

OUTLINE EVIDENCE CONVENTION



Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Purpose of the Convention

The Evidence Convention establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters. The Convention, which applies only between States Parties¹, provides for the taking of evidence (i) by means of *letters of request*, and (ii) by *diplomatic or consular agents* and *commissioners*². The Convention provides effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence.

Letters of Request

A judicial authority of one State Party (requesting State) may request, by means of a letter of request, a Competent Authority of another State Party (State addressed) to obtain evidence which is intended for use in judicial proceedings in the requesting State. The judicial authority of the requesting State transmits the letter of request to the *Central Authority* of the State addressed (see also Arts. 24(2) and 25). The latter then forwards the letter of request to the Competent Authority in its country for execution. The law of the State addressed applies to the execution of the letter of request. In order to expedite and facilitate execution, the Convention provides for an option to allow the participation of members of the judicial personnel of the requesting authority, the parties and/or their representatives, in executing the letter of request. The requesting authority may also request the use of a special method or procedure for execution of the letter of request, provided that this is not incompatible with the law of the State addressed or impossible to perform. Certain States have even amended their domestic law in order to permit techniques for the execution of requests that are customarily used in other States (e.g., the drafting of verbatim transcripts of testimony, the possibility of cross-examination, etc.).

A requested authority unable to perform the letter of request itself may appoint a suitable person to do so (this applies in particular when the request is directed at common law countries; the court addressed may then be unable to perform the letter of request itself because according to its procedure, it is up to the parties to collect the evidence). The person to be questioned or requested to discover documents is entitled to assert a privilege or duty to refuse to give evidence under either the law of the requesting State or the law of the State addressed.

A letter of request shall be executed "expeditiously" and may be refused only in specific cases. Lastly, the execution of the letter of request may not give rise to any reimbursement of taxes or costs; however, the State addressed may require the requesting State to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the requesting State.

Diplomatic or Consular agents, Commissioners

¹ A comprehensive and updated list of Contracting States to the Convention is available on the "Evidence Section" of the Hague Conference website at < www.hcch.net >.

² Art. 33, however, provides an option for any State to exclude wholly or in part the application of the provisions of Chapter II relating to diplomatic and consular agents and commissioners.

Chapter Two of the Convention also allows diplomatic or consular agents and commissioners to take evidence and may be subject to the prior permission of the appropriate authority of the State in which the evidence is to be taken. States may exclude in whole or in part the application of this Chapter. It is therefore critical to check whether a State has made a declaration under this Chapter. Subject to the relevant permission, the representative or commissioner may take evidence, insofar as their proposed actions are compatible with the law of the State of execution and may also have power to administer an oath or take an affirmation. The consular or diplomatic agent or commissioner may not exercise any compulsion against the person concerned by the request. The Convention provides, however, that States may, by declaration, authorize foreign persons permitted to take evidence to apply to the Competent Authority for appropriate assistance to obtain the evidence by compulsion. Unlike letters of request, the taking of evidence is as a rule performed in accordance with the manner required by the law of the Court before which the action is initiated. However, if the manner in which the evidence is taken is forbidden by the law of the State of execution, it may not be used. Cross-examination, during which the witness is questioned by counsel for both parties, is also permitted. Last, the person required to give evidence may, in the same way as pursuant to a letter of request, assert a privilege or duty to refuse to give evidence.

Pre-trial discovery (Art. 23)

Pre-trial discovery is a procedure known to common law countries, which covers requests for evidence submitted *after the filing of a claim but before the final hearing on the merits*. The Convention permits States Parties to ensure that such a request for discovery of documents is sufficiently substantiated so as to avoid requests whereby a party is merely seeking to find out what documents might be in the possession of the other party to the proceedings.

Due to existing misunderstandings of the nature of pre-trial discovery, the 2003 Special Commission clarified the nature and purpose of this procedure and invited States that have made a general non-particularised declaration to revisit their declarations (see Conclusions and Recommendations Nos 29-34 of the 2003 Special Commission, available on the Hague Conference website at < www.hcch.net >).

Monitoring of the Convention

The practical operation of the Convention has been reviewed by several Special Commissions (in 1978, 1985, 1989, 2003 and 2009). A model letter of request was adopted at the 1978 Special Commission and amended in 1985. The Special Commissions have confirmed the continuing interest for this Convention and reaffirmed its undisputable practical usefulness.

For additional information, please visit the "Evidence Section" of the Hague Conference website at < www.hcch.net > or contact the Permanent Bureau of the Hague Conference at: secretariat@hcch.net.