THE HAGUE CONVENTION ON

THE TAKING OF EVIDENCE ABROAD

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 discussión 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 the 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".