert Smith Freehills LLP for their financial sponsorship in making the development and launch of this work possible.

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DEVELOPMENT AND FUNDING PARTNERS



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Publication Date: 5 July 2017

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EXECUTIVE SUMMARY: APPLYING FOR VIDEO LINK EVIDENCE

This Executive Summary is designed to provide a quick reference; offering caseworkers an overview of the steps needed to prepare and submit a request for video link evidence, particularly in the Labour Tribunal. Readers should consult the full Manual for additional information as needed.

This Manual provides practical steps to enable migrant domestic workers to pursue their cases in Hong Kong courts and tribunals from abroad, with a particular focus on applying for video link evidence.

The Manual is designed to help lawyers and caseworkers understand when and how applications for video link evidence have previously been granted in the higher courts, and what legal considerations can guide similar applications at the Labour Tribunal and Small Claims Tribunal.

Video link evidence is of particular relevance in these Tribunals, as under the applicable laws, a claimant must be present when bringing his or her case, which would require migrant domestic workers to return to Hong Kong, and incur significant time and costs in doing so. Successful applications for video link evidence (and appearance) would enable migrant domestic workers to access these Tribunals without having to return to Hong Kong.

At present, there are no reported cases for successful applications of video link evidence in either of these Tribunals. Claimants may thus find that such applications will be largely novel to the presiding officers, who ultimately have the discretion to grant or refuse such applications. This Manual aims to assist claimants with such applications and explain the possible application of criteria developed in higher levels of the Hong Kong judicial system to Tribunals, such as the Labour Tribunal and Small Claims Tribunal.

Going forward, additional applications for video link evidence launched in these Tribunals will hopefully lead to a body of judicial reasoning that can provide clearer guidance on when applications will be accepted, or rejected. More applications will also provide opportunities for appeal to the High Court that may ultimately create precedents for the general application of video link evidence in migrant domestic worker cases.

CHECKLIST FOR CASEWORKERS PREPARING THE APPLICATION

This checklist outlines the key steps in applying to the Labour Tribunal or Small Claims Tribunal for use of the Technology Court, or other forms of video link evidence. While lawyers cannot represent parties before either Tribunal, they can advise their client at all other times, including helping them prepare submissions to the Tribunals. As such, it is recommended that claimants seek legal assistance prior to making an application for video link evidence.

1. Before applying for video link evidence

- **Prepare the case as normal.** As a first step, any claimant will have to file his or her substantive case in accordance with the required procedure at the relevant Tribunals. In order to properly prepare the claimant's case and put the claimant in the best possible position to subsequently apply for video link evidence, as much of the facts of the case and evidence should be prepared in advance.
- **Determine the factors for and against the application.**
 - Separately from the substantive case of the claimant, specific criteria and evidence in support of such criteria need to be collated and prepared for the application for video link evidence – the focus should be on the reasons why the claimant cannot come to Hong Kong and attend hearings of his or her claim in person.
 - See Appendix 1 for the factors that courts consider when deciding an application (as of the time of writing).
 - Include any other factors that you think support the claimant's application. With few existing precedents on video link evidence applications, it is worth putting forward every reasonable argument possible.
 - Consult a lawyer. Provide an outline of the factors you think support or weigh against the application.
- **Identify when the claimant is leaving Hong Kong.** If the claimant has not already left Hong Kong, and (if possible) he or she remains in Hong Kong long enough to attend the hearing where their application will be considered in person, their chances of obtaining leave for video link evidence may be increased.

- An in-person appearance at this stage can avoid the danger of the Tribunal rejecting the case outright due to the claimant's absence.
- **Find a local partner.** Once the claimant leaves Hong Kong, he or she should find a suitable partner organisation based in his or her destination country to help serve as a liaison to communicate important information between the caseworker/lawyer in Hong Kong and the claimant.
 - Please contact Justice Without Borders for assistance with locating partner organisations in Indonesia and the Philippines.
- **Find a remote video link site near the claimant's residence**
 - For a successful application for video link evidence, the claimant will have to demonstrate that the remote site from which he or she will provide their evidence fulfils all technical requirements for a seamless link to the Hong Kong court/tribunal.¹
 - Consult with your local partner on potential venues with reliable video conferencing facilities. Examples include embassies, universities, business hotels, law firms, local court venues, and even internet cafes.
 - Check that the remote site fulfils the technical requirements for using the video conferencing facilities. Refer to the specifications found in [Appendix 1](#).
- **Preparing the request**
 - **Identify available dates at the Technology Court.** Contact the Clerk of Court in the High Court to confirm whether the Technology Court will be available during the period of time you anticipate the hearing date could be set down. A 4-6 week time window is a good starting point.
 - **Write to the opposing party to seek their consent to use the Technology Court:**
 - a sample letter to the opposing party is found in [Appendix 2](#); and
 - note that the opposing party's objection will not necessarily prevent the judge from allowing the application, but will be taken into consideration.

¹ The Judiciary of the HKSAR, 'Technology Court Technical Specifications for the Judiciary of HKSAR' (Technology Court, June 2015) <www.judiciary.gov.hk/en/crt_services/tech_crt/pdf/technical_specifications.pdf>.

2. Making the application

- Draft the request
 - For a successful application, all relevant criteria and evidence why a claimant cannot come to Hong Kong will have to be set out in detail:
 - list all criteria why the claimant cannot attend the proceedings in Hong Kong in person;
 - insofar as available, provide all relevant evidence in support of such criteria;
 - identify the particular facilities and equipment you wish to utilise in the Technology Court;
 - provide reference of the video conferencing facilities abroad (possible with evidence that such facilities can fulfil the requirements by the Hong Kong courts for the transmission of video link evidence);
 - provide an indication of how arrangements to use the court and corresponding video facility abroad will be made;
 - provide evidence that consent has been sought from the opposing party; and
 - provide an estimate of the court time needed.
 - A sample letter is in [Appendix 3](#). Furthermore, the accompanying witness statement letter is found in [Appendix 4](#). Note that formal letters are not required for the Labour Tribunal and Small Claims Tribunal. A simple, clearly drafted letter that includes all the points you identified supporting the application should be sufficient.
- **Inform the court.** Send the request and supporting witness statement(s) with details and evidence to the judge or presiding officer in charge of the case as early as possible.

3. After Applying for Use of the Technology Court

- If there is a hearing set down for the application, the claimant should attend if still in Hong Kong. In the Labour Tribunal:
 - lawyers cannot represent the claimant in the Tribunal, but they can assist claimants outside of the Tribunal, including preparing documents. This is also true for the opposing party; and

- claimants can request a trade union representative to assist them in the Tribunal. Note that the other party may request a representative of the Employers Association to represent them as well. The Tribunal may reject either party's request. (If the claimant has already left Hong Kong, the application to have a representative act for the claimant at the hearing should be made in advance of the hearing.)
- After the application is **granted**
 - For caseworkers and/or legal counsel:
 - test the video link connection for stability and quality beforehand. This should be done in advance to allow for troubleshooting or finding an alternative venue if there are connection problems;
 - make sure all relevant documents are made available to the claimant giving the evidence remotely; and
 - ensure an interpreter is on hand for the claimant (if needed).
 - For claimants:
 - follow all steps that the Tribunal requires;
 - per Tribunal directions, contact the Clerk of Court in the High Court to fix the date for the hearing in the Technology Court;
 - contact the Technology Court's staff to confirm that any equipment and/or facilities used abroad are compatible with the equipment installed in the Technology Court; and
 - report back to the Tribunal by its stated deadline to inform it that the claimant is ready to proceed with the hearing in the Technology Court.
- For applications that are **rejected**
 - Consult with a lawyer about the potential for appeal (leave of the Court of First Instance is required).
 - The claimant may need to request a transcript from the Tribunal to understand the specific reasons for the rejection and formulate grounds for appeal. It is worth noting that the Tribunal may only grant the request for a transcript after the application for leave to appeal is made.

CHAPTER 1: INTRODUCTION

This Manual charts the first steps for migrant domestic workers in accessing Hong Kong courts remotely, via video link, usually from their home countries. At the time of writing, this issue is entirely new legal territory. When we began this work, we found no cases of migrant domestic workers using video link to appear or give evidence, despite the legal potential to do so on paper. This stands in stark contrast to commercial cases, where courts are more likely to use video link as a matter of course.

Our analysis focuses primarily on the Labour Tribunal, with remote access provided via the Technology Court, a venue that offers facilities to hear evidence via video link (“video link evidence”). As will be analysed in this Manual, migrant domestic workers face particular challenges when bringing claims in Hong Kong. The use of video link evidence via the Technology Court offers tremendous potential for improving and facilitating access to justice for these workers.

This Manual is divided into the following chapters:

Chapter 2 provides an introduction to the court venues at which evidence can be given via video link, and considers the relevant legal principles that apply when making an application for video link evidence.

Chapter 3 discusses the use of video link in Labour Tribunal proceedings. It examines the less formal nature of the Tribunal’s proceedings, the possibility of remote appearance, as well as the potential venues through which video link evidence can be given. Emphasis is placed on the Labour Tribunal’s mandate to offer a “quick, informal and inexpensive” way of settling labour disputes.

Chapter 4 shifts to the specific context of migrant domestic workers. It examines the application of existing legal principles surrounding video link evidence in Hong Kong to the common claims brought by this demographic. It also covers the legal and logistical challenges migrant domestic workers face when pursuing claims, as well as common fact patterns in migrant domestic worker cases.

Chapter 5 outlines the practical procedures for video link evidence in the Technology Court and other potential venues. This chapter also addresses practical considerations for applicants, such as costs, technical and logistical matters, and compliance with immigration law.

Why Workers Need Access to Video Link Evidence

Most migrant domestic workers' claims are heard in lower courts, either at the Labour Tribunal or Small Claims Tribunal. Neither of these forums have recorded instances of hearing video link evidence, even though they have the legal authority to do so. The current reality in Hong Kong is that if a migrant domestic worker leaves the city, they almost always are forced to give up their claim in these Tribunals.

Although staying in Hong Kong until the case is resolved is clearly the best way to ensure a claim is heard, doing so can be incredibly costly. With residency tied to employment for migrant domestic workers, those who wish to remain in Hong Kong must either find new employment, or else obtain a special pass and renew it repeatedly while awaiting trial. Special pass holders are forbidden to work. For many who simply wish to resolve their case and return home, the threat of unemployment will compel them to give up and not even attempt to seek aid. Our organisation has encountered many such returnees in Indonesia and the Philippines.

For those who have returned home, remote video link is often the only way to pursue their claims. The cost of flying repeatedly to Hong Kong for court hearings can take up a substantial amount of the funds they are seeking. Further, those with work or family obligations may not even have the time or opportunity to leave home.

How Many Workers Might Actually Have Claims?

The population of migrant domestic workers is relatively large, and the statistics of exploitation paint a bleak picture. Hong Kong employs nearly 350,000 migrant domestic workers annually,¹ with the vast majority coming from the Philippines (53%) and Indonesia (44%).² Many of these migrant domestic workers face problems for which they are entitled to claim compensation or even damages.

¹ Census and Statistics Department of the Government of the Hong Kong Special Administrative Region, 'Foreign domestic helpers by nationality and sex' (*Labour Force Characteristics*, 21 December 2015) <www.censtatd.gov.hk/FileManager/EN/Content_1149/T04_48.xls> accessed 20 June 2017.

² Census and Statistics Department of the Government of the Hong Kong Special Administrative Region, 'Foreign domestic helpers by nationality and sex' (*Labour Force Characteristics*, 21 December 2015) <www.censtatd.gov.hk/FileManager/EN/Content_1149/T04_48.xls> accessed 20 June 2017.

Sadly, a Mission for Migrant Workers survey found that 18% of 3,000 migrant domestic workers interviewed reported physical abuse, and 6% reported sexual abuse by their employers.³ This amounts to 540 potential claimants in one survey alone.

In their 2016 service report, Mission for Migrant Workers found that 45% of their 5,048 clients reported paying between HK\$5,000 – HK\$10,000 in employment agency fees.⁴ In the same study, 21% of their clients reported that their agency fees totalled more than HK\$15,000. However, under Hong Kong law, agency fees should total no more than 10% of their first month's salary.

In terms of salary, Justice Centre Hong Kong reported that of the 1,049 migrant domestic workers surveyed between 2015–2016, 71.8% of respondents reported that they earned less than the minimum allowed wage.

Finally, migrant domestic workers encountered a variety of work environment issues that could result in claims for compensation or damages. The same survey immediately above found that 63.7% of the respondents reported that they worked more than 12 hours a day; 12.9% worked for 15 or more hours a day.⁵ 33.3% of respondents were not given a full 24-hour rest period. More troubling, 39.3% reported that they did not have adequate accommodation with privacy; and of those who reported this, 2% lived in their employers' kitchens or washrooms.

³ Mission for Migrant Workers, 'Live-in Policy Increases Female MDW's Vulnerability to Various Types of Abuse,' (April 2013) 10 <http://issuu.com/mfmw/docs/primer_live-in_english>.

⁴ Mission for Migrant Workers, 'Service Report 2016: Statistics on MFMW Case Support, Shelter and other Emergency Services' (April 2017). <www.migrants.net/wp-content/uploads/MFMW_Casework_Report2016_FINAL.pdf> accessed 22 June 2017.

⁵ Justice Centre Hong Kong, 'Coming Clean: The Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour amongst Migrant Domestic Workers in Hong Kong' (March 2016) 26.

Overall, the above survey determined that 66.3% of the respondents exhibited “strong signs of exploitation.”⁶ Many, if not most of these forms of exploitation would give rise to a claim for damages...if the victim was able to pursue that claim.

These surveys alone account for hundreds of potential claimants annually, but actual numbers for the entire population may well be in the thousands. With many more workers not seeking help until they return home, the true number of migrant domestic workers with valid claims could well be much higher.

Building the Practice of Remote Video Link

NGOs and lawyers will play critical roles in establishing access to remote video link for their clients. Requests for remote appearance will be cases of first impression for nearly all presiding officers at the Labour Tribunal and Small Claims Tribunal. These officers are likely to raise questions; they (and the defendants) will bring up objections; and a fair number of requests may be rejected the first time around. Appeals to the High Court will be needed to establish guidelines as to when these venues should and should not lean towards granting such requests.

It will thus take many cases before advocates have a clear understanding of when lower courts will and will not approve the use of video link. While it is unlikely that all claimants will be granted the use of video link, on paper, the process offers the possibility of resolving at least some percentage of these claims. Case outcomes will also give advocates hard data to support proposals for further improvement of the video link system that can specifically meet the needs of migrant domestic worker cases.

The first step, however, is to make applications. We hope this Manual will be helpful in guiding NGO and legal advocates through those initial attempts.

⁶ Justice Centre Hong Kong, ‘Coming Clean: The Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour amongst Migrant Domestic Workers in Hong Kong’ (March 2016) 54.

CHAPTER 2: HOW VIDEO LINK IS USED IN LEGAL PROCEEDINGS IN HONG KONG

1. Overview

This chapter introduces:

- the court venues at which evidence can be given via video link;
- the legal principles that apply when the Court exercises its discretion to allow/deny the use of video link evidence (whether at the Technology Court or elsewhere); and
- the case law showing how the High Court has previously exercised its discretion in allowing or refusing applications to give video link evidence.

Generally, a witness in legal proceedings in the HKSAR must attend hearings, give evidence, and undergo cross-examination in person before the court or tribunal concerned. However, the court has discretion to allow the use of video link evidence and/or the Technology Court, depending on the facts and circumstances of the case. As such, a party planning to give (or have one of their witnesses give) video link evidence usually must file an application with the judge or presiding officer, and provide sufficient reasons for seeking approval.

Section 2 introduces the venues at which evidence may be given via video link. The section begins with an introduction to the High Court, followed by the District Court, the Labour Tribunal and the Small Claims Tribunal.

Section 3 also discusses the Technology Court, which is a special courtroom with advanced technological equipment such as video conferencing facilities.¹ The use of the Technology Court is governed by “Practice Direction 29: Use of the Technology Court, 14 December 2015” (“**PD 29**”).²

Generally, if the court or tribunal concerned approves an application to adduce video link evidence, video conferencing may be conducted by using the available facilities at the venue, or by setting up ad-hoc facilities. If neither of these arrangements is

¹ The Judiciary of the HKSAR, ‘Introducing the Technology Court’ (Technology Court, Court Services and Facilities, 31st August 2015) <www.judiciary.hk/en/crt_services/tech_crt/pamphlet.htm>.

² This includes the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court, the Lands Tribunal, the Magistrates’ Courts, the Labour Tribunal and the Small Claims Tribunal. *Practice Direction 29: Use of the Technology Court*, 14 December 2015, para 2.

possible, the applicant may apply for the hearings to be conducted at other venues, such as the Technology Court.³

Section 4 discusses the legal principles governing the use of video link in legal proceedings in Hong Kong. All principles are set out in common law, i.e. case precedents, which have all been decided in the High Court, and should therefore be of relevance for all levels of the HKSAR system. Unfortunately, without relevant case precedents in the lower courts and tribunals, such as the Labour Tribunal and the Small Claims Tribunal, test litigation will be necessary to determine when these venues generally grant or refuse applications for video link evidence.

If the applicant is not considering use of the Technology Court, they need not refer to PD 29.

While the principles in PD 29 apply to all levels of the Hong Kong judicial system, including the Labour Tribunal and the Small Claims Tribunal, it specifically applies to the use of the Technology Court, which can be used for purposes other than adducing video link evidence.

While PD 29 provides helpful guidance on applications for the use of video conferencing facilities in the Technology Court,⁴ it does not provide conclusive guidance as to when the court may allow video link evidence.⁵

Existing case law provides more comprehensive guidance as to when the court may allow the use of video link evidence. While exercising its discretion, the court will generally consider the “balance of prejudice as between the parties.”⁶ The considerations documented to date for and against granting the use of video link evidence are summarised in the table on the following page.

³ For practical issues in applying for the use of other venues and guidelines for making the arrangement or setting up video conferencing facilities, please see **Chapter 5**.

⁴ PD 29, paras 4-5.

⁵ In *Re Chow Kam Fai* [2004] 1 HKLRD 161, at [27], the court indicated that PD 29 “[does not] prescribe the principle as to when video link may, as a general rule, be used so as to enable part of the proceedings to be conducted from outside the courtroom. However, Practice Direction 29 para 5 does provide some hints as to the kind of consideration a judge should take into consideration when permitting the use of the Technology Court, which are also relevant in considering whether to permit the use of video link evidence.”

⁶ *Daimler AG v Leiduck* (No 2), [23].

Table 1: Factors for and against allowing video link evidence

A. Factors for allowing video link evidence	
1. Where a party would be denied access to court if video link evidence is excluded	<ul style="list-style-type: none"> ● E.g. the witness is unable to travel to Hong Kong due to health problems. To rely on health reasons, the applicant must provide clear medical evidence showing that: <ol style="list-style-type: none"> a. The witness's medical condition is sufficiently severe to prevent him or her from travelling to Hong Kong; and b. There is sufficient connection between the infirmity and the witness's inability to travel.
2. Where the witness's evidence is of critical importance to the party's claim	<ul style="list-style-type: none"> ● Approval more likely if refusing video link evidence would wholly deprive the applicant of the ability to give evidence crucial to his or her case, thus causing serious prejudice to the case.
3. Cost and inconvenience	<ul style="list-style-type: none"> ● Note cost and inconvenience alone do not form a sufficient basis for granting video link evidence. Must be weighed with/against other factors.
4. Where the other party is opposing the application for a "collateral advantage" or is doing so for other ulterior motives	<ul style="list-style-type: none"> ● In theory, the courts could assess an application for video link evidence on the basis of whether the other party is opposing the request for some advantage or for ulterior motives. ● To date, however, the court has never disallowed the use of video link evidence on this basis.
B. Factors against allowing video link evidence	
1. Where the witness's credibility is crucial and his or her physical attendance in court would assist the court in assessing his or her credibility	<ul style="list-style-type: none"> ● An issue when the witness's testimony contains a fact that is challenged by the opposing party. ● Here, the court's major concerns about the use of video link evidence are: <ol style="list-style-type: none"> a. It would partly dispel the solemnity of the court and the threat of immediate sanction for perjury; and b. The possible disadvantage to the other party in cross-examining the witness via video link and to the judge in assessing the witness's credibility.
2. Where a party is seeking the use of video link for a collateral advantage or some other ulterior motives	<ul style="list-style-type: none"> ● This consideration relates to the issues of public interest and policy. ● Reasons for not coming to Hong Kong that were rejected include: <ol style="list-style-type: none"> a. avoiding contractual or court ordered obligations. b. avoiding criminal investigation by law enforcement.

B. Factors against allowing video link evidence	
3. Cases that are document-heavy	<ul style="list-style-type: none"> Potential difficulties in referring to a large number of documents via video link can concern the court.
4. Interpretation is required	<ul style="list-style-type: none"> The need for interpretation may give rise to additional concerns about the court's assessment of the witness if he or she is to be cross-examined via video link and his or her credibility is at stake.

2. Use of Video Link in Different Venues

This section introduces (i) the use of video link in different venues in Hong Kong and (ii) the Technology Court as a specific courtroom providing video conferencing facilities.

This guide covers only courts and tribunals with jurisdiction over civil claims commonly brought by migrant domestic workers. **Table 2** summarises the relevant features, and the possibility of, using video link in the following venues:

- the High Court;
- the District Court;
- the Labour Tribunal; and
- the Small Claims Tribunal.

If the facilities needed to conduct the case remotely are not available in any of the above venues, parties may apply to move the hearings to the Technology Court. Note the Technology Court is not an independent court or tribunal. Rather, it is a specific court containing equipment that includes video conferencing facilities,⁷ i.e. cameras and display facilities for capturing and displaying video sources.⁸ It is available for use by parties in both civil and criminal proceedings at all levels of the judicial system in Hong Kong.⁹

⁷ Other features and facilities available at the Technology Court include multimedia presentation of evidence, Documentation and Exhibits handling system and interpretation services. All facilities are integrated into a centrally controlled network. The Judiciary of the HKSAR, 'Introducing the Technology Court' (Technology Court, Court Services and Facilities, 31st August 2015) <www.judiciary.hk/en/crt_services/tech_crt/pamphlet.htm>.

⁸ The Judiciary of the HKSAR, 'Technology Court Technical Specifications for the Judiciary of HKSAR' (Technology Court, June 2015) <www.judiciary.gov.hk/en/crt_services/tech_crt/pdf/technical_specifications.pdf>.

⁹ This includes the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court, the Lands Tribunal, the Magistrates' Courts, the Labour Tribunal and the Small Claims Tribunal. *Practice Direction 29: Use of the Technology Court, 14 December 2015*, para 2.

Allowing use of the Technology Court is at the discretion of the court or tribunal concerned.¹⁰ PD 29 provides guidance as to when the Technology Court should be used,¹¹ how applications for use of the Technology Court should be made,¹² and the cost.¹³ Again, however, PD 29 does not provide conclusive rules as to when the court may allow a witness to give video link evidence.

¹⁰ PD 29, paras 4-5.

¹¹ PD 29, paras 4-5.

¹² PD 29, paras 6-9.

¹³ PD 29, paras 16-17. For details of the application process and other procedural matters relating to use of the Technology Court, see **Chapter 5**.

Table 2: Summary of procedures and the possibility of using video link in different venues

Venue	Higher Courts	District Court	Labour Tribunal ¹⁴	Small Claims Tribunal
Possible causes of action	<p>All civil claims above threshold claim amount.¹⁵</p> <p>Court of Appeal: appeals from lower courts and tribunals.¹⁶</p> <p>Court of First Instance: both appeals and cases lodged before it.¹⁷</p>	<p>All civil claims within threshold claim amount.</p> <p>Common types of claims include contract, tort (including personal injury claims), harassment or discrimination.¹⁸</p>	<p>Employment-related issues (statutory or contractual), e.g. wages, dismissal and compensation, excluding tortious claims.¹⁹</p>	<p>Non-employment related civil claims, e.g. cases in contract, quasi-contract or tort that do not fall within the jurisdiction of the Labour Tribunal.²⁰</p>

¹⁴ The Labour Tribunal was established to provide a “quick, informal and inexpensive” way of settling labour disputes. (The Judiciary of the HKSAR, ‘Labour Tribunal, Court Services and Facilities’ (Labour Tribunal: Guide to Court Services) <www.judiciary.gov.hk/en/crt_services/pphlt/html/labour.htm#1>. See also *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.9.) As many migrant domestic worker claims relate to their employment in Hong Kong and subsequent disputes arising from such employment, the Labour Tribunal is one of the most common forums for migrant domestic workers to appear.

¹⁵ The Judiciary of the HKSAR, ‘High Court, Court Services and Facilities’ <www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#1>.

¹⁶ The Court of Appeal hears appeals on criminal and civil matters from the Court of First Instance, the Competition Tribunal, the District Court, the Lands Tribunal and various Tribunals and statutory bodies. See The Judiciary of the HKSAR ‘High Court, Court Services and Facilities’ (High Court: Guide to Court Services) <www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#1>.

¹⁷ *Ibid.*

¹⁸ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.118. It is worth noting that claims involving mostly or only employment matters are generally heard at the Labour Tribunal (Labour Tribunal Ordinance (Cap. 25) s7 and Sch), but can be transferred to the District Court if the claims are sufficiently important or complex (Labour Tribunal (General) Rules (Cap. 25A) r 7; See further in *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.120.) The same applies to cases heard in the Small Claims Tribunal.

¹⁹ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.10. Examples of employment-related claims include unpaid wages, payment for untaken statutory holidays and rest days, etc.; tort claims should be lodged in the Small Claims Tribunal.

²⁰ Small Claims Tribunal Ordinance (Cap. 338) s 5, sch; migrant domestic worker claims commonly heard before the Small Claims Tribunal generally concern loan agreements and agency fees. See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.57.

Venue	Higher Courts	District Court	Labour Tribunal	Small Claims Tribunal
Amount claimed	Over HK\$1 million. ²¹	Over HK\$50,000 but less than HK\$1 million. ²²	Exceeding HK\$8,000 for at least one plaintiff, or if 10 plaintiffs have the same claim. ²³	HK\$50,000 or less. ²⁴
Legal representation	Permitted. ²⁵	Permitted. ²⁶	Not permitted. ²⁷	Not permitted. ²⁸
Non-legal representation	Not applicable.	Not applicable.	Possible to have union representative if approved for all stages, but must have “equality of arms.”	Possible for filing initial claim. Hearing requires self-representation.
Appearance requirement	Not required except for giving evidence during trial.	Not required except for giving evidence during trial.	Must attend hearing – claim can be struck out if absent from hearing. ²⁹	No such statutory requirement but claimants are generally expected to appear in person. ³⁰

²¹ If a claim is slightly in excess of HK\$1 million, the excess can be abandoned to bring the claim within the jurisdiction of the District Court, where the costs are generally lower. See The Judiciary of the HKSAR ‘High Court, Court Services and Facilities’ (High Court: Guide to Court Services) <www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#1>.

²² See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.120.

²³ The Judiciary of the HKSAR, ‘Labour Tribunal, Court Services and Facilities’ (Labour Tribunal: Guide to Court Services) <www.judiciary.gov.hk/en/crt_services/pphlt/html/labour.htm#1>. See also *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.11.

²⁴ The Judiciary of HKSAR, ‘Small Claims Tribunal: Before you start a claim’ <www.judiciary.hk/en/crt_services/pphlt/html/sc.htm#2>.

²⁵ The parties may employ a legal practitioner in private practice, or they may apply for legal aid if they are able to satisfy the statutory criteria as to the financial eligibility and the merits for taking or defending the legal proceedings.

²⁶ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.124.

²⁷ Labour Tribunal Ordinance (Cap. 25) s 23(2).

²⁸ Small Claims Tribunal Ordinance (Cap. 338), s 19(2).

²⁹ Labour Tribunal Ordinance (Cap. 25) s 20A(1).

³⁰ There is no provision in the Small Claims Tribunal Ordinance (Cap. 338) that requires a claimant to “appear” at the hearings in order to avoid a dismissal of his or her claim.

Venue	Higher Courts	District Court	Labour Tribunal	Small Claims Tribunal
Rules and procedures	Strict and complex evidential rules. And procedures.	Strict and complex evidential rules. and procedures.	Informal proceedings; evidential rules. and court procedures are less strict. ³¹	Informal proceedings; evidential rules. and court procedures are less strict. ³²
Precedent for video link evidence or remote appearance?	All relevant cases being discussed in this Manual were decided before the High Court.	No reported instances of the use of video link evidence in civil proceedings.	No precedents found for video link evidence or remote appearance.	No precedents found for video link evidence, or remote appearance.
Possibility of adducing video link evidence	Possible, subject to the court's discretion. ³³	Theoretically possible in the absence of express prohibition against adducing video link evidence in civil proceedings, and based on relevant High Court precedents.	<u>Uncertain, but theoretically possible</u> , based on the guiding principles of the Labour Tribunal Ordinance, relevant High Court precedents and the rules in PD 29. ³⁴	<u>Uncertain, but theoretically possible</u> , based on the guiding principles of the Small Claims Tribunal Ordinance, relevant High Court precedents and the rules in PD 29. ³⁵
Possibility of remote appearance	Not applicable, legal counsel can appear.	Not applicable, legal counsel can appear.	Uncertain, test litigation will be necessary. ³⁶	Uncertain, test litigation will be necessary. ³⁷

³¹ Labour Tribunal Ordinance (Cap. 25) s 20(1), 27(2).

³² See *JWB Hong Kong Practitioner's Manual for Migrant Workers*, 3.60, 3.67; Small Claims Tribunal Ordinance (Cap. 338), s 16.

³³ See **Chapter 2 – Section 4**.

³⁴ See **Chapter 3 – Section 3.II**.

³⁵ See **Chapter 3 – Section 5**.

³⁶ See **Chapter 3 – Section 3.I**.

³⁷ See **Chapter 3 – Section 5**.

Venue	Higher Courts	District Court	Labour Tribunal	Small Claims Tribunal
Equipped with video conferencing facilities?	Yes.	Yes.	Appears to lack such facilities. ³⁸	Appears to lack such facilities. ³⁹
Possibility of moving hearings to other venues, e.g. Technology Court	Use of the Technology Court permitted under PD 29.	Use of the Technology Court permitted under PD 29.	Use of the Technology Court permitted under PD 29; test litigation required due to lack of precedents. ⁴⁰	Use of the Technology Court permitted under PD 29; test litigation required due to lack of precedents. ⁴¹

3. Legal Principles that Guide the Court’s Exercise of Discretion to Allow Use of Video Link Evidence

Theoretically, it is possible for overseas witnesses to give video link evidence in all of the venues discussed above. This section discusses the legal principles guiding the court’s exercise of discretion on when to allow video link evidence.

Sub-Section I discusses the nature of a court decision as a “case management decision.” in allowing or refusing an application to adduce video link evidence or use the Technology Court.

Sub-Section II introduces the relevant guiding principles of PD 29, which is specifically focused on the use of the video conferencing facilities available at the Technology Court. As mentioned earlier, PD 29 does not directly govern the court’s exercise of discretion on whether to grant use of video link evidence in civil proceedings. However, certain paragraphs in PD 29 are also applicable to the use of video link evidence.⁴²

³⁸ Based on telephone inquiries with the Labour Tribunal on 15 August 2016 and 15 November 2016.

³⁹ Based on telephone inquiries with the Small Claim Tribunal on 15 November 2016.

⁴⁰ There is only one Technology Court in Hong Kong. Given the limited availability of the Technology Court, it would be wise to explore also the possibility of using other venues. Venues other than the Technology Court should be permissible in principle because section 17 of the Labour Tribunal Ordinance (Cap. 25) enables the presiding officer to sit for the disposal of the proceedings at places as he may think fit, having regard to the “convenience of the parties and witnesses.” See **Chapter 3 – Section 4**.

⁴¹ See **Chapter 3 – Section 4**.

⁴² PD 29, paras 4-5; See also *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822, [11].

Sub-section III discusses the relevant legal principles set out in case precedents. All relevant cases found to date regarding video link evidence have been decided at the High Court. While the precedents in these cases should also be guiding the District Court, the Labour Tribunal and the Small Claims Tribunal, the lack of specific precedents at these levels (and the high likelihood of different factual patterns for cases at those Tribunals) introduces an element of uncertainty as to how judges or presiding officers in these courts / tribunals may deal with an application for the use of video link evidence.

I. Video Link Evidence is a Case Management Question

Whether to allow video link evidence is a case management decision that trial judges are entitled to make. These judges are “there to control the case,” taking into consideration all circumstances of the case.⁴³ Accordingly, case management decisions can only be challenged on appeal “in very exceptional circumstances,”⁴⁴ such as when the decision involves a clear error of law.⁴⁵

As of printing, it is understood that only one case exists where an appellate court reversed the first instance decision to allow the use of video link evidence.⁴⁶ In that case, the Court of Appeal held that there was a “flawed” assessment of the balance of the prejudice as between the parties.⁴⁷ The first instance judge took into account matters that were “not in evidence before him,”⁴⁸ which were considered to be “no more than speculation.”⁴⁹

Thus, an application to use the Technology Court for adducing video link evidence is also “a case management question within the discretion of the court or tribunal concerned.”⁵⁰

⁴³ *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] 5 HKLRD 119, [12]: It was held that a case management decision is to be made by taking into consideration all relevant matters. Also, such decision is best put into the hands of trial judges who are “there to control the case.”

⁴⁴ *Akai Holdings Ltd v James Henry Ting* [2014] HKEC 385, [2].

⁴⁵ *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822 is one example.

⁴⁶ *Daimler AG v Leiduck (No 2)*.

⁴⁷ *Daimler AG v Leiduck (No 2)* [23].

⁴⁸ *Daimler AG v Leiduck (No 2)*, [17].

⁴⁹ *Daimler AG v Leiduck (No 2)*, [17].

⁵⁰ PD 29, para 4.

II. Practice Direction 29: Use of the Technology Court

The contents of PD 29 contemplate the use of the Technology Court for giving video link evidence. Existing case law also states that paragraph 5 of PD 29 is relevant when the court is exercising its discretion on whether to allow the use of video link evidence.⁵¹

As set out in paragraph 5 of PD 29, the court or tribunal should take into account the following considerations in exercising its discretion:

- the views of all the parties;
- the availability of the Technology Court;
- the subject-matter of the proceedings or the relevant part of the proceedings; and
- all other material circumstances, including in particular, whether the proposed use of the Technology Court is likely:
 - to promote the fair and efficient disposal of the proceedings;
 - to save costs; and/or
 - to materially delay disposal of the proceedings.⁵²

Although considerations set out in paragraph 5 of PD 29 are also applicable to the court's exercise of discretion on questions of video link evidence,⁵³ they do not provide conclusive guidance as to when the use of video link evidence should be allowed.⁵⁴ Existing case precedents must also be consulted.

III. Common Law Principles on the Use of Video Link Evidence

This section introduces the common law principles guiding the court's exercise of discretion on whether to allow an application for video link evidence. **Sub-sections A and B** examine how the court engages in balancing considerations for and against granting use of video link evidence.

⁵¹ *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822, [11]: "the question of whether or not to make an order permitting the 1st defendant to give his evidence by video link was a question of case management, taking into account whether or not the use of the Technology Court for this purpose would be likely to promote the fair and efficient disposal of the proceedings, to save costs and / or materially to delay disposal of the proceedings (as set out in paras. 4 and 5 of *Practice Direction 29*)."

⁵² PD 29, para 5.

⁵³ *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822.

⁵⁴ See **Chapter 2 – Section 2**.

Table 3: Factors affecting the court's exercise of discretion

A. In favour of allowing video link evidence	B. Against allowing video link evidence
<ol style="list-style-type: none"> 1. Where a party would be denied access to court if video link evidence is excluded,⁵⁵ for example: <ul style="list-style-type: none"> • where the witness is unable to travel to Hong Kong because of health problems.⁵⁶ 2. Where the witness's evidence is of critical importance to the party's claim.⁵⁷ 3. Cost and inconvenience.⁵⁸ 4. Where the other party is opposing the application for a collateral advantage or is doing so for some other ulterior motives.⁵⁹ 	<ol style="list-style-type: none"> 1. Where the witness's credibility is crucial and his or her physical attendance in court would assist the court in assessing his or her credibility.⁶⁰ 2. Where a party is seeking the use of video link for a collateral advantage or some other ulterior motives.⁶¹ 3. Cases that are document-heavy.⁶² 4. Interpretation is required.⁶³

Table 3 summarises the specific considerations for, and against, granting the use of video link evidence as established in the existing case law. Each factor for consideration will then be examined with reference to the relevant case authorities.⁶⁴

The leading case authority on the use of video link evidence is *Re Chow Kam Fai ex parte Rambas Marketing Co LLC*,⁶⁵ in which the Court of Appeal affirmed the principles laid down by the Court of First Instance. Those principles were followed and applied

⁵⁵ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁵⁶ Relevant cases include *Re Chow Kam Fai* [2004] 1 HKLRD 161, *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822, *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939.

⁵⁷ Relevant cases include *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors* [2008] 4 HKLRD 239 and *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822.

⁵⁸ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30]; After the Civil Justice Reform, which aimed at increasing the cost-effectiveness of practice and procedure in civil proceedings in the High Court and the District Court, cost and inconvenience have become important considerations. However, cost and inconvenience alone cannot be a sufficient justification for the use of video link.

⁵⁹ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁶⁰ Relevant cases include *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander* [2011] 1 HKLRD 582, *Re Chow Kam Fai* [2004] 1 HKLRD 161, [2004] 2 HKLRD 260 and *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822.

⁶¹ Relevant cases include *Re Chow Kam Fai* [2004] 1 HKLRD 161, [2004] 2 HKLRD 260; *H.K.C.T. Trading Ltd. Li Luen Ping* [2001] 3 HKLRD 504; *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors* [2008] 4 HKLRD 239.

⁶² Relevant cases include *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander* [2011] 1 HKLRD 582; *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939.

⁶³ *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939.

⁶⁴ See **Chapter 2 – Section 2**.

⁶⁵ [2004] 1 HKLRD 161; [2004] 2 HKLRD 260.

in a number of subsequent cases, including *Mahajan v HCL Technologies (Hong Kong) Ltd*⁶⁶ and *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander*.⁶⁷

According to *Re Chow Kam Fai*, testifying in person before the court is a general requirement: the “starting point” is that “proper administration of justice must be conducted and seen to be conducted by proceedings within the courtroom.”⁶⁸ The rationale is the court’s emphasis on the need to uphold “the solemnity of the court atmosphere”⁶⁹ and the importance of “the threat of immediate sanction to give evidence on oath or under affirmation and to tell the truth.”⁷⁰ It follows that giving evidence via video link is “a privilege and an exception to the general rule.”⁷¹ (emphasis added)

The party seeking to adduce evidence via video link must thus set out a “good reason” to justify departing from the general rule of in-person appearance.⁷² What constitutes a “good reason” depends on the circumstances of the particular case.⁷³ In fact, there are currently no defined circumstances when a party will be permitted to give evidence via video link.⁷⁴ However, *Re Chow Kam Fai* suggests⁷⁵ that applications might be more readily granted in cases involving non-controversial evidence or expert evidence of a technical nature, or where the witness is suffering from infirmity or disability and living overseas.⁷⁶

Additionally, the court’s discretion in whether or not to allow video link evidence is a balance of “all considerations against the costs and expenses to the party and the inconvenience to the witness in bringing the witness to Hong Kong for the proceedings.”⁷⁷

For earlier cases on video link evidence, the “overall consideration” in the court’s

⁶⁶ [2010] 5 HKLRD 119.

⁶⁷ [2011] 1 HKLRD 587.

⁶⁸ [2004] 1 HKLRD 161, [28].

⁶⁹ [2004] 1 HKLRD 161, [28].

⁷⁰ [2004] 1 HKLRD 161, [28].

⁷¹ [2004] 1 HKLRD 161, [29], [32].

⁷² *Re Chow Kam Fai* [2004] 1 HKLRD 161, [32]; The Court of Appeal in *Re Chow Kam Fai* used the word “sound,” instead of “good,” in describing the threshold of a sufficient reason. However, the Court of Appeal did not explain the inconsistency. Given the Court of Appeal’s approval of the Court of First Instance’s decision, it may be assumed the Court of Appeal’s choice of word did not affect the threshold of a sufficient reason.

⁷³ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [32]; *Daimler AG v Leiduck* (No 2), [18].

⁷⁴ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁷⁵ *Re Chow Kam Fai* [2004] 1 HKLRD 161.

⁷⁶ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁷⁷ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

exercise of its discretion have been “the interests of justice” and “the just and efficient disposal of the proceedings.”⁷⁸ As the law has developed in subsequent cases, the question has become predominantly one of a “balance of prejudice as between the parties,”⁷⁹ or “what course is best calculated to achieve a just result – for both parties,”⁸⁰ except in cases involving issues related to public interest or public policy.⁸¹

A. Factors in Favour of Allowing Video Link Evidence

Parties seeking to give video link evidence must give “good reasons” for his or her inability or unwillingness to come to Hong Kong and attend court in person.⁸² These “good reasons” may vary, but can include:

- the denial of access to court if video link evidence is excluded;
- the critical importance of his or her evidence to the party’s case;
- the cost and inconvenience involved in travelling to Hong Kong; or
- the other party *is opposing* the application for a collateral advantage or is doing so for other ulterior motives.

1. Where a Party Would be Denied Access to Court if Video Link Evidence is Excluded

According to the leading case authority, denial of access to court is the “single and most important factor” affecting the court’s discretion.⁸³ The cause of such denial may be relevant to the extent that it affects the overall considerations of “the interests of justice” and “the just and efficient disposal of the proceedings.”⁸⁴ Examples of relevant causes include physical impossibility, disability, infirmity, risk of arrest and criminal prosecution or risk of revenge or risk of violence, etc.⁸⁵

In terms of clear precedents, health problems, which include disability and infirmity, have been raised in a number of existing cases as justifications for allowing video link

⁷⁸ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁷⁹ *Daimler AG v Leiduck (No 2)*, [23].

⁸⁰ *Daimler AG v Leiduck (No 2)*, [28].

⁸¹ In some circumstances, such as when the witness refuses to return to Hong Kong because of the risk of arrest or criminal investigation, issues of public interest or public policy may also affect the court’s discretion. For example, in *Attorney General v Lui Lok alias Lui Mo-lok* [1982] HKLR 413, at p 417, the court held that justice was more than “the mere settlement of disputes between individuals”, it concerned also “the wider issue of public interest or public policy.” This was cited in *H.K.C.T. Trading Ltd. Li Luen Ping* [2001] 3 HKLRD 504 at [9]. See further in **Section 3.III.B.(2)**.

⁸² *Re Chow Kam Fai* [2004] 1 HKLRD 161, [29].

⁸³ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁸⁴ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

⁸⁵ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

evidence. If a claimant is unable to travel to Hong Kong because of ill health, it may be stated as a factor in support of an application for video link evidence.

Medical evidence proving ill health must show conditions sufficiently severe to prevent the witness from travelling to Hong Kong.⁸⁶ For example, clear medical evidence showing that it would be “life-threatening” for the applicant party to travel to Hong Kong has been deemed sufficient.⁸⁷ However, if the witness’s inability to travel is not clear from the medical evidence, then the court may refuse to grant video link evidence on that basis.⁸⁸

The illness or threat to health must also specifically affect the witness’s ability to travel. In one case,⁸⁹ a defendant likely suffering from Post-Traumatic Stress Disorder was refused leave to give video link evidence when the court considered that the threat to his mental health arose more generally from the stress associated with the litigation proceedings, rather than specifically his return to Hong Kong,⁹⁰ and that he was actually fit to travel.⁹¹

In summary, health reasons must be supported by clear evidence from a medical doctor showing that travelling would pose a substantial risk for the witness’s health,⁹² and therefore that access to court would be denied because of ill health if video link evidence was not allowed to be adduced. Whether health problems constitute a “good reason” is subject to certain considerations, including the seriousness of the medical condition and the link between the infirmity and the witness’s inability to travel. However, in the absence of contrary expert evidence,⁹³ the court would likely exercise its discretion in favour of the use of video link evidence.

⁸⁶ *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, [10].

⁸⁷ *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822, [20]. In the absence of contrary evidence, the appellate court held that it was “not open to the Judge to speculate” that the applicant may travel to Hong Kong by some other means.

⁸⁸ For instance, in *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, at [8] and [10], considering that the applicant would be able to travel by air despite his long-standing heart problem and “the new illness of diabetes,” the court held that his health condition was not “a problem of sufficient scale to warrant the privileged treatment of giving evidence via video link.”

⁸⁹ *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939; [2014] HKEC 385.

⁹⁰ *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939, [16].

⁹¹ *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939, [14].

⁹² There is not a “substantial risk” principle in law, but the witness’s medical condition must be sufficiently severe that it prevents the witness from travelling to Hong Kong. (*Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, [10]).

⁹³ In *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors*, at [16], the court held that “in the absence of contrary expert evidence, it is not open to the court to reject or place no weight on the diagnoses and opinions expressed in the reports.”

2. Witness Whose Evidence is of Critical Importance to the Party's Claim

Given the need to ensure a fair trial between the parties, the importance of the witness's evidence to the applicant party's case is a relevant consideration.

In one case,⁹⁴ the defence's "prime and only witness"⁹⁵ was unable to appear in court. Taking into account the critical importance of the defendant's evidence to the defence case, the court held that it would cause "serious prejudice to the defence case"⁹⁶ to exclude the defendant's testimony.

In another case where video link evidence was allowed,⁹⁷ the court noted a refusal would likely deprive the defendants "wholly... of evidence which was crucial to their case, making it extremely difficult, if not impossible... [for their claim to succeed]."⁹⁸

However, if the crucial witness intends to give evidence about facts in dispute (as opposed to other testimony, such as an expert opinion), his or her credibility would potentially be in issue. In such circumstances, using video link may cause some prejudice to the other party, given potential difficulties in cross-examining the witness and the difficulties in the court's assessment of the witness's credibility.⁹⁹ Discussion of how the issue of credibility affects the court's exercise of discretion is found at **Section 4.B.(1)** below.

3. Cost and Inconvenience

As stated in paragraph 5 of PD 29, cost and efficiency are considerations that the court should take into account in deciding whether or not to allow the use of the Technology Court.¹⁰⁰

Similar considerations apply to the use of video link evidence. In the leading case, it was held that "the court has to balance all considerations against the *costs and expenses* to the party and the *inconvenience* to the witness in bringing the witness to Hong Kong for proceedings."¹⁰¹ (emphasis added)

⁹⁴ *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors* [2008] 4 HKLRD 239.

⁹⁵ *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors*, [17].

⁹⁶ *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors*, [22].

⁹⁷ *Daimler AG v Leiduck (No 2)*.

⁹⁸ *Daimler AG v Leiduck (No 2)*, [23].

⁹⁹ *Daimler AG v Leiduck (No 2)*, [26].

¹⁰⁰ PD 29, para 5.

¹⁰¹ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30]; The importance of the question of cost and convenience in the balancing exercise was confirmed by the Court of Appeal at paragraph 19.

However, cost and inconvenience alone do not form a sufficient basis for granting video link evidence.¹⁰² In fact, it is only one factor to be considered against other factors. For example, if the witness seeking to give video link evidence is “an expert, whose expertise or expert opinion rather than his credibility is in issue,” the court would be more inclined to “bend in favour of costs and convenience.”¹⁰³ Also, if a witness “is suffering from infirmity or disability and living overseas,” the court would likewise be more disposed to consider such witness’s convenience and “spare him the difficulties and discomfort of having to come to court, especially if it involves a long flight.”¹⁰⁴

Finally, since the Civil Justice Reform came into effect in 2009, increasing the cost-effectiveness of any practice and procedure in civil proceedings has become one of the underlying objectives of the Rules of the High Court and the District Court.¹⁰⁵ The focus of the Civil Justice Reform may therefore further support considerations for granting the use of video link evidence. Cost and inconvenience alone, however, are unlikely to be a sufficient justification for granting video link evidence.

4. Where the Other Party is Opposing the Application for a Collateral Advantage, or is Doing So For Other Ulterior Motives

In theory, the courts could weigh an application for video link evidence on the basis of whether the other party is opposing the request for some advantage or for their own ulterior motives.¹⁰⁶ However, there is currently no example or clear definition of what “collateral advantage” and “ulterior motives” could mean in the context of opposing a request for video link evidence.

To date, only one case exists that included a claim that the other party was seeking an “unfair advantage” by compelling the applicant’s attendance in court.¹⁰⁷ The applicant argued that the opposing party was “using the opportunity to request cross-examination as a means of forcing the respondent to come to Hong Kong and

¹⁰² In *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, at [13], the court held that “mere convenience is not sufficient.”

¹⁰³ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30]; The same was also mentioned in the Court of Appeal decision.

¹⁰⁴ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30].

¹⁰⁵ ‘Civil Justice Reform’ <www.civiljustice.gov.hk/eng/home.html>.

¹⁰⁶ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [30]: “The court may consider whether... the party opposing the application is seeking a collateral advantage against the other or is doing so for some other ulterior motives.”

¹⁰⁷ *Re Chow Kam Fai* [2004] 2 HKLRD 260, [21].

thus being put in a position where he was likely to be arrested.”¹⁰⁸ The court dismissed the applicant’s argument on the basis that the opposing party’s request to cross-examine the applicant was “not only understandable, but, probably, inevitable.”¹⁰⁹

Notwithstanding the above, “collateral advantage” or “ulterior motives” were explicitly mentioned in the case law as relevant considerations, although without explanation.¹¹⁰

B. Factors Against the Use of Video Link Evidence

Factors weighing against granting video link evidence can include:

- doubts about the credibility of the remote witness;
- the relevant witness is seeking the use of video link for a collateral advantage or some ulterior motives;
- document-heavy cases; or
- interpretation requirements of the relevant witness.

In exercising its discretion, the court will take into account all relevant considerations and balance the prejudice that allowing or denying the application would cause to *both* parties.

5. Where the Witness’s Credibility is Crucial and His or Her Physical Attendance in Court Would Assist the Court in Assessing His or Her Credibility¹¹¹

Credibility will be an issue when the witness’s testimony is challenged by the other party. A clear example is when “each side accuses the other of lying as to a question in issue.”¹¹² Case law shows examples of claimants who have both failed and succeeded in mitigating the court’s concerns about credibility.

a. Examples of Witnesses Who Had Unsatisfactory Reasons for Failing to Come to Hong Kong

In one case where the applicant was considered to be a “crucial witness of fact,”¹¹³ the court decided that it was necessary to “hear [the applicant’s] testimony ‘live’ and be in a position to see/scrutinise the witness some 10

¹⁰⁸ *Re Chow Kam Fai* [2004] 2 HKLRD 260, [21].

¹⁰⁹ *Re Chow Kam Fai* [2004] 2 HKLRD 260, [21].

¹¹⁰ *Re Chow Kam Fai* [2004] 2 HKLRD 260, [20].

¹¹¹ *Re Chow Kam Fai* [2004] 2 HKLRD 260, [20].

¹¹² *Asia-Pac Infrastructure Development Ltd*, [59].

¹¹³ *Asia-Pac Infrastructure Development Ltd*, [61].

feet away in the witness box, and not allow him to be ‘shielded’ through the medium of a plasma screen”¹¹⁴

However, the consideration of credibility issues alone may not be decisive. In fact, the court in the above case rejected the use of video link evidence based on two other reasons – first, the applicant failed to satisfy the court that he had good reasons for not coming to Hong Kong;¹¹⁵ second, the case involved a large number of documents¹¹⁶ (see **Section 3.III.B.(3)**). Therefore, even though the witness in question was “the sole witness” for the plaintiff,¹¹⁷ the court concluded that the applicant failed to justify an order for evidence to be given via video link.¹¹⁸ The case thus hinged on consideration of all the circumstances of the case, with witness credibility being one factor.

In another case,¹¹⁹ a witness’s credibility and his intentions were central to the cross-examination.¹²⁰ Considering the witness’s avoidance of his contractual and legal obligations under a previous court order,¹²¹ the court took the view that he “had not shown, in the past, that his word outside the court could be relied upon.”¹²² As a result, the court rejected the application and required the witness to give evidence in person on the basis that “the solemnity of the court atmosphere” and “the threat of immediate sanction” were of particular relevance in this case.¹²³

Another important consideration was the reason for the witness’s reluctance to come to Hong Kong: he wished to avoid his legal obligation under an earlier court order.¹²⁴ As a result, the witness was considered to be “seeking a collateral advantage”¹²⁵ and had failed to satisfy the court that “good reasons” existed to justify the privilege of giving video link evidence.

¹¹⁴ *Asia-Pac Infrastructure Development Ltd*, [62].

¹¹⁵ In *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander*, the applicant was unwilling to come to Hong Kong because of an unsatisfied judgement debt against him in relation to litigation unrelated to the action in *Asia-Pac Infrastructure* ([9]). Also, the applicant “did not invoke any question of residual disability as a cause of being unable to travel and to make the entirely routine air journey from Beijing to Hong Kong” ([64]).

¹¹⁶ See **Chapter 2 – Section 3.III.B.(3)**.

¹¹⁷ *Asia-Pac Infrastructure Development Ltd*, [66].

¹¹⁸ *Asia-Pac Infrastructure Development Ltd*, [65] - [66].

¹¹⁹ *Re Chow Kam Fai* [2004] 1 HKLRD 161.

¹²⁰ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [39].

¹²¹ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [25].

¹²² *Re Chow Kam Fai* [2004] 1 HKLRD 161, [25].

¹²³ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [24].

¹²⁴ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [25].

¹²⁵ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [37].

b. Examples of Witnesses Who Had Satisfactory Reasons for Not Coming to Hong Kong

If the witness is able to justify their inability to come to Hong Kong but his or her credibility is being challenged by the other party, the court will seek to balance the prejudice as between the parties.

Key Point: *One potential prejudice to the opposing party is the lack of immediate sanctions for perjury against a remote witness caught lying.¹²⁶ However, the court in one case held that the absence of an effective sanction for perjury is “a matter that can adequately be addressed by the trial judge... in considering the weight to be accorded to the [applicant’s] evidence.”¹²⁷ The court concluded that concerns about cross-examination “pale[d] into comparative insignificance” when compared with the prejudice caused to the defendant if video link evidence was refused.¹²⁸*

The court gave two main reasons in support of this conclusion. First, the defendant witness had “un-contradicted medical evidence” showing his inability to travel to Hong Kong, meaning he could not access the court if the use of video link evidence was not granted. Second, the exclusion of his evidence would “wholly deprive [the defendants] of evidence which was crucial to their case, making it extremely difficult, if not impossible, for their [defence]... to succeed.”¹²⁹

¹²⁶ *Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKEC 1511, [7]; Sanctions for perjury include a fine and imprisonment. (Crimes Ordinance (Cap 200), s 31).

¹²⁷ *Daimler AG v Leiduck (No 2)*, [25].

¹²⁸ *Daimler AG v Leiduck (No 2)*, [27].

¹²⁹ *Daimler AG v Leiduck (No 2)*, [23].

6. Where a Party is Seeking to Use Video Link for a Collateral Advantage or Other Ulterior Motives

As discussed above, the court has mentioned, but been unclear about, the scope of these particular public policy concerns.

In one case, the defendant applicant sought to avoid his contractual and legal obligations in relation to an outstanding judgment debt.¹³⁰ The court held that he was “seeking a collateral advantage by asking the Court to protect him from the consequence of disobeying the court’s order” and therefore, it would be “against public interest” to allow his application.¹³¹

In another case,¹³² the applicant deliberately put himself outside Hong Kong to avoid criminal investigation by the Independent Commission Against Corruption,¹³³ and accordingly, the court rejected his application, as deciding otherwise would “have the effect of encouraging or condoning any attempt to avoid or hinder investigation by a law enforcement agency,” which would be against public interest or public policy.¹³⁴

7. Cases that are Document-Heavy

If a case involves a significant number of documents, the court may be less prepared to accept video link evidence.¹³⁵ In one case, there were “at least some 50 box files of documents”¹³⁶ and the court decided “any delay/confusion as to the document being referred to... [would be] more easily dealt with in the courtroom itself than in remote

¹³⁰ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [35].

¹³¹ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [35], [37].

¹³² *H.K.C.T. Trading Ltd. Li Luen Ping* [2001] 3 HKLRD 504.

¹³³ *H.K.C.T. Trading Ltd. Li Luen Ping*, [8].

¹³⁴ *H.K.C.T. Trading Ltd. Li Luen Ping*, [9]. The court’s reluctance in *Re Chow Kam Fai* and *H.K.C.T. Trading Ltd. Li Luen Ping* to assist a fugitive from justice was questioned by the court in *Sun Legend Investment Ltd v Ho Yuk Wah David & Ors* at [12], where it was held that “the witness’s unwillingness to testify in person at the trial because he is a fugitive from justice may, depending on the circumstances of the case, be a good and sufficient reason for making a VCF (video conferencing facilities) order.” However, the court’s approach towards a fugitive from justice in *Sun Legend* was reversed in *Mahajan v HCL Technologies (Hong Kong) Ltd* at [16] and *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung* at [48], where the decision in *Re Chow Kam Fai* was considered to be “clearly held sway.” On the basis that it was part of the court’s function “not only to give judgements but [also] to make sure that they are enforced,” the court in *Mahajan* re-affirmed that an applicant’s being a fugitive from justice would be “a factor which would militate against making a VCF (video conferencing facilities) order.”

¹³⁵ *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander* [2011] 1 HKLRD 587; *Akai Holdings Ltd v James Henry Ting* [2013] HKEC 1939.

¹³⁶ *Asia-Pac Infrastructure Development Ltd*, [63]; The plaintiff witness’s witness statement alone incorporated four box files.

terms.”¹³⁷ In another case, considering the difficulties involved in referring to “various documents in various different bundles” during cross-examination, the court took a similar view that “those difficulties are greatly augmented if one has to do that long-distance over video link.”¹³⁸

Despite these cases, it is not clear at the time of writing what constitutes a “document-heavy” case or how relevant the applicant witness’s testimony must be to the documents.

8. Interpretation is Required

In one case, the court noted that “interpretation is an additional overlay to the existing problems that occur when a witness whose credibility is at stake is being cross-examined by video link.”¹³⁹

That said, at the time of writing, only one case was found where interpretation was raised as a concern.¹⁴⁰ The trial judge in that case took into account his own experience in receiving video link evidence and expressed reservations about the possibility of his being able to “properly exercise his duty as a trial judge and make a proper assessment of [the] witness.”¹⁴¹

C. Summary

Giving video link evidence is a privilege, not a right. Parties must always make a valid case for his or her application.¹⁴² The applicant must give “good reasons” for his or her inability or unwillingness to come to Hong Kong and attend court in person.¹⁴³ These “good reasons” may vary, but can include the critical importance of his or her evidence to the party’s case, as well as the cost and inconvenience involved with travelling to Hong Kong.

Factors weighing against granting video link evidence can include doubts about the credibility of the remote witness, document-heavy cases, and interpretation requirements of the relevant witness. In exercising its discretion, the court will take into account all relevant considerations and balance the prejudice that allowing or

¹³⁷ *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander*, [63].

¹³⁸ *Akai Holdings Ltd v James Henry Ting*, [8]; Note that *Asia-Pac Infrastructure* was not considered in the judgement of *Akai Holdings Ltd*.

¹³⁹ *Akai Holdings Ltd v James Henry Ting*, [9].

¹⁴⁰ *Akai Holdings Ltd v James Henry Ting*.

¹⁴¹ *Akai Holdings Ltd v James Henry Ting*, [11].

¹⁴² *Daimler AG v Leiduck (No 2)*, [29].

¹⁴³ *Re Chow Kam Fai* [2004] 1 HKLRD 161, [29].

denying the application would cause to both parties.

Finally, note that it is currently unclear how much weight the courts will apply to each factor in weighing an application. Further litigation is likely required to establish which situations are most likely to result in an approval or rejection, particularly in migrant domestic worker cases.

4. Conclusion

While giving evidence via video link is theoretically possible at all levels of Hong Kong courts and tribunals, most courts below the High Court do not appear to have recorded instances where the judge or presiding officer stated their considerations in approving or denying the application. Further test litigation is thus needed to establish clear precedent.

The principles applicable to the use of video link evidence and the Technology Court are largely similar. While it is the general rule to give evidence live and before the court, video link evidence may be allowed at the court's discretion, depending on the circumstances of the case.

Although video link evidence in the Labour Tribunal and the Small Claims Tribunal has yet to be tested, all the legal principles discussed in this chapter are theoretically applicable to both tribunals. Further discussion on applying for video link evidence in the Labour Tribunal or Small Claims Tribunal can be found at **Chapter 3**.

CHAPTER 3: THE USE OF VIDEO LINK IN LABOUR TRIBUNAL PROCEEDINGS

Potential Strategies for Applying for Video Link in Labour Tribunal Cases

Lacking precedents for remote appearance or giving video link evidence in the Labour Tribunal, the Tribunal may react conservatively to applications for video link.

Applicants may therefore wish to consider first appearing in person to file his or her case, and the application for video link, before he or she must leave Hong Kong. An in-person request would avoid the danger of the court rejecting the case due to the absence of the applicant.

At that stage, applicants can:

- explain his or her situation in person, for example:
 - background of the claim;
 - finances;
 - the need to return home; and,
 - the difficulties in appearing at future hearings that will occur after he or she leaves Hong Kong;
- make submissions as to how he or she intends to appear or give evidence via video link;
- show the court that the facilities he or she proposes to use in the remote site will comply with the technical requirements of the Technology Court:
 - for example, by submitting a confirmation letter from the organisation or company providing the video conferencing facilities; and
- Lawyers can still be helpful! While lawyers cannot represent parties at the Labour Tribunal, they can advise their client at all other times, helping them to prepare for appearances and submissions.

1. Overview

This chapter discusses:

- the features of Labour Tribunal proceedings;
- how an application to appear and/or give evidence via video link in Labour Tribunal proceedings may be possible in future test cases;

- the venues for using video conferencing facilities;
- the use of video link in hearings at the Small Claims Tribunal and the Minor Employment Claims Adjudication Board; and
- suggestions for parties applying for the use of video link in those tribunals.

The Labour Tribunal aims to provide a “quick, informal and inexpensive” way of settling labour disputes.¹ (emphasis added) The Tribunal deals with monetary disputes between employees and employers that mainly arise from breaches of the Employment Ordinance² or of the terms of an employment contract.³ It does not hear tort claims or claims seeking non-monetary remedies.⁴ It only has jurisdiction over cases where the amount of the claim exceeds HK\$8,000 for at least one claimant, or where the number of claimants in a single claim exceeds ten people.⁵

The Labour Tribunal Ordinance (Cap. 25) (the “**LTO**”) includes a number of provisions that take into account the convenience of the parties and provides for informal proceedings, including:

- flexible of time and location** – “A presiding officer shall sit for the disposal of the business of the tribunal **at such places and times as, having regard to the convenience of the parties and witnesses, he may think fit** [emphasis added]”;⁶
- informal proceedings are informal** – “The hearing of a claim shall be conducted in an **informal manner** [emphasis added]”;⁷
- ability to consider a broad range of evidence** – “The rules of evidence shall not apply to proceedings in the tribunal, which may receive any evidence which it considers relevant”;⁸ and
- flexible court procedures** – “In any matter of procedure for which no provision is made by this Ordinance or by rules made pursuant to section 45 the procedure applicable shall be such as the presiding officer may determine.”⁹

¹ *Labour Tribunal: Guide to Court Service*, Judiciary of the HKSAR, p 16. <www.judiciary.gov.hk/en/crt_services/pphlt/pdf/labour.pdf>; See also *JWB Hong Kong Practitioner's Manual for Migrant Workers*, 3.9.

² Cap. 57.

³ *Labour Tribunal: Guide to Court Service*, Judiciary of the HKSAR, p 16. Retrieved from <www.judiciary.gov.hk/en/crt_services/pphlt/pdf/labour.pdf>; See also *JWB Hong Kong Practitioner's Manual for Migrant Workers*, 3.9-3.10.

⁴ See *JWB Hong Kong Practitioner's Manual for Migrant Workers*, 3.11.

⁵ *Labour Tribunal: Guide to Court Service*, Judiciary of the HKSAR, p 17. Retrieved from <www.judiciary.gov.hk/en/crt_services/pphlt/pdf/labour.pdf>.

⁶ Labour Tribunal Ordinance (Cap. 25), s 17.

⁷ Labour Tribunal Ordinance (Cap. 25), s 20.

⁸ Labour Tribunal Ordinance (Cap. 25), s 27.

⁹ Labour Tribunal Ordinance (Cap. 25), s 46.

Migrant domestic worker claims tend to be employment or wage-related, and a large percentage of claims, therefore, tend to fall within the jurisdiction of the Labour Tribunal. On paper, the Tribunal should enable migrant domestic workers to seek just compensation in an inexpensive, convenient, and above all, efficient manner.

However, proceedings before the Labour Tribunal may still take several months to conclude, and this poses a challenge for migrant domestic workers.¹⁰ First, these workers operate under the “two-week rule,”¹¹ which requires them to leave Hong Kong within two weeks after completion or termination of their employment contracts if they do not find new work. Thus, they may not have the opportunity to resolve their disputes before leaving Hong Kong.

Complicating matters, the Labour Tribunal generally does not permit representation by lawyers in court, requiring migrant domestic workers to appear in person. Those who have left may have to return to Hong Kong if they want to pursue or conclude their claims, at their own cost and time. These costs can outweigh the amounts they stand to win from their claims, putting them under pressure to accept (sometimes unfavourable) settlements at the conciliation stage.

Video link may thus be a means of allowing returnee migrant domestic workers to continue to remotely pursue their claims at the Labour Tribunal by: (i) appearing in person via video link; and (ii) giving video link evidence. However, no established practice in the Labour Tribunal currently exists for granting the use of video link.

2. Features of Labour Tribunal Proceedings

This section discusses the key features and guiding principles of the Labour Tribunal that may be relevant to the use of video link in Labour Tribunal proceedings. The features to be discussed include:

- informal proceedings;
- requirement of appearance; and
- proceedings may be conducted where the Presiding Officer thinks fit.

I. Informal Proceedings

The LTO gives the presiding officer the discretion to adopt measures or adjust hearings to allow for an informal and efficient resolution of such proceedings. For

¹⁰ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.15.

¹¹ See **Chapter 4 – Section 2.I**.

instance, the presiding officer has broad discretion to admit any evidence which he or she considers relevant,¹² and, in the absence of any express provisions in the LTO, to adopt measures in any way he or she sees fit.¹³

The informality of Labour Tribunal proceedings appears to give the presiding officer the necessary discretion to order the use of video link if he or she considers such measure appropriate. See **Section 3** below for further discussion of the potential use of video link in the Labour Tribunal.

II. Requirement of Appearance

The LTO requires a claimant to “appear” at the hearing of a claim; failing which, the claim may be struck out.¹⁴ Lawyers or others representing the claimant are generally not allowed to appear on the claimant’s behalf.¹⁵ This is in contrast with the High Court and District Court proceedings (as discussed in **Chapter 2**), where parties can be represented by legal counsel.

Without legal representation, “appearance” means that parties must present their case in person through all stages of the process, including discussion of procedural matters at pre-trial hearings, making submissions on claims and defences at the actual trial, and during cross-examination.

One exception is that representation by “an office bearer of a registered trade union” is possible,¹⁶ subject to the Tribunal’s permission.¹⁷ If permitted, this representative may be able to attend mention hearings (i.e. those that do not involve the giving of evidence) without requiring the migrant domestic worker to be present. Nevertheless, giving witness evidence (for example during cross-examination) is a separate matter, and the presiding officer would most likely require the migrant domestic worker to attend the trial in person to give evidence.

The appearance requirement puts migrant domestic workers at a disadvantage, potentially forcing them to return to Hong Kong if they want to pursue their existing claims in the Labour Tribunal.

¹² Labour Tribunal Ordinance (Cap. 25), s 27.

¹³ Labour Tribunal Ordinance (Cap. 25), s 46.

¹⁴ Labour Tribunal Ordinance (Cap. 25), s 20A(1): “If, upon the hearing of a claim, the claimant does not appear, the tribunal may strike out the claim, without prejudice, however, to the restoration thereof by the tribunal, on the application of the claimant, on such terms as it thinks just.”

¹⁵ Labour Tribunal Ordinance (Cap. 25), s 23(2).

¹⁶ Labour Tribunal Ordinance (Cap. 25), s 23(1) (e). For the avoidance of doubt, the trade union representative cannot be a barrister or a solicitor i.e. the claimant must not be represented by a legal professional attending on his or her behalf.

¹⁷ Labour Tribunal Ordinance (Cap. 25), s 23(1) (e).

This is where using video link may allow a claimant to still “appear” in court “in person.” As of writing, it is unclear whether “appearance” actually means physical presence. Test litigation will be needed to determine the meaning of this term, and whether electronic presence through video link is sufficient for the court.

Given the discretion these officers have in how they run hearings, **Section 3** will discuss the possible arguments that could be used by migrant domestic workers to persuade the Tribunal officers to exercise their discretion and grant use of video link for appearance.

III. Proceedings May be Conducted Where the Presiding Officer Thinks Fit

Theoretically, the venue for Labour Tribunal proceedings is not fixed. According to the LTO, a presiding officer “shall sit for the disposal of the business of the tribunal at such places and times as, having regard to the convenience of the parties and witnesses, he may think fit.”¹⁸

Unfortunately, at the time of writing, no precedents describing the range of possible venues have been found at time of writing. However, given the broad language of the LTO, hearings may theoretically be conducted at venues that are less formal than courts and tribunals, as long as the presiding officer considers such venues appropriate.

This provision may well provide the presiding officer with the necessary discretion to move a hearing before the Labour Tribunal to such venues that would have the necessary video conferencing facilities, such as the Technology Court, business centres, hotel business facilities, etc.¹⁹

For a more detailed discussion on the venues for using video conferencing facilities, see **Section 4**.

3. Possibility of Remote Appearance and Giving Remote Evidence via Video Link in Labour Tribunal Proceedings

This section discusses the access to justice considerations of using video link for remote appearance.

The second part discusses the use of video link evidence in Labour Tribunal

¹⁸ Labour Tribunal Ordinance (Cap. 25), s 17.

¹⁹ Critically, according to our informal inquiries with the Labour Tribunal conducted in November 2016, the Labour Tribunal does not appear to have any video conferencing facilities in-house.

proceedings. Note that making a remote appearance and giving evidence via video link are two distinct issues.

I. Time and Expense: A Case for “Appearance” via Video Link

As mentioned in **Section 2.II** above, a claimant must “appear” at all hearings of his or her claim. Otherwise, the Labour Tribunal may strike out the claim.²⁰ Remote appearance via video link is an untested area of law. It is therefore unclear how the Labour Tribunal would interpret the word “appear” in section 20A(1) of the LTO.

However, considering the function of the Labour Tribunal as a “quick, informal and inexpensive” forum for settling labour disputes,²¹ using video link for remote appearance appears consistent with the overall aim of the Labour Tribunal. As mentioned in Section 2.I above, the presiding officer has a duty to ensure that “there is no avoidable delay in the determination of a claim... to the prejudice of the claimant.”²²

Many migrant domestic worker claimants experience time and financial difficulties in returning to Hong Kong for hearings. These difficulties include the cost of travel versus the amount claimed, their current employer’s refusal to grant them time off, and/or parenting or other family obligations that would prevent them from leaving home for several days at a time. Therefore, the availability of video link for remote appearance would offer such claimants a quick, convenient, and less expensive way of pursuing the claim.

These reasons would align with LTO provisions stating that the convenience of the parties should be taken into account. Additionally, claimants lack rights to formal representation at the LT.²³ As such, claimants facing the above time and expense issues would have little alternative other than remote appearance to pursue their case. Refusal to grant appearance via video link may in fact force applicants to give up their claim, in reality cutting off their access to justice.

²⁰ Labour Tribunal Ordinance (Cap. 25), s 20A(1). Although it is possible to apply for the restoration of the claim, it is subject to the Tribunal’s decision “on such terms as it thinks just.”

²¹ *Labour Tribunal: Guide to Court Service*, Judiciary of the HKSAR, p 16. Retrieved from <www.judiciary.gov.hk/en/crt_services/pphlt/pdf/labour.pdf>.

²² Labour Tribunal Ordinance (Cap. 25), s 16.

²³ Claimants before the Labour Tribunal can only be represented by members of a trade union and only at the discretion of the LT. See **Chapter 3 – Section 2.II**.

Whether the Labour Tribunal will indeed grant leave, and under what circumstances it decides to do so, must still be explored in future test litigation.

II. Giving Testimony: The Use of Video Link Evidence in Labour Tribunal Proceedings

The principles identified in the High Court cases set out in Chapter 2 are binding on all lower courts, and should provide guidance to the presiding officer in Labour Tribunal proceedings. As discussed previously, High Court precedent notes that the use of video link evidence is an exception to in-person appearances, rather than the rule. While following this principle, the flexibility and informality of LTO proceedings should include the ability to allow the use of Video Link Evidence.

4. Venues for Using Video Conferencing Facilities

As of the date of writing, the Labour Tribunal appears to lack the equipment and meeting room facilities necessary for conducting hearings that involve the use of video link.²⁴ However, Labour Tribunal proceedings may be conducted at places where the presiding officer thinks fit.²⁵

Sub-section I first discusses the use of the Technology Court, which appears to be the most straightforward venue for conducting hearings via video link, as PD 29 expressly provides for its use in Labour Tribunal cases. **Sub-section II** then discusses the possibility of moving Labour Tribunal hearings to other venues if the Technology Court is unavailable.

I. Use of the Technology Court

While video link evidence or appearance by video link is not discussed in the LTO and lacks relevant precedent, PD 29 specifically provides that the Technology Court can be used for hearings at the Labour Tribunal.²⁶ Applications to do so are made to “[t]he presiding officer in charge of the case; or if none is allocated, the Principal Presiding

²⁴ Based on telephone inquiries with the Labour Tribunal on 15 August 2016 and 15 November 2016.

²⁵ Labour Tribunal Ordinance (Cap. 25), s 17. See **Chapter 3 – Section 2.III** above, “Proceedings may be conducted at places where the presiding officer thinks fit.”

²⁶ PD 29, para 2: “Subject to the direction of the court or tribunal concerned, the Technology Court is available for use, where appropriate, upon the application of one or more of the parties in relation to proceedings or particular parts of proceedings, both civil and criminal, in ... the Labour Tribunal and the Small Claims Tribunal.”

Officer. If unavailable, the Chief Magistrate.²⁷ When assessing an application, the Labour Tribunal is likely to take into account the considerations stated in PD 29,²⁸ which include fairness, cost and efficiency, as discussed in **Chapter 2 – Section 3.I and 3.II.**²⁹

These factors provide a number of arguments for overseas applicants. First, they could argue that the Technology Court would be an efficient and cost-saving method for the Labour Tribunal, as it would save applicants the time and costs associated with returning to Hong Kong from their home countries for the hearing (without increasing time or costs for the opposing party).

Second, applicants could argue that it would promote fairness, as migrant domestic workers attending hearings and giving evidence by video link would avoid 1) situations where the costs of returning to Hong Kong for attending the Labour Tribunal proceedings outweigh (or are grossly disproportionate to) their actual claims; and 2) the risk that the Labour Tribunal dismisses their case due to their absence at the hearing.

As such, the considerations of moving proceedings to the Technology Court as provided in PD 29 seem to align with the general principles in the LTO advocating the efficient handling of the proceedings.

II. Use of Other Venues Where Video Conferencing Facilities are Available

While the Technology Court would seem the most obvious venue, it may at times be unavailable, given its accessibility for use by those in litigation and arbitration proceedings. Other venues are possible, given the LTO's flexibility with respect to the location of hearings. However, to date there is no precedent on when and in what circumstances other locations with video link facilities might be used.

For those cases where the Technology Court is unavailable, claimants may wish to consult with the Labour Tribunal about holding hearings where video conferencing facilities are available. Examples include the Hong Kong International Arbitration Centre, university campuses, business centres and hotels. Whether the Labour Tribunal would be inclined to move hearings to such fora is a question for test litigation.

²⁷ PD 29, para 7.

²⁸ PD 29, para 5.

²⁹ PD 29, para 5.

5. The Small Claims Tribunal and the Minor Employment Claims Adjudication Board (“MECAB”)

Migrant domestic worker claimants commonly access two other parts of the justice system to pursue claims related to their work in Hong Kong; namely, the Small Claims Tribunal and MECAB. Both are similar to the Labour Tribunal in that there is a lack of precedent for video link use, but with a potential to grant its use, and thus a need for future test litigation.

The Small Claims Tribunal generally deals with claims not exceeding HK\$50,000 involving non-employment contracts, quasi-contracts, or tort claims.³⁰

The equivalent of the Small Claims Tribunal for labour disputes is MECAB, a division of the Labour Department.³¹ It adjudicates minor employment claims not exceeding HK\$8,000 per claimant involving ten or less claimants.³²

Procedurally, the Small Claims Tribunal and the MECAB are similar to the Labour Tribunal in that they are set up to handle claims in a quick and simple manner.³³ The rules and procedures in both are less strict than in most Hong Kong courts.³⁴ Unfortunately, neither the Small Claims Tribunal nor the MECAB allow legal representation,³⁵ so in-person appearance is generally required.³⁶

There is no case precedent on the use of video link in either venue, but in light of the similarities in rules and procedures between these venues and the Labour Tribunal, similar considerations as set out in the analysis above may well apply for parties who wish to give evidence via video link. Again, the situations in which video link will be allowed in any of these fora require clarification via test litigation.

³⁰ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.57.

³¹ *Public Services, Labour Relations*, Labour Department. <www.labour.gov.hk/eng/labour/content.htm>.

³² *Minor Employment Adjudication Board*, Labour Department. Retrieved from <www.labour.gov.hk/eng/labour/content4.htm> on 25 October 2016; see also *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.5.

³³ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.60; “Minor Employment Adjudication Board, Labour Department”. <www.labour.gov.hk/eng/labour/content4.htm> accessed on 25 October 2016.

³⁴ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.67 and 3.8.

³⁵ See *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.69.

³⁶ MECAB Ordinance (Cap. 453), s 18(1) states: “If, upon the hearing of a claim, the claimant does not appear, the Board may strike out the claim, without prejudice, however, to the restoration of such claim by the Board, on the application of the claimant, on such terms as it may think just;” for the need to appear before the Small Claims Tribunal, see *JWB Hong Kong Practitioner’s Manual for Migrant Workers*, 3.69.

6. Test litigation: Suggestions for Applying for Video Link

The Labour Tribunal, the Small Claims Tribunal and MECAB may react conservatively to applications for video link, given that it is new territory for them. To date, they have received little guidance from the High Court as to when to grant remote appearance. Precedent for video link evidence exists to some small degree, but is still quite thin. The strategies below thus take a safe, step-by-step approach to building precedent.

First, applicants may have a greater chance of success if the claimant first appears in person to file his or her case and the application for video link, i.e. before he or she must leave Hong Kong. Doing so respects the general rule that parties must appear in person. At that stage, the claimant can explain his or her situation in person (for example, background of claim, finances, the need to return home and the difficulties in appearing at future hearings scheduled by the Tribunal). They can also respond to the Presiding Officer's questions, and hopefully obtain a decision on the application fairly quickly. This tactic can be combined with filing an application for leave to appoint a labour union representative to handle procedural matters while the claimant is absent from the jurisdiction.

In addition to submitting reasons as to why video link is necessary, claimants may also have to make submissions as to how they intend to appear or give evidence through video link. The *Technology Court Operation Manual* sets out technical requirements and specifications that are needed to establish a stable video or audio connection.³⁷ Claimants should therefore ensure that the facilities they propose to use in their home country comply with these requirements. If the video conferencing facilities are provided through an organisation or company, it may be helpful to have a letter from such organisation or company confirming their facility's ability to comply with the requirements of the Technology Court.

In short, full preparation of required documentation, and appearing in person to make the initial application, can reduce the risk of their application being denied on procedural grounds. Applicants may need to seek help from pro bono lawyers or front-line community service organisations to prepare the application.

³⁷ See **Chapter 5 – Section 2.I.**

7. Conclusion

At the time of writing, there has been no recorded case of the use of video link in Labour Tribunal proceedings, either for the purpose of appearance, or for giving evidence. However, in light of the LTO's aim to offer a "quick, informal and inexpensive" way of settling labour disputes, and the express reference in PD 29 that Labour Tribunal cases can be heard in the Technology Court, it appears that appearance via video link and the use of video link evidence may be possible.

For remote appearance, video link essentially concerns the need for access to court. For migrant domestic worker clients who cannot return to Hong Kong, denial of appearance via video link could amount to a denial of access to the Labour Tribunal, and thus their claim.

For video link evidence, the informal nature of evidence-taking at the Labour Tribunal may alleviate some of the concerns about remote evidence that the rules of evidence can create at the District Court and higher courts. Optimistically, it is arguable that the threshold for allowing the use of video link evidence might be lower in Labour Tribunal cases than in High Court cases. Again though, test litigation will be necessary.

Notwithstanding these uncertainties, adopting an appropriate strategy when applying for the use of video link in Labour Tribunal proceedings may increase the likelihood of a successful application. As legal precedent for video link use is still in development, the safest strategy is for claimants to appear in person to file their case and apply for remote appearance and video link evidence at the hearing before they leave Hong Kong. To strengthen the application, applicants should set out their reasons for applying for appearance via video link and the proposed venue and arrangements to ensure that appropriate video link facilities are available. As always, consulting pro bono legal advice beforehand is advised.

More details of what to include in an application are found at **Chapter 5**.

CHAPTER 4: APPLICATION OF ESTABLISHED LEGAL PRINCIPLES TO MIGRANT DOMESTIC WORKER CLAIMS

1. Overview

This Chapter discusses legal strategies for applying for video link evidence in migrant domestic worker cases, including:

- how to demonstrate that denying access to video link evidence would amount to a denial of access to court for plaintiffs;
- the migrant domestic worker's role as a key witness in proceedings and how that can affect an application; and
- when issues of the plaintiff's credibility as a witness can influence the application.

Those assisting migrant domestic workers in seeking use of video link evidence will be charting new territory in the courts. Many of the issues these plaintiffs will raise in requesting video link evidence are likely to be new issues for the courts to consider when deciding whether to grant their request. Further, there are issues common to migrant domestic workers as a class of workers. This chapter will begin with those general issues.

The principles outlined in **Chapter 2** provide a starting point for drafting requests to the court. Most migrant domestic workers claims have common features that appear to align with the objectives of achieving time and cost efficiency, as well as access to justice, set out in case law and statute. That said, the typical fact-patterns of many migrant domestic worker cases¹ are rather distinct from the precedents cited in **Chapter 2**. The first cases to request video link evidence will thus serve as test litigation.

It should be noted that the use of video link evidence is an exception granted rather than a right. Thus, the starting points for all applications are (i) the party intending to give video link evidence must apply to the court for leave to do so, and (ii) any such application must convince the court (i.e. give proper grounds and supporting

¹ See *JWB Hong Kong Practitioner's Manual for Migrant Workers*, Chapters 4 and 5, for more information on the common types of migrant domestic claims.

evidence) for why the court should exercise its discretion to grant leave for video link evidence.

The strategies discussed below are thus designed to inform test litigation. Many court rulings will be necessary before practitioners have a clear understanding of when the courts are most likely to exercise their discretion and approve a request.

2. When Denying Video Link Evidence Means Denying Access to Court—Relevant Factors

As explained in **Chapter 2**, one of the major factors the court will take into consideration is whether a party would be denied access to justice if video link evidence is not allowed.² This section discusses several factors that can be highlighted when making an application to the court, including how the two-week rule, as well as visa restrictions on work can force workers to return home, while issues of time and costs in returning to Hong Kong can prevent them from attending court. Finally, health issues are raised in the context of injuries and illnesses that workers sometimes encounter.

I. The Two-Week Rule

Most claims of any significant amount will involve disputes with the employer, and these will usually result in one side or the other terminating the employment. Unfortunately, migrant domestic workers are required to leave Hong Kong if they fail to secure new employment within two weeks after the termination of their previous employment contract.³ While strategies such as temporary trips to Macau can help them buy time to find new employment, those who fail to find work must depart.

The two-week rule thus puts significant time pressure on workers. Those wishing to stay will be focused on finding new work, while those who do not or who fail to do so must hurry to put their affairs in order before returning home.

Potential Supporting Arguments for Video Link Evidence

Practitioners may be able to argue that the two-week rule makes it impracticable for returning workers to file and pursue a claim while still in Hong Kong. Without criticising the policy decisions behind the rule itself, practitioners can claim that the

² See **Chapter 2 – Section 3.III.A.(1)**.

³ “Conditions of Employment for Foreign Domestic Helpers: A General Guide to the Helper,” Immigration Department of the HKSAR. Retrieved from <www.immd.gov.hk/pdforms/ID911A.pdf> Accessed on January 6, 2017.

time pressures force migrant domestic workers to return home quickly, and then follow up with their claims at a later date. In short, the existence of the two-week rule makes access to video link evidence an issue of access to justice, and not a mere question of convenience for the plaintiff.

II. Visa Restrictions

Workers can remain in Hong Kong for legal proceedings by applying for an extension of their stay. However, these are at the discretion of the Immigration Department. Court proceedings are uncertain, and claimants must be prepared to extend their stay in Hong Kong more than once for the duration of such proceedings. Claimants usually must bear the costs of the visa extension.

For those remaining solely to see their case through, a visa extension almost always results in financial loss. Visa extensions do not permit the plaintiff to engage in work, forcing them to wait, unemployed, for their case to be decided.⁴

Potential Supporting Arguments for Video Link Evidence

A strong financial argument can be made for plaintiffs who would only be staying for the purpose of the proceedings. For those seeking employment back home, every month spent unemployed in Hong Kong would amount to several months of local wages. Using video link evidence could thus potentially save the worker a significant amount of money that they, and their dependents, may be relying upon. For those with smaller claims in the Labour Tribunal, the costs of staying in Hong Kong could constitute a large amount, or even a majority, of the claim they are seeking.

Note that cost is expressly stated as a consideration that the courts will examine when considering whether to allow the use of the Technology Court in PD 29.⁵ This position is also supported by case law.⁶ It is currently unclear whether the costs that the courts and statute have described would also cover opportunity costs, such as unemployment. Test litigation will be necessary to establish the court's position.

Regardless, the argument is one of both cost and access to justice. The realities of staying in Hong Kong without employment while waiting for their claim to be heard make pursuing their claim incredibly expensive, forcing many to simply give up their claim and go home. Video link evidence thus becomes the only financially viable route to pursuing their claim.

⁴ While the plaintiff could seek out new domestic work, the unknown length of legal proceedings make it very difficult to commit to new employment.

⁵ PD 29, para 5.

⁶ See **Chapter 2 – Section 3.III.A.(3)**.

III. Time Required in Returning to Hong Kong

Turning to those already home, it is important to highlight to the court that returning to Hong Kong is not merely inconvenient;⁷ for migrant domestic workers, it is often considerably time-consuming and potentially impossible, given work and family caretaking responsibilities.

Potential Supporting Arguments for Video Link Evidence

Time savings and the avoidance of delays are examples of supporting arguments when applying to have proceedings heard in the Technology Court under PD29.⁸ Travelling back to Hong Kong may take considerable time. For the vast majority of workers who are not from major cities like Jakarta or Manila, a single appearance in court may require three to four days away from home, including travel time

For those with work and family commitments, the time requirement may be impossible. Hong Kong courts generally convene only during weekdays, and workers with new jobs may not be able to take time off work. Those with family care duties may be unable to find others to step in for them. Therefore, the time commitment required may be a real barrier to pursuing their case.

Practitioners can thus argue that giving video link evidence may take only a matter of hours, rather than days required to travel to/from Hong Kong to attend hearings. Depending on the court's flexibility in terms of a video facility location, facilities for video link evidence may be as close as a few hours away from the plaintiff's residence. Most importantly, the court's approval would essentially allow plaintiffs with travel difficulties to continue pursuing their claims.

IV. Costs of Travel to Attend Court

As seen above, cost has been raised in several different contexts. Cost is expressly stated as a consideration that the courts will examine when considering whether to allow the use of the Technology Court in PD 29.⁹ This position is also supported by case law.¹⁰ This section talks specifically about the costs of travel.

Travel to Hong Kong for court proceedings would normally include the costs of plane tickets, ground transport, accommodation and food. These costs could easily add up

⁷ See **Chapter 2 – Section 3.III.A.(3)**.

⁸ PD 29, para 5.

⁹ PD 29, para 5.

¹⁰ See **Chapter 2 – Section 3.III.A.(3)**.

to an amount that would equal or exceed the one month of standard wage many migrant domestic workers are paid in Hong Kong (and will greatly exceed monthly average wages in their home countries). Multiple trips to Hong Kong for hearings may also be required.

The upfront costs to migrant domestic worker claimants are considerable. Those without funds will simply be unable to attend court. Those with the money to return to Hong Kong cannot expect reimbursement for their travel costs. They will receive nothing if they lose their case, and they may not recover 100% of their costs from the other party even if they do win.

Finally, the potential costs can amount to a large portion of the potential claim, if not exceed it.

Possible Supporting Arguments for Video Link Evidence

Those without the means to return to Hong Kong would likely have the strongest financial argument for video link evidence, their application to the court can focus more on the issue of access to justice. Regardless, where relevant, an argument about costs being disproportionate to the claim can still be made out for all claimants. This will be a new factor to be considered by the courts, but the size of most claims by migrant domestic workers means that the problem of disproportionate costs is a key issue that practitioners should seek to develop, as it can seriously prejudice a migrant domestic worker's claim.

V. Medical Conditions

Medical conditions are one of the few areas that court precedent has already considered, as seen in **Chapter 2**. Migrant domestic workers who suffered serious injuries during their employment in Hong Kong, resulting in disability or a severe medical condition, could reasonably raise this issue to justify their request for video link evidence.

However, current precedent suggests that the medical condition suffered must be sufficiently severe, with medical proof that they are unable to travel to Hong Kong.¹¹ That said, those plaintiffs who suffered on-the-job accidents or endured physical or sexual abuse may wish to consider adding in related medical conditions for their application.

Practitioners can look to factors such as reduction in mobility, ongoing medical care,

¹¹ See **Chapter 2 – Section 3.III.A.(1)** for discussion on the severity of medical condition required.

or need for a care worker to accompany them as potentially valid medical issues that could justify an application for video link evidence.

3. Importance of the Migrant Domestic Worker's Evidence to Case

Most migrant domestic worker cases will often involve the worker as a key witness. This is due to the nature of the disputes, which involve either (i) the migrant domestic worker and the employer, usually over a matter that took place inside the employer's house, away from witnesses; or (ii) the worker and the employment agency. The importance of the migrant domestic worker's witness testimony will likely be a clear consideration when deciding whether or not to allow video link evidence.¹²

Possible Supporting Arguments for Video Link Evidence

Practitioners may wish to explicitly mention the migrant domestic worker's role as a key witness in the plaintiff's application for video link evidence, with the argument that access to justice concerns should outweigh the court's desire to have key witnesses appear in person.

Note that for Labour Tribunal and other minor venues, rejecting the application would mean that the client would have to appear in person, likely amounting to the case being dismissed, given the difficulties in returning to Hong Kong. For Magistrate's court and above, it would mean rejecting key evidence, which would seriously hamper the plaintiff's case.

¹² See **Chapter 2 – Section 3.III.A.(2)**.

4. Issues of Witness Credibility

Many migrant domestic worker cases, such as those claiming the tort of assault and/or breach of statutory duty involve disputes about what actually happened. The case outcomes are thus highly fact-sensitive and heavily dependent on whether the court believes the plaintiff's testimony. As credibility plays a more central role in such proceedings, the court may be less inclined to accept video link evidence, as the witness is far removed from any potential sanctions for perjury.

Cases where parties have complicated disputes as to the facts of the case may be decided largely based on the credibility of each party's factual witnesses. Based on case law,¹³ an opposing party could object to an application for a witness to provide evidence via video link if the credibility of such witness is disputed. The opposing party would likely insist on having the opportunity to cross-examine witness evidence in court. Case law suggests that in these situations, courts tend to be reluctant to grant video link evidence.¹⁴

Possible Supporting Arguments for Video Link Evidence

Practitioners will likely have to highlight the balance of interests and the prejudice caused to each party. Highlighting access to justice issues in the event that video link evidence is denied appears to be the strongest line of argument at the outset. Note that defending parties may also attack the credibility of a migrant domestic worker based on allegations that are not true.

Pointing to existing case law, practitioners may also wish to persuade the court that migrant domestic workers cases should be distinguished from the cases of disputed credibility that were discussed in Chapter 2. In most of those cases, the witness concerned applied for video link evidence in order to avoid criminal or civil liabilities in Hong Kong. Most migrant domestic worker claimants will have no such liabilities.

Finally, it should be noted that even if a witness's credibility is disputed, it may not necessarily be a sufficient reason for the court to refuse an application for video link evidence. The Court of Appeal in *Daimler AG* held that rather than barring witnesses from giving video link evidence, doubts regarding the witness's credibility could be sufficiently addressed when the court decided on the weight to afford the witness's

¹³ *Re Chow Kam Fai ex parte Rambas Marketing Co LLC* [2004] 1 HKLRD 161, [30]. See also **Chapter 2 – Section 3.III.B.(1)**.

¹⁴ *Re Chow Kam Fai ex parte Rambas Marketing Co LLC* [2004] 1 HKLRD 161, [30]. See also **Chapter 2 – Section 3.III.B.(1)**.

evidence.¹⁵ As there exists some case law¹⁶ that included witness credibility as one of several reasons in refusing to allow video link evidence, practitioners will likely need to convince the court to follow the *Daimler AG* decision instead.

5. Conclusion

Migrant domestic worker cases are treading new ground when it comes to applying for video link evidence. Most of the facts in the most common types of migrant domestic worker claims go beyond the existing precedents and statutes outlined in **Chapter 2**. Test litigation will be needed to delineate what are and are not valid applications in this area.

That said, the courts have broad discretion in deciding whether to allow use of video link evidence. While the guidelines discussed in **Chapter 2** offer some guidance, the courts can also consider other factors they deem relevant. Therefore, applicants can raise any and all issues that may help substantiate the plaintiff's need for video link evidence, even if they are not factors already discussed by the court.

Ultimately, the decision of the court will rest upon the balancing exercise it undertakes with respect to evaluating the prejudice caused to both parties.¹⁷ In migrant domestic worker cases, it is therefore important to clearly state the potential prejudice that a decision to deny access to video link evidence would cause to their case, i.e. that they would likely be forced to relinquish their claim and would therefore be refused access to justice for their claims in Hong Kong.

¹⁵ See **Chapter 2 – Section 3.III.A(2)**.

¹⁶ *Daimler AG v Leiduck (No 2)*, [23].

¹⁷ *Daimler AG v Leiduck (No 2)*, [23].

CHAPTER 5: PROCEDURES FOR THE USE OF VIDEO LINK IN THE TECHNOLOGY COURT AND OTHER VENUES

1. Overview

This chapter introduces the mechanics of applying for and using video link venues. It includes:

- a. the preparatory steps and procedures for using the Technology Court or other venues for the purpose of remote appearance or video link evidence; and
- b. the practical considerations applicants may take into account when deciding whether or not to apply for use of video link evidence and the Technology Court.

There are no clear procedural guidelines for applications to give video link evidence in general. However, *Practice Direction 29* and the *Technology Court Operation Manual* set out the general procedures for applying to use the Technology Court, as well as the applicant's responsibilities, which may also be of relevance to parties contemplating the use of venues other than the Technology Court.

Hearings using video link evidence must be conducted in venues where video conferencing facilities are available. Not every court room or tribunal in Hong Kong has these facilities. As such, claimants may need to apply for use of other venues, such as the Technology Court, in order to make use of video conferencing facilities. Claimants may also wish to consider whether other more convenient venues could be used. The Labour Tribunal in particular is able to conduct less formal hearings,¹ so claimants can propose to the presiding officer use of other venues, such as the Hong Kong International Arbitration Centre, instead of the Technology Court.

2. Checklist of Preparatory Steps for Launching an Application

Below is a checklist of the preparatory steps to take when applying for use of the Technology Court. As always, consultation with a lawyer prior to applying is advised.

¹ PD 29, para 6.

No.	Task	Yes/ No
Before Applying for Use of the Technology Court		
1.	Consult the Judiciary’s website to obtain all relevant, up-to-date information.	
2.	Call or write to the Clerk of Court in the High Court about the availability of the Technology Court during the time period that you anticipate the hearing date will be set down. ²	
3.	Make arrangements for a remote site near the claimant. ³ Check that the video conferencing venues to be used in both Hong Kong and the home country meet the technical requirements for video conferencing. ⁴ Specifications of the Technology Court video conferencing system are found at Appendix 1.	
4.	Write to the opposing party to seek their consent to use the Technology Court. A sample precedent letter to the opposing party can be found at Appendix 2. Note that their consent is not required, only sought.	
When Applying for use of the Technology Court		
5.	Send a letter and supporting witness statement to the judge or presiding officer in charge of the case as early as possible ⁵ and: (a) identify the issues with in-person proceedings or the particular items of evidence that make use of the Technology Court desirable; ⁶ (b) provide an explanation of how arrangements to use the court and corresponding facility abroad will be made; ⁷ (c) identify the particular facilities and equipment you wish to utilise in the Technology Court; (d) provide evidence that consent has been sought from the opposing party; and (e) provide an estimate of the court time needed. ⁸ A sample precedent letter can be found at Appendix 3 and a sample precedent witness statement can be found at Appendix 4 .	

² Should the Technology Court be unavailable during the relevant dates, or is otherwise inappropriate, applicants should also check the price and availability of other venues offering video conferencing facilities. One such venue is the Hong Kong International Arbitration Centre, which has booking terms that can be found on their website; including costs (for 2017) of HK\$1,800+ for whole day room rental; and HK\$1,400+ for half day room rental (both with video conferencing facilities).

³ Paragraph 2.4(6) of the Technology Court Operation Manual makes it clear that it is the responsibility of the party requesting the use of video link to coordinate the arrangements with respect to the remote site.
PD 29, para 14.

⁵ PD 29, paras 7-8. Whether the use of the Technology Court will be allowed is a “case management question within the discretion of the court or tribunal concerned”: PD 29, para 4.

⁶ In other words, the reasons for the use of video link which satisfy the principles discussed in **Chapters 2 to 4**, as well as the provision of any supporting evidence.

⁷ Including that the Technology Court/ relevant venue is available during potential hearing dates; that the applicant is prepared to bear the associated costs; whether other arrangements such as interpreters have been made.

⁸ PD 29, para 9.

No.	Task	Yes/ No
After Applying for Use of the Technology Court		
6.	If there is a hearing set down for the application, the client should try to attend. Depending on the venue, either the client or the lawyer must be prepared to explain their application.	
7.	<p>If the application is granted, the claimant should:</p> <ul style="list-style-type: none"> (a) apply within the period of time specified in the response to the Clerk of Court in the High Court to fix the date for the hearing in the Technology Court. This should be done in consultation with the listing officer of the court or tribunal that granted the application; (b) contact the Technology Court’s staff (as may be required) to confirm that any equipment and/or facilities used abroad are compatible with the equipment installed in the Technology Court; and (c) at a specified time prior to the hearing, report back to the relevant court or tribunal as to the readiness of the parties to proceed with the hearing in the Technology Court.⁹ 	
8.	<p>Prior to the hearing where the Technology Court is to be used, make “all arrangements necessary for or incidental to ensuring that use of the Technology Court proceeds smoothly and effectively.”¹⁰ You should:</p> <ul style="list-style-type: none"> (a) check the stability and quality of the video conferencing facilities/ video link connection beforehand; (b) make sure that all relevant documents are made available to the witness giving the evidence remotely; and (c) ensure that an interpreter is on hand for the witness (if needed). 	

3. Practical Considerations

In addition to legal issues, there are practical considerations of cost and technical logistics in using video link evidence facilities, both in Hong Kong and abroad, which are discussed below.

I. Cost Concerns

A. Costs of Video Conferencing Facilities in Hong Kong

Use of the Technology Court is mostly free of charge. The *Technology Court Operation Manual* states that while no fees or charges will be imposed by the Technology Court for use of its facilities¹¹ (including ISDN dial-in and Internet connection

⁹ PD 29, para 13.

¹⁰ Paragraph 15 of PD 29 states that it is generally the responsibility of the applicant to make such arrangements.

¹¹ *Technology Court Operation Manual*, p 12, para 4.3.

costs),¹² the requesting party should bear ISDN dial-out connection costs charged by telecommunication service providers.¹³

However, paragraph 16 of PD 29 states that successful applicants must make appropriate arrangements with telecommunication carriers providing video conferencing services, and must bear any carrier charges. Applicants are advised to speak with the Technology Court staff about general carrier charges.

Other video conferencing facilities are unlikely to be free. Use of the Hong Kong International Arbitration Centre, for example, will likely require renting rooms offering appropriate facilities. For these and other private venues, it may well be that airfare costs to Hong Kong will end up being a cheaper alternative to the rental of other venues. Applicants and their advocates may always ask for pro bono support for use of these facilities, although it is unclear whether the venue will agree.

B. Costs of Video Conferencing Facilities in Home Country

Determining and then reducing the costs of using video link facilities should be the first step, prior to applying for use of video link evidence. Where free or discounted facilities are unavailable, the expense of video link may actually outweigh travel to Hong Kong. Pro iu bono organizations or NGOs are thus encouraged to arrange proper video conferencing facilities that are free of charge for the migrant domestic worker to use. In Hong Kong, the use of the Technology Court is recommended, as this minimizes any extra costs incurred for external video conferencing facilities.

Note that costs of using video conferencing services in the claimant's home country will vary widely. Claimants will need to ensure that the venues have appropriate technology and connection speeds that meet the Technology Court's requirements.¹⁴ Some examples of appropriate venues would include high-end business hotels, embassies, universities, and/or TV station offices.

For those living further away from major cities, claimants may also incur time and travel costs to get to and from the appropriate facility.

¹² *Technology Court Operation Manual*, p 6, para 2.3.

¹³ *Technology Court Operation Manual*, p 6, para 2.3.

¹⁴ See *Technology Court Operation Manual*, p 5, paragraph 2.1(a); see also **Chapter 5 – Section 2.I**.

C. Legal Fees

In the Labour Tribunal, claimants must bring their claims in person and legal representation is not allowed, as discussed in **Chapter 3 – Section 2.III** above. As such, there is little to no room for incurring legal fees. Any assistance that migrant domestic workers would receive from legal practitioners is likely on a pro bono basis.

That said, adverse costs against the claimant become a real risk at higher levels of court, where legal representation is allowed. While the migrant domestic worker may be represented by pro bono counsel or through a legal aid counsel, any judgments against the claimant could include cost orders to pay for the other party's legal expenses.

As such, even potential applications for Technology Court and video link evidence should take adverse cost consequences into account. Heavily contested cases could expose the claimant to high cost orders. Claimants should consult a lawyer about the potential for security for costs prior to litigation, as well as any consequences of not paying a cost order.

D. Recovery of Costs

On the other hand, if the Labour Tribunal approves the claimant's application to give evidence via video link, he or she may be able to recover the costs of arranging video conferencing facilities under Section 28 of the LTO, usually in circumstances where the claim is successful. In such cases, the Tribunal may exercise its discretion to award the migrant domestic worker her costs and expenses, including any that are reasonably incurred in arranging evidence to be given via video link.¹⁵

II. Technical Concerns: Suitability of Video Conferencing Facilities in Home Country

In cases where the application to use the Technology Court is granted, it can be difficult for the applicant to find a site in the home country that has equipment that is compatible with the equipment in the Technology Court. According to the *Technology Court Operation Manual*, "Video Conferencing facilities in the Technology Court provide a direct video link between any locations having similar provision..."¹⁶ The Hong Kong Judiciary has expressly disclaimed any responsibility

¹⁵ Those pursuing cases in District Court or High Court may also make applications for cost, as normal.

¹⁶ See *Technology Court Operation Manual*, p 5, para 2.1(a); see also **Chapter 5 – Section 2.I**.

for equipment or network failures at any site when using the Technology Court.¹⁷

Accordingly, challenges may arise for migrant domestic workers who live in rural areas in their home countries, although a “gateway booking”¹⁸ may be used (at the applicant’s own cost) to ensure compatibility.¹⁹

Parties wishing to apply for the use of video link may wish to ensure that they can arrange compatible and stable video conferencing services at the remote venue before making their application. Contact Justice Without Borders for assistance in identifying such facilities in Indonesia and the Philippines.

4. Conclusion

While the legal arguments around applying for video link evidence are a major consideration, applicants must also consider logistical and cost issues. Sourcing appropriate facilities in the claimant’s home country is critical. They should be tested before the application is made. Costs are primarily related to facilities, which ideally can be arranged pro bono, as well as adverse costs orders. The latter are universal to nearly all cases, but the added dimension of remote litigation means that legal advice should be obtained prior to applying for video link evidence.

¹⁷ See *Technology Court Operation Manual*, p 5, para 2.1(a); see also **Chapter 5 – Section 2.1**.

¹⁸ Video conferencing facilities of the Technology Court uses Internet or ISDN network. If the video conferencing facilities at the remote site does not provide the same connection type, then a gateway booking will be necessary to translate the content from one connection type to the other.

¹⁹ *Technology Court Operation Manual*, p 6, para 2.4 (9).

CONCLUSION - THE FIRST STEPS IN BUILDING REMOTE ACCESS TO LEGAL CLAIMS IN HONG KONG

It should now be clear to readers that remote access to Hong Kong's courts is still in its infancy; even more so for migrant domestic worker claims. Case precedents are rare even at higher courts. Either there have been few applications, or those that were made have mostly happened without objection. This leaves very little guidance for those looking to apply for the use of Video Link Evidence.

Test litigation will thus be needed to lay out what the courts will and will not allow. Complicating matters, approval for video link evidence is discretionary, with many factors for the courts to weigh, and thus many opportunities for a court to fashion a reason to deny the application if they so choose. This is where a large volume of claims, along with appeals to High Court for the strongest ones, can help alert the judicial system to the need to establish clear rules and requirements for claimants. Such a project will require that lawyers, caseworkers and union representatives work together with claimants to ensure that the strongest cases are made in each case, and the results well-documented for potential appeals.

We believe the goal is worth the effort. For many foreign workers in Hong Kong, returning home currently means giving up their claim. Access to remote video link could thus make the difference between securing financial stability and returning to their families empty-handed and even deeper in debt. It could also mean an end to the impunity that bad actors currently enjoy: having video link evidence means the claimant may have gone home, but she is not going away.

APPENDIX 1:

TECHNOLOGICAL REQUIREMENTS OF THE TECHNOLOGY COURT VIDEO CONFERENCING SYSTEM

Paragraph 2.1(a) of the *Technology Court Operation Manual* provides the following specifications for the Technology Court video conferencing system:

Protocol	ITU H.323, SIP and H.320 compliant
Connection	Internet; or Integrated Services Digital Network (ISDN)
Speed	Up to 6 Mbps for Internet connection; or Up to 512 kbps for ISDN connection
MCU compatibility	H.241 and H.231
Video resolution	From 352x240 up to 1920x1080
Security	Embedded encryption
Multi-site conference	Up to three remote sites

APPENDIX 2:

SAMPLE LETTER TO OPPOSING PARTY SEEKING CONSENT TO USE THE TECHNOLOGY COURT

[Claimant's name]

[Claimant's address]

[Opposing party's name]

[Opposing party's address]

[Date]

Dear [Opposing party's name],

Re: [Cite Case Number] - Request for Consent to Use Technology Court

1. I refer to the abovementioned claim that is currently being heard in the [Labour Tribunal/Small Claims Tribunal/Court] (the "**Proceedings**").
2. I intend to apply to have the remainder of the Proceedings heard in the Technology Court pursuant to Practice Direction 29 so that I am able to attend the Proceedings and give my evidence via video link. This application is made in order to ensure that I can have proper access to the [Labour Tribunal/Small Claims Tribunal/Court] and attend the remainder of the Proceedings in a fair, efficient and cost-effective way.
3. In order to save the [Labour Tribunal/Small Claims Tribunal/Court]'s valuable time and resources that would otherwise be required to assess my application for the use of the Technology Court, **I would be grateful if you could confirm in writing by no later than [date]** that you agree to the use of the Technology Court for the remainder of the Proceedings in order for me to appear and give my evidence via video link.
4. Please direct your response to [Claimant's address].

Yours faithfully,

[Claimant's name]

APPENDIX 3:

SAMPLE LETTER TO TRIBUNAL/COURT REGARDING APPLICATION FOR USE OF TECHNOLOGY COURT

[Claimant's name]

[Claimant's address]

Presiding Officer/Principal Presiding Officer/Chief Magistrate [delete, if inapplicable]
[Address of Labour Tribunal/Small Claims Tribunal/Court]

[Date]

Dear Sirs,

**Re: [Cite Case Number] - Application by [insert party] (the "Claimant")
for the Use of Technology Court**

I, [insert party], hereby make an application pursuant to Practice Direction 29 to the [Labour Tribunal/Small Claims Tribunal/Court] for [specify which hearing or all future hearings] to be moved to the Technology Court in order for me to appear via video link and (if required) give evidence via video link.

Please find enclosed my witness statement dated [date] with respect to this application.

Yours faithfully,

Name:

Date:

APPENDIX 4:

SAMPLE WITNESS STATEMENT TO TRIBUNAL/COURT REGARDING APPLICATION FOR USE OF TECHNOLOGY COURT

Claim No: *[reference number]*

IN THE *[LABOUR TRIBUNAL/SMALL CLAIMS TRIBUNAL/COURT]*
OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

BETWEEN

[Claimant's name]

Claimant

AND

[Opposing party's name]

Defendant

WITNESS STATEMENT OF *[CLAIMANT'S NAME]*

1. I, *[Claimant's name]*, the claimant in this case, make this statement in support of my application for use of the Technology Court for all further hearings held in these proceedings pursuant to Practice Direction 29 ("**PD29**") issued by the Hong Kong Judiciary.
2. Insofar as the submissions below relate to matters within my own knowledge, they are true; and insofar as they relate to matters outside my own personal knowledge, they are true to the best of my information and belief, on the basis of the sources and grounds stated.

Practice Direction 29

3. I understand that the applicable laws in Hong Kong provide for the use of the Technology Court for hearing proceedings in the [*Labour Tribunal/Small Claims Tribunal/Court*]. The Technology Court can be used (inter alia) to hear parties via video link from remote places. If I were granted leave to attend the hearing[s] via video link and give my evidence via video link, I could avoid having to travel to Hong Kong and the time and costs associated with such travels. On this basis, I wish to apply for leave to have the current proceedings moved to the Technology Court.
4. PD29 provides for the use of the Technology Court and its facilities, including its video-conferencing facilities. PD29 applies to proceedings in the [*Labour Tribunal/Small Claims Tribunal/Court*] as well (see §2, PD29) and provides that applications for the use of the Technology Court should be made to “[t]he presiding officer in charge of the case; or if none is allocated, the Principal Presiding Officer. If unavailable, the Chief Magistrate” (see §7, PD29).
5. PD29 provides for specific considerations that the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] should take into account when considering whether to move proceedings to the Technology Court. These principles partly overlap with the guiding principles of the Labour Tribunal as set out above. §4 and §5 of PD29 provide:
 4. *It is a case management decision within the discretion of the court or tribunal concerned whether any proceedings or parts of any proceedings should be conducted in the Technology Court.*
 5. *In making the decision, the court or tribunal shall take into account the views of all the parties, the availability of the Technology Court, the subject matter of the proceedings or the relevant part of the proceedings and all other material circumstances, including in particular, whether the proposed use of the Technology Court is likely:*
 - § *to promote the fair and efficient disposal of the proceedings;*
 - § *to save costs, and/or*
 - § *materially to delay disposal of the proceedings.*
6. It is worth noting that PD29 §5 specifically provides that the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] can and should take into account the views of all parties. For that purpose, I have sent a letter dated [*insert date*] to the Defendant asking for consent to have the proceedings moved to the Technology

Court. At the date of this submission, I have yet to receive the Defendant's response.

7. The main factors when considering whether or not to move proceedings to the Technology Court are therefore i) fairness; ii) efficiency/cost savings; and iii) avoiding delay.
8. Fairness. Under the aspect of fairness, the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] must take into account whether a party would be denied access to justice if the application for using the Technology Court (for example for the purpose of making use of the video link facility) is denied. This may be the case if any decision against the use of the Technology Court may deprive the party of a chance to have his/her case heard and would result in forcing the party to give up his / her case. At the same time, the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] would have to make sure that any decision to use the Technology Court is not unfair to the counterparty, i.e. the interests of all parties involved would have to be balanced.
9. Efficiency/Cost savings. The [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] can consider moving proceedings to the Technology Court, if doing so would further the objectives of running the proceedings in an efficient and cost saving manner. As such, moving proceedings to the Technology Court should be considered if it assists the parties to save costs (for example, by minimising the need for costly and time consuming travels to attend the proceedings).
10. Avoiding Delay. When considering whether or not to move proceedings to the Technology Court, the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] should consider whether doing so would cause delay to the proceedings.

Reasons for the Application

11. [*State the reasons for the claimant's inability to return to Hong Kong and attend hearings in person such as excessive time and cost or other difficulties faced, with all supporting documents attached*]

Arrangements for Video Link

12. In order to ensure that I have access to appropriate video-conferencing facilities to connect to the Technology Court in case my application is granted, I have confirmed with [*insert technology provider in the home country*] that I would be able to make use of their video-conferencing facilities. I understand that these video-conferencing facilities would be compliant with the requirements for video-conferencing at the Technology Court.

Conclusion

For the above reasons, I respectfully ask that the [*Presiding Officer/Principal Presiding Officer/Chief Magistrate*] exercise its discretion and grant leave for the hearing[s] to be moved to the Technology Court and for me to [*appear and/or give evidence*] via video link.

*“Because the right to just compensation shouldn’t end
even when a victim returns home.”*

Justice Without Borders