

# **The Hague Convention on the Taking of Evidence Abroad**

Explanatory Documentation  
prepared for  
Commonwealth Jurisdictions

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Commonwealth Secretariat

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## PREFACE

In this the eight 'kit', published by the Commonwealth Secretariat, Professor David McClean, with the assistance of Mr Campbell McLachlan, has in part revised the very first kit in the series dealing with the Hague Convention on the Service of Process, The Taking of Evidence and Legalisation.

This 'kit' deals exclusively with The Taking of Evidence Convention, which was extensively re-examined at a meeting of experts in the Hague in 1985. It follows the pattern of previous kits in the series and explains how the Convention operates. Included, inter alia, is model legislation designed to facilitate accession to the Convention.

The Secretariat would like to record its appreciation of the contribution made by Professor McClean and Mr McLachlan in the preparation of this publication.

- (1) The Hague Convention on the Service of Process, The Taking of Evidence and Legalisation
- (2) International Conventions in the Field of Succession
- (3) The Hague Convention on the Civil Aspects of International Child Abduction
- (4) International Conventions on the Recognition and Enforcement of Foreign Arbitral Awards
- (6) Three International Conventions on Hijacking and offences on board Aircraft
- (7) The Hague Convention on International Access to Justice

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**THE HAGUE CONVENTION ON  
THE TAKING OF EVIDENCE ABROAD**

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**Introduction** The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was drafted at the Eleventh Session of The Hague Conference on Private International Law in 1968, and signed on 18 March 1970. It has proved to be one of the most successful of international conventions in the field of civil procedure, a field in which The Hague Conference has great experience. Separate Conventions deal with related matters, the Service of Process Abroad, Legalisation, and International Access to Justice. All seek to facilitate the handling of disputes in civil and commercial matters which have an international dimension; all use simple administrative procedures. Together they form an attractive 'package'; The Commonwealth Secretariat can provide information about them all. This present paper concentrates on the Taking of Evidence Convention, because of the re-examination it received at a meeting of experts in The Hague in 1985.

The Convention provides a simple, effective, and (most important) inexpensive procedure for obtaining evidence abroad for use in civil litigation. In many Commonwealth jurisdictions the law as to obtaining evidence abroad is ill-developed or unclear, and the inherited procedures are cumbersome and expensive to litigant and administration alike. The provision of a simple, regular administrative channel for communication in civil and commercial disputes has many attractions, both for large jurisdictions in which such litigation arises frequently and for the smaller and more remote territory in which legal resources are limited and where the complexity and expense of international litigation may seem to present insuperable obstacles.

**Parties** For these reasons, the Convention has attracted a large and growing number of member States. It is currently in force in the following States and territories. All have ratified it, or acceded [A] or had it extended to them by a member State responsible for their foreign relations [E].

Akrotiri and Dhekelia [E]  
Barbados [A]  
Cayman Islands [E]  
Cyprus [A]  
Czechoslovakia  
Denmark  
Falkland Islands and Dependencies [E]  
Finland  
France  
Germany, Federal Republic of  
Gibraltar [E]

Guam [E]  
Hong Kong [E]  
Israel  
Italy  
Luxembourg  
Man, Isle of [E]  
Netherlands  
Norway  
Portugal  
Puerto Rico [E]  
Singapore [A]  
Sweden  
United Kingdom  
United States  
Virgin Islands of the U.S.

In addition Spain and Switzerland have signed but not yet ratified. The Irish Law Reform Commission is preparing a report with a view to legislation. Other States have the matter under examination. Since the Convention first came into force it has been examined on two occasions (in June 1978 and May 1985) by experts from signatory and other interested States, the Commonwealth Secretariat being represented at both. The two meetings examined the workings of the Convention and were able to make suggestions of a practical nature to facilitate its operation; no major difficulties were discovered.

It is noteworthy that recent years have seen a growth in Commonwealth parties to the Convention, e.g. Barbados, Cyprus and Singapore. Australia and Canada may become parties, and Swaziland was represented at the expert meeting held in 1985.

Similar work has been undertaken by regional organisations working in the legal field. There is an Inter-American Convention on the Taking of Evidence Abroad 1975 (with a supplementary Protocol of 1984) and the Asian-African Legal Consultative Committee has drafted model bilateral conventions including provisions on the same topic. Close co-operation between the relevant bodies and The Hague Conference have ensured compatibility between these various documents.

Practical  
Handbook

The Permanent Bureau of The Hague Conference has prepared a Practical Handbook on the Operation of the Convention, in English and French editions. In loose-leaf form it contains the text of the Convention in both languages, lists of parties, an explanatory report written at the time the Convention was negotiated, a note of the 1978 meeting of experts, a digest of case-law on the Convention, and - most important - detailed practical information, including addresses and telephone numbers as well as reservations and declarations made under the various articles of the Convention, for each member State. The Handbook will be kept up to date. The Handbook and a companion handbook on the Service of Process Convention are available for purchase by practitioners and libraries from the law publishers Kluwer in the Netherlands and via law publishers in other countries.

Outline            The Convention provides for the taking of evidence or the performing of other judicial acts abroad, by means of Letters of Request or by the use of diplomats and consuls (herein collectively called consuls), and commissioners.

Chapter I deals with the contents of Letters of Request, the establishment of Central Authorities, and related matters. Chapter II regulates the taking of evidence by consuls and commissioners. Chapter III contains general clauses and preserves existing State laws which permit evidence to be taken by other equally liberal procedures.

Chapter One:     Letters of Request

Scope            Article 1 of the Convention provides that a judicial authority of a contracting State may request the competent authority of another contracting State, by means of a Letter of Request, to obtain evidence or to perform some other judicial act. This is governed by the limitation to "civil or commercial matters". The article and related provisions contain other limitations:

- (i) the Letter of Request must emanate from a "judicial authority";
- (ii) it must seek "evidence" or the performance of "other judicial acts";
- (iii) requests for the pre-trial discovery of documents may be excluded.

Civil and commercial matters            The text, and indeed the full title, of the Convention limits its field of application to "civil and commercial matters". This phrase is used in many Hague Conventions, dating back to 1905. It is recognised that civil-law and common-law countries do have a different approach. A common law country will usually interpret the phrase to include almost anything which is not a criminal matter. Civil law countries have a different approach to the use of legal categories. They tend to make more use of a greater number of exclusive categories and would in some cases regard Public Law or Family Law or Fiscal Law as separate and distinct from Civil Law and Commercial Law. So, for example, a building contract between a government agency and a company might be regarded as falling outside the field of "civil and commercial matters" because of its "public law" content. But bankruptcy, at least where this involves some judicial proceedings, will be within the Convention.

This is a well-known problem, so deep-seated that it is insoluble except within a group of states such as those of the European community which has institutions (notably the Court of Justice) capable of developing a special "community" understanding of "civil and commercial" (see L.T.U. v Eurocontrol, decided by the Court in 1976).

Perhaps because it is such a well-known problem, there are few occasions on which the matter is allowed to hinder the working of the Convention. It would appear that in at least some

States, the practice under that Convention is to apply the approach more familiar to the requested State, even if this means declining to act. For example, the French authorities will refuse requests arising in fiscal matters.

One particular question has been the subject of much recent discussion. If a request is made to obtain evidence abroad for use in civil proceedings, is it a sufficient ground for rejecting the request that the evidence might be used in subsequent proceedings of a penal or fiscal nature? The general opinion is that a request should not be rejected on this ground; and this appears to accord with the views expressed in the House of Lords in Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] 1 All ER 434 (see per Lord Wilberforce at p.444). However it is quite proper to reject a request if the evidence sought could be directly linked to a penal (or tax) proceeding in the requesting country. This again accords with the decision in the Westinghouse case: Viscount Dilhorne said, "I hope that the courts of this country will always be vigilant to prevent a misuse of the convention and will not make an order requiring evidence to be given ... unless it is clearly established that, even if required for civil proceedings, it is not also sought for criminal proceedings" (ibid, at p.460).

Judicial  
authorities

The request must emanate from a "judicial authority", but there is no definition of this expression. The Commission responsible for preparing the Convention considered that courts of arbitration were excluded, but it was undecided about administrative tribunals, many of which closely resemble ordinary courts, whilst others do not. Each case must be examined on its own facts, examining the function rather than just the formal categorisation of the requesting authority. In re Letters Rogatory Issued by the Director of Inspection of Government of India, 385 F (2d) 1017 (1967), the court decided, after analysis of the powers and duties of a tax assessment agency in India, that it was not a tribunal entitled to the execution in New York of a Letter of Request.

"Evidence"  
and "other  
judicial acts"

No definition of these terms is given, but some guide to the meaning of "obtain evidence" is given in Article 3(e), (f) and (g) which refer to witnesses, questions to be asked, and documents or property to be inspected.

In Rio Tinto Zinc Corporation v Westinghouse Electric Corporation, already referred to, the House of Lords interpreted the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to the Convention in U.K. law. Both Lord Wilberforce and Viscount Dilhorne referred to the distinction drawn in the earlier case of Radio Corporation of America v Rauland [1956] 1 Q.B. 618, decided under the Foreign Tribunals Evidence Act 1856 (repealed by the 1975 Act). The Divisional Court in that case distinguished between the obtaining of evidence for use in a trial and the obtaining of evidence which might lead to the procurement of evidence. In the Westinghouse case, it was said that the 1975 Act, which uses "evidence" where the earlier Act speaks of "testimony", and not diminished the value of that distinction.

Examples of "other judicial acts" may include the obtaining of blood-grouping tests, preventive seizure of goods, forced sale of property, conciliation in matrimonial proceedings, obtaining extracts of public records, appointments of temporary receivers or a guardian. Not all countries may recognise all such requests e.g. U.S.A. would not compel a defendant to give security for a possible future judgment for the plaintiff in a foreign proceeding. Article 1 itself excludes certain matters which are either dealt with in other Conventions, or which might involve the exercise of the Court's discretion, such as the service of process, the enforcement of Orders, and orders for provisional or protective measures, e.g. injunctions.

The act must be "judicial". If it is an administrative matter, not within the function of the judiciary in the State of execution, e.g. procuring an extract from a public record, conducting conciliation in matrimonial proceedings or valuing property, the Request may be refused (even if it is a judicial act in the requesting State (Article 12(a)). See below).

#### Central Authorities

Each Contracting State must establish a Central Authority. It is important to note that this requirement is not as onerous as the formal language of the Convention suggests. So, while the Minister of Justice or his Ministry may be designated as the Central Authority pro forma, (and it is customary for the same body to be designated as the Central Authority for other Hague Conventions dealing with civil procedure, notably that on Service of Process), the work will in practice be done by an officer of such a Ministry, or of the Courts Service, as part of a much wider remit to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them (Article 2). To ensure the simplicity of the system, it is expressly provided (also in Article 2) that no intervening agency in the requested State is to deal with the Request on its way to the designated Central Authority.

A State, including one with more than one legal system may designate "other authorities" and determine the extent of their competence. A federal State may designate more than one Central Authority (Articles 24 & 25). In Commonwealth jurisdictions, the designated Central Authority is frequently the Registrar of the Supreme Court or its equivalent (so in Barbados, Singapore, Hong Kong) but sometimes the Ministry of Justice (as in Cyprus) or the Governor (as in the Cayman Islands). In the United Kingdom, the foreign and Commonwealth Office is the Central Authority but "other authorities" designated for England, Scotland and Northern Ireland discharge the functions, and all are more closely court-related officers (e.g. in England, the Senior Master of the Supreme Court).

It is important to note that various provisions of the Convention enable other modes of transmission to be used. Article 27(a) permits a State to declare that it will accept transmission of Letters of Request to its judicial authorities by other channels (no State has done so); Article 28(a) enables two or more Contracting States to make other arrangements inter se; and Article 32 protects existing bilateral Conventions.

The Convention does not prescribe how the Request should be despatched from within the requesting State. In the U.S.A. the courts transmit the Requests direct to the Central Authority abroad. In the U.K. and France Requests are transmitted through their own Central Authorities which has the advantage of ensuring that they go abroad in correct form.

Contents of  
Letter of  
Request

The detailed information which the Letter of Request must contain is set out in Article 3. It includes the name of the requesting authority, and the name of the requested authority if known; otherwise the Letter could simply refer to "the appropriate authority". Details of the parties, the proceedings, the evidence to be obtained, or other judicial act to be performed and questions to be put must be included. If, under the law of the requesting authority, the evidence is to be given on oath or any special form is to be used, this should be included, along with any special procedure to be followed under Article 9 (see below). The Letter may also contain information about the privileges and duties of witnesses required under Article 11. No legalisation of the Letter or other like formality may be required.

The meetings of Experts held in 1978 and 1985 considered that there was a need for a model or standard form of Letter of Request to overcome the problem of inadequate information, e.g. as to the precise nature of the evidence to be obtained, or the authority to whom the Letter should be returned, as well as difficulties of interpretation over legal terminology used in different systems. Accordingly a model form was drafted and approved and is reproduced below as revised in 1985. It is designed to operate as a "check list" of all information, which is considered to be desirable or necessary for the successful execution of the Request and its prompt return to the requesting authority. The model form is not obligatory but is recommended in the interest of both requesting and requested States. What is most needed is a clear explanation of the particular point on which evidence is sought, the model form includes requests for summaries of the parties' positions and suggests that relevant documentation (court orders, pleadings) might be attached; but these should be restricted to matters illuminating the particular request for evidence and should not seek to rehearse the whole case.

The model form need not be printed or set out in any particular style. It is reproduced below in what seems to be a convenient style; it could simply be photocopied from that text.

Language of  
the Request

By virtue of Article 4, Letters of Request shall be in the language of the authority requested to execute it (or a translation thereof), or in English or in French, unless a party has made a reservation under Article 33 excluding the use of English or French. A State with more than one official language may, if necessary under internal law, declare the language of Letters to be used in specified parts of its territory. Unjustified failure to comply with this declaration will make the State or origin liable to pay the cost of translation. A State may prescribe additional languages for Letters of Request.

The Convention does not prescribe the language in which the executed Letter is to be returned but it is anticipated that they would normally be returned in the language in which the Letter is sent.

Rejection of  
Letter of  
Request

A Central Authority may object to a Letter on the ground that it does not comply with the Convention, whereupon it must promptly inform the sending authority (Article 5). The Letter may, for example, not fall within the scope of the Convention as discussed in para. 15 above, or it may lack sufficient information under Article 3.

The Convention creates an obligation to execute Letters of Request falling within its terms; and the Letter is to be executed "expeditiously" (Article 9). The exceptional circumstances in which execution may be refused are very narrowly defined. If the Letter of Request complies with the Convention, its execution may be refused only on the grounds set out in Article 12, and only to the extent that it is objectionable on those grounds. They are that in the State of execution the execution of the Letter does not fall within the province of the judiciary; and that the State addressed considers that its sovereignty or security would be prejudiced thereby.

The Westinghouse case illustrates the reference to prejudice to the sovereignty of a State, the Attorney-General appearing to represent that H.M. Government regarded as an unacceptable invasion of its own sovereignty the use of the U.S. courts by the U.S. government as a means by which it sought to investigate activities outside the U.S. of British companies and individuals which might infringe the anti-trust laws of the U.S. An example of a Request falling outside the judicial function in some States would be a request for extracts from a public record which may be a judicial function in the requested State but an administrative matter in the requesting State.

The meeting of Experts in June 1978 discussed a difficult question, raised by the United States, as to whether or not a Central Authority was obliged to prosecute or to defend an appeal against a decision of the judicial authority granting or refusing execution of a Letter. In the U.S.A., the Central Authority has, on several occasions, responded to appeals made to higher courts by one of the parties. The discussion was not conclusive but views were expressed that there was no such obligation on the Central Authority although it felt that if good grounds existed for an appeal, it should do so.

Execution of  
Letters of  
Request

The scheme devised by the Convention provides that Letters of Request should be executed by a "competent authority" which would apply its own laws and procedures, save where a request is made to follow a special method or procedure, which is acceptable in the requested State. The parties and their legal representatives may appear, and judicial personnel from the requesting authority may also be present in certain circumstances. Witnesses may be compelled to appear where necessary, but any privilege to refuse to testify will be upheld. Provision is made for return of the executed Letter, and for liability for costs and fees.

(i) The Executing Authority

Letters of Request are to be executed by a "competent authority" (Article 2) although in Article 9 reference is made to "the judicial authority". If a Request is sent to an authority which is not competent to execute it, it must be sent forthwith to the correct authority. (Article 6) (i.e. presumably by either the former authority direct, or by the Central Authority).

In the United States, the competent authorities are mostly the United States Attorney's field offices, which take statements on oath from witnesses. Formal resort to the courts or a commissioner is usually only necessary when compulsion is required. As commissioners are usually public officials, costs are kept to a minimum. In the U.K. the competent authorities are the Masters of the Queen's Bench Division, who make orders appointing examiners to take the testimony. Examiners are usually barristers, paid by the Government, and the Treasury Solicitor acts as the moving party before the court on behalf of the requesting authority. In other countries, such as Austria, Sweden, Norway and Denmark, the local court where the witness resides is the authority. In France, the authorities are the judiciary, the diplomatic or consular officers of the requesting State and persons designated as commissioners by the French Government.

A question was raised at the June 1978 meeting as to whether a "judicial authority" under Article 9 must be a judge, but this would not appear to be the practice of States, and the U.S.A., for example, is prepared to appoint as commissioners persons who are not judges but who are entitled to administer oaths. The Commission felt that, to save time and expense, competent authorities should include not only courts, but commissioners, notaries public, lawyers and others, insofar as they could be given some of the attributes of a judicial authority.

(ii) Attendance of the parties and their representatives

Notice of the time and place of the proceedings must, on request, be sent to the requesting authority, or direct to the parties, to enable them and their representatives to be present (Article 7). The notice could be given either by the Central Authority or, to save time, by the competent authority. Requests for such information are often received in the U.K., France, and U.S.A. but seldom elsewhere. In the U.K. the information is sent to the requesting authority by the Queen's Bench Masters' Secretary on behalf of the Senior Master. Elsewhere it is given either by the executing authority or the Central Authority.

(iii) Attendance of judges

Contracting States may declare that judicial personnel from the requesting authority may be present at the execution of the letter (Article 8). Thus, judges cannot attend as of right, but only if a State has made such a declaration. The declaration may also require prior authorisation by the competent authority to be obtained in each particular case.

The practice of States varies: some, e.g. France and U.K., permit judges to attend (pursuant either to a declaration under the Article or other procedures) but it has been rare for them to do so and they could normally only ask questions with leave of the court. The United States adopts a liberal approach and some foreign judges have actually been sworn in as commissioners by American courts, e.g. German and Italian judges have been allowed to execute the Letters themselves in the United States by examining witnesses in their own language and according to their own procedures. United States judges also have gone abroad on rare occasions, e.g. to the U.K. in the Westinghouse case but it is understood that the United States would now discourage this practice.

(iv) Special procedures and methods

The "judicial authority" executing the Letter will apply its own law as to the methods and procedures to be followed, unless a special method or procedure has been requested by the requesting authority, which is not incompatible with the internal law of the State of execution or impossible of performance by reason of its internal practice or procedure or by reason of practical difficulties (Article 9).

Some requesting States may only accept evidence taken in a particular way and the Convention tries to ensure that a request for a special procedure will not be refused merely because it is inconvenient to the requested State. It is suggested that "incompatible" with internal law does not mean simply "different" from such law, but that there must be some constitutional or statutory prohibition. It is, of course, for the requested State to determine whether the special method is impractical or impossible of performance.

In the U.S.A. Requests sometimes ask that statements be given before a judge, whereas what is important under U.S. law is that the witness makes his statement on oath. In the U.K. Requests are sometimes received to take evidence by way of answers to interrogatories, which are acceptable. Other types of request which have been reported are for verbatim transcripts (or, on the other hand, for a summary of the evidence in deposition form) and for video-taped evidence (a request complied with by France, though without enthusiasm for the precedent!).

In appropriate cases a commissioner from the Requesting State might be appointed to carry out the special method or procedure requested, e.g. to overcome the difficulty which a civil law State may have in satisfying a Request from a common law State to take evidence under cross examination, because no judge or local lawyer in the Requested State had any experience in that field. There are indications, however, that the operation of the Convention leads to a greater willingness on the part of requested countries to adapt their procedures so that the needs of countries with different traditions are more readily met. The German courts, for example, have developed a procedure for taking depositions in response to requests from foreign countries, with provision for cross-examination, which appears entirely to meet the needs of common law countries

Letters of Request are to be executed expeditiously. Does this mean that Requests from abroad should be accorded priority status in court lists ahead of long awaited local cases? The solution again may be for a judge to delegate the execution of the Letter to a lawyer - commissioner or other competent court officer. At the 1985 meeting of Experts various estimates were given as to the length of time taken to comply with a Letter of Request. A fair number of countries indicated that a response could be given within three months. Those with a slower response time indicated that special treatment would be given to Requests which indicated genuine urgency. The model as revised in 1985 includes questions as to the date by which a response is needed, and the reasons for the choice of that date.

(v) Compulsion against a witness

The requested authority is required by Article 10 to apply the same measures of compulsion against an unwilling witness as it would do under its internal law in local proceedings. The law of the requested State, including discretionary powers, will determine whether, and to what extent, compulsion will be granted in a particular case.

No serious problems have arisen under this Article but there is a divergence of practice in applying compulsion for blood tests in paternity cases, where the Convention is often used. Some countries apply compulsion including the United Kingdom (except Scotland). Other countries including France, the Netherlands, Portugal, Scotland and the United States, refuse compulsion. In the U.S.A. it may be unconstitutional to force a person to give up part of his body and in criminal cases it could be self-incriminating.

(vi) Privileges and duties of witnesses (Article 11)

A witness may refuse to give evidence if he has a privilege or duty to do so either under the law of the requested State or under the law of the requesting State.

Where the privilege arises under the law of the requesting State and the privilege has not been stated in the Letter, the requested authority may ask the requesting authority to confirm whether such privilege or duty exists, in order to safeguard the witness's interests. It is obviously more convenient if the requesting authority anticipates any possible claim of privilege under its own law, and it may be helpful for a copy of relevant legal provisions to be supplied with the Letter of Request.

States may also declare that they will respect privileges and duties under the law of third States. This would, e.g. protect such witnesses as a Swiss banker who is prevented by Swiss law from disclosing bank details, and who may otherwise have been compelled to testify in another country and there is no such privilege in either requesting or requested State. The United Kingdom has made no such declaration.

The Westinghouse case yet again illustrates the operation of Article 11. One group of witnesses successfully claimed a privilege existing in English law, another group of witnesses successfully relying upon a privilege existing in the law of the United States, the requesting State.

(vii) Return of executed Letter of Request

The documents establishing the execution of the Letter are to be sent by the requested authority to the requesting authority by the same channel as was used for transmission of the Request. If the Letter is not executed in whole or in part, the requesting authority shall be informed immediately (Article 13).

Some States return the documents through their Central Authorities or other authority (e.g. the U.K. which uses the Queen's Bench Masters' Secretary's Department). The U.S. uses its Central Authority because it enables them to control the implementation of the Convention. Other States leave it to the competent authority to return the documents, or to inform the requesting authority that the Letter of Request has not been executed. This obviously helps to speed up procedures and emphasises the need for the name of the requesting authority (i.e. the judicial authority which approved the Request) to be clearly identified in the Letter. The model form takes account of this.

(viii) Taxes and costs (Articles 14 & 26)

A State may not claim reimbursement of taxes and costs of any nature for executing a Letter, but it may recover from the requesting State any fees paid to experts and interpreters, as well as the cost of any special procedure requested under Article 9. Furthermore, a requested authority, whose law obliges the parties themselves to secure the evidence, and which is not able itself to execute the Letter may, with the consent of the requesting authority, appoint a suitable person to do so. Costs can only be recovered from the requesting authority if it gives such consent. This latter provision would enable e.g. the U.K. to recover the fees of private examiners appointed by the Court. The requesting State and not the moving party is liable for these costs, and it is of interest that this provision enables a judge of the requesting State to impose an international fiscal obligation on his Government. The model form asks for details of the authority which will make any necessary payments; it will presumably be the appropriate financial agency responsible for the courts in the requesting state.

Under Article 26 a State may, due to constitutional limitations (and on the basis of reciprocity), request reimbursement by the requesting State of fees and costs for the service of process on an unwilling witness and for his attendance, and for transcripts or evidence. This provision does not appear to have been formally invoked but it would help e.g. the U.S.A. to overcome the constitutional problems it may have in appropriating funds for these expenses under its federal system.

No difficulties appear to have arisen over these Articles, but certain States in fact claim reimbursement of high fees and daily allowances and travel costs of witnesses who have to travel long distances, although these costs should normally be borne by the requested State, unless Article 26 can be invoked.

Pre-trial  
discovery of  
documents

Article 1, 2nd Paragraph, provides that a Letter of Request "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated" (emphasis added). This provision, and the related Article 23, has caused a great deal of misunderstanding and much unnecessary controversy.

The main fear is that the Convention could be used for mere "fishing expeditions" by parties seeking to discover whether they had a case worth pursuing; the potential defendant could be put to a great deal of trouble and expense, and with no prospect of recovering the expense. This fear is largely, though not completely, met by the fact that a Request has to be made by a "judicial authority". Although the proceedings need not be at or near the trial stage, they are under judicial control, and judges are quick to sense when a mere "fishing expedition" is being mounted.

When the Convention was being negotiated there was a serious misunderstanding on the part of a number of delegations about the nature of pre-trial discovery in the common law jurisdictions. Despite the point made above, this was equated with the "fishing expedition". Article 23, inserted as a compromise at the suggestion of the United Kingdom delegation, permits a State to declare that it will not execute a Letter of Request if it has been issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries; a number of States made this declaration, commonly called "the Article 23 reservation". Further reflection, and the discussions at the meetings of Experts in 1978 and 1985, have made it clear that Article 23 is badly drafted and the original "Article 23 reservation" too broadly drawn.

In practice there is no danger in or difficulty with the process of discovery as used in England and Commonwealth countries in the same legal tradition. Despite some recent reforms, the United States discovery practice is much wider and is objected to in other countries. In the U.S. jurisdictions discovery may take place at an early stage, before the pleadings have closed; it may require the production of documents which are not specified with any particularity but only as falling within a broad category (e.g. in the Westinghouse case reference was made to specified documents but also to "any memoranda, correspondence or other documents relating thereto"); and discovery processes may be addressed to non-parties, who may not have to produce documents but may be required to give oral evidence as to the relevant documents and their contents. (On this latter point, the limitation of Article 23 to the "discovery of documents" is unsatisfactory.)

There is now general agreement that Article 23 should be used, if it is to be used at all, to make a qualified declaration, one in effect directed against what are seen as the excesses of

United States discovery procedures. Two models have been formulated. One was used by the United Kingdom: it declared that it would not execute Letters of Request which require a person

- "a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power."

A second model is taken from Article 16 of the additional Protocol 1984 to the Inter-American Convention on the Taking of Evidence Abroad. It reads as follows:

The States Parties to this Protocol shall process a letter rogatory that requests the exhibition and copying of documents if it meets the following requirements:

- a. The proceeding has been initiated;
- b. The documents are reasonably identified by date, contents, or other appropriate information;
- c. The letter rogatory specifies those facts and circumstances causing the requesting party reasonably to believe that the requested documents are or were in the possession, control, or custody of, or are known to the person from whom the documents are requested.

The person from whom documents are requested may, where appropriate, deny that he has possession, control or custody of the requested documents, or may object to the exhibition and copying of the documents, in accordance with the rules of the Convention.

At the time of signing, ratifying or acceding to this Protocol a State may declare that it will process the Letters rogatory to which this article applies only if they identify the relationship between the evidence or information requested and the pending proceeding.

A number of States which originally made a general reservation under Article 23 have now amended it along these lines.

As discussion at the 1985 meeting of Experts made clear, the sensitivity of the issues surrounding Article 23 is increased by the use of United States discovery processes in anti-trust actions and other contexts in which the U.S. courts claim to have jurisdiction more extensive than other countries are willing to approve. A number of "blocking statutes" such as the Foreign Proceedings (Excess of Jurisdiction) Act 1984 [Australia] and the Protection of Trading Interests Act 1980 [U.K.] have been enacted to deal with some features of this problem. In this context, two agreed conclusions of the 1985 meeting of experts can usefully be quoted:

Statutes which prohibit the production of evidence abroad, commonly known as "blocking statutes", many of which have been adopted since the 1978 meeting ... , are in part a response to what are perceived in some countries as exorbitant assertions of jurisdiction by the courts of other countries. Such statutes however constitute a complicating factor and emphasize the need for long-term solutions through international understanding.

The combined effect of a blocking statute and an unqualified reservation under article 23, when both are adopted by a State, may be to discourage use by other States of the Hague Convention.

## Chapter Two: Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners

The drafting of the Convention brought out interesting differences between the common law and civil law countries as to the degree of acceptability of consuls and commissioners. In a common law country, the preparation of a case for trial is the private responsibility of the parties, and so the taking of evidence, without compulsion, by a consul or a commissioner does not necessarily offend such a country's concept of judicial sovereignty; but in some civil law countries the obtaining of evidence is part of the judicial function, and official permission will be required before the evidence can be taken privately. The Convention, partly drawing on U.K. bilateral conventions, sought to harmonise these different concepts by providing a procedural device acceptable to all systems. In so doing, it achieved a successful bridge between the two systems.

It is convenient to reproduce the summary of the English legal position concerning the taking of evidence by consuls and similar officers, a summary prepared as part of the preliminary work leading up to the Convention:

"There is no legal objection to the taking of evidence in England for use outside the jurisdiction without the intervention of the English court. Evidence can be freely taken by agents acting on behalf of foreign litigants; but no compulsory processes may be used, nor may the evidence be taken on oath. A foreign court is at liberty to appoint a consul in England of its own country, or any other person it desires as an examiner to take evidence. So long as the witnesses are willing to attend to give evidence the examination may be completed and the result returned to the foreign court without the intervention of the court in England. The administration of an oath in England without lawful authority is an offence, but a person appointed by order of a foreign court or other judicial authority has the necessary authority by virtue of Section 1 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963, for use in civil proceedings carried on under the law of that country, and a consul may administer an oath under certain other statutory provisions" (Actes et Documents de la Onzieme Session, Tome IV, pp.41-2).

(For the "other statutory provisions", see now the Consular Relations Act 1968, s.10.)

Civil law countries take a much stricter line on the permissibility of such actions in their jurisdiction by the agents of foreign courts. For this reason the whole of Chapter II of The Hague Convention, while providing much fuller and clearer guidance than the earlier 1954 text, is subject to optional clauses and rights of reservation. Indeed the whole Chapter may be excluded by a reservation under Article 33 and the German Federal Republic has taken this course.

The Convention provides that consuls (i.e. diplomatic officers and consular agents) and commissioners may take evidence in civil or commercial matters from nationals of the States they represent or of other States, compulsory in certain circumstances, subject to the conditions prescribed in the various Articles of Chapter II.

They may only take "evidence", which is a well recognised function of consuls, as reflected e.g., in U.K. bilateral conventions and in the 1954 Convention. They may not, however, perform "other judicial acts" (which is regarded as an exclusively judicial function). Moreover the proceedings for which the evidence is required must be actually "commenced", and not merely "contemplated".

Taking of  
evidence by  
consul

(i) From nationals of the State the consul represents

Under Article 15, a consul may take evidence without compulsion of nationals of the State he represents in aid of court proceedings commenced in that State. A State may declare that prior permission must be obtained for that purpose from a designated authority. This Article was said to be more restrictive than the 1954 Convention which did not give States the right to require such permission and also permitted consuls to perform "other judicial acts".

However, in practice, no serious difficulties have arisen in the application of this Article e.g. the U.S.A. follows a liberal policy and does not require advance permission, but in fact encourages the use of consuls in order to save time and expense. In England, American consuls have often taken evidence from their own nationals. Several countries have made declarations requiring permission to be obtained from the appropriate Ministry.

(ii) From nationals of the host State and of third States

In contrast, Article 16 provides that a consul may only take evidence, without compulsion, of nationals of the State in which he exercises his functions, or of third States if a competent authority in the requested State has given its permission, either generally or in the particular case, and subject to any conditions imposed. A State may dispense with the need for such permission by declaration.

The Article would enable a State, inter alia, to protect its own nationals, if necessary. If permission is granted

generally, it will obviously relieve the consul of the need to make a separate application in each case.

Most States have made declarations under Article 16, subject, however, to a variety of conditions, mainly requiring the requested State to be informed about, or to be present at, the taking of the evidence. Some States, including U.K., do not require prior permission, if reciprocity is accorded. Another would not allow evidence to be taken from its own nationals. The U.S.A. does not require advance permission. France and other countries require prior permission to be obtained from their Central Authority or Ministry of Justice. France has indicated the terms upon which permission will be given, and these include an insistence that the evidence be taken exclusively within the premises of the foreign Embassy or Consulate.

Taking of  
evidence by  
commissioners

Commissioners may, without compulsion, take evidence in one State in aid of court proceedings commenced in another State, on the same conditions as apply under Article 16. Declarations similar to those referred to in the last paragraph have also been made under Article 17.

Commissioners may be appointed by a judicial authority of either the requesting or the requested State, and the Article would, for example, enable U.S. courts to continue to appoint foreign judges as "commissioners" to examine witnesses directly (under compulsion if necessary) in their own language and under their own procedures without intervention of the local courts.

Commissioners have mainly been used by the U.S. in its relations with France and the United Kingdom. The American authorities appoint as commissioners, persons from the United States itself, or American consuls, or judicial authorities or other persons residing in the requested State. This procedure can minimise costs, e.g. where the alternative would be to send witnesses to the U.S.A., but, as the French authorities have pointed out, where the request is a straightforward one, it is sometimes cheaper to use a Letter of Request, rather than appoint a commissioner from U.S.A. The French impose the same conditions, e.g. as to the use of diplomatic or consular premises, as under Article 16.

Measures of  
compulsion

Under Article 18, a State may declare that a consul or commissioner may apply to the designated competent authority for assistance to obtain evidence by compulsion. The declaration may impose conditions. The measures of compulsion will be "appropriate", and must be those prescribed by law for use in internal proceedings. Czechoslovakia, Italy, the United Kingdom and the United States have made the declaration under this Article.

States vary in their practice. The U.S.A. and the U.K. can be expected to employ their ordinary procedures for issuing subpoenas or other measures. The U.S. Central Authority has assisted Canadian and Hong Kong authorities in obtaining compulsory process in aid of Commission proceedings (not under the Convention). In contrast, France which has made no declaration under Article 18, will only make compulsion

available to a commissioner if he is a French judicial authority, appointed as commissioner.

Conditions of grant of permission      In giving permission for consuls or commissioners to take evidence under Articles 15-17, or in granting measures of compulsion, the competent authority may prescribe such conditions as it deems fit, including the time and place of the taking of evidence and the giving of reasonable advance notice of hearing (Article 19). The conditions should not, of course, exclude the rights conferred under Articles 20 and 21 (see below).

A representative of the authority is entitled to be present at the taking of the evidence, for example, the authority may wish to ensure that there is no infringement of his State's sovereignty or security, or to uphold privileges of the witness. Examples of other conditions might be to limit the scope and subject matter of the examination, to specify the persons who may be present at the taking of the evidence other than the parties and the witnesses, and to limit the right to enter and inspect real property.

The power to impose conditions should be used sparingly so as not to restrict the use of consuls and commissioners who have often proved, in the past, a more efficient and speedier means of obtaining evidence, than using Letters of Request.

Legal representation      Persons concerned in the taking of evidence under Chapter II may be legally represented (Article 20). They would, no doubt, include the parties and witnesses, but whether others such as the employer of a witness, or an insurance company, would be so entitled, is not clear.

Administrative rules      The consul or commissioner may take all kinds of evidence which are not incompatible with local law or contrary to any permission granted and, within such limits, they may administer oaths. A request to a person to appear or to give evidence must be in the language of the place where the evidence is to be taken, unless the witness is a national of the requesting State. The person must be told that he may be legally represented and, if the requested State has not filed a declaration under Article 18, the Request must state that he is not compelled to appear or to give evidence. The evidence may be taken in the manner provided by the law of the requesting State if this is not forbidden in the requested State. The privileges and duties to refuse to give evidence contained in Article 11 are also available under Chapter II (Article 21).

The power of consuls and commissioners to administer oaths may be limited, if local law provides that only judges and notaries may administer oaths. If a State has not filed a declaration under Article 18 but nonetheless measures of compulsion are available by other means under internal law, then, of course, the witness should not be informed that he is not compelled to appear.

As any privilege to refuse to give evidence can be invoked by witnesses, the "commission" or other document appointing the consul or commissioner should contain the necessary details about such privilege and the requesting authority may be called

upon to confirm the extent of such privilege or duty at the request of the consul or commissioner, in like manner as is provided under Article 11.

Failure to  
secure  
evidence

Failure to obtain the evidence through a consul or commissioner does not preclude a later application being made for such evidence by Letter of Request (Article 22).

Other issues

Exclusivity

An issue which has caused some controversy in the United States is the relationship of the Convention to other procedures already existing in the requesting state (see Re Anschuetz & Co., GmbH, 5th Cir C.As., 1985). The 1985 meeting of experts discussed this issue but reached no firm conclusion as to what was required by the Convention itself. It is, however, quite possible for a country becoming a party to the Convention to render the Convention procedure the exclusive channel, by legislation to that effect.

Assessment

It remains to quote the final conclusion of the 1985 meeting of experts, which was "unanimously of the opinion that the use of the Convention should be encouraged, since its use can help to avoid conflicts".

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## ACCESSION TO THE EVIDENCE CONVENTION

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### Accession procedure

The Convention is open for accession by States which are not Members of The Hague Conference. The instrument of accession must be deposited with the Ministry of Foreign Affairs of the Netherlands. Under article 39, the accession will have effect only as regards the relations between the acceding State and such Contracting States as declare their acceptance of the accession.

Various decisions fall to be taken before accession can be effected, and information on most of these matters must be communicated to the Netherlands Ministry of Foreign Affairs - see articles 33 and 35:

- (1) A decision must be made whether or not to enter a reservation excluding Chapter Two (article 33).
- (2) A Central Authority must be designated (article 2) and additional authorities may be designated in certain circumstances (articles 24 and 25).
- (3) A declaration may be made insisting on the use of a language other than English or French, and related declarations on language matters may also be made (articles 4 and 33); for anglophonic countries these matters do not arise.
- (4) An acceding State may decide to declare that it will not accept Letters of Request seeking pre-trial discovery of documents (article 23) (see above).
- (5) Declarations may be made under article 8, permitting members of the judicial personnel of the requesting State to be present at the execution of a Letter of Request, and, if so required, prescribing the authority which must give permission in each case.
- (6) A declaration may be made under article 11 recognising the privileges and duties of witnesses under the law of third States.
- (7) Under article 15, a declaration may be made requiring consuls to seek the permission of a designated authority before taking the evidence of their own nationals.
- (8) Under article 16, a declaration may be made either designating an authority with power to give permission for the taking of evidence by consuls from persons not their nationals or dispensing with the need for prior permission.

- (9) Under article 17, a declaration may be made either designating an authority with power to give permission for the taking of evidence by commissioners or dispensing with the need for prior permission.
- (10) A declaration may be made under article 18 enabling consuls or commissioners to seek assistance to obtain evidence by compulsion, and designating the authority to whom such application should be made.
- (11) Under article 27, a State may declare that Letters of Request may be transmitted by channels other than the one principally prescribed in the Convention.

By way of illustration, the text of the U.K. declarations is as follows:

"1. In accordance with Article 8 Her Majesty's Government declare that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.

2. In accordance with Article 18 Her Majesty's Government declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 and 17 may apply to the competent authority designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

4. In accordance with Article 27 Her Majesty's Government declare that by the law and practice of the United Kingdom the prior permission referred to in Articles 16 and 17 is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 and 17."

Legislative  
provisions

Legislation is necessary to give effect to the Convention. In the United Kingdom, there was passed the Evidence (Proceedings in Other Jurisdictions) Act 1975. A number of features of that Act are noteworthy.

- (i) It provides a set of rules applicable to requests originating from foreign countries generally, and is not limited expressly to contracting States to The Hague Convention. In view of the traditional approach to common law countries, this would seem likely to be generally acceptable in the Commonwealth.
- (ii) It went further than the Convention requires in a number of respects, making provision for the supply of evidence in criminal proceedings (s.5) and certain international proceedings (s.6).
- (iii) It replaces the Foreign Tribunals Evidence Act 1856, the Evidence by Commission Act 1859 and the Evidence by Commission Act 1885; these Acts or their counter-jurisdictions.

A draft Bill, based closely upon the U.K. provisions follows, and it is followed in turn by some explanatory notes.

**DRAFT EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT 197-**

An Act to make new provision for enabling the Supreme Court to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions.

Short title and commencement

1.(1) This Act may be cited as the Evidence (Proceedings in Other Jurisdictions) Act. 197-.

(2) This Act shall come into operation on [-----].

Interpretation

2. In this Act -

"civil proceedings", in relation to the requesting court, means proceedings in any civil or commercial matter;

"requesting court" means any court or tribunal exercising jurisdiction in a country or territory outside [-----];

"property" includes any land, chattel, or other corporeal property of any description;

"request" includes any commission order or other process issued by or on behalf of the requesting court.

Application to the Supreme Court for assistance in obtaining evidence for civil proceedings in other court

3. Where an application is made to the Supreme Court for an order for evidence to be obtained in [-----] and the court is satisfied -

(a) that the application is made in pursuance of a request issued by or on behalf of the requesting court; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the Supreme Court shall have the powers conferred on it by the following provisions of this Act.

Power of the Supreme Court to give effect to application for assistance

4.(1) Subject to the provisions of this section, the Supreme Court shall have power, on any such application as is mentioned in section 3 above, by order to make such provision for obtaining evidence in [-----] as may appear to the court to be appropriate for the purpose of giving effect to the

request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision -

- (a) for the examination of witnesses, either orally or in writing;
- (b) for the production of documents;
- (c) for the inspection, photographing, preservation, custody or detention of any property;
- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
- (e) for the medical examination of any person;
- (f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the Supreme Court (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person -

- (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the order and appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the Supreme Court.

#### Privilege of witnesses

5.(1) A person shall not be compelled by virtue of an order under section 4 above to give any evidence which he could not be compelled to give -

(a) in civil proceedings in [-----]; or

(b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

(2) Subsection (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either -

(a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or

(b) conceded by the applicant for the order;

and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 4 above to give any evidence if his doing so would be prejudicial to the security of the State; and a certificate signed by or on behalf of [-----] to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(4) In this section references to giving evidence include references to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.

#### Rules of court

6. Rules of court may be made making provision -

(a) as to the manner in which any such application as is mentioned in section 3 above is to be made;

(b) subject to the provisions of this Act, as to the circumstances in which an order can be made under section 4 above;

(c) as to the manner in which any such reference as is mentioned in section 5(2) above is to be made

and making such incidental, supplementary and consequential provision as is necessary or expedient.

#### [Orders not to bind the Crown or Crown servants

7. Nothing in this Act shall be construed as enabling the Supreme Court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown.]

[False statements

8. If any person is giving testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 4 above, makes a statement -

- (a) which he knows to be false in a material particular or
- (b) which is false in a material particular and which he does not believe to be true,

he shall be guilty of an offence and shall be liable on conviction [-----].]

Repeals

9.(1) [Repeals]

(2) Nothing in this section shall affect -

- (a) any application to any court or judge which is pending at the commencement of this Act;
- (b) any certificate given for the purposes of any such application;
- (c) any power to make an order on such an application; or
- (d) the operation or enforcement of any order made on such an application.

**NOTES ON DRAFT EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS)  
ACT 197-**

This Draft measure follows closely the text of the U.K. Act of 1975, omitting provisions dealing with other matters. The following Table identifies the corresponding provisions:

<u>Draft</u>	<u>U.K. Act</u>
s.1(1)	s.10(1)
(2)	s.10(2)
s.2	s.1(a), s.9(1)
s.3	s.1
s.4	s.2
s.5	s.3
s.6	s.7
s.7	s.9(4)
s.8	s.8(1) and Sched. 1
s.9	s.8(2) (3)

The blanks in sections 2, 3, 4 and 5(1) will be filled by the name of the country in question; that in s.5(3) by an appropriate Minister or Law Officer.

If it is desired to limit the scope of the Act to Contracting States to The Hague Convention, the definition of "requesting court" in s.2 could be amended accordingly; but there would be further complications in those countries which have legislation based upon the earlier U.K. statutes and which could not simply repeal those Acts.

If it is desired to recognise the privileges available to witnesses under the law of a third State (see article 11), s.5 will need amendment.

Section 7 in its present form is inappropriate in republican states; and it does of course contain a policy decision not dictated by the terms of the Convention.

Section 8 may be better placed in the criminal code or legislation (and in the U.K. is inserted in the Perjury Act 1911). An appropriate penalty is to be inserted; in the U.K. Act the penalty is imprisonment for two years, a fine or both.

## DRAFT RULES OF COURT

The draft Rules which follow are based closely on the current English Rules of the Supreme Court, adjusted to fit the draft Bill above. The Rules as to evidence by deposition (i.e. cases in which a party to an English case seeks evidence abroad) are also provided for information.

### ORDER -

#### OBTAINING EVIDENCE FOR FOREIGN COURTS ETC.

##### Interpretation [and exercise of jurisdiction]

1. [(1)] In this Order, 'the Act of 197-' means the Evidence (Proceedings in Other Jurisdictions) Act 197- and expressions used in this Order which are used in that Act shall have the same meaning as in that Act.

[(2) The power of the Court to make an order under section 4 of the Act of 197- may be exercised by the Registrar.]

##### Application for order

2.(1) Subject to rule 3 an application for an order under the Act of 197- must be made ex parte and must be supported by affidavit.

(2) There shall be exhibited to the affidavit the request in pursuance of which the application is made, and if the request is not in the English language, a translation thereof in that language.

##### Application by [Attorney-General] in certain cases

3. Where a request is received by [the Minister responsible for foreign affairs] and sent by him to the Registrar with an intimation that effect should be given to the request without requiring an application for that purpose to be made by the agent in [-----] of any party to the matter pending or contemplated before the foreign court or tribunal, the Registrar shall transmit the request to [the Attorney-General] and [the Attorney-General] may make an application for an order under the Act of 197- and take such other steps as may be necessary to give effect to the request.

##### Person to take examinations

4. Any order made in pursuance of this Order for the examination of a witness may order the examination to be taken before any fit and proper person nominated by the person applying for the order or before such other qualified person as to the Court seems fit.

##### Dealing with deposition

5. Unless any order made in pursuance of this Order for the examination of any witness otherwise directs, the person

before whom the examination was taken must send the deposition of that witness to the Registrar, and the Registrar shall

- (a) give a certificate sealed with the seal of the Supreme Court for use out of the jurisdiction identifying the documents annexed thereto, that is to say, the request, the order of the Court for examination and the deposition taken in pursuance of the order; and
- (b) send the certificate with the documents annexed thereto to [the Minister responsible for foreign affairs.]

Claim to privilege

- 6.(1) The provisions of this rule shall have effect where a claim by a witness to be exempt from giving any evidence on the ground specified in section 5(1)(b) of the Act of 197- is not supported or conceded as mentioned in sub-section (2) of that section.
- (2) The examiner may, if he thinks fit, require the witness to give the evidence to which the claim relates and, if the examiner does not do so the Court may do so, on the ex parte application of the person who obtained the order under section 2.
- (3) If such evidence is taken -
  - (a) it must be contained in a document separate from the remainder of the deposition of the witness;
  - (b) the examiner shall send to the Registrar with the deposition a statement signed by the examiner setting out the claim and the ground on which it was made;
  - (c) on receipt of the statement the Registrar shall, notwithstanding anything in rule 5, retain the document containing the part of the witness's evidence to which the claim relates and shall send the statement and a request to determine the claim to the foreign court or tribunal with the documents mentioned in rule 5;
  - (d) if the claim is rejected by the foreign court or tribunal, the Registrar shall send to that court or tribunal the document containing that part of the witness's evidence to which the claim relates, but if the claim is upheld he shall send the document to the witness, and shall in either case notify the witness and the person who obtained the order under section 2 of the court or tribunal's determination.

ORDER -

EVIDENCE BY DEPOSITION

Power to order depositions to be taken

- 1.(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order

for the examination of the Court or some other person, at any place, or any person.

- (2) An order under paragraph (1) may be given on such terms (including in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

Where person to be examined is out of the jurisdiction

2. Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made -
  - (a) for an order under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person, or
  - (b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order under that rule appointing a special examiner to take the evidence of that person in that country.

Order for issue of letter of request

- 3.(1) Where an order is made under rule 1 for the issue of a letter of request to the judicial authorities of a country to take, or cause to be taken, the evidence of any person in that country the following provisions of this rule shall apply.
  - (2) The party obtaining the order must prepare the letter of request and lodge it in the Registry.
  - (3) If the evidence of the person to be examined is to be obtained by means of written questions, there must be lodged with the letter of request a copy of the interrogatories and cross-interrogatories to be put to him on examination.
  - (4) Each document lodged under paragraph (2) or (3) must be accompanied by a translation of the document in the official language of the country in which the examination is to be taken or, if there is more than one official language of that country, in any one of those languages which is appropriate to the place in that country where the examination is to be taken unless
    - (a) the Registrar has given a general direction in relation to that country that no translation need be provided, or
    - (b) the official language or one of the official languages of that country is English.

- (5) Every translation lodged under paragraph (4) must be certified by the person making it to be a correct translation; and the certificate must contain a statement of that person's full name, of his address and of his qualifications for making the translation.
  
- (6) The party obtaining the order must, when he lodges in the Registry the documents mentioned in paragraphs (2) to (5) also file in that office an undertaking signed by him or his solicitor to be responsible personally for all expenses incurred by the Minister responsible for foreign affairs in respect of the letter of request and, on receiving due notification of the amount of those expenses, to pay that amount to the Minister and to produce a receipt for the payment to the Registrar.

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## THE TEXT OF THE CONVENTION

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### CONVENTION SUR L'OBTENTION DES PREUVES A L'ETRANGER EN MATIERE CIVILE OU COMMERCIALE

Les Etats signataires de la présente Convention,

Désirant faciliter la transmission et l'exécution des commissions rogatoires et promouvoir le rapprochement des diverses méthodes qu'ils utilisent à ces fins,

Soucieux d'accroître l'efficacité de la coopération judiciaire mutuelle en matière civile ou commerciale,

Ont résolu de conclure une Convention à ces effets et sont convenus des dispositions suivantes:

#### CHAPITRE I – COMMISSIONS ROGATOIRES

##### Article premier

En matière civile ou commerciale, l'autorité judiciaire d'un Etat contractant peut, conformément aux dispositions de sa législation, demander par commission rogatoire à l'autorité compétente d'un autre Etat contractant de faire tout acte d'instruction, ainsi que d'autres actes judiciaires.

Un acte d'instruction ne peut pas être demandé pour permettre aux parties d'obtenir des moyens de preuves qui ne soient pas destinés à être utilisés dans une procédure engagée ou future.

L'expression «autres actes judiciaires» ne vise ni la signification ou la notification d'actes judiciaires, ni les mesures conservatoires ou d'exécution.

##### Article 2

Chaque Etat contractant désigne une Autorité centrale qui assume la charge de recevoir les commissions rogatoires émanant d'une autorité judiciaire d'un autre Etat contractant et de les transmettre à l'autorité compétente aux fins d'exécution. L'Autorité centrale est organisée selon les modalités prévues par l'Etat requis.

Les commissions rogatoires sont transmises à l'Autorité centrale de l'Etat requis sans intervention d'une autre autorité de cet Etat.

##### Article 3

La commission rogatoire contient les indications suivantes:

a) l'autorité requérante et, si possible, l'autorité requise;

b) l'identité et l'adresse des parties et, le cas échéant, de leurs représentants;

c) la nature et l'objet de l'instance et un exposé sommaire des faits;

d) les actes d'instruction ou autres actes judiciaires à accomplir.

Le cas échéant, la commission rogatoire contient en outre:

e) les nom et adresse des personnes à entendre;

f) les questions à poser aux personnes à entendre ou les faits sur lesquels elles doivent être entendues;

### CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

#### CHAPTER I – LETTERS OF REQUEST

##### Article I

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

##### Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

##### Article 3

A Letter of Request shall specify –

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* –

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) les documents ou autres à objets examiner;

h) la demande de recevoir la déposition sous serment ou avec affirmation et, le cas échéant, l'indication de la formule à utiliser;

i) les formes spéciales dont l'application est demandée conformément à l'article 9.

La commission rogatoire mentionne aussi, s'il y a lieu, les renseignements nécessaires à l'application de l'article 11.

Aucune légalisation ni formalité analogue ne peut être exigée.

#### Article 4

La commission rogatoire doit être rédigée dans la langue de l'autorité requise ou accompagnée d'une traduction faite dans cette langue.

Toutefois, chaque Etat contractant doit accepter la commission rogatoire rédigée en langue française ou anglaise, ou accompagnée d'une traduction dans l'une de ces langues, à moins qu'il ne s'y soit opposé en faisant la réserve prévue à l'article 33.

Tout Etat contractant qui a plusieurs langues officielles et ne peut, pour des raisons de droit interne, accepter les commissions rogatoires dans l'une de ces langues pour l'ensemble de son territoire, doit faire connaître, au moyen d'une déclaration, la langue dans laquelle la commission rogatoire doit être rédigée ou traduite en vue de son exécution dans les parties de son territoire qu'il a déterminées. En cas d'inobservation sans justes motifs de l'obligation découlant de cette déclaration, les frais de la traduction dans la langue exigée sont à la charge de l'Etat requérant.

Tout Etat contractant peut, au moyen d'une déclaration, faire connaître la ou les langues autres que celles prévues aux alinéas précédents dans lesquelles la commission rogatoire peut être adressée à son Autorité centrale.

Toute traduction annexée à une commission rogatoire doit être certifiée conforme, soit par un agent diplomatique ou consulaire, soit par un traducteur assermenté ou juré, soit par toute autre personne autorisée à cet effet dans l'un des deux Etats.

#### Article 5

Si l'Autorité centrale estime que les dispositions de la Convention n'ont pas été respectées, elle en informe immédiatement l'autorité de l'Etat requérant qui lui a transmis la commission rogatoire, en précisant les griefs articulés à l'encontre de la demande.

#### Article 6

En cas d'incompétence de l'autorité requise, la commission rogatoire est transmise d'office et sans retard à l'autorité judiciaire compétente du même Etat suivant les règles établies par la législation de celui-ci.

#### Article 7

L'autorité requérante est, si elle le demande, informée de la date et du lieu où il sera procédé à la mesure sollicitée, afin que les parties intéressées et, le cas échéant, leurs représentants puissent y assister. Cette communication est adressée directement auxdites parties ou à leurs représentants, lorsque l'autorité requérante en a fait la demande.

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

#### Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

#### Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

#### Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

#### Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

#### Article 8

Tout Etat contractant peut déclarer que des magistrats de l'autorité requérante d'un autre Etat contractant peuvent assister à l'exécution d'une commission rogatoire. Cette mesure peut être soumise à l'autorisation préalable de l'autorité compétente désignée par l'Etat déclarant.

#### Article 9

L'autorité judiciaire qui procède à l'exécution d'une commission rogatoire, applique les lois de son pays en ce qui concerne les formes à suivre.

Toutefois, il est déferé à la demande de l'autorité requérante tendant à ce qu'il soit procédé suivant une forme spéciale, à moins que celle-ci ne soit incompatible avec la loi de l'Etat requis, ou que son application ne soit pas possible, soit en raison des usages judiciaires de l'Etat requis, soit de difficultés pratiques.

La commission rogatoire doit être exécutée d'urgence.

#### Article 10

En exécutant la commission rogatoire, l'autorité requise applique les moyens de contrainte appropriés et prévus par sa loi interne dans les cas et dans la même mesure où elle y serait obligée pour l'exécution d'une commission des autorités de l'Etat requis ou d'une demande formulée à cet effet par une partie intéressée.

#### Article 11

La commission rogatoire n'est pas exécutée pour autant que la personne qu'elle vise invoque une dispense ou une interdiction de déposer, établies:

- a) soit par la loi de l'Etat requis;
- b) soit par la loi de l'Etat requérant et spécifiées dans la commission rogatoire ou, le cas échéant, attestées par l'autorité requérante à la demande de l'autorité requise.

En outre, tout Etat contractant peut déclarer qu'il reconnaît de telles dispenses et interdictions établies par la loi d'autres Etats que l'Etat requérant et l'Etat requis, dans la mesure spécifiée dans cette déclaration.

#### Article 12

L'exécution de la commission rogatoire ne peut être refusée que dans la mesure où:

- a) l'exécution, dans l'Etat requis, ne rentre pas dans les attributions du pouvoir judiciaire; ou
- b) l'Etat requis la juge de nature à porter atteinte à sa souveraineté ou à sa sécurité.

L'exécution ne peut être refusée pour le seul motif que la loi de l'Etat requis revendique une compétence judiciaire exclusive dans l'affaire en cause ou ne connaît pas de voies de droit répondant à l'objet de la demande portée devant l'autorité requérante.

#### Article 13

Les pièces constatant l'exécution de la commission rogatoire sont transmises par l'autorité requise à l'autorité requérante par la même voie que celle utilisée par cette dernière.

#### Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

#### Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

#### Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

#### Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

- (a) under the law of the State of execution; or
- (b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

#### Article 12

The execution of a Letter of Request may be refused only to the extent that –

- (a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
- (b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

#### Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

Lorsque la commission rogatoire n'est pas exécutée en tout ou en partie, l'autorité requérante en est informée immédiatement par la même voie et les raisons lui en sont communiquées.

#### Article 14

L'exécution de la commission rogatoire ne peut donner lieu au remboursement de taxes ou de frais, de quelque nature que ce soit.

Toutefois, l'Etat requis a le droit d'exiger de l'Etat requérant le remboursement des indemnités payées aux experts et interprètes et des frais résultant de l'application d'une forme spéciale demandée par l'Etat requérant, conformément à l'article 9, alinéa 2.

L'autorité requise, dont la loi laisse aux parties le soin de réunir les preuves et qui n'est pas en mesure d'exécuter elle-même la commission rogatoire, peut en charger une personne habilitée à cet effet, après avoir obtenu le consentement de l'autorité requérante. En demandant celui-ci, l'autorité requise indique le montant approximatif des frais qui résulteraient de cette intervention. Le consentement implique pour l'autorité requérante l'obligation de rembourser ces frais. A défaut de celui-ci, l'autorité requérante n'est pas redevable de ces frais.

### CHAPITRE II – OBTENTION DES PREUVES PAR DES AGENTS DIPLOMATIQUES OU CONSULAIRES ET PAR DES COMMISSAIRES

#### Article 15

En matière civile ou commerciale, un agent diplomatique ou consulaire d'un Etat contractant peut procéder, sans contrainte, sur le territoire d'un autre Etat contractant et dans la circonscription où il exerce ses fonctions, à tout acte d'instruction ne visant que les ressortissants d'un Etat qu'il représente et concernant une procédure engagée devant un tribunal dudit Etat.

Tout Etat contractant a la faculté de déclarer que cet acte ne peut être effectué que moyennant l'autorisation accordée sur demande faite par cet agent ou en son nom par l'autorité compétente désignée par l'Etat déclarant.

#### Article 16

Un agent diplomatique ou consulaire d'un Etat contractant peut en outre procéder, sans contrainte, sur le territoire d'un autre Etat contractant et dans la circonscription où il exerce ses fonctions, à tout acte d'instruction visant les ressortissants de l'Etat de résidence ou d'un Etat tiers, et concernant une procédure engagée devant un tribunal d'un Etat qu'il représente:

a) si une autorité compétente désignée par l'Etat de résidence a donné son autorisation, soit d'une manière générale, soit pour chaque cas particulier, et

b) s'il respecte les conditions que l'autorité compétente a fixées dans l'autorisation.

Tout Etat contractant peut déclarer que les actes d'instruction prévus ci-dessus peuvent être accomplis sans son autorisation préalable.

#### Article 17

En matière civile ou commerciale, toute personne régulièrement désignée à cet effet comme commissaire, peut procéder, sans contrainte, sur le territoire d'un

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

#### Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

### CHAPTER II – TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

#### Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

#### Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

#### Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contract-

Etat contractant à tout acte d'instruction concernant une procédure engagée devant un tribunal d'un autre Etat contractant:

a) si une autorité compétente désignée par l'Etat de l'exécution a donné son autorisation, soit d'une manière générale, soit pour chaque cas particulier; et

b) si elle respecte les conditions que l'autorité compétente a fixées dans l'autorisation.

Tout Etat contractant peut déclarer que les actes d'instruction prévus ci-dessus peuvent être accomplis sans son autorisation préalable.

#### Article 18

Tout Etat contractant peut déclarer qu'un agent diplomatique ou consulaire ou un commissaire, autorisé à procéder à un acte d'instruction conformément aux articles 15, 16 et 17, a la faculté de s'adresser à l'autorité compétente désignée par ledit Etat, pour obtenir l'assistance nécessaire à l'accomplissement de cet acte par voie de contrainte. La déclaration peut comporter toute condition que l'Etat déclarant juge convenable d'imposer.

Lorsque l'autorité compétente fait droit à la requête, elle applique les moyens de contrainte appropriés et prévus par sa loi interne.

#### Article 19

L'autorité compétente, en donnant l'autorisation prévue aux articles 15, 16 et 17 ou dans l'ordonnance prévue à l'article 18, peut déterminer les conditions qu'elle juge convenables, relatives notamment aux heures, date et lieu de l'acte d'instruction. Elle peut de même demander que ces heures, date et lieu lui soient notifiés au préalable et en temps utile; en ce cas, un représentant de ladite autorité peut être présent à l'acte d'instruction.

#### Article 20

Les personnes visées par un acte d'instruction prévu dans ce chapitre peuvent se faire assister par leur conseil.

#### Article 21

Lorsqu'un agent diplomatique ou consulaire ou un commissaire est autorisé à procéder à un acte d'instruction en vertu des articles 15, 16 et 17:

a) il peut procéder à tout acte d'instruction qui n'est pas incompatible avec la loi de l'Etat de l'exécution ou contraire à l'autorisation accordée en vertu desdits articles et recevoir, dans les mêmes conditions, une déposition sous serment ou avec affirmation;

b) à moins que la personne visée par l'acte d'instruction ne soit ressortissante de l'Etat dans lequel la procédure est engagée, toute convocation à comparaître ou à participer à un acte d'instruction est rédigée dans la langue du lieu où l'acte d'instruction doit être accompli, ou accompagnée d'une traduction dans cette langue;

c) la convocation indique que la personne peut être assistée de son conseil, et, dans tout Etat qui n'a pas fait la déclaration prévue à l'article 18, qu'elle n'est pas tenue de comparaître ni de participer à l'acte d'instruction;

d) l'acte d'instruction peut être accompli suivant les formes prévues par la loi du tribunal devant lequel la procédure est engagée, à condition qu'elles ne soient pas interdites par la loi de l'Etat de l'exécution;

ing State in aid of proceedings commenced in the courts of another Contracting State if -

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

#### Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

#### Article 19

The competent authority, in giving the permission referred to in Article 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

#### Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

#### Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence -

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) la personne visée par l'acte d'instruction peut invoquer les dispenses et interdictions prévues à l'article 11.

#### Article 22

Le fait qu'un acte d'instruction n'ait pu être accompli conformément aux dispositions du présent chapitre en raison du refus d'une personne d'y participer, n'empêche pas qu'une commission rogatoire soit adressée ultérieurement pour le même acte, conformément aux dispositions du chapitre premier.

### CHAPITRE III – DISPOSITIONS GÉNÉRALES

#### Article 23

Tout Etat contractant peut, au moment de la signature, de la ratification ou de l'adhésion, déclarer qu'il n'exécute pas les commissions rogatoires qui ont pour objet une procédure connue dans les Etats du *Common Law* sous le nom de «pre-trial discovery of documents».

#### Article 24

Tout Etat contractant peut désigner, outre l'Autorité centrale, d'autres autorités dont il détermine les compétences. Toutefois, les commissions rogatoires peuvent toujours être transmises à l'Autorité centrale.

Les Etats fédéraux ont la faculté de désigner plusieurs Autorités centrales.

#### Article 25

Tout Etat contractant, dans lequel plusieurs systèmes de droit sont en vigueur, peut désigner les autorités de l'un de ces systèmes, qui auront compétence exclusive pour l'exécution des commissions rogatoires en application de la présente Convention.

#### Article 26

Tout Etat contractant, s'il y est tenu pour des raisons de droit constitutionnel, peut inviter l'Etat requérant à rembourser les frais d'exécution de la commission rogatoire et concernant la signification ou la notification à comparaître, les indemnités dues à la personne qui fait la déposition et l'établissement du procès-verbal de l'acte d'instruction.

Lorsqu'un Etat a fait usage des dispositions de l'alinéa précédent, tout autre Etat contractant peut inviter cet Etat à rembourser les frais correspondants.

#### Article 27

Les dispositions de la présente Convention ne font pas obstacle à ce qu'un Etat contractant:

a) déclare que des commissions rogatoires peuvent être transmises à ses autorités judiciaires par d'autres voies que celles prévues à l'article 2;

b) permette, aux termes de sa loi ou de sa coutume interne, d'exécuter les actes auxquels elle s'applique dans des conditions moins restrictives;

c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente Convention.

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

#### Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

### CHAPTER III – GENERAL CLAUSES

#### Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

#### Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

#### Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

#### Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

#### Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

#### Article 28

La présente Convention ne s'oppose pas à ce que des Etats contractants s'entendent pour déroger:

- a) à l'article 2, en ce qui concerne la voie de transmission des commissions rogatoires;
- b) à l'article 4, en ce qui concerne l'emploi des langues;
- c) à l'article 8, en ce qui concerne la présence de magistrats à l'exécution des commissions rogatoires;
- d) à l'article 11, en ce qui concerne les dispenses et interdictions de déposer;
- e) à l'article 13, en ce qui concerne la transmission des pièces constatant l'exécution;
- f) à l'article 14, en ce qui concerne le règlement des frais;
- g) aux dispositions du chapitre II.

#### Article 29

La présente Convention remplacera, dans les rapports entre les Etats qui l'auront ratifiée, les articles 8 à 16 des Conventions relatives à la procédure civile, respectivement signées à La Haye le 17 juillet 1905 et le premier mars 1954, dans la mesure où lesdits Etats sont Parties à l'une ou l'autre de ces Conventions.

#### Article 30

La présente Convention ne porte pas atteinte à l'application de l'article 23 de la Convention de 1905, ni de l'article 24 de celle de 1954.

#### Article 31

Les accords additionnels aux Conventions de 1905 et de 1954, conclus par les Etats contractants, sont considérés comme également applicables à la présente Convention, à moins que les Etats intéressés n'en conviennent autrement.

#### Article 32

Sans préjudice de l'application des articles 29 et 31, la présente Convention ne déroge pas aux conventions auxquelles les Etats contractants sont ou seront Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

#### Article 33

Tout Etat, au moment de la signature, de la ratification ou de l'adhésion, a la faculté d'exclure en tout ou en partie l'application des dispositions de l'alinéa 2 de l'article 4, ainsi que du chapitre II. Aucune autre réserve ne sera admise.

Tout Etat contractant pourra, à tout moment, retirer une réserve qu'il aura faite; l'effet de la réserve cessera le sixième jour après la notification du retrait.

Lorsqu'un Etat aura fait une réserve, tout autre Etat affecté par celle-ci peut appliquer la même règle à l'égard de l'Etat qui a fait la réserve.

#### Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

- (a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- (b) the provisions of Article 4 with respect to the languages which may be used;
- (c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- (d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- (e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- (f) the provisions of Article 14 with respect to fees and costs;
- (g) the provisions of Chapter II.

#### Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8–16 of the earlier Conventions.

#### Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

#### Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

#### Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

#### Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

#### Article 34

Tout Etat peut à tout moment retirer ou modifier une déclaration.

#### Article 35

Tout Etat contractant indiquera au Ministère des Affaires Etrangères des Pays-Bas, soit au moment du dépôt de son instrument de ratification ou d'adhésion, soit ultérieurement, les autorités prévues aux articles 2, 8, 24 et 25.

Il notifiera, le cas échéant, dans les mêmes conditions:

- a) la désignation des autorités auxquelles les agents diplomatiques ou consulaires doivent s'adresser en vertu de l'article 16 et de celles qui peuvent accorder l'autorisation ou l'assistance prévues aux articles 15, 16 et 18;
- b) la désignation des autorités qui peuvent accorder au commissaire l'autorisation prévue à l'article 17 ou l'assistance prévue à l'article 18;
- c) les déclarations visées aux articles 4, 8, 11, 15, 16, 17, 18, 23 et 27;
- d) tout retrait ou modification des désignations et déclarations mentionnées ci-dessus;
- e) tout retrait de réserves.

#### Article 36

Les difficultés qui s'élèveraient entre les Etats contractants à l'occasion de l'application de la présente Convention seront réglées par la voie diplomatique.

#### Article 37

La présente Convention est ouverte à la signature des Etats représentés à la Onzième session de la Conférence de La Haye de droit international privé.

Elle sera ratifiée et les instruments de ratification seront déposés auprès du Ministère des Affaires Etrangères des Pays-Bas.

#### Article 38

La présente Convention entrera en vigueur le sixtième jour après le dépôt du troisième instrument de ratification prévu par l'article 37, alinéa 2.

La Convention entrera en vigueur, pour chaque Etat signataire ratifiant postérieurement, le sixtième jour après le dépôt de son instrument de ratification.

#### Article 39

Tout Etat non représenté à la Onzième session de la Conférence de La Haye de droit international privé qui est Membre de la Conférence ou de l'Organisation des Nations Unies ou d'une institution spécialisée de celle-ci ou Partie au Statut de la Cour Internationale de Justice pourra adhérer à la présente Convention après son entrée en vigueur en vertu de l'article 38, alinéa premier.

L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères des Pays-Bas.

La Convention entrera en vigueur, pour l'Etat adhérent, le sixtième jour après le dépôt de son instrument d'adhésion.

L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérent et les Etats contractants qui auront déclaré accepter cette adhésion. Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères des Pays-Bas; celui-ci en enverra, par la voie diplomatique,

#### Article 34

A State may at any time withdraw or modify a declaration.

#### Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following -

- (a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- (b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- (c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
- (d) any withdrawal or modification of the above designations and declarations;
- (e) the withdrawal of any reservation.

#### Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

#### Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

#### Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

#### Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this

une copie certifiée conforme, à chacun des Etats contractants.

La Convention entrera en vigueur entre l'Etat adhérent et l'Etat ayant déclaré accepter cette adhésion soixante jours après le dépôt de la déclaration d'acceptation.

#### Article 40

Tout Etat, au moment de la signature, de la ratification ou de l'adhésion, pourra déclarer que la présente Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international, ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment de l'entrée en vigueur de la Convention pour ledit Etat.

Par la suite, toute extension de cette nature sera notifiée au Ministère des Affaires Etrangères des Pays-Bas.

La Convention entrera en vigueur, pour les territoires visés par l'extension, le sixantième jour après la notification mentionnée à l'alinéa précédent.

#### Article 41

La présente Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur, conformément à l'article 38, alinéa premier, même pour les Etats qui l'auront ratifiée ou y auront adhéré postérieurement.

La Convention sera renouvelée tacitement de cinq en cinq ans, sauf dénonciation.

La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangères des Pays-Bas.

Elle pourra se limiter à certains des territoires auxquels s'applique la Convention.

La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

#### Article 42

Le Ministère des Affaires Etrangères des Pays-Bas notifiera aux Etats visés à l'article 37, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 39:

- a) les signatures et ratifications visées à l'article 37;
- b) la date à laquelle la présente Convention entrera en vigueur conformément aux dispositions de l'article 38, alinéa premier;
- c) les adhésions visées à l'article 39 et la date à laquelle elles auront effet;
- d) les extensions visées à l'article 40 et la date à laquelle elles auront effet;
- e) les désignations, réserves et déclarations mentionnées aux articles 33 et 35;
- f) les dénonciations visées à l'article 41, alinéa 3.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le <sup>1</sup> ..... 19.., en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats représentés à la Onzième session de la Conférence de La Haye de droit international privé.

Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

#### Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

#### Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following -

- (a) the signatures and ratifications referred to in Article 37;
- (b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- (c) the accessions referred to in Article 39 and the dates on which they take effect;
- (d) the extensions referred to in Article 40 and the dates on which they take effect;
- (e) the designations, reservations and declarations referred to in Articles 33 and 35;
- (f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the <sup>1</sup> ..... day of ....., 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

<sup>1</sup> The Convention was signed on the 18th of March 1970 and thus bears that date.

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**MODEL FOR LETTERS OF REQUEST RECOMMENDED  
FOR USE IN APPLYING THE CONVENTION**

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The text reproduced in the following pages was settled at the second meeting of the Special Commission of the Hague Conference on Private International Law on the Operation of the Convention. It can be printed in any appropriate way, or could simply be reproduced from the following text.

**REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE  
PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON  
THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS**

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of English, French or another language.

In order to avoid confusion, please spell out the name of the month in each date.

Please fill out an original and one copy of this form (use additional space if required).

- 1 **Sender** .....  
[identity and address] .....
- 2 **Central Authority of the Requested State** .....  
[identity and address] .....
- 3 **Person to whom the executed request is to be returned** .....  
[identity and address] .....
- 4 **Specification of the date by which the requesting authority requires receipt of the response to the letter of request**  
  
Date .....  
Reason for urgency\* .....

**IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOUR TO SUBMIT THE FOLLOWING REQUEST:**

- 5 a **Requesting judicial authority** [article 3,a] .....  
[identity and address] .....
- b **To the competent authority of** .....  
[the requested State] .....  
[article 3,c] .....
- c **Name of the case and any identifying number** .....

[\* omit if not applicable]

6 **Names and addresses of the parties and their representatives** (including representatives in the requested state\*)  
[article 3,b]

a **Plaintiff** .....

**Representatives** .....

b **Defendant** .....

**Representatives** .....

c **Other parties** .....

**Representatives** .....

7 a **Nature of the proceedings** (divorce, paternity, breach of contract, product liability, etc)  
[article 3,c] .....

b **Summary of complaint** .....

c **Summary of defence and counterclaim\*** .....

d **Other necessary information or documents\*** .....

[\* omit if not applicable]



16 Specification of privilege or .....  
duty to refuse to give .....  
evidence under the law of the .....  
State of origin .....  
[article 11,b] .....

Attach copies of relevant laws or regulations

17 The fees and costs incurred .....  
which are reimbursable under .....  
the second paragraph of .....  
article 14 or under article 26 .....  
of the Convention will be .....  
borne by\* .....

DATE OF REQUEST .....

SIGNATURE AND SEAL OF THE .....  
REQUESTING AUTHORITY .....

[\* omit if not applicable]

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