

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.