SC 1965 SERVICE & 1970 EVIDENCE & 1980 ACCESS TO JUSTICE

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Title	**Revised Draft of the Practical Handbook on the Operation of the Evidence Convention**
Document	**Prel. Doc. No 8 of May 2024** – *provisional edition, pending the completion of the French and Spanish versions*
Author	PB
Agenda Item	Item TBD
Mandate(s)	C&D Nos 47 and 49 of CGAP 2024 C&D No 36 of CGAP 2021 C&R No 39 of CGAP 2019
Objective	To seek approval, in principle, of the revised draft of the 5th edition of the Practical Handbook on the Operation of the Evidence Handbook
Action to be Taken	For Decision ☐ For Approval ☒ For Discussion ☒ For Action / Completion ☐ For Information ☐
Annexes	Annex I – Revised draft of the 5th edition of the Practical Handbook on the Operation of the Evidence Convention
Related Documents	Prel. Doc. No 12B of December 2023 – 1965 Service, 1970 Evidence, and 1980 Access to Justice Conventions: Plans for the next meeting of the Special Commission

Revised Draft of the Practical Handbook on the Operation of the Evidence Convention

I. Introduction

1 As mandated by the Council on General Affairs and Policy (CGAP) at its 2019 meeting,[1] the Permanent Bureau (PB) has worked to prepare a new edition of the Practical Handbook on the Operation of the Evidence Convention (Evidence Handbook).

2 Since the publication of the current 4th edition of the Evidence Handbook in 2020, there have been developments in case law and in the practice of Contracting Parties in relation to the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention). The PB has been monitoring these developments with a view to preparing the 5th edition of the Evidence Handbook.

3 The revised draft of the 5th edition of the Evidence Handbook (revised Evidence Handbook) will be considered at the upcoming meeting of the Special Commission (SC) on the practical operation of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention), the Evidence Convention, and the *Convention of 25 October 1980 on International Access to Justice* (Access to Justice Convention).[2] The revised Evidence Handbook is provided in the Annex.[3]

II. Timeline

4 The PB has carried out a range of work to prepare the revised Evidence Handbook, as outlined below.

5 In December 2022, the PB circulated the "Questionnaire relating to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters"[4] (2022 Evidence questionnaire) to all HCCH Members and respective Central Authorities designated by Contracting Parties to the Evidence Convention. The responses to the 2022 Evidence questionnaire provided by Contracting Parties have informed the updates to the revised Evidence Handbook.[5] The PB is very grateful to all the respondents for their time and effort devoted in preparing their responses.

6 On matters of substance, a significant change to the revised Evidence Handbook is the incorporation of the *Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention*, with the aim of producing a single text for practitioners and other users of the Evidence Convention. Information collected through the PB's research and monitoring of the operation of the 1970 Evidence Convention has also been included in the revised Evidence Handbook.

7 An earlier version of the revised Evidence Handbook (available as a clean copy and with tracked changes and incorporating feedback provided) was circulated to Members and Central Authorities of Members for comment on 14 November 2023,[6] with a consultation period of 10 weeks (Consultation). The PB has further updated the revised Evidence Handbook in response to the

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1 See C&R No 39 of CGAP 2019. See also C&D No 36 of CGAP 2021, all available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy" then "Archive (2000-2023)".

2 To be held from Tuesday 2 to Friday 5 July 2024 in the Hague Academy Building, on the grounds of the Peace Palace, Carnegieplein, The Hague, the Netherlands.

3 A marked-up version of the revised Evidence Handbook, indicating the changes that have been made to the document since the Consultation, is available on the Secure Portal of the HCCH website under ''Special Commission Meetings" then "Special Commission on the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions".

4 Prel. Doc. No 3 of December 2022, available on the HCCH website at www.hcch.net under "Evidence Convention" then "Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions".

5 Prel. Doc. No 4 of April 2024, available on the HCCH website at www.hcch.net (see path indicated in the note 4 above).

6 See Focused Circular No 61(23) available on the Secure Portal of the HCCH website at www.hcch.net.

feedback received from the Consultation. Please note that all feedback received from the Consultation will be made available on the Secure Portal of the HCCH website in due course.

8 Pursuant to CGAP's mandate at its 2024 meeting,[7] a Working Group (WG) consisting of representatives from a variety of geographical regions was established to review and refine updates to the Evidence Handbook. The input and consideration of the WG will be of great value in addition to the significant engagement on the text that has been received through the Consultation. An online WG meeting will be held on 21 May 2024 to consider the revised Evidence Handbook. The results of the WG meeting, including any recommendations for further amendment and update to the revised Evidence Handbook will be reported back to the meeting of the SC. The revised Evidence Handbook annexed to this Prel. Doc. is subject to the consideration of the WG.

9 The WG will reconvene following the meeting of the SC to ensure that further updates, including relevant Conclusions and Recommendations (C&R) of the SC are incorporated into the final revised Evidence Handbook.

10 As decided by CGAP at its 2024 meeting,[8] following the meeting of the SC, and upon finalisation by the WG, the revised Evidence Handbook will be submitted to CGAP 2025 for approval. However, if the revised Evidence Handbook is finalised well in advance of CGAP 2025, CGAP decided that it could be approved through a written procedure and, in the absence of any objection within one month after the circulation, would be taken to be approved. It was further decided that in the case of one or more objections, the PB would immediately notify Members of any objection and the revised Evidence Handbook would be submitted to CGAP 2025.

11 Following the final approval, the revised Evidence Handbook will be prepared for publication. This will include the preparation of a foreword drafted by the Secretary General, an introduction, the insertion of cross-references, figures, annexes, and an index.

III. Proposal for the SC

12 The SC is invited to approve, in-principle, the revised Evidence Handbook, including recommendations of the WG following its 21 May 2024 meeting. The SC is invited to note that further amendments will be made to the text to reflect the discussions held at the meeting of the SC including relevant C&R, and that the WG will be engaged following the SC meeting to further consider the revised Evidence Handbook before its submission for final approval.

13 The SC is also asked to recommend that CGAP approve the revised Evidence Handbook for publication.

7 See C&D No 47 of CGAP 2024.
8 See C&D No 49 of CGAP 2024.

ANNEX

[Title Page]

Evidence Practical Handbook

Practical Handbook on the Operation of the Evidence Convention

[Placeholder: Foreword]

[move to website]

Introduction [to be updated post SC]

Contents

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Abbreviations

ABA	American Bar Association (United States)
AC	Appeal Cases (United Kingdom)
ACJC	Arrêt de la Cour de Justice, Cour Civile (Switzerland)
AIR	All India Reporter (India)
All ER	All England Law Reports (United Kingdom)
ALR	Australian Law Reports (Australia)
Am. J. Int'l L.	American Journal of International Law (United States)
Am. Rev. Int'l Arb.	American Review of International Arbitration (United States)
ATF	Arrêts du Tribunal fédéral (Switzerland)
Bankr. E.D.N.Y	U.S. Bankruptcy Court for the Eastern District of New York (United States)
BCLC	Butterworths Company Law Cases (United Kingdom)
BCSC	Supreme Court of British Columbia (Canada)
Bda LR	Bermuda Law Reports (Bermuda)
B.U. Int'l L. Rev.	Boston University International Law Review (United States)
B.U. L. Rev.	Boston University Law Review (United States)
BVerfG	Bundesverfassungsgericht (Germany)
C. Apel.	Cámara de Apelaciones (Argentina)
C&D	Conclusions & Decisions (HCCH)
C&R	Conclusions & Recommendations (HCCH)
CA	Cour d'Appel (France) / Corte d'Appello (Italy)
Cass. Civ.	Cour de Cassation, Chambre civile (France)
Cass. Crim.	Cour de Cassation, Chambre criminelle (France)
Cass. (It.)	Corte di Cassazione (Italy)
C.D.	Chikur Din (Israel)
CELAC	Community of Latin American and Caribbean States
CFR	Code of Federal Regulations (United States)
Ch.	Chamber (France)
Ch. C.	Civil Chamber (France)
CILR	Cayman Islands Law Reports (Cayman Islands)

Cir.	Circuit (United States)
CN Com.	Cámara Nacional de Apelaciones en lo Comercial (Argentina)
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law (United States)
DAJV	Deutsch-Amerikanischen Juristen-Vereinigung (Germany)
D.C. (T.A.)	District Court of Tel Aviv (Israel)
D. D.C.	US District Court for the District of Columbia (United States)
D. Del.	US District Court for the District of Delaware (United States)
D. Kan.	US District Court for the District of Kansas (United States)
D. Minn.	US District Court for the District of Minnesota (United States)
DAJV	Deutsch-Amerikanische Juristen-Vereinigung (Germany)
D.C. (T.A.)	District Court of Tel Aviv (Israel)
D.D.C.	US District Court for the District of Columbia (United States)
DLT	Delhi Law Times (India)
ECC	European Commercial Cases (United Kingdom)
E.D. Mich.	US District Court for the Eastern District of Michigan (United States)
E.D.N.Y.	US District Court for the Eastern District of New York (United States)
E.D. Pa	US District Court for the Eastern District of Pennsylvania (United States)
E.D. Va	US District Court for the Eastern District of Virginia (United States)
EU	European Union
EU:C	Court of Justice of the European Union (European Union)
EWCA Civ.	Court of Appeal of England and Wales (Civil Division) (United Kingdom)
EWHC (Ch)	High Court of England and Wales (Chancery Division) (United Kingdom)
EWHC (QB)	High Court of England and Wales (Queen's Bench Division) (United Kingdom)
EWHC (KB)	High Court of England and Wales (King's Bench Division) (United Kingdom)
F.2d	Federal Reporter, Second Series (United States)
F.3d	Federal Reporter, Third Series (United States)
FCA	Federal Court of Australia (Australia)
FCR	Federal Court Reports (Australia)
Fed. R. Civ. P.	Federal Rules of Civil Procedure (United States)

FMCAfam	Federal Magistrates Court of Australia (Family Law Division) (Australia)
F.R.D.	Federal Rules Decisions (United States)
F. Supp. 2d	Federal Supplement, Second Series (United States)
H.C.	High Court of Justice (Israel)
HCCH	Hague Conference on Private International Law
HKC	Hong Kong Cases (People's Republic of China)
HKCA	Hong Kong Court of Appeal (People's Republic of China)
HKCFI	Hong Kong Court of First Instance (People's Republic of China)
HKEC	Hong Kong Electronic Citation (People's Republic of China)
HKLRD	Hong Kong Law Reports and Digest (People's Republic of China)
Hof.	Gerechtshof (Netherlands)
Hong Kong SAR	Hong Kong Special Administrative Region (People's Republic of China)
HR	Hoge Raad (Netherlands)
IEHC	High Court of Ireland (Ireland)
I.L.M.	International Legal Materials (United States)
I.L.Pr.	International Litigation Procedure (United Kingdom)
INDLHC	High Court of Delhi (India)
Int'l & Comp. L.Q.	International and Comparative Law Quarterly (United Kingdom)
Int'l L. Rev.	International Law Review (United States)
Int'l Law.	International Lawyer (United States)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Germany)
Israel L. Rev.	Israel Law Review (Israel)
IT	Information Technology
J. Priv. Int'l L.	Journal of Private International Law (United Kingdom)
J.C.I.	Juris-Classeur de droit international (France)
JLR	Jersey Law Reports (United States)
JOL	Jurisprudentie OnLine (Netherlands)
JOR	Jurisprudentie Onderneming & Recht (Netherlands)
Juzg. Nac. Com.	Juzgado Nacional de primera instancia en lo Comercial (Argentina)
Ktg.	Kantongerecht (Netherlands)
Lloyd's Rep.	Lloyd's Law Reports (United Kingdom)

LSG	Landessozialgericht (Germany)
Macao SAR	Macao Special Administrative Region (People's Republic of China)
M.C. (T.A.)	Magistrates Court of Tel Aviv (Israel)
M.C.C. (T.A.)	Magistrates Court of Tel Aviv, Civil Cases (Israel)
Mod. L. Rev.	Modern Law Review (United States)
N.D. Cal.	US District Court for the Northern District of California (United States)
N.D. Tex.	US District Court for the Northern District of Texas (United States)
NIMaster	Northern Ireland Master's Decisions (United Kingdom)
NIPR	Nederlands Internationaal Privaatrecht (Netherlands)
NJ	Nederlandse Jurisprudentie (Netherlands)
NSWCA	New South Wales Court of Appeal (Australia)
NSWLR	New South Wales Law Reports (Australia)
NSWSC	Supreme Court of New South Wales (Australia)
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics (United States)
OECD	Organisation for Economic Co-operation and Development
OLG	Oberlandesgericht (Germany)
ONSC	Supreme Court of Ontario (Canada)
ONCJ	Ontario Court of Justice (Canada)
Or. Ct. App.	Oregon Court of Appeal (United States)
ORD	Ordinary Procedure of the High Court (Civil Division) (Isle of Man)
P. & H. H.C.	High Court of Punjab and Haryana (India)
P.2d	Pacific Reporter, Second Series (United States)
PB	Permanent Bureau (HCCH)
P.D.	Peskei Din (Israel)
QB or QBD	Queen's Bench Division Reports (United Kingdom)
RCADI	Recueil des cours de l'Académie de droit international de La Haye (Netherlands)
Rép. Dr. int. Dalloz	Répertoire de droit international Dalloz (France)
Res/D/N/DC	Reservations/Declarations/Notifications/Depositary Communications
Rev. crit. d.i.p.	Revue critique de droit international privé (France)
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale (Italy)

RIW	Recht der internationalen Wirtschaft (Germany)
RvdW	Rechtspraak van de Week (Netherlands)
S. Ct.	Supreme Court (Israel)
S. Ct. R.	Supreme Court Reporter (United States)
SASC	South Australia Supreme Court (Australia)
SSC	Session Cases (Scotland)
SC	Special Commission (HCCH)
SC (Bda)	Supreme Court of Bermuda (Bermuda)
S.D.N.Y.	US District Court for the Southern District of New York (United States)
SLR	Singapore Law Reports (Singapore)
Stan. J. Complex Litig.	Stanford Journal of Complex Litigation (United States)
STJ	Supremo Tribunal de Justiça (Portugal)
TASSC	Supreme Court of Tasmania (Australia)
TGI	Tribunal de grande instance (France)
Trib. civ.	Tribunal civil (France)
Trib. inst.	Tribunal d'instance (France)
Trib. Sup.	Superior Tribunal de Justicia (Argentina)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States Reports (United States)
US	United States of America
U.S.C.	United States Code (United States)
U.W. Austl. L. Rev.	University of Western Australia Law Review (Australia)
W.D. Tenn.	U.S. District Court for the Western District of Tennessee (United States)
WL	Westlaw (United States)
WLR	Weekly Law Reports (England and Wales)
ZR	Blätter für zürcherische Rechtsprechung (Switzerland)
ZZP	Zeitschrift für Zivilprozess (Germany)

Glossary

The following key terms are used in this Handbook.

1954 Civil Procedure Convention

An international treaty developed and adopted under the auspices of the HCCH, the full title of which is the *Convention of 1 March 1954 on Civil Procedure*. The 1970 Evidence Convention replaces the provisions of the 1954 Civil Procedure Convention relating to the taking of evidence abroad (*i.e.*, Chapter II, Arts 8-16).

The full text of the 1954 Civil Procedure Convention is available on the HCCH website.

1965 Service Convention

An international treaty developed and adopted under the auspices of the HCCH, the full title of which is the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The full text of the Convention is available on the Service Section of the HCCH website.

1970 Evidence Convention (or Convention)

An international treaty developed and adopted under the auspices of the HCCH, the full title of which is the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. The full text of the Convention is set out in Annex 3 and is also available on the Evidence Section of the HCCH website.

2020 EU Evidence Regulation

A regulation partially applicable as of 1 July 2022 among all European Union (EU) Member States (with the exception of Denmark) on cooperation between the courts in the taking of evidence in civil or commercial matters, the full title of which is *Regulation (EU) No 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast)*.[1] Certain provisions relating to the creation of a decentralised IT system will apply from May 2025. This Regulation replaced the 2001 EU Evidence Regulation.

2001 EU Evidence Regulation

A regulation previously in force among all European Union (EU) Member States (with the exception of Denmark)[2] on the cooperation between the courts in the taking of evidence in civil or commercial matters, the full title of which is *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*. This Regulation was repealed by the 2020 EU Evidence Regulation with certain provisions remaining applicable until the decentralised IT system is established in May 2025.

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1 The full text of the Regulation is accessible from the EUR-Lex database, available at the following address: < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783&qid=1644510578884 > [last consulted on 6 May 2024].

2 The United Kingdom remained bound by the 2001 EU Evidence Regulation until 31 December 2020, pursuant to the Withdrawal Agreement signed between the United Kingdom and the European Union and which entered into force on 1 February 2020.

Acceding Party

A Contracting Party that has joined the 1970 Evidence Convention by accession. The entry into force of the Convention as between an acceding Party and another Contracting Party is subject to an acceptance procedure described in paragraphs 43 *et seq.*

Accession

An international act, whereby a State establishes its consent to be bound by a treaty, such as the 1970 Evidence Convention (see Art. 2 of the *Vienna Convention of 23 May 1969 on the Law of Treaties* (hereinafter, "Vienna Convention on Law of Treaties")).

Article 39 of the 1970 Evidence Convention stipulates that the Convention is open to accession by a State which was not represented at the Eleventh Session of the HCCH provided that the State is either a Member of the HCCH, a member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice.

A State accedes to the Convention by depositing an instrument of accession with the depositary of the Convention. A State may accede to the Convention even if it is not a Member of the HCCH.

For an acceding State, the Convention does not automatically enter into force: the Convention only enters into force if an existing Contracting Party accepts the accession of the acceding State (para. 46). The HCCH website has an overview of acceptances of accession by Contracting Parties entitled 'Spreadsheet showing acceptances of accessions to the Evidence Convention'.

Article 23 declaration

A declaration made by a Contracting Party stating that it will not execute Letters of Request issued by another Contracting Party for the purpose of obtaining pre-trial discovery of documents, as known in common law States. As discussed at paragraph 426, the true object of Article 23 is to ensure that an Article 23 declaration should not be applied to *all* Letters of Request for the production of documents emanating from a common law State during the pre-trial discovery phase, but rather to Letters of Request for the production of documents that *are not sufficiently substantiated*. Contracting Parties that have made an Article 23 declaration – as well as States that are contemplating joining the 1970 Evidence Convention and making an Article 23 declaration – are encouraged to consider qualifying their exclusion to reflect this object.

Blocking statute

The term "blocking statute" generally refers to a law that prohibits a person from providing (or requesting) evidence within the territory of a Contracting Party when that evidence would ultimately be used by foreign authorities. Some Contracting Parties have enacted blocking statutes to force other Contracting Parties to use the 1970 Evidence Convention (instead of their internal laws) to take evidence in their territory (paras 39-41). The term may also refer to a law that limits the power of an authority (*i.e.*, the requested authority) to execute incoming Letters of Request in certain circumstances.

Blue-pencilling

The act of modifying or limiting a Letter of Request to make it compliant with the provisions of the 1970 Evidence Convention, or executable following the methods and procedures of the law of the Requested State. Blue-pencilling is usually performed by the Central Authority of the Requested State or the requested authority.

Central Authority

The authority designated by a Contracting Party pursuant to Article 2(1). Information about Central Authorities designated by Contracting Parties is available on the Evidence Section of the HCCH website.

Chapter I

The provisions of the 1970 Evidence Convention dealing with the system of Letters of Request. Chapter I comprises Articles 1 to 14 of the Convention.

Chapter II

The provisions of the 1970 Evidence Convention dealing with the taking of evidence by Consuls and Commissioners. Chapter II comprises Articles 15 to 22 of the Convention. Under Article 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the status table for the Convention, in column entitled "Res/D/N/DC" on the Evidence Section of the HCCH website.

Civil or commercial matters

A term used to delimit the substantive scope of the 1970 Evidence Convention. The term "civil or commercial" matters is interpreted liberally and in an autonomous manner and applied consistently across both the 1970 Evidence and 1965 Service Conventions.

Commissioner

For the purposes of Chapter II, a person appointed to take evidence (see in particular Art. 17). For a detailed discussion of the use of Commissioners to take evidence under the 1970 Evidence Convention, see paragraphs 488 *et seq*.

Competent authority

For the purposes of Chapter I, the authority that executes the Letter of Request (*i.e.*, the judicial authority).

For the purposes of Chapter II, the authority(ies) designated by the State of Execution to give permission for the taking of evidence under Articles 15, 16 or 17, and the authority designated by the State of Execution to grant applications for assistance to obtain evidence by compulsion under Article 18.

Conclusions & Recommendations (C&R)

The form in which outcomes of meetings of the Special Commission (SC) are developed, reflected and adopted. Under the HCCH Rules of Procedure, Special Commission meetings adopt Conclusions & Recommendations. References to the Conclusions & Recommendations are made throughout this Handbook together with the year of the relevant meeting (*e.g.*, C&R of the 2014 SC refers to the Conclusions & Recommendations adopted by the 2014 meeting of the Special Commission). Conclusions & Recommendations are submitted to CGAP for approval.

Although not binding, Conclusions & Recommendations play an important role in ensuring the uniform interpretation and practical operation of the 1970 Evidence Convention.

Consul

For the purposes of Chapter II, Consul is a term used to denote consular agents and diplomatic officers.

Consular agent

For the purposes of Chapter II, a person engaged to take evidence (see in particular Arts 15 and 16). For convenience, the term Consul is used in this Handbook to denote consular agents and diplomatic officers.

Contracting Party

With reference to the 1970 Evidence Convention, a Contracting Party to the Evidence Convention, whether or not the Convention has entered into force for that Contracting Party (see Art. 2(1)(f) of the *Vienna Convention of 23 May 1969 on the Law of Treaties).* An updated list of all Contracting Parties, called the "status table", is available on the Evidence Section of the HCCH website.

Country Profile

The online profile containing practical and country-specific information about a Contracting Party to the 1970 Evidence Convention, which is available on the Evidence Section of the HCCH website.

2017 Country Profile Questionnaire

A Country Profile Questionnaire was circulated by the Permanent Bureau to Contracting Parties regarding the taking of evidence by video-link under the 1970 Evidence Convention in 2017. Each individual response to the 2017 Country Profile Questionnaire is available on the Evidence Section of the HCCH website.

Court of origin

For the purposes of Chapter II, the court in which proceedings are commenced and in aid of which evidence is being taken.

Depositary

An authority charged with administering an international treaty. In the case of the 1970 Evidence Convention (and all other HCCH Conventions), the depositary is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In fulfilment of its duties, the website of the depositary provides the authoritative record of signatures, ratifications, accessions, and successions, as well as Convention notifications, designations and declarations. The website is available at: https://treatydatabase.overheid.nl/en.

The contact details of the depositary are as follows:

Treaties Division, Ministry of Foreign Affairs

Postal address:	DJZ/VE, PO BOX 20061
	2500 EB The Hague
	The Netherlands
Telephone:	+31 70 759 9456
E-mail:	djz-ve@minbuza.nl
Website:	https://verdragenbank.overheid.nl/en

Diplomatic officer

For the purposes of Chapter II, a person engaged to take evidence (see in particular Arts 15 and 16). For

convenience, the term Consul is used in this Handbook to denote diplomatic officers and consular agents.

Direct taking of evidence

The procedure for the taking of evidence whereby the authority in the Requesting State in which proceedings are pending conducts the witness / expert examination directly.

Explanatory charts outlining the process for the direct taking of evidence are at paras. 105 *et seq.*, see also Annex 2.

e-Discovery

The use of pre-trial discovery to obtain information stored in digital form. e-Discovery is specifically provided for in several common law legal systems.

Evidence

For a detailed discussion of the term evidence, see paragraphs 65 *et seq*.

Evidence Section

A section of the website of the HCCH dedicated to the 1970 Evidence Convention. The Evidence Section can be accessed via a link on the home page of the HCCH website at www.hcch.net.

Explanatory Report

The report drawn up by Mr Philip W. Amram that provides an introduction to the 1970 Evidence Convention as well as an article-by-article commentary on its text. The Explanatory Report was published in *Actes et documents de la Onzième session (Proceedings of the Eleventh Session) (1968)*.[3] The full text of the Explanatory Report is also available on the Evidence Section of the HCCH website.

Hague Conference on Private International Law (HCCH)

A permanent intergovernmental organisation with a mandate to work for the progressive unification of the rules of private international law (Art. 1 of the HCCH Statute) and under the auspices of which the 1970 Evidence Convention was negotiated and adopted. In fulfilment of its mandate, the HCCH develops and adopts Conventions and Instruments and supports their promotion, implementation, and operation.

"Handshake" Project

A project conducted between 2014 and 2017 by the Expert group on videoconferencing of the Working Party on e-Law (e-Justice) within the Council of the European Union, the full name of which was Multi aspect initiative to improve cross-border videoconferencing.[4] The stated aim of the project was "to promote the practical use of and to share best practice and expertise on the organisational, technical and legal aspects of cross-border videoconferencing (VC) in order to help improve the overall functioning of e-Justice systems in Member States and at European level."

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3 HCCH, *Actes et documents de la Onzième session* (1968), Tome IV, *Obtention des preuves à l'étranger*, The Hague, Imprimerie Nationale, 1970, pp. 202-216.

4 Available here: https://e-justice.europa.eu/fileDownload.do?id=c87e10f3-95d9-402a-89b8-fc5c663106a6 [last consulted on 9 April 2024].

HCCH Conventions and Instruments

International treaties negotiated and adopted by the HCCH. A complete list of HCCH Conventions and Instruments is available on the HCCH website. The 1970 Evidence Convention is the twentieth HCCH Convention (including the Statute of the HCCH).

Hearing

For the purpose of this Handbook, the term "hearing" is used to refer to any kind of examination of a witness from whom evidence is to be taken, whether occurring as part of proceedings in a court, or conducted outside of court. See also *"Witness", "Consul" and "Commissioner".*

Indirect taking of evidence

The procedure of taking of evidence whereby an authority in the Requested State in whose territory the witness or expert is located conducts the witness or / expert examination.

Explanatory charts outlining the process for the indirect taking of evidence are at paras 105 *et seq.*, see also Annex 1.

Judicial act

For a detailed discussion of the term "other judicial act", see paragraphs 72-74.

Judicial authority

The term "judicial authority" is used in the 1970 Evidence Convention to describe: (a) the authority that issues Letters of Request (Art. 1(1)), and (b) the authority that executes Letters of Request (Art. 9(1)).

Letter of Request

For the purposes of Chapter I, a device used to request the obtaining of evidence or the performance of some other judicial act. In this Handbook, "letter of request" (without capitalisation) refers to the device under other treaties (*e.g.,* the 1954 Civil Procedure Convention) or internal law for the taking of evidence or performance of some other judicial act (commonly known as "letters rogatory", and less frequently as a "rogatory commission").

Member (of the HCCH)

Any State or Regional Economic Integration Organisation (REIO) may seek to become a Member of the HCCH (pursuant to Arts 2 and 3 of the HCCH Statute). Being a Member of the HCCH should not be confused with being a Contracting Party to the 1970 Evidence Convention (or any other HCCH Convention). A Member is not required to be (or become) a Contracting Party to the 1970 Evidence Convention and a Contracting Party to the Convention is not required to be (or become) a Member of the HCCH. Not all Members of the HCCH have joined the Convention.[5]

Model Form

The model Letter of Request form recommended by the Special Commission. Fillable versions of the Model Form in English, French, and Spanish are available from the Evidence Section of the HCCH website. A copy of the Model Form with instructions for completion is set out at Annex 4.

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[5] For an updated list of Members of the HCCH, see the HCCH website under "HCCH Members". For an updated list of Contracting Parties, see the status table.

Moving party

A party that applies to (or petitions) a judicial authority for a particular order. In the context of the 1970 Evidence Convention, this term most commonly refers to the party that applies to a judicial authority for the issuance of a Letter of Request. In jurisdictions where a Letter of Request may be executed by application of a party (*e.g.,* several common law jurisdictions), the term may also refer to that party.

Permanent Bureau (PB)

The secretariat of the HCCH. Among its responsibilities, the Permanent Bureau monitors the promotion, implementation, and operation of the 1970 Evidence Convention, as it does for all core HCCH Conventions and Instruments. This includes supporting Members and Contracting Parties, as well as organising meetings of the Special Commission.

Pre-trial discovery (of documents)

A process used in common law legal systems that allows the parties to proceedings to obtain (or "discover") information that is relevant to the matters at issue in preparation for trial.

Questionnaires

The Permanent Bureau prepares and circulates Questionnaires to Contracting Parties (as well as some non-Contracting Parties). These Questionnaires are generally circulated in preparation for meetings of the Special Commission on the operation of various HCCH Conventions, and at times, for other purposes. The purpose of Questionnaires is to collect data and information from Contracting Parties to ascertain how, from a practical perspective, the Conventions are operating. Relevantly for the 1970 Evidence Convention, the Permanent Bureau has circulated Questionnaires in May 2008, in preparation for the 2009 Special Commission; in November 2013, in preparation for the 2014 Special Commission; in 2019, regarding the use of information technology, and in December 2022, in preparation for the 2024 Special Commission. These Questionnaires, as well as a synopsis of responses, are available on the Evidence Section of the HCCH website.[6]

Ratification

An international act whereby a State establishes its consent to be bound by a treaty, such as the 1970 Evidence Convention (see Art. 2 of the *Vienna Convention on Law of Treaties*).

In the case of the 1970 Evidence Convention, only States that were represented at the Eleventh Session of the HCCH (*i.e.*, the meeting that adopted the final text of the instrument in 1968) could sign and ratify the Convention. These States comprised 25 Member States (Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Türkiye, former United Arab Republic, United Kingdom, United States of America, and former Yugoslavia) and one non-Member State participating as an Observer (Indonesia). Many of these States have become Contracting Parties to the Convention with the exception of Austria, Belgium, Canada, Indonesia, Ireland, Japan, and the United Arab Republic (the successor State of which is Egypt). Any other State wishing to become a Contracting Party to the Convention may do so by accession.

Report of the 1968 Special Commission

Report prepared by Mr Philip W. Amram on the work of the Special Commission which met in June 1968

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6 Questionnaires, synopsis of the responses and individual responses are available on the Evidence Section of the HCCH.

to develop a draft of the 1970 Evidence Convention. The Report of the 1968 Special Commission, which was drafted in English only, contains additional explanations on various provisions of the Convention, in particular those provisions that were adopted without change, or with only stylistic improvements, from the draft Convention. References in this Handbook to the Report of the 1968 Special Commission are to the version set out in *Actes et documents de la Onzième session* (1968).[7] A copy of the Report is also available on the Evidence Section of the HCCH website.

Requested authority

For the purposes of Chapter I of the Convention, the authority that executes the Letter of Request. The 1970 Evidence Convention provides that a requested authority is a judicial authority of the Requested State that is competent to execute Letters of Request under its internal law.

Requested State

For the purposes of Chapter I of the Convention, the Contracting Party to which a Letter of Request is, or will be, addressed (as the case may be).

Requesting authority

For the purposes of Chapter I of the Convention, the authority that issues a Letter of Request. The 1970 Evidence Convention provides that the requesting authority is a judicial authority of the Requesting State that is competent to issue Letters of Request under its internal law.

Requesting State

For the purposes of Chapter I of the Convention, the Contracting Party from which a Letter of Request is, or will be, issued.

Sending State

In this Handbook, this term is used solely in the context of its meaning under the *Vienna Convention of 24 April 1963 on Consular Relations* (hereinafter, "Vienna Convention on Consular Relations"), referring to the State that sends a diplomatic or consular official to represent its interests abroad.

Special Commission (SC)

A Special Commission (SC) is a body established under Article 8 of the HCCH Statute and convened by its Secretary General to develop and negotiate new Conventions (or other instruments), or to review the practical operation of existing HCCH Conventions. In this Handbook, Special Commission refers to the Special Commission that meets periodically to review the practical operation of the 1970 Evidence Convention.

State of execution

For the purposes of Chapter II, the Contracting Party in whose territory evidence is, or will be, taken.

State of origin

For the purposes of Chapter II, the Contracting Party in the territory of which proceedings are commenced and in aid of which evidence is, or will be, taken. Where evidence is taken by a Consul, the State of origin

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7 *Op. cit.* note 3, pp. 55-73.

is also the State which the Consul represents.

Status table

A list of Contracting Parties that is maintained by the Permanent Bureau based on information received from the depositary. The status table includes important information relating to each Contracting Party, including:

a. the date of entry into force of the Convention for that Contracting Party;

b. the method by which it joined the Convention (*e.g.*, signature / ratification, accession, or succession);

c. for acceding Parties, whether the accession has been accepted by other Contracting Parties;

d. any extensions of application of the Convention;

e. the authorities it has designated under the Convention (*e.g.*, Central Authorities); and

f. any reservations, notifications, or other declarations it has made under the Convention.

The status table is available on the Evidence Section of the HCCH website, together with explanations as to how to read the status table.

Video-link technology (also known as videoconferencing technology)

Technology that allows two or more locations to interact simultaneously by two-way video and audio transmission. Please note that for the purposes of this Handbook, the expression "video-link" encompasses the various technologies employed to enable videoconferencing, remote appearances, or any other form of video presence.

Witness

For the purpose of this Handbook, the term "witness" includes both parties to the proceedings and third parties, from whom testimony is to be taken.

Frequently Asked Questions (FAQ)

Short explanations on various aspects of the 1970 Evidence Convention.*

I. Purpose, nature, and operation of the Convention

1. *What is the purpose of the Convention?*
2. *In what States does the Convention apply?*
3. *Does the Convention need to be applied whenever evidence is to be taken abroad (i.e., is the Convention mandatory or not)?*
4. *What methods of taking evidence are provided for under the Convention, and in what circumstances do they apply?*
5. *May evidence be taken by other methods than those provided for under the Convention?*
6. *Can information technology be used to facilitate the operation of the Convention?*
7. *What types of evidence can be taken under the Convention?*

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8. *Who issues the Letter of Request?*
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18. *May the parties concerned and / or their representatives be present at the execution of a Letter of Request?*
19. *May members of the judicial personnel of the requesting authority be present at the execution of a Letter of Request?*
20. *To what extent may the parties, their representatives and / or judicial personnel participate in the examination of a witness?*
21. *How is a witness examination conducted under Chapter I of the Convention?*

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* Commonly used terms are underlined and are defined in the Glossary.

22. *What privileges and duties do witnesses have?*
23. *Under what circumstances may the execution of a Letter of Request be refused?*
24. *Who informs the requesting authority about the execution of the Letter of Request?*
25. *Who is responsible for costs associated with the execution of a Letter of Request?*
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28. *Can a Contracting Party exclude the application of Chapter II and if so, what are the effects?*
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30. *What is a Commissioner?*
31. *What permission must a Commissioner obtain?*
32. *What types of conditions can be imposed on giving permission?*
33. *What types of evidence may a Consul and Commissioner take?*
34. *How is a witness examination conducted under Chapter II of the Convention?*
35. *May compulsion be used?*
36. *What are the costs for the using Consuls or Commissioners?*
37. *What privileges or duties to refuse to give evidence apply?*
38. *What options are available if evidence cannot be obtained via Chapter II?*

I. Purpose, nature, and operation of the Convention

1. *What is the purpose of the Convention?*

The Convention facilitates the taking of evidence abroad in civil or commercial matters by establishing various means of co-operation among Contracting Parties for the taking of evidence. The Convention does not address or comprise substantive rules relating to the actual taking of evidence.

In particular, the Convention contains a range of provisions that seek to minimise the impact of the differences between civil law systems (where evidence is typically obtained by the court) and common law systems (where evidence is typically obtained by the parties).

The Convention accommodates these different approaches by:

a. improving the "letter of request" system;

b. enlarging the devices for the taking of evidence abroad.

2. *In what States does the Convention apply?*

The Convention only applies between Contracting Parties. However, the Convention *does not automatically apply* between two Contracting Parties if at least one of them *acceded* to the Convention. For each Contracting Party that acceded to the Convention, the Convention only applies between that Contracting Party (Party A) and another Contracting Party (Party B) if:

a. Party B was a Contracting Party to the Convention (whether it became so by accession or ratification) at the time of accession of Party A, and Party B has accepted the accession of Party A; or

b. Party B acceded to the Convention after Party A became a Contracting Party, and Party A has accepted the accession of Party B; or

c. Party B ratified the Convention (whether before or after Party A became a Contracting Party), and Party B has accepted the accession of Party A.

An updated list of all Contracting Parties, called the "status table", as well as a spreadsheet showing acceptances of accessions to the Evidence Convention are available on the Evidence Section of the HCCH website.

3. *Does the Convention need to be applied whenever evidence is to be taken abroad (i.e., is the Convention mandatory or not)?*

Contracting Parties to the Convention have divergent views on whether the Convention is mandatory. However, this difference has not been an obstacle to the effective operation of the Convention.

In general, Contracting Parties with a civil law system tend to view the Convention as mandatory whereas Contracting Parties with a common law system tend to view the Convention as non-mandatory.

For more on the mandatory / non-mandatory character of the Convention, see paras 31 *et seq*.

4. *What methods of taking evidence are provided for under the Convention, and in what circumstances do they apply?*

The Convention comprises two *separate* and *independent* systems for the taking of evidence abroad: Chapter I (Arts 1-14, see Questions 8-27) and Chapter II (Arts 15-22, see Questions 28-38).

Under Chapter I, evidence may be taken by Letter of Request if all of the following requirements are met, *i.e.*, that the Letter of Request:

a. is issued by a judicial authority either for evidence to be obtained or for a judicial act to be performed in another Contracting Party. If one or both of the Contracting Parties have joined by

accession, the Convention will only apply if it is in force as between these Contracting Parties. This must occur by way of the acceptance of accession process (for more information, see Question 2);

b. relates to civil or commercial matters;

c. relates to the obtaining of evidence or the performing of some other judicial act;

d. seeks to obtain evidence that is for use in judicial proceedings that are commenced or contemplated.

Under Chapter II, evidence may be taken by Consul or Commissioner if all of the following requirements are met:

a. the evidence is to be taken in aid of judicial proceedings commenced in a Contracting Party, and taken on the territory of another Contracting Party that has not excluded the application of the relevant provisions of Chapter II (see Question 28). If one or both of the Contracting Parties have joined by accession, the Convention will only apply if it is in force as between these Contracting Parties. This must occur by way of the acceptance of accession process (for more information, see Question 2);

b. the evidence relates to civil or commercial matters;

c. in the case of evidence to be taken by:

   i. a Consul: that the Consul has been engaged to take evidence, is acting in the territory of another Contracting Party and within the area where they exercise their functions and represents the Contracting Party where the judicial proceedings are commenced (for more information and conditions of application, see Question 29);

   ii. a Commissioner: that the Commissioner has been duly appointed to take evidence (for more information and conditions of application, see Question 30);

d. where applicable, the other Contracting Party upon whose territory the evidence is to be taken has given its *permission* for the evidence to be taken.

For more information about Commissioners, see Question 30.

5. *May evidence be taken by other methods than those provided for under the Convention?*

Yes. Contracting Parties may provide for methods of taking of evidence other than those established under the Convention (known as "derogatory channels"). There are three types of derogatory channels:

a. derogation by agreement: two or more Contracting Parties may agree to permit Letters of Request to be transmitted by other methods of transmission (Arts 28(a) and 31);

b. existing or future treaties that derogate from this Convention, which contain provisions on the matters governed therein, concluded (or to be concluded) among Contracting Parties (Art. 32); and

c. unilateral derogation, where a Contracting Party has declared that Letters of Request may be transmitted to its judicial authorities by consular channels or where the internal law or practice of a Contracting Party permits transmission to its judicial authorities upon less restrictive conditions (*e.g.*, direct court-to-court transmission), with no specific declaration needed (Art. 27).

For more on derogatory channels of transmission of Letters of Request, see paras 233-237.

6. *Can information technology be used to facilitate the operation of the Convention?*

Yes. The use of information technology to facilitate the operation of the Convention, including e-mail communication and the taking of evidence by video-link is consistent with the framework of the Convention. In addition, it is generally accepted that neither the spirit nor letter of the Convention

constitutes an obstacle to the use of information technology, and that the application and operation of the Convention can be further improved by relying on such technology (see also Question 9).

For more on electronic Letters of Request, see paragraphs 194-196; for more on the electronic transmission of Letters of Request, see paragraph 238.

Information about the use of video-link to take evidence under the Convention has been introduced in paras 475 *et seq*. Further information about the use of video-link to take evidence can be found throughout this Handbook at relevant sections.

7. *What types of evidence can be taken under the Convention?*

The Convention does not delineate the types of evidence that may be taken under the Convention.

For the taking of evidence under Chapter I (by Letter of Request), Article 3 contemplates Letters of Request being used to examine persons (whether parties or non-parties, witnesses or experts), or to secure the inspection of documents or other property, real or personal. In practice, Letters of Request are most commonly used to obtain oral testimony, documentary evidence, and written responses to written interrogatories.

For the taking of evidence under Chapter II (by Consul or Commissioner), Article 21(a) provides that all kinds of evidence may be taken which are not incompatible with the law of the State of execution or contrary to any permission granted.

For more on what is considered evidence, see paragraph 65, and for a discussion of the types of evidence provided for under Chapter II, see paragraph 512.

II. Letters of Request (Chapter I)

8. *Who issues the Letter of Request?*

A Letter of Request is issued by a judicial authority of the Requesting State, in accordance with the provisions of the law of that Contracting Party.

For more on the issuance of Letters of Request, see paragraph 138.

9. *How is a Letter of Request sent?*

The Convention does not specify which authority in the Requesting State is competent to send the request to the Requested State. This is determined by the internal law of the Requesting State.

Under the main channel of transmission:

a. in some Contracting Parties, the requesting authority transmits the Letter of Request abroad, or authorises it to be transmitted abroad by the moving party (or its representative);

b. in other Contracting Parties, the Letter of Request is first transmitted to a centralised authority (*e.g.*, the Central Authority) of the Requesting State, which itself transmits it to the Requested State.

Letters of Request are sent directly to the Central Authority of the Requested State, without being transmitted through any other authority of the Requested State (Art. 2(2)).

In addition, the Convention does not specify the means by which a Letter of Request is to be transmitted to the Requested State. In practice, the postal service (ordinary or registered mail) or a private courier service is commonly used. An increasing number of Contracting Parties also accept Letters of Request by electronic means (*e.g.,* e-mail or fax), although some only accept this method if the original Letter of Request is subsequently sent by post.

For more on the transmission of Letters of Request (including the channels and means of transmission), see paragraphs 225 *et seq*.

10. *What should a Letter of Request include?*

The content requirements for Letters of Request are set out in Article 3(1) of the Convention. Some of the items listed in Article 3(1) must always be specified in a Letter of Request. Other items must be specified in the Letter of Request only where appropriate.

The Letter of Request may also specify any privileges or duties to refuse to give evidence that the person concerned may have under the law of the Requesting State (Art. 11(b)). On privileges and duties, see Question 22. In addition, a requesting authority may indicate in the Letter of Request if the parties and / or their representatives wish to be present at execution, and request that the information on the time and place of execution be sent directly to them, see Question 19.

For more on the content of Letters of Request, see paragraphs 153 *et seq*.

11. *Is there a prescribed form for the Letter of Request?*

Yes. A Model Form for Letters of Request has been developed by the Special Commission, and while its use is not mandated by the Convention, it has been strongly recommended by the Special Commission as well as by many Central Authorities.

For more on the Model Form, see paragraph 192. A copy of the Model Form with instructions for completion is also set out at Annex 4.

12. *What are the language requirements for the Letter of Request and the attached documents?*

The basic rule under the Convention is that a Letter of Request must be written in the language of the Requested State or accompanied by a translation into that language (Art. 4(1)).

However, under Article 4(2), the Requested State is obliged to accept a Letter of Request written in either English or French, or translated into one of those languages, unless that Contracting Party has made a reservation under Article 33(1). Moreover, Contracting Parties with more than one official language may specify, by declaration, which language is to be used for specified parts of their territory (Art. 4(3)). A Contracting Party may also declare that it will accept Letters of Request in (an)other specified language(s) (Art. 4(4)).

Under Article 4(5), any translation that accompanies a Letter of Request must be certified by:

a. a diplomatic officer or consular agent;

b. a sworn translator; or

c. a person authorised to certify translations in either the Requesting State or Requested State.

These requirements apply equally to attachments to the Letter of Request, which form an integral part of the Letter of Request.

For more on the language requirements for Letters of Request, see paragraph 200. The reservations made by Contracting Parties can be accessed on the Evidence Section of the HCCH website.

13. *Is the Letter of Request subject to legalisation or similar formality?*

No. Article 3(3) of the Convention expressly provides that no legalisation or other similar formality (*e.g.,* an Apostille under the HCCH 1961 Apostille Convention) may be required.

For more on the exemption from legalisation, see paragraph 215.

14. *What is meant by some "other judicial act" (Art. 1)?*

The term "other judicial act" is not defined in the Convention, although it does expressly exclude the service of judicial documents, the issuance of any process by which judgments or orders are executed or enforced, and orders for provisional or protective measures.

For more on "other judicial act", see paragraphs 72 *et seq*.

15. *Who executes a Letter of Request?*

The Letter of Request is executed by a judicial authority that is competent under the law of the Requested State to execute incoming Letters of Request. In most Requested States, Letters of Request are executed by judges, magistrates or judicial officers. In some Requested States (typically common law), the Letter of Request is executed by an "examiner" appointed by a court of the Requested State.

For more on the execution of Letters of Request, see paragraphs 265 *et seq*.

16. *How is a request for the taking of evidence executed, and which law applies?*

The law of the Requested State applies to the execution of a Letter of Request (Art. 9(1)), and the requested authority executes the request either:

a. by the methods and procedures under the law of the Requested State (Art. 9(1)); or

b. by a special method or procedure requested by the requesting authority (Art. 9(2)), unless this is incompatible with the internal law of the Requested State or is impossible of performance by reason of (a) the requesting authority's internal practice and procedure or (b) practical difficulties.

For more on the methods and procedures for executing Letters of Request, see paragraphs 276 *et seq*.

17. *May compulsion be used in the execution of a Letter of Request?*

Yes. In executing the Letter of Request, the requested authority must apply the same measures of compulsion under its internal law as it would in local proceedings (Art. 10).

For more on the use of compulsion in executing Letters of Request, see paragraphs 310 *et seq*.

18. *May the parties concerned and / or their representatives be present at the execution of a Letter of Request?*

Yes. The Convention provides for the parties to the proceedings in the Requesting State and their representatives to be present at the execution of the Letter of Request (Art. 7). The information on the time and place of execution of the Letter of Request must be requested by the requesting authority either in the Letter of Request or by separate transmission. If this information is requested by the requesting authority, it must be sent either to the requesting authority and/or directly to the parties and/or their representatives.

For more on the presence of the parties and/or their representatives, see paragraphs 319-330.

19. *May members of the judicial personnel of the requesting authority be present at the execution of a Letter of Request?*

Yes, provided that the Requested State has made a declaration to that effect (Art. 8). Such a declaration may provide that prior authorisation by a designated competent authority is required.

For more on the presence of members of the judicial personnel, see paragraphs 331-344.

20. *To what extent may the parties, their representatives and / or judicial personnel participate in the examination of a witness?*

Judicial personnel, parties and their representatives may be present at the execution of the Letter of Request (such as at the examination of a witness), however this does not necessarily mean they will be permitted to participate. Participation will be allowed to the extent that it is provided for under the internal law of the Requested State (Art. 9(1)), or to the extent that it is requested as a special method or procedure (Art. 9(2)).

In many Requested States, the parties and/or their representatives are permitted to ask follow-up (or

supplementary) questions directly to the witness, or indirectly through the judicial officer of the Requested State executing the Letter of Request.

For more on executing Letters of Request following a special method or procedure, see paragraph 276.

21. *How is a witness examination conducted under Chapter I of the Convention?*

The requested authority examines the witness by methods and procedures prescribed by the law of the Requested State or by a special method or procedure requested by the requesting authority (Art. 9).

Based on the responses to the 2022 Questionnaire, in the vast majority of Contracting Parties:

a. the execution of a Letter of Request is conducted in a public hearing;

b. the witness is not provided in advance with a copy of the questions or matters to be addressed;

c. the witness is administered with an oath;

d. the witness may be subject to further examination and recall (although this usually requires a second Letter of Request to be sent);

e. documents produced by the witness are not required to be authenticated;

f. the testimony of witnesses is transcribed by court staff or the judge;

g. the final transcript is delivered to the requesting authority; and

h. where the services of an interpreter are requested, the Requested State may require the interpreter to be court-certified.

For more on executing Letters of Request following a special method or procedure, see paragraph 276.

22. *What privileges and duties do witnesses have?*

A witness may refuse to give evidence insofar as they have a privilege or duty to do so under:

a. the law of the Requested State (Art. 11(1)(a));

b. the law of the Requesting State, subject to conditions (Art. 11(1)(b)); or

c. the law of a third State, subject to conditions (pursuant to Art. 11(2)).

For more on privileges and duties to refuse to give evidence, see paragraphs 371 *et seq*.

23. *Under what circumstances may the execution of a Letter of Request be refused?*

The execution of a Letter of Request may be refused on any of the following grounds:

a. the Central Authority in the Requested State considers that the request does not comply with the provisions of the Convention (Art. 5);

b. the execution of the request does not fall within the functions of the judiciary in the Requested State (Art. 12(1)(a));

c. the Requested State considers that the execution would prejudice its sovereignty or security (Art. 12(1)(b));

d. the Letter of Request is issued for the purpose of obtaining pre-trial discovery of documents (as known in common law States), to the extent that the Requested State has made a declaration that it will not execute such Letters of Request (pursuant to Art. 23).

For more on refusal to execute Letters of Request, see paragraphs 399 *et seq*.

24. *Who informs the requesting authority about the execution of the Letter of Request?*

The documents establishing the execution of the Letter of Request must be sent by the requested

authority to the requesting authority through the same channel that was used by the requesting authority (Art. 13(1)).

If the Letter of Request has not been executed in whole or in part, the requesting authority must be informed immediately through the same channel that was used to transmit the Letter of Request, and advised of the reasons for non-execution (Art. 13(2)).

For more on returning documents establishing execution, see paragraphs 394-398, and for giving reasons for refusal to execute Letters of Request, see paragraphs 470-472.

25. *Who is responsible for costs associated with the execution of a Letter of Request?*

The basic rule under the Convention is that the Requested State must not charge for the services provided in the execution of a Letter of Request (Art. 14(1)).

However, the Requesting State may be required to reimburse the following:

a. fees paid to experts and interpreters (Art. 14(2));

b. costs occasioned by the use of a special procedure requested by the Requesting State (Art. 14(2));

c. fees paid for translation, where the requesting authority has failed to comply with an Article 4(3) declaration specifying the language to be used for specified parts of the territory of a Contracting Party with more than one official language (Art. 14(3));

d. costs incurred by the appointment of an examiner to execute a Letter of Request where the law of the Requested State obliges parties to secure evidence themselves, provided that the requesting authority gives its prior consent to such appointment (Art. 14(3));

e. specified expenses in connection with the execution of a Letter of Request because of constitutional limitations (Art. 26).

For more on costs for execution, see paragraphs 351 *et seq*.

26. *Does the Convention apply to pre-trial discovery of documents?*

Yes. However, the Convention allows Contracting Parties, under Article 23, to make declarations that they will not execute Letters of Request issued for the purpose of pre-trial discovery of documents. Some Contracting Parties have made a general, non-particularised declaration that they will not execute any such requests ("full exclusion"). Other Contracting Parties have made a particularised declaration, specifying the circumstances in which they will or will not execute such requests ("qualified exclusion").

In some common law legal systems, pre-trial discovery may take other forms, such as oral testimony. An Article 23 declaration may not be invoked to refuse to execute a Letter of Request for pre-trial discovery of oral testimony.

For more on Article 23 and the pre-trial discovery of documents, see paragraphs 426-448.

27. *What is the timeframe for executing a Letter of Request?*

The Convention does not set a specific timeframe for executing a Letter of Request. Instead, it requires Letters of Request to be executed *expeditiously* (Art. 9(3)).

For more on timing for execution, see paragraphs 346-350.

III. Use of Consuls and Commissioners (Chapter II)

28. *Can a Contracting Party exclude the application of Chapter II and if so, what are the effects?*

Yes, Article 33 permits Contracting Parties to exclude in whole or in part the application of Chapter II by reservation, in which case the relevant provisions of Chapter II may not be used for the taking of evidence

in that Contracting Party. The reservation must be made at the time of signature, ratification, or accession.

For more on the exclusion of Chapter II, see paragraphs 482 *et seq*.

29. *Of whom may a Consul take evidence and when is permission required?*

The basic rule of the Convention is that a Consul representing the State of origin and exercising their functions in the State of execution may take evidence without compulsion of:

a. a national of the State of origin *without* obtaining the permission of the State of execution (Art 15(1)) unless that Contracting Party has declared that prior permission to do so is required (Art. 15(2));

b. a national of the State of execution or of a third State *provided that* the State of execution (through a designated competent authority) has given its permission (Art. 16(1)) unless that Contracting Party has declared that prior permission is not required (Art. 16(2)).

For more on the permission to take evidence under Chapter II, see paragraphs 496-507.

30. *What is a Commissioner?*

The Convention does not define the term "Commissioner" or specify any particular legal prerequisite as to what constitutes a commission for the purpose of taking evidence under the Convention. Accordingly, it is left to the law of the State of origin to determine who may be appointed as a Commissioner and how a Commissioner is appointed. In practice, a Commissioner is often a legal practitioner (whether located in the State of origin or State of execution), but may be a judicial official (including the presiding judge) or a court reporter.

The scope of the power of the Commissioner will be determined by the commission given to them by the appointing authority.

For more on Commissioners, see paragraphs 494 and 495.

31. *What permission must a Commissioner obtain?*

The basic rule is that a Commissioner must obtain the permission of the State of execution (through a designated competent authority) before taking evidence in the territory of that State (Art. 17(1)). The State of execution may declare that evidence may be taken without its prior permission (Art. 17(2)).

For more on the permission to take evidence under Chapter II, see paragraphs 496-507.

32. *What types of conditions can be imposed on giving permission?*

In giving permission, the Convention allows the competent authority to lay down such conditions as it deems fit. Such conditions may include, among other things:

a. fixing a time, place or time period for the taking of the evidence;

b. requiring reasonable advance notice of the time and place of the taking of the evidence to be provided to the competent authority;

c. the presence of a representative of the competent authority or other persons at the taking of the evidence; and

d. defining and limiting the scope and subject-matter of the examination, the documents or other objects to be produced and / or the scope of the entry and inspection of real property.

Applications for permission to take evidence under Chapter II may be subjected to the same conditions of specificity required for Letters of Request issued for the purpose of obtaining pre-trial discovery of documents, notwithstanding the fact that Article 23 applies only to Chapter I.

For more on conditions to the grant of permission, see paragraph 504.

33. *What types of evidence may a Consul and Commissioner take?*

Consuls and Commissioners may take all kinds of evidence which are not incompatible with the law of the State of execution or contrary to any permission given by that Contracting Party (Art. 21(a)). On giving permission, see Questions 31 and 32.

For more on the types of evidence that may be taken under Chapter II, see paragraphs 512 and 513.

34. *How is a witness examination conducted under Chapter II of the Convention?*

The methods and procedures for taking evidence are prescribed by the law of the State of origin (*e.g.*, in consular regulations and / or rules of civil procedure) and are supplemented in a particular case by instructions set out in the appointing document or commission.

The Convention provides that a request to a person to appear or to give evidence must be drawn up in the language of the State of execution, or be accompanied by a translation into that language, unless the recipient of the request is a national of the State of origin (Art. 21(b)).

In addition, the request must also inform the recipient that the witness is entitled to be legally represented and that the witness is not compelled to appear or to give evidence unless the State of execution has made a declaration under Article 18 (Art. 21l) (see Question 35).

The Consul or Commissioner may take evidence in the manner provided by the law applicable to the court before which the proceedings are pending, provided that such manner is not forbidden by the law of the State of execution (Art. 21(d)).

The Consul or Commissioner may also administer an appropriate oath or affirmation, provided that this is not incompatible with the law of the State of execution or contrary to any permission given by that Contracting Party (Art. 21(a)). On giving permission, see Questions 31 and 32.

For more on the taking of evidence under Chapter II, see paragraphs 508 *et seq*.

35. *May compulsion be used?*

Consuls or Commissioners are not permitted by the Convention to compel the giving of evidence. However, they may apply to the State of execution (through a designated competent authority) for assistance to obtain evidence by compulsion, provided that that Contracting Party has made a declaration to that effect (Art. 18(1)).

If assistance is granted, the competent authority is required to apply the same measures of compulsion under its internal law as it would in local proceedings (Art. 18(2)).

In granting the assistance, the competent authority may impose such conditions as it deems fit. This could include the requirement to pay a fee or cover the costs of applying the measures of compulsion.

For more on compulsion, see paragraphs 526-532.

36. *What are the costs associated with using Consuls or Commissioners?*

The taking of evidence by Consul and Commissioner may incur a range of costs, which are generally borne by the party seeking evidence to be taken. Such costs may include, for example:

a. fees for the services of the Consul or Commissioner;

b. travel and accommodation expenses of the Consul, Commissioner and witnesses;

c. hiring costs for the place where the evidence is taken and the use of any particular equipment;

d. fees for interpreters and stenographers; and

e. fees or costs for applying measures of compulsion.

For more on costs for use of Consuls and Commissioners, see paragraphs 540 *et seq*.

37. *What privileges or duties to refuse to give evidence apply?*

The person requested to give evidence may refuse to give evidence insofar as they have a privilege or duty to do so (Art. 21(e)):

a. under the law of the State of execution (Art. 11(1)(a));

b. under the law of the State of origin provided that the privilege or duty has been specified in the document engaging the Consul or the Commissioner or confirmed by the court of origin (Art. 11(1)(b)); or

c. under the law of a third State, to the extent that the State of execution has made a declaration to that effect (Art. 11(2)).

For more on privileges and duties, see paragraphs 545-550.

38. *What options are available if evidence cannot be obtained via Chapter II?*

If an attempt to take evidence under Chapter II fails, due to a refusal of a person to give evidence (Art. 22) or on the basis of another ground not contemplated in Art. 12, evidence may be requested under Chapter I via a Letter of Request.

For more on this situation and other unacceptable grounds of refusal under Chapter I, see paragraphs 452 *et seq*.

PART 1. Purpose, scope, and use of video-link

I. History, purpose and monitoring

1. History

1. The immediate origins of the 1970 Evidence Convention lie in efforts to revise the 1954 Civil Procedure Convention. These efforts began in 1960, when the Ninth Session of the HCCH agreed to re-examine the provisions of that Convention dealing with service of documents abroad.[1] This exercise ultimately led to the adoption of the 1965 Service Convention by the Tenth Session in 1964. In view of the success of that exercise, the delegation of the United States proposed to the Tenth Session that work be undertaken on revising and improving the provisions of the 1954 Civil Procedure Convention dealing with the taking of evidence abroad.[2] In support of this proposal, the United States delegation submitted a memorandum, in which it suggested that "the real purpose of a revision [...] would be to extend beyond the limits of letters rogatory techniques for the taking of evidence abroad".[3]

2. After a short discussion, the Tenth Session recommended the inclusion of "the revision of Chapter II, relating to letters rogatory, of the [Civil Procedure] Convention"[4] in the work programme of the HCCH. This paved the way for the convocation of a Special Commission,[5] which met in June 1968 to develop a draft Convention.[6] The text drafted by the Special Commission was then discussed and refined, and a final text adopted, by the Eleventh Session in October 1968. The Convention was first signed on 18 March 1970 (hence the date in its full title).[7] In accordance with its Article 38(1), the Convention entered into force on 7 October 1972, on the sixtieth day after the deposit of the third instrument of ratification.[8]

3. For more on the history and preparatory works of the Convention, see the Report of the 1968 Special Commission and the Explanatory Report prepared by Mr P.W. Amram.[9]

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1 Set out in Chapter I of the 1954 Civil Procedure Convention. See "Acte final de la Neuvième session", in HCCH, *Actes et documents de la Neuvième session (1960)*, Tome I, *Matières diverses*, The Hague, Imprimerie Nationale, 1961, § B, III, p. 314 [in French only].

2 Set out in Chapter II of the 1954 Civil Procedure Convention. See "Procès-verbal No 6 – Cinquième Commission – séance du vendredi 23 octobre 1964 (extrait)", in HCCH, *Actes et documents de la Dixième session (1964)*, Tome I, *Séances plénières – Divorce*, The Hague, Imprimerie Nationale, 1965, p. 94 [in French only] ("The United States Delegation wishes to propose the following topic for possible consideration at the Eleventh Session: Revision of Chapter II of the Convention of 1954 on Civil Procedure, including alternative methods and techniques for the taking of evidence in a [C]ontracting State other than that in which the action is pending").

3 "Questionnaire on the Taking of Evidence Abroad – Annex II: Memorandum of the United States with respect to the Revision of Chapter II of the 1954 Convention on Civil Procedure", Prel. Doc. No 1 of November 1967, in HCCH, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves à l'étranger*, The Hague, Imprimerie Nationale, 1970, p. 15.

4 *Actes et documents de la Dixième session*, Tome I (*op. cit*. note 2), pp. 78-79.

5 The Special Commission was composed of experts designated by 13 Member States: Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Spain, Switzerland, the United Arab Republic, the United Kingdom, and the United States. The work of the Special Commission was facilitated by a questionnaire prepared by the Permanent Bureau (Prel. Doc. No 1 of November 1967, in *Actes et documents de la Onzième session*, Tome IV, *op. cit.* note 3, p. 9) as well as the responses of the various Members (Prel. Doc. No 2 of May 1968, *ibid.*, p. 21).et

6 "Draft Convention relating to the Taking of Evidence Abroad drafted by the Special Commission on June the 22nd, 1968", Prel. Doc. No 3 of August 1968 (*ibid.*), p. 48.

7 Four States signed the Convention on 18 March 1970: Germany, Norway, Portugal and the United Kingdom.

8 For more on the relationship between the 1970 Evidence Convention and the 1954 Civil Procedure Convention, see paras 562-565.

9 A collection of documents and minutes of the Eleventh Session is contained in *Actes et documents de la Onzième session* (Proceedings of the Eleventh Session), Tome IV, *Obtention des preuves à l'étranger*. Details of these publications are available on the Evidence Section of the HCCH website.

2. Current status of the Convention

4. The 1970 Evidence Convention now forms part of a comprehensive suite of HCCH Conventions and Instruments that facilitate and support transnational litigation and associated cross-border matters. In addition to the 1970 Evidence Convention, these Conventions include the 1961 Apostille Convention, the 1965 Service Convention, the 1980 Access to Justice Convention, the 2005 Choice of Court Convention, the 2015 Choice of Law Principles, and the 2019 Judgments Convention.[10] Contracting Parties to one or more of these Conventions are encouraged to adopt this suite of Instruments to ensure that, for their citizens and businesses domestically and across the globe, there is an effective, robust and an available framework in place to facilitate the resolution of cross-border civil and commercial matters. Further information about the above-mentioned Conventions can be found on the HCCH website.

5. The 1970 Evidence Convention remains today one of the most widely accepted of all the HCCH Conventions. It is in force in over 65 Contracting Parties, representing all major legal systems of the world, making it a key international treaty in the area of international judicial co-operation.

6. Pursuant to Article 39 of the Convention, States that were not represented at the Eleventh Session of the HCCH may join the Convention by accession.

3. Purpose of the Convention

7. The purpose of the Convention is two-fold: (a) to improve the system under the 1954 Civil Procedure Convention for the obtaining of evidence abroad (paras 9-12); and (b) to enlarge the devices for the taking of evidence abroad (paras 13-16).[11] By doing so, the Convention seeks to "improve mutual judicial co-operation in civil or commercial matters".[12] It also reflects the basic principle that "any system of obtaining evidence or securing the performance of other judicial acts internationally must be tolerable in the State of execution [or Requested State], and must also be utilisable in the forum of the State of origin [or Requesting State] in which the action is pending".[13]

Interpreting the 1970 Evidence Convention

8. The provisions of the Convention should be interpreted so as to promote mutual judicial co-operation among Contracting Parties. In general, this means that terms defining the circumstances in which judicial assistance will be granted should be interpreted broadly, and terms defining the circumstances in which judicial assistance will not be granted should be interpreted narrowly.[14]

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10 Conventions and Instrument, the full titles of which are: (i) *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*; (ii) *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; (iii) *Convention of 25 October 1980 on International Access to Justice*; (iv) *Convention of 30 June 2005 on Choice of Court Agreements*; (v) *Principles on Choice of Law in International Commercial Contracts*; (vi) *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*.

11 These purposes were mentioned by the United States in its supporting Memorandum in *Actes et documents de la Onzième session*, Tome IV (*op. cit.* note 3), and are mentioned in the Explanatory Report, § I(A). They are also reflected in the Preamble to the Convention, which expresses the desire of the signatory States "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".

12 Preamble to the Convention.

13 Explanatory Report, para. 5.

14 In *Securities and Exchange Commission v. Eddie Antar*, M.C.C. (T.A.), 5 August 1992, No 5-41/92, the Magistrates Court of Tel Aviv in Israel noted that "the Convention should not be interpreted in a restricted technical manner, since the object of the Convention is to enable the courts to continue with their judicial functions […] without them being blocked by the obstacle of borders". A similar view was expressed by the Supreme Court of the Netherlands in *Arcalon and Ramar B.V. v. United States Bankruptcy Court for the Southern District of California*, HR, 21 February 1986, *NJ 1987*, 149 (English translation in *I.L.M.*, Vol. 28, 1989, p. 1578) [hereinafter the "Arcalon case"] and in *News Int'l plc v. ABN Amro N.V.*, HR, 18 February 2000, *NJ 2001*, 259 . In *Upaid Systems Ltd v. Satyam Computer Services* [2009] 164 DLT 45, the High

i. Improving the letter of request system

9. Under the 1954 Civil Procedure Convention, the obtaining of evidence abroad was done by means of a letter of request (commonly known as a "letter rogatory", and less frequently as a "rogatory commission"). According to this system, a judicial authority of one Contracting Party requested a judicial authority of another Contracting Party to obtain the evidence.[15]

More about letters of request

10. A letter of request is essentially a document drawn up by a court in which it requests a court in another jurisdiction (*e.g.*, a foreign State) to provide some form of judicial assistance. Every Contracting Party represented during the negotiations on the Convention, whether common law or civil law, recognised and used letters of request for the taking of evidence abroad.[16] In some legal systems (particularly civil law jurisdictions), letters of request are used not only for the taking of evidence but for other forms of judicial co-operation, including the service of judicial documents, enforcement of judgments, and the ordering of provisional or protective measures. However, as noted at paragraph 76, a Letter of Request may not be used under the 1970 Evidence Convention for these other forms of judicial co-operation (Art. 1(3)).

11. The Convention introduced a number of improvements to the letter of request system. In particular, the Convention:

    a. Established a Central Authority mechanism to facilitate the transmission and processing of Letters of Request (Art. 2, see paras 240 *et seq.*);

    b. reduced formalities for the transmission of Letters of Request (*i.e.*, abolishing the requirement of legalisation or similar formality) (Art. 3(3), see para. 215);

    c. streamlined content requirements for Letters of Request (Art. 3(1), see paras 153 *et seq.*);

    d. set out detailed rules on language (translation) requirements (Art. 4, see para. 200);

    e. provided a refined costs regime for the execution of Letters of Request (Art. 14, see paras 351 *et seq.*); and

    f. established rules on the privileges and immunities of witnesses (Art. 11, see paras 371 *et seq.*).

12. Since the conclusion of the Convention, there have been significant advancements in technology that were unforeseen at the time the Convention was negotiated. Technology can be and is used in a variety of ways to facilitate the efficient operation of the Convention. This Handbook provides information on how the use of information technology supports the taking of evidence in civil and commercial matters (see paras 475 *et seq.*).

ii. Enlarging the devices for the taking of evidence abroad

13. Under the traditional letter of request system, evidence is taken by a foreign judicial authority. Whilst this arrangement might be adequate for legal systems in which the taking of evidence is a function of the judiciary (*i.e.*, civil law systems), it may not be adequate for systems in which the

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Court of Delhi in India noted (at para. 22) that the content requirements for Letters of Request should not be interpreted in a technical manner. See also A. Heck, "U.S. Misinterpretation of the Hague Evidence Convention", (1986) 24 *Colum. J. Transnat'l L. 231*, pp. 236-7, 248 ("the grounds on which a Contracting Party may refuse execution of a Letter of Request are very narrowly defined and should be construed restrictively. From this fact, as well as from the spirit and purpose of the Convention, it follows that the other provisions of the Convention must be construed liberally").

15 The 1954 Civil Procedure Convention also provides for letters of request to be executed directly by the diplomatic officers or consular agents of the first Contracting Party, but only "if that is allowed by conventions concluded between the States concerned or if the State on the territory of which the [l]etter is to be executed does not object" (Art. 15).

16 Report of the Special Commission by P.W. Amram, Prel. Doc. No 3 of August 1968, in HCCH, *Actes et documents de la Onzième session (1968)*, Tome IV (*op. cit.* note 3), p. 56 [hereinafter "Report of the 1968 SC"].

taking of evidence is a function of the parties and their representatives (*i.e.*, common law systems).[17] In these systems, other devices are used to facilitate the taking of evidence abroad, namely the use of consuls posted to the State in which evidence is to be taken, and court-appointed commissioners.[18] Letters of request were not unknown in these other legal systems, but were traditionally only used where the assistance of a foreign judicial authority was required to obtain evidence by compulsion, or where that Contracting Party had objected to the use of consuls or commissioners.[19]

14. At the request of common law Contracting Parties, the drafters of the Convention sought to accommodate the additional devices of consuls and commissioners into the new multilateral regime.[20] In doing so, however, the drafters were confronted with the need to address different legal philosophies and concepts of judicial sovereignty that were maintained by the various Contracting Parties involved.[21] For many civil law Contracting Parties, the taking of evidence in aid of foreign proceedings was (and still is) considered a judicial act, which, if performed by someone other than a competent authority without the permission of the Contracting Party, would constitute a breach of that Contracting Party's judicial sovereignty.[22] As a compromise, the Convention establishes a mechanism for requesting and granting permission for evidence to be taken using Consuls and Commissioners, and offers Contracting Parties the ability to exclude the application of the operative provisions altogether (see para. 31).

The 1970 Evidence Convention as a bridge between legal systems

15. Contracting Parties employ different methods and procedures to obtain evidence for use in proceedings, in terms of what evidence may be obtained and how it is obtained (see paras 277-292). This difference is particularly noticeable as between civil law systems (where evidence is typically obtained by the court) and common law systems (where evidence is typically obtained by the parties). As one commentator has noted, "[t]here is no field where civil law and common law procedural systems are more divergent than in the context of obtaining information needed for the resolution of a lawsuit".[23]

16. The Convention contains a range of provisions that seek to minimise the impact of these differences on the cross-border taking of evidence. These include:

    a. allowing the requesting authority to issue a Letter of Request for the taking of evidence for

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17 In fact, no common law State was involved in negotiating the text of the 1954 Civil Procedure Convention. Although the United Kingdom did participate at the Seventh Session at which the text of the Civil Procedure Convention was adopted, the text itself was a verbatim reproduction of Chapter II of the *HCCH Convention of 17 July 1905 relating to Civil Procedure*, on which the United Kingdom was not involved in negotiations. According to one commentator, the official view of the UK Government at the time was that the differences inherent between the common law and civil law systems rendered it impossible for the United Kingdom to become Party to a civil procedure convention: P.F. Sutherland, "The Use of the Letter of Request (or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad", (1982) 31 *Int'l & Comp. L.Q. 784*, p. 787.

18 As discussed *infra* at note 700, the device of commissioner has largely been replaced by examiners in common law jurisdictions.

19 For a history of the use of letters of request in English law, see P.F. Sutherland (*op. cit*. note 17), pp. 786-787.

20 The use of consuls to take evidence abroad is recognised in Art. 15 of the 1954 Civil Procedure Convention, but only to a very limited extent.

21 Report of the 1968 SC (*op. cit*. note 16), p. 56.

22 For example, according to the Federal Office of Justice of Switzerland, "[t]he act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures always constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is regarded as a violation of Swiss sovereignty whether the persons affected by these legal procedures are willing to cooperate": *Guidelines on International Judicial Assistance in Civil Matters*, 3rd ed., Berne, January 2013, p. 20, available online at: < https://www.rhf.admin.ch/dam/data/rhf/zivilrecht/wegleitungen/wegleitung-zivilsachen-e.pdf > [last consulted on 8 May 2024]. It may also constitute a violation of Art. 271 of the *Criminal Code* of Switzerland, which is discussed further at note 59 .

23 P.F. Schlosser, "Jurisdiction and International Judicial and Administrative Co-operation", (2000) 284 *RCADI*, p. 114. For a comparison of different methods and procedures of taking evidence in the context of the Convention, see Section of Antitrust Law of the American Bar Association (ABA), *Obtaining Discovery Abroad*, 3rd ed., Chicago, ABA, 2005.

use in judicial proceedings regardless of the stage of the proceedings (Art. 1(2), see paras 80-84);

b. allowing the requesting authority to request that a Letter of Request be executed following a special method or procedure (Art. 9(2), see paras 295-300);[24]

c. allowing a witness to invoke any privileges or duties to refuse to give evidence under the law of the Requesting State (in addition to any privileges or duties under the law of the Requested State or a third State) (Art. 11, see para. 371);

d. allowing the parties and/or their representatives to be present at the execution of the Letter of Request (Art. 7, see paras 319 *et seq.*);

e. allowing a requested authority in a common law jurisdiction to appoint an examiner to execute the Letter of Request (Art. 14(3), see paras 272 *et seq.*); and

f. allowing Consuls and Commissioners to take evidence abroad applying the methods and procedures of the State of origin (Chapter II, see paras 508 *et seq.*).

4. Monitoring the practical operation of the Convention

i. The Evidence Section

17. The Permanent Bureau maintains a section of the HCCH website that is dedicated to the 1970 Evidence Convention (the Evidence Section). The Evidence Section provides a wealth of useful and up-to-date information on the practical operation of the Convention, including:[25]

a. the full text of the Convention (in the three official languages of the HCCH – English, French, and Spanish– as well as translations into a variety of other languages);

b. a list of Contracting Parties (the status table), with explanations on how to read the status table;

c. Country Profiles;

d. explanatory material on the Convention, including the text of the Explanatory Report, the Report of the 1968 Special Commission, and this Handbook; and

e. documentation relating to the Special Commission meetings, including Conclusions & Recommendations and responses to questionnaires prepared by the Permanent Bureau.

ii. Role of the Permanent Bureau

18. The Permanent Bureau conducts and coordinates various activities aimed at promoting, supporting, and monitoring the practical operation of the Convention. In particular, the Permanent Bureau develops explanatory documents, such as this Handbook which is extensively reviewed and finally adopted by Members of the HCCH. It also responds to queries from Contracting Parties concerning the application of the Convention and prepares and organises meetings of the Special Commission. The Permanent Bureau has neither the mandate nor the power to regulate the operation of the Convention (or any other HCCH Convention).

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24 The Special Commission has recognised that this provision "serves a very useful function in bridging the difference between the various systems of civil procedure": "Report on the work of the Special Commission of May 1985 on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters", Part I, § 3(B), reproduced in (1985) 24 *I.L.M.*, p. 1668 (available on the Evidence Section of the HCCH website under "Special Commissions") [hereinafter "Report of the 1985 SC"].

25 The Special Commission has noted that the Evidence Section is a very helpful source of information and has encouraged Central Authorities to publicise it. See C&R No 4 of the 2014 SC.

iii. Special Commission

19. The operation of the Convention (like several other HCCH Conventions) benefits from periodic review by Special Commission. The Special Commission on the practical operation of the Convention has met on a number of occasions, in 1978, 1985, 1989, 2003, 2009, 2014, and 2024.[26]

20. The Special Commission is composed of experts designated by Members of the HCCH and by Contracting Parties to the Convention. It may be attended by representatives of other interested States (in particular those that are considering joining the Convention) and relevant international organisations, in an observer capacity.

21. Meetings of the Special Commission are prepared by the Permanent Bureau on the basis of information provided by Contracting Parties and other interested States and international organisations (generally in response to questionnaires circulated by the Permanent Bureau). They allow for in-depth analysis of important issues relating to the contemporary operation of the Convention, including the definition of terms, good practices in respect of the taking of evidence, and the impact of information technology on evidence gathering and judicial co-operation. More specifically, Special Commission meetings offer a forum for Contracting Parties to raise issues with the practical operation of the Convention, including differences with other Contracting Parties (see also para. 23), and for experts to discuss and devise solutions.

22. The Conclusions & Recommendations adopted by the Special Commission play an important role in the uniform interpretation and application of the Convention. The Conclusions & Recommendations are occasionally referred to by courts when called upon to interpret and apply the Convention,[27] and may be seen as providing evidence of a subsequent practice in the application of the Convention establishing an agreement among the Contracting Parties regarding its interpretation (Art. 31(3)(b) of the *Vienna Convention on Law of Treaties*). The Special Commission has also encouraged Contracting Parties to publicise the Conclusions & Recommendations among users of the Convention, including judicial authorities, judicial officers, practitioners, and Central Authorities.[28]

iv. Resolving differences

23. Article 36 of the Convention provides for difficulties arising between Contracting Parties in connection with the operation of the Convention to be settled through diplomatic channels.[29] The Explanatory Report anticipates that this provision may be invoked in circumstances where there is a dispute between Contracting Parties as to whether a Letter of Request falls within the scope of the Convention, namely whether it is issued in a "civil or commercial matter" (paras 52-57) or whether it seeks to obtain "evidence" (paras 65-70).

24. Article 36 does not affect the ability of a Contracting Party to bring difficulties arising in connection with the operation of the Convention to the attention of the Special Commission, nor the ability of Central Authorities to resolve such difficulties among themselves.[30] Moreover, it does not prevent

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26 In all but the first two meetings (1978 and 1985), the Convention has been reviewed in conjunction with the other HCCH Conventions on legal co-operation (namely the 1961 Apostille, 1965 Service and 1980 Access to Justice Conventions).

27 See, *e.g.,* Supreme Court of the Canton of Zurich (Switzerland), 4 December 2003, No NV030007. Reference to the Report of the 1985 SC (*op. cit.* note 24) was made by the Supreme Court of the Netherlands in the *Arcalon case* (*op. cit.* note 14) to support its finding on the ability of the requesting authority to review a Letter of Request for compliance with the provisions of the Convention.

28 C&R No 2 of the 2014 SC.

29 The provision is similar to Art. 14 of the 1965 Service Convention and Art. 9(2) of the 1954 Civil Procedure Convention.

30 At its meeting in 1989, the Special Commission noted that the corresponding provision in Art. 14 of the 1965 Service Convention "does not prevent Central Authorities from resolving among themselves difficulties arising in connection with

the application of the Convention by a Contracting Party from being reviewed internally by way of appeal or judicial review, as confirmed by the courts of several Contracting Parties.[31]

25. More importantly, to the best of the knowledge of the Permanent Bureau, this provision has never been used in practice, which shows that Contracting Parties find that the meetings of the Special Commission are a more suitable forum to discuss divergent views with regard to the operation of the Convention.[32]

II. Structure, applicability and scope

1. Operational structure of the Convention: Chapter I and Chapter II

26. The 1970 Evidence Convention comprises two *separate* and *independent* systems for the taking of evidence abroad:

    a. Chapter I of the Convention (Arts 1-14) sets out provisions for the taking of evidence by means of Letters of Request – the operation of Chapter I is the focus of Part 2 of this Handbook;

    b. Chapter II of the Convention (Arts 15-22) sets out provisions for the taking of evidence by Consuls and Commissioners – the operation of Chapter II is the focus of Part 3 of this Handbook.

27. Both systems are available to obtain evidence abroad, although a Contracting Party may, by reservation, exclude the application of all or part of Chapter II (see para. 31). There is no hierarchy as between these two systems, and opting to obtain evidence using one system does not prevent the use of the other system.[33]

28. Each system is *self-contained*. If evidence is sought to be taken by means of Letter of Request, then the provisions of Chapter I (and not Chapter II) regulate the taking of evidence. If evidence is sought to be taken by Consul or Commissioner, then the provisions of Chapter II (and not Chapter I) regulate the taking of evidence. Accordingly, a Letter of Request may not be the proper vehicle for applying for the various permissions under Chapter II, although the State of execution may require an applicant to furnish information similar to that set out in Article 3 when applying for a particular permission (see, however, the Guidelines for completing the Model Form and paras 500-502). Similarly, the provisions of Chapter II relating to Commissioners do not apply where a Letter of Request is executed under Chapter I by a court-appointed examiner (as contemplated in Art. 14(3)).[34]

29. For more on the distinction between Commissioners appointed to take evidence abroad under

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the Convention's application and that it is not always necessary to use diplomatic channels first": "Report on the work of the Special Commission of April 1989 on the operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters" (hereinafter "Report of the 1989 SC"), para. 24.

31 *Time, Inc. v. Attorney-General of the State of Israel*, H.C., 27 November 1984, No 676/84, 38(iv) *P.D.* 385, judgment of the High Court of Justice of Israel, discussed in O. Schmalz, "On Recent Cases Concerning Legal Assistance to Foreign States", (1985) 20 (2-3) *Israel L. Rev*. 418, pp. 422-423; *Arcalon* case (*op. cit*. note 14), Supreme Court of the Netherlands; Administrative Commission of the Supreme Court of the Canton of Zurich (Switzerland), 18 May 1998, *ZR* 97 (1998) No 116.

32 See, *e.g.*, the Report of the 1989 SC, which contains discussions of two important and somewhat controversial decisions of the Supreme Court of the United States: *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa* 482 U.S. 522 (1987) (hereinafter the "Aérospatiale case") and *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694; 108 S. Ct. R. 2104 (1988); *I.L.M.* 1988, p. 1093, annotated in: *Am. J. Int'l L*. 1988, p. 816; *IPRax* 1989, p. 313.

33 This is expressly recognised in the Convention with respect to attempts to obtain evidence under Chapter I after an unsuccessful attempt to obtain evidence under Chapter II (Art. 22, discussed further at para. 465).

34 Similarity in terminology under the law of a particular Contracting Party may be the source of some confusion in this regard.

Chapter II and examiners appointed to execute Letters of Request under Chapter I, see paragraphs 366 and 367.

30. Chapter III of the Convention (Arts 23-42) completes the text, setting out provisions on the relationship of the Convention with other treaties and internal law – these provisions are the focus of Part 4 of this Handbook.

i. Excluding the application of Chapter II

31. A Contracting Party may exclude in whole or in part the application of Chapter II by making a reservation pursuant to Article 33.[35] If such a reservation is made, the relevant provisions of Chapter II may not be used for the taking of evidence in that State.[36] For a breakdown of Contracting Parties that have made an Article 33(1) reservation excluding in whole or in part the application of Chapter II, see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", on the distinction between Commissioners appointed to take evidence abroad under Chapter II and 482-484.

2. Applicability

32. A question that has preoccupied discussions of the Special Commission as well as commentary on the Convention is whether the Convention is of a mandatory character (sometimes referred to as an "exclusive" character). In other words, is a Contracting Party obliged to have recourse to the Convention on each occasion that it seeks evidence to be taken in the territory of another Contracting Party? Or rather, may a Contracting Party have recourse to procedures under its internal law that provide for the taking of evidence abroad?[37]

i. 2008 Preliminary Document

33. The question of the mandatory character of the Convention has been comprehensively addressed by the Permanent Bureau in a 2008 Preliminary Document entitled "The Mandatory/Non-Mandatory Character of the Evidence Convention".[38] The findings of this paper may be summarised as follows:

a. The question was not actively considered during negotiations on the Convention,[39] and was not raised at the Special Commission until its meeting in 1985.[40] The question was the main point of discussion at the 1989 meeting of the Special Commission due in large part to the decision handed down two years earlier by the Supreme Court of the United States in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of*

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35 For more on the exclusion of Chapter II, see paras 482-487.

36 According to the Report of the 1968 SC (*op. cit.* note 16), Art. 33 was inserted out of respect for the concepts of judicial sovereignty maintained by some States, according to which Consuls and Commissioners may not take evidence in the territory of the State of execution even if prior permission were to be required and evidence were to be taken of a national of the State of origin (see p. 71).

37 The question of whether a Contracting Party may have recourse to other bilateral, regional or multilateral treaties that provide devices for the taking of evidence abroad is addressed in Part 4 of this Handbook. This question is also distinct from the effect that an international treaty may have on inconsistent internal law, which is a constitutional matter for the Contracting Party concerned. For example, in Germany, the Regional Court of Munich has held that the Convention prevails over the provisions of the *Code of Civil Procedure*: OLG München, 10 June 1981, (1982) 95 *ZZP* 362, at p. 363 . See discussion in Heck (*op. cit.* note 14), p. 247.

38 "The Mandatory / Non-Mandatory Character of the Evidence Convention", Prel. Doc. No 10 of December 2008 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions, available on the Evidence Section of the HCCH website.

39 *Ibid.*, para. 42.

40 *Ibid.*, paras 8-9. At its meeting in 1985, the Special Commission noted that the question was a "new issue" that had not arisen during the previous meeting of the Special Commission in 1978: Report of the 1985 SC (*op. cit.* note 24), Part I, § 6. According to J.-P. Beraudo, the problem appeared during the 1970s, when States in Europe were becoming aware of US courts ordering their citizens and companies to produce documents in their possession: J.-P. Beraudo, Commission rogatoire (matière civile), (1998) *Rép. Dr. int. Dalloz*, Tome I, para. 71.

Iowa,[41] where the Court unanimously held that the Convention was non-mandatory.[42]

b. The question has been discussed at subsequent meetings of the Special Commission without a common view being expressed.[43]

c. The question is a point of difference between Contracting Parties.[44] In general, Contracting Parties which view the Convention as mandatory tend to come from a civil law tradition.[45] Whereas Contracting Parties which come from a common law tradition tend to view the Convention as non-mandatory, with certain Contracting Parties with a civil law system also sharing this view.[46] These differing views have been reflected in case law[47] and commentary.[48]

d. Arguments in support of the view that the Convention is *mandatory* tend to focus on sovereignty concerns, according to which the taking of evidence in the territory of a

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41 The Aérospatiale case (*op. cit.* note 32).

42 Prel. Doc. No 10 of December 2008 (*op. cit*. note 38), paras 10-11.

43 At its meeting in 2003, the Special Commission noted that there were still "differing views" among Contracting Parties as to the mandatory character of the Convention: C&R No 37. At its meeting in 2009, the Special Commission arrived at a similar conclusion, adding that the different views "have not been an obstacle to the effective operation of the Convention": C&R No 53.

44 Prel. Doc. No 10 of December 2008 (*op. cit*. note 38), para. 1.

45 In response to the 2022 Questionnaire, the following Contracting Parties indicated that the Convention was *mandatory*: Albania, Andorra, Argentina, Brazil, China, China (Macao SAR), Croatia, Czech Republic, Estonia, the European Union, France, Georgia, Hungary, Italy, Kazakhstan, Lithuania, Montenegro, Portugal, Serbia, Slovakia, Slovenia, Sweden, Switzerland and Türkiye. The Contracting Parties mentioned here come from civil law traditions, with the exception of Andorra practising mainly customary law along with statutory law, and Georgia having a common law-based system.

46 R. Garnett, *Substance and Procedure in Private International Law*, Oxford University Press, 2012, p. 229. In response to the 2022 Questionnaire, the following Contracting Parties indicated that the Convention was *non-mandatory*: Australia, China (Hong Kong SAR), Finland, Israel, Latvia, Nicaragua, Poland, Singapore, the Netherlands, the United Kingdom, the United States and Viet Nam. Among the Contracting Parties mentioned here, Australia, China (Hong Kong SAR), Israel, Singapore, the United Kingdom, and the United States come from common law traditions; whereas Finland, Latvia, Nicaragua, Poland, the Netherlands and Viet Nam come from civil law traditions.

47 In the United States, state and federal court decisions following the *Aérospatiale* case (*op. cit*. note 32) have confirmed the non-mandatory character of the Convention. The Federal Court of Australia has found the notion of exhausting all reasonable alternatives (such as having recourse to the Convention) before making an order for discovery to be "inconsistent with established authority and principle" (*Nexans S.A. RCS Paris 393 525 852 v. Australian Competition and Consumer Commission* [2014] FCA 255 (20 March 2015) at 32). In addition, the Supreme Court of the State of New South Wales has confirmed that evidence may be obtained abroad outside the Convention by way of subpoena: *Caswell v. Sony/ATV Music Publishing (Australia) Pty Ltd* [2012] NSWSC 986 (29 August 2012). In England, the decision of the High Court (QB) in *Partenreederei M/s Heidberg v. Grosvenor Grain and Feed Co. Ltd* [1993] 2 Lloyd's Rep. 324 is generally considered as supporting the view that the Convention is of a non-mandatory character. See also *Tchenguiz v. Director of the Serious Fraud Office* [2014] EWHC 2379 (Comm). In Jersey, the Royal Court has found that legislation implementing the Convention does not prevent the granting of orders for the taking of evidence under internal law: *I.B.L. Ltd v. Planet Ltd* [1990] JLR 294, 310. In Israel, the Convention was also considered as non-mandatory, Judge Grunis of the Supreme Court has stated that the Convention is not the only means for obtaining documents and information located within the territory of another Contracting Party: *Y. Dori & Tchaikovsky Building & Investments Ltd v. Shamai Goldstein*, S. Ct., 24 September 2007, No 3810/06 (reported in T. Einhorn, *Private International Law in Israel, 3rd ed.,* Alphen aan den Rijn, Kluwer Law International, 2022, p. 613). In France, a State that views the Convention as mandatory, the Court of Appeal of Versailles has noted that the Convention does not affect the taking of evidence abroad in a manner that infringes the sovereignty of the State: *Société Luxguard c. Société SN Sitraco*, CA Versailles, Ch. 14, 9 April 1993, [1996] I.L.Pr. *5, Rev. crit. D.i.p*., 1995, p. 80, reported by G. Couchez. In a decision of 24 January 2013 in the case of *Union des Étudiants Juifs de France c. Twitter Inc*., No 13/50262, the High Court of Paris rejected a request by the defendant to issue a Letter of Request to obtain information stored electronically on its servers located in the United States, and instead ordered production of the information pursuant to the *Code of Civil Procedure* of France. Although the Court did not engage in any discussion about the applicability of the Convention (which appeared to apply), the decision could be seen as supporting the view that the Convention is non-mandatory. However, in a decision of 13 December 2007, No 06/09164, *Kensington International Ltd c. BNP Paribas S.A.*, the Court of Appeal of Paris held that the Convention was of a mandatory character. The Court of Justice of the European Union has found that a court of an EU Member State is not obliged to resort to the Regulation on each occasion that it seeks evidence to be taken in another EU Member State: see *Lippens and Others v. Kortekaas and Others*, C-170/11, EU:C:2012:540 and *ProRail BV v. Xpedys NV and Others*, C-332/11, EU:C:2013:87.

48 See references in Prel. Doc. No 10 of December 2008 (*op. cit.* note 38), p. 3: "As the responses to the Questionnaire demonstrate, opinion is divided on this question. In general, (mainly European) States Parties from a civil law background consider that evidence located abroad ought only to be taken pursuant to the methods set out in the Convention. On the other hand, most common law States Parties consider that a State is not required to have recourse to the Convention and may permissibly take evidence in another State Party by other means."

Contracting Party without its permission (whether pursuant to the Convention, another treaty, or given on a case-by-case basis) would violate the sovereignty of that Contracting Party.[49] At the same time, there are several Contracting Parties that do *not* consider such conduct to be a violation of their sovereignty.

e. Arguments in support of the view that the Convention is *non-mandatory* tend to focus on the permissive language of the Convention,[50] in particular the provision that judicial authorities in one Contracting Party "may" request evidence to be taken by way of a Letter of Request (Art. 1(1)),[51] and that diplomatic officers, consular agents and commissioners "may" take evidence (Arts 15-17).

f. A similar question arises in the context of the 1965 Service Convention, whose "exclusive" character is undisputed.[52] The Special Commission, as well as the case law and commentary, accepts the view that a Contracting Party to the 1965 Service Convention is obliged to have recourse to the Convention on each occasion that it seeks to transmit judicial or extrajudicial documents abroad for service.[53] This view is based on the text of the 1965 Service Convention itself, which provides (in Art. 1) that the Convention "shall apply in all cases [...] where there is occasion to transmit a judicial or extrajudicial document for service abroad". It is also confirmed by the negotiation history, where the question of the exclusive character of the Convention was actively considered by the drafters.[54] The 1970 Evidence Convention contains no such provision (*i.e.*, to the effect that the Convention applies in all cases where there is occasion to take evidence abroad).

34. In the 2008 Preliminary Document, the Permanent Bureau did not take a view on the mandatory character of the Convention, although it acknowledged that it would be of great benefit to all Contracting Parties and to the Convention itself if the question were resolved.

35. Since the publication of the Preliminary Document, the question was raised – but not resolved – at the 2009 meeting of the Special Commission, which reiterated the conclusion from its 2003 meeting that there were still "differing views" among Contracting Parties as to the mandatory character of the Convention. The Special Commission went on to observe that this difference has "not been an obstacle to the effective operation of the Convention".[55]

ii. Assessment

36. The question of the mandatory character of the Convention is ultimately a matter of treaty interpretation. Whether a Contracting Party is under an international obligation to have recourse to the Convention on each occasion that it seeks evidence to be taken in another Contracting Party

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49 See Report of the 1985 SC (*op. cit*. note 24, § 7: "[C]ertain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention on their territory will take on an exclusive character". See also, *e.g.*, the European Union Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (hereinafter General Data Protection Regulation, or "GDPR"), Art. 48 (pursuant to which transfer or disclosure of personal data to courts, tribunals or administrative authorities of third countries may only be carried on the basis of international agreements).

50 See Prel. Doc. No 10 of December 2008 (*op. cit.* note 38), paras 17-22.

51 See, *e.g.*, *Société Luxguard c. Société SN Sitraco* (*op. cit.* note 47).

52 See Permanent Bureau of the HCCH, *Practical Handbook on the Operation of the Service Convention*, 4th ed., The Hague, 2016, para. 50 [hereinafter "Service Handbook"] [The Service Handbook is being updated]. At its meeting in 2009, the Special Commission confirmed the view that the 1965 Service Convention is of an exclusive character, as explained in the Service Handbook: C&R No 12.

53 See Prel. Doc. No 10 of December 2008 (*op. cit*. note 38), paras 6-7.

54 See Rapport explicatif prepared by V. Taborda Ferreira, in HCCH, *Actes et documents de la Dixième session* (*op. cit*. note 2) *(1964)*, Tome III, *Notification*, The Hague, Imprimerie Nationale, 1965, p. 366 [in French only] [hereinafter "Explanatory Report of the 1965 Service Convention"]: "It should be noted that the opinion of the Third Commission was that the Convention was 'mandatory', and that Requesting States were to apply it in all cases where they were required to 'transmit a document for service abroad'." [translation by the Permanent Bureau].

55 C&R No 53 of the 2009 SC.

(and therefore whether it is under an international obligation to refrain from recourse to procedures under internal law that are incompatible with the Convention) depends on the text of the Convention, read in the light of its object and purpose.[56]

37. Whatever view is taken on the question, and whether or not the question can be resolved by the Special Commission, sovereignty concerns persist. The Convention does not overcome these concerns (*i.e.*, joining the Convention does not imply that the Contracting Party no longer considers the taking of evidence in its territory, without its permission, a violation of its sovereignty); rather, it provides an international framework in which that permission may be given. What is crucial is for all Contracting Parties, as well as all stakeholders such as judges, legal practitioners, and government officials, to appreciate that the taking of evidence in the territory of another State outside the Convention *may* be considered by that State to amount to a breach of its sovereignty, which could affect the relations between the States concerned, particularly in the field of judicial co-operation.[57]

Principle of first resort

38. The Special Commission has recommended that Contracting Parties, whatever their views of the mandatory character of the Convention, give priority to the procedures offered by the Convention when evidence abroad is being sought.[58] This is known as the principle of first resort. This principle is particularly relevant where evidence is sought to be taken in the territory of a Contracting Party that views the taking of evidence in its territory without its permission as a breach of sovereignty. However, it equally applies where evidence is sought to be taken in a Contracting Party whose laws allow for evidence to be taken in its territory without its permission, as this is provided for under the Convention itself (Art. 27(b)).

iii. The use of blocking statutes to force recourse to the Convention

39. Some Contracting Parties have enacted "blocking statutes" to prevent evidence being taken in their territory for use in foreign proceedings other than under the Convention (or under some other applicable treaty).[59] These blocking statutes operate to penalise the seeking and possibly also the

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56 General principle of treaty interpretation, reflected in Art. 31 of the *Vienna Convention on Law of Treaties*.

57 In this regard, the American Bar Association (ABA) adopted a resolution in 2012 urging US courts to "consider and respect, as appropriate, the data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data sought in discovery in civil litigation". In an accompanying report, the chair of the ABA Section of International Law noted that "[p]ermitting broad discovery in disregard or even defiance of foreign protective legislation can ultimately impede global commerce, harm the interests of US parties in foreign courts and provoke retaliatory measures".

58 Report of the 1989 SC, para. 34(c), reproduced in (1989) 28 *I.L.M.,* p. 1558 (*op. cit*. note 30)

59 In China, according to Art. 294 of the *Civil Procedure Law of the People's Republic of China*, mutual legal assistance shall be requested and provided through the channels prescribed in an international treaty concluded or acceded to by the People's Republic of China; or in the absence of such a treaty, shall be requested and provided through diplomatic channels. A foreign embassy or consulate to the People's Republic of China may serve process on and investigate and collect evidence from its citizens but shall not violate the laws of the People's Republic of China and shall not take compulsory measures. In the EU, GDPR Art. 48 (pursuant to which transfer or disclosure of personal data to courts, tribunals or administrative authorities of third countries may only be carried on the basis of international agreements). In France, *Law No 80-538* prohibits a national or habitual resident of France, or an officer of a company headquartered in France, from communicating to a foreign authority documents or information relating to economic, commercial, industrial, financial or technical matters, the communication of which is capable of harming the sovereignty, security or essential economic interests of France (Art. 1). It also prohibits any person from requesting, investigating or communicating such documents or information to provide evidence in foreign administrative or judicial proceedings (Art. 1 *bis*). Violations are punishable by imprisonment of up to six months and a fine of up to €18,000. Switzerland does not have a blocking statute, although it has taken the view that the Convention applies exclusively on its territory (*i.e.*, it considers the Convention to be mandatory), and regards any foreign evidence-gathering measure that bypasses the channels prescribed by the Convention to be a violation of its sovereignty. Depending on the circumstances, such measures fall within the scope of Swiss penal law. Art. 271(1) of the *Criminal Code* of Switzerland prohibits any person from carrying

communication of evidence without prior permission, thereby channelling evidence gathering through the devices under the Convention. However, it has also been expressed that calling such laws "blocking statutes" may be misleading, as such laws only reflect the principle of the primacy of treaties over law.[60] Contracting Parties to the Convention may include information about their respective laws in individual Country Profiles available on the Evidence Section of the HCCH website.

40. Although not common, there are cases of individuals being prosecuted for violating these blocking statutes. For example, in a widely publicised decision in the "MAAF case" in 2007,[61] the Court of Cassation of France upheld a fine of €10,000 imposed on a French lawyer who had sought to obtain information in France in aid of proceedings in the United States contrary to the French blocking statute (*Law No 80-538*).

41. However, blocking statutes have not always had their desired effect. In several cases, the courts of Australia, the United States and the United Kingdom have proceeded to order the disclosure of documents from a party in France under internal law despite claims that such disclosure would violate the French blocking statute and with full awareness of the MAAF case.[62] That said, in several recent decisions, the United States courts have considered the French blocking statute and held in favour of the use of the Convention instead.[63] In addition, while there are some cases in which potential prosecution under Article 271(1) of the *Criminal Code of Switzerland* has satisfied the United States courts to resort to the Convention before seeking discovery under internal law,[64] there are equally cases in which US courts have ordered discovery under internal law without resort to the Convention.[65]

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out activities on behalf of a foreign State on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official of Switzerland. Violations are punishable by custodial sentence not exceeding three years or by monetary penalty, or in serious cases by a custodial sentence of not less than one year. The prohibition in Art. 271(1) extends to persons carrying out such activities for a foreign party or organisation, and persons who encourage such activities.

60 N. Lenoir, "Le droit français de la preuve et la protection contre les excès de l'activisme judiciaire international", *Le droit comme facteur d'attractivité*, Larcier, 2023, p. 105.

61 Cass. Crim., 12 December 2007, No 07-83. 228, *Rev. crit. d.i.p*. 2008, p. 626, reported by D. Chilstein.

62 For Australia, see *Australian Competition and Consumer Commission v. Prysmian Cavi e Sistemi Energia S.R.L.* (No 7) [2014] FCA 5 (17 January 2014). For the United Kingdom, see *National Grid Electricity Transmission plc v. Siemens A.G*. [2013] EWHC 822 (Ch) (High Court of England), which includes a discussion of previous English cases considering the French blocking statute. This decision was upheld by the Court of Appeal in *Secretary of State for Health v. Servier Laboratories Ltd* [2013] EWCA Civ. 1234. For the United States, see *Trueposition, Inc. v. LM Ericsson Telephone Co*., No. 11-cv-4574, 2012 WL 707012, at n.6 (E.D. Pa. 6 March 2012), in which the United States District Court for the Eastern District of Pennsylvania noted that "numerous [U.S.] courts have discounted the fear of criminal prosecution in light of the ruling in (the MAAF case) as a basis for permitting French litigants to invoke the Hague Evidence Convention".

63 See, *e.g., Behrens v. Arconic, Inc*., 2020 WL 1250956, at *9 (E.D. Pa. Mar. 13, 2020) (citing the *Aérospatiale* case (*op. cit.* note 32)) and *Salt River Project Agric. Improvement & Power Dist. v. Trench Fr. SAS*, 303 F. Supp. 3d 1004, 1009 (D. Ariz. 2018). In *Behrens v. Arconic, Inc*., the United States District Court for the Eastern District of Pennsylvania found that the case favoured the use of the Convention and noted that "the Supreme Court's rejection of exclusive adherence to the Hague Convention in *Aérospatiale* does not mean that these procedures are entirely irrelevant. To the contrary, the Hague Convention was 'adopted by the President and approved by a unanimous vote of the Senate in 1972.' *Automotive Refinishing, 358 F.3d at 306* (Roth, J., concurring). This means that the Hague Convention coexists with the discovery rules in the Federal Rules of Civil Procedure—it is not inferior nor is it superior. Id. In an appropriate case—that is, a case where the balance of the *Aérospatiale* factors favors the Hague Convention—a court may require that a party in United States litigation seek discovery through the Hague Convention". It is understood that in this case, the judge later appointed a commissioner to channel the transfer of evidence from France to the US by selecting only documents related to the dispute or not posing any difficulty from the perspective of protection of personal data: N. Lenoir (*op. cit*. note 60) p. 105.

64 See, *e.g*., *SEC v. Stanford Int'l Bank, Ltd*, 776 F. Supp. 2d 323 (N.D. Tex. 2011).

65 See cases cited in *Trueposition, Inc. v. LM Ericsson Telephone Co*. (*op. cit*. note 62), *e.g., In re Aspartame Antitrust Litig.*, No. 06-1732, 2008 WL 2275531, at *4 (E.D. Pa. 13 May 2008) (finding that a Swiss blocking statute does not mandate that the Hague Convention should be utilized over the Federal Rules of Civil Procedure); *Schindler Elevator Corp. V. Otis Elevator Co.*, 657 F. Supp. 2d 525, 533-534 (D.N.J. 2009) (party's reliance on Swiss Penal Law unavailing pointing out that foreign statutes prohibiting discovery do not bind American courts); the *Aérospatiale* case (*op. cit.* note 32) (Specifically addressing the French Blocking Statute, the *Aérospatiale* Court stated that "[i]t is clear that American courts are not required to adhere blindly to the directives of such a statute."); *In re Automotive Refinishing Paint Antitrust Litig.*,

3. Scope of the Convention

42. The Convention applies *between Contracting Parties* (see paras 43 *et seq.*) once the Convention has *entered into force* for each Contracting Party (paras 50 and 51). In terms of substantive scope, the Convention applies in *civil or commercial matters* (paras 52-62) to requests for the taking of *evidence* for use in *judicial proceedings* (paras 80-91), or to requests for the performance of *other judicial acts* (paras 72-79).

i. Between Contracting Parties

43. The 1970 Evidence Convention applies only as between Contracting Parties,[66] However, the Convention does not automatically apply between two Contracting Parties if at least one of them has acceded to the Convention.[67] This is because every accession is subject to an acceptance process, which is set out in Article 39(4) of the Convention.[68]

44. This process works as follows: the Convention only applies between an acceding Party (Party A) and another Party (Party B) if:

a. Party B was a Contracting Party to the Convention (whether it became so by accession or ratification) at the time of the accession of Party A, and Party B has accepted the accession of Party A; or

b. Party B acceded to the Convention after Party A became a Contracting Party by accession, and Party A has accepted the accession of Party B; or

c. Party B ratified the Convention (whether before or after State A became a Contracting State),

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358 F.3d 288, 299 (3d Cir. 2004) (stating that Aérospatiale reiterates the well-settled view that blocking statutes do not deprive U.S. courts of their jurisdiction to order a foreign national party to produce evidence located within its country through the Federal Rules); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 454 (E.D.N.Y. 2008) ("The Supreme Court examined … the French Blocking Statute, and ordered discovery notwithstanding the penalties that could be imposed."); *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) ("[T]he French Blocking Statute does not subject defendant to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.").

66 To see who is a Contracting Party to the Convention, go to the "status table" on the Evidence Section of the HCCH website.

67 The Convention is only open for signature and ratification by the States that were represented at the Eleventh Session of the HCCH in 1968, *i.e.*, 25 Member States (Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Türkiye, United Arab Republic, United Kingdom, United States, and Yugoslavia) and one non-Member State participating as an Observer (Indonesia). All of these States have become Contracting Parties to the Convention with the exception of Austria, Belgium, Canada, Indonesia, Ireland, Japan, and the United Arab Republic (the successor State of which is Egypt). Any other State wishing to become a Contracting Party to the Convention may do so by *accession*.

68 The acceptance is done by way of a declaration, which must be deposited with the depositary. This procedure is different to that set out in the 1965 Service Convention (the accession has no effect at all if an objection is raised by a ratifying State) and the 1980 Access to Justice Convention (the accession has no effect as between the acceding State and a Contracting Party that has raised an objection to the accession). The reason for adopting such a procedure in Art. 39(4) of the Convention is not given in the Explanatory Report. However, an identical provision is contained in Art. 38(4) of the *HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("1980 Child Abduction Convention"), and the Explanatory Report to that Convention drawn up by E. Pérez Vera states that, by adopting this procedure, the drafters sought to "maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence". It further states that the choice of a system based on the express acceptance of accession ("opt-in" system), in preference to a more open system by which the accession has effect unless an objection is raised within a specified time ("opt-out" system), demonstrates the importance which the negotiating States attached to the selection of their co-signatories: HCCH, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, p. 437, para. 41. It is somewhat surprising that the drafters of the 1965 Service Convention adopted an acceptance process that was potentially more "fatal" to the relations between a newly acceding State and existing Contracting Parties compared to the Convention insofar as Art. 28(3) of the 1965 Service Convention effectively allows an existing Contracting Party (which has ratified the Convention) to veto any new accession. After all, the Convention tends to involve heightened co-operation between States in an area where procedural systems are most divergent (as noted by P.F. Schlosser, *op. cit.* note 23), which would presumably point towards greater scrutiny of new accessions by existing Contracting Parties. In practice, however, no Contracting Party has ever exercised its "veto" under Art. 28(3) of the 1965 Service Convention.

and Party B has accepted the accession of Party A.[69]

45. For an overview of acceptances of accession, go to the "Spreadsheet showing acceptances of accessions to the Evidence Convention" on the Evidence Section of the HCCH website.

Acceptance of newly acceding Parties

46. New accessions are notified to all Contracting Parties by the depositary (Art. 42(c)). Whether a Contracting Party accepts the accession is an internal consideration for the Contracting Party. When accepting the accession, the Contracting Party should inform the depositary of this by way of a note verbale. In view of the purpose of the Convention, particularly the desire to improve mutual judicial co-operation in civil or commercial matters (see para.7), Contracting Parties are urged to consider each accession with a view to its acceptance.[70]

a) Overseas territories

47. The Convention allows a Contracting Party to extend the Convention to its overseas territories at the time of signature, ratification or accession – by declaration; or at any other time thereafter – by notification to the depositary.

48. Whether the territory of a Contracting Party is an overseas territory (and how those territories are referred to) is a matter for the law of that Contracting Party.[71]

Examples of extensions to overseas and other territories

49. Details about extensions are available from the status table on the Evidence Section of the HCCH website. If a Contracting Party has extended the Convention, this is indicated by a number in the column entitled "Ext". A list of the territories to which the Convention is extended can then be accessed by clicking on the number.

ii. Entry into force

50. The Convention only applies once it has entered into force for each of the Contracting Parties concerned.

51. The Convention enters into force for a Contracting Party on the sixtieth day after it becomes a Contracting Party (*i.e.*, after it deposits its instrument of ratification or accession).[72] To see whether the Convention has entered into force for a Contracting Party, go to the "status table" on the Evidence Section of the HCCH website and check the column entitled "EIF". The date indicated is the date of entry into force.

iii. "Civil or commercial matters"

a) General

52. Each device under the Convention (*i.e.*, Letters of Request under Chapter I and the use of Consuls and Commissioners under Chapter II) is available only in "civil or commercial matters" (Arts 1, 15 and 17). If a Letter of Request is issued in a matter that is not a civil or commercial matter, it may

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69 Although not expressly provided in Art. 39(4), the practice of the depositary dictates that it is always for the ratifying State to accept the accession, even if the ratification occurred *after* the accession.

70 C&R No 8 of the 2014 SC.

71 A. Aust, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, p. 201.

72 Arts 38(2) (for ratifying States) and 39(2) (for acceding States). As the Convention only entered into force after three ratifications (Art. 38(1)), it did not enter into force for the first two Contracting Parties (Denmark and Norway) until the sixtieth day after the deposit by the United States of its instrument of ratification (*i.e.*, 7 October 1972).

be refused execution on grounds that it is non-compliant with the provisions of the Convention.[73]

53. The term "civil or commercial matters" has featured in HCCH Conventions dealing with cross-border civil procedure since the very beginning of the HCCH,[74] and is used to delimit the substantive scope of other HCCH Conventions, such as the 1965 Service Convention,[75] 2005 Choice of Court Convention[76] and the 2019 Judgments Convention.[77] The term is intentionally not defined in the 1970 Evidence Convention or in any other HCCH Convention.[78] There are different interpretations of the term among the various Contracting Parties: in general, with regard to the 1970 Evidence Convention, common law States tend to interpret the term broadly to include all matters that are not criminal matters,[79] whereas civil law States tend to interpret the term more restrictively, drawing an additional distinction between private law and public law matters, the latter being neither civil nor commercial.

54. The Special Commission has provided the following guidance to assist Contracting Parties in determining the scope of the term "civil or commercial matters":

a. the term should be interpreted in an *autonomous manner*, without reference exclusively to either the law of the Requesting State (or State of origin in the case of Chapter II), or to the law of the Requested State (or State of execution in the case of Chapter II), or to both laws cumulatively;[80]

b. the term should be interpreted *liberally*, keeping in mind that the Convention does not expressly exclude any particular subject-matter from its scope;[81]

c. in determining whether a matter is "civil or commercial", the focus should be on the

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73 For more on refusal to execute non-compliant Letters of Request, see para. 404.

74 See, *e.g.*, HCCH Convention of 14 November 1896 relating to Civil Procedure (Art. 5), HCCH Convention of 17 July 1905 relating to Civil Procedure (Art. 8); 1954 Civil Procedure Convention (Art. 8).

75 Art. 1(1) ("The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad").

76 2005 Choice of Court Convention, Art. 1(1) ("This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters").

77 2019 Judgments Convention, Art. 1(1) ("This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters").

78 It was pointed out during negotiations that the inclusion of a definition would be "contrary to the historic policy of the [Hague] Conference": see Report of the 1968 SC (*op. cit*. note 16), p. 57.

79 D. McClean, *International Co-operation in Civil and Criminal Matters*, 3rd ed., Oxford University Press, 2012, p. 33. See also Report of the Special Commission by P. Nygh and F. Pocar, in HCCH, *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 217, at para. 27 (also available on the HCCH website) [hereinafter "Nygh/Pocar Report"].

80 C&R No 40 of the 2014 SC and C&R No 13 of the 2009 SC (applied *mutatis mutandis* to the Convention pursuant to C&R No 46). A similar conclusion was reached by the Special Commission at its meeting in 1989: Report of the 1989 SC (*op. cit.* note 30), para. 26(a). See also M. Frigo & L. Fumagalli, *L'assistenza giudiziaria internazionale in Materia Civile*, Padua, Cedam, 2003, p. 130. The House of Lords of the United Kingdom took a different view in *Re State of Norway's Application* [1990] 1 AC 723, in which Lord Goff, with whom the other members agreed, held that the term "civil or commercial matters", as it appears in the UK implementing legislation, "cannot be construed with reference to any internationally acceptable meaning", and proceeded to apply a combination of the law of the Requesting State (Norway) and the Requested State (United Kingdom). In Hong Kong SAR, this approach was also followed in the HKCFI case of *AB v X* (HCMP 971/2021), [2022] HKCFI 132 where it considered that the proceedings in question must be shown to be of a "civil or commercial matter" in both the law of the Requesting State (United States) and the Requested State (China (Hong Kong SAR)). In Switzerland, the Federal Office of Justice has expressed the opinion that the concept of "civil or commercial matters" should be understood in the broader sense and need not necessarily to correspond to the concept used at a domestic level: *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit*. note 22), p. 5.

81 C&R No 40 of the 2014 SC. See also C&R No 14 of the 2009 SC, applied *mutatis mutandis* to the 1970 Evidence Convention pursuant to C&R No 46. It is relevant to note that other HCCH Conventions whose scope is defined by the term "civil or commercial matters" do contain lists of excluded matters, *e.g.*, the 2005 Choice of Court Convention (Art. 2(2)) and the 2019 Judgments Convention (Art. 2). In the *Arcalon* case (*op. cit*. note 14), the Supreme Court of the Netherlands found that "[t]he nature and tenor of th[e] Convention which encourages the mutual co-operation of the courts of the Contracting Parties, pleads in favour of a broad interpretation of Article 1".

substantive nature of the *cause of action* rather than on the entity making the request.[82] The focus should therefore not be on the nature of the relief sought (*e.g.*, actions where punitive damages are sought),[83] the identity of the parties (*e.g.*, actions where a government agency is a party),[84] or the identity of the judicial authority before which proceedings are commenced (or contemplated) (*e.g.*, actions before a *bankruptcy* court).[85] The focus on the nature of the cause of action underscores the importance of specifying the nature of the proceedings in the Letter of Request when Chapter I is used to take evidence (as required by Art. 3(1)(c)),[86] or when permission from a competent authority may be required in order to take evidence under Chapter II (Arts 15 – 17).

55. The Service Handbook notes that while in practice some Contracting Parties tend to construe the term "civil or commercial matters" more strictly in relation to the 1970 Evidence Convention than in relation to the 1965 Service Convention, the Special Commission has recommended that the terms be applied consistently across both Conventions.[87] Similarly, the Supreme Court of the Canton of Zurich (Switzerland) has stated, in discussing the scope of the term "civil or commercial matters", that identical terms in the HCCH Conventions should not be defined differently.[88] This view has been echoed by the Swiss Federal Office of Justice.[89] Notwithstanding this guidance, certain Contracting Parties have expressed difficulty in interpreting the term "civil and commercial matters".[90]

56. In respect of Letters of Request issued under Chapter I of the Convention, the authorities in some Contracting Parties accept the determination of the requesting authority as to the civil or commercial nature of the matter.[91] However, the authorities of the Requested State (*e.g.*, the

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82 C&R No 14 of the 2009 SC (applied *mutatis mutandis* to the Convention pursuant to C&R No 46). See also C&R No 41 of the 2014 SC, which welcomed the flexible practice reported by Contracting Parties in this regard. This approach was supported by the Supreme Court of the Canton of Zurich (Switzerland) in its decision of 4 December 2003 (*op. cit*. note 27). See also M. Frigo & L. Fumagalli (*op. cit.* note 80), pp. 130-131.

83 This view was supported by a number of experts during the 1989 meeting of the Special Commission with respect to the 1965 Service Convention: Report of the 1989 SC (*op. cit.* note 30), para. 8(d). See also M. Frigo & L. Fumagalli (*op. cit.* note 80), p. 132. In *Sykes v. Richardson* (2007) 70 NSWLR 66, the Supreme Court of New South Wales (Australia) agreed to order the execution of a Letter of Request "[d]espite the punitive nature of the treble damages sought". In *Siemens A.G. v. Bavarian Ministry of Justice*, 27 November 1980, No 9 VA 4/80 [hereinafter the "Siemens case"], the Higher Regional Court of Munich (Germany) rejected the argument that proceedings were not civil or commercial in nature on account of the fact that they involved a counterclaim for punitive damages. An English translation of the decision is reproduced in (1981) 20 *I.L.M.*, p. 1025, and published in part in *RIW*, 1989, p. 556. Several decisions of the courts in Germany in the context of the 1965 Service Convention confirm the view that punitive damages are irrelevant to the characterisation of a cause of action as "civil or commercial": see, *e.g.*, OLG Düsseldorf, 22 July 2007, No I-3 VA 9/03, and OLG Frankfurt am Main, 8 February 2010, No 20 VA 15/09. However, these decisions also reflect a view in Germany that a cause of action will not be characterised as "civil or commercial" where the law provides for a proportion of the eventual damage award to be paid into the public treasury of the Requesting State (*e.g.*, pursuant to "split-recovery statutes" in force in the United States). Actions where punitive damages are sought are also considered at paras 418 *et seq.* and paras 456 *et seq.* in the context of grounds for refusal.

84 The execution of Letters of Request against a government agency may be subject to sovereign immunity under the law of the Requested State (see para. 379) or subject to refusal on grounds that it is prejudicial to the sovereignty and security of the Requested State (paras 418 *et seq.*). Liability of a government agency for acts or omissions in the exercise of sovereign authority (*acta jure imperii*), and actions brought by a State acting in a regulatory capacity (particularly in anti-trust (competition) matters, as discussed at para. 60), may be considered by some States to fall outside the scope of the term "civil or commercial matters". However, the fact that a State is party to proceedings should not alone deny the characterisation of a cause of action as "civil or commercial".

85 This approach has been followed in subsequent work of the HCCH in other areas of civil procedure, *e.g.*, the Nygh/Pocar Report (*loc. cit.* note 79) (discussing the meaning of the term "civil and commercial" in the context of the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters). See also M. Frigo & L. Fumagalli (*op. cit*. note 80), pp. 130-131.

86 For more on fulfilling this content requirement, see para. 165.

87 Service Handbook (*op. cit*. note 52), para. XX. See also C&R No 40 of the 2014 SC.

88 Decision of 4 December 2003 (*op. cit.* note 27).

89 Guidelines on International Judicial Assistance in Civil Matters (*op. cit.* note 22), p. 4.

90 See responses to question 6 of the 2022 Questionnaire. Certain Contracting Parties indicated that they had difficulties with administrative cases, while others had difficulties with proceedings brought by a State or as a State as a party to the proceedings, as well as by State authorities.

91 See Report of the 1985 SC (*op. cit.* note 24), Part I, § 1(A)(2).

Central Authority or the requested authority) are not bound by the determination of the requesting authority,[92] the authorities of some Contracting Parties review the nature of the proceedings to determine themselves whether the Letter of Request has been issued in a civil or commercial matter, and therefore whether it complies with the provisions of the Convention.[93] In this regard, the 1970 meeting of the Special Commission observed that in practice, Contracting Parties appeared to apply more rigorous controls in connection with the taking of evidence than in connection with the service of documents.[94] As noted above, the Special Commission has more recently recommended that this term be applied consistently across both the 1965 Service and 1970 Evidence Conventions.[95] Central Authorities have shown a willingness to address issues that may arise with the characterisation of a particular matter by way of direct communication with the relevant authorities of the Requesting State,[96] a practice that is encouraged by the Special Commission.[97]

57. The Special Commission has acknowledged that in some cases (albeit exceptionally), proceedings that are civil or commercial in nature may be directly linked to proceedings that are not (*e.g.*, criminal proceedings), with a result that the evidence sought in the first proceedings may be used in the second proceedings. Where evidence is sought under Chapter I, the authorities of the Requested State may determine that the evidence sought is not actually intended for use in a civil or commercial matter and may therefore refuse to execute the Letter of Request as falling outside the substantive scope of the Convention. This does not mean, however, that the Requested State may refuse to execute the Letter of Request on grounds alone of a mere possibility that the evidence sought may be subsequently used for purposes other than in civil and commercial proceedings.[98] In the spirit of the Convention to improve mutual judicial co-operation (as discussed at para. 7), the authorities of the Requested State should avoid "second-guessing" the motives of the requesting authority in issuing a particular Letter of Request.[99]

b) Specific categories

58. The Special Commission has noted a "historical evolution" in the scope of the term "civil or commercial matters", suggesting that as judicial co-operation between Contracting Parties expands, there will be greater consensus among Contracting Parties as to the specific categories of matters that fall within the scope of the Convention.[100]

59. There appears to be broad support among Contracting Parties that bankruptcy and insolvency

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92 This view was shared by the Supreme Court of the Netherlands in the *Arcalon* case (*op. cit.* note 14), where the Court reasoned that because the Convention "uses wide terms which are not defined by the Convention and which in the Contracting Parties can easily be conceived differently… in the absence of an explicit rule on this point, it is implausible that the authorities of the Requested State, regarding the question whether a Letter of Request complies with the provisions of the Convention, would be bound by the judgment of the judicial authority of the Requesting State".

93 This view was supported by a number of experts during the 1989 meeting of the Special Commission in respect of the 1965 Service Convention; see Report of the 1989 SC (*op. cit.* note 30), para. 8(a). See also D. Epstein, J. Snyder & C.S. Baldwin IV, *International Litigation: A Guide to Jurisdiction, Practice, and Strategy*, 4th ed., Leiden/Boston, Martinus Nijhoff Publishers, 2010, § 10.10[4].

94 Report on the work of the Special Commission on the operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in HCCH, *Actes et documents de la Quatorzième session (1980)*, Tome IV, *Judicial co-operation*, The Hague, Imprimerie Nationale, 1983, p. 418, Part I § 1 [hereinafter "Report of the 1978 SC"]. The Special Commission added that a more cautious approach under the Convention was "understandable" given that the taking of evidence involves not merely the simple transmission of documents, but also the participation directly or indirectly of the authorities of the Requested State in a proceeding that is unfolding abroad.

95 See also C&R No 40 of the 2014 SC.

96 See responses to question 17(b) of the 2008 Questionnaire.

97 C&R No 9 of the 2014 SC. See also C&R No 44 of the 2009 SC, and C&R No 44 of the 2003 SC.

98 For more on refusing to execute Letters of Request for evidence possibly used for other purposes, see para. 467.

99 A similar view was expressed by the United States Court of Appeals for the Fourth Circuit in *United States v. Morris (In re Letter of Request from the Amtsgericht Ingolstadt)*, 82 F.3d 590, 592 (4th Cir. 1996).

100 Report of the 1989 SC (*op. cit.* note 30), para. 26.

matters;[101] insurance matters;[102] employment matters;[103] and consumer protection matters are "civil or commercial" in nature.

60. It is also widely accepted that family law matters,[104] personal status matters,[105] and intellectual property matters are "civil" in nature. There is also broad support among Contracting Parties that anti-trust (competition) matters are "civil or commercial" in nature, although some Contracting Parties may consider certain anti-trust (competition) proceedings to be public or criminal in nature, and therefore outside the scope of the Convention.[106] This is particularly the case where the proceedings are brought by a Contracting Party acting in a regulatory capacity.[107] Where proceedings are brought by a private party, they are generally considered to be "civil or commercial matters".[108] Similarly, proceedings for collective redress (class actions) brought by private parties would fall within the scope of "civil or commercial matters", even though in some Contracting Parties, such proceedings would be brought by the Contracting Party acting in a regulatory

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101 At its meeting in 1985, the Special Commission drew a distinction between criminal proceedings arising from fraud on the part of the bankrupt person or officer of the bankrupt company, which were considered outside of scope, and "regular bankruptcy proceedings", which were "everywhere considered to be civil in nature": Report of the 1985 SC (*op. cit*. note 24), Part I, § 1(A)(1). At its meeting in 1989, the Special Commission appeared to take one step back when it concluded that bankruptcy matters "*might* fall within the scope" of the term "civil or commercial matters": Report of the 1989 SC (*op. cit.* note 30), para. 26 (emphasis added). Since then, bankruptcy and insolvency matters have been treated as civil or commercial matters in the work of the HCCH in other areas of civil procedure: see, *e.g*., Nygh/Pocar Report (*op. cit.* note 79), para. 25. This view is also supported by case law in several States. In *Pickles v. Gratzon* (2002) 55 NSWLR 533, the Supreme Court of New South Wales (Australia) ordered the execution of a Letter of Request issued in bankruptcy proceedings. In Switzerland, the Federal Supreme Court has accepted that "civil or commercial matters" include proceedings in relation to debts and bankruptcy when the claims are of a civil nature: see Federal Office of Justice, *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit.* note 22), pp. 4-5.

102 At its meeting in 1989, the Special Commission concluded that insurance matters "might fall within the scope" of the term "civil or commercial matters": Report of the 1989 SC (*op. cit.* note 30), para. 26.

103 At its meeting in 1989, the Special Commission concluded that employment matters "might fall within the scope" of the term "civil or commercial matters": Report of the 1989 SC (*ibid.*). In *Stuke v. ROST Capital Group Pty Ltd* (2012) 207 FCR 86, the Federal Court of Australia assumed that the Convention would be available in an employment matter. In *Weryński v. Mediatel 4B spółka z o.o*., C-283/09, EU:C:2011:85, the Court of Justice of the European Union applied the 2001 EU Evidence Regulation in an employment matter.

104 This was expressly endorsed in Australia by the Federal Magistrates Court in *Secretary of the Attorney-General's Department & Evans and Norris* (2010) 245 FLR 381. It has also been confirmed in Germany by the Higher Regional Court of Frankfurt am Main in child custody proceedings: OLG Frankfurt am Main, 26 March 2008, No 20 VA 13/07. For divorce proceedings, see the decision of the Supreme Court of the Canton of Zurich (Switzerland) of 23 October 2001, *ZR* 101 (2002) No 84, and the decision of the Court of Cassation of the Canton of Zurich of 10 July 2002, *ZR* 101 (2002) No 88.

105 Report of the 1978 SC (*op. cit.* note 94), Part I, § 1. At the 1978 meeting of the Special Commission, the Egyptian delegation pointed out that it did not view personal status matters as civil matters, whereas such matters fell within the scope of the Convention in all other States represented.

106 This matter was discussed at length by the Special Commission at its meeting in 1985, which observed that: (a) "[c]ertain States make a clear distinction between unfair competition law, which is characterised as a civil or commercial matter and therefore falls within the Convention, and antitrust law, characterised as administrative or penal and therefore falling outside the scope of the Convention"; and (b) "[i]n certain States antitrust proceedings may be brought either by public authorities or by individuals or private companies": Report of the 1985 SC (*op. cit.* note 24), Part III.

107 ABA, *Obtaining Discovery Abroad* (*op. cit.* note 23), p. 28. In Germany, the Higher Regional Court of Frankfurt am Main (*op. cit*. note 83) has held that in the context of the 1965 Service Convention, the fact that the eventual monetary award is to be paid into the public treasury is decisive of whether the cause of action is characterised as "civil or commercial".

108 In the *Siemens* case (*op. cit.* note 83), the Higher Regional Court of Munich (Germany) rejected the argument that a Letter of Request was not issued in civil or commercial matters on account of the fact that a counterclaim had been made by the defendant in proceedings before the requesting authority for violations of US antitrust legislation. In a case under the 1965 Service Convention, the Higher Regional Court of Frankfurt am Main (*op. cit.* note 83) noted that antitrust cases were civil or commercial in nature provided that they were between private persons. In *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] 1 All ER 434 [hereinafter the "Westinghouse case"], the House of Lords (United Kingdom) agreed that proceedings brought by Westinghouse in Illinois for breach of US anti-trust laws were civil proceedings. In *Re the Matter of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970* [2008] SASC 51 (29 February 2008), the Supreme Court of South Australia (Australia) agreed to order the execution of a Letter of Request issued in trademark infringement and unfair competition proceedings instituted in the US state of California. In *Sykes v. Richardson* (*op. cit.* note 83), the Supreme Court of New South Wales agreed to execute a Letter of Request issued by a US court in a civil action arising out of an alleged conspiracy to manipulate the copper futures market in violation of US antitrust legislation. The Court did, however, admit that the issue was not easy to resolve, particularly given that if established, the violations could also entail criminal prosecution.

capacity.[109]

61. Criminal matters are *not* "civil or commercial matters". This has been confirmed by the Special Commission[110] as well as in case law.[111] This exclusion does not apply to proceedings brought by a private person for compensation arising from a criminal act.[112] However, based on the responses to the 2008 Questionnaire, there is broad support among Contracting Parties for the view that proceedings in respect of legislation on proceeds of crime are *not* "civil or commercial" in nature,[113] although the Special Commission has noted that at least some Contracting Parties do apply the Convention to such proceedings.[114]

62. Opinion remains divided among Contracting Parties as to whether taxation matters fall within the scope of the Convention.[115] A similar division exists in relation to administrative matters, customs matters, social security matters, as well as matters relating to the regulation of markets and stock exchanges.[116] In some Contracting Parties, these matters may be beyond the competence of the

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109 At its meeting in 2009, the Special Commission noted that the 1965 Service Convention is applicable to a request for service upon a defendant in proceedings for collective redress, although it did not specifically address the issue from the standpoint of whether such proceedings were "civil or commercial" in nature: C&R No 17. This issue was, however, addressed by the Higher Regional Court of Dusseldorf (Germany) in a decision of 22 July 2007 (*op. cit.* note 83), which held that the characterisation of a cause of action as "civil or commercial" was not affected by the fact that it was being pursued as a class action.

110 Report of the 1978 SC (*op. cit*. note 94), Part I, § 1.

111 *Westinghouse* case (*op. cit*. note 108, House of Lords of the United Kingdom); *Sykes v. Richardson* (*op. cit.* note 83, Supreme Court of New South Wales (Australia)); *United Kingdom v. United States*, 238 F.3d 1312, 1317-1318 (11th Cir. 2001) (United States). See also the case of *Application of the Securities and Exchange Commission of the United States of America under the Evidence on Commission Act 1995 (NSW) (No 2)* [2020] NSWSC 1500 where the Supreme Court of New South Wales considered an application seeking orders under the Evidence on Commission Act 1995 (NSW) to obtain evidence from ten witnesses resident in New South Wales by way of oral examination pursuant to Letters of Request issued by the United States District Court in the Central District Court of California. The Supreme Court held that the carve out of "proceedings relating to the commission of an offence or an alleged offence" under section 32(2) of the Act meant criminal proceedings. It stated that "[t]he 'carve-out' by the legislature was enacted in circumstances where the provision could operate in the context of the Hague Convention being adopted by a wide range of nations having both different criminal justice or penal systems [...] and practices and proceedings relating to criminal proceedings [...] The language of the provision needed to be wide enough to encompass those variations in criminal law or justice systems". In this case, the Supreme Court found that the United States proceedings were civil proceedings because: (1) the Securities and Exchange Commission (SEC) sought civil remedies; (2) the United States proceedings must be proved to the civil standard of proof; (3) the United States proceedings were brought by the SEC, which did not have jurisdiction to institute criminal proceedings; (4) the US Attorney's Office and the Department of Justice, which each report to the United States Attorney General were the only entities which may commence criminal proceedings for offences under the US Code; (5) criminal proceedings against the defendant in the United States proceedings have been dismissed with prejudice and cannot be re-instigated; (6) success by the SEC could not establish the commission of an offence, so as to expose the defendant to any criminal sanction. Further, the Supreme Court considered that "proceeding" for the purpose of section 32(2) of the Act must be understood as being limited to a consideration of the actual proceeding on foot in the foreign jurisdiction, and considerations such as other powers contained in the US Code that were not relevant to the United States proceedings, were not relevant to the assessment of whether the "proceedings" were civil or criminal.

112 M. Frigo & L. Fumagalli (*op. cit.* note 80), pp. 130-131.

113 Compare this to the Nygh/Pocar Report (*loc. cit.* note 79), which states that "civil claims for compensation for victims of crime brought by them or on their behalf in conjunction with criminal proceedings should not for that reason be denied a civil character".

114 C&R No 71 of the 2003 SC.

115 See, *e.g.*, L. Chatin, "Régime des commissions rogatoires internationales de droit privé", *Rev. crit. d.i.p.*, Paris, éditions Sirey, 1977, p. 616 (Letters of Request for obtaining evidence in taxation matters cannot be executed). In *Gloucester (Sub-Holdings 1) Pty Ltd v. Chief Commissioner of State Revenue* [2013] NSWSC 1419 (26 September 2013), the Supreme Court of New South Wales (Australia) appeared to accept that the Convention would apply in proceedings concerning the assessment of duties payable by a company for a share acquisition. In another case, which concerned taxation matters, the Federal Court of Australia issued a Letter of Request which was also subsequently executed by a court in Israel: *BCI Finances Pty Ltd (in liq) v. Commissioner of Taxation* [2015] FCA 679 (7 July 2015). In *Re Charlton* [1993] JLR 360, the Royal Court of Jersey executed a Letter of Request for evidence to be used in proceedings for tax fraud despite the risk that the proceedings may result in a liability to pay tax. In doing so, the Court distinguished "civil tax-gathering proceedings" for which a Letter of Request would not be executed.

116 In Singapore, the High Court has held that proceedings brought for alleged breach of US insider trading laws are "civil" in nature: *Securities and Exchange Commission v. Ong Congqin Bobby and Lum Kwan Sung* [1999] 1 SLR 310. See also decision of 23 February 1984 of the High Court of England (QB): *Securities and Exchange Commission v. Stockholders of Santa Fe Int'l Corp.*, [1985] E.C.C. 187 (also reproduced in *I.L.M.*, Vol. 23, 1984, p. 511). According to Chatin (*loc. cit.*

judicial authorities that are authorised to execute Letters of Request. The Permanent Bureau considers that, in view of the liberal interpretation of the term "civil or commercial" recommended by the Special Commission, Contracting Parties should endeavour to apply the Convention to these matters to the greatest extent possible. Where a Letter of Request is considered by the Requested State to fall outside the substantive scope of the Convention, the Central Authority should inform the requesting authority of any alternative devices available for the taking of evidence, noting that many Contracting Parties have entered into bilateral and multilateral arrangements for co-operation in administrative, criminal, customs and taxation matters.[117]

iv. Obtaining / taking "evidence" and performing some "other judicial act"

63. Under Chapter I, a Letter of Request may be issued to "obtain evidence" or to "perform some other judicial act". Under Chapter II, a Consul may be used to "take evidence". However, under Chapter II a Consul may not be used to perform some other judicial act.

64. This part of the Handbook separately explores the concept of obtaining / taking "evidence" (paras 65-71), and the concept of performing some "other judicial act" (paras 72-74). Admittedly, the distinction between these two concepts may not be readily made in some Contracting Parties, particularly those in which the taking of evidence is a function of the judiciary (and therefore by definition a "judicial act").[118] What is considered the obtaining / taking of "evidence" in one Contracting Party may be considered the performing of some "other judicial act" in another (and *vice versa*).

a) "Evidence"

(i) General

65. The term "evidence" is not defined in the Convention, although the text of the Convention does provide some guidance as to what is meant by the term. Specifically, Article 3 contemplates Letters of Request being used to examine persons (whether parties or non-parties, witnesses or experts), or to secure the inspection of documents or other property, real or personal.[119] In practice, Letters of Request are most commonly used to obtain oral testimony, documentary evidence, and written responses to written interrogatories.[120] Letters of Request are also used to obtain blood samples

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note 115), while taxation matters fall outside the scope of the Convention, administrative matters may fall within the scope of Convention, to be decided by the Requested State on a case-by-case basis. In one case, the Higher Social Court of North Rhine-Westphalia (Germany) applied the Convention in a social security matter: see LSG Nordrhein-Westfalen, 3 December 2008, No Az. L 8 R 239/07. Most Contracting Parties responding to the 2008 Questionnaire stated that social security matters do fall within the scope of "civil or commercial matters".

117 See, *e.g.*, the 1988 OECD Convention on Mutual Administrative Assistance in Tax Matters, the 1978 European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, the 1959 European Convention on Mutual Assistance in Criminal Matters, and the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters, and the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. Some regional judicial co-operation treaties dealing with the taking of evidence abroad purport to have a broader substantive scope than the 1970 Evidence Convention (see list at para. 576). As noted at paras 575 *et seq.*, the Convention does not derogate from these treaties, which continue to have full force among States Parties.

118 Some commentators have queried the separate treatment of "other judicial acts": see, *e.g.*, McClean (*op. cit*. note 79), p. 92; P. Monin-Hersant, "Entraide judiciaire internationale – Obtention des preuves à l'étranger (droit conventionnel)", (1989) 9(120) *J.C.I.* 49, fasc. 124-2, para. 15.

119 See Explanatory Report, para. 22. The 1968 Special Commission had initially proposed a statement that evidence included "the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property", but this statement was removed at the Eleventh Session on the basis that it was unnecessary. According to the Explanatory Report, the scope of evidence derived from Art. 3 is broader than the statement proposed by the Special Commission (presumably on the basis that it applies to witness examination more broadly, as well as to the inspection of real property).

120 See responses to questions 6(b) and 7(b) of the 2008 Questionnaire. Oral testimony is most commonly sought. States have reported Letters of Request being used to obtain the following evidence: bank records, payment orders, civil status documents, wills, clarifications of financial situation, and medical assessments. In one case in India, the High Court of

and other biospecimens (see para. 75), although this may be considered the performance of a "judicial act" rather than the taking of evidence in some Contracting Parties. The European Commission has also noted that "verifications, establishment of facts, and expertise on family or child welfare" fall within the meaning of the term "evidence" for the purposes of the 2001 EU Evidence Regulation (which has now been replaced by the 2020 EU Evidence Regulation).[121]

66. The term "evidence" covers information stored in digital form (electronic evidence), which may include e-mail messages, digital images, and entries in electronic registers. It can be expected that Letters of Request for electronic evidence will continue to increase. After all, in the modern digital economy, a large percentage of information is produced and stored in digital form,[122] and the law of many Contracting Parties now provides for the use of such information as evidence in proceedings.[123] The Special Commission has recommended that requests for electronically stored information should be treated in the same manner as requests for hard copy documents.[124]

67. The term "evidence" should be given a uniform meaning in each Chapter of the Convention. Like the term "civil or commercial matters", it has been suggested that the term "evidence" be interpreted in an *autonomous* manner.[125] The Special Commission has added that the term "evidence" should be interpreted *liberally*.[126] In a similar vein, the Special Commission has stated that the word "commenced", as used in both Chapters I and II, "should be given a uniform interpretation".[127]

(ii) "Evidence" versus "fishing expeditions"

68. Some Contracting Parties place emphasis on the term "evidence" in order to avoid Letters of Request that are suspected of seeking material that may not necessarily be used as evidence in the proceedings in the Requesting State (so-called "fishing expeditions"). This is particularly the case where the material sought is specified in broad terms. The distinction between *evidence* and

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Punjab and Haryana ordered the execution of a Letter of Request seeking a sample of a chemical compound that was the subject of patent infringement proceedings in the United States: *Aventis Pharmaceuticals, Inc. v. Barr Laboratories, Inc., P. & H. H.C.*, No CO 2 of 2008 (1 July 2009).

121 "Practice Guide for the application of the Regulation on the taking of evidence" (2011), developed by the European Judicial Network in civil and commercial matters. (The Guide was published by the European Commission, but the positions taken within it are those of the Network and not of the European Commission or of the European Union). The Guide is available online at: https://e-justice.europa.eu/fileDownload.do?id=dec18da1-6842-47b3-a142-d0e0c236fcbc and "Practical Guide on using videoconferencing to obtain evidence in civil and commercial matters" (2009), available online at: < https://e-justice.europa.eu/fileDownload.do?id=51799298-66d3-4ef1-a974-9fee4375b2e4 > [both last consulted on 12 April 2024]. Although the interpretation of the 2001 EU Evidence Regulation has no direct impact on the Convention, these examples provide a useful illustration of the possible application of the Convention. One commentator has noted that "requests… for an opinion of a specialized judicial authority are usually executed without any difficulties": M. Radvan, "The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters: Several Notes concerning its Scope, Methods and Compulsion", (1981) 16(5) *N.Y.U. J. Int'l L. & Pol*. 1031, p. 1040. At the same time, the Special Commission has rejected a proposal that the Convention be used for the exchange of information on foreign law (see, *infra*, note 155).

122 By some accounts, information stored in digital form represents over 90 percent of all existing information: M. Caylor, "Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts during Civil and Commercial Litigation", (2010) 28 *B.U. Int'l L. Rev.* 341, p. 349.

123 For example, legislation based on the 1996 *UNCITRAL Model Law on Electronic Commerce*.

124 C&R No 50 of the 2009 SC. For more on returning electronic evidence obtained in execution of a Letter of Request, see paras 394-398.

125 Supreme Court of the Canton of Zurich (Switzerland), 23 October 2001 (*op. cit*. note 104). Similarly, with respect to the 2001 EU Evidence Regulation, which provides for requests "to take evidence", Advocate General Kokott, in her opinion delivered 18 July 2007 in *Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd*, C-175/06, EU:C:2007:451 before the Court of Justice of the European Union (at para. 42), expressed the view that this term "must be determined *independently* having regard to the wording, legislative history, scheme and purpose of the [Regulation]" (emphasis added).

126 Report of the 1978 SC (*op. cit.* note 94), Part I, § 2(A). A similar view was expressed in the opinion of AG Kokott in *Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (*op. cit.* note 125), para. 43.

127 C&R No 48 of the 2009 SC. No significance should be placed on the fact that the English text of Chapter I refers to "obtaining" evidence whereas Chapter II refers to the "taking" of evidence. If anything, the different wording reflects the fact that under Chapter I, evidence is effectively being taken "indirectly" through the authorities of the Requesting State, whereas under Chapter II, evidence is being taken "directly" by the Requested State.

fishing expeditions is particularly prevalent in the case law of England, and was the motivation behind the proposal by the United Kingdom to allow a Contracting Party to refuse to execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents pursuant to Article 23 (see paras 426 *et seq.*).[128] This distinction has been accepted by the courts in other jurisdictions, including Australia,[129] the Cayman Islands,[130] Hong Kong SAR,[131] Jersey,[132] Scotland,[133] Switzerland,[134] and the United States.[135] It has been applied in cases concerning both the production of documents and the examination of witnesses,[136] as well as in respect of Letters of Request emanating from Contracting Parties whose laws do not know the process of pre-trial discovery.[137] The distinction has also been accepted in at least one case in the context of Chapter II.[138] It is questionable that such a distinction would be supported by reference to the French text ("*acte d'instruction*").[139]

69. In most jurisdictions in which the distinction is made, Letters of Request suspected of being fishing expeditions are generally still considered to fall within the substantive scope of the Convention,[140] thereby avoiding the need to determine whether the material being sought (*e.g.,* witness testimony or documents) will actually be used in the proceedings in the Requesting State.[141] Nevertheless, a Letter of Request seeking material specified in broad terms risks being refused execution on the

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128 See, *e.g.*, the decisions of the Court of Appeal in *Radio Corp. of America v. Rauland Corp*. [1956] 1 QB 618 and Re State of Norway's Application (No 1) [1987] 1 QB 433. The distinction is described by L. Collins as one between "material to prove or disprove facts in issue" and "material which may lead to the discovery of evidence": "The Hague Evidence Convention and Discovery: a Serious Misunderstanding?", *International and Comparative Law Quarterly*, Vol. 35, 1986. The distinction is also discussed by D. McClean (*op. cit*. note 79).

129 *British American Tobacco Australia Services Ltd v. Eubanks* (2004) 60 NSWLR 483. See also, *Application of Computer Sciences Corporation under the Evidence on Commission Act 1995* (NSW) [2017] NSWSC 810 where the Supreme Court of New South Wales considered whether the requests made in the Letters of Request issued by the Court of Chancery of the State of Delaware in the United States fell within the term "evidence" under section 33(6) of the Evidence on Commission Act 1995 (NSW) which was intended to reflect the usage of that term in the Convention. The Supreme Court found that while requests are made in terms of categories of documents rather than individual documents, the solicitor has deposed in her affidavit that the documents are known to exist and be within the custody and control of the party they are seeking the documents from, further that the documents are described with sufficient particularity so as to satisfy the terms of section 33(6) of the Act.

130 *Re Drammen Byrett's Request* [2000] CILR 81.

131 *Prediwave Corp. & Another v. New World TMT Ltd* [2007] 4 HKC 207.

132 *Wigley v. Dick* [1989] JLR 318.

133 *Lord Advocate v. Jetstream Aircraft Ltd* 1997 SSC 87, at 92.

134 Supreme Court of the Canton of Zurich, 23 October 2001 (*op. cit.* note 104); Supreme Court of the Canton of St. Gallen, 26 October 2009, No RH.2009.104; Federal Supreme Court of Switzerland, 21 December 2005, No 5P.267/2005, ATF 132 III 291.

135 *Metallgesellschaft v. Hodapp (In re an Order Permitting Metallgesellschaft A.G. to Take Discovery),* 121 F.3d 77, 79 (2d Cir. 1997).

136 The characterisation of a request for oral evidence as "fishing" has been questioned in the United Kingdom. In *Re State of Norway's Application* (No 2) [1988] 3 WLR 603, Woolf LJ acknowledged the "difficulty in applying the concept of fishing to a request that a witness should be required to give oral evidence". This view was echoed by the Court of Appeal of England in *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* [1998] 4 All ER 439, which conceded that the party seeking evidence cannot be expected to know in advance what answers the witness will be able to give. In India, the High Court of Delhi has acknowledged that without access to that witness, the requesting authority may not be in a position to describe exactly the evidence to be given: *Upaid Systems Ltd v. Satyam Computer Services* (*op. cit.* note 14).

137 See, *e.g.*, Supreme Court of the Canton of Zurich (Switzerland), 23 October 2001 (*op. cit.* note 104, concerning a Letter of Request issued by a court in Argentina), *Re State of Norway's Application (No 1)* (*op. cit.* note 128, decision of the High Court of England concerning a Letter of Request issued by a court in Norway), and *Re Drammen Byrett's Request* (*op. cit.* note 130, decision of the Grand Court of the Cayman Islands concerning a Letter of Request issued by a court in Norway).

138 In *Indochina Medical Co. Pty Ltd v. Nicolai* [2013] NSWCA 436 (17 December 2013), the New South Wales Court of Appeal (Australia) upheld a decision not to appoint a Commissioner to take evidence abroad, noting that Art. 17 of the Convention contemplated that the Commissioner would "take evidence" and did not permit the Commissioner to conduct an inquiry with a view to discovering evidence for use in proceedings.

139 This term tends to focus on the scope of judicial power, rather than the material sought to be obtained.

140 Although this is the argument put forward by L. Collins (*op. cit.* note 128).

141 As noted at para. 57, the authorities of the Requested State should avoid "second-guessing" the motives of the requesting authority in issuing a particular Letter of Request. Moreover, as discussed at paras 462-463, it is not for the Requested State to assess whether the evidence sought is relevant to, or otherwise admissible in, the proceedings in the Requesting State. In the context of witness examination, the High Court of England has stated that a Letter of Request must not be rejected as a "fishing expedition" on the basis alone that it is not known what answers the witness will give: *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit.* note 136).

ground that it is not sufficiently substantiated and therefore non-compliant with the content requirements of the Convention (Arts 3(1) and 5).[142] It also risks being returned unexecuted to the extent that it is unexecutable following the methods and procedures under the law of the Requested State (Art. 9(1))[143] or insofar as the evidence sought is refused to be given pursuant to a privilege under the law of the Requested State, such as a privilege against oppressive requests (Art. 11(1)(a)).[144]

70. It should not be assumed that all Letters of Request issued for the purposes of pre-trial discovery are fishing expeditions.

(iii) Measures for the preservation of evidence

71. In the context of Chapter I, obtaining "evidence" extends to measures for the preservation of evidence. This position is confirmed by the Explanatory Report,[145] and is supported by case law,[146] commentary,[147] and practice.[148] If a particular measure is not recognised in the Requested State, it may be requested as a "special method or procedure" (Art. 9(2)).[149] Moreover, if the measure is outside the functions of the judiciary in the Requested State, the Letter of Request may be refused execution (Art. 12(1)(a)).[150]

b) "Other judicial act"

(i) General

72. The performance of other judicial acts is a device only available under Chapter I, and was introduced into the Convention to cover differences in the use of letters of request among Contracting Parties.[151] The Convention does not provide for the performance of other judicial acts by Consuls or Commissioners.[152]

73. The term "other judicial act" is not defined in the Convention, although the Convention does

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142 See paras 169-170 and 404 *et seq*. This was the approach taken by the Supreme Court of the Canton of Zurich (Switzerland) in its decision of 23 October 2001 (*op. cit.* note 104).

143 See paras 293 *et seq*. This is the approach taken in Australia (*British American Tobacco Australia Services Ltd v. Eubanks*, *op. cit*. note 129), and the United Kingdom (*Westinghouse* case, *op. cit*. note 108).

144 See, *e.g.*, *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit*. note 136). Also, in *Aureus Currency Fund v. Credit Suisse* [2018] EWHC 2255 (QB), the English High Court followed the case of *First American Corp.* and stated that if the width of topics for questioning was too wide, or uncertain or vague, it may be refused on the grounds that it is oppressive to the witness. Where the request was considered too wide, the court retained a discretion whether to grant the request and could "blue pencil" but not redraft the request.

145 The Explanatory Report notes (at para. 26) that by providing for the obtaining of evidence for "contemplated" proceedings (Art. 1(2)), discussed at paras 88 *et seq.*, the Convention authorises the use of a Letter of Request for the purposes of "perpetuation of testimony" under common law procedure (whereby testimony is taken of an aged, dying or going witness), and the civil law procedures of "*l'enquête ad futurum*" (now known as "*référé préventif ou probatoire*", *e.g.*, Art. 145 of the *Code of Civil Procedure* of France, whereby a court may take certain measures if there is a legitimate reason to preserve or establish evidence) and "*Beweissicherungsverfahren*" (now known as "*Selbständiges Beweisverfahren*", *e.g.*, § 485(1) of the *Code of Civil Procedure* of Germany, whereby the examination of witnesses or inspection of documents or other property may be authorised where there is a risk that the evidence may be destroyed or otherwise become unusable). It was only after the conclusion of the Convention that similar devices were recognised in the United Kingdom, namely the "Anton Piller" order (*Anton Piller K.G. v. Manufacturing Process Ltd* [1976] 1 All ER 779).

146 Supreme Court of the Canton of Zurich (Switzerland), 16 November 2004, No NV040009.

147 See, *e.g.*, the opinion of AG Kokott in *Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (*op. cit.* note 125), para. 85 (confirming that the 2001 EU Evidence Regulation applies to measures for the preservation of evidence).

148 At its meeting in 2009, the Special Commission noted the practice of Contracting Parties of applying the Convention to proceedings for the taking of evidence before the main proceedings have been instituted, and where there is a danger that evidence may be lost: C&R No 47 of the 2009 SC.

149 For more on executing Letters of Request following a special method or procedure, see paras 295 *et seq*.

150 For more on refusal to execute Letters of Request on grounds that execution falls outside the functions of the judiciary, see paras 413-417.

151 Report of the 1968 SC (*op. cit.* note 16), p. 57.

152 The Explanatory Report notes (at para. 167) that this omission was deliberate, reasoning that other judicial acts tend to be "matters which are part of the exclusively judicial function, and which should be performed by judges or by lawyers designated by the judges for the purpose".

expressly exclude certain judicial acts from its scope (see paras 76-79). The ordinary meaning of the term "other judicial act" suggests an act done in exercise of judicial power. The Special Commission has indicated that the term should be interpreted liberally,[153] applying to "any act which ha[s] legal effect".[154] In practice, Letters of Request are used to perform a variety of different acts,[155] although their use is infrequent when compared to Letters of Request for the taking of evidence.[156]

74. A judicial act in one Contracting Party may be beyond the exercise of judicial power in another Contracting Party.[157] To address these differences, the Convention allows the refusal of execution of a Letter of Request to the extent that the execution does not fall within the functions of the judiciary in the Requested State (Art. 12(1)(a)).[158]

Blood samples and other biospecimens

75. Letters of Request are sometimes used to collect blood samples and other biospecimens (*e.g.*, by way of buccal swab) for the purposes of establishing maternity or paternity in family law matters. The Special Commission has confirmed that the performance of blood tests "clearly falls within the scope of the Convention", and has acknowledged that some Contracting Parties do not apply measures of compulsion to perform blood tests on unwilling witnesses (see paras 310-318).[159] It may also be the case that under the internal law of the Requested State, the person may have a privilege to refuse to submit to the blood test (see para. 371).[160] Practice shows that the execution of Letters of Request seeking the performance of blood tests or other DNA tests may call for special methods and procedures to be followed in terms of the material used to collect and transport the sample, and the means by which the sample is transported back to the Requesting State (see paras 295-300). In this regard, the United States has indicated that it requires the requesting authority

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153 Report of the 1978 SC (*op. cit.* note 94), Part I, § 2(A). This has been confirmed by D. McClean (*op. cit*. note 79), p. 92.

154 Report of the 1989 SC (*op. cit.* note 30), para. 37.

155 In their responses to the 2008 Questionnaire (questions 6(b) and 7(b)), responding Contracting Parties reported using the Convention to perform a variety of judicial acts, including establishing the defendant's address and/or nationality, obtaining information about the income of a person, obtaining a statement regarding the establishment of paternity, obtaining a certificate of non-appeal, and the transfer of a sum of money. By contrast it should be noted that the EU Evidence Regulation does not apply to a situation where the court of a Member State seeks the address, in another Member State, of a person on whom a judicial decision is to be served. See *Toplofikatsia Sofia,* CJEU, C-208/20. Several examples of judicial acts have also been mentioned at the Special Commission, such as asking about changes in family status or capacity, obtaining a copy of an entry in a public register, obtaining the agreement or the opinion of a specialised judicial authority of the Requested State in a family law matter (Report of the 1978 SC, *op. cit.* note 94, Part I, § 2(A)), and obtaining an official consent to a marriage from a party residing abroad (Report of the 1989 SC, *op. cit.* note 30, para. 37). However, the Special Commission has rejected a proposal that the Convention be used for the exchange of information on foreign law: Report of the 1978 SC, *op. cit.* note 94, Part I, § 1(D). Case law mentions additional examples of judicial acts performed under the Convention such as the conduct of conciliation proceedings between spouses (Supreme Court of the Canton of Zurich (Switzerland), 23 October 2001, *op. cit.* note 104), and the psychological assessment of a minor (Cass. (Italy), 10 October 2010, No 24996).

156 See responses to questions 6(b) and 7(b) of the 2008 Questionnaire.

157 For example, the act might be performed by administrative authorities of that Contracting Party or be altogether unknown to the law of the Contracting Party.

158 The Explanatory Report acknowledges (at para. 30) that in some States, it may not be within the function of the judiciary to secure copies of birth certificates or public records, or to advertise the existence of legal proceedings pending in another State, or to conduct conciliation proceedings between spouses. In *Heinrichs v. Parkes-Heinrichs* [1997] JLR Note 9a, the Royal Court of Jersey refused to execute a Letter of Request seeking an investigation into the social and family situation of a child on the grounds that this was an act outside the function of the judiciary in Jersey. For more on refusal to execute Letters of Request on grounds that execution falls outside the functions of the judiciary, see paras 413-417.

159 Report of the 1978 SC (*op. cit.* note 94), Part I, § 5(C).

160 Courts in the United States have confirmed that blood tests and buccal swabs are not covered by the privilege under US law against unreasonable searches and seizures: see, *e.g.*, *In re Letter of Request from the Boras District Court, Sweden*, 153 F.R.D. 31 (E.D.N.Y. 1994) (concerning a blood test) and, In *re Request for Judicial Assistance from the District Court in Svitavy*, Czech Republic, 748 F. Supp. 2d 522 (E.D. Va. 2010) (concerning a buccal swab).

to supply such materials,[161] whereas Australia has indicated that it requires the Requesting State to cover the costs of transporting blood samples.[162]

(ii) Judicial acts expressly excluded from the scope

76. As noted in paragraph 10, letters of request are used in some legal systems for the service of judicial documents, recognition and enforcement of judgments, and the ordering of provisional or protective measures. The drafters of the Convention felt that these acts should be excluded from the system of Letters of Request under Chapter I in favour of other treaty regimes.[163] Accordingly, Article 1(3) of the Convention expressly excludes these acts from the scope of the term "other judicial acts".[164]

77. With regard to the service of judicial documents, this is covered by the 1965 Service Convention.[165]

78. With regard to provisional or protective measures, the Explanatory Report confirms that the term comprises injunctions, restraining orders, forced sales, receiverships or *mandamus*.[166] It is not clear from the Explanatory Report whether the exclusion covers *measures for the preservation of evidence*, although the negotiation history[167] and subsequent work at the HCCH[168] tend towards treating such measures as distinct from provisional or protective measures. In any case, as discussed *supra* at paragraph 71, measures for the preservation of evidence are considered to be within the scope of the term "to obtain evidence".

79. With regard to the recognition and enforcement of judgments, the Magistrates Court of Tel Aviv (Israel) has held that the exclusion in Article 1(3) does not prevent the use of the Convention to obtain evidence for use in proceedings for the enforcement of a judgment in the Requesting State.[169] A similar finding was reached by the Grand Court of the Cayman Islands, which noted that

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161 See Office of International Judicial Assistance of the U.S. Department of Justice, *OIJA Evidence and Service Guidance* (30 November 2023), available in several languages at < https://www.justice.gov/civil/evidence-requests > [last consulted on 14 April 2024] (hereinafter "OIJA Evidence and Service Guidance").

162 See response of Australia to question 68 of the 2008 Questionnaire. See also *Attorney General in and for the State of New South Wales; ex parte Thomas Hollins* [2016] NSWSC 622 which concerned a request from the District Court in the Czech Republic for DNA testing to determine paternity of child. While the Supreme Court of New South Wales did not make an order as to costs for the taking of or transportation of the blood/buccal samples, it ordered the person who was the subject of the request for examination to attend office of the Consulate General of the Czech Republic in New South Wales, provide identification documents to consular officials and thereafter accompany a consular official to a medical appointment made by the consular official with a qualified medical practitioner in the city of Sydney for the purpose of taking blood/buccal samples for DNA testing. The Supreme Court also ordered the consulate official to take all steps necessary to convey the buccal sample and blood spot to the Czech Republic court appointed expert, in accordance with their letter and shipping instructions.

163 In a 2013 decision, the Supreme Court of New South Wales (Australia) noted that "the service of a subpoena for the production of documents that might be tendered in evidence would be a judicial act that is covered by the Convention": *Gloucester (Sub-Holdings 1) Pty Ltd v. Chief Commissioner of State Revenue* (*op. cit.* note 115), para. 56. This finding is not in line with Art. 1(3) of the Convention.

164 See Cass. Civ. 2, 29 November 1973, No 73-10712, *Rev. crit. d.i.p*. 1974, p. 690, reported by G. Couchez, in which it confirmed that a letter of request under the 1954 Civil Procedure Convention could not be used to request enforcement of a custody decision. In fact, the HCCH *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (1996 Child Protection Convention) could be used for requesting enforcement of decisions related to custody / child protection.

165 For more on the relationship between the 1970 Evidence Convention and 1965 Service Convention, see paras 566-569.

166 Explanatory Report, para. 29.

167 The drafters of the Convention were concerned with excluding provisional or protective measures that were aimed at securing the future enforcement of an eventual judgment, rather than preserving evidence: see interventions of the delegates of Greece and Israel at the 1968 meeting of the Special Commission, *Actes et documents de la Onzième session*, Tome IV (*op. cit.* note 3), pp. 158-159.

168 Work at the HCCH on the earlier phases of the "Judgments Project" supports the view that measures to preserve evidence do not fall within the scope of provisional or protective measures. For more information see the Jurisdiction Project Section of the HCCH website. As the Nygh/Pocar Report (*op. cit.* note 79) notes, "remedies whose main purpose is to obtain evidence for use in the trial do not fall within the scope of provisional and protective measures": para. 179. It is to be noted that both the HCCH 2005 Choice of Court and 2019 Judgments Conventions, derived from the Judgments Project, do not cover interim measures.

169 *Securities and Exchange Commission v. Eddie Antar* (*op. cit.* note 14). In that case, the court agreed to execute a Letter of Request requesting evidence seized by the Israeli police relating to the assets of the judgment debtor.

widening the interpretation of Article 1(3) so as to preclude the seeking of evidence which may lead to later efforts to enforce a foreign judgment would impose an "unnatural and unnecessary impediment upon the operation of the Convention".[170]

c) "Judicial proceedings, commenced or contemplated"

80. Under Chapter I, a Letter of Request may only be issued to obtain evidence[171] which is intended for use in "judicial proceedings, commenced or contemplated" (Art. 1(2)).[172] Under Chapter II, a Consul or Commissioner may only be used to take evidence in aid of proceedings that have "commenced in the courts" of the State of origin (Arts 15-17). There is no reason to distinguish the types of proceedings to which Chapter I and Chapter II apply, and for the purposes of this Handbook, the two terms are taken to refer to "judicial proceedings" (see paras 81-84 below). However, a distinction can be made between the scope of Chapter I and Chapter II insofar as the former applies to proceedings that are "commenced or contemplated" (see paras 85-91 below), whereas the latter only applies to proceedings that are "commenced" (see paras 86 and 87 below).

d) Judicial proceedings

81. The term "judicial proceedings" is not defined in the Convention, although its ordinary meaning suggests any proceedings before a judicial authority.[173] In view of the discussions at paragraphs 138 *et seq*, this points towards an authority that, in the particular proceedings, exercises a function of an adjudicatory nature.

82. Under Chapter I, a Letter of Request is generally issued to obtain evidence for use in proceedings before the requesting authority, which is a judicial authority (Art. 1(1)). Accordingly, any enquiry into the judicial nature of the proceedings is likely to be merged with an enquiry into the judicial nature of the requesting authority. But in cases where the Letter of Request is issued by the requesting authority to take evidence intended for use in proceedings before *another* authority of the Requesting State (see para. 467),[174] there may be cause for enquiry into the judicial nature of these proceedings without enquiry into the judicial nature of the requesting authority.

83. Under Chapter II, the judicial nature of the proceedings in the State of origin may be reviewed by the competent authority in the State of execution in deciding whether to give its permission for the evidence to be taken.

84. The Convention applies to all types and to all stages of judicial proceedings. Accordingly, a Letter of Request may be used to take evidence for use in adversarial and non-adversarial proceedings.[175] It may also be used to take evidence for use during preliminary and post-judgment stages of the

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170 *Voluntary Purchasing Group, Inc. v. Insurco Int'l Ltd* [1994-95] CILR 84, 93-4.

171 This limitation does not apply to other judicial acts.

172 The French text of the Convention only refers to "*une procédure*" without the "judicial" qualifier. This difference was noted by the Special Commission at its meeting in 1989 without further consideration. At the 2003 meeting of the Special Commission, an expert from a French-speaking Contracting Party noted that the English text better reflected the intention of the drafters, although the Special Commission arrived at no conclusion on this point.

173 In the *Arcalon* case (*op. cit.* note 14), the Supreme Court of the Netherlands accepted that the term "judicial proceedings" in Art. 1(2) of the Convention implies the adjudication of a "legal dispute" by a judicial authority.

174 As noted at paras 150-152, the judicial authority in whose proceedings evidence is sought to be used may not be competent under the law of the Requesting State to issue a Letter of Request, in which case it may need to request another authority to issue the Letter of Request. The comment in the Explanatory Report (para. 24) that "[n]o court in a foreign country should be asked to undertake the obtaining of evidence unless it is to be used in judicial proceedings in the requesting tribunal" should not be interpreted as limiting this possibility. Rather, this comment is aimed at situations where there are no judicial proceedings (litigation) *at all* – whether commenced or contemplated – in the Requesting State.

175 In *Re Int'l Power Industries N.V.* [1985] BCLC 128, the High Court of England stated that the object of the Convention is to assist in the determination of actions of a civil nature *between one party and another*. However, this statement was made to support the view that the Convention does not apply to fact-finding investigations, and should not be taken to suggest that the Convention does not apply to non-adversarial proceedings.

proceedings, in addition to use at the main hearing or trial.[176]

e) Commenced and contemplated

85. Under Chapter I, a Letter of Request may be used to obtain evidence that is intended for use in proceedings that have commenced (see paras 86 and 87) or are contemplated (see paras 88-91 below). Under Chapter II, a Consul or Commissioner may only be used to take evidence in aid of proceedings that have commenced (*i.e.*, not in aid of proceedings that are contemplated) (paras 88-91).[177]

(i) Commenced

86. Neither the Convention nor the Explanatory Report elaborates on when proceedings are "commenced", although it would seem to correlate to the time at which the relevant judicial authority is seized (in the sense that proceedings can be said to be "pending" before that judicial authority).[178] The Special Commission has stated that the term "commenced" should be given a uniform interpretation in both Chapter I and Chapter II.[179] The question as to whether proceedings have "commenced" arises very rarely in practice[180] and does not appear to give rise to any difficulties, particularly in the context of Chapter I (given that evidence may also be obtained for proceedings that are "contemplated", as discussed at paras 88-91 below).

87. Whether proceedings have "commenced" should be a matter for the law of the Requesting State (for Chapter I) or the State of origin (for Chapter II). As has been noted elsewhere in the work of the HCCH,[181] internal law of the various Contracting Parties differs with regard to when a judicial authority is considered to be seized. Some Contracting Parties regard a judicial authority to be seized only after the defendant has been served or after the necessary steps have been taken to notify the defendant. Other Contracting Parties regard a judicial authority as seized as soon as the initiating document has been filed in the court registry, or, where notification is required before filing, as soon as the documents are delivered to the person or authority responsible for service.

(ii) Contemplated

88. By providing for the taking of evidence for use in "contemplated" proceedings, Article 1(2) of the Convention makes it clear that proceedings need not be commenced in order for a Letter of

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176 *Re Int'l Power Industries N.V.* (*ibid.*). In *Voluntary Purchasing Group, Inc. v. Insurco Int'l Ltd* (*op. cit.* note 170), the Grand Court of the Cayman Islands stated that the court (as requesting authority) should not seek to define the proceedings before the requesting authority narrowly simply by reference to the stage which they had reached. In that case, the Court confirmed that the Convention applied to the post-judgment discovery stage of proceedings for which the requesting authority was still seized to determine issues between the parties. In *Geo-Culture, Inc. v. Siam Investment Management S.A.*, 936 P.2d 1063 (Or. Ct. App. 1997), the Oregon Court of Appeals (United States) confirmed that the Convention could be used by a court to discover jurisdictional facts for the purpose of establishing its personal jurisdiction over a particular matter. The applicability of the Convention to jurisdictional discovery has subsequently been confirmed by the United States Court of Appeals for the Third Circuit in *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004).

177 The restricted use of Chapter II for the taking of evidence in aid of proceedings that have commenced was emphasised by the New South Wales Court of Appeal (Australia) in *Indochina Medical Co. Pty Ltd v. Nicolai* (*op. cit.* note 138), at para. 45.

178 The Explanatory Report uses the terms "pending" and "commenced" interchangeably. The link between "commenced proceedings" and *litispendance* has been made by at least one Contracting Party (Switzerland) in response to question 19 of the 2008 Questionnaire ("*[l]a notion de procédure « engagée » renvoie à celle de litispendance*").

179 C&R No 48 of the 2009 SC.

180 The 2008 Questionnaire asked specifically whether the term "commenced" had posed any problems in practice (question 20-1). One Contracting Party noted an occasion where its authorities had sought clarification as to whether proceedings in the Requesting State were "commenced or contemplated". None of the other responding Contracting Parties indicated any difficulties in the context of Chapter I. Moreover, no responding Contracting Party indicated any difficulties with the term "commenced" in the context of Chapter II.

181 See the Nygh/Pocar Report (*op. cit.* note 79), commenting on the *lis alibi pendens* rule in Art. 21 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: paras 263-264.

Request to be issued under Chapter I.[182] However, the Convention does not elaborate on what is meant by the term "contemplated".

89. On the one hand, the Explanatory Report, as well as subsequent practice, suggests that the reference to "contemplated" proceedings is intended to cover requests for the preservation of evidence (as discussed in para. 71).[183] In this regard, the subject of inquiry is not so much the meaning of the word "contemplated", but rather whether conditions laid down under internal law relating to measures for the preservation of evidence have been met. One commentator has suggested that when a Letter of Request is issued by a requesting authority for the preservation of evidence on the basis that the conditions under its internal law have been met, the requested authority may not review the propriety of the issuance of the Letter, or insist that the conditions laid down by its own internal law also be met in order for the Letter of Request to be executed.[184] A similar approach was taken by the Supreme Court of the Canton of Zurich (Switzerland), which confirmed that it is not open to the requested authority to enquire into *whether* or *how* the contemplated proceedings will actually be commenced, or to preoccupy itself with considerations of either the law of the Requesting State or Requested State in this regard.[185] Of course, as noted above (para. 71), if a particular measure is not recognised in the Requested State, it may be requested as a "special method or procedure" (Art. 9(2)), and if the measure is outside the functions of the judiciary in the Requested State, the Letter of Request may be refused execution (Art. 12(1)(a)).

90. On the other hand, it is conceivable that evidence may be sought prior to commencement of proceedings for purposes other than preservation.[186] In these cases, whether proceedings are "contemplated" is a matter of fact and should be interpreted broadly, without the need to enquire into the actual state of mind of the moving party.[187] In this regard, the "White Book" on the *Civil Procedure Rules* of England and Wales has previously stated that the term "contemplated" requires "not simply that the institution of proceedings is possible or even probable but that it is *imminent* or *impending*, that the institution of proceedings has reached the stage not merely of being considered or examined but is almost about to happen".[188] This interpretation has been rejected by the Court of Appeal of the Hong Kong SAR (China) as too narrow, with the Court preferring to equate the term "contemplated" with its ordinary meaning (something akin to "likely" but more

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182 The use of Letters of Request to obtain evidence for "contemplated" proceedings was a novelty for the Convention. The ability to use letters of request to obtain evidence for use in contemplated proceedings was not expressly addressed in the 1954 Civil Procedure Convention.

183 See, *supra*, note 145.

184 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, Washington, D.C., International Law Institute, Georgetown University Law Center, Vol. 1, 2000 Revision, § 5-1-4(4).

185 Decision of 16 November 2004 (*op. cit.* note 146).

186 For example, the use of the procedure known as "*référé préventif ou probatoire*" (see *op. cit.* note 145) to determine whether there is a dispute: see discussion in W. Kennett, "The Production of Evidence within the European Community", (1993) 56(3) *Mod. L. Rev*. 342, p. 342. In *Union des Étudiants Juifs de France c. Twitter Inc*. (*op. cit.* note 47), the High Court of Paris (France) used this procedure to order production of information from Twitter, Inc. for the purposes of identifying the authors of certain libellous "tweets" posted on its social media site in anticipation of future proceedings against those authors. Pursuant to Art. 186 of the *Code of Civil Procedure* of the Netherlands, testimony may be taken in order to obtain information on whether or not to start proceedings (in a procedure known as "*voorlopig getuigenverhoor*"). In his note on the decision of the Supreme Court of the Netherlands in *Saueressig GmbH & Co. v. Forbo-Krommenie B.V.*, HR, 24 March 1995, *NJ* 1998, 414, P. Vlas accepts that this procedure falls within the scope of the Convention. Similarly, it is conceivable that a Letter of Request could be issued as part of a pre-litigation discovery procedure, as known in common law States: see M. Davies, "Evidence, Documents and Preliminary Discovery in International Litigation", (1996) 26 *U.W. Austl. L. Rev*. 286, p. 307. See generally, B. Hess, "Preservation and Taking of Evidence in Cross-Border Proceedings – Comparative Remarks in the Context of IP Litigation", in A. Nuyts (ed.), *International Litigation in Intellectual Property and Information Technology*, Alphen aan den Rijn, Kluwer Law International, 2008, p. 292.

187 The French term "*futur*" is arguably broader and more objective than the English term "contemplated".

188 *The White Book Service 1993: Civil Procedure*, Vol. 1, 1993, p. 1206, para. 70/1-6/3 (emphasis added), cited by the HKCA of the Hong Kong SAR in *Camaro Trading Co. Ltd v. Nissei Sangyo America Ltd* [1994] 3 HKC 94.

than just a mere possibility).[189] The Supreme Court of the United States has also distinguished contemplated proceedings from proceedings that are "imminent – very likely to occur and very soon to occur".[190]

91. It should be noted that Letters of Request issued for the purpose of pre-trial discovery are *always* issued after the commencement of proceedings in the Requesting State.[191]

III. Use of Video-Link

92. The environment in which the 1970 Evidence Convention operates has changed considerably since the Convention entered into force. This is especially so regarding advances in information and communication technology. Due to the technology neutral language of the Convention, modern technologies can be used to facilitate the operation of the Convention in ways that remain in-step with the current environment. While the Convention makes no specific reference to modern technologies such as video-link, it has long been established that the use of information technology to assist in the effective operation of the Convention is permitted, and indeed, encouraged.[192]

93. In addition to providing information about information technology that is relevant to the general use of the Convention, this Handbook provides further detailed information and guidance on the use of video–link under each of the two Chapters of the Convention. For information on Chapter I and video-link see Part 2, for information on Chapter II and video-link, see Part 3. A compilation of good practices on the use of video-link technology is also available at the Evidence Section of the HCCH website.

1. What is Video-Link

94. 'Video-link' refers to the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations. As this practice has gradually been introduced into procedural laws as well as into cross-border legal co-operation mechanisms, various legal definitions have been developed. Other terms commonly used to describe this practice, when used for the purpose of taking evidence, include "videoconferencing", "remote appearance" or "video presence".[193]

95. In the context of judicial proceedings, as video-link is not bound by traditional borders it allows the parties, their representatives and also a witness to appear and, where relevant, to testify before a court from another location within the same territory as the court, in a different territorial unit of the same State, or abroad.

96. By overcoming the distance between the court, the parties, their representatives and any witnesses, video-link offers potential reductions in time, cost, inconvenience, and the environmental impact

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189 *Camaro Trading Co. Ltd v. Nissei Sangyo America Ltd* (*ibid*.). The Court added that an assertion that proceedings are "contemplated" should be supported by "substantial and cogent" evidence to ensure that evidence is not sought for proceedings that are "not likely to be instituted". In his minority judgment, Liu JA approved the position in the "White Book".

190 *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 US 241 (2004). Note that this decision relates to requests for judicial assistance brought under internal law (28 U.S.C. § 1782), which applies to proceedings that are "within reasonable contemplation".

191 C&R No 31 of the 2003 SC. For more on pre-trial discovery and the execution of Letters of Request issued for that purpose, see paras 426 *et seq*.

192 See C&R No 4 of the 2003 SC, C&R No 55 of the 2009 SC and C&R No 20 of the 2014 SC.

193 Depending on the context and the source, there can be different nuances in the definitions ascribed to these and analogous terms. See, *e.g.*, the discussion of the difference between videoconferencing and telepresence in M. E. Gruen and C. R. Williams, *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearing*s, Administrative Conference of the United States, 2015, pp. 9-10, available at the following address: < https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings > [last consulted on 12 April 2024].

of travelling to court,[194] as well as a means to overcome any inability of one or more persons to participate in the proceedings. This is of particular benefit in the case of expert witnesses, whose lack of availability can often give rise to scheduling delays.[195] In fact, in some instances the use of video-link may even render witness availability of far less significance among the factors considered in determining whether a court should exercise jurisdiction in a particular matter.[196] The use of video-link can also provide more flexibility in the scheduling of proceedings, as well as in accommodating witnesses with certain physical or mental conditions, or witnesses who would be intimidated by a personal appearance in court, thereby improving access to justice. Together, all of these factors can contribute to better informed decisions, and more efficient judicial proceedings.

97. There are three legal bases under which the taking of evidence by video-link may be requested or sought:

    1. **under internal law** (for more information see Part 4);

98. In relation to internal law, by virtue of Article 27, the Convention does not prevent the use of internal law to take evidence by video-link under less restrictive conditions. Authorities should verify whether the taking of evidence by video-link is:

    a. allowed under the internal law of the place where proceedings are pending;

    b. not contrary to the internal law of the place from which evidence is to be taken, including any existing "blocking statutes" or criminal laws.

    For further discussion on the use of video-link under internal law, see [4].

    2. **under other instruments** (for more information see Part 4);

99. A number of instruments at the bilateral, regional and multilateral level make express provision for the use of video-link in the taking of evidence in judicial co-operation cases. There have been some positive developments in this regard in the European Union under the 2020 EU Evidence Regulation (for more discussion on this see paras 584 *et seq*). As the Convention does not derogate from other instruments (Art. 32), authorities should verify whether any other bilateral or multilateral instruments may prevail in the particular case. For further discussion on the use of video-link under other instruments, see paras 590 *et seq*.

    3. under the **1970 Evidence Convention**.

100. With regard to the legal basis of using video-link under the Convention itself, neither the spirit nor letter of the Convention constitutes an obstacle to the use of new technologies and the operation

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194 See, *e.g.*, M. Davies, "Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation", *American Journal of Comparative Law*, vol. 55 (2), 2007, p. 206; Council of the European Union, "D1a: Judicial use cases with high benefits from cross-border videoconferencing", the "Handshake" Project (*op. cit.* Glossary), 2017, p. 2; in addition, both the 2020 EU Evidence Regulation and the EU Regulation (EU) 2023/2844 of the European Parliament and the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (EU Digitalisation Regulation) use the term "videoconferencing or other distance communication technology". In the latter, the term "videoconferencing" is defined as meaning "audio-visual transmission technology that allows two-way and simultaneous communication of image and sound, thereby enabling visual, audio and oral interaction" (Art. 2(6) of the EU Digitalisation Regulation).

195 Council of the European Union, "The availability of expert witnesses has been identified as one cause of delays", *Guide on videoconferencing in cross-border proceedings*, Luxembourg, Publications Office of the European Union, 2013, p. 6 [hereinafter, "Guide on videoconferencing in cross-border proceedings"], available at the following address: < https://www.consilium.europa.eu/ en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/ > [last consulted on 12 April 2024].

196 M. Davies (*op. cit.* note 194), p. 236.

of the Convention can benefit from their use.[197]

101. The use of video-link is permissible in both the execution of a Letter of Request under Chapter I and the execution of a request under Chapter II of the Convention.[198]

102. Under Chapter I, a judicial authority of a Contracting Party may request another Contracting Party to obtain evidence. The competent authority in the Requested State conducts the examination. The requesting authority may request a special method or procedure to be followed. Chapter II provides for a Contracting Party to permit evidence to be taken in its territory by Consuls or Commissioners.

103. In particular, video-link may be used:

a. to facilitate the presence and possibly also the participation of the parties to the proceedings, their representatives, and judicial personnel at the taking of evidence; or

b. to facilitate the actual taking of the evidence (both direct and indirect taking of evidence).

104. The taking of evidence abroad using video-link was discussed by the Special Commission at its meetings in 2009 and 2014. The Special Commission concluded that video-link could be used to assist in the taking of evidence under the Convention, as set out in the following table:

	Situation	Articles of the Convention
Chapter I	**Presence and participation at the execution of the Letter of Request** Where the parties to the proceedings, their representatives and possibly also their judicial personnel of the requesting authority are located in the Requesting State and wish to be present by video-link during the taking of testimony and possibly also participate in the examination of the witness. Video-link established between: • location in the Requesting State (*e.g.*, premises of the requesting authority); and • location where the Letter of Request is being executed (*e.g.*, courtroom in the Requested State). **Competent Authority** in the Requested State (*i.e.*, the requested authority) conducts the examination following the methods and procedure under the law of the Requested State, subject	Chapter I (Arts 7, 8 and 9)

197 See C&R No 4 of the 2003 SC. See also, *e.g.*, C&R No 55 of the 2009 SC and C&R No 20 of the 2014 SC. 43. Contracting Parties remain divided as to whether the Convention is of a mandatory character (*i.e.*, whether the Convention needs to be applied whenever evidence is to be taken abroad, be it in person or by video-link) (for detailed discussion on the mandatory / non-mandatory nature of the Convention, see paras 33 *et seq.*). This division of views notwithstanding, the Special Commission has recommended that Contracting Parties give priority to the Convention when evidence abroad is being sought (principle of first resort). Further, having resort to the Convention or other applicable treaties is generally consistent with the provisions of blocking statutes (for detailed discussion on blocking statutes, see paras 39-41).

198 In response to the 2022 Questionnaire, most of the Contracting Parties indicated that they allow video link in the taking of evidence under Chapter I of the Convention. These Contracting Parties are: Albania, Andorra, Australia, Brazil, Croatia, Czech Republic, Estonia, Finland, France, Georgia, China (Hong Kong and Macao SARs), Hungary, Israel, Italy, Kazakhstan, Latvia, Montenegro, Nicaragua, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Netherlands, Türkiye, the United Kingdom and Viet Nam. In certain other States, such as Switzerland, video link in the taking of evidence under Chapter I of the Convention is not completely excluded, but it is determined by the requested judge on a case-by-case basis. As for Chapter II, in response to the 2022 Questionnaire, the majority of the Contracting Parties indicated that they allow the taking of evidence by video-link under Chapter II. These Contracting Parties are: Albania, Finland, France, Georgia, Germany, Hungary, Italy, Lithuania, Montenegro, Norway, Portugal, Slovakia, Sweden, Switzerland, the United Kingdom and the United States.

	to any special method or procedure requested by the requesting authority.[199]	

	Situation	Articles of the Convention
Chapter II	**Testimony taken by Consul or Commissioner**[200] Where the Consul representing the State of origin exercising their functions in the State of execution, or a duly appointed Commissioner uses video-link to take testimony of a person located in the State of execution. Video-link established between: • location where the Consul is stationed (*e.g.*, embassy or consulate in the State of execution) or where Commissioner operates (*e.g.*, courtroom in the State of origin); and • location of witness in the State of execution (*e.g.*, office or courtroom). **Consul** or **Commissioner** conducts the examination in accordance with its own law and procedure unless forbidden by the law of the State of execution. A member of the judicial personnel of the court of origin (or other duly appointed person) acting as a **Commissioner** under Art. 17, who is located in one Contracting Party, may examine a person located in another Contracting Party by video-link.	Chapter II (Arts 15, 16, 17 and 21)
Other treaties or internal law or practice	**Other methods of taking of evidence** A Contracting Party may permit, by internal law or practice, methods of taking of evidence other than those provided for in the Convention. The Convention does not derogate from other conventions containing provisions regarding the taking of evidence abroad.	Arts 27(c) and 32

2. Direct and indirect taking of evidence by video-link

105. Evidence may be taken "directly" or "indirectly" using video-link depending on the authority that is taking the evidence. This is not only a semantic distinction, but one that has important consequences in practice.

106. In general, existing instruments provide for the use of video-link to examine witnesses abroad in two ways, "directly" and "indirectly":

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199 The 2014 meeting of the Special Commission on the practical operation of the HCCH 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions did not specifically discuss the direct taking of evidence under Chapter I of the 1970 Evidence Convention, *i.e.,* where the requesting authority requests that the examination be conducted by a judge of the Requesting State as a special procedure. This is distinct from the judge conducting the examination as an appointed Commissioner under Chapter II.

200 Under Art. 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the status table for the 1970 Evidence Convention, in column entitled "Res/D/N/DC".

a. the authority before which proceedings are pending (or a member of judicial personnel of that authority or a representative) conducts the witness examination by video-link with the permission and assistance of an authority of the State in whose territory the witness is located – in this sense, evidence is taken "directly" by video-link;[201] and

b. an authority of the State in whose territory the witness is located conducts the witness examination and permits the requesting court (as well as the parties and possibly their representatives) to be "present" at and possibly participate in (but not conduct) the examination by video-link – in this sense, evidence is taken "indirectly" by video-link.[202]

107. However, the 1970 Evidence Convention makes no mention of video-link or of the possibility of direct taking of evidence under Chapter I, having been drafted at a time when computer technology and global air travel were at earlier stages of development, and indirect taking of evidence was the norm. In addition, the drafters could not have envisaged that under Chapter II evidence would eventually be taken by Commissioners physically located in the State of origin using video-link.

108. With regard to the direct taking of evidence under the general provisions and operation of the Convention, and without the use of video-link, a question arises as to whether the Convention allows for this under Chapter I. While the direct taking of evidence is permitted under Chapter II, it is debatable whether it would be permitted under Chapter I of the Convention. From a strict reading of Article 1 of the Convention, Chapter I would not appear to allow direct taking of evidence as it specifically provides that a judicial authority of a Contracting Party may request the competent authority of another Contracting Party to obtain evidence. Consequently, while some Contracting Parties allow direct taking of evidence under Chapter I, others may consider its provisions to be a legal obstacle and therefore that the direct taking of evidence exceeds the scope of Chapter I of the Convention.

109. It appears in the responses to the 2017 Country Profile Questionnaire, Contracting Parties are almost evenly divided as to whether evidence may be taken directly by video-link under Chapter I of the Convention. There is no clear trend in this regard. However, it is worth noting that many European States, as well as South Africa and Israel are of the view that direct taking of evidence by video-link may be possible under Chapter I, whereas most Latin American and Asian States, as well as the United States, are of the opposite view.[203]

110. Concerning the use of video-link under internal law, one Contracting Party has passed legislation to permit the direct taking of evidence by video-link under Chapter I of the Convention as it is of the view that the Convention does not provide for this possibility.[204] It is suggested that authorities verify whether direct taking of evidence by video-link is permitted in the place where the evidence is located before filing a Letter of Request for this purpose.[205]

111. Under Chapter II, the Commissioner generally appointed by the State of origin conducts the witness / expert examination. In such cases, it is considered that evidence is taken "directly". As

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201 This approach is adopted in the Ibero-American Convention on the Use of Videoconferencing (in particular Art. 5), and Art. 20 of the 2020 EU Evidence Regulation.

202 Arts 12-14 of the 2020 EU Evidence Regulation.

203 See responses to Part V, q. (b) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary). Contracting Parties in the 2017 Country Profile Questionnaire which consider that direct taking of evidence may be done by video-link under Chapter I of the Convention: China (Hong Kong SAR), Cyprus, Estonia, Finland, France, Greece, Israel, Malta, Portugal, Romania, Slovenia, South Africa, Sweden, the United Kingdom (England and Wales).
Contracting Parties in the 2017 Country Profile Questionnaire which consider that direct taking of evidence may not be done by video-link under Chapter I of the Convention: Belarus, Brazil, China (Macao SAR), Croatia, Czech Republic, Germany, Hungary, Latvia, Lithuania, Mexico, Republic of Korea, Singapore, the United States, Venezuela. In certain States (Switzerland), this procedure is not completely excluded, but it is determined by the requested judge on a case-by-case basis.

204 France (Decree No 2017-892 of 6 May 2017) (*see, infra,* note 820).

205 See Country Profiles of the relevant Contracting Party.

indicated above, the Special Commission has agreed that a Commissioner may take evidence by video-link either from the State of origin or the State of execution. Authorities should, prior to seeking evidence in a Contracting Party through a Commissioner by video-link, verify whether the State of execution has made a declaration with respect to Article 17 of the Convention. Such a declaration may permit evidence to be taken under Article 17 without the prior permission of the Contracting Party.[206]

112. In addition, in relation to diplomatic or consular missions, there may be instances (*e.g.*, in the case of geographically large areas) in which a Consul could use video-link to examine a witness located at a (distant) location which is nonetheless still within the State of execution, subject to any conditions specified in the permission granted. Authorities should verify whether this is possible in the relevant Contracting Party.

113. By way of illustration, the table below sets out the possibilities with regard to the direct and indirect taking of evidence under the Convention:

	Practice	**Articles of the Convention**
Chapter I	Indirect taking of evidence Parties, their representatives and possibly also the judicial personnel of the requesting authority may be present via video link during the taking of evidence. (Direct taking of evidence under Art. 9(2), only available in some Contracting Parties).	Chapter I (Art. 9(1) and (2))
Chapter II	Direct taking of evidence Commissioners may take evidence by video-link either from the State of origin or the State of execution. Consuls, by nature of their function, will presumably be located in the State of execution, from where they will take evidence by video-link.	Chapter II (Arts 15, 16 and 17)
	Practice	Articles of the Convention
Internal law or practice	Direct and indirect taking of evidence	Arts 27(b) and (c), and 32

114. Irrespective of whether the evidence is taken directly or indirectly, the parties and representatives may be present by video-link.

115. As indicated above, while Chapter I of the Convention would not appear to allow direct taking of evidence, the current trend in existing instruments on video-link is to allow it under provisions similar to Chapter I (likely for reasons of increased efficiency) provided specific *legal safeguards* have been satisfied.[207] Such legal safeguards include but are not limited to:

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206 To view the declarations or reservations made by a particular Contracting Party, see the status table for the 1970 Evidence Convention, in column entitled "Res/D/N/DC".

207 Art. 3 of the Ibero-American Convention on the Use of Videoconferencing and Art. 19(2) and (7) of the 2020 EU Evidence Regulation.

a. The request is made in writing, contains all the necessary information and is accepted by the competent authority;

b. The request falls within the scope of the relevant treaty;

c. The request is technically feasible;

d. The request is not contrary to national law or fundamental legal principles of the Contracting Parties involved;

e. The taking of evidence is performed on a voluntary basis without the need for coercive measures.

116. In addition, the European Union has reiterated that videoconferencing technology provides the "most efficient"[208] method by which to take evidence directly, at least among its Member States. Further, one Contracting Party has advised that in practice, direct taking of evidence by video-link is very common, indeed the norm, for both domestic and international cases.[209] However, it is not known how often direct taking of evidence is actually used in practice in other Contracting Parties, under either Chapter of the 1970 Evidence Convention.[210]

117. Some restrictions relating to video-link were reported by Contracting Parties in the 2017 Country Profile Questionnaire.[211]

118. Explanatory charts showing how video-link may be used under the Convention (both in cases of direct and indirect taking of evidence can be found at Annex 2).

3. Legal, Practical and Technical Guidance for the use of video-link

119. The main objective of any use of video-link should always be to ensure that the examination is able to proceed in a manner which is as close as possible to that which would occur if it were conducted in a physical courtroom.[212] In order to achieve this, the use of video-link in a particular case may be subject to considerations of justice,[213] as determined by the court, as well as practical and technical considerations.

i. Legal considerations for the taking of evidence by video-link

120. Under Chapter I, a request for a special method or procedure (such as the use of video-link) must be complied with unless it is incompatible with the internal law of the Requested State or it is impossible to perform. In addition, if judicial personnel of the Requesting State wish to participate in the hearing either physically or via video-link, prior authorisation by the Requesting State may be required.

121. Under Chapter II, permission may be required in order to obtain evidence by a Consul or Commissioner, irrespective of whether or not the taking of evidence would be conducted by video-link.

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208 Views expressed by the European Judicial Network in civil and commercial matters (*op. cit.* note 121), p. 6.

209 See the response of Portugal to Part II, q. (b) of the 2017 Country Profile Questionnaire, (*op. cit.* Glossary).

210 See Synopsis of Responses (*op. cit.* note 6), Part V, q. (b); Part VI, q. (e).

211 Such restrictions may relate to the types of evidence which may be obtained by video-link, the persons who may be examined by video-link, locations in which evidence may be taken when video-link is used, or how the evidence that is taken by video-link is to be handled. See, *e.g.*, Synopsis of Responses (*ibid.*), Part IV, q. (b) and (d).

212 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), pp. 15, 17; N. Vilela Ferreira *et al.*, *Council Regulation (EC) no 1206/2001: Article 17º and the video conferencing as a way of obtaining direct evidence in civil and commercial matters*, Lisbon, Centre for Judicial Studies (*Centro de Estudos Judiciários)*, 2010, p. 14.

213 The interest of justice is a guiding principle for courts when determining whether to permit the use of video-link in taking evidence. For example, courts in the United Kingdom have embraced the concept that video-link may assist in pursuing the "overriding objective" in civil procedure for courts to take measures to achieve justice. See, *e.g.*, the High Court of Justice Queens Bench Division in *Rowland v. Bock* [2002] EWHC 692 (QB).

122. While the Convention provides clear guidance on the use of coercive measures and compulsion (discussed in paras 134 *et seq.* and 475 *et seq.* for Chapter I and Chapter II, respectively), for some Contracting Parties these coercive measures may extend only to compelling a witness to give evidence, not compelling that witness to give evidence specifically via a video-link.

123. Contracting Parties may also have time limits or notice requirements applicable to the use of video-link, as well as certain restrictions on the taking of evidence when video-link is used. For example, this may relate to the type of evidence which may be obtained by video-link, the person who may be examined by video-link, locations in which the evidence may be taken when video-link is used, or how the evidence that is taken by video-link is to be handled.

124. In addition, Contracting Parties would generally apply the same restrictions on the taking of evidence by video-link as they would do if evidence was obtained in person. Authorities should look to the internal law of the relevant Contracting Party to verify if any additional restrictions are imposed. With regard to the persons who may be examined by video-link, these are usually limited to witnesses (*i.e.*, the term witness understood in its broadest sense, see the Glossary). Other restrictions include: age (person is under 18 years of age), people with disabilities, relatives up to the third degree, spouses or partners, the ability of the witness to speak on behalf of an organisation or agency, etc.[214]

125. The location where evidence by video-link may be taken is either the courtroom or the premises of the Embassy or Consulate, depending on the Chapter of the Convention invoked.[215] In addition, it was indicated that the location should be a hearing room within a court authority building,[216] and in some instances, this may even be a specifically designated room within the court building.[217]

126. Considerations of justice may involve an assessment of the effect of the video-link on the credibility of the witness.[218] This is due to the reduced ability of the fact-finder to assess the demeanour of the witness, or of the absence of the *gravitas* established by physical attendance in the courtroom. However, these concerns may be overcome or diminished in time by technological advances, increased use of equipment, and the resulting greater familiarity with their use.[219] The probative value of the testimony itself may also be deemed less when a video-link is used, depending on whether the relevant penal provisions (*e.g.*, relating to perjury or contempt) are enforceable in the

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214 See Synopsis of Responses (*ibid.*), Part IV, q. (d).

215 See Synopsis of Responses (*ibid.*), Part IV, q. (f).

216 See the responses of Australia (most states), Belarus, Bulgaria, Cyprus, Finland, France, Greece, South Africa to Part III, q. (e) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

217 See, *e.g.*, the responses of China (Hong Kong SAR – the Technology Court located in the High Court) and Malta (however, video-link can also be held in most Court Halls using portable video-link equipment) to Part III, q. (e) of the 2017 Country Profile Questionnaire (*ibid.*).

218 The extent to which an assessment of witness credibility may be impeded by video-link is not settled in jurisprudence. As such, it remains a relevant consideration for courts and those seeking to rely on the technology. The courts of a number of Contracting Parties have regarded video-link as not having a significant impact on the assessment of credibility. See, *e.g.*, *In re Rand International Leisure Products, LLC*, No.10-71497-ast, 2010 WL 2507634, at *4 (Bankr. E.D.N.Y. 16 June 2010) (Bankruptcy Court Eastern District of New York, United States), which found only a limited discernible impact of video-link technology on the ability to observe a witness' demeanour and to cross-examine; *Skyrun Light Industry (Hong Kong) Co Ltd v. Swift Resources Ltd* [2017] HKEC 1239 (HKCFI, Hong Kong SAR), noting that although there may be some impairment, there is nothing inherently unfair about the use of video-link to interrogate a witness; *State of Maharashtra v. Dr Praful B Desai* AIR 2003 SC KANT 2053 (Supreme Court of India), taking the view that when the technology works effectively, credibility can be assessed adequately. A similar position has also been taken by courts in non-Contracting Parties to the Convention, such as Canada: see, *e.g.*, the Supreme Court of British Colombia in *Slaughter v. Sluys* 2010 BCSC 1576 and the Supreme Court of Ontario in *Chandra v. Canadian Broadcasting Corporation* 2016 ONSC 5385; *Paiva v. Corpening* [2012] ONCJ 88; *Davies v. Clarington* 2011 ONSC 4540. Nonetheless, the impact of video-link technology on assessing witness credibility remains a vexed question and courts in other States have been more cautious in their praise. See, *infra*, note 824.

219 Some commentators have suggested that the issue of "decreased personal interactions" may be significantly diminished once users and participants "become accustomed to this mode of interaction": M. Dunn and R. Norwick (*see, infra,* note 225), pp. 16-17, N. Vilela Ferreira *et al.* (*op. cit.* note 212), pp. 17-18.

place from which the witness is providing evidence.[220]

ii. Practical considerations – preparing for and conducting hearings using video-link

127. Annex 6 contains detailed practical information on preparing and conducting hearings using video-link, including consideration of potential practical obstacles, such as the scheduling and testing of the equipment, technical support and training, reservation of appropriate facilities, use of interpretation, recording, reporting and review, as well as environment, positioning and protocols.

128. Practical considerations may also include the costs of hiring and using video-link equipment. In addition, when requesting the use of video-link, it is essential to take different time zones into consideration.

iii. Technical considerations

129. Technical considerations may range from specific operational aspects of the connection such as ensuring sufficient bandwidth and appropriate network settings, to the actual quality of the video and audio being transmitted. Annex 7 sets out information aiming to address many of the aspects associated with information technology and security in the context of cross-border video-link use. Given the fast-paced nature of technological developments, however, it should not be viewed as comprehensive, but as pertinent on the date of publication. Authorities and users are encouraged to, as much as possible, keep pace with such developments to ensure that high quality infrastructure is maintained. If new equipment or technologies are to be implemented, the Council of the European Union has recommended that a pilot programme first take place, and if successful, that the implementation take place in separate stages or phases.[221]

130. Nevertheless, none of these considerations can be viewed in isolation. The successful use of video-link calls for a holistic approach which ensures the complementarity of the legal, practical and technical considerations.[222] To assume that traditional court practices and procedures can necessarily be applied in the same manner to proceedings where a video-link is used, is to fundamentally underestimate the current limitations of the technology. Adjustments, whether major or minor, will need to be made to take into account limitations introduced by the technology being used, and the changed environment created by that technology and the different locations of participants. As such, the legal, practical and technical considerations are each canvassed in this Handbook.

A note about the suitability of video-link

131. Courts must look beyond convenience alone to determine whether in the circumstances of the individual case, the use of video-link is, on balance, beneficial to the overall fair and efficient administration of justice. The use of video-link may not be appropriate in all circumstances where a person is to appear and testify before a court. It therefore continues to be regarded as complimentary to (and not a substitute for) traditional methods of obtaining evidence (*i.e.*, personal attendance in the courtroom). This is principally because the level of personal interaction with the witness is inevitably less than that which occurs when the witness is physically present in the courtroom.[223] As such, the ability of participants to assess the demeanour and credibility of the

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220 M. Davies (*op. cit.* note 194), p. 225. See also, paras 219 *et seq.* (Chapter I) and paras 475 *et seq.* (Chapter II).

221 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 13.

222 E. Rowden *et al.*, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings,* University of Western Sydney, 2013, pp. 6, 10, 19. This report details the findings and recommendations of a three-year Australian Research Council Linkage Project: "Gateways to Justice: improving video-mediated communication for justice participants". The project involved a comprehensive review of the literature and legislation, actual site visits, as well as semi-structured interviews in controlled environments to assess different factors and influences.

223 "Handshake" Project (*op. cit.* Glossary), p. 26.

witness may be impaired,[224] particularly where the technology and lack of proximity exacerbate differences of language or culture, leading to a loss of nuance. For example, a study across various appellate courts of one Contracting Party (United States) found that some judges believed they asked fewer questions when examining a witness by video-link and were less likely to interrupt an argument.[225] In some cases, the remoteness of the witness could also diminish the ability of the court to exercise control over the witness. Another concern is that of possible technical problems, so those responsible should ensure the availability of suitable facilities, equipment and support at all participating locations. Each of the potential issues associated with the use of video-link could compromise such fundamental aspects of the proceedings as the "right to a fair trial" or the "principle of immediacy", in addition to inhibiting or limiting access to justice.[226]

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224 R. A. Williams, "Videoconferencing: Not a foreign language to international courts", Oklahoma Journal of Law and Technology, vol. 7, No 1, 2011, p. 21. For a discussion of the effect of video-link technology on assessing the credibility of a witness, see also note 218.

225 M. Dunn and R. Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeals*, Federal Judicial Center, 2006, p. 13, available at the following address: < https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf > [last consulted on 13 April 2024].

226 "Handshake" Project (*op. cit.* Glossary), pp. 26-27. The notion of immediacy is a general principle of procedural law in a number of States, in particular in Europe, encompassing the idea that evidence should be heard in its original and not derivative form (*i.e.*, "immediate" both in the temporal and corporeal sense). For a more detailed discussion of the principle of immediacy and its relationship with the use of video-link, see, *e.g.*, T. Ivanc, "Theoretical Background of Using Information Technology in Evidence Taking", in V. Rijavec *et al.* (eds), *Dimensions of Evidence in European Civil Procedure*, the Netherlands, Kluwer Law International, 2016, pp. 265-300; V. Harsági, "Evidence, Information Technology and Principles of Civil Procedure – The Hungarian Perspective", in C.H. van Rhee and A. Uzelac (eds), *Evidence in Contemporary Civil Procedure*, Cambridge, Intersentia, 2015, pp. 137-154.

PART 2. Letters of Request ("Chapter I")

I. Introduction

1. General

132. Under Chapter I, a judicial authority of one Contracting Party may request another Contracting Party to obtain evidence, or perform some other judicial act, using a Letter of Request that is sent to the Central Authority of the other Contracting Party. The Central Authority may then transmit the request to the competent authority for execution.

133. The competent authority in the Requested State (*i.e.*, the requested authority) then conducts the examination following the methods and procedure under the law of the Requested State pursuant to Article 9(1) of the 1970 Evidence Convention. Alternatively, the requesting authority may request, pursuant to Article 9(2) of the Convention, that a special method or procedure be followed by the requested authority, subject to limited exceptions.

2. Use of video-link

134. The use of video-link may also be relevant in the execution of a Letter of Request under Chapter I. This use of video-link may be permitted by the methods and procedures available under the law of the Requested State (Art. 9(1)). Alternatively, the establishment of a video-link may be sought by the requesting authority as a special method or procedure (Art. 9(2)). In the latter case (Art. 9(2)), the requested authority is required to comply unless the establishment of the video-link is incompatible with the internal law of the Requested State, or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. Costs may however be incurred when the use of video-link is sought as a special method or procedure.[227]

135. The typical video-link request under Chapter I would arise where the parties to the proceedings, their representatives, and possibly also judicial personnel of the requesting authority located in the Requesting State wish to be present by video-link during the taking of testimony. The video-link would then be established between a location in the Requesting State (*e.g.*, premises of the requesting authority) and the location where the Letter of Request is being executed (*e.g.*, a courtroom in the Requested State) or alternatively, both locations would be connected via a virtual conferencing room.

136. Although less common, an alternative scenario may arise where (*e.g.*, in the case of geographically large areas), the witness or expert is within the Requested State but at another (distant) location from the judicial authority charged with taking the evidence. The competent authority in the Requested State may wish to conduct the witness or expert examination by video-link in accordance with its own internal law. If this is not contemplated, the requesting authority may wish to request the establishment of a video-link as a special method or procedure, in order to facilitate the taking of evidence and minimise the costs incurred by the Requested State in the execution of a Letter of

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227 With regard to costs, see Art. 14(1) and (2) of the Convention:
"(1) The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.
(2) 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 […]"
With respect to practical difficulties, it has been noted that Art. 10(4) of the 2001 EU Evidence Regulation allows the courts concerned to agree on the provision of the necessary technical equipment if the requested court alone is unable to do so. See: M. Torres, "Cross-Border Litigation: 'Video-taking' of evidence within EU Member States", *Dispute Resolution International*, vol. 12(1), 2018, p. 76. There is a similar provision under Art. 12(4) of the 2020 EU Evidence Regulation.

Request. Should the parties to the proceedings, their representatives, and possibly also judicial personnel of the requesting authority also wish to be present, this may necessitate a third location to be included in a multipoint video-link and would be subject to the requirements stated above.

137. The possibility of taking evidence directly via video-link under Chapter I (*e.g.*, using Art. 9(2) of the Convention as a mechanism to do so) is controversial, with some Contracting Parties allowing this form of taking of evidence and others refusing to do so.[228] At the time of publication of this Handbook, there is virtually no uniform practice in this regard among Contracting Parties to the Convention. For more on the distinction between direct and indirect taking of evidence, see paras 105 *et seq*.

II. Preparation of Letters of Request

1. Issuing the Letter of Request

138. Letters of Request are issued by a judicial authority of the Requesting State in accordance with the provisions of the law of the Requesting State. As discussed above (para. 63), Letters of Request are issued to obtain evidence or to perform some other judicial act (Art. 1(1)).

i. Issuance by a "judicial authority"

139. The term "judicial authority" is not defined in the 1970 Evidence Convention, although it clearly applies to courts, no matter what type or level.[229] The Explanatory Report reveals that the drafters had in mind authorities that exercise a function of an *adjudicatory nature* in the case at hand.[230] This view is supported by the Special Commission, which has added that the name of the issuing authority is not necessarily determinative of whether it is a "judicial authority".[231] The nature of the issuing authority is a matter for the law of the Requesting State,[232] which may confer functions of an adjudicatory nature on authorities other than courts.[233]

140. Practice shows that some Central Authorities interpret the term liberally.[234] In the case of doubt as to whether a Letter of Request has been issued by a "judicial authority", the authority seized of the matter in the Requested State (*e.g.*, the Central Authority or the requested authority) may contact

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228 In *Nanoteko Pty Limited v Nanotech Industrial Solutions Inc* [2022] NSWSC 272, an application was made before the Supreme Court of New South Wales for an order, *inter alia*, that a witness be examined via video-link by "Teams" pursuant to a letter of request issued by the United States District Court for the District of New Jersey under the Convention. The Supreme Court granted orders for *inter alia*, the issue of a subpoena for the witness to attend to give evidence, the appointment of a certain counsel of the New South Wales Bar as an examiner pursuant to rule 24.3 of the Uniform Civil Procedure Rules 2005 (NSW) and that they conduct the examination of the witness by video-link, as well as allowing the "examination, oral examination (including oral examination and re-examination, either in person or by video conference)" of the witness to be conducted by the United States counsel for the parties in the United States proceedings.

229 The 1970 Evidence Convention was negotiated shortly after the *HCCH Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* ("Enforcement Convention"), which featured considerable discussion about the concept of a "court". The Explanatory Report on the 1971 Enforcement Convention prepared by C.N. Fragistas states that the Convention applies to courts of all types and levels ("*de tous ordres et de tous rangs*"): HCCH, *Actes et documents de la Session extraordinaire (1966), Exécution des jugements*, The Hague, Imprimerie Nationale, 1969, p. 365 [in French only].

230 Explanatory Report, paras 254-255. According to B. Ristau (*op. cit.* note 184), legislative bodies and administrative agencies do not qualify under the Convention as "judicial authorities": § 5-1-4(2). For more on administrative tribunals, see paras 144 *et seq*. In *Re Dunne's Payments* [1997] CILR 330, the Grand Court of the Cayman Islands affirmed that legislative bodies are not judicial authorities for the purposes of the Convention.

231 Report of the 1985 SC (*op. cit.* note 24), Part I, § 1(B). See also D. McClean (*op. cit.* note 79), p. 91; P. Monin-Hersant (*op. cit.* note 118), para. 9; L. Chatin (*op. cit.* note 115), p. 615.

232 For examples of cases in which reference to the law of the Requesting State has been made in order to determine the nature of the issuing authority, see *Re Dunne's Payments* (*loc. cit.* note 230), at 342 (Grand Court of the Cayman Islands); *Re Imacu* [1989] JLR 17 (Royal Court of Jersey); and *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967) (United States Court of Appeals for the Second Circuit).

233 For example, the law in some Requesting States may confer such functions on notaries in particular matters, and may authorise these authorities to issue Letters of Request for the taking of evidence abroad in those matters.

234 Report of the 1985 SC (*op. cit.* note 24), Part I, § 1(B).

the Central Authority of the Requesting State to clarify the nature of the authority.

141. The term "judicial authority" does not apply to private persons (para. 142) or arbitral tribunals (para. 143), but it may extend to administrative tribunals (paras 144-146).

a) Private persons (incl. lawyers / attorneys)

142. The term "judicial authority" does not apply to private persons, such as lawyers or attorneys.[235] Accordingly, Letters of Request may not be issued by these persons.[236] However, such persons may be involved in the preparation and transmission of Letters of Request (see para. 229). In fact, in many States, Letters of Request are regularly drafted by counsel for the moving party and filed with the requesting authority for approval and issuance. In these cases, the Letter of Request should not be rejected on the grounds that it has not been issued by a judicial authority, even if the requesting authority makes no amendments to the Letter of Request filed by the moving party.[237]

b) Arbitral tribunals

143. The term "judicial authority" does not apply to arbitral tribunals. This is made clear by the Explanatory Report, which reveals that the drafters specifically decided to exclude arbitral tribunals from the definition of "judicial authority".[238] It has also been confirmed by the courts in at least one Contracting Party.[239] However, arbitral tribunals may have recourse to the Convention in certain circumstances (see paras 147-149).

c) Administrative tribunals

144. The term "judicial authority" may extend to certain administrative authorities. The Explanatory Report reveals that the drafters of the Convention could not reach a decision on whether administrative tribunals should be included within the meaning of the term "judicial authority", given the variation in powers and functions of administrative tribunals in the various legal systems.[240] Accordingly, the facts of each case must be examined with reference to the law of the Requesting State, in particular whether the authority exercises, in the case at hand, a function that is of an adjudicatory nature.

145. In a decision that predates the Convention, the United States Court of Appeals for the Second Circuit refused to execute a letter of request issued by an income tax official of India. In coming to its decision, the Court held that despite having the same powers of a court to inspect documents and compel testimony under Indian law, and being under an obligation to afford due process to the parties, the official did not exercise functions that were sufficiently separated from prosecutorial

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235 Although the exclusion of private persons is not apparent from the preparatory works for the Convention, it can be implied from the fact that the 1965 Service Convention, which does allow requests to be issued by lawyers, refers to "authorities and judicial officers", whereas the 1970 Evidence Convention does not make reference to "judicial officers". This approach has been adopted by the Federal Office of Justice of Switzerland: *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit.* note 22), p. 21 ("The FOJ is of the opinion that the application for judicial assistance must in fact be issued by an *authority* and not by a private person, such as a lawyer").

236 *Cf.* use of the term "judicial authority" in Art. 9(1), discussed *infra* at para. 272. Some commentators have suggested that the more liberal interpretation given by the Special Commission to the term in Art. 9(1) (which includes notaries and lawyers) might also be applied to Art. 1(1): M. Radvan (*op. cit.* note 121); Li Shuangyuan, *Private International Law in China and its International Unification*, Wuhan, Wuhan University Press, 1993, p. 137.

237 In *Re Request from the Sandefjord Court* [2001] CILR 322, the Grand Court of the Cayman Islands rejected an argument that an incoming Letter of Request should be refused execution on the grounds that it was prepared by the moving party and merely "rubber-stamped" by the issuing authority. The Grand Court found that the issuing authority had reviewed the Letter of Request for compliance with the provisions of the law of the Requesting State, and that therefore it had itself issued the Letter of Request and not merely passed on a request from the moving party.

238 Explanatory Report, para. 254.

239 See, *e.g.*, *Viking Insurance Co. v. Rossdale* [2002] 1 Lloyd's Rep 219, at 222 (High Court of England (QB)).

240 Explanatory Report, para. 254.

functions.[241]

146. In another decision falling outside the scope of the Convention, the Court of Cassation of France acknowledged that the Ministry of Justice of a State could, in some cases, exercise a judicial function with the power to take evidence.[242] A court in Switzerland has also ordered the execution of a Letter of Request issued by an administrative law judge of the United States International Trade Commission in an IP dispute, notwithstanding the court's characterisation of the requesting authority as an administrative tribunal.[243] At the same time, one commentator has suggested that administrative bodies in the United States such as the Securities Exchange Commission and Federal Trade Commission would not be exercising functions of an adjudicatory nature when conducting administrative investigations for securities or antitrust violations.[244] In a case before the Court of First Instance in Hong Kong SAR, the court had set aside an order for execution of a Letter of Request issued by an "Administrative Law Judge" on behalf of the Board of Governors of the Federal Reserve System of the United States, as it considered that the Board did not have sufficient "judicial" qualities that would constitute it as a "court or tribunal" for the purposes of local legislation which gives effect to the Convention.[245]

Assistance to non-judicial bodies in obtaining evidence abroad (particularly in the case of arbitration)

147. If a person or body in a Contracting Party does not fall within the meaning of the term "judicial authority" (*e.g.*, an arbitral tribunal), it may be possible for that person or body to seek assistance from a judicial authority of that Contracting Party for the issuance of a Letter of Request. Pursuant to Article 1(1) of the Convention (discussed *infra* at para. 150), whether the person or body may request the issuance of a Letter of Request is a matter for the law of the Requesting State.[246] The Special Commission has specifically recognised this "workaround" in the context of arbitration proceedings.[247]

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241 *In re Letters Rogatory Issued by Director of Inspection of Government of India* (*op. cit*. note 232).

242 *IPCL c. Elf Aquitaine*, Cass. Civ. 1, 22 May 2007, No 02-12857, *Rev. crit. D.i.p.* 2008, p. 278.

243 Decision of the Presidium of the Cantonal Court of First Instance of Obwalden of 17 April 2013, No RH.2013.025.I.

244 ABA, *Obtaining Discovery Abroad* (*op. cit.* note 23), p. 29. This is distinct from cases where the Letter of Request is issued by a judicial authority that has been seized of proceedings brought by such bodies.

245 *AB v X* (HCMP 971/2021) (*op. cit.* note 80). In this case, the HKCFI considered that decision-making bodies which did not display independence and impartiality were unlikely to be considered to be a "judicial" authority and it was problematic that the Board of Governors of the Federal Reserve System was both the decision-maker and a party to the proceedings leading to its own decision, compounded by the fact that the Board could override the process which was otherwise "outsourced" to the "Administrative Law Judge" or the Office of Financial Institution Adjudication.

246 Of course, the judicial authorities of the Requesting State may not be competent under the internal law of that State to provide such assistance. Indeed, O. Knöfel, Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration: A German Perspective, (2009) 5(2) *J. Priv. Int'l L.*, p. 285) has noted that there is still "some uncertainty" as to whether a particular State's courts have jurisdiction to provide assistance. Conversely, cases have been reported in Switzerland indicating that Letters of Request have been issued: see, *e.g.*, response of Switzerland to question 23 of the 2008 Questionnaire as well as question 9 of the 2022 Questionnaire, although it has been indicated that such applications are very rare, and O. Knöfel (*ibid.*, p. 284). At the 1985 meeting of the Special Commission, the experts from the Nordic States and the United States pointed out that under the internal law of their respective States, courts may render assistance for the production of evidence abroad in the context of arbitration proceedings: Report of the 1985 SC (*op. cit.* note 24), Part I. A similar approach has been reported by Estonia and Macao SAR: see responses to question 23 of the 2008 Questionnaire and question 7 of the 2003 Questionnaire: "Questionnaire relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*", Prel. Doc. No 4 of August 2003 for the attention of the Special Commission of October/November 2003, available on the Evidence Section of the HCCH website under "Questionnaires & Responses". For further commentary, see D. Gauthey & A.R. Markus, *L'entraide judiciaire internationale en matière civile*, Berne, Stämpfli Editions SA, 2014, pp. 256-257. It is not clear whether internal law implementing Art. 27 of the UNCITRAL Model Law on International Commercial Arbitration (which provides for an arbitral tribunal to request assistance in taking evidence from the courts in the seat of arbitration) extends to the issuance of a Letter of Request: see, *e.g.*, M. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge/New York, Cambridge University Press, 2008, p. 108.

247 C&R No 38 of the 2003 SC.

148. Admittedly, Letters of Request in aid of arbitration proceedings would appear to be infrequent.[248] Moreover, as noted above (para. 81), only Letters of Request seeking evidence intended for use in "judicial proceedings" fall within the scope of the Convention.[249] Nevertheless, cases have been reported where Letters of Request issued by judicial authorities for evidence intended for use in arbitration proceedings have been executed.[250]

149. As an alternative, the person or body may wish to have recourse to the internal law of the Contracting Party in which evidence is sought, which may authorise the courts of that Contracting Party to provide assistance to non-judicial bodies in obtaining evidence.[251] This alternative method, contemplated by Article 27(b) of the Convention, takes place outside the Letter of Request system under Chapter I.

ii. Issuance "in accordance with the provisions of the law" of the Requesting State

150. The Convention does not provide an independent source of power for a judicial authority to issue a Letter of Request, nor does it establish the procedure for the issuance of a Letter of Request. Pursuant to Article 1(1), these matters are left to the law of the Requesting State.[252] Provisions on the issuance of Letters of Request are often set out in the code or rules of civil procedure of Contracting Parties.

151. Accordingly, the law of the Requesting State determines any of the following matters:

a. which judicial authorities are competent to issue a Letter of Request;[253]

b. whether a Letter of Request is issued by the judicial authority on its own motion (*sua sponte*)

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248 See responses to question 23 of the 2008 Questionnaire and question 9 of the 2022 Questionnaire.

249 See *e.g.*, response of Singapore to question 9 of the 2022 Questionnaire, where a request for taking of evidence in connection with arbitration proceedings was received and was considered to fall outside the scope of Art. 1 of the Convention.

250 See responses to question 23 of the 2008 Questionnaire. In *Primarius Capital LLC & Others v. Jayhawk Capital Management LLC* [2009] 4 HKLRD 58, the HKCFI of the Hong Kong SAR accepted a Letter of Request seeking the taking of evidence for use in arbitration proceedings, although it ultimately refused to execute the Letter of Request on other grounds. See also M. Penny, "Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?", (2001) 12 *Am. Rev. Int'l Arb*. 249, p. 249.

251 At its meeting in 1989, the Special Commission noted that the laws of some States did provide for judicial assistance in obtaining evidence for use in arbitration proceedings: Report of the 1989 SC (*op. cit.* note 30), para. 37. In the United States, 28 U.S.C. § 1782 allows an application to be filed in a US court seeking assistance in obtaining evidence for use in proceedings in a foreign or international tribunal. Previously there was a circuit court split on whether this assistance should be granted for private commercial arbitration. The United States Courts of Appeals for the Sixth Circuit and the Fourth Circuit held that discovery may be granted pursuant to 28 U.S.C. § 1782 even for use in private international commercial arbitrations (*Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019); and *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) (contrasted by *Servotronics Inc. v. Rolls Royce PLC,* No. 19-1847 (7th Cir. Sept. 22, 2020)). However, in June 2022, the Supreme Court of the United States resolved the split and held in *ZF Auto. US, Inc. v. Luxshare, Ltd*., 596 U.S. 619, 638 (2022) that the statute does *not* extend to overseas private arbitration. The Supreme Court held that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under 28 U.S.C. § 1782. It is stated in this case that "a 'foreign tribunal' is a tribunal imbued with governmental authority by one nation, and an 'international tribunal' is a tribunal imbued with governmental authority by multiple nations".

252 This was confirmed by the Supreme Court of the Netherlands in *X v. van Hartingsveld*, HR, 14 November 2003, *JOL* 2003, 582, and by the Supreme Court of Israel in *Israel Discount Bank v. Hassan*, S. Ct., 13 October 2010, No CA 8692/09.

253 In some common law jurisdictions, the power to issue a Letter of Request is within the inherent power of the court (*i.e.*, without the need for statutory authorisation). This is the case in England (*Panayiotou v. Sony Music Entertainment (UK) Ltd* [1994] 1 All ER 755 (High Court) [hereinafter the "George Michael case"]), the Hong Kong SAR (*Kwan Chui Kwok Ying & Another v. Tao Wai Chun & Others* (13 December 2002, CACV 194/2002)), and the United States (*In re Urethane Antitrust Litigation*, 267 F.R.D. 361, 364 (D. Kan. 2010)). In Australia, however, the Federal Court has held that the issuance of a Letter of Request is not within the inherent power of the court, and that therefore an Australian court may only issue a Letter of Request pursuant to statutory authorisation: *Elna Australia Pty Ltd v. Int'l Computers (Aust) Pty Ltd* (1987) 14 FCR 461; *Allstate Life Insurance Co. v. Australia and New Zealand Banking Group Ltd (No 18)* (1995) 133 ALR 667.

or by application of a party to the proceedings;

c. what conditions must be fulfilled before a Letter of Request is issued;[254]

d. whether a Letter of Request may only be used to obtain particular kinds of evidence or to perform particular judicial acts (if any);[255]

e. whether the issuance of a Letter of Request may be challenged;[256]

f. whether the issuance of a Letter of Request may be the subject of appeal;

g. whether a Letter of Request may be issued in electronic form;[257]

h. whether a Letter of Request may be amended or reissued.[258]

152. It is not for the Requested State to review whether a Letter of Request has actually been issued in accordance with the law of the Requesting State (see para. 453).

2. Content of the Letter of Request

153. The 1970 Evidence Convention establishes certain content requirements for Letters of Request

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254 In some Requesting States, the relevance or materiality of the evidence to be obtained will be screened before a Letter of Request is issued. In the Netherlands, the Supreme Court confirmed that a Letter of Request may be refused issuance under Dutch law where the evidence sought is not relevant: *X v. van Hartingsveld* (*op. cit.* note 252). In *Been v. van Waveren en Zonen B.V.*, Hof. Amsterdam, 30 June 1983, *NIPR* 1983, 368, the Amsterdam Court of Appeal confirmed that a Letter of Request would be issued if the interests of justice so require. In the United States, in *Estate of Klieman v. Palestinian Authority*, 272 F.R.D. 253 (D.D.C. 2011) the issuance of a series of Letters of Request was challenged on the basis that the evidence sought was not relevant and that resort to the Convention would delay proceedings. The Court upheld the application to issue the Letters of Request, finding that (at 259-260) "the clear relevance of the evidence sought outweighs any concerns of expediency." In some Requesting States, the issuance of a Letter of Request depends on considerations of justice. In Singapore, the *Rules of Court* require the issuance of a Letter of Request to be "necessary for the purposes of justice", as confirmed by the High Court in *Credit Suisse v. Lim Soon Fang Bryan* [2007] 3 SLR 414. In the Hong Kong SAR, the HKCFI has stressed that, for granting an application to issue letters of request under Order 31 rule 2 of the High Court, it must be satisfied that the evidence to be obtained is necessary and in the interest of justice (*Tang Yi v Edmond de Rothschild Asset Management Hong Kong Ltd* 2018 WL 250454 (CFI), [2018] HKEC 1235). Furthermore, in some Requesting States, the courts have confirmed that the principles guiding the issuance of outgoing Letters of Request should be the same as those guiding the execution of an incoming Letter of Request. See, *e.g.*, *Indochina Medical Co. Pty Ltd v. Nicolai* (*op. cit.* note 138), New South Wales Court of Appeals (Australia)), *Re Lehman Re, Ltd* [2011] Bda LR 26 (Bermuda), and *Charman v. Charman* [2006] 1 WLR 1053 (Court of Appeal of England).

255 In some common law jurisdictions, there is some doubt whether judicial authorities have the power to issue Letters of Request for documents. This is particularly the case where the power to issue Letters of Request is solely found in statute, rather than the inherent power of the court (see discussion at note 253). For example, in Australia, where the power to issue Letters of Request is statutory, the Federal Court has held that the relevant statute only authorises the issuance of Letters of Request for the production of documents that are ancillary to the taking of the oral testimony of a witness: *Elna Australia Pty Ltd v. Int'l Computers (Australia) Pty Ltd* (*op. cit.* note 253). The Supreme Court of New South Wales has also doubted whether it has the power under the relevant statute to issue a Letter of Request for documents alone, although it refused to rule on this point: *Gloucester (Sub-Holdings 1) Pty Ltd v. Chief Commissioner of State Revenue* (*op. cit.* note 115). Conversely, in England, where the issuance of Letters of Request falls within the inherent power of the court, the High Court has confirmed that a Letter of Request may be issued for the production of documents alone: *George Michael* case (*op. cit.* note 253).

256 Around half of the Contracting Parties that responded to the 2022 Questionnaire stated that it was possible to contest the issuance of a Letter of Request, whilst the other half indicated that it was not possible (see question 20).

257 On the acceptance of electronic Letters of Request, see paras 194-196.

258 For example, in *In re Urethane Antitrust Litigation* (*op. cit.* note 253), a party asked the United States District Court for the District of Kansas to strike off certain special procedures from a proposed Letter of Request on the basis that they were not consistent with the procedure in the Requested State. As discussed at paras 256-258, the Requested State may request the requesting authority to amend or reissue a Letter of Request that is non-compliant with the provisions of the Convention. In *Beauty World Wide N.V. v. Bayer A.G. & Bayer Nederland B.V.*, the Amsterdam Court of Appeal (Netherlands) confirmed that nothing in the Convention prohibited a court from reissuing a Letter of Request: Hof. Amsterdam, 21 September 1989, *NJ* 1990, 617.

(Art. 3(1)).[259] Some content requirements apply to all Letters of Request (paras 159-170)[260] whereas other content requirements apply only "where appropriate" (paras 171-189). The Convention also contemplates that Letters of Request may specify additional content regarding privileges under the law of the Requesting State (para. 190) and the attendance of the parties and their representatives at the execution of the Letter of Request (para. 191).

154. The content requirements established in the Convention reflect what the drafters deemed to be essential for the effective execution of a Letter of Request.[261] As noted at para. 68, they reflect a general preoccupation that a Letter of Request should be *sufficiently substantiated*.[262] Article 3(1) only prescribes *minimum* content, and there is nothing in the Convention prohibiting the requesting authority from specifying other content in a Letter of Request that it considers will assist in its execution (as demonstrated by the Model Form). In particular, the Letter of Request should make reference to the fact that it is being issued under the Convention.

155. A failure to comply with the content requirements in Article 3(1) may result in a Letter of Request being refused execution on the ground that it does not comply with the provisions of the Convention (Art. 5).[263] In practice, incomplete or insufficient information provided to the Central Authorities or the requested authorities in the Requested States could also lead to non-compliance, it is thus advisable to consider the drafting tips below.[264]

Drafting tips for preparing a Letter of Request

156. A well-drafted Letter of Request is vital to ensuring that evidence is taken in the Requested State in a timely manner and in such a way that it can be effectively utilised in proceedings in the Requesting State. Requesting authorities (or other persons responsible for preparing Letters of Request) are strongly encouraged to use the Model Form (see paras 192 and 193) and refer to instructions for completion set out at Annex 44.

157. When preparing a Letter of Request, it is important to bear in mind that the Letter of Request may be received and executed by authorities or officials that are not familiar with civil procedure in the Requesting State.[265] Accordingly, the requesting authority (or other person responsible for

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259 In this regard, the Convention goes further than the 1954 Civil Procedure Convention, which establishes no content requirements. The content requirements in Art. 3(1) are substantially based on the bilateral agreements that the United Kingdom had entered into with various other States prior to negotiating the 1970 Evidence Convention: Report of the 1968 SC (*op. cit*. note 16), p. 59.

260 The mandatory nature of the content requirements in Art. 3(1) was confirmed by the Federal Magistrates Court of Australia in *Secretary of the Attorney-General's Department & Evans and Norris* (*op. cit*. note 104).

261 Report of the 1968 SC (*op. cit.* note 16), p. 58; J.-P. Beraudo (*op. cit.* note 40), para. 58. In *News Int'l plc v. ABN Amro N.V.* (*op. cit.* note 14), the Supreme Court of the Netherlands stated that "[t]he purpose of Article 3 is clearly nothing else but to inform the judicial authority of the Requested State of the content and purpose of the judicial act sought by the Letter of Request".

262 The Supreme Court of the Canton of Zurich (Switzerland) (*op. cit*. note 104) has stated that the requirements of Art. 3(1) (particularly paras (c), (d), (f) and (g)) are designed to ensure that the Letter of Request is sufficiently specified ("*genügend spezifiziert*") so as to avoid fishing expeditions. This statement has been followed by the Supreme Court of the Canton of St. Gallen in its decision of 26 October 2009 (*op. cit*. note 134). The Supreme Court of New South Wales (Australia) has also observed that Art. 3 is consistent with the proposition that the nature of evidence sought should be disclosed in a Letter of Request with "reasonable particularity", although the Court later held that this was not a necessary precondition for executing the Letter of Request: see *Pickles v. Gratzon* (*op. cit*. note 101). In addition, the Higher Regional Court of Dusseldorf (Germany) has noted that Art. 3 possesses a dual character, in that its specific content requirements give rise to a norm that is both procedural and protective in nature (28 December 2011, No I-3 VA 2/11, at 59).

263 For more on refusal to execute non-compliant Letters of Request, see paras 404 *et seq*.

264 In the responses to the 2022 Questionnaires, some Contracting Parties listed certain reasons for non-compliance: such as where a request for the taking of evidence and a request for the service of documents were joined in one request; where the request was unclear, too broad, purpose of the evidence unclear, poor translations, incorrect or incomplete address, questions not listed or insufficient information provided, lack of description of the link between the case and the witness; requests did not comply with Art. 1 in that the request related to service of judicial documents, and under the internal law of that Contracting Party, an application for disclosure of documents sought would not have been granted.

265 Indeed, Central Authority staff charged with reviewing incoming Letters of Request may not be legally trained.

preparing the Letter of Request) should avoid using standard formulations used for the taking of evidence in domestic proceedings. As far as possible, the Permanent Bureau recommends that Letters of Request be drafted in simple, non-technical language. As noted by the Special Commission, the use of "words of art", which may be customarily employed in the internal legal practice of the Requesting State, may cause difficulties with interpretation in the Requested State.[266] The moving party may wish to engage counsel, or the Central Authority (where workable), in the Requested State to advise on the drafting of the Letter of Request.[267]

158. As much as possible, Letters of Request and their translations should be typed rather than drafted by hand.[268]

i. Information required in all cases

159. Article 3(1) of the Convention requires *every* Letter of Request to specify the following:

a. the requesting authority (Art. 3(1)(a));

b. the requested authority (if known) (Art. 3(1)(a));

c. the names and addresses of the parties to the proceedings and their representatives (if any) (Art. 3(1)(b));

d. the nature of the proceedings for which the evidence is required (Art. 3(1)(c)); and

e. the evidence to be obtained or other judicial act to be performed (Art. 3(1)(d)).

a) Requesting authority

160. The Letter of Request must specify the requesting authority (Art. 3(1)(a)). This should include the name and address of the requesting authority. The Permanent Bureau also recommends that the Letter of Request specify the telephone number and email address of the requesting authority to facilitate any follow-up correspondence with the Requested State concerning the execution of the Letter of Request (*e.g.*, where the Central Authority of the Requested State considers that the Letter of Request is non-compliant, or where the requesting authority requests to be kept informed on the progress of execution, or where video-link would be used or organised).

b) Requested authority

161. The Letter of Request must specify the requested authority, if known to the requesting authority (Art. 3(1)(a)). Often, the identity of the authority that is competent to execute the Letter of Request is not known to the requesting authority. If this is the case, the Letter of Request need not specify the requested authority. Alternatively, it may simply specify the "Competent authority of [*insert name of the Requested State*]". It will more likely be the case that the identity of the requested authority will be known where Letters of Request are transmitted directly from judicial authority to judicial authority (as discussed at paras 233 *et seq.*).

c) Names and addresses of the parties to the proceedings and their representatives

162. The Letter of Request must specify the names and addresses of the parties to the proceedings,

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266 The XVII Ibero-American Judicial Summit (2014) has recommended that letters of request be formulated in plain language: "Guide to Good Practice for International Letters Rogatory in Civil Matters", Annex 3A to the *Ibero-American Protocol on International Judicial Co-operation*, part 1(j).

267 The importance of this practice was stressed by the Grand Court of the Cayman Islands in *First American Corp. v. Zayed* [2000] CILR 57, at 77. Certain Contracting Parties have also indicated in their response to the 2022 Questionnaire that they provide assistance to legal representatives to prepare a Letter of Request (see question 17).

268 C&R No 25 of the 2014 SC.

and the names and addresses of their representatives (if any) (Art. 3(1)(b)).

163. In exceptional cases, there may only be a single party to the proceedings.[269] This may occur where a Letter of Request is issued to obtain evidence for use in contemplated proceedings (as discussed at paras 88-91, where a Letter of Request is issued at the request of a non-judicial body (as discussed at para. 147), or where a Letter of Request is issued in non-adversarial proceedings (see para. 84).

164. The provision of complete and accurate contact details is particularly important where the parties and / or their representatives wish to be present at the execution of the Letter of Request. As discussed in more detail at paragraphs 319 *et seq.*, the Convention provides for the parties and their representatives to be directly informed of the time and place of execution to allow for their presence. To this end, the requesting authority may request for the parties and their representatives to be informed by e-mail (*e.g.*, for convenience or to avoid delays), in which case, the Letter of Request should specify the relevant e-mail addresses.[270]

d) Nature of the proceedings

165. The Letter of Request must specify the "nature of the proceedings for which the evidence is required", and must also "giv[e] all necessary information" (Art. 3(1)(c)). How much detail is specified in the Letter of Request on the nature of the proceedings will depend on the particular case. One commentator has suggested that this information should be "neutral, brief and to the point".[271] In other words, the nature of the proceedings should be specified in such a way as to ensure that a foreign judicial authority unfamiliar with litigation practices in the Requesting State would understand the request. In this regard, the Model Form provides as examples "divorce", "paternity", "breach of contract", and "product liability" proceedings.[272]

166. The Special Commission has suggested that the Letter of Request include a summary of the complaint, defence, and any counterclaim (where relevant).[273] One commentator has cautioned that the Letter of Request should not be used as an opportunity to "rehearse the whole case".[274] At the same time, detailed information may be warranted where the Letter of Request seeks to have a witness examined about a particular subject-matter (see para. 176).

167. The Letter of Request should state whether the proceedings have commenced or whether the proceedings are contemplated. This is particularly useful if the Letter of Request is being issued for the purpose of pre-trial discovery to avoid any confusion in the Requested State as to the status of the proceedings.[275] If proceedings are contemplated, the Letter of Request should explain the steps to be taken before proceedings are commenced.[276]

168. Specifying the nature of the proceedings may be crucial in satisfying the requested authority that it has the requisite power to execute the request in the circumstances under the law of the Requested State.[277] In one case in Australia, a Letter of Request seeking the performance of a DNA test was refused execution on the basis that the requested authority had insufficient information about the

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269 As noted in para. 83, a Letter of Request may be used to take evidence for use in non-adversarial proceedings.

270 See, *e.g.*, *In re Baycol Products Litigation*, 348 F. Supp. 2d 1058 (D. Minn. 2004), where the United States District Court for the District of Minnesota specified in a Letter of Request addressed to Italy the e-mail address of local counsel retained by the moving party to facilitate the acquisition, copying, shipping and handling of documents sought.

271 C. Platto, "Taking Evidence Abroad for Use in Civil Cases in the United States – A Practical Guide", in *Obtaining evidence in another jurisdiction in business disputes*, London, Graham & Trotman, 1993, p. 157.

272 The Letter of Request should avoid using "labels" that may not be understood outside the Requesting State.

273 Report of the 1985 SC (*op. cit.* note 24), Part I, § 2(C). This is reflected in the Model Form.

274 D. McClean (*op. cit.* note 79), p. 94.

275 As noted in para. 91, Letters of Request issued for the purpose of pre-trial discovery are *always* issued after the commencement of proceedings in the Requesting State.

276 For more on contemplated proceedings, see paras 88-91.

277 For more on refusing to execute Letters of Request for want of power, see paras 413 *et seq*.

nature of the proceedings before the Swedish court in order to invoke the relevant powers under Australian legislation to order performance.[278]

e) Evidence to be obtained or other judicial act to be performed (Art. 3(d))

169. The Letter of Request should include a clear and definite statement about the evidence to be obtained (*e.g.,* witness examination, document or property inspection) or judicial act to be performed.[279] This is to ensure that the requested authority understands what it is being requested to do. Where evidence is sought, Article 3(1)(e)–(i) requires additional specifics to be provided (see paras 171 *et seq.*).

170. The Special Commission has recommended that the Letter of Request specify how the evidence or judicial act sought relates to the proceedings in the Requesting State.[280] This is particularly important in order to avoid rejection on the basis that the Letter of Request is a "fishing expedition" (see para. 68).[281] At the same time, as discussed at paragraph 462, it is not for the requested authority to assess whether the evidence sought is relevant to the proceedings in the Requesting State.

ii. Information required where appropriate

171. Depending on the type of evidence that is sought, Article 3(1) also requires a Letter of Request to specify the following:

a. the names and addresses of the persons to be examined (Art. 3(1)(e));

b. 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 (Art. 3(1)(f));

c. the documents or other property, real or personal, to be inspected (Art. 3(1)(g));

d. any requirement that the evidence is to be given on oath or affirmation, and any special form to be used (Art. 3(1)(h)); and

e. any special method or procedure to be followed (Art. 3(1)(i)).

a) Names and addresses of the persons to be examined

172. If the requesting authority is seeking for a person to be examined, the Letter of Request must

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278 *Secretary of the Attorney-General's Department & Evans and Norris* (*op. cit*. note 104).

279 Explanatory Report, para. 58. See also the decision of the United States District Court for the District of Delaware in *Abbott Laboratories v. Impax Laboratories, Inc.*, No Civ.A. 03-120-KAJ, 2004 WL 1622223 (D. Del. 15 July 2004). As D. McClean notes (*op. cit.* note 79, p. 94), "[w]hat is most needed [in the Letter of Request] is a clear explanation of the particular point on which evidence is sought".

280 Report of the 1985 SC (*op. cit*. note 24), Part I, § 2(C).

281 In a decision of 21 December 2005 (*op. cit.* note 134), the Federal Supreme Court of Switzerland confirmed that a failure to specify a connection between the evidence sought and the proceedings before the requesting authority could be a factor in determining that a Letter of Request had been issued for the purposes of a fishing expedition. The courts in several common law States have held that although statements in a Letter of Request are not conclusive, they may assist in satisfying the requested authority that the Letter of Request is not a "fishing expedition": see, e.g., *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit*. note 136, High Court of England), *Prediwave Corp. & Another v. New World TMT Ltd* (*op. cit*. note 131, HKCA of the Hong Kong SAR), and *Gray 1 CPB, LLC v. Gulfstream Finance, Inc*, 17 February 2012, No 10 (Grand Court of the Cayman Islands). In *Golden Eagle Refinery Co., Inc. v. Associated Int'l Insurance Co*. [1998] EWCA Civ. 293, the Court of Appeal of England agreed to execute a Letter of Request due in part to a statement by the requesting party's counsel that the witness examination sought was only "to perpetuate testimony for admission at the trial". At the same time, there is at least one case in the United States where a district court refused to state in the Letter of Request that documents sought were "necessary for the continuance of these proceedings" on the basis that, without prior vetting of the requested documents, it could not assert that all returned evidence would be relevant or admissible at trial: *In re Baycol Products Litigation* (*op. cit*. note 270). The absence of such a statement should not alone imply that the Letter of Request is a "fishing expedition": *Smith v. Philip Morris Companies, Inc*. [2006] EWHC 916 (QB) (High Court of England).

specify the full name and address of that person (Art. 3(1)(e)).[282] The purpose of this requirement is to allow the requested authority to readily identify and notify[283] the person. It may also assist the Central Authority in identifying the authority competent to execute the Letter of Request (*e.g.*, where competence to execute Letters of Request is determined by the residence of the person to be examined).[284] As a result, it is generally preferable for the Letter of Request to specify the residential address (for natural persons) or corporate address (for legal persons) of the person to be examined, rather than a postal address. To further facilitate identification of natural persons (and therefore avoid any delays in the execution of the Letter of Request), it may also be helpful to specify the person's nationality, profession, date of birth, phone number, e-mail address, and national identity code (if known).

173. Although Article 3(1)(e) only contemplates *witness examination*, for practical purposes, a Letter of Request seeking the *production of document*s should also specify the details of the person or body, including an authority, from whom the documents are to be produced. The internal law of some Requested States may provide for the person producing documents to give oral evidence to identify the documents (see para. 281).

174. In most cases, fulfilling this content requirement will not be an issue. Difficulties may arise, however, where evidence is sought from a legal person (*e.g.*, a bank), particularly given differences in the methods and procedures followed by Contracting Parties under their internal law. In this situation, the requesting authority may not be in a position to identify the office authorised to give evidence on behalf of the legal person and / or the individual holding that office, and may only be in a position to identify the legal person. In practice, Letters of Request are issued and executed without the details of the particular office or individual office holder being specified,[285] and requested authorities appear to be prepared to execute Letters of Request that do not identify witnesses in accordance with the methods and procedures followed under the internal law of the Requested State.[286] In the case of doubt as to the identification of witnesses where evidence is sought from a legal person, the requesting authority (or other person responsible for preparing the Letter of

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282 In the case of *Korthofer v. ICI & V. Teich GmbH*, the District Court of Arnhem (Netherlands) relied on Art. 3(1)(e) of the Convention to refuse to issue a Letter of Request for the examination of witnesses whose full names and addresses had not been provided by the moving party: 8 April 1993, *NIPR* 1993, 474. In that case, the moving party claimed that they were only able to provide the surnames of the witnesses to be examined and, for one person, the town of residence.

283 It is up to the law of the Requested State to determine how the witness is notified (see discussion at para. 278).

284 This is particularly the case in federal States.

285 In *News Int'l plc v. ABN Amro N.V.* (*op. cit*. note 14), the Supreme Court of the Netherlands rejected a challenge to the execution of a Letter of Request that sought the examination of the "head of the legal department, ABN Amro Bank N.V.", or some "other properly nominated person on behalf of ABN Amro Bank N.V.". The court held that the Letter of Request complied with Art. 3(1)(e), noting that a Letter of Request should not be refused execution solely on the grounds that the exact name and address of the individual is not specified, provided that the identity of the individual (or some other appropriate individual) can readily be established. In a decision of 27 August 1996, *NIPR* 1997, No 269, the District Court of Amsterdam upheld a decision to execute a Letter of Request that only identified the name of the bank from which the production of documents was sought. In *Re Application of Attorney General of New South Wale*s [2013] NSWSC 807 (12 June 2013), the Supreme Court of New South Wales (Australia) ordered the production of bank records from "the proper officer" of the bank. In another Australian case, *BCI Finances Pty Ltd (in liq) v. Commissioner of Taxation* (*op. cit*. note 115), a Letter of Request was issued by the Federal Court of Australia which had named a specific employee of an Israeli bank on the basis that that employee would be able to provide the evidence sought. Upon application by the Israeli bank, the requested court in Israel then substituted the named employee for two other employees, who were deemed to have better knowledge of the circumstances and would thus be in a better position to provide the evidence sought in the Letter of Request. In the *George Michael* case (*op. cit*. note 253), the High Court of England agreed to issue a Letter of Request to the "proper officer" of a licensing company. In *Kayne Creditors v. Roderick John Sutton & Others* (30 September 2013, HCMP 463/2013), the HKCFI of the Hong Kong SAR refused to overturn an order for the execution of a Letter of Request where the capacity of the witness, who was a company liquidator, was not identified.

286 See, *e.g.*, paras 279-281. In its decision of 27 August 1996 (*op. cit*. note 285), the District Court of Amsterdam (Netherlands) dismissed a challenge to the execution of a Letter of Request on the basis that the witness identified was a legal person and that under Dutch law, a legal person could not appear as a witness. In *Penn-Texas Corp. v. Murat Anstalt (No 2)* [1964] 2 QB 647, which predated the Convention, the Court of Appeal of England agreed to execute a letter of request by summoning the "proper officer" of a company to produce documents (as required for witness summonses under English law), despite the letter of request specifying individual office holders to give evidence.

Request) should contact the Central Authority of the Requested State.

Multiple witnesses

175. The Convention contemplates the possibility of issuing a single Letter of Request used for the examination of multiple witnesses.[287] In practice, where multiple persons are sought to be examined, requesting authorities will either issue a single Letter of Request,[288] or a separate Letter of Request for each witness.[289] It is up to the requesting authority to determine how to organise the issuance of Letters of Request to ensure their effective execution. However, as noted at paragraphs 272 to 275, in many Contracting Parties, the authority competent to execute a Letter of Request is determined by the residence of the person to be examined, in which case a Letter of Request seeking the examination of multiple witnesses may involve multiple authorities. Although Article 6 of the Convention requires the Requested State to forward the Letter of Request to the authority competent to execute it, it may be more expedient in the first place for the requesting authority to issue a Letter of Request for each person or for each competent authority (if already known).[290] In case of doubt, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State to confirm whether multiple Letters of Request should be issued.

b) 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

176. If the requesting authority is seeking for a person to be examined, the Letter of Request must specify either:

a. the questions to be put to the person; or

b. a statement of the subject-matter about which the person is to be examined (Art. 3(1)(f)).

177. Witness examination may take place in oral form (oral testimony in response to questions put by the examining officer) or in written form (written responses to written interrogatories).[291]

178. The practice in Contracting Parties is divided as to whether the Letter of Request should contain a list of specific questions.[292] When doing so, questions should be drafted in a clear and concise manner and should avoid vague and uncertain concepts.[293] If the requesting authority opts to include a statement of the subject-matter of the examination, this should be clearly defined,[294]

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287 Art. 3(1)(e) refers to the "persons to be examined" in the plural.

288 This was the case in the *Siemens* case (*op. cit*. note 83).

289 This was the case in the *Westinghouse* case (*op. cit*. note 108).

290 An alternative is for the Central Authority to copy a Letter of Request seeking the examination of multiple witnesses and to forward it to each competent authority involved. However, the competent authorities in some Contracting Parties still require a Letter of Request to bear the original seal of the requesting authority. Another alternative is for the requesting authority to issue the Letter of Request in electronic form (with an electronic signature). For more on the acceptance of electronic Letters of Request, see paras 194-196.

291 Report of the 1968 SC (*op. cit*. note 16), p. 59.

292 See responses to question 36 of the 2008 Questionnaire and question 27 of the 2022 Questionnaire. In the 2022 Questionnaire, half of the Contracting Parties which responded indicated that they required a list of specific questions and the other half indicated that they did not.

293 See, in general, responses to question 36 of the 2008 Questionnaire. In response to question 25 of the 2022 Questionnaire where it was asked if as the Requested State, a Letter of Request seeking discovery would be rejected if it was too broad, Germany indicated that whilst a list of questions to the person to be questioned was not required, a list of matters to be addressed would suffice if it was not intended to seek disclosure by an adversary of facts supporting a case. In *Upaid Systems Ltd v. Satyam Computer Services* (*op. cit.* note 14), the High Court of Delhi in India considered that it would be "impermissible and imprudent" to review the specificity of questions in an incoming Letter of Request.

294 *Re the Matter of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970* (*op. cit*. note 108). In a 2007 decision, the HKCFI of the Hong Kong SAR considered, but ultimately rejected, arguments that the statements of the topics on which evidence was sought were vague and uncertain: *Re United States District Court for the*

bearing in mind that the requested authority is unlikely to know more about the nature of the proceedings than that which is specified in the Letter of Request (see paras 165-168). If the statement is drafted in broad terms, the Letter of Request risks being considered a "fishing expedition" and refused execution (see paras 68-70).[295] It has been stated that the wider the scope of the subject-matter, the more necessary it is for particulars to be given.[296] The requesting authority should not rely on the possibility that the Central Authority or requested authority will "blue-pencil" (*i.e.*, modify or limit) a Letter of Request that is considered too broad.[297] For more on witness examination, see para. 279.

List of specific questions or statement of subject-matter?

179. As a basic rule, a Letter of Request is executed by applying the methods and procedures prescribed by the law of the Requested State (Art. 9(1)). This law may dictate that witness examination be conducted on the basis of a list of specific questions. Even if no such requirement exists, a number of Contracting Parties have indicated that their authorities prefer that the Letter of Request specify a list of specific questions to facilitate the taking of evidence.[298] At the same time, the Convention contemplates that a Letter of Request for witness examination may be executed on the basis of specific questions or a statement of subject-matter.[299] Accordingly, a Letter of Request containing a statement of subject-matter cannot be refused execution on the basis that it does not comply with the provisions of the Convention. However, it may complicate or delay the execution of the Letter of Request, and it may be more expedient for the requesting authority to reissue the Letter of Request specifying the questions to be put to the witness.[300] If a Letter of Request is reissued, it is advisable for both the requesting and requested authorities to exchange informal or direct

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Central District of California under No. CV06-6508 RSWL (CWx) [2008] 1 HKLRD 581. In *Metso Minerals, Inc. v. Powerscreen Int'l Distribution Ltd* [2008] NIMaster 55, the High Court of Justice of Northern Ireland refused to execute a Letter of Request seeking witness examination to the extent that the subject-matter was considered "too broad". In *State of Minnesota v. Philip Morris, Inc*. [1998] I.L.Pr. 170, the Court of Appeal of England confirmed that the courts of England will not execute Letters of Request that are "uncertain, vague or… objectionable". In that case, the Court found a Letter of Request "wholly unacceptable" as being too wide and uncertain insofar as it sought the examination of witnesses on information regarding the health effects of cigarette smoking. In particular, the Letter of Request mentioned (as summarised by the Court) "smoke and health issues relating to tobacco and cigarettes; marketing of cigarettes; scientific research related to smoking and health issues; manipulation of nicotine by [certain] defendants or their subsidiaries and affiliated companies; the exercise of control by those defendants over their subsidiary and affiliated companies; and the interaction of those companies and affiliated companies, including, but not limited to [another] defendant". The Court also noted that the subject-matter of examination must be specified with "sufficient particularity". In Australia, the Supreme Court of New South Wales has held that a Letter of Request need not disclose with "reasonable particularity" the nature of the evidence that is to be taken: *Pickles v. Gratzon* (*op. cit*. note 101). Instead, the Court found that it was sufficient if the "Letter of Request and other material before the Court indicates *in general terms* the evidence which is sought" (emphasis added).

295 In *State of Minnesota v. Philip Morris Inc*. (*op. cit.* note 294), the Court of Appeal of England noted that where the statement of subject-matter is too widely drawn, it will "lead to the inference that the Letter of Request was designed to elicit information which might lead to the obtaining of evidence rather than to establish allegations of fact, and that would amount to an impermissible fishing expedition" (Lord Justice Peter Gibson). However, in *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit.* note 136), the Court of Appeal cautioned that while the width of a request may indicate the absence of an intention to obtain "evidence", it may equally be "an inevitable consequence of the complexities of the issues and of the witness's involvement in them". See also *Aureus Currency Fund v. Credit Suisse* (*op. cit.* note 144).

296 *State of Minnesota v. Philip Morris Inc*. (*op. cit*. note 294), p. 186. In *First American Corp. v. Zayed* (*op. cit.* note 267), the Grand Court of the Cayman Islands noted with reference to Art. 3(1)(f) that "the greater the complexity and breadth of the subject-matter, the greater will be the need to enable the witness to identify the specific issues to which they must respond and to prepare themselves for doing so".

297 For more on the limits of blue-pencilling, see paras 404 *et seq*.

298 See responses to the 2008 Questionnaire and the 2022 Questionnaire (*op. cit.* note 6).

299 The ability of the requesting authority to elect either approach was emphasised by the Higher Regional Court of Munich in Germany in the *Siemens* case (*op. cit.* note 83) and by the Grand Court of the Cayman Islands in *Re Drammen Byrett's Request* (*op. cit.* note 130). In the latter case, the Court noted that if the requesting authority wanted to subsequently elect the other approach, it would need to issue a new Letter of Request.

300 *Beauty World Wide N.V. v. Bayer A.G. & Bayer Nederland B.V*. (*op. cit*. note 258).

contact information with a view to speeding up the process of reissuing the Letter of Request.

180. In the case of doubt, as to whether a Letter of Request for witness examination based on a statement of subject-matter is capable of execution, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State to check whether the competent authority of that Contracting Party has a particular requirement as to whether the Letter of Request should specify a list of specific questions.

181. It may not always be practicable for the Letter of Request to specify the questions to be asked, particularly in complex litigation or where the examination is sought to be conducted "common law style".[301] This issue was addressed by a District Court of the United States in *Abbott Laboratories v. Impax Laboratories, Inc.*,[302] where the plaintiff challenged an application for issuance of a Letter of Request on the basis that the defendant had not sufficiently identified the scope of information sought to be obtained from the witnesses. The court rejected the challenge and agreed to issue the Letter of Request, noting that as the witnesses were likely to possess a variety of relevant information, it was impracticable and would be counterproductive to require the applicant to attempt a more detailed specification of the information sought.

c) The documents or other property, real or personal, to be inspected

182. Where documents are requested, the documents should be specifically identified. Wherever possible, the Letter of Request should specify the author, recipient, subject-matter, the date of the document,[303] and specify the details of the person from whom the documents are to be produced.

183. Where documents are sought for the purpose of pre-trial discovery, the requesting authority should check whether the Requested State has made a declaration under Article 23. The Special Commission has recommended that Article 23 not be applied to refuse the execution of Letters of Request where the requested documents are "specified in the request, or otherwise reasonably identified."[304] Therefore, it is recommended that the requesting authority ensure that the requested documents are reasonably identified, to minimise the chances of rejection under Article 23.[305]

184. Even for Contracting Parties that have not made an Article 23 declaration, or for those that have made a qualified Article 23 exclusion that allows for execution in certain circumstances,[306] the Letter of Request should avoid requesting documents in broad terms. In particular, requests for "any and all documents" of a particular class of documents should be avoided.[307]

185. In the case of doubt as to the identification of documents to be produced, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State.[308].

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301 See C. Platto (*op. cit*. note 271), p. 157.

302 *Abbott Laboratories v. Impax Laboratories, Inc.*,(*op. cit.* note 279).

303 D. Prescott & E.R. Alley, "Effective Evidence-Taking under the Hague Convention", (1988) 22(4) *Int'l Law*., 939.

304 C&R No 18 of the 2014 SC.

305 For more on the refusal to execute Letters of Request issued for the purpose of pre-trial discovery of documents, see paras 426 *et seq*.

306 For a breakdown of the different declarations made by Contracting Parties under Art. 23, see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", available on the Evidence Section of the HCCH website.

307 In the United States, a District Court refused to issue a Letter of Request formulated in terms of "any and all documents" on the grounds that outgoing Letters of Request should be "narrowly tailored to obtain particular evidence". The Court acknowledged that Letters of Request failing to adhere to this requirement risked being refused execution abroad: see *Kia Motors America, Inc. v. Autoworks Distributing*, No. 06-cv-156 (DWF-JJG), 2007 WL 4372949 (D. Minn. 27 September 2007). See also *Cywee Grp. Ltd. v. Huawei Device Co. Ltd*., No. 2:17-CV-495-WCB, 2018 WL 4100763 (E.D. Tex. 13 July 2018).

308 For more on the production of documents, see para. 281.

d) Any requirement that the evidence is to be given on oath or affirmation

186. In many Contracting Parties, oral testimony is usually taken on oath or affirmation.[309] When it is, the form of oath or affirmation differs among Contracting Parties. If the requesting authority wishes for evidence to be taken under oath or affirmation, this should be stated in the Letter of Request. If a special form of oath is required (*e.g.*, the use of particular words, or the use of a particular person to administer the oath, in accordance with the law of the Requesting State), this should also be specified in the Letter of Request.

187. A request for evidence to be given on oath or affirmation, as well as a request to use a special form in doing so, are "special procedures",[310] and are therefore subject to Article 9(2) of the Convention.[311] To avoid delays in cases where such a request is not followed, the Letter of Request should specify whether evidence may be taken in accordance with domestic procedure in the Requested State. In the case of doubt as to whether a particular oath or affirmation may be administered, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State.

e) Any special method or procedure to be followed

188. As discussed at paragraph 276, the basic rule of the Convention is that Letters of Request are executed following the methods and procedures of the law of the Requested State (which can vary considerably among Contracting Parties). However, subject to limited exceptions, the requested authority must follow a special method or procedure requested by the requesting authority. To give effect to this rule, the requesting authority should specify any such request in the Letter of Request.

189. To avoid delays in the execution of the Letter of Request, the requesting authority should pay attention to clearly specifying the special method or procedure requested, including by providing an extract of the relevant law or guidelines of the Requesting State, translated into an official language of the Requested State.[312]

iii. Information regarding privileges

190. Article 11 of the Convention contains rules on privileges and duties not to give evidence.[313] Article 11(1)(b) provides that a person may invoke a privilege or duty to refuse to give evidence under the law of the Requesting State if the privilege or duty has been specified in the Letter of Request or otherwise confirmed by the requesting authority.[314] If the requesting authority wishes for a person to be able to invoke a privilege or duty to refuse to give evidence under its law, this should be specified in the Letter of Request to ensure that the privilege or duty is recognised by the requested authority when executing the Letter of Request.[315] To avoid delays in the execution of the Letter of Request, the requesting authority should pay attention to clearly specifying the privileges and duties, including by providing an extract of the relevant law of the Requesting State,

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309 See responses to question 33 of the 2022 Questionnaire.

310 For more on executing Letters of Request following a special method or procedure, see paras. 293-294.

311 See interventions of the Delegate of Norway and response of the *Rapporteur* at the 1968 meeting of the Special Commission, *Actes et documents de la Onzième session,* Tome IV (*op. cit*. note 3), p. 159.

312 The Special Commission has emphasised this practice in respect of requests to allow the cross-examination of witnesses: see, *infra*, note 443.

313 For more on privileges and duties to refuse to give evidence, see paras 371 *et seq*.

314 Art. 11 of the Convention also provides for the person to refuse to give evidence insofar as they have a privilege or duty under the law of the Requested State or a third State. For more on privileges and duties to refuse to give evidence, see *id*.

315 As noted in para. 382, the requested authority is under no obligation to request confirmation from the requesting authority as to the existence or application of a privilege or duty if it is subsequently invoked in the execution of the Letter of Request. If the requested authority proceeds to execute the Letter of Request, the admissibility of the evidence obtained in proceedings in the Requesting State may be compromised under the law of that State.

translated into the official language of the Requested State.[316]

iv. Information regarding the presence of the parties and their representatives

191. Article 7 of the Convention provides that the parties and their representatives may be present at the execution of the Letter of Request, and for information on the time and place of execution to be sent to them.[317] This information is not automatic; it need only be sent if the requesting authority so requests. Accordingly, if the parties and / or their representatives wish to be present at execution, the Letter of Request should include a statement to this effect and, where applicable, request that information on the time and place of execution be sent directly to the parties and / or their representatives. If the parties and / or their representatives wish to be present by video-link, this should also be specified.

3. Form of the Letter of Request

i. Model Form

192. Unlike the 1965 Service Convention, the 1970 Evidence Convention does not mandate the use of a particular form for Letters of Request. Nevertheless, with a view to facilitating the preparation and timely execution of Letters of Request, the Special Commission has developed a Model Form, which is available on the Evidence Section of the HCCH website.[318] A copy of the Model Form with instructions for completion is set out at Annex 44: Recommended Model Form (with Instructions for Completion).

193. The Special Commission strongly recommends that the Model Form be used for Letters of Request to further enhance the practical operation of the Convention and has noted that many Central Authorities also recommend the use of the Model Form as a means to expedite processing times for incoming Letters of Request.[319]

ii. Electronic transmission of Letters of Request

194. The Convention was concluded at a time when Letters of Request were issued in paper form and physically transmitted from the Requesting State to the Requested State. Nevertheless, the Special Commission has accepted that the Convention operates in an environment that is subject to important technical developments, including the execution and transmission of documents by electronic means.[320] It has also noted that neither the spirit nor letter of the Convention constitutes

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316 At its meeting in 1989, the Special Commission heard from one delegation that provisions of foreign law concerning privileges were frequently attached to Letters of Request, and that the absence of translation into the language of the Requested State created difficulties for the requested authority: Report of the 1989 SC (*op. cit.* note 30), para. 42.

317 For more on the presence of the parties and / or their representatives, see paras 319 *et seq*.

318 The Model Form was first developed and adopted by the Special Commission at its meeting in 1978 and was subsequently revised by the Special Commission at its meeting in 1985. Provided that the content requirements in Art. 3 of the Convention are fulfilled, the Convention does not prevent a requested authority from using another form, such as a form used under bilateral or regional instruments (with adaptations if necessary). In response to the 2022 Questionnaire, the following Contracting Parties which responded indicated that as the Requesting State, their authorities used the Model Form sometimes: Albania, Argentina, Brazil, Bulgaria, Finland, France, Germany, Hungary, Slovenia, Sweden and Switzerland; the following Contracting Parties indicated that as the Requesting State, their authorities always used the Model Form: Andorra, China, Czech Republic, Estonia, Georgia, Israel, Italy, Kazakhstan, Lithuania, Portugal, Romania, Serbia, Singapore, Slovakia and the United Kingdom (England, Wales and Northern Ireland); while the following Contracting Parties indicated that as the Requesting State, their authorities do not use the Model Form: Croatia, China (Hong Kong SAR), China (Macao SAR), Latvia, Nicaragua, Türkiye and Viet Nam. In China (Hong Kong SAR), a standard form prescribed pursuant to local law (Form 35 in Appendix A of the *Rules of the High Court*), must be used (*Rules of the High Court (Cap. 4A)*, Order 39, r.3). For Nicaragua, requests are sent through a note in accordance with Art. 3 of the Convention, but the Model Form can also be used. In Türkiye, a model form similar to the Model Form is used for all requests under the Convention.

319 C&R No 12 of the 2014 SC. See also C&R No 54 of the 2009 SC.

320 C&R No 4 of the 2003 SC.

an obstacle to the use of information technology, and that the application and operation of the Convention can be further improved by relying on such technology.[321] Further, the Special Commission has encouraged the transmission of Letters of Request using such technology, as this may facilitate more timely and efficient execution.[322]

195. Approximately one quarter of Contracting Parties that responded to the 2013 Questionnaire indicated that they would accept electronic Letters of Request (although some of them did state that the electronic Letter of Request would need to be followed by a paper version).[323] The Special Commission has expressed support the practice of sending or receiving Letters of Request by electronic means, and encouraged Contracting Parties to consider the possibility of accepting electronic Letters of Request.[324] In response to the 2022 Questionnaire, more than half of the responding Contracting Parties have now indicated that they would accept the transmission of Letters of Request electronically.[325] Some Contracting Parties, such as China, have taken a step further to establish an electronic platform, through which the request and the documents can be submitted online. As for the EU, the 2020 EU Evidence Regulation and its implementing Regulation[326] will oblige Member States of that Regulation to use a decentralised IT system as a means of communication for the transmission and receipt of requests, forms and other communication under the Regulation from 1 May 2025 onwards. The European Commission is currently developing software which its Member States may choose to use to connect to the decentralised IT system, to send and process requests. For more on the electronic transmission of Letters of Request, see paragraph 238.

196. If a requesting authority wishes to issue a Letter of Request in electronic form (*e.g.*, as a PDF file),[327] it should check with the Central Authority in the Requested State that the Letter of Request will be accepted.[328] Although the Central Authority may not subject the Letter of Request to legalisation or any other similar formality to determine its authenticity (para. 215), and although the Convention does not require the Letter of Request to be in a particular form (para. 192), the requesting authority should consider issuing the Letter of Request using an electronic signature so that the identity of the requesting authority can be readily verified.[329] It should be noted that the Convention

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321 *Ibid*.

322 C&R No 39 of the 2014 SC.

323 Likewise, approximately three quarters of Contracting Parties that responded to the 2019 Questionnaire are in favour of the use of information technology (IT) to facilitate the operation of the Convention.

324 C&R No 39 of the 2014 SC. See also C&R No 49 of the 2009 SC. At the 1st CELAC-EU Judicial Summit in Santiago, Chile, on 10-11 January 2013, the Presidents and representatives of the Supreme Courts of Member States of the Community of Latin American and Caribbean States, along with the Presidents of the Supreme Courts of the EU Member States adopted a declaration of common principles for judicial co-operation, in which they recommended that authorities "recognise the validity of electronic communications in the judiciary, especially with regards to the transmission and reception of urgent requests for international judicial assistance", and promoted the "utilisation of technologies to simplify and speed up such requests, without disregard to the need for adequate measures to ensure the integrity, security and reliability of said transmissions", available online at: < https://network-presidents.eu/sites/default/files/DeclarationSantiagoIngles2.pdf > [last consulted on 12 April 2024].

325 See responses to question 39 of the 2022 Questionnaire.

326 Commission Implementing Regulation (EU) 2022/422 of 14 March 2022 (hereinafter Commission Implementing Regulation), which lays down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in 2020 EU Evidence Regulation.

327 Whether a Letter of Request may be issued in electronic form is a matter for the law of the Requesting State (Art. 1(1)): see paras 150-152150152.

328 For some Contracting Parties, the Central Authority may be willing to accept an electronic Letter of Request, but the executing authority (*i.e.*, the requested authority) may require the Letter of Request to be in paper form. In these circumstances, it may be sufficient for the Central Authority to print out the Letter of Request and transmit it to the requested authority. If the requested authority requires the Letter of Request to be in a paper form and to bear the seal of the requesting authority, the Central Authority may request the requesting authority to reissue the Letter of Request accordingly.

329 See, *e.g.*, Art. 263 of the *Code of Civil Procedure* of Brazil, in force as of 2016, which provides for the issuance of letters rogatory using an electronic signature. See also Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC which provides the conditions for the acceptance of electronic signatures and seals.

itself does not stipulate that the request be signed or sealed, but the Model Form provides for a signature and seal of the requesting authority. In addition, it is recommended that consideration be given to data protection and security when using electronic transmission.

iii. Use of attachments

197. The Convention does not deal with the use of attachments, although the drafters did, for practical reasons, warn against Letters of Request being transmitted in the form of multiple documents (*e.g.*, a dossier).[330]

198. Depending on the nature of the evidence to be taken, it may be convenient to list the questions to be put to the witness or the documents to be produced in an attachment rather than in the body of the Letter of Request. Additional documents may also need to be submitted with the Letter of Request to facilitate execution (*e.g.*, where a witness is sought to be examined on a particular document), in which case the documents might be transmitted as attachments to the Letter of Request.

199. Attachments should be clearly identified in, and securely fastened to, the main body of the Letter of Request. In the case of electronic Letters of Request (para. 194), attachments should be logically associated with the Letter of Request (*e.g.*, the Letter of Request and attachments sent in the same e-mail or be uploaded in the same batch of documents, or the Letter of Request and attachments created in a single PDF file).[331]

4. Language of the Letter of Request (incl. translation)

200. The Convention sets out certain language (translation) requirements that each Letter of Request must meet (Art. 4). These requirements apply equally to attachments to the Letter of Request, which form an integral part of the Letter of Request.[332] A failure to comply with the language requirements may result in the Letter of Request being refused execution on grounds of non-compliance with the provisions of the Convention (Art. 5).

i. The basic rule

201. The basic rule of the Convention is that a Letter of Request must be written in the *language of the Requested State* or accompanied by a translation into that language (Art. 4(1)).

202. However, Article 4(2)-(4) of the Convention provides for the following *modifications* to this basic rule, each of which is explained at paragraphs 203 *et seq.*:

a. a Letter of Request may be written in either English or French (Art. 4(2)), unless the Requested State has made a reservation under Article 33(1);

b. a Letter of Request must be written in the language of the part of the territory of the Contracting Party where the request is to be executed, if a declaration is made under Article 4(3) *and* a reservation is made under Article 33(1); and

c. a Letter of Request may be written in another language, if a declaration is made to that effect

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330 Explanatory Report, para. 61. See also the interventions of the Rapporteur and the Chair at the 1968 meeting of the Special Commission, *Actes et documents de la Onzième session*, Tome IV (*op. cit*. note 3), pp. 103-104.

331 In this regard, practice under the 1961 Apostille Convention of "attaching" electronic Apostilles (e-Apostilles) to the underlying electronic public document may be relevant. See Permanent Bureau of the HCCH, *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention*, 2nd Edition, The Hague, 2023, available on the Apostille Section of the HCCH website.

332 See responses to question 66 of the 2008 Questionnaire. One commentator has suggested that attachments to Letters of Request be kept to an absolute minimum to avoid translation costs: B. Ristau (*op. cit*. note 184), § 5-17.

under Article 4(4), or if the internal law or practice of the Requested State permits.[333]

ii. Modifications to the basic rule

a) A Letter of Request may be written in either English or French, unless the Requested State has made a reservation under Article 33(1)

203. The vast majority of Contracting Parties have made a reservation under Article 33(1). Some of these Contracting Parties have made a reservation under Article 33(1) only with respect of one of the languages (*i.e.,* English or French), with the effect that a Letter of Request may still be written in or translated into the other language (in addition to the language of the Requested State as per the basic rule). Other Contracting Parties have made a reservation under Article 33(1) with respect to both languages (*i.e.*, English and French), with the effect that a Letter of Request may only be in the language of the Requested State (as per the basic rule). Reservations under Article 33(1) may only be made at the time of signature, ratification or accession.

204. To see whether a Contracting Party has made a reservation under Article 33 with respect to the application of Article 4(2), review the Country Profile of a Contracting Party, or the "status table" on the Evidence Section of the HCCH website and click on the hyperlink in the column entitled "Res/D/N". If there is no hyperlink, the Contracting Party has not made any reservation with respect to the Convention.

b) A Letter of Request must be written in the language of the part of the territory of the Contracting Party where the request is to be executed, if a declaration is made under Article 4(3) *and* a reservation is made under Article 33(1)

205. A Contracting Party with more than one official language may specify, by declaration, which language is to be used for specified parts of its territory (Art. 4(3)). Very few Contracting Parties have made such a declaration.[334]

206. While a declaration under Article 4(3) modifies the basic rule under Article 4(1), it does not modify Article 4(2). Accordingly, a Letter of Request addressed to a Contracting Party that has made a declaration under Article 4(3) may still be written in, or translated into English or French *unless* the Contracting Party has excluded the application of Article 4(2) by reservation under Article 33(1).[335]

207. If a requesting authority fails to comply with a declaration made by the Requested State under Article 4(3) without justifiable excuse, the Requesting State must bear the costs of translating the Letter of Request into the required language. Alternatively, the Central Authority of the Requested State may request the requesting authority to furnish a translation.[336] This does not apply where the Letter of Request is written in English or French and the Requested State has not excluded the application of Article 4(2) in respect of that language by reservation under Article 33(1).

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333 To see the language requirements that apply for a particular Contracting Party, check the specific Country Profile of a Contracting Party on the Evidence Section of the HCCH website.

334 Such as, China, Switzerland and the United States. The United States has issued a declaration that it will accept Letters of Request in Spanish for execution in the Commonwealth of Puerto Rico, but in practice, English translations are necessary to promptly process the request.

335 This position is clarified by the Explanatory Report, para. 70 ("If a State, such as Switzerland, does not file a reservation under article 33(1), the English or French rule of article 4(2), discussed above, would still remain effective, in spite of the declaration under article 4(3). This would mean that the Letter must be written in the designated language stated in the declaration under article 4(3) or in English or in French. Of course, if a reservation is filed, then only the language specified in the declaration could be used").

336 See response of Switzerland to question 67 of the 2008 Questionnaire.

Example – Letters of Request executed in Switzerland

208. In Switzerland, Letters of Request are executed by the authorities of the various territorial units (cantons). The official language in a particular canton may be German, French or Italian, or even two of these languages. Switzerland has declared that a Letter of Request must be in the language of the requested authority (*i.e.,* German, French or Italian), or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the Letter of Request is to be executed. Letters of Request written in or translated into English will not be accepted. In case of doubt, the requesting authority (or other person responsible for preparing or translating the Letter of Request) should contact the Central Authority of the Requested State before sending the Letter of Request.

c) A Letter of Request may be written in another language, if a declaration is made to that effect under Article 4(4), or if the internal law or practice of the Requested State permits

209. A Contracting Party may also declare that it will accept Letters of Request in (an)other specified language(s) (Art. 4(4)). A few Contracting Parties have made such a declaration. For example, Denmark has declared that it will accept Letters of Request in Norwegian and Swedish. The Netherlands has declared that it will accept Letters of Request in, or accompanied by a translation into, German. Norway has declared that it will accept Letters of Request in Danish or Swedish. Sweden has declared that it will accept Letters of Request in Danish and Norwegian. Luxembourg has declared that it will accept Letters of Request in German. Kazakhstan, Latvia and Lithuania have declared that they will accept Letters of Request in Russian.

210. To see whether such a declaration pursuant to Article 4(3) or 4(4) has been made, review the information contained in a Contracting Party's Country Profile, or view the "status table" on the Evidence Section of the HCCH website and click on the hyperlink in the column entitled "Res/D/N". If there is no hyperlink, the Contracting Party has not made any declaration with respect to the Convention.

211. The Convention does not affect internal law or practice of the Requested State that may provide less restrictive language requirements for the acceptance of Letters of Request (Art. 27(b)). In the case of doubt as to whether this is the case, the requesting authority (or other person responsible for preparing or translating the Letter of Request) should contact the Central Authority of the Requested State before sending the Letter of Request.

iii. Certification of translations

212. Any translations accompanying a Letter of Request must be certified by one of the following:

a. a diplomatic officer or consular agent;

b. a sworn translator; or

c. a person authorised to certify translations in either the Requesting State or Requested State.

213. As the Explanatory Report explains, the final category is designed to cover situations of Contracting Parties which do not have functionaries known as "sworn translators" but who have competent and qualified translators whose work is recognised and accepted by the authorities and courts of the Contracting Parties in litigious and non-litigious matters.[337]

214. The Special Commission has underscored the importance of quality translations as a means of

[337] Explanatory Report, para. 75.

avoiding delays in the execution of Letters of Request.[338]

5. No legalisation required

215. The Requested State may not require a Letter of Request to be legalised or subjected to similar formality (Art. 3(3)). "Similar formality" includes the addition of an Apostille under the 1961 Apostille Convention. This exemption equally applies to all attachments to the Letter of Request, which, as noted in paragraph 200, form an integral part of the Letter of Request. It also applies regardless of the channel used to transmit the Letter of Request to the requested authority (*i.e.,* whether the Letter of Request was transmitted via the main channel (the Central Authority in the Requested State) or via some other permitted channel).[339]

6. Number of copies

216. Unlike the 1965 Service Convention,[340] the 1970 Evidence Convention does not specify how many copies of the Letter of Request should be transmitted. The Model Form specifies that the Letter of Request be furnished in duplicate.[341] However, electronic Letters of Request (para. 194) need only be furnished in a single copy, provided that the Letter of Request can be reproduced by the authorities in the Requested State.[342] At least one Contracting Party (Australia) requires Letters of Request to be furnished in triplicate (*i.e.*, original plus two copies).[343] It should be noted that the number of witnesses to be examined may also have an impact on the number of copies that are necessary (for more on multiple witness, see para. 175). In the case of doubt as to the number of copies of the Letter of Request to be transmitted, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State.

7. Withdrawal of Letter of Request

217. The Convention does not deal with the withdrawal of Letters of Request, and there is nothing to prevent a Letter of Request from being withdrawn. In practice, Letters of Request are usually withdrawn where the proceedings are settled or dropped and the evidence sought is no longer needed.[344] Where evidence is no longer needed, the Central Authority should be promptly notified by either the requesting authority or the moving party.[345] In response to the 2022 Questionnaire,

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338 Report of the 1985 SC (*op. cit*. note 24), Part I, § 2(B).

339 A different view was taken by the Federal District Court of First Instance for Commercial Matters (Argentina) in *Panamerican Resource & Development, Inc. v. Huancayo S.A.F.*, in which the Letter of Request was presented to the Court directly by one of the parties and not transmitted via the Central Authority in Argentina. In a judgment of 8 July 1988 (No 7, *secretaria* No 13), the judge considered that the exemption from legalisation in Art. 3(3) only applied to the main channel of transmission.

340 Art. 3(2) of the 1965 Service Convention provides for the request for service and the document to be served to be furnished in *duplicate*.

341 See the Model Form developed by the Special Commission and the Guidelines for Completing the Model Form.

342 At the Geneva Roundtable in 1999, participants acknowledged that the requirement in Art. 3(2) of the 1965 Service Convention (that requests for service and the document to be served must be furnished in duplicate) should be interpreted in a functional sense when transmission is effected by electronic means, and concluded that since a document transmitted electronically can, generally speaking, be reproduced (printed) at any time and in an unlimited number of copies, the requirement of a copy or a duplicate can be satisfied by sending a single message: see C. Kessedjian, "Electronic Data Interchange, Internet and Electronic Commerce", Prel. Doc. No 7 of April 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference, available on the HCCH website under "Work in Progress" then "General Affairs", Chapter III B § 5.3.

343 See Attorney General's Department, "Taking Evidence in Australia for Foreign Court Proceedings", 2012, p. 2, available online at: < https://www.ag.gov.au/InternationalRelations/PrivateInternationalLaw/Documents/Taking-of-Evidence-in-Australia-for-Foreign-Court-Proceedings.pdf > [last consulted on 12 April 2024].

344 See, *e.g.*, Order Regarding Withdrawal of Request for International Judicial Assistance Pursuant to the Hague Convention, ECF No. 237, *In re Scor Holding (Switzerland) AG Sec. Litig.*, 1:04-cv-07897-DLC (S.D.N.Y. June 24, 2008) .

345 A notification of withdrawal may be transmitted by the requesting authority using the same channel that was used to

most Contracting Parties which responded indicated that as the Requested State, the Requesting Authority may make such a request.[346]

218. If the Letter of Request is executed prior to receipt of the notification of withdrawal, the Requested State retains the right to require the reimbursement of any reimbursable costs related to the execution (Art. 14).[347]

8. Video-Link

219. Permission to conduct a video-link may be requested either in the Letter of Request itself or potentially, it may be subsequently requested by informal means of communication. However, specifying this in the Letter of Request is strongly recommended. It is also recommended that the Central Authority of the Requested State be contacted before formally filing the Letter of Request, to confirm whether the use of video-link is possible.

220. It is important to keep in mind that the video-link itself remains simply a means by which the Letter of Request can be executed. Consequently, the formal Letter of Request requirements must first be met before any aspect of the request to use video-link can be acted upon.

221. As mentioned above, the requesting authority is encouraged to use the Model Form for Letters of Request.[348] In addition to the standard details about the matter at hand and the evidence sought, the Letter of Request should specify the requirements for video-link, including whether additional assistance, equipment or facilities are available and are also required (*e.g.*, a document camera to facilitate the real-time transmission of documents between locations), along with the relevant technical details where applicable.

222. The Letter of Request may include a request that a special method or procedure be followed (Art. 9(2)). If requested as a special method or procedure, information relating to the use of video-link should be included in item 13 of the Model Form.

223. In addition, items 14 and 15 of the Model Form should be completed with the relevant information if the parties to the proceedings, their representatives, and possibly also judicial personnel of the requesting authority located in the Requesting State wish to be present (in person or by video-link) during the taking of testimony. This is all the more important if they intend to be present by video-link, see para. 319.

224. Regardless of whether a special method or procedure is being requested, it is recommended that requesting authorities include with the Model Form the optional, video-link specific form, so as to expedite the handling of video-link requests and to avoid technical problems. This optional form is available on the Evidence Section of the HCCH website and contains the following information:

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transmit the Letter of Request. If notified by the moving party, the Central Authority may wish to confirm withdrawal of the Letter of Request with the requesting authority directly. In one case in Jersey, the requested authority held that execution of a Letter of Request should proceed unless and until the Letter of Request was formally withdrawn, despite one of the parties asserting that the timeline for adducing evidence in the proceedings in the Requesting State had passed: *Wadman v. Dick* [1993] JLR 52. In addition, in *BCI Finances Pty Ltd (in liq) v. Commissioner of Taxation* (*op. cit*. note 115), the Federal Court of Australia held that although the proceedings for which the Letter of Request had been executed had been adjourned, the court of the Requested State was bound to continue with its execution, as no formal application had been made to revoke the original Court order for the Letter of Request. However, the HKCFI of the Hong Kong SAR has noted that the requested authority may refuse to execute a Letter of Request without withdrawal of the Letter of Request if the proceedings for which the evidence is required have been dismissed or the discovery cut-off date in those proceedings has lapsed: *Kayne Creditors v. Roderick John Sutton & Others* (*op. cit*. note 285).

346 See responses to question 24 of the 2022 Questionnaire. Certain Contracting Parties which responded also indicated that as the Requested State, in addition to the requesting authority, the representatives of the parties and the parties themselves may also request that Letter of Request be withdrawn.

347 For more on costs, see paras 351 *et seq*.

348 In response to the 2022 Questionnaire, the majority of Contracting Parties which responded indicated that they did not use the Model Form for video-link evidence (see question 42).

a. Technical parameters of the video-link device(s): brand, type of endpoint or multipoint control unit, network type, address and / or hostname, type of encryption used;

b. Full contact details of the technical contact person(s).

III. Transmission of Letters of Request

For a flowchart of the channels of transmission, see Annex 1.

225. The 1970 Evidence Convention provides for one main channel for the transmission of Letters of Request from the Requesting State to the Requested State (paras 226-232). It also provides for derogatory channels of transmission (paras 233-237).

1. The main channel of transmission

226. Under the main channel of transmission, the Letter of Request is transmitted from the requesting authority to the Central Authority (or additional authority) of the Requested State, which then transmits it on to the authority competent to execute the Letter of Request (Art. 2(1)).[349]

i. Transmission within the Requesting State

227. The 1970 Evidence Convention does not specify how outgoing Letters of Request are to be transmitted abroad. This matter is therefore left to the law of the Requesting State.[350] In general, there are two models:[351]

a. in some Contracting Parties, the requesting authority itself transmits the Letter of Request abroad, [352] or authorises it to be transmitted abroad by the moving party (or its representative);[353]

b. in some Contracting Parties, the Letter of Request is first transmitted to a centralised authority, which itself transmits the Letter of Request abroad.[354] This centralised authority is generally the Central Authority designated to receive *incoming* Letters of Request from abroad. This practice, which is mirrored by certain Contracting Parties under the 1965 Service Convention, has developed outside the framework of the 1970 Evidence Convention.[355]

As for some of the Contracting Parties, both of the above models are used to transmit Letters of

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349 For more on the designation of Central Authorities, see paras. 249-252 and for more on designation of additional authorities, see paras 253-254.

350 See Explanatory Report, para. 36. See also B. Audit, *Droit International Privé*, 3rd ed., Paris, Economica, 2000, p. 366.

351 The merits of these two models were discussed by the Special Commission at its meeting in 1985, which noted that "[a]rguments in favour of and against both systems were advanced, but no single solution was achieved": Report of the 1985 SC (*op. cit*. note 24), Part I, § 2(A). The Special Commission had previously noted at its 1978 meeting that the practice of channelling Letters of Request through a centralised authority "permits an authority which is accustomed to international contacts to exercise some preventive control and thereby to cut down on the hindrances to obtaining of the evidence abroad": Report of the 1978 SC (*op. cit.* note 94), Part I, § 3. It is not the purpose of this Handbook to engage in this discussion. The Permanent Bureau remains available to Contracting Parties and States intending to become a Contracting Party to advise on the merits of each model.

352 In response to the 2022 Questionnaire, the following Contracting Parties which responded indicated that the Letter of Request is transmitted directly from a judicial authority to the Central Authority of the Requested State: Australia, Czech Republic, France, Germany, Kazakhstan, Lithuania, Montenegro, Norway, Poland, Portugal, Servia, Slovakia, Slovenia, Netherlands and the United States. For Czech Republic, it has indicated that where the other Contracting Party does not have direct postal connection with Czech Republic, Letters of Request are transmitted via diplomatic channels.

353 The latter practice is commonly followed by requesting authorities in the United States.

354 In response to the 2022 Questionnaire, the following Contracting Parties which responded indicated that the Letter of Request is transmitted via its Central Authority to the Central Authority of the Requested State: Albania, Argentina, Brazil, Bulgaria, China (Macao SAR), Croatia, Estonia, Finland, Georgia, Hungary, Israel, Italy, Latvia, Nicaragua, Romania, Singapore, Sweden, Türkiye, the United Kingdom and Viet Nam. As for China (Hong Kong SAR), it indicated that the Letter of Request is transmitted via the Chief Secretary for Administration's Office, which is a competent forwarding authority, to the Central Authority of the Requested State.

355 Report of the 1978 SC (*op. cit*. note 94), Part I, § 3.

Request abroad.[356]

228. For more on how Letters of Request are transmitted from a particular Requesting State, review the information contained in a Contracting Party's Country Profile or view the Evidence Section of the HCCH website. For further information, contact the Central Authority in the Requesting State.

ii. Transmission within the Requested State

229. The Convention provides for incoming Letters of Request to be sent *directly* to the Central Authority of the Requested State, without being transmitted through any other authority of the Requested State (Art. 2(2)). Accordingly, the Requested State may not require incoming Letters of Request to be transmitted via its Ministry of Justice, Ministry of Foreign Affairs, or its diplomatic or consular officers posted in the Requesting State.[357] Article 2(2) does not prevent the use of a private person in the Requested State (*e.g.*, a courier or a representative of the moving party) to deliver the Letter of Request to the Central Authority (or additional authority).[358]

Multiple Central Authorities and additional authorities

230. The Convention allows federal Contracting Parties to designate multiple Central Authorities, and a number of Contracting Parties have done so (see paras 249-252). In general, Letters of Request to be executed in a federal unit of these Contracting Parties are transmitted to the Central Authority designated for that federal unit. If evidence is sought from multiple federal units (*e.g.*, two witnesses each resident in different units), the requesting authority (or other person responsible for preparing the Letter of Request) should prepare separate Letters of Request to be issued to the respective Central Authority. In Switzerland, the Federal Office of Justice – which has no Central Authority function under the Convention – undertakes to receive Letters of Request and to transmit them to the Central Authority of the relevant canton.[359] In Germany, where each of the 16 states (*Länder*) has its own Central Authority in addition to one federal Central Authority, requests should be sent to the Central Authority in the state where the witness is located in order to secure timely execution.

231. The Convention also allows Contracting Parties to designate "additional authorities" to receive Letters of Request to be executed in a particular territorial unit, and a number of Contracting Parties have done so (see paras 253 and 254). In these Contracting Parties, Letters of Request may always be sent to the Central Authority.

232. If the Letter of Request is sent to the incorrect Central Authority (or additional authority), that authority must send the Letter of Request to the correct Central Authority (or additional authority) (Art. 6).[360]

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356 In response to the 2022 Questionnaire, the following Contracting Parties which responded indicated that both the models are used to transmit Letters of Request abroad: Andorra, China (Mainland) and Switzerland.

357 These are specifically identified in the Report of the 1968 SC (*op. cit.* note 16), p. 57. Of course, the Ministry of Justice or Ministry of Foreign Affairs may be designated as the Central Authority, in which case the Letter of Request will be transmitted to that authority.

358 The Special Commission encourages the practice of many Contracting Parties in accepting Letters of Request sent by private courier: C&R No 49 of the 2009 SC. The drafters anticipated that requesting authorities may deliver Letters of Request to the representative of the moving party, which then sends it to counsel in the Requested State, which in turn presents it to the Central Authority: Report of the 1968 SC (*op. cit.* note 16). Of course, the requesting authority would need to be empowered under its own law to deliver the Letter of Request to the representative (see Art. 1(1) and the discussion at paras 150 *et seq.*). In the *Siemens* case (*op. cit.* note 83), the Higher Regional Court of Munich (Germany) found that the transmission of the Letter of Request to the Central Authority by a representative of one of the parties did not constitute a formal defect that would give grounds for refusing to accept the Letter of Request.

359 *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit.* note 22), p. 21.

360 Explanatory Report, para. 48. See also the discussion at para. 175 on the issuance of Letters of Request for multiple witnesses.

2. Derogatory channels of transmission

233. Unlike the 1965 Service Convention, the 1970 Evidence Convention does not specifically provide for alternative channels of transmission, such as consular or diplomatic channels, direct court-to-court transmission, or transmission via a party to the proceedings.[361] However, like the 1965 Service Convention, the 1970 Evidence Convention allows Contracting Parties to deviate (or derogate) from the main channel either by agreement among themselves (para. 234), by being or becoming a Contacting Party to another treaty (para. 235), or unilaterally (paras. 236). These channels are referred to as the "derogatory channels".

i. Derogation by agreement

234. The Convention provides that two or more Contracting Parties may agree to permit Letters of Request to be transmitted by other methods of transmission (Art. 28(a)). Moreover, the Convention carries forward the application of any supplementary agreements entered into under the 1954 Civil Procedure Convention between Contracting Parties to both Conventions which may also provide for other methods of transmission (Art. 31, see para. 565).

ii. Derogation by existing or future treaties

235. The Convention provides that it does not derogate from existing or future treaties containing provisions on the matters governed by this Convention to which the Contracting Parties are or will become Parties (Art. 32).[362] This provision thus enables Contracting Parties to derogate from the main channel of transmission by applying other existing or future international treaties.

iii. Unilateral derogation

236. The Convention provides for a Contracting Party to declare that Letters of Request may be transmitted to its judicial authorities through channels other than the main channel (Art. 27(a)). Pursuant to this provision, a number of Contracting Parties have declared that Letters of Request may be transmitted to their judicial authorities by consular channels (Denmark and Mexico) or by direct court-to-court transmission (Mexico[363]).

237. The Convention also provides that the internal law or practice of a Contracting Party may permit the Letter of Request to be transmitted to its judicial authorities "upon less restrictive conditions" (Art. 27(b)). This effectively preserves more direct channels of transmission that may be provided by that internal law or practice, and no specific declaration is needed in order for a Letter of Request to benefit from these channels.[364] In this regard, several Contracting Parties do permit Letters of Request to be transmitted directly to the requested authority by the requesting authority or by the parties themselves.[365]

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361 See Explanatory Report, paras 49-50, which notes that the drafters rejected a proposal for the Convention to expressly provide for consular or diplomatic channels as an alternative to the main channel.

362 For more on other treaties dealing with the taking of evidence abroad, see paras 575 *et seq*.

363 In its declaration, Mexico has specified that the use of direct court-to-court transmission is subject to the Letter of Request being legalised. Compare this to the view expressed at para. 215 that the exemption from legalisation in Art. 3(3) of the Convention applies regardless of the channel used to transmit the Letter of Request to the requested authority.

364 As the Explanatory Report notes (at para. 51), Art. 27(a) and (b) "may permit the issuing authority to send Letters direct[ly] 'from court to court', or through a party to the action direct to the executing tribunal, by-passing the Central Authority of the State of execution".

365 In a number of Contracting Parties, internal law allows a party to the proceedings to apply directly to the requested authority to execute a Letter of Request. For example, in the United States, the competent authority (the District Court) may order evidence to be taken "pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person": 28 U.S.C. § 1782(a). In Australia, an application may be made to the competent authority (the Supreme Court of the relevant state or territory) by "a person nominated for that purpose by the requesting court": see, *e.g.*, *Uniform Civil Procedure Rules* 2005 (New South Wales), reg. 52.1. In England, the *Civil Procedure Rules* allow for the application to be made by one of the parties to the proceedings: r. 34.17.

3. Means of transmission

238. The Convention does not specify the means by which a Letter of Request is to be transmitted to the Requested State. In practice, the postal service (ordinary or registered mail) or a private courier service is commonly used.[366] In the case of electronic Letters of Request (para. 194), the Letter of Request may be transmitted by e-mail or be uploaded onto a designated online platform. The Special Commission has encouraged the transmission and receipt of Letters of Request by electronic means, adding that consideration should also be given to matters of security when evaluating such methods.[367] Similar consideration should also be given to data protection. For more on the execution and transmission of Letters of Request by electronic means, see paragraphs 194 *et seq*.

239. The contact details for Central Authorities and additional authorities (including postal address and email address) can be found on the Evidence Section of the HCCH website under "Central and other Authorities". The Permanent Bureau encourages Contracting Parties to provide updates, as necessary, including in their Country Profiles, so that the information on the website remains up to date.

IV. Receipt of Letters of Request

1. Central Authorities

i. The functions of Central Authorities

240. The 1970 Evidence Convention establishes a Central Authority mechanism that is based on the 1965 Service Convention. The Central Authority is a *receiving* authority, charged under the Convention (Art. 2(1)) with the following functions:

a. receiving Letters of Request from Requesting States; and

b. transmitting them to the authority competent to execute them.

241. Like under the 1965 Service Convention, Central Authorities under the 1970 Evidence Convention may also act as a *sending* authority, charged with transmitting Letters of Request abroad (see para. 227). This practice has developed outside the framework of the Convention, and the performance of this function is purely a matter for the law of the Requesting State.

242. The Convention also provides the following additional functions of the Central Authority:

a. informing the authority of the Requesting State that transmitted the Letter of Request of any non-compliance of the Letter of Request with the provisions of the Convention, and specifying the objections to the Letter (Art. 5);

b. transmitting the documents establishing the execution of the Letter of Request to the

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366 The Special Commission encourages the practice of many Contracting Parties in accepting Letters of Request sent by private courier: C&R No 49 of the 2009 SC.

367 C&R No 39 of the 2014 SC. See also C&R No 49 of the 2009 SC. Art. 3(1) of the 2010 *Additional Protocol to the Ibero-American Convention on the Use of Videoconferencing in International Co-operation between Judicial Systems* provides for the electronic transmission of requests made under the Ibero-American Convention ("[r]equests for videoconferencing may be transmitted by any electronic means that allows a written record of the transmission, provided that the requested Party is able to establish its authenticity") [translation by the Permanent Bureau]. Also, the *Medellin Treaty concerning the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities* encourages its Contracting Parties to use the electronic platform established by the treaty, "Iber@", to transfer requests for international legal assistance. Also, in the context of the 2020 EU Evidence Regulation, the e-CODEX system is used (see also, Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726). For further discussion on these treaties, see paras 575 *et seq*.

Requesting State (Art. 13(1));

c. informing the requesting authority of non-execution of the Letter of Request and advising of the reasons for non-execution (Art. 13(2)). [368]

243. Central Authorities of many Contracting Parties provide additional assistance to requesting authorities to ensure that a Letter of Request conforms to the requirements of the Requested State. This practice is consistent with the spirit of the Convention to improve mutual judicial co-operation, and has been encouraged by the Special Commission.[369]

244. Another informal function of Central Authorities is to act as a contact point for direct communications with the Permanent Bureau and other Contracting Parties concerning the practical operation of the Convention. The Special Commission has specifically encouraged better communication between Central Authorities.[370]

Co-operation between Central Authority and requesting authority

245. Central Authorities are encouraged to co-operate with requesting authorities of other Contracting Parties to ensure the timely execution of Letters of Request. Indeed, such co-operation was envisaged by the drafters of the Convention, [371] and the Special Commission has specifically encouraged better communication between the requesting authority and the Central Authority, including by e-mail, *at all stages* of the execution of a Letter of Request.

246. At its 2014 meeting, the Special Commission noted that such communication was not to be limited to between the Central Authority and the requesting authority, but also welcomed reported practices of communication between Central Authorities and "interested parties". [372] Such communication and co-operation may take the following forms:

a. receiving enquiries from requesting authorities and possibly also interested parties concerning the preparation of Letters of Request, the methods and procedures of the Contracting Party as to the execution of Letters of Request,[373] and whether particular acts fall within the functions of the judiciary;[374]

b. promptly sending the requesting authority and possibly also interested parties an acknowledgment of receipt of the Letter of Request (*e.g.*, by email).[375] If possible, Contracting Parties may wish to include additional information about the estimated time within which the Letter of Request will be executed;

c. promptly responding to enquiries from requesting authorities and / or interested parties about the status of execution of the Letter of Request;[376]

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368 For more on screening Letters of Request for non-compliance, see paras 259 *et seq.* and for more on returning documents establishing execution, see paras 394 *et seq*.

369 C&R Nos 44 and 45 of the 2009 SC.

370 C&R No 9 of the 2014 SC. See also C&R No 44 of the 2009 SC.

371 See Explanatory Report, in particular discussion about Art. 4(4) (para. 72).

372 C&R Nos 9 & 10 of the 2014 SC. Cf. C&R No 44 of the 2009 SC and C&R No 44 of the 2003 SC.

373 Among the Contracting Parties which responded to the 2022 Questionnaire, more than half stated that they provide assistance to foreign judicial authorities to prepare a Letter of Request (see question 16). On the other hand, less than half of the Contracting Parties that responded indicated that they provide assistance to legal representatives to prepare a Letter of Request (see question 17). Brazil indicated that they provide assistance only if the legal representative is an authorised forwarding authority designated by the Contracting Party in question under the Convention. For both questions, France indicated that it will only provide initial information on how the Convention works and how it applies in France, but it is not its Central Authority's role to assist foreign judicial authorities in drafting Letters of Request and/or pre-approve draft Letters of Request.

374 This type of co-operation is expressly envisaged in the Explanatory Report, para. 31.

375 C&R No 10 of the 2014 SC.

376 *Ibid.*

d. communicating to the requesting authority and / or interested parties an indication of steps to be taken for execution;[377]

e. if the Letter of Request is not executed within the time period notified by the Central Authority, advising the reasons why the Letter of Request has not yet been executed;

f. liaising with requesting authorities and possibly also interested parties to remedy non-compliant Letters of Request (where non-compliance can be remedied) or to clarify a particular issue of compliance; and

g. acting as an intermediary between the requesting authority and the requested authority, particularly in respect of requests for reformulation or reissuance of Letters of Request (see para. 409).

247. The Special Commission has welcomed the use of electronic tools to check the status of requests online, noting the importance of confidentiality and privacy considerations.[378]

248. The Convention does not provide rules on the language of communication between the Central Authority and requesting authority (unlike the language requirements for Letters of Request set out in Art. 4 as discussed at paras 200 *et seq.*). However, it is reasonable to assume that the Central Authority will be willing to communicate in the same languages in which the Requested State accepts Letters of Request.[379] Moreover, Contracting Parties should state the languages spoken by Central Authority staff in their Country Profiles, which is available on the Evidence Section of the HCCH website.

ii. The designation of Central Authorities

249. Each Contracting Party must designate a single Central Authority (Art. 2(1)). This requirement, as well as the need to inform the depositary of this designation, was recalled by the Special Commission at its 2014 meeting.[380] Most Contracting Parties have designated their Ministry of Justice, or some specialised unit within the Ministry of Justice, as Central Authority under the 1970 Evidence Convention. Some Contracting Parties have placed the Central Authority within the judicial system. Relatively few Contracting Parties have designated their Ministry of Foreign Affairs.

250. To verify the identity of the Central Authority (or Central Authorities) designated by a particular Contracting Party, follow the link entitled “Central and other Authorities” on the Evidence Section of the HCCH website and click on the name of the Contracting Party, or check the Country Profile of a Contracting Party on the Evidence Section of the HCCH website.

251. Most Contracting Parties to both the 1965 Service and the 1970 Evidence Conventions have designated the same authority as the Central Authority under each Convention.

252. The Convention allows federal States to designate more than one Central Authority (Art. 24(2)).[381] Pursuant to this provision, Germany has designated a Central Authority for each of its states (*Länder*), and a federal Central Authority, the Federal Office of Justice; the Netherlands has designated a separate Central Authority for Aruba, and Switzerland has designated a Central Authority for each of its cantons. Other federal States that are Contracting Parties to the Convention, such as Australia, India, Mexico, and the United States, have designated a single Central Authority.

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377 *Ibid.*
378 C&R No 11 of the 2014 SC.
379 See Explanatory Report, para. 77.
380 C&R No 3 of the 2014 SC.
381 For more on multiple Central Authorities, see para. 230.

iii. The designation of additional authorities

253. A Contracting Party may designate authorities in addition to the Central Authority ("additional authorities") to receive Letters of Request for a particular territorial unit (Art. 24(1)). This provision is specifically addressed to States that have separately administered territorial units but which are not necessarily "federal". Pursuant to this provision, the United Kingdom has designated additional authorities for England and Wales, Northern Ireland, and Scotland, as well as for the overseas territories to which the United Kingdom has extended the Convention. Similarly, China has designated additional authorities for Hong Kong and Macao SARs. In addition, notwithstanding its federal system, Australia has also designated additional authorities for each state and territory. Poland has also used Art. 24(1) to designate the various voivodeship courts to receive Letters of Request.[382]

254. Additional authorities are not Central Authorities for the purposes of the Convention (cf. multiple Central Authorities designated by federal States, discussed at para. 252), and do not prevent Letters of Request from being sent to the Central Authority of the Contracting Party concerned (Art. 24(1)).

iv. The organisation of Central Authorities

255. Each Contracting Party is responsible for the organisation of its Central Authority(ies) (Art. 2(1)). Each Central Authority should be sufficiently staffed and resourced to perform its functions (see paras 240-248). This includes access to effective means of communication, including telephones and e-mail.

2. Receipt and screening of Letters of Request

i. Acknowledgment of receipt

256. The Convention does not require the Requested State to acknowledge receipt of the Letter of Request. Nevertheless, in the spirit of the Convention to improve mutual judicial co-operation,[383] the Central Authority (or other receiving authority in the Requested State) should consider sending an acknowledgment of receipt to the requesting authority.[384] In this regard, the Ibero-American Judicial Summit has recommended that receiving authorities acknowledge receipt of Letters of Request received under the Convention as soon as possible, indicating the name and contact details (including telephone and fax numbers and e-mail address) of the authority competent to execute the Letter of Request.[385] The acknowledgment of receipt may be sent by e-mail, provided that an e-mail address for the requesting authority has been specified in the Letter of Request (see para. 160).

257. The Special Commission has [also] welcomed practices where Central Authorities promptly acknowledge receipt of Letters of Request and promptly respond to enquiries about the status of execution, including by e-mail.[386]

258. Of course, promptly acknowledging receipt and responding to status enquiries are only two examples of what are considered good communication practices. Efficient and, where possible, direct communication between the requesting authority and the relevant authority in the Requested

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382 For more on the designation of additional authorities of a particular Contracting Party, check the Country Profile of a Contracting Party on the Evidence Section of the HCCH website.

383 See Preamble to the Convention.

384 In response to the 2022 Questionnaire, the following Contracting Parties which responded indicated that as the Requested State, the authorities of their State will send an acknowledgement of receipt for a Letter of Request: France, Georgia, Israel, Lithuania, Poland, Serbia, Singapore, Netherlands, the United Kingdom and the United States.

385 See "Guide to Good Practice for International Letters Rogatory in Civil Matters" (*op. cit.* note 266), Part 2(a).

386 C&R Nos 9 and 10 of the 2014 SC.

State (generally the Central Authority) should also be encouraged, as it may facilitate, and in many cases expedite, the execution process where clarifications are needed due to differences in legal terminology and usage across jurisdictions.[387]

ii. Screening of Letters of Request

259. When a Central Authority receives a Letter of Request, it should screen the Letter of Request to determine whether it complies with the provisions of the Convention (see para. 264). Identifying and remedying issues of non-compliance early on is crucial to the timely execution of Letters of Request.[388]

260. The extent of screening by the Central Authority varies among Contracting Parties.[389] The Central Authority of some Contracting Parties only conducts a summary check of an incoming Letter of Request (if at all), leaving it to the requested authority to determine whether the Letter of Request complies with the provisions of the Convention. The Central Authority of other Contracting Parties conducts a more thorough check of the Letter of Request, leaving the requested authority with limited scope to determine issues of non-compliance. Where the Letter of Request is transmitted to the Requested State by some other channel (thereby bypassing the Central Authority), or where the Letter of Request is transmitted to an additional authority designated by the Requested State pursuant to Article 24(1) to receive Letters of Request, the screening should be performed by the authority of the Requested State that receives the Letter of Request or the requested authority (if not the same).[390]

261. Irrespective of the outcome, the authorities of the Requested State are encouraged to make decisions relating to incoming Letters of Request as expeditiously as practicable. [391]

262. If the Central Authority considers that the Letter of Request does not comply with the provisions of the Convention (whether at its own determination, or as determined by the requested authority or additional authority), it must:

    a. promptly inform the authority in the Requesting State that transmitted the Letter of Request (*e.g.*, the requesting authority, Central Authority of the Requesting State, or other transmitting authority); and

    b. specify the objections (Art. 5).[392]

    This procedure is designed to allow the requesting authority to reformulate and reissue the Letter of Request, if possible.[393] It does not, however, prevent a non-compliant Letter of Request from

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387 C&R No 44 of the 2009 SC and C&R No 9 of the 2014 SC. See also in the European context in the use of cross-border videoconferencing, the "Handshake" Project, "D1b Recommended step-by-step protocol for cross-border videoconferencing in judicial use-cases", pp. 16-17.

388 For more on refusal to execute non-compliant Letters of Request, see paras 404 *et seq*.

389 The Federal Supreme Court of Switzerland has noted that the Convention does not define the scope of the screening that the Central Authority should perform: 13 November 2002, No 5A.17/2002, ATF 129 III 107. The Higher Regional Court of Karlsruhe in Germany ruled that the Central Authority can confine itself to verifying if the requested evidence is adequately specified based on the information provided, including the type and purpose of proceedings and, if applicable, the list of questions submitted, However, the Court stated that the Central Authority may decide whether to leave the decision to the executing court in situations where a particular method is requested under Art. 9(2), or concerning the extent to which questions in the request can be asked to the witness: 13 December 2017, 6 VA 12/17.

390 The Explanatory Report contemplates as much (see para. 85).

391 While the Convention does not impose a timeframe, in the context of the 2001 EU Evidence Regulation, the European Union recommends in relation to the use of cross-border videoconferencing an ideal timeframe of 1 to 2 weeks for a decision to be taken (with a maximum of 30 days). See "Handshake" Project (*op. cit.* Glossary), pp. 14, 16. (The positions taken within the project are not of the European Commission or of the European Union.) In the 2020 EU Evidence Regulation, there are time limits imposed in certain situations, *e.g.*, where a request cannot be executed because it does not contain all of the necessary information referred to in Art. 5 of the Regulation, the requested court shall inform the requesting court without delay and, at the latest, within 30 days.

392 Art. 5 is based on Art. 4 of the 1965 Service Convention.

393 Explanatory Report, para. 85. See also C&R No 41 of the 2003 SC.

being executed where the Requested State has no objections to the non-compliance, or where the non-compliance is unilaterally rectified by blue-pencilling (*i.e.,* modifying or limiting).[394] In the case of doubt as to a particular issue of compliance (*e.g.*, whether the matter is civil or commercial in nature), the Central Authority may contact the requesting authority for clarification.

263. While it may be possible for a reissued Letter of Request to remedy some issues of non-compliance (*e.g.*, formal deficiencies relating to compliance with the content requirements under Art. 3 or language (translation) requirements in Art. 4), it may not be possible to remedy others (*e.g.*, the request falls outside the scope of the Convention).

Non-compliant Letters of Request

264. A Letter of Request may be non-compliant with the provisions of the Convention if:

a. it does not arise out of a matter that is "civil or commercial" (see paras 52 *et seq.*);

b. it was not issued by a "judicial authority" (see paras 139-149);

c. it does not relate to judicial proceedings (see paras 81-84);

d. the proceedings to which it relates are not "commenced or contemplated" (see paras 85-91);

e. it relates to a judicial act that is excluded from scope (see paras 76-79);

f. it does not comply with the content requirements set out in Article 3 (see paras 153-155);

g. it does not comply with the language (translation) requirements set out in Article 4 (see paras 200-202).

V. Execution of Letters of Request

1. Basic outline

265. The 1970 Evidence Convention establishes an obligation on the Requested State to execute Letters of Request (para. 270). The Letter of Request is executed by a judicial authority (the "requested authority") (para. 272) that is competent under the law of the Requested State to execute incoming Letters of Request (paras 273-275). When executing a Letter of Request, the requested authority applies its own law (*i.e.*, the law of the Requested State) as to the methods and procedures to be followed (paras 277-292). However, it must follow a special method or procedure requested by the requesting authority (paras 295-300) subject to limited exceptions (paras 301-309).

266. The requested authority also applies its own law (*i.e.,* the law of the Requested State) as to:

a. the measures to compel the examination of the witness or production of documents (paras 310-313); and

b. the privileges and duties of the person to refuse to give evidence (para. 379).

267. In addition, the requested authority may be required to observe the privileges and duties of the person to refuse to give evidence under the law of the Requesting State (paras 381-385), or of a third State (para. 386).

268. The Letter of Request is executed in the presence of the parties and their representatives, if so desired by the requesting authority (paras 319 *et seq*). Members of the judicial personnel of the

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394 As discussed further at para. 405, many Contracting Parties take a pragmatic, non-formalistic approach to issues of non-compliance, particularly with regard to the content requirements, and will tolerate minor formal non-compliance. For more on blue-pencilling non-compliant Letters of Request, see paras 404 *et seq*.

requesting authority may also be present (paras 331-343).

269. When a Letter of Request relating to the use of video-link is executed, it is also for the requested authority to determine the time and place, specifying the relevant conditions for the video-link. Where possible, these should be determined in consultation with the requesting authority, taking the time zones into account.

2. The obligation to execute

270. The obligation to execute a Letter of Request is an obligation of public international law,[395] and not a matter of comity[396] or reciprocity.[397] The obligation consists of obtaining the evidence requested, or performing the judicial act requested (as the case may be). The obligation to execute a Letter of Request in no way implies the recognition of the jurisdiction of the requesting authority or forecloses consideration of whether to recognise any judgment that may result from the proceedings in the Requesting State.

271. The obligation to execute is subject to limited exceptions (see Part VI).

3. The requested authority

i. Execution by a "judicial authority"

272. The Convention envisages that Letters of Request will be executed by a "judicial authority" of the Requested State. The scope of the term "judicial authority" was discussed by the Special Commission at its meeting in 1978, which noted that other provisions of the Convention simply referred to a "competent" authority (*i.e.,* without qualifying it as a "judicial" authority, see Arts 1, 2(1), and 6). After a long discussion, the Special Commission concluded that a "courteous application" of the Convention called for including as requested authorities not only courts and judges of the Requested State, but also other persons "insofar as these persons are given in the specific case under their laws certain attributes of a judicial authority".[398] The Special Commission recognised that these other persons could include court-appointed examiners, notaries public, *notaires*, and legal practitioners.[399]

ii. Competence to execute Letter of Request

273. It is up to the law of the Requested State to determine which authorities are competent to execute Letters of Request.[400] In most Requested States, these would be judges, magistrates, special masters or other court officials.[401] In other Requested States (typically common law), Letters of Request are often executed by court-appointed examiners, which are typically private legal

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395 O. Capatina, "L'entraide judiciaire internationale en matière civile et commerciale", (1983) 179(I) *RCADI* 305, p. 331.

396 A number of decisions, particularly of common law courts, cite comity as the basis for executing Letters of Request: see, *e.g.*, *State of Minnesota v. Philip Morris Inc*. (*op. cit*. note 294, Court of Appeal of England), *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit*. note 129, New South Wales Court of Appeal (Australia)). In his report in the case of *AXA Mediterranean Int'l Holding v. ING Insurance Int'l B.V*. before the Court of Cassation of France (request for advisory opinion No 12-70.020, advice No 15006 of 18 March 2013, reported by B. Bouloc in *Rev. crit. d.i.p*., 2013, p. 666), P. Matet approved the view that the execution of a Letter of Request was an act of international comity. While comity may be the driving force behind the execution of letters of request in the absence of an international treaty, it is not the case under the Convention.

397 In *Aventis Pharmaceuticals, Inc. v. Barr Laboratories, Inc*. (*op. cit*. note 120), the High Court of Punjab and Haryana (India) noted that a Letter of Request is to be executed "owing to reciprocity between the two foreign countries". See also discussion at para. 461 (regarding lack of reciprocity as an unacceptable ground for refusing to execute a Letter of Request).

398 Report of the 1978 SC (*op. cit.* note 94), § 5.

399 *Ibid*.

400 *AXA Mediterranean Int'l Holding v. ING Insurance Int'l B.V*. (*op. cit.* note 396), report of P. Matet.

401 See responses to question 26 of the 2022 Questionnaire.

practitioners.[402] The appointment of such examiners under the Convention is subject to the consent of the requesting authority, as explained in paragraph 274. In certain Contracting Parties, Letters of Request are also executed by judicial officers, as well as by any fit and proper person nominated by the requesting authority or such other qualified person as the court deems fit.[403] In some Contracting Parties, the competence of the requested authority is determined by the geographical unit in which the Letter of Request is to be executed (*e.g.*, where the person to be examined or produce documents resides, or where the property to be inspected is located).

274. It is important to note that a court-appointed examiner may only be employed to execute the Letter of Request if the requesting authority has given its consent (Art. 14(3)). Although Article 14(3) is primarily concerned with fees, its first sentence has the effect of limiting the power of the requested authority to appoint an "examiner" to circumstances where the requesting authority has given its consent. However, the requirement to obtain prior consent of the requesting authority is particularly useful in cases where the evidence is to be used in proceedings in a Contracting Party whose internal law requires evidence to be obtained by judges, and not by the parties.[404] Moreover, if the Requested State wishes to charge for the costs incurred in employing the examiner, it must indicate the approximate costs when seeking the consent of the requesting authority.

A note about judicial authorities that issue and execute Letters of Request

275. The Convention provides that Letters of Request are issued by a "judicial authority" of the Requesting State (Art. 1(1)) and executed by a "judicial authority" of the Requested State (Art. 9(1)). In each case, the competence of the authority to issue and execute Letters of Request is determined by the law of the State concerned. In practice, a wider range of authorities are competent to execute Letters of Request than to issue them (for the latter, see paras 139-149).

4. Methods and procedures

276. In executing a Letter of Request, the requested authority applies its own law as to the methods and procedures to be followed (paras 277-292). However, it must follow a special method or procedure requested by the requesting authority (paras 295-300) subject to limited exceptions (paras 301-309).

i. Methods and procedures under the law of the Requested State

277. The basic rule of the Convention is that the requested authority applies its own law as to the methods and procedures to be followed in executing the Letter of Request (Art. 9(1)). The methods and procedures under the law of the Requested State are usually set out in the code / rules of civil procedure or in specific evidence legislation. These may be specific methods and procedures for international letters of request or they may simply be the same as those followed in internal proceedings without cross-border elements.[405]

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402 See Explanatory Report, para. 146 and also responses to question 26 of the 2022 Questionnaire where China (Hong Kong SAR) and the United Kingdom indicated that Letters of Request are also executed by a private examiner. Israel indicated that Letters of Request are usually executed by a court, and, hearings can be conduct either before a judge or before a certified lawyer that is agreed by the parties, as approved by the court. In *Aventis Pharmaceuticals, Inc. v. Barr Laboratories, Inc.* (*op. cit.* note 120), the High Court of Punjab and Haryana (India) agreed to appoint an independent chemical specialist to take evidence relating to pharmaceutical products for use in patent infringement proceedings.

403 See responses of Australia and Singapore to question 26 of the 2022 Questionnaire. In other States, such as the United States, Letters of Request are executed by an attorney within the Department of Justice (the Central Authority).

404 This additional consent requirement ensures that evidence taken in the Requested State may be effectively used in proceedings in the Requesting State, thereby reinforcing the importance of the Convention as a bridge between different legal systems as confirmed by the Special Commission (C&R No 27 of the 2003 SC).

405 For example, in the Netherlands, the Supreme Court has confirmed that Letters of Request are executed pursuant to the *Code of Civil Procedure* (as applicable in internal proceedings): *News Int'l plc v. ABN Amro N.V.* (*op. cit*. note 14).

278. The methods and procedures under the law of the Requested State may determine:

a. whether a Letter of Request is executed by the judicial authority at its own motion or by application of the Central Authority or one of the parties to the proceedings;

b. whether the execution of a Letter of Request may be challenged;[406]

c. the persons to be notified of execution and how they are to be notified;

d. how witnesses are examined; and

e. how documents and other property are to be produced and inspected (including whether electronic evidence may be taken).[407]

Methods and procedures for examining witnesses

279. Methods and procedures do differ among Contracting Parties for the examination of witnesses in proceedings, including in the context of video-link. These differences manifest themselves with respect to issues including:

a. how the examination is arranged;

b. where the witness is examined;

c. how the witness is notified of the examination;

d. whether the witness is provided with the questions in advance;[408]

e. how the witness is prepared for the examination;

f. identification of the witness;

g. whether the person is examined under oath and how the oath is administered;[409]

h. who conducts the examination (*e.g.*, the judge or representatives of the parties);

i. how the witness is examined (*e.g.,* whether the witness may be cross-examined or asked follow-up (or supplementary) questions);[410]

j. the language of the examination and how interpreters are used (if needed);[411]

k. the requirements for documents that are to be presented to the witness;[412]

l. whether the witness is to have legal representation (a lawyer present);

m. whether the witness may appear remotely by video-link and how the video-link is established;

n. how the witness testimony is recorded and transcribed (*e.g.*, by deposition, by affidavit);[413]

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406 See responses to question 42 of the 2008 Questionnaire and question 19 of the 2022 Questionnaire.

407 With regard to electronic evidence, some institutions, such as the Sedona Conference, have developed guidelines on obtaining electronic evidence.

408 See responses to question 29 of the 2022 Questionnaire. In most Contracting Parties which responded, the witness is not provided with the questions in advance. Those where this is the case are typically common law jurisdictions.

409 See responses to question 33 of the 2022 Questionnaire. In most Contracting Parties which responded, an oath or affirmation is administered to the witness before the taking of evidence.

410 See responses to question 32 of the 2022 Questionnaire. In the majority of Contracting Parties which responded, representatives of the parties who attend the taking of evidence could ask additional questions or cross-examine the witness. However, most indicated that this was subject to specified conditions.

411 See responses to question 37 of the 2022 Questionnaire. In most Contracting Parties which responded, interpreters in taking of evidence are required to be certified.

412 See responses to question 30 of the 2022 Questionnaire. In most Contracting Parties which responded, any document presented to a witness must be attached to a Letter of Request. In addition to this, some of the Contracting Parties which responded also require that the document be approved by the authority taking evidence.

413 See responses to question 38 of the 2022 Questionnaire.

o. whether the Letter of Request is executed in public or in private;[414]

p. whether the witness is immune from arrest or service of process;[415]

q. whether the witness can be subject to further examination.[416]

280. For more on how witnesses are examined in the various Contracting Parties, review the information in a Contracting Party's Country Profile of or view the Evidence Section of the HCCH website. For further information, contact the Central Authority in the Requesting State.

Methods and procedures for document production and inspection

281. Methods and procedures do differ among Contracting Parties for the production and inspection of documents in proceedings. These differences manifest themselves in respect of issues including:

a. the persons who may be required to produce documents (in particular the extent to which documents may be produced from non-parties);[417]

b. the types of documents that may be produced, and the circumstances in which their production may be required (including by function of their relevance to the case);[418]

c. how the documents are to be produced and inspected (including whether the person producing the document is called to give oral evidence to identify the document); and

d. whether the documents are authenticated (see para. 395).[419]

Methods and procedures that are relevant in the context of video-link

Notifying or summoning the witness, expert or other actors

282. For proceedings under Chapter I involving the use of video-link, under Article 9, the requested authority is responsible for summoning the witness or expert in accordance with its own law and procedures.

283. It appears that in the majority of Contracting Parties which responded to the 2017 Country Profile Questionnaires there are no special rules to be used in cases where the witness or expert is being notified or summoned to give evidence by video-link, as opposed to giving evidence in person.[420] This is usually the case where the witness or expert is in a remote location to the court and where evidence is taken indirectly, *i.e.*, where the Requested State is taking the evidence.

284. That being said, at least one Contracting Party requires that the witness consent to give evidence

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414 See responses to question 28 of the 2022 Questionnaire. In most Contracting Parties which responded, hearings are public, unless otherwise ordered by a judge.

415 The Convention does not deal with the issue of immunity from arrest. The drafters considered that it would be extraordinary that a witness would have to travel to the Requested State to testify pursuant to a Letter of Request and thus concluded that this was a matter for the law of the Requested State to determine. In normal circumstances the witness would usually reside in the Requested State. See the Explanatory Report, para. 249.

416 See responses to questions 34 and 35 of the 2022 Questionnaire. In most Contracting Parties which responded, the witness can be subject to further examination, although most required a second Letter of Request to be sent.

417 In some States, there are limits on obtaining documents from non-parties.

418 For example, in Switzerland, the *Code of Civil Procedure* imposes an obligation to produce exhibits that are likely to be relevant to the case: see Federal Office of Justice, *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit.* note 22), p. 26.

419 See responses to question 31 of the 2022 Questionnaire. In most of the Contracting Parties which responded, documents produced by the witness during the taking of evidence are authenticated by the court or authority.

420 See, *e.g.*, the responses of Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Hungary, Israel, Latvia, Lithuania, Malta, Norway, Poland, Romania, Singapore, Slovenia, South Africa, Sweden to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

by video-link, a requirement which is contained in the court order which is served upon the witness.[421] In another Contracting Party, the witness or expert is summoned by a simple letter, unless the requested court determines that a particular type of service must be used.[422]

285. It is worth noting that different rules may apply in Contracting Parties where *direct* taking of evidence by video-link under Chapter I is permitted. In such cases, the Requesting State (and not the Requested State) would be in charge of effecting service or delivering the summons.[423] Moreover, other States which have responded to the 2017 Country Profile Questionnaire have noted that a witness cannot be compelled by its courts to give evidence directly to a foreign tribunal by video-link (see paras 314 *et seq.*).[424]

286. If and when direct taking of evidence is sought from a Contracting Party which permits this, it is recommended that requesting authorities ensure that the witness is willing to give evidence by video-link before filing a Letter of Request.

Oath / affirmation

287. In the execution of a request to take evidence indirectly under Chapter I of the Convention that makes use of video-link, the law of the Requested State applies (Art. 9(1)), including to the administration of oaths or affirmations. However, a specific form of oath or affirmation may be requested by the requesting authority (Art. 3(h)) as a special method or procedure (Art. 9(2)). The requested authority may also wish to explain to the witness the method of administering the oath or affirmation.

288. In contrast, if evidence is being taken directly under Chapter I (if permitted in the Requested State), it is usually the Requesting State which administers the oath or affirmation.[425] However, users should keep in mind that the administration of foreign oaths and affirmations may be considered a violation of the sovereignty of the Requested State.[426] Clarification on this point should be sought from the relevant competent authority.

289. Authorities should verify the relevant internal law requirements of either the Requested State, the Requesting State, or both, to ensure the admissibility of any evidence given.

Identification of witness / expert and other actors

290. The identification of the witness / expert may vary depending on the jurisdiction. Similar to court proceedings where evidence is taken in person, the witness / expert would usually be required to show a valid identity document (ID) for the purposes of identification in video-link proceedings.[427]

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421 See the response of the United Kingdom (England and Wales) to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*ibid.*).

422 See the response of Germany to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*ibid.*).

423 See, *e.g.*, the response of France to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*ibid.*).

424 See, *e.g.*, the responses of Australia (one state), Switzerland and the United States to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*ibid.*).

425 Response of Portugal to Part II, q.(a) and (b) of the 2017 Country Profile Questionnaire (*ibid.*).

426 For example, according to the Federal Office of Justice of Switzerland, "[t]he act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures always constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is regarded as a violation of Swiss sovereignty whether or not the persons affected by these legal procedures are willing to cooperate": *Guidelines on International Judicial Assistance in Civil Matters*, 3rd ed., Bern, January 2013, p. 20, available at the following address: < http://www.rhf.admin.ch > [last consulted on 9 April 2024]. See also M. Davies (*op. cit.* note 194), pp. 217-218.

427 See, *e.g.*, the responses of Belarus, China (Hong Kong SAR), Cyprus, Czech Republic, France, Germany, Hungary, Israel, Korea (Republic of), Lithuania, Malta, Mexico, Norway, Poland, Portugal, Singapore, Slovenia, South Africa, and Venezuela to Part VII, q. (j) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

In some jurisdictions, the oath or affirmation as administered will be sufficient.[428] Under Article 9(1) of the Convention, these procedures are to be determined by the internal law of Requested State, unless otherwise requested via an Article 9(2) special method or procedure.

291. In the case of indirect taking of evidence, it is the Requested State that would conduct the identification of the witness. In contrast, in the case of direct taking of evidence by video-link, the identification of the witness may be conducted by the Requested State and / or the Requesting State. In the latter case, however, it may be that more stringent procedures are required to verify the identity of the witness / expert. In practice, a convenient way of doing so would be to request the witness / expert to show their ID card to the requesting judicial officer through the video camera. A document camera may also be used for this purpose.[429]

292. All other actors in the proceedings who are present, either physically or via video-link, will likely also need to have their identity appropriately verified. Once again, this is subject to the requirements of the law of the Requested State, unless requested as a special method or procedure. As such, the participants themselves are responsible for ensuring their ability to adhere to any the relevant laws or procedures in place in the Requested State with respect to identification.[430]

ii. Non-execution following the methods or procedures under the law of the Requested State

293. There may be cases where the methods or procedures under the law of the Requested State do not provide for a particular measure to be taken that is required for the execution of the Letter of Request. In these cases, the requesting authority may request the measure to be taken as a special method or procedure pursuant to Article 9(2) (see paras 295-300).[431] However, if no such request is made, the part of the Letter of Request affected risks being returned unexecuted.[432]

294. In cases where no special method or procedure is requested, the requested authority may contact the requesting authority to confirm whether or not it requests a special method or procedure to be followed.[433] Alternatively, the requested authority may be willing, as a matter of internal law, to "blue-pencil" (*i.e.*, modify or limit) the Letter of Request in order for it to be executable following the methods or procedures under its law.[434]

iii. Obligation to follow special method or procedure

295. In executing the Letter of Request, the requested authority must follow a special method or procedure requested by the requesting authority, subject to limited exceptions (Art. 9(1)). The

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428 See, *e.g.,* the responses of Australia (two states), Croatia, Romania, United Kingdom (England and Wales) to Part VII, q. (j) of the 2017 Country Profile Questionnaire (*ibid.*). In India, the Karnataka High Court in *Twentieth Century Fox Film Corporation v. NRI Film Production Associates Ltd AIR* 2003 SC KANT 148 required further documentation to establish the identity of the witness, in the form of an "identification affidavit".

429 Response of Hungary to Part VII, q. (h) and (j) of the 2017 Country Profile Questionnaire (*ibid.*).

430 See "Handshake" Project (*op. cit.* Glossary), p. 18.

431 This assumes that the requesting authority was aware of the differences in methods and procedures between the law of the Requesting State and the law of the Requested State, and had the prescience to request that a special method or procedure be followed. This underscores the importance of the requesting authority (or other person responsible for preparing the Letter of Request) seeking advice on the particular methods and procedures followed in the Requested State to ensure that the evidence sought will be taken in the Requested State and, once returned, may be effectively used in proceedings in the Requesting State.

432 Nothing in the Convention prohibits the requesting authority from reissuing the Letter of Request (with a request for a special method or procedure to be followed): *Beauty World Wide N.V. v. Bayer A.G. & Bayer Nederland B.V.* (*op. cit.* note 258).

433 For example, in *Uriel Yarkoni v. Boston Scientific Corp*., D.C. (T.A.), 17 June 2003, No 2962/02, the requested authority (the District Court of Tel Aviv (Israel)) contacted the requesting authority (a District Court of the United States) to check whether the Letter of Request sought to have the witness testify in open court or sit for a deposition. The requesting authority responded by confirming that it sought to have the witness sit for a deposition.

434 For more on the limits of blue-pencilling, see para. 404 *et seq*.

special method or procedure should be specified in the Letter of Request (Art. 3(1)(i)).[435]

296. The right to request that a special method or procedure be followed is designed to ensure that evidence taken in the Requested State may be effectively utilised in proceedings in the Requesting State.[436] Evidence taken following a form or method provided under the law of the Requested State may be rendered useless in the proceedings in the Requesting State if the law of that Contracting Party requires evidence to be taken following a different form or method.

297. In practice, requests to follow a special method or procedure are common for some Contracting Parties, but less common in others.[437]

298. The types of special methods and procedures requested vary.[438] In some cases the requesting authority may seek for the Letter of Request to be executed applying the law of the Requesting State as to the methods and procedures to be followed.[439] In other cases, more specific requests are made including:

a. conducting the witness examination by a judge from the Requesting State;[440]

b. administering an oath or affirmation (incl. a particular form of oath or affirmation);[441]

c. employing a stenographer to take a verbatim transcript, or using audio / audio-visual equipment to take a recording of the witness examination;[442]

d. the examination and / or cross-examination of witnesses by representatives of the parties, or the asking of follow-up (or supplementary) questions;[443]

e. certifying that the recorded testimony is accurate and reliable;

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435 For more on specifying the special method or procedure in the Letter of Request, see paras 188 *et seq*.

436 Explanatory Report, paras 95-8.

437 See responses to question 72 of the 2008 Questionnaire and question 22 of the 2022 Questionnaire.

438 *Ibid*.

439 In the case of *U.S. Securities and Exchange Commission v. Samuel E. Wyly* ORD 2012/24 (30 April 2012), the High Court of Justice of the Isle of Man ordered the examination of witnesses applying the *Federal Rules of Evidence and Federal Rules of Civil Procedure* of the United States. The use of Art. 9(2) to apply the law of the Requesting State was recognised in the report of P. Matet in the case of *AXA Mediterranean Int'l Holding v. ING Insurance Int'l B.V*. before the Court of Cassation of France (*op. cit.* note 396).

440 The taking of evidence by a foreign judge pursuant to a special method or procedure under Chapter I is distinct from the taking of evidence by a foreign judge appointed as a Commissioner under Chapter II. For more on the taking of evidence by Commissioners, see Part 3. It is also distinct from the presence of judicial personnel at execution (see paras 331 *et seq.*). In some Requested States, the law may provide for witness examination to be conducted only by the authorities of that State. Allowing a foreign judge to conduct the examination may be incompatible with that law, in which case the requested authority may refuse to follow such a request pursuant to Art. 9(1) (see paras 305 *et seq.*).

441 The responses to question 22 of the 2022 Questionnaire reveal instances of such requests being made.

442 Requests to video-tape witness examinations were discussed by the Special Commission at its meeting in 1989, where most delegations did not envisage any problems with following such requests: Report of the 1989 SC (*op. cit.* note 30), para. 38. The responses to question 72 of the 2008 Questionnaire and question 22 of the 2022 Questionnaire also reveal instances of such requests being made. Case law provides examples of Letters of Request being executed following a request for witness examination to be video-taped: see, *e.g.*, *J. Barber & Sons v. Lloyd's Underwriters* [1987] QB 103 (High Court of England (QB)); *Mitre Sports Int'l Ltd v. Home Box Office, Inc*. [2009] INDLHC 3661, No OMP 516/2009 (8 September 2009) (High Court of Delhi (India)); *Re the Matter of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970* (*op. cit*. note 108) (Supreme Court of South Australia (Australia)). However, in a decision of 23 May 2003 in the case of *Manhattan Investment Fund Ltd c. Bear Stearns Securities Corp*., the First Instance Court of Paris (France) refused to follow a request for witness examination to be video-taped, citing opposition to "current practice". This decision, however, is at odds with the response of France to question 72 of the 2008 Questionnaire, which reports that Letters of Request from the United States seeking for witness examination to be video-taped are regularly received and mostly followed by authorities in France.

443 Requests to allow the cross-examination of witnesses were discussed by the Special Commission at its meeting in 1989, which felt that such requests did not raise any legal problems: Report of the 1989 SC (*op. cit.* note 30), para. 39. However, the Special Commission did foresee some "practical problems" with following such requests "owing to the inexperience of lawyers of civil law countries in such matters". Because of this, the Special Commission emphasised the importance of clearly informing all parties of the relevant rules of procedure prior to the cross-examination. The responses to question 72 of the 2008 Questionnaire and question 22 of the 2022 Questionnaire also reveal instances of such requests being made.

f. recording objections made by a party or witness in the transcript of the witness examination;

g. taking a witness statement in a particular form (*e.g.*, by affidavit in a specific language);

h. where electronic evidence is sought, specifying the format in which the evidence is to be produced (*e.g.*, original or native file format) and / or the medium (*e.g.*, on a hard disk) on which the evidence is to be produced;

i. where blood samples or other biospecimens are sought, specifying the material used to obtain and transport the sample or biospecimen.[444]

299. In the case of doubt or need for clarification as to following a special method or procedure requested, the requested authority should contact the requesting authority.[445]

300. A request for a special method or procedure to be followed is distinct from a request for the presence of the parties, their representatives, and members of the judicial personnel of the requesting authority at the execution of the Letter of Request.[446]

iv. Exceptions to following a special method or procedure

301. The requested authority is not required to follow a request that is:

a. incompatible with the law of the Requested State (see paras 305-307); or

b. impossible of performance by reason of (a) the requested authority's internal practice and procedure or (b) practical difficulties (see paras 308 and 309).

302. The Special Commission has confirmed that these two exceptions (Art. 9(2)) are to be interpreted *narrowly*,[447] and in particular so as to permit, to the greatest extent possible, the use of information technology. As the Explanatory Report explains, they were drafted with a view to maximising international judicial co-operation and to minimising the possibilities of refusal to co-operate.[448] Indeed, in practice, Contracting Parties have shown a great openness towards admitting application of each other's procedure on their territory.[449]

303. While the exceptions permit the requested authority to refuse to follow a special method or procedure in executing a Letter of Request, they do not permit the requested authority to refuse to execute the Letter of Request altogether (*i.e.*, to refuse to obtain particular evidence or perform a particular other judicial act). If one of the exceptions applies, the requested authority simply applies its own law as to the methods and procedures to be followed (Art. 9(1)). Alternatively, the requested authority may seek to follow the special method or procedure in a *modified form* (*e.g.*, by "blue-pencilling" the request), in a way that does not invoke the exception concerned.[450] In keeping with the basic principle of the Convention to ensure that evidence taken in the Requested State can be effectively utilised in the proceedings in the Requesting State, the requested authority should check

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444 For more on DNA evidence, see para. 75.

445 See example described at note 433.

446 In *Re Application of Jan L. Brodie v. ex parte Dunlop* [2013] NSWSC 829 (25 June 2013), the Supreme Court of New South Wales (Australia) considered a request for the moving party to be notified of the time and place of execution and to have access to inspect and copy the documents which was sought as a request for a special method or procedure to be followed, and therefore ordered that the moving party cover the costs incurred by the witnesses in producing the documents.

447 C&R No 43 of the 2003 SC.

448 See Explanatory Report, para. 103.

449 See Report of the 1985 SC (*op. cit*. note 24), Part I, § 3(B).

450 This approach was preferred in the opinion of Advocate General Kokott in *Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (*op. cit.* note 125, para. 60) under the 2001 EU Evidence Regulation, which contains a similar provision to Art. 9(2) of the Convention (see Art. 10(3)) ("As a less radical measure, however, the requested court must first attempt to execute the requested order in a modified manner, thereby observing the guarantees provided for by national law"). The 2020 EU Evidence Regulation follows the same approach of its predecessor and contains a similar provision to Art. 9(2) of the Convention (see Art. 12(3)). For more on the limits of blue-pencilling, see paras 404 *et seq.*

with the requesting authority that evidence taken following the methods and procedures under the law of the Requested State or in a modified form is acceptable before proceeding to execute the Letter of Request.

304. To the extent that the Letter of Request is not executed following a special method or procedure, the Requested State is required to inform the requesting authority and advise it of the reasons (Art. 13(2)).

a) Incompatible with the law of the Requested State

305. The requested authority is not required to follow a request that is incompatible with the law of the Requested State (Art. 9(2)).[451]

306. The term "incompatible with" does not mean simply "different from" or "unknown to". Instead, it means that there must be some constitutional inhibition or some absolute statutory prohibition.[452] For example, a request to administer a religious oath may be incompatible with a constitutional separation of religion and the State. Moreover, a request to conduct a witness examination in a language other than the official language of the Requested State may be incompatible with a statutory requirement that proceedings be conducted in that language. Similarly, a request that a particular person conduct the examination may be incompatible with statutory limitations on entitlements to appear in judicial proceedings. However, the fact that the law of the Requested State does not recognise electronic disclosure of documents in civil proceedings (*e.g.*, e-discovery) does not alone mean that a request for the production of electronic evidence is incompatible with that law. This exception therefore assumes a *very high threshold*.

307. During negotiations, no civil law delegation suggested that its State had constitutional or statutory provisions that would prevent the examination of witnesses and the preparation of the transcript of testimony "common law style". Nor did any common law delegation suggest that its State had constitutional or statutory provisions which would prevent a judge or an official designated by a judge from interrogating a witness and preparing a summary in "civil law style". Moreover, at least one Contracting Party (France) has passed legislation to ensure that a special request for the transcription or recording of a witness examination, or the representatives of the parties to ask follow-up questions, is not "incompatible" with the law of that Contracting Party.[453]

b) Impossibility of performance

308. The requested authority is not required to follow a request that is impossible of performance by reason of (Art. 9(2)):

a. the requested authority's internal practice and procedure; or

b. practical difficulties.

309. The term "impossible" is given its ordinary meaning, and requires a higher threshold than "difficult" to administer, "inconvenient" or "impracticable".[454] Two examples of impossibility of performance were discussed during negotiations:[455]

a. a Letter of Request addressed to a civil law State requests evidence to be taken by cross-examination, and neither the requested authority nor the local lawyers have any experience

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451 This exception is formulated in identical terms to Art. 5(1)(b) of the 1965 Service Convention.

452 Explanatory Report, para. 102. This view was accepted by the High Court of Justice of the Isle of Man in *U.S. Securities and Exchange Commission v. Samuel E. Wyly* (*op. cit*. note 439) and by the Tel Aviv District Court of Israel in *Uriel Yarkoni v. Boston Scientific Corp*. (*op. cit*. note 433).

453 See Arts 739 and 740 of the *Code of Civil Procedure* of France.

454 Explanatory Report, para. 103.

455 *Ibid.*, para. 105 and Report of the 1968 SC (*op. cit.* note 16), pp. 62-63.

or competence in this procedure;[456]

b. a Letter of Request addressed to a common law State requests evidence to be taken by a judge, and the requested authority, which uniformly appoints an examiner to execute Letters of Request, is several years behind on its civil list.[457]

5. Compulsion

310. In executing the Letter of Request, the requested authority must apply the same measures of compulsion under its internal law as it would in local proceedings (Art. 10). Measures of compulsion are generally applied in situations where the person is unwilling to appear and / or give evidence, and are subject to any privilege or duty of the person to refuse to give evidence (see paras 371 *et seq.*).

311. The law of the Requested State may provide for measures of compulsion to be applied at the discretion of the court. The obligation under Article 10 does not affect such discretion.[458]

312. The types and availability of measures of compulsion differ from Contracting Party to Contracting Party. While the legal systems of common law jurisdictions and the Nordic Contracting Parties generally provide for such measures to be applied against a party to a lawsuit or a third person to produce a document in their possession, most civil law systems do not provide such a possibility.[459] Moreover, in some civil law systems, a party cannot be compelled to testify.[460] In most Contracting Parties, sanctions may be imposed against an unwilling witness.[461] Sanctions in most Contracting Parties take the form of civil penalties (*e.g.*, payment of costs, fines), whereas in some Contracting Parties, non-appearance is a criminal offence.[462]

313. Although the requested authority must apply the same measures of compulsion under its internal law in executing the Letter of Request as it would in local proceedings, the witness may claim the right to refuse to give evidence in accordance with the law of either the Requested State (Art. 11(1)(a)) or the Requesting State (Art. 11(1)(b)) or, if specified by declaration of the Requested State, the law of a third State (Art. 11(2)).

In the context of execution by video-link

314. It is important to note that a distinction may need to be drawn between compelling a witness / expert to give evidence before a court and compelling the witness / expert to give the evidence using a particular medium (*i.e.*, by video-link). Therefore, depending on the scope of the measures of compulsion available to the requested authority under its internal law, it is entirely possible that a witness / expert may be compelled to give evidence before a court, but not compelled to use video-link to give that evidence.

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456 A possible solution in this case would be for an examiner appointed by the requesting authority to conduct the examination as a special method or procedure.

457 A possible solution in this case would be for a judge from the Requesting State to conduct the examination as a special method or procedure.

458 Explanatory Report, para. 115.

459 Report of the 1985 SC (*op. cit.* note 24), Part I, § 1(C).

460 Explanatory Report, paras 117-118. In *Applicants v. Karadžić*, HR, 6 April 2012, *NJ* 2012, 363, the Supreme Court of the Netherlands referred to Art. 173(1) of the *Code of Civil Procedure* of the Netherlands, which provides that a party may not be compelled to give evidence. In that case, a Letter of Request had been issued by a District Court of the United States for the examination of a person concerning the "nature, location, status and extent of his assets" in connection with an outstanding damages award ordered by the Court against that person in previous litigation. The Supreme Court confirmed that the person was a party witness and, referring to Art. 10 of the Convention, upheld the decision not to apply measures of compulsion against them. See however, responses to question 35 of the 2022 Questionnaire, where certain responding Contracting Parties with civil law systems indicated that it is also possible to forcibly bring a witness to court.

461 See responses to question 35 of the 2022 Questionnaire.

462 *Ibid*.

315. As mentioned above, the witness may claim the right to refuse to give evidence in accordance with the law of either the Requested State or the Requesting State or, if specified by declaration of the Requested State, the law of a third State.

316. Half of the Contracting Parties which responded to the 2017 Country Profile Questionnaire referred to their internal laws authorising the compelling of a witness / expert to appear before the court and they did so mainly in the context of Chapter I.[463] It is unclear, however, whether once before the court, the witness could be compelled to give that evidence by video-link.

317. In contrast, the other half of the Contracting Parties which responded indicated that a witness or expert could not be compelled to use video-link to give evidence.[464] In particular, two of the Contracting Parties which responded advised that their internal law does not contemplate using compulsion to force a witness to give evidence by video-link.[465] Another Contracting Party mentioned that the taking of evidence by video-link is subject to the condition that the witness is not compelled to give evidence by video-link.[466]

318. One of the Contracting Parties which responded further clarified that *if* evidence is being taken directly under Chapter I (as discussed in), the witness should give evidence voluntarily as compulsion is not available in such cases, not even to compel the witness to be present at the hearing.[467]

6. Presence and participation at execution

i. Presence of parties and / or their representatives (Art. 7)

319. The 1970 Evidence Convention provides for the parties to the proceedings in the Requesting State and their representatives to be present at the execution of the Letter of Request. The representatives of a party may be the party's lawyer / attorney retained by the party for the proceedings in the Requesting State, or a lawyer / attorney specifically retained by the party in the Requested State for the purposes of the execution of the Letter of Request.

320. The presence of parties and / or their representatives at the execution of the Letter of Request is a right, and is not subject to any additional consent of the Requested State. To facilitate the exercise of this right, the Convention provides for information on the time and place of execution of the Letter of Request to be sent either to the requesting authority, or directly to the parties and / or their representatives.[468] However, this information is not automatic; it must be requested by the requesting authority, whether in the Letter of Request or by separate transmission.[469] Whether the requesting authority is required to make such a request is a matter of the law of the Requesting

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463 Responses of Australia (three states), China (Hong Kong and Macao SARs), Cyprus, Czech Republic, Hungary, Israel, Korea (Republic of), Lithuania, Mexico, Norway, Poland, Romania, and Singapore to Part IV, q.(g) of the 2017 Country Profile Questionnaire. Some of these States also provided information on compulsion in their responses to Part IV, q.(h) of the 2017 Country Profile Questionnaire (*ibid.*).

464 Responses of Australia (two states), Belarus, Croatia, Estonia, France, Germany, Greece, Malta, Portugal, Slovenia, South Africa, United Kingdom (England and Wales), United States, and Venezuela to Part IV, q.(g) of the 2017 Country Profile Questionnaire (*ibid.*).

465 Responses of Croatia and Slovenia to Part IV, q.(g) of the 2017 Country Profile Questionnaire (*ibid.*).

466 Response of the United Kingdom (England and Wales) to Part IV, q.(e) and (g) of the 2017 Country Profile Questionnaire (*ibid.*).

467 Response of France to Part IV, q.(g) of the 2017 Country Profile Questionnaire (*ibid.*), which makes reference to Art. 747-1 of the Code of Civil Procedure of France.

468 The Explanatory Report states (at para. 87) that this alternative may be preferred to avoid loss of time in multiple transmissions.

469 In Contracting Parties where a Letter of Request is executed on the motion of the parties (*e.g.*, in several common law jurisdictions), sending information to the parties and their representatives occurs as a matter of course.

State (see para. 150).[470]

321. Where requested, the information on the time and place of execution (for more, see paras 346 *et seq.*) is sent by the judicial authority competent to execute the request in some of the Contracting Parties, whereas in other Contracting Parties, it is sent by the Central Authority.[471] Certain Contracting Parties have also indicated that private agents of parties or other authorities are responsible to send the information instead.[472] The Convention does not prescribe the language in which the information is to be sent, although it is reasonable to assume that the informing authority will be willing to communicate in the same languages in which the Requested State accepts Letters of Request (see paras 200 *et seq.*).

What to do if the parties and / or their representatives wish to be present at execution

322. If the parties to the proceedings in the Requesting State and / or their representatives wish to be present at the execution of the Letter of Request, this should be specified in the Letter of Request. Information on the time and place of execution will then be sent to the requesting authority as well as to the parties and / or their representatives (provided that this is requested by the requesting authority) (Art. 7).

323. The parties and / or representatives should arrange for an interpreter if interpretation is needed to allow them to follow the proceedings. Alternatively, a request may be made to the requested authority (in the Letter of Request) to make arrangements for an interpreter. Arrangements made by the requested authority to facilitate the participation of the parties and / or their representatives may incur costs (see para. 345).

324. If a request is made, the time fixed for the execution of the Letter of Request should be such as to allow for the information to be sent to the parties and their representatives with ample time for them to arrange to be present or to be represented.[473] To avoid delays, sending authorities may wish to consider using more rapid means of communication, such as e-mail. To facilitate this, the e-mail addresses for the parties and / or their representatives could be specified in the Letter of Request (in cases where the requesting authority requests for them to be informed directly).

325. A failure to send information about the time and place of execution may render the evidence obtained inadmissible in the Requesting State under the internal law of that Contracting Party.[474] The requested authority of a number of Contracting Parties will re-execute the Letter of Request after sending the required information (if the Letter of Request has already been executed) or re-schedule the execution of the Letter of Request (if the Letter of Request has not already been

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470 In a decision of 23 September 1997, No 340/97, the Supreme Court of Portugal held that Art. 7 of the Convention does not confer on the requesting authority a discretionary power to decide whether to admit a party's request to be informed of the time and place of the execution of the Letter of Request. However, this decision appears at odds with the text of Art. 7, which provides that the information will be provided if the requesting authority "so desires". Whether the requesting authority is obliged to make a request is not addressed by the Convention and is left to the internal law of the Requesting State.

471 See responses to question 21 of the 2022 Questionnaire. Estonia indicated that the information is sought from the courts, but the Central Authority usually sends the information. Slovenia indicated that usually the information is sent by the Central Authority, depending on the subject matter and time management of the case, but it is also possible for a judicial authority competent to execute the request to send the information especially where the requesting authority so requests.

472 *Ibid*. China (Hong Kong SAR) indicated that the information is sent by private agent of parties or in the absence of private agents, the Law Officer (International Law) of the Department of Justice of the Government of the Hong Kong SAR and/or judicial authority competent to execute the request. Singapore indicated that the information is sent by the Attorney-General's Chambers.

473 See Explanatory Report, para. 88.

474 This issue is not addressed in the Convention itself. See decision of the Supreme Court of Portugal, 3 February 1997, No 493/96. See also the decision of the Supreme Court of the Netherlands in *Peters v. Hagemans*, 25 October 1991, *RvdW*, 1991, 233, in which evidence obtained in Belgium by letter of request issued under the 1954 Civil Procedure Convention was held to be invalid because the Belgian authorities failed to inform the plaintiff of the time and place of execution, as required under that Convention.

executed). This is generally done at the request of the requesting authority.

In the context of execution by video-link

326. The Special Commission has confirmed that the parties and / or their representatives may be present at execution by video-link.[475]

327. If the parties and / or their representatives wish to be present by video-link at the execution of the Letter of Request, the requesting authority should specify this in items 13 and 14 of the Model Form for Letters of Request. Although the presence of the parties and / or their representatives at the execution of the request is, under Article 7 of the Convention, a right, this right does not necessarily extend to requiring the requested authority to establish a video-link to facilitate that presence. Accordingly, the establishment of the video-link to facilitate this presence is subject either to permission from the relevant authority or a special method or procedure being requested under Article 9(2). In the case of the latter, the requested authority is required to comply unless it would be incompatible with the internal law of the Requested State, or if it is simply not possible due to a lack of equipment or facilities.

328. If interpretation is needed to allow the parties and / or their representatives to follow the proceedings by video-link, a request may be made to the requested authority (in the Letter of Request) so that the requested authority may make necessary arrangements. As mentioned above, arrangements made by the requested authority may incur costs (see para. 345).

329. Most Contracting Parties which responded to the 2017 Country Profile Questionnaire reported applying the same rules for the presence of the parties and their representatives irrespective of whether they are physically in a single location or present via video-link.[476] The active participation of the parties and their representatives in the hearing via video-link (*i.e.*, not simple presence) in this case is determined by the internal law of the Requested State. In some of the Contracting Parties, the authorisation to actively participate remains at the discretion and direction of the presiding official in charge of the execution, in accordance with internal law.[477] Accordingly, in such circumstances, the extent to which the parties and their representatives may participate in the hearing via video-link is determined by the presiding official on a case-by-case basis.

330. Moreover, it should be noted that the majority of the Contracting Parties which responded allow cross-examination of a witness / expert by video-link by the representatives located in the Requesting State.[478] However, some require that cross-examination via video-link be specifically mentioned in the Letter of Request[479] and that questions be made indirectly through the judicial authority.[480] While some jurisdictions do not allow cross-examination by representatives of the Requesting State, a jurisdiction in one of the Contracting Parties which responded indicated that cross-examination may be permitted if the practitioner of the Requesting State is also authorised to practice in its territory (*i.e.*, the Requested State).[481]

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475 C&R No 55(a) of the 2009 SC.

476 See the responses of Belarus, Brazil, China (Hong Kong and Macao SARs), Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Israel, Latvia, Lithuania, Malta, Mexico, Poland, Portugal, Romania, Singapore, Slovenia, South Africa, Sweden, United Kingdom (England and Wales) and Venezuela to Part V, q. (e) of the 2017 Country Profile Questionnaire (*ibid.*).

477 See, *e.g.*, the responses of Australia (two states), Brazil, France and Israel to Part V, q. (e) of the 2017 Country Profile Questionnaire (*ibid.*).

478 See the responses of Brazil, China (Hong Kong SAR), Cyprus, Estonia, Finland, France, Greece, Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Portugal, Romania, Singapore, Slovenia, South Africa, United Kingdom (England and Wales), Venezuela to Part V, q. (f) of the 2017 Country Profile Questionnaire (*ibid.*).

479 See, *e.g.*, the response of France to Part V, q. (f) of the 2017 Country Profile Questionnaire (*ibid.*).

480 See, *e.g.*, the response of Brazil to Part V, q. (f) of the 2017 Country Profile Questionnaire (*ibid.*).

481 Response of Australia (Queensland) to Part V, q. (f) of the 2017 Country Profile Questionnaire (*ibid.*).

ii. Presence of members of the judicial personnel (Art. 8)

331. The Convention provides for members of the judicial personnel of the requesting authority (*e.g.*, the presiding judge) to be present at the execution of the Letter of Request if:

a. the Requested State has made a declaration to that effect pursuant to Article 8; and

b. prior authorisation by a competent authority designated in the declaration is granted (if such authorisation is required by the Requested State).[482]

332. Unlike in the case of the parties and / or their representatives, the presence of judicial personnel is not an automatic right (see para. 320).

333. Most Contracting Parties have made a declaration pursuant to Article 8, and in the vast majority of cases, prior authorisation is required. In practice, requests for authorisation for members of judicial personnel to be present at the execution of a Letter of Request are rare.[483]

334. To see whether a Contracting Party has made a declaration pursuant to Article 8 and the content of that declaration, review the information in a Contracting Party's Country Profile or the "status table" on the Evidence Section of the HCCH website and click on the hyperlink in the column entitled "Res/D/N". If there is no hyperlink, the Contracting Party has not made any declaration with respect to the Convention.

335. The Convention does not affect provisions of internal law that might permit the presence of judicial personnel on less restrictive conditions (Art. 27(b)). Thus, in the event that the Requested State has not made a declaration under Article 8, presence of judicial personnel may nonetheless be possible in accordance with the internal law or practice of the Requested State.

336. Moreover, the Convention expressly provides for two or more Contracting Parties to agree on a more liberal system for the presence of judges at the execution of the Letter of Request (Art. 28(c)).

337. Even if judicial personnel may be present, actual active participation in the examination is another matter. As noted in Article 8, the prior authorisation of the competent authority may be required, and in some cases the participation of the judicial personnel of the Requesting State may be subject to the applicable court rules and the control of the presiding official.

In the context of execution by video-link

338. Similarly, an Article 8 declaration is also needed to permit the presence of judicial personnel of the Requesting State at the execution of the Letter of Request by video-link. Where such a declaration has been made, prior authorisation by the designated competent authority may be required.

339. When seeking authorisation from the Requested State, requesting authorities should clearly specify that the presence of the judicial personnel will take place by video-link and provide the relevant technical specifications of your video-link equipment.

340. The active participation of judicial personnel in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

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482 The process for applying for such authorisation, and the terms and conditions of such authorisation are entirely a matter for the Requested State: see Explanatory Report, para. 92.

483 See Report of the 1978 SC (*op. cit.* note 94), Part I, § 5(B), as well as responses to question 64 of the 2008 Questionnaire.

iii. Presence versus participation

341. Presence at the execution of the Letter of Request does not necessarily mean that the parties, their representatives or judicial personnel may participate in the execution. Participation will be allowed to the extent that it is provided for under the internal law of the Requested State (Art. 9(1)), or to the extent that it is requested as a special method or procedure (Art. 9(2)).

342. The internal law of many Contracting Parties provides for parties and / or their representatives to ask follow-up (or supplementary) questions, usually with the permission of the requested authority (*e.g.,* the judge or court-appointed examiner). As noted above (para. 293), the requesting authority may request, as a special method or procedure, that representatives cross-examine a witness, or ask follow-up questions.

343. In relation to actual active participation of judicial personnel in the examination. as noted in Article 8, the prior authorisation of the competent authority may be required. In some cases the participation of the judicial personnel of the Requesting State may be subject to the applicable court rules and the control of the presiding official.[484]

344. The active participation of judicial personnel in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

iv. Costs

345. The costs regime under Article 14 of the Convention (discussed at paras 351 *et seq.*) does not apply to costs associated with mere presence at the execution of the Letter of Request. As noted in paragraph 300, the mere presence of the parties, their representatives and / or members of the judicial personnel of the requesting authority is not a special method or procedure for the purposes of Article 9(2), and therefore the Requested State may not request reimbursement of costs occasioned by such presence under Article 14(2). At the same time, the Convention does not prevent the requested authority from requiring the payment of fees or reimbursement of costs associated with the presence of members of judicial personnel as a condition for the granting of authorisation pursuant to Article 8. Moreover, it does not prevent the requested authority from requiring the payment of fees or reimbursement of costs occasioned by the use of any special procedure to facilitate the participation of the parties, their representatives or judicial personnel (*e.g.*, the use of an interpreter or video-link equipment).[485]

7. Timing for execution

346. Letters of Request must be executed *expeditiously* (Art. 9(3)).

347. In practice, the timing for execution varies from one Contracting Party to another, with some Contracting Parties taking on average 1 to 3 months to execute Letters of Request, to others taking on average 6 to 12 months. Most Letters of Request appear to be executed within six months.[486] Without limiting the obligation to execute Letters of Request expeditiously, the Permanent Bureau suggests that, as a goal, Letters of Request be executed within six months.

348. The timing for execution may be affected by a range of factors, including:

    a. the nature of the evidence to be taken or judicial act to be performed;

    b. how clearly the Letter of Request is drafted and any compliance issues with the requirements

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484 See, *e.g.*, the responses of Australia (two states), Brazil and France to Part V, q. (g) of the 2017 Country Profile Questionnaire (*ibid.*).

485 This is distinct from the regime for fees paid to interpreters in the examination of witnesses (see para. 357).

486 See, *e.g.*, responses to question 4 under "Data & Statistics of Contracting Parties" of the 2022 Questionnaire.

of the Convention;

c. whether the requesting authority has requested a special method or procedure to be followed;

d. difficulties in locating a witness;[487]

e. the willingness of the witness to give evidence;

f. avenues of redress against the execution of a Letter of Request;

g. the geography and transport infrastructure of the Requested State (which may affect how long it takes to summon a witness, or to carry out an examination or inspection);

h. the complexity and amount of procedural steps that have to be taken by a judicial authority, including exequatur proceedings, and

i. the workload of the judicial authority competent to execute the Letter of Request.[488]

349. The Model Form makes provision for the requesting authority to specify the date by which it requires receipt of the response to the Letter of Request (*i.e.*, the documents establishing execution). It also makes provision for the requesting authority to indicate the reason for urgency (if any). In practice, some Contracting Parties are able to give special expedited processing to urgent requests, in accordance with their own internal law.[489]

350. A number of Contracting Parties have expressed concern about delays in executing Letters of Request.[490] Delays may cause Contracting Parties to lose faith in the effectiveness of the Convention, and may prompt parties to seek alternative solutions to obtaining evidence abroad outside the Convention, to which many Contracting Parties object (see para. 601). In all cases, a range of measures can be taken to expedite the execution of Letters of Request, including:

a. improved co-operation between the relevant authorities of both Contracting Parties concerned;[491]

b. the use of electronic means of communication (*e.g.*, e-mail) by the relevant authorities of both Contracting Parties concerned, including for the transmission of Letters of Request (see para. 238) and the documents establishing execution, notifications of objections and refusals, as well as requests for, and provision of, information;

c. the moving party engaging counsel[492] in the Requested State to:

i. advise on the particular methods and procedures followed in the Requested State and whether the obtaining of evidence or performance of other judicial act sought in that State falls within the functions of the judiciary,

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487 For more on providing details of witnesses, see paras 172-174.

488 The drafters of the Convention rejected a proposal that Letters of Request should be accorded priority status by the requested authority. The drafters felt that it would be unacceptable for local litigants, who may have been waiting for extended periods for their matter to reach a hearing, to step aside in every instance and permit a Letter of Request to take priority, irrespective of relative urgency: see Explanatory Report, para. 110.

489 See Report of the 1985 SC (*op. cit*. note 24), Part I, § 3(A). For cases demonstrating the willingness of the requested authority to accommodate urgent requests, see *Re Application of Attorney General of New South Wales* (*op. cit*. note 285, Supreme Court of New South Wales (Australia)) and *State of Minnesota v. Philip Morris* (*op. cit.* note 294, Court of Appeal of England). The Ibero-American Judicial Summit has recommended that priority be given to letters of request marked as urgent, provided that according such priority does not contravene the law of the Requested State: "Guide to Good Practice for International Letters Rogatory in Civil Matters" (*op. cit.* note 266), part 2(c).

490 See responses to question 9 of the 2013 Questionnaire (and more generally questions 12 and 19), question 9 of the 2008 Questionnaire and question 49 of the 2022 Questionnaire.

491 For more on co-operation between the Central Authority and the requesting authority in particular, see para. 245.

492 See, *e.g.*, the New York State Bar Association, "Guidelines for Obtaining Cross-Border Evidence*", NYSBA NYLitigator*, spring 2018, vol 24, no 1, pp. 46-48, Guideline 8.

ii. advise on the drafting of the Letter of Request, and

iii. be present at the execution of the Letter of Request (if desired);

d. ensuring that Letters of Request are clearly drafted, and comply with the content requirements (para. 153) and language (translation) requirements (para. 200) of the Convention.

8. Costs for execution

i. Basic rule

351. The basic rule of the Convention is that the Requested State must not charge for the services provided in the execution of a Letter of Request (Art. 14(1)). Accordingly, the Requested State may not require the Requesting State (including the requesting authority, the parties to the proceedings in the Requesting State, or their representatives) to reimburse any of the following:

a. costs of services rendered by the Central Authority or by the requested authority;[493]

b. costs of personnel of the courts or other government agencies involved in the execution of the Letter of Request;

c. fees paid to witnesses (incl. *per diem* allowances and travel costs);[494] or

d. fees paid to official personnel employed to compel the appearance of a witness.

352. The costs regime under Article 14 of the Convention does not apply to costs associated with mere presence at the execution of the Letter of Request (for more discussion, see para. 345).

353. The Convention provides for some exceptions to this basic rule. These exceptions are discussed below.

ii. Exceptions to the basic rule

354. The Convention provides that the Requested State may require reimbursement of certain costs related to the execution of Letters of Request in limited circumstances (as set out below). In these circumstances, the Convention confers on the Requested State *a right to reimbursement* for the costs occasioned pursuant to Articles 9(2) and 14(2), even if the evidence is no longer sought (*e.g.*, where the requesting authority withdraws the Letter of Request) and the Letter of Request is ultimately not (fully) executed.[495]

355. The Convention excludes any power of the Requested State to demand an advance deposit of costs as a condition precedent to the execution of the Letter of Request.[496] With regard to Article 14(2), the Special Commission has concluded that this provision does not provide for the Requested State

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493 The prohibition on requiring reimbursement of the costs of the requested authority was confirmed in Switzerland by the Supreme Court of the Canton of St. Gallen in its decision of 26 October 2009 (*op. cit.* note 134) and the Supreme Court of the Canton of Obwalden in its decision of 15 January 1999, No AbR 1998/99 No 3.

494 In interpreting Art. 18 of the 2001 EU Evidence Regulation, the Court of Justice of the European Union noted that its content corresponds to that of Art. 14 of the Convention and that the reimbursement of fees paid to witnesses was "deliberately dropped" during the drafting of the Convention. Furthermore, the Court found that the fact that the 2001 EU Evidence Regulation reproduced the text of Art. 14 of the Convention, and not Art. 16 of the 1954 Civil Procedure Convention was "an argument against regarding witness expenses as reimbursable": *Weryński v. Mediatel 4B spółka z o.o.* (*op. cit*. note 103).

495 C&R No 14 of the 2014 SC.

496 See Explanatory Report, para. 158. Compare this to Art. 22(3) of the 2020 EU Evidence Regulation, which provides that "[w]here in the opinion of an expert is required, before executing the request for the taking of evidence, the requested court may ask the requesting court for an adequate deposit or advance towards the anticipated costs of the expert opinion".

to require advance payment of costs.[497] At the same time, the requesting authority may seek, under its internal law, to offset the obligation to reimburse by demanding an advance deposit from the moving party before issuing the Letter of Request.[498]

356. The reimbursement of costs provided for under the Convention appears to cause few problems in practice.[499] However, to better facilitate the practice, the Special Commission has acknowledged that electronic payment facilitates reimbursement and encouraged Contracting Parties to update the relevant information for inclusion in their respective Country Profiles on the Evidence Section.[500]

a) Fees paid to experts and interpreters

357. The Requested State may require the Requesting State to reimburse the fees paid to experts and interpreters (Art. 14(2)). Experts and interpreters may be used to execute a Letter of Request (*e.g.*, witness examination, collection of biospecimens). In practice, for Contracting Parties that require the Requesting State to reimburse fees, most have sought reimbursement of fees paid to experts and interpreters.[501]

b) Costs occasioned by the use of a special procedure

358. The Requested State may require the Requesting State to reimburse the costs occasioned by the use of a special procedure requested by the Requesting State (Art. 14(2)). These costs might include the fees for employing a stenographer to take a verbatim transcript, and the fees for hiring audio / audiovisual equipment. In practice, some Contracting Parties which require the Requesting State to reimburse fees have sought reimbursement of costs occasioned by the use of a special procedure.[502]

Costs associated with the use of video-link as a special procedure

359. The use of video-link in the execution of a Letter of Request may give rise to costs pursuant to Article 14(2). Given that the costs associated with current video-link technologies can be high,[503] the issue of costs is perhaps more sensitive in the context of the video-link use than it otherwise is under the Convention.

360. If video-link is requested as a special method or procedure under Article 9(2), the requested authority may require reimbursement of costs occasioned by the use of the video-link, including transmission charges, and fees for the hire of equipment and technical support (Art. 14(2)).

361. Applicants should also bear in mind that even if the use of video-link is not specifically requested as an Article 9 special method or procedure, it is possible that the authority in the Requested State may nonetheless consider it to be such a request and may therefore seek reimbursement of at least some costs.

362. Other costs associated with the taking of evidence by video-link under Chapter I may include:

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497 See C&R No 13 of the 2014 SC, specifically in relation to "fees paid to experts and interpreters" and the "costs occasioned by the use of a special procedure".

498 See Explanatory Report, para. 157. In Ireland, a request for the issuance of a Letter of Request must be accompanied by an undertaking by counsel for the moving party "to be responsible for all expenses incurred by the Minister for External Affairs in respect of the letter of request", and "to pay the same as directed by the Master of the High Court" (Rules of the Superior Courts of Ireland, App. D).

499 Report of the 1989 SC (*op. cit*. note 30), para. 40.

500 C&R No 15 of the 2014 SC.

501 See responses to the 2008 and 2022 Questionnaires, a number of responding Contracting Parties reported that they had sought reimbursement for (as the Requested State) – or reimbursed (as the Requesting State) – fees paid to experts and interpreters.

502 See responses to question 23.1 of the 2022 Questionnaire.

503 R. A. Williams (*op. cit.* note 224), p. 21.

booking fees and hourly rate for the use of video-link equipment, communication fees such as the use of internet or telephone, fees for technicians and external video-link service providers, fees for interpretation, judicial costs (incl. fees for the rental of a courtroom with video-link facilities and the use of a sheriff for service of subpoenas), and staff wages (*e.g.*, payment of overtime when holding a video-link outside office hours).[504] Some of the Contracting Parties which responded to the 2017 Country Profile Questionnaire reported charging a flat-rate fee for the use of video-link,[505] whereas others will charge on a case-by-case basis depending on the circumstances and resources such use would entail.[506]

363. Ultimately, while the Convention is quite clear on costs in general, it remains silent on the exact method(s) by which these are to be reimbursed. Practice shows that the requesting authority is usually responsible for bearing the costs occasioned by the use of video-link under Chapter I (incl. interpretation) and that the preferred payment method is by wire transfer.[507]

364. It is suggested that before requesting the use of video-link in the execution of a Letter of Request, it should be verified whether any costs may be incurred in both the Requesting State and the Requested State and who would be responsible for bearing such costs.[508]

c) Fees paid for translation

365. As noted in paragraph 205, a Contracting Party with more than one official language may specify, by declaration, which language is to be used for specified parts of its territory (Art. 4(3)). If the requesting authority fails to comply with such a declaration without justifiable excuse, the Requesting State must bear the costs of translating the Letter of Request into the required language. For the very few Contracting Parties which have made an Article 4(3) declaration,[509] there have been occasions in practice where reimbursement has been required.[510] As a practical consideration, before translating documents, the Requested State may consider consulting the Requesting State to ascertain if the latter is ready to pay for the translation.

d) Appointment of an examiner

366. As noted in paragraph 273, some (typically common law) Contracting Parties appoint examiners to execute Letters of Request. If the requesting authority consents to the employment of an examiner, the Requested State may require reimbursement of any costs incurred by employing the examiner (Art. 14(3)). When seeking the consent of the requesting authority, the requested authority must indicate the approximate costs of employing the examiner.

367. This provision only applies where the law of the requested authority obliges the parties themselves to secure evidence.[511] In practice, the reimbursement of costs for the employment of an examiner is seldom sought.[512]

e) Request for reimbursement due to constitutional limitations

368. Article 26(1) of the Convention provides that the Requested State may request reimbursement of

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504 See Synopsis of Response (*op. cit.* note 6), Part VII, q. (m).
505 See, *e.g.*, the responses of Australia (one state), Hungary (for video-link outside Budapest) and Malta to Part VII, q. (m) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).
506 See, *e.g.*, the response of Brazil to Part VII, q. (m) of the 2017 Country Profile Questionnaire (*ibid.*).
507 See Synopsis of Responses (*op. cit.* note 6), Part VII, q. (n), (o), (p).
508 See Country Profiles of the relevant Contracting Party.
509 Only China, Switzerland and the United States.
510 See responses to question 23.1 of the 2022 Questionnaire. According to the responses, certain Contracting Parties which have not made a declaration under Art. 4(3) of the Convention have also indicated that they have sought reimbursement from Requesting States for fees paid for translation.
511 *A.C. v. C.A.D.P. S.A.*, C. Apel. Trelew, 24 December 2003, No 205 (Argentina).
512 See responses to question 23.1 of the 2022 Questionnaire.

specified expenses[513] from the Requesting State in connection with the execution of a Letter of Request if "required to do so because of constitutional limitations". The provision was inserted at the request of the United States to address the situation where the legislature (Congress) did not appropriate the funds necessary to cover the costs of executing a Letter of Request, without which it may not be possible for the Letter of Request to be executed.[514] In accepting the inclusion of Article 26(1), the drafters of the Convention expressed the hope that it would not need to be invoked.

369. In response to the 2008 Questionnaire, most Contracting Parties indicated that this provision did not apply as no constitutional limitations existed that would require reimbursement of expenses in connection with the execution of a Letter of Request.[515] Only very few Contracting Parties indicated in the 2022 Questionnaire that they have sought reimbursement for fees and costs due to constitutional limitations. [516] Under certain circumstances, the United States requests reimbursement for employing a stenographer or if interpreters are needed for a deposition. In keeping with the object of Article 26(1) and to avoid upsetting the costs regime in Article 14, reimbursement of expenses should only be requested in exceptional circumstances.

370. Article 26(1) operates on a reciprocal basis, such that if a Contracting Party has requested reimbursement of expenses, any other Contracting Party may request reimbursement of similar expenses from that Contracting Party. Unlike the other provisions of the Convention discussed in this section providing for the reimbursement of particular costs, Article 26(1) does not impose an *obligation* on the Requesting State to reimburse the fees and costs requested. If the Requesting State refuses to accede to the request, it may be impossible for the Requested State to execute the Letter of Request.

9. Privileges and duties to refuse to give evidence

i. General

371. The Convention establishes rules on the law applicable to privileges and duties to refuse to give evidence that have been described as "privilege creating, rather than privilege limiting". [517] Article 11 of the Convention provides that a person may refuse to give evidence in the execution of a Letter of Request insofar as they have a privilege or duty to refuse to give the evidence under:

a. the law of the Requested State (Art. 11(1)(a)) (para. 379);

b. the law of the Requesting State, subject to conditions (Art. 11(1)(b)) (paras 381-385); and

c. the law of a third State, subject to conditions (Art. 11(2)) (para. 386).

372. This provision is subject to any specific regime agreed upon between the Requested State and Requesting State with respect to the privileges and duties of witnesses to refuse to give evidence (Art. 28(d)).[518]

373. Depending on the relevant law, a range of privileges and duties may apply, including:

a. self-incrimination or incrimination of related person;[519]

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513 These expenses are fees and costs for the service of process necessary to compel the appearance of a person to give evidence (*e.g.*, service of subpoenas), the costs of attendance of such persons (*e.g., per diem* allowance and travel expenses), and the costs of any transcript of the evidence (*e.g.*, fees for employing a stenographer).

514 See B. Ristau (*op. cit*. note 184), § 5-2-4.

515 See responses to question 70 of the 2008 Questionnaire.

516 See responses to question 23.1 of the 2022 Questionnaire.

517 *Renfield Corp. v. E. Remy Martin & Co. S.A.*, 98 F.R.D. 442 (D. Del. 1982) (United States).

518 For more on the interaction between the Convention and other instruments, see Part 4.

519 See responses to question 65 of the 2008 Questionnaire.

b. diplomatic immunity;

c. sovereign immunity;[520]

d. banking secrecy;

e. trade secrecy;[521]

f. reporter's privilege;

g. data protection / privacy;

h. privileges based on a professional or special relationship (*e.g.*, lawyer-client, spouse-spouse,[522] parent-child, doctor-patient, priest-penitent); and

i. oppression to the witness.[523]

374. In general, how privileges and duties are invoked and applied is a matter for the law of the Requested State (Art. 9(1)). In this regard, practice does differ among Contracting Parties. For example, in common law States where Letters of Request are executed by a court-appointed examiner (para. 273), the refusal to give evidence on the basis of a privilege or duty is generally not determined by the examiner, but rather referred back to the appointing court for determination.[524] The drafters of the Convention also recognised that although it will often be for the witness to invoke the privilege or duty, it may well be that the requested authority will apply the

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520 In *Re Pan American World Airways, Inc. and Others' Application* [1992] 1 QB 854, the Court of Appeal of England refused to take evidence from a retired public servant on the basis of a broad interpretation of the provision in the UK implementing legislation precluding a 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".

521 For example, *Code of Civil Procedure* of Germany, § 384(3), as confirmed by the Regional Court of Munich in its decision of 10 June 1981 (*op. cit.* note 37).

522 This privilege was invoked in a decision of the Court of Appeal of Amsterdam (Netherlands): *A. L. Aulbers v. Genovo A.G.*, Hof. Amsterdam, 4 January 1996, *NJ* 1997, 741.

523 Case law in the United Kingdom confirms that a Letter of Request may be refused execution to the extent that it is "oppressive" by analogy to the grounds for refusal to issue a witness summons (subpoena) under internal law: *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit.* note 136, Court of Appeal of England); *Metso Minerals, Inc. v. Powerscreen Int'l Distribution Ltd* (*op. cit.* note 294, High Court of Justice of Northern Ireland). This approach has been followed in the Hong Kong SAR: *Re United States District Court for the Central District of California under No CV06-6508 RSWL (CWx)* (*op. cit.* note 294). However, it has been questioned in Australia: *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit.* note 129). See also, *Atlantica Holdings Inc & Ors v. Sovereign Wealth Fund Samruk-Kazyna JSC & Anor* [2019] 1 C.L.C. 408 (QB) in the United Kingdom, where the English High Court considered the ground of oppression raised by the applicants contending that the timescales allowed for in the United States proceedings were too tight to allow the witnesses to prepare for the oral examination. It was held that while the requested court should not order an examination where it would be oppressive to the proposed witness, the court must hold a fair balance between the interests of the requesting court and the interests of the witness (citing the case *USA v. Philip Morris Inc.* [2004] EWCA Civ 330). In *KG Bidco APS v. Procuritas Partners AB* [2023] EWHC 167 (KB), the English High Court in considering the ground of oppression raised by the witnesses, found that as the late notice and urgency of the application in question was primarily the fault of the applicants, if the examinations were to proceed on the agreed dates, in the circumstances where the witnesses have been given short notice of the application, and the extent of the areas of questioning was extensive, the themes for examination need to be restricted to avoid unfairness to the witnesses. As mentioned in note 144, in *Aureus Currency Fund v. Credit Suisse* (*op. cit.* note 144), the English High Court following the case of *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit.* note 136), held that a request may be oppressive to a witness if the width of topics for questioning was too wide, or uncertain or vague. Other cases in the United Kingdom where oppression may arise is where there is a risk of self-incrimination. This was considered in the case of *Compagnie Des Grands Hotels D'Afrique SA v Purdy & Anor* [2021] EWHC 1031 (QB), where the English High Court held that a balance needed to be struck in each case between the legitimate requirements of the foreign court and the burden those requirements may place on the intended witness. It was mentioned that any oppression was neutralised where the witness was entitled to rely on the privilege against self-incrimination. However, under English law, the privilege against self-incrimination attached only where there was danger in relation to proceedings in part of the United Kingdom. Notwithstanding this limitation, the court stated that it could nevertheless intervene to excuse a witness from giving self-incriminating evidence where the feared prosecution was under foreign law. The court in this case made an order to set aside the deposition order, holding that the risk of oppression to the appellant in giving evidence could not be eliminated but could only be alleviated as there was a real risk that the compelled testimony could be used against the witness for the purposes of the Moroccan criminal investigation and any subsequent prosecution.

524 See, *e.g.*, Practice Direction 34A (England) and *Federal Court Rules 2011*, r. 29.18 (Australia).

privilege or duty *sua sponte* and refuse to take the evidence concerned.[525]

375. It should be noted that the rules in Article 11 on privileges and duties to refuse to give evidence do not necessarily provide a defence against a failure to provide evidence in the proceedings in the Requesting State. If a person invokes a privilege or duty under the law of the Requested State or the third State, and the law of the Requesting State does not recognise the privilege or duty, the person may nonetheless be subject to sanction under the law of the Requesting State.

376. In practice, privileges and immunities appear to be infrequently invoked.[526]

In the context of execution by video-link

377. The use of video-link may give rise to more complex safeguards in terms of invoking privileges or duties to refuse to give evidence. These could include, but are not limited to, protective measures to ensure the safety of the witness / expert at the other location, the right to legal representation and the ability to confer with this legal representative confidentially, the right to be refunded for travel / accommodation costs and loss of revenue, as well as the provision of interpretation. Many of these issues can be addressed when arranging the video-link.

378. It should be noted however that, as the taking of evidence using video-link remains, in many instances, voluntary, the witness / expert is not obliged to specifically use video-link to give evidence and may refuse to do so without the need of invoking any privilege or duty.

ii. Privileges and duties under the law of the Requested State

379. In the execution of a Letter of Request, a person may always invoke a privilege or duty to refuse to give evidence under the law of the Requested State (Art. 11(1)(a)). In this context, a number of Contracting Parties have enacted blocking statutes that impose a specific duty on persons not to give certain evidence in aid of proceedings before foreign courts. For example, in Australia, the *Foreign Evidence Act 1994* authorises the Attorney-General to make a written order prohibiting the production of a document or thing, or the giving of evidence or information where they are satisfied that it is "desirable to do so for the purpose of preventing prejudice to the security of the State".[527]

380. The Special Commission has noted that no problems seem to arise in practice where a privilege or duty to refuse to give evidence is based on the law of the Requested State.[528]

iii. Privileges and duties under the law of the Requesting State

381. In the execution of a Letter of Request, a person may invoke a privilege or duty to refuse to give the

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525 Report of the 1968 SC (*op. cit.* note 16), p. 61. In OLG Karlsruhe, 13 December 2017, No. 6VA 12/17, the Higher Regional Court of Karlsruhe in Germany dealt with an application challenging the decision of the Central Authority to forward to the local court a Letter of Request to examine the applicant as witness in a patent infringement dispute conducted in the United States. The applicant contended the entitlement to refuse to testify on the basis that the questions affected the applicant's duty of confidentiality as a licensed pharmacist and business secrets of the employer. The German court decided that whilst the Central Authority was authorised to refuse to forward a Letter of Request in cases where it was aware that the witness will invoke a doubtless right to testify, it was however not required to hear a designated witness before forwarding the Letter of Request as to whether he or she wished to invoke a right to refuse to testify and on what grounds, if any, this was justified. The rights of the witness were fully protected by the fact that the applicant could assert the right to refuse to testify via-à-vis the court rendering the judicial assistance.

526 See responses to question 36 of the 2022 Questionnaire. Most Contracting Parties which responded indicated that it was unknown whether a person requested to give evidence invoking privilege in the past five years. However, more Contracting Parties indicated that they were not aware of a person invoking privilege than those that indicated that they did.

527 A refusal of a witness to give evidence on grounds of security pursuant to Art. 11 is distinct from a refusal of the requested authority to execute the Letter of Request on grounds of sovereignty and security pursuant to Art. 12(1)(b), which is addressed in paras 418 *et seq*.

528 Report of the 1985 SC (*op. cit.* note 24), Part I, § 3 C.

evidence under the law of the Requesting State if the privilege or duty has been:

a. specified in the Letter of Request[529] (see para. 190); or

b. confirmed by the requesting authority at the request of the requested authority.

382. In cases where the Letter of Request *does not* specify any information regarding privileges and duties to refuse to give evidence under the law of the Requesting State, the Convention does not oblige the requested authority to request confirmation from the requesting authority as to their existence or application. If a person subsequently invokes a privilege or a duty not to give evidence under the law of the Requesting State, the requested authority has the option of either refusing to recognise the privilege or duty and proceeding with executing the Letter of Request, or confirming the application of the privilege or duty with the requesting authority (in which case the privilege or duty would be recognised to the extent specified by the requesting authority).[530]

383. If the Letter of Request *does* specify a privilege or duty under the law of the Requesting State (or the requesting authority subsequently confirms the application of the privilege or duty at the request of the requested authority), the requested authority may contact the requesting authority to clarify or confine its application. This mechanism is designed to avoid disputes as to the content of foreign law, and therefore delays in execution.[531]

384. The Special Commission has noted that problems may arise where the privilege is founded on the laws of the Requesting State due to the difficulty of determining the privilege under the law of that Contracting Party, which consequently might cause delay in execution.[532] For this reason, the requesting authority should pay attention to clearly specifying the privileges and duties, including by providing an extract of the relevant law of the Requesting State, translated into the official language of the Requested State (as noted in para. 190). Moreover, to the extent possible under its law, the requested authority is encouraged to communicate directly with the requesting authority in order to resolve any problems in a timely manner.

385. In one case in the United States, a District Court ordered an outgoing Letter of Request to be revised to specify that the examination should not enquire into matters which are the subject of applicable privilege.[533] This approach was not followed in another case before a different District Court on the basis that it was for the witness to invoke privileges rather than for the Letter of Request to limit the scope of examination.[534]

iv. Privileges and duties under the law of a third State

386. The Convention also provides that a person may refuse to give evidence insofar as they have a privilege or duty to refuse to give the evidence under the law of a third State, but only to the extent that the Requested State has declared that it will respect the privilege and duties existing under

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529 In the case of *Staravia Ltd v. Consolidated Aeronautics Corp.* [1989] SLR 883, a Letter of Request issued by a court in the State of California (United States) included a statement "privilege against self-incrimination; attorney-client privilege". On the basis of this statement, the High Court of Singapore held that the witness was entitled to invoke privileges under the law of the United States. The Court also noted that the court in California had ruled that the witness was entitled to the privilege against self-incrimination under the Fifth Amendment to the US Constitution. In *In re Urethane Antitrust Litigation* (*op. cit*. note 253), the United States District Court for the District of Kansas agreed to specify the potential applicable privileges under US law that had been identified by the parties (attorney-client privilege, and the privilege against self-incrimination under the Fifth Amendment of the US Constitution), but refused to include a request that the requested authority in Germany advise the witnesses of particular privileges, noting that such a request was not "the type of procedural request contemplated by the Hague Convention".

530 Explanatory Report, para. 123. In the *Westinghouse* case (*op. cit.* note 108, House of Lords of the United Kingdom), an examiner appointed to execute Letters of Request referred a question about the application of privilege against self-incrimination under the Fifth Amendment of the US Constitution back to the requesting authority.

531 For more on communication between authorities in order to expedite the execution of Letters of Request, see para. 350.

532 Report of the 1985 SC (*op. cit.* note 24), Part I, § 3 C.

533 *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 475 (D. Del. 2003).

534 *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc*., 708 F. Supp. 2d 450, 453 (D. Del. 2010).

the law of that State (Art. 11(2)).[535] Very few Contracting Parties have made such a declaration.[536]

10. Penal provisions

387. The drafters of the Convention made the conscious decision to exclude all reference to penal matters connected to the taking of evidence, particularly *contempt of court* (*i.e.*, refusing to give evidence or disrupting proceedings) and *perjury* (*i.e.*, giving false testimony).[537] At the same time, the drafters noted that these matters may involve a jurisdictional *overlap* as between the Requesting State and Requested State, whereby the person giving evidence would be subject to penal provisions in both Contracting Parties.

388. This overlap is particularly discernible where evidence is taken by video-link with the examiner and witness located in different Contracting Parties. Although giving evidence by video-link is usually voluntary in nature, perjury and contempt of court may be penalised.

389. It is equally possible that the penal provisions of neither Contracting Party would apply, or that neither Contracting Party would have jurisdiction to prosecute the person concerned, thereby creating a jurisdictional void.

390. The Convention makes no provision for the enforcement by one Contracting Party of sanctions imposed by another Contracting Party in connection with the giving of evidence. Resolving potential jurisdictional overlap and the enforcement of sanctions is therefore left to separate arrangements between the Contracting Parties concerned (*e.g.*, pursuant to mutual legal assistance agreements in criminal matters),[538] internal law,[539] or general principles of public international law. It is therefore advisable that, prior to the hearing, the witness or expert should therefore be duly informed of the consequences of giving evidence that is false or misleading.[540]

Resolving jurisdictional overlap under the Trans-Tasman Agreement

391. In Australia and New Zealand, legislation implementing the 2008 Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement between the two States assigns jurisdiction to punish for contempt as between them. It provides that where a witness located in one State Party appears before proceedings in the other State Party via video-link, the first State has jurisdiction to

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535 This provision was included to protect individuals (in particular, professionals) travelling abroad, who may be required to give evidence outside their home State: see Report of the 1968 SC (*op. cit*. note 16), p. 61. For an example of a case where a witness sought to invoke a duty to refuse to give evidence under the law of a third State, see *Securities and Exchange Commission v. Stockholders of Santa Fe Int'l Corp*. (*op. cit.* note 116). In that case, the High Court of England rejected an appeal against the execution of a Letter of Request issued by a US court on the grounds that giving evidence would put the witness (a banker) in breach of banking secrecy laws of Luxembourg.

536 As at time of publication, these States were Bulgaria, Estonia and Liechtenstein.

537 Explanatory Report, paras 256-257.

538 See, *e.g.*, *Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*, O.J. C 197/1, Art. 10(8). See, also, the *Trans-Tasman Proceedings Act 2010* (Cth), section 61, which is the relevant Australian legislation implementing the *2008 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement* (hereinafter, 2008 *Trans-Tasman Agreement*). This provision assigns jurisdiction for contempt for persons in Australia appearing remotely in proceedings before a New Zealand Court.

539 For example, some states within Australia have legislation specifically addressing the jurisdictional overlap arising from the use of video-link technology when taking evidence. See, *e.g., Evidence (Miscellaneous Provisions) Act* 1958 (Victoria), section 42W; *Evidence (Audio and Audio Visual Links) Act* 1998 (New South Wales), section 5C.

540 "Handshake" Project (*op. cit.* Glossary). See, also, the responses of Australia (one state), Czech Republic and Venezuela to Part V, q. (d) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary). In practice, some courts have pragmatically chosen to simply ignore or disbelieve the evidence when unable to sanction a witness who has committed perjury while giving evidence by video-link. See, *e.g.*, the Supreme Court of India in *State of Maharashtra v. Dr Praful B Desai* (*op. cit*. note 218).

prosecute the witness, and the second State has no jurisdiction to prosecute.[541]

11. Challenging (non-)execution

392. As noted in paragraph 277, the basic rule of the Convention is that the law of the Requested State governs the methods and procedures to be followed in executing a Letter of Request. Among other things, this law determines whether the execution or non-execution of a Letter of Request may be challenged (*e.g.*, by administrative or judicial review). In some Contracting Parties, it is possible to challenge the execution of a Letter of Request received from abroad.[542] Where this is possible, most of those Contracting Parties also permit the requesting authority or the interested party to respond to the challenge.[543]

393. The Special Commission has previously addressed the issue of whether the Central Authority of the Requested State is under an obligation to challenge the execution or non-execution of a Letter of Request, but was unable to reach any firm conclusions.[544]

12. Returning documents establishing execution

394. The documents establishing the execution of the Letter of Request must be sent by the requested authority to the requesting authority (Art. 13(1)). This applies equally to any material obtained in execution of the Letter of Request (*e.g.*, blood samples). The types of documents that are sent back depend on the type of evidence sought to be obtained or type of judicial act sought to be performed, as well as the internal practice of the requested authority. In some cases, the requesting authority may request that a particular document be drawn up as a special method or procedure (*e.g.*, a verbatim transcript of a witness examination). The documents establishing execution may be accompanied by a statement of costs to be reimbursed pursuant to Article 14 of the Convention.

395. In some Contracting Parties, the documents establishing execution are drawn up only in the language of the Requested State without translation. In others, it is possible to request a translation of these documents into the language of the Requesting State at the cost of the Requesting State.

396. The documents establishing execution may be drawn up in electronic format and transmitted to the requesting authority electronically (*e.g.*, by e-mail), although the law of the Requesting State may require the documents to be in a particular format (*e.g.*, paper). If the requesting authority requires the documents establishing execution to be in a particular format, this should be specified in the Letter of Request or subsequently confirmed with the authorities in the Requested State.

397. Documents establishing execution are returned using the same channel that was used by the requesting authority to transmit the Letter of Request (*e.g.*, via the Central Authority of the Requested State to the judicial authority of the Requesting State) (Art. 13(1)).[545] However, the Requesting State and Requested State may agree on alternative methods of returning documents (Art. 28(e)). The requesting authority may also request that the documents be returned by a particular method as a special method or procedure. This may be desirable where the requesting authority seeks electronic evidence stored on a particular medium, or blood samples to be transported in a particular environment.

398. In practice, Contracting Parties apply a variety of methods for returning documents. In many States, the documents establishing execution are transmitted via the Central Authority of the Requested

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541 See *Trans-Tasman Proceedings Act 2010* (Cth) (Australia), section 61 and *Trans-Tasman Proceedings Act 2010* (New Zealand), section 50.
542 See responses to question 19 of the 2022 Questionnaire.
543 See responses to question 19.1 of the 2022 Questionnaire.
544 Report of the 1978 SC (*op. cit.* note 94), Part I, § 5 F.
545 See for example the Higher Regional Court of Dusseldorf (Germany) (*op. cit.* note 262).

State. This method allows the Central Authority to monitor the implementation of the Convention.[546] In other States, the requested authority transmits the documents directly to the requesting authority. The Special Commission has recognised that this method has the advantages of expediting Convention procedures.[547]

VI. Refusal to execute Letters of Request

399. A Letter of Request may only be refused execution to the extent that it:

   a. does not comply with the provisions of the Convention (paras 404-409); or

   b. falls within a specific ground for refusal set out in the Convention (paras 410 *et seq.*).

400. The exhaustive nature of these grounds for refusal has been recognised by the Special Commission,[548] as well as in case law[549] and commentary.[550]

401. Parts of a Letter of Request that are compliant with the provisions of the Convention or that do not fall within a specific ground for refusal should still be executed, where appropriate (paras 449-451).

402. Refusal to execute is distinct from the non-execution of a Letter of Request insofar as evidence is refused to be given pursuant to a privilege or duty to refuse to give evidence.[551]

403. Refusal to execute is also distinct from the non-execution of the Letter of Request to the extent that:

   a. the methods and procedures under the law of the Requested State do not provide for the taking of the evidence or performance of the judicial act sought; or

   b. a special method or procedure is requested by the requesting authority and the special method or procedure is not followed.

1. Non-compliant Letters of Request and "blue-pencilling"

404. As discussed at paragraph 256, the Letter of Request may be refused execution if it does not comply with the provisions of the 1970 Evidence Convention. The Convention places the Central Authority at the centre of dealing with issues of non-compliance (Art. 5). In practice, however, the requested authority may also play a role in determining whether a Letter of Request is non-compliant.[552]

405. In practice, requested authorities of many Contracting Parties take a pragmatic, non-formalistic approach to issues of non-compliance, particularly with regard to the content requirements, and will tolerate minor formal non-compliance.[553] In some cases, the requested authority may be willing

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546 D. McClean (*op. cit*. note 79), p. 99.

547 Report of the 1978 SC (*op. cit.* note 94), Part I, § 5(F).

548 C&R No 16 of the 2014 SC.

549 Federal Supreme Court of Switzerland, decisions of 26 August 2002, No 5P.152/2002 and 20 August 2013, No 5A.284/2013; *In re Letters Rogatory from Local Court*, 29 F. Supp. 2d 776 (E.D. Mich. 1998) (United States).

550 See also M. Frigo & L. Fumagalli (*op. cit*. note 80), p. 140.

551 According to the English text of Art. 11(1), not taking evidence as the result of a person invoking a privilege or duty is not expressed in terms of non-execution of the Letter of Request. However, the French text makes it clear that not taking the evidence is tantamount to the non-execution of the Letter of Request in respect of that evidence. The 2020 EU Evidence Regulation treats the invocation of privileges and duties not to give evidence as a separate ground for refusal (see Art. 16(1)).

552 It may also be another receiving authority in cases where the Letter of Request is not transmitted via the main channel, or is sent to an additional authority designated by the Requested State pursuant to Art. 24(1).

553 *News Int'l plc v. ABN Amro N.V.* (Netherlands) (*op. cit*. note 14) with opinion of Advocate General Strikwerda. See also *Upaid Systems Ltd v. Satyam Computer Services* (India) (*op. cit.* note 14) ("letters of request are issued by foreign courts that cannot access evidence which is beyond their territorial limits. If the requested court were to technically interpret

to accept supplementary material to satisfy itself of the content requirements of the Convention.[554] Requested authorities of some Contracting Parties are willing, as a matter of internal law, to "blue-pencil" (*i.e.,* modify or limit) a Letter of Request in order for it to be compliant with the provisions of the Convention.[555] In this context, blue-pencilling usually involves restructuring, striking out or rephrasing objectionable questions, offensive wording or overly broad requests for documents, and often occurs where the Letter of Request falls within the scope of an Article 23 declaration made by the Requested State (in respect of Letters of Request issued for the purposes of pre-trial discovery of documents).

406. The Permanent Bureau encourages the practice of blue-pencilling (*i.e.,* modifying or limiting) to the extent that it is possible under the internal law of the Requested State, and provided that it does not fundamentally change the nature of the request. Bearing in mind the basic principle of the Convention (mentioned at para. 7) to ensure that evidence is taken in such a way that it can be effectively utilised in the proceedings in the Requesting State, the requested authority should check with the requesting authority or moving party before executing the Letter of Request as modified or limited.

Requesting authorities should not rely on the requested authority blue-pencilling Letters of Request

407. Case law of certain Contracting Parties confirms the willingness of some requested authorities to blue-pencil (*i.e.,* modify or limit) Letters of Request that are either non-compliant with the provisions of the Convention, or unexecutable following the methods or procedures under the law of the Requested State (see para. 293).[556] At the same time, it also confirms the limits to this practice. For example, in the **United Kingdom**, the courts will not restructure, recast or rephrase a Letter of Request so that it becomes different in substance from the original, and in the case of documents, they will not substitute a different category of documents for the category specified in the Letter of

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such provisions, their object would be defeated"). Also, in the *Siemens* case (*op. cit.* note 83), the Higher Regional Court of Munich (Germany) found that a failure to specify the addresses of the persons to be examined was a "relatively minor formal defect" that did not give grounds alone to refuse execution of the Letter of Request. In *State of Minnesota v. Philip Morris Inc*. (*op. cit.* note 294), the Court of Appeal of England expressed its reluctance to send back a Letter of Request "on the basis of technical ground alone".

554 In *Voluntary Purchasing Group, Inc. v. Insurco Int'l Ltd* (*op. cit*. note 170), the Grand Court of the Cayman Islands considered the motion filed with the requesting authority for issuance of the Letter of Request to inform itself of the nature of the proceedings (which should otherwise be specified in the Letter of Request pursuant to Art. 3(1)l).

555 Less than a quarter of the Contracting Parties responding to question 18 of the 2022 Questionnaire indicated that their authorities would "blue-pencil" Letters of Request. The majority however indicated that they would not.

556 The Supreme Court of New South Wales (Australia) has noted that it should only reject a Letter of Request if it is "unable to mould an order so as to give effect to the request in an appropriate manner": *Re Application of Monier Inc*. (2009) 76 NSWLR 158. The Court of Appeals of England has noted that the court will, if appropriate, be prepared to give a Letter of Request an "amended effect": *State of Minnesota v. Philip Morris Inc.* (*op. cit*. note 294). The Court of Appeal of Jersey has noted that "the court may amend Letters of Request by excision, or by adding or substituting words in order to clarify what is being sought without altering the substance of the Letters of Request": *Wadman v. Dick* (*op. cit.* note 345), at 66. In Germany, the Higher Regional Court of Munich agreed, in the *Siemens* case (*op. cit.* note 83), to reformulate a Letter of Request that sought the examination of witnesses concerning the content of broadly-described documents. In the Hong Kong SAR, the courts will delete from a Letter of Request any parts that are considered excessive: *Kayne Creditors v. Roderick John Sutton & Others* (*op. cit*. note 285). In Scotland, the Court of Session amended a Letter of Request seeking oral evidence of a witness by adding the words "for the purpose of his trial testimony only" to ensure that the Letter of Request would be used solely to obtain evidence rather than pre-trial discovery of testimony, and therefore be executable following the methods and procedures under the law of Scotland: *Lord Advocate v. Murdoch* 1993 SSC 638. A similar approach was taken by the Court of Appeal of England in *Golden Eagle Refinery Co., Inc. v. Associated Int'l Insurance Co*. (*op. cit.* note 281). The Federal Supreme Court of Switzerland has confirmed that it is possible for Swiss courts to blue-pencil Letters of Request, noting that the Convention neither obliges nor prevents the requested authority from undertaking further investigations in order to rectify a non-compliant Letter of Request: see decision of 21 December 2005 (*op. cit.* note 134) and 4 December 2007, No 4A.399/2007. And in the United States, the Supreme Court has noted that unduly intrusive or burdensome requests may be "trimmed" by US courts: *Intel Corp. v. Advanced Micro Devices, Inc*., (*op. cit.* note 190).

Request.[557]

408. The requesting authority should therefore avoid relying on the willingness of the requested authority to blue-pencil when preparing or issuing a Letter of Request, especially at the expense of paying attention to the content requirements (paras 153 *et seq.*) and the different methods and procedures followed under the law of the Requested State (para. 277).[558] Such reliance risks delaying the execution of the Letter of Request, or even non-execution, in cases where the blue-pencilling required exceeds that which is possible under the law of the Requested State.

409. Where the requested authority (or other receiving authority) determines that a Letter of Request is non-compliant, the requested authority should communicate this to the Central Authority so that it may promptly inform the Requesting State in accordance with Article 5 (see para. 262). The requested authority and requesting authority of some Contracting Parties may be authorised to communicate directly, with a view to remedying issues of noncompliance. This practice, which is permitted by virtue of Article 28 of the Convention and which has been acknowledged by the Special Commission,[559] may assist Contracting Parties in expediting the execution of Letters of Request.[560]

2. Other acceptable grounds for refusal

410. A Letter of Request that is compliant with the provisions of the Convention may be refused execution on the two grounds set out in Article 12(1) of the Convention, namely that:

a. the execution of the Letter of Request does not fall within the functions of the judiciary in the Requested State (paras 413-417); or

b. the Requested State considers that the execution of the Letter of Request would prejudice its sovereignty or security (paras 418-425).

411. Given that the Convention is designed to give effect to the desire of Contracting Parties to improve mutual judicial co-operation,[561] these exceptions should be applied in a restrictive manner.[562] In fact, cases of refusal to execute a Letter of Request on the grounds set out in Article 12(1) appear to be very infrequent in practice.[563]

412. In addition to the grounds set out in Article 12(1), a Letter of Request that is issued for the purpose of pre-trial discovery of documents may be refused execution if the Requested State has made a declaration pursuant to Article 23 of the Convention that it will not execute such Letters of Request (paras 426 *et seq.*).

i. Outside the functions of the judiciary

413. As the Convention applies to requests to perform other judicial acts, the drafters considered it necessary to include a ground for refusal on account of the fact that a certain act may be performed by judicial authorities of one Contracting Party (thereby making it a "judicial act"), but by administrative authorities of another. Accordingly, Article 12(1)(a) of the Convention permits the

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557 *Westinghouse* case (*op. cit.* note 108). This approach has been adopted in Australia: *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit*. note 129).

558 *Cf. Tulip Computers Int'l B.V. v. Dell Computer Corp*. (*op. cit*. note 533), where the United States District Court for the District of Delaware agreed to issue a Letter of Request to the Netherlands seeking the production of documents on the assumption that the judicial authorities in the Netherlands would blue-pencil the Letter of Request to the extent that the documents could not be executed under Dutch law. The court took the same approach in *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc*. (*op. cit.* note 534).

559 C&R No 41 of the 2003 SC.

560 In a decision of 4 December 2007 (*op. cit.* note 556), the Federal Supreme Court of Switzerland noted that the Convention neither obliges nor prevents the requested authority from requesting additional information to render a Letter of Request compliant with the provisions of the Convention.

561 See Preamble to the Convention.

562 *AXA Mediterranean Int'l Holding v. ING Insurance Int'l B.V*. (*op. cit.* note 396), report of P. Matet.

563 Report of the 1978 SC (*op. cit.* note 94), Part I, § 5(F).

requested authority to refuse to execute a Letter of Request to the extent that the execution of the Letter of Request does not fall within the functions of the judiciary in the Requested State. So as to clarify these functions, the Special Commission has invited Contracting Parties to provide, where possible, information to the Permanent Bureau concerning acts that typically do not fall within the functions of the judiciary of their Contracting Party for inclusion in the Country Profiles on the Evidence Section of the HCCH website.[564]

414. In Switzerland, Article 12(1) may be invoked, for example, where money is sought to be collected in Switzerland and the parties themselves have to act by way of forcible execution.[565]

415. The courts of a number of Contracting Parties have invoked this ground to refuse execution in circumstances where the law of the Requested State does not confer on the requested authority the requisite power to take the particular evidence or perform the particular judicial act sought.[566] In *Re Pan American World Airways, Inc. and Others' Application*,[567] the Court of Appeal of England held that the Convention does not require Contracting Parties to confer on its judiciary "all-embracing powers", and that a Contracting Party may refrain from giving its judiciary the power to execute a Letter of Request in particular circumstances.

416. In *Kilbarr Corp. v. Holland and Teeuwen*, the Supreme Court of the Netherlands noted that it was clear from Article 12(1)(a) (in conjunction with Arts 9 to 11) that the Convention did not extend beyond that which was permitted under the internal law of the Requested State.[568] In that case, as Dutch law did not confer power to order a person to produce documents on which that person was to be examined, the Court refused to execute the Letter of Request to the extent that it sought the production of documents.[569] In keeping with the object of Article 12(1)(a), the Permanent Bureau considers that it may not be necessary for the requested authority to invoke this ground for refusal where the law of the Requested State does not authorise the requested authority to take particular evidence. After all, this is not the result of differences in the functions of the judiciary between the Contracting Parties involved, but rather differences in the methods and procedures followed under their law (see discussion at paras 293-294).

417. The ground for refusal in Article 12(1) may *not* be invoked by a Contracting Party solely on the basis that the taking of evidence in that State is ordinarily performed by the parties and not the

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564 C&R No 17 of the 2014 SC. For example, see the information provided by the United States in the *OIJA Evidence and Service Guidance* (*op cit.* note 161).

565 Federal Office of Justice, *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit.* note 22), p. 25.

566 The 2001 EU Evidence Regulation and the 2020 EU Evidence Regulation contains a ground for refusal in terms similar to Art. 12(1)(a) (Art. 14(2)(b) of the 2001 EU Evidence Regulation provides that "the execution of a request may be refused only if […] the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary"; Art. 16(2)(b) of the 2020 EU Evidence Regulation similarly provides that "the execution of a request may only be refused on grounds other than those referred to in [Art. 16(1)], where […] the execution of the request does not fall within the functions of the judiciary under the law of the Member State of the requested court"). According to the Practice Guide drawn up by the European Judicial Network in civil and commercial matters (*op. cit.* note 121), this provision allows for execution to be refused where "the requested court does not have the power to instruct the requested measure". Similarly, when the ground for refusal found in Art. 12(1)(a) was first discussed at the HCCH during negotiations on the *Hague Convention of 14 November 1896 relating to Civil Procedure*, the drafters considered that it would apply where "the letter rogatory seeks an act for which, under the law of the requested State, there is no competent judicial authority" [translation by the Permanent Bureau]: "Rapport présenté au nom de la IIIème commission (procédure civile), Annexe No 2 au procès-verbal No 4", in HCCH, A*ctes de la Deuxième Conférence de La Haye chargée de réglementer diverses matières de droit international privé (25 juin – 13 juillet 1894)*, The Hague, Imprimerie Nationale, 1894, p. 52 [in French only].

567 *See Re Pan American World Airways, Inc and Others' Application* (*op. cit.* note).

568 HR, 11 March 1994, *NJ* 1995, 3. This ruling has been followed by the District Court of Amsterdam in its decisions of 23 February 1995, *NIPR* 1995, 415, *Ernst & Young v. Internationalen Nederlanden Verzekeringen N.V.*, and 27 August 1996 (*op. cit.* note 285). See also *News Int'l plc v. ABN Amro N.V.* (*op. cit.* note 14).

569 However, the Supreme Court added that this did not prevent the witness from being asked, during the witness examination, whether they had knowledge or possession of certain documents, or whether they were informed of their contents (see also note 646).

judiciary.[570]

ii. Prejudice to sovereignty or security

418. The requested authority may refuse to execute the Letter of Request to the extent that the Requested State considers that execution would prejudice its sovereignty or security (Art. 12(1)(b)).[571]

419. This ground for refusal is only available where the Requested State considers that the *execution* of the Letter of Request would prejudice its sovereignty or security. In other words, the focus is on the actual act requested. Whether other aspects of the proceedings, or the possible future use of the evidence, might be prejudicial to the sovereignty and security of the Requested State is irrelevant.[572] The narrow focus of Article 12(1)(b) has been confirmed in the case law.[573]

420. Prejudice to "sovereignty or security" is not the same as incompatibility with public policy (*ordre public*). It is a narrower concept.[574] Indeed, when the ground for refusal was first proposed at the HCCH during negotiations on the *HCCH Convention of 14 November 1896 relating to Civil Procedure*, the drafters were explicit in their desire to avoid requests being rejected on the grounds of public policy, which they considered to be "too vague and ambiguous". For them, the concept of

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570 See opinion of Advocate General Kokott in *Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (*op. cit*. note 125) discussing Art. 14(2)(b) of the 2001 EU Evidence Regulation, which, as stated at note 566, contains a ground for refusal in terms similar to Art. 12(1)(a). On this basis, Advocate General Kokott of the Court of Justice of the EU rejected the argument advanced by Ireland and the United Kingdom in that case that the UK court could refuse to execute the request because the taking of evidence was performed in the UK by the parties, not by the court itself. The Permanent Bureau considers that this reasoning applies equally to the Convention.

571 The refusal to provide judicial assistance on grounds of sovereignty and security has a long history in the work of the HCCH on cross-border civil procedure. The *HCCH Convention of 14 November 1896 relating to Civil Procedure* provided that a letter of request could be refused execution if the requested State "deems that execution would infringe its sovereignty or security" (See Art. 7(3)). Identical words were used in the *HCCH Convention of 17 July 1905 relating to Civil Procedure* (Art. 11(3)(3)) and the 1954 Civil Procedure Convention, and a similar formulation is found in the 1965 Service Convention (Art. 13(1)). Art. 12(1)(b) of the 1970 Evidence Convention was inserted with specific reference to these other HCCH Conventions (see Explanatory Report, para. 135), and therefore the drafting history, as well as the corresponding discussion in the Service Handbook, may serve as useful guides for the interpretation and application of this ground for refusal as it appears in the 1970 Evidence Convention.

572 P. Volken, *Die Internationale Rechtshilfe in Zivilsachen*, Zurich, Schulthess Polygraphischer Verlag, 1996, p. 111; O. Capatina (*op. cit*. note 395), p. 371 (albeit in reference to a general ground for refusal based on "public policy", *cf.* discussion at paras 456-458). See also the Explanatory Report of the 1965 Service Convention (*op. cit*. note 5454), p. 375.

573 See, *e.g.*, OLG Frankfurt am Main (Germany), 26 March 2008 (*op. cit.* note 104104), and the High Court of Justice of Israel in *Time, Inc. v. Attorney-General of the State of Israel* (*op. cit.* note 31) (in which the Court focussed on whether the "awarding of the assistance" or the "acts following from it" were prejudicial to the security of the State). The courts of Germany have adopted a similar narrow focus with respect to the corresponding provision in Art. 13(1) of the 1965 Service Convention. See BVerfG, 24 January 2007, 2 BvR 1133/04. H.-E. Rasmussen-Bonne notes that more recent German case law supports the position that the Art. 13(1) exception in the Service Convention "must rather have a restricted, convention-specific meaning and not be burdened by other public policy notions that are extraneous for Convention purposes": "The Pendulum Swings Back: The Cooperative Approach of German Courts to International Service of Process", in P. Hay et al. (ed.), *Resolving international conflicts, Liber Amicorum Tibor Várady*, Budapest/New York, Central European University Press, 2009, p. 231. In Federal Supreme Court of Switzerland (First Court of Civil Law), 14 March 2023, No 4A_389/2022, ATF 149 III 235, the Switzerland court also adopted a similar narrow focus in its interpretation of Art. 12(1)(b) of the Convention. In considering an appeal from a decision of the Civil Chamber of the Court of Justice of the Canton of Geneva refusing to execute a Letter of Request from UK authorities of bank documents for use by the appellant in defending itself against civil proceedings initiated in the UK, it stated that "[t]he literal interpretation made in good faith of the relevant provision also reveals that it is the *execution* of the letter of request itself, and not its purpose, which is decisive in assessing whether it is likely to undermine the sovereignty or security of the requested State…there is nothing to infer from the wording of art. 12 [of the Convention] that the judge hearing a request for international legal assistance in civil matters should consider the possible use of the means of evidence referred to in such a request for other purposes" (the English translation is quoted from Pra 2023 No. 74 p. 7-8.).

574 The characterisation of sovereignty and security as a subset of public policy is confirmed in the commentary and case law. See, *e.g.*,: L. Chatin (*op. cit*. note 115115), p. 615; and Supreme Court of the Canton of Zurich (Switzerland), 21 April 2008, No NV080003. Similar comments have been made in respect of the parallel provision in Art. 13(1) of the 1965 Service Convention: see, *e.g.*, H.-E. Rasmussen-Bonne (*op. cit*. note 573573) ("[t]he *ordre public* concept of Art. 13 sets a much narrower standard than the general *ordre public*"); OLG Frankfurt am Main (Germany), 13 February 2001, No 20 VA 7/00.

"sovereignty or security" was "more precise and limited" than public policy.[575] The Federal Supreme Court of Switzerland has also held that the exhaustive reasons under Article 12(1)(b) capable of justifying the refusal to execute a letter of request relate solely to the "sovereignty" and "security" of the Requested State, which is not linked to or synonymous with incompatibility with public order, but is a narrower concept.[576]

421. Examples of cases where the execution of Letters of Request would be prejudicial to the sovereignty or security of the Requested State include obtaining information regarding State secrets such as military plans, or negotiations or diplomatic meetings.[577] The High Court of Justice of Israel has upheld refusals to execute Letters of Request seeking the examination of witnesses and production of documents relating to activities of the Israeli Defence Force on grounds of prejudice to the security of the State.[578] According to the Federal Office of Justice of Switzerland, requests for "coercive measures ordered in support of foreign decisions that influence the proceedings" may prejudice Swiss sovereignty.[579] In a 2008 decision, the Higher Regional Court of Frankfurt am Main in Germany acknowledged that an action completely foreign ("*schlechthin wesensfremd*") to German law might be prejudicial to German sovereignty and security.[580] This decision must, however, be reconciled with Art. 12(2) of the Convention, which prohibits the requested authority from refusing to execute a Letter of Request on grounds alone that the right of action is unknown to, or opposed by, the law of the Requested State (see para. 454). At the same time, the Higher Regional Court of Munich in Germany has held that the examination of witnesses with respect to certain documents in aid of US proceedings for alleged patent infringement in which punitive damages were being sought raised "no question of a danger to the sovereignty or the security" of Germany.[581] Moreover, the Federal Constitutional Court, in a case concerning the 1965 Service Convention, has confirmed that the fact that the proceedings concern a claim for punitive damages is not alone prejudicial to the sovereignty of Germany.[582]

422. Article 12(1)(b) makes it clear that it is for the *Requested State* to determine whether execution would prejudice its sovereignty or security. Accordingly, the authorities of the Requesting State should avoid reviewing a decision by the authorities of the Requested State to refuse to execute a Letter of Request pursuant to Article 12(1)(b).

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575 See "Rapport présenté au nom de la IIIème commission (procédure civile), Annexe No 2 au procès-verbal No 4" (*op. cit.* note 566566), pp. 51-2.

576 Case No 4A_389/2022 (*op. cit.* note 573).

577 *Ibid.,* p. 51.

578 In 1983, libel proceedings were commenced in a US court against Time, Inc. for the publication of a story in *Time Magazine* regarding the involvement of the Israeli Defence Minister in certain events at a refugee camp in Beirut in 1982. On application of Time Inc., the US court issued a series of Letters of Request to Israel for the examination of witnesses and production of documents. The Attorney-General of Israel refused to execute the Letters of Request in part on the grounds that the taking of evidence would likely be prejudicial to the security of Israel. Time, Inc. applied to the High Court of Justice in Israel for an order nisi against the Attorney-General, effectively challenging the respective decisions to refuse execution. In each case, the Court set the order aside. In its judgment of 27 November 1984 (*op. cit.* note 31), the Court considered the refusal to execute Letters of Request for documents brought before the Inquiry Commission into activities of the Israeli Defence Force as well as the examination of witnesses on past military actions. The Court found there to be "no justification to interfere with the Attorney General's decisions which were anchored in grounds of the security of the State". At the same time, the Court praised efforts made (presumably by the parties) to find a way that would make it possible to bring admissible evidence before the requesting authority in such a way that would not be prejudicial to the security of Israel, and expressed the desire that every effort should be made to assist the requesting authority without prejudice to the security of Israel. In its judgment of 14 January 1985 (*Time, Inc. v. Attorney-General of the State of Israel & Ors*, H.C., 14 January 1985, No 750/84, 38(iv) P.D. 609), the High Court of Justice considered the refusal to execute a Letter of Request for the examination of a high ranking officer in the Israeli Defence Force with regards to the reputation of the Israeli Defence Minister. The Court accepted that despite the limited focus of the request and assurances that the witness would not be asked about delicate matters which may be prejudicial to the security of Israel, the requested evidence might lead to testimony on military subjects and on events which occurred in the army and which, for the sake of State security, are required to be kept secret. For commentary on the case, see O. Schmalz (*op. cit.* note 31).

579 See *Guidelines on International Judicial Assistance in Civil Matters* (*op. cit*. note 22), pp. 25-6.

580 *Op. cit.* note 104.

581 *Siemens* case (*op. cit.* note 83).

582 BVerfG, 9 January 2013, 2 BvR 2805/12.

423. In practice, Letters of Request are rarely refused execution on grounds of prejudice to sovereignty or security. In one case, the House of Lords of the United Kingdom invoked Article 12(1)(b) to refuse execution of a Letter of Request coming from the United States.[583] In that case, the Attorney-General had intervened to state the policy of the British Government that requests to obtain evidence of British companies and individuals for the purposes of the extraterritorial exercise of investigatory jurisdiction in anti-trust matters, constituted an infringement of United Kingdom sovereignty. The House of Lords accepted this policy.

424. Internal law of some Contracting Parties may require the requested authority to consider or to follow the position of the executive organs of the Contracting Party in determining what constitutes a prejudice to sovereignty or security.[584] For example, the *Protection of Trading Interests Act 1980* of the United Kingdom provides that a certificate signed by the responsible Secretary of State to the effect that the execution of a Letter of Request is prejudicial to the sovereignty of the United Kingdom is conclusive evidence of that fact.[585]

425. Further to the discussion at paragraph 402, refusal to execute a Letter of Request pursuant to Article 12(1)(b) should be distinguished from the non-execution of a Letter of Request pursuant to a privilege or duty under internal law to refuse to give evidence in cases where disclosure would be prejudicial to the sovereignty or security of that Contracting Party (Art. 11).[586]

iii. Pre-trial discovery of documents

426. The Convention provides that a Contracting Party may 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 Contracting Parties (Art. 23). Article 23 has long been the source of confusion and misunderstanding and has been the subject of lengthy discussions by the Special Commission.[587] Just as civil law Contracting Parties need to understand pre-trial discovery, so do common law Contracting Parties need to understand that the Convention is not designed for the extraterritorial extension of pre-trial discovery procedures.[588]

a) What is pre-trial discovery?

427. "Pre-trial discovery" is a process used in common law legal systems that allows the parties to proceedings to obtain (or "discover") information that is relevant to the matters in issue in

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583 *Westinghouse* case (*op. cit.* note 108).

584 In the *Westinghouse* case (*ibid*.), Lord Wilberforce noted (at 448, after acknowledging that a Letter of Request may be refused execution on grounds of prejudice to UK sovereignty) that it was "beyond doubt" that "in a matter affecting the sovereignty of the United Kingdom, the courts are entitled to take account of the declared policy of Her Majesty's Government". Further on, he noted that "[t]he courts should in such matters speak with the same voice as the executive; they have [...] no difficulty in doing so". Since that case, the UK has passed legislation (*Protection of Trading Interests Act* 1980) that gives conclusive effect to the pronouncements of the UK Government.

585 *Protection of Trading Interests* Act 1980, s. 4 (United Kingdom).

586 The High Court of Justice of Israel recognised as much in *Time, Inc. v. Attorney-General of the State of Israel* (*op. cit.* note 31), where the Court noted a certain parallelism between the ground for refusal in Art. 12(1)(b) (or more specifically the relevant provision of the implementing legislation incorporating Art. 12(1)(b) into domestic law) and the provision in section 44 of the Evidence Ordinance, 1971, by which a person is not bound to give evidence that, in the opinion of the Prime Minister or Minister of Defence expressed by certificate, is likely to impair the security of the State of Israel. The Court found that the privilege in the Evidence Ordinance did not pre-empt the ability to refuse execution under the implementing legislation, and it was up to the competent authority in Israel to choose which provision to apply: see commentary in O. Schmalz (*op. cit.* note 31), p. 425.

587 Report of the 1978 SC (*op. cit.* note 94), Part I, § 2(B); Report of the 1985 SC (*op. cit.* note 24), Part I, § 4; Report of the 1989 SC (*op. cit.* note 30), paras 32-34; C&R Nos 29-35 of the 2003 SC; C&R Nos 51-52 of the 2009 SC; C&R No 18 of the 2014 SC.

588 "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States" appearing under the title *International controversy concerning discovery abroad*. American Law Institute, *Restatement (third) of Foreign Relations Law of the United States*, § 442, Reporters' note 1, Minnesota, American Law Institute Publishers, 1990.

preparation for trial. Pre-trial discovery is a product of the "adversarial" nature of civil procedure in common law legal systems, in which the parties play a primary role in gathering evidence and presenting it to the court. As noted at paragraphs 13 *et seq.*, in common law systems, the court does not participate directly in obtaining evidence, although it may order the production of documents or testimony (by witness summons or subpoena).

428. Pre-trial discovery is a primary method by which evidence is obtained for use in proceedings in common law legal systems. However, pre-trial discovery is more than just obtaining evidence; it is also used to obtain information that may lead to the discovery of evidence.[589] In other words, not all information obtained as a result of pre-trial discovery may be admitted as "evidence" or will indeed be used in the proceedings as evidence.

429. Pre-trial discovery takes place *after* proceedings have been commenced but before the final hearing on the merits.[590] As correctly noted in Germany by the Higher Regional Court of Munich, "the procedure of 'pre-trial discovery' does not only presuppose a pending judicial proceeding… but even is the essential part of the obtaining of evidence for the court decision in the 'trial'".[591]

430. Pre-trial discovery is regulated by rules of civil procedure and is conducted under the supervision of the court seised. In general, it involves:

    a. an obligation on each party to disclose to each other party a list of documents in its possession or control – whether favourable or adverse to its claims; and

    b. a right of every other party to inspect and copy those documents (by way of notice to produce).

431. Pre-trial discovery is recognised – although not always by that name – in many Contracting Parties, namely Australia,[592] Barbados,[593] China (Hong Kong SAR),[594] Cyprus,[595] India,[596] Ireland,[597] Israel,[598] Seychelles,[599] Singapore,[600] South Africa,[601] Sri Lanka,[602] the United Kingdom (where it is known as "disclosure and inspection"),[603] and the United States.[604] However, pre-trial discovery differs among the various Contracting Parties (particularly as between the United Kingdom and the United States) in several respects, including:[605]

    a. *scope of pre-trial discovery*: in the United States, discovery extends to information that is reasonably calculated to lead to the discovery of admissible evidence[606] whereas in the United Kingdom, it is limited to documents that are supportive of, or adverse to, the party's

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589 See, *e.g.*, the *Federal Rules of Civil Procedure (Fed. R. Civ. Pro.)* 26(b)(1) (United States). Many common law jurisdictions have adopted the "train of inquiry" approach propounded by the High Court of England (QB) in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co*. (1882) 11 QBD 55.

590 The Special Commission has noted that in some instances, States may have made an Art. 23 declaration on the mistaken belief that they were objecting to Letters of Request submitted *prior* to the initiation of proceedings in the Requesting State: C&R No 31 of the 2003 SC.

591 *Siemens* case (*op. cit.* note 83). See also the analysis of pre-trial discovery from the perspective of German civil procedure by the Higher Regional Court of Dusseldorf, 14 June 2006, No I-3 VA 2/06.

592 *E.g.*, Federal Court Rules 2011, Part 20.

593 Supreme Court (Civil Procedure) Rules, 2008, Part 28 (*Disclosure and Inspection of Documents*).

594 Rules of High Court, Order 24 (*Discovery and Inspection of Documents*).

595 Civil Procedure Rules (2023).

596 Code of Civil Procedure Act, 1908, Order XI.

597 Rules of the Superior Courts, Order 31.

598 Civil Law Procedure Regulations, Chapter 9.

599 Seychelles Code of Civil Procedure Act, Chapter 213, s. 84.
Rules of Court, Order 11 (2021).

601 Uniform Rules of Court, Order 35.

602 Civil Procedure Code, Chapter XVI.

603 Civil Procedure Rules, Part 31.

604 Fed. R. Civ. Pro. 26.

605 See, *e.g.*, the observations of the Court of Appeal of England in *State of Minnesota v. Philip Morris, Inc*. (*op. cit.* note 294).

606 Fed. R. Civ. Pro. 26(b)(1).

case or the case of any other party;[607]

b. *forms of pre-trial discovery*: in the United States, pre-trial discovery may take the form of oral testimony (depositions), a procedure that is not known in the United Kingdom;

c. *subjects of pre-trial discovery*: in the United States, pre-trial discovery is widely available from persons that are not parties to the proceedings (non-parties) whereas in the United Kingdom, it is only available from non-parties in limited circumstances;[608]

d. *involvement of the court*: in the United States, discovery generally proceeds without intervention of the court,[609] whereas in the United Kingdom, pre-trial discovery is necessarily subject to court order.

b) The true object of Article 23

432. Article 23 is not intended to apply to all Letters of Request for the production of documents emanating from common law Contracting Parties during the pre-trial discovery phase.[610] Rather, the true object of Article 23 is to ensure that requests for the production of documents are sufficiently substantiated so as to avoid "fishing expeditions" (see paras 68-70).[611] With this in mind, the Special Commission has recommended that Article 23 not be applied to refuse the execution of Letters of Request where the requested documents are "specified in the request, or otherwise reasonably identified."[612]

433. The preoccupation with avoiding fishing expeditions is clear from the drafting history of the provision, and has been confirmed by the Special Commission[613] and in case law.[614] It is also evidenced from the declaration made by the United Kingdom (the proponent of Art. 23) upon joining the Convention.[615] A similar preoccupation is clearly expressed in the 1984 *Additional Protocol to*

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607 Civil Procedure Rules, r. 31.6.

608 *E.g.*, Senior Courts Act 1981, s. 34.

609 As noted in the response of the United States to the 2008 Questionnaire, the *Fed. R. Civ. Pro.* have been progressively amended to provide for greater judicial control over pre-trial discovery. See also Rule 26, 33 and 34 of the *Fed. R. Civ. Pro.*

610 As noted in para. 428, pre-trial discovery is the primary method for obtaining evidence for use at trial in common law States. Accordingly, Letters of Request for the production of documents will ordinarily be issued during pre-trial discovery. If an Art. 23 declaration were to have the effect of blocking the execution of *all* Letters of Request for the production of documents, even those for the production of documents that are clearly to be used in evidence, the system of Letters of Request under Chapter I of the Convention would offer little benefit to common law States in their relations with Contracting Parties that have made an Art. 23 declaration. At its first meeting in 1978, the Special Commission noted that States that had made an Art. 23 declaration did not intend to refuse all requests for evidence emanating from common law States: Report of the 1978 SC (*op. cit* note 94), Part I, § 2(B).

611 In response to question 25 of the 2022 Questionnaire, where it was asked whether States as the Requested State rejected a Letter of Request if it was too broad, most Contracting Parties that responded indicated that it was not applicable as they had made an Article 23 declaration. Among Contracting Parties that indicated that they rejected a Letter of Request if it was too broad: Hungary has made a full Article 23 declaration; France, Germany, Singapore and Switzerland have made a qualified Article 23 declaration; whilst the Czech Republic, Latvia and the United States have not made any Article 23 declaration. For Contracting Parties which indicated that they did not reject such a Letter of Request: Albania, Georgia, Israel, Nicaragua, Serbia, Slovakia and Slovenia have not made any Article 23 declaration; Romania has made a qualified Article 23 declaration; whilst Argentina, Bulgaria, Italy, Kazakhstan and Montenegro have made a full Article 23 declaration.

612 C&R No 18 of the 2014 SC.

613 C&R No 29 of the 2003 SC. This conclusion was recalled by the Special Commission at its 2014 meeting (C&R No 18).

614 See, *e.g.*, Federal Supreme Court of Switzerland, 21 December 2005 (*op. cit.* note 134) and 4 December 2007 (*op. cit.* note 556). In the latter decision, the Court explained that the qualified exclusion made by Switzerland pursuant to Art. 23 was aimed at "fishing expeditions" rather than simply Letters of Request made during the pre-trial discovery phase. For similar views expressed in the case law of the United States, see *Tulip Computers Int'l B.V. v. Dell Computer Corp*. (*op. cit*. note 533).

615 This declaration reads: "Her Majesty's Government understand 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents'… 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

the Inter-American Convention on the Taking of Evidence Abroad, concluded under the auspices of the Organization of American States in the years following the entry into force of the 1970 Evidence Convention, Article 16 of which provides for letters rogatory requesting the exhibition and copying of documents to be executed only if the documents are reasonably identified and the request is substantiated.[616]

Revisiting Article 23 declarations

434. At its meeting in 2003, the Special Commission noted that the United Kingdom declaration (see note 615) and Article 16 of the Inter-American Additional Protocol (see note 616) each reflect the true object of Article 23. It urged all Contracting Parties that have made an Article 23 declaration – as well as those that are contemplating joining the Convention and making an Article 23 declaration – to consider qualifying their reservation in terms similar to the United Kingdom declaration or Article 16 of the Inter-American Additional Protocol.[617] By doing so, States can ensure that their declarations reflect the true object of Article 23 (*i.e.*, avoiding fishing expeditions). In the past a number of Contracting Parties have modified their Article 23 declarations.[618] In addition, at its 2014 meeting, the Special Commission noted that one such Contracting Party, which also regards the Convention as mandatory, considers the qualifying of its reservation under Article 23 to have encouraged other Contracting Parties that do not regard the Convention as mandatory to use the Convention.[619]

c) Article 23 only applies to pre-trial discovery of "documents"

435. Article 23 only allows Contracting Parties to declare that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of *document*s.[620] Article 23 only applies to pre-trial discovery of documents and not, for example, to witness testimony. As noted at paragraph 431, in some common law legal systems, pre-trial discovery may take other forms such as *oral testimony*. An Article 23 declaration may not be invoked to refuse to execute a Letter of Request for pre-trial discovery of *oral testimony*.[621]

436. In practice, the form used to take oral testimony for the purposes of pre-trial discovery (deposition)

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being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power". In *Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331, Lord Fraser of Tullybelton noted that the UK declaration, as incorporated into internal law, "is to be construed so as not to permit mere 'fishing' expeditions."

616 Art. 16(1) provides: "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; and (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". None of the States Parties to the Inter-American Additional Protocol have incorporated pre-trial discovery in their systems.

617 C&R No 34 of the 2003 SC. Report of the 1989 SC (*op. cit*. note 30), para. 34(d). This recommendation was recalled by the Special Commission at its 2009 meeting (C&R No 51), and again at its 2014 meeting (C&R No 18).

618 For example, France modified its Art. 23 declaration in 1987, for more details, see para. 439. In 1980, Sweden made an additional declaration to the effect that it understood its Art. 23 declaration to apply to Letters of Request requiring a person to (a) state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in their possession, custody or power, or (b) produce any documents other than particular documents specified in the Letter of Request, which are likely to be in their possession, custody or power. As a recent example, Germany modified its Art. 23 declaration in July 2022, for more details see para. 445.

619 C&R No 18 of the 2014 SC.

620 The limited scope of Art. 23 in terms of other forms of pre-trial discovery was emphasised by the Court of Appeal of Brescia (Italy) in *Stanadyne Automotive S.p.A. v. Traverso*, 28 November 1991, reported in *Riv. dir. int. priv. pro*. 1992, p. 397.

621 C&R No 35 of the 2003 SC. Several cases in Germany provide examples of the court executing the part of a Letter of Request seeking pre-trial discovery of oral testimony but refusing to execute the part of the Letter of Request seeking pre-trial discovery of documents: see, *e.g.*, *Siemens* case (*op. cit*. note 83) and the decision of the Higher Regional Court of Celle, 6 July 2007, No 16 VA 5/07. A similar approach was followed by the Supreme Court of the Netherlands in *Kilbarr Corp. v. Holland and Teeuwen* (*op. cit*. note 568). There is a risk that the Letter of Request might nevertheless be refused execution or otherwise returned unexecuted on the grounds that it is a fishing expedition (see A6.4(a)(ii)).

may be unknown to the law of the Requested State, even other common law Contracting Parties. If this is the case, the Letter of Request should specify any special method or procedure to be followed (Art. 3(1)(i)), which the requested authority will be required to follow subject to certain limited exceptions (Art. 9(2)).[622]

d) Article 23 declarations

437. Most Contracting Parties have made an Article 23 declaration. Of these, most have simply made a general, non-particularised declaration that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery. A number of others have made declarations on particularised terms to reflect the true object of Article 23 (*i.e.*, ensuring that requests for the production of documents are sufficiently substantiated so as to avoid "fishing expeditions").

438. For a breakdown of the different declarations made by Contracting Parties under Article 23, see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", available on the Evidence Section of the HCCH website.

Examples of particularised Article 23 declarations

439. France has declared that its Article 23 declaration "does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure". This qualified exclusion has been interpreted liberally.[623] For example, the Court of Appeal of Paris has determined that an enumeration was "limitative" when the documents were identified with a reasonable degree of specificity concerning date, description, etc.[624] The Court acknowledged that an exact description of the document sought cannot be required from a party that does not have the documents in its possession. In the case concerned, the Court found that a Letter of Request satisfied these requirements even though certain documents dated from 13 years prior.[625] Similarly, China has declared that only a request for obtaining discovery of documents clearly enumerated in the Letter of Request and of direct and close connection with the subject matter of the litigation will be executed.

440. Mexico has declared that it will only execute letters of request issued for the purpose of obtaining the production and transcription of documents when (a) the judicial proceeding has been commenced; (b) the documents are reasonably identifiable as to date, subject and other relevant information and the request specifies those facts and circumstances that lead the requesting party to reasonably believe that the requested documents are known to the person from whom they are requested or are in their possession or under their control or custody; and (c) the direct relationship between the evidence or information sought and the pending proceeding is identified.

441. Switzerland has declared that it will not execute Letters of Request issued for the purposes of pre-trial discovery of documents in any of the following four circumstances: (a) the request has no direct and necessary link with the proceedings in question; (b) a person is required to indicate what documents relating to the case are or were in their possession or keeping or at their disposal; (c) a person is required to produce documents other than those mentioned in the Letter of Request, which are probably in their possession or keeping or at their disposal; (d) interests worthy of

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622 For more on executing Letters of Request following a special method or procedure, see paras 295 *et seq*.

623 N. Meyer-Fabre, *L'obtention des preuves à l'étranger*, Travaux du Comité français de droit international privé, Années 2002-2004, Paris, éditions A. Pedone, 2005, p. 207.

624 *Marc Ladreit de Lacharrière c. Commissaire aux assurances de l'État de Californie*, CA Paris, Ch. C. 1, 18 September 2003, No 2002/18509.

625 However, the Art. 23 declaration has been applied in a subsequent case by the Court of Appeal of Paris in order to refuse execution of a Letter of Request issued by a US court seeking "all documents" over a four-year period concerning the finance and sale of cruise ships: see *West Virginia Investment Management Board c. S.A. Electro Banque*, CA Paris, Ch. 1, 9 November 2010, No 10/08413.

protection of the concerned persons are endangered. According to the Federal Supreme Court, the effect of this declaration is that Switzerland will accept Letters of Request for the production of documents issued during the pre-trial discovery phase where the relevance and precision of the request matches the criteria inspired by Swiss procedural law.[626]

442. The United Kingdom has declared that it understands its Article 23 declaration to apply to "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."[627] The scope of this declaration, in particular the second limb, which is reflected in the implementing legislation,[628] has been the subject of considerable case law according to which the phrase "particular documents specified" is to be construed strictly,[629] requiring more than the specification of classes of documents.[630] *In Re Asbestos Insurance Coverage Cases*,[631] the House of Lords confirmed that the phrase required either "individual documents separately described",[632] or a compendious description of several documents that clearly indicates the exact documents.[633]

443. Venezuela has declared that it will execute Letters of Request issued for the purposes of obtaining pre-trial discovery on the conditions prescribed under Article 16 of the Inter-American Additional Protocol (see note 616) and provided that the connection between the evidence or information sought and the pending litigation is made quite clear.[634]

444. As a newer Contacting Party, Viet Nam, acceding to the Convention in 2020, has made a particularised Article 23 declaration. It will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law States, unless all of the following conditions are met: 1. The judicial proceeding before competent court has been commenced; 2. The documents to be collected are specified in the Letters of Request as to date, subject and relevant information and facts to prove the direct relationship between information sought and the pending proceeding; and 3. The documents are related to the requested person or under the person's possession or control.

445. Germany has amended its general Article 23 declaration to a particularised declaration in July 2022. With this revised declaration, a Letter of Request for the purpose of obtaining pre-trial discovery of documents shall only be executed if: "1) the documents requested are described separately in detail; 2) the documents requested are of immediate and clearly recognisable relevance for the respective proceedings and their outcome; 3) the documents requested are in the possession of a party to the proceedings; 4) the Letter of Request does not violate fundamental principles of German law; and 5) to the extent the documents requested contain personal data, the

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626 Decision of 4 December 2007 (*op. cit.* note 556). For further commentary on this point, see D. Gauthey & A.R. Markus (*op. cit*. note 246), pp. 214-218.

627 Art. 23 declarations with the same wording were made by Cyprus, Finland, the Republic of Korea and Singapore.

628 Evidence (Proceedings in Other Jurisdictions) Act 1975, s. 2(4).

629 *Re Asbestos Insurance Coverage Cases* (*op. cit*. note 615).

630 *Westinghouse* case (*op. cit.* note 108).

631 *Op. cit.* note 615.

632 *Westinghouse* case (*op. cit.* note 108). In *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998), the United States Court of Appeals for the Second Circuit accepted the argument that in some cases where documents are sought for the purposes of pre-trial discovery, it may be impossible for documents to be separately described.

633 Accordingly, the House of Lords stated that a Letter of Request for monthly bank statements for a particular year relating to a person's current account with a named bank would be sufficient. However, it would be insufficient if the Letter of Request sought all of the person's bank statements for 1984.

634 The requirement for a clear connection between the evidence or information sought and the pending litigation derives from Art. 16(2) of the Inter-American Additional Protocol, which allows a State Party to declare that it will execute letters rogatory requesting the exhibition and copying of documents only if such a connection is identified. Venezuela has made such a declaration.

requirements for the transfer of personal data to a third country pursuant to Chapter V of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)".[635]

446. Some Contracting Parties that have made a general, non-particularised declaration under Article 23 may still execute Letters of Request for the purposes of pre-trial discovery of documents where the documents sought are specifically described in the Letter of Request. For example, in Australia, despite a general, *non-particularised* Article 23 declaration, uniform state legislation implementing the Convention reflects the *particularised* declaration made by the United Kingdom.[636] Australian courts may therefore order the execution of a Letter of Request for the production of "particular documents specified in the order and appearing to the court making the order to be, or likely to be, in the person's possession, custody or power".[637] Similar in Brazil, although it has made a general, non-particularised Article 23 declaration, the court has held that courts may execute the Letter of Request where there is an individualised list of documents and demonstration of their relevance to the proceedings.[638] In Italy, it appears that limited discovery requests are executed notwithstanding a general, non-particularised Article 23 declaration.[639] Moreover, in India, the courts have confirmed that the general, non-particularised Article 23 declaration made by India does not limit the general power under internal law to execute Letters of Request seeking documentary evidence.[640]

Seeking production of documents in Contracting Parties that have made an Article 23 declaration

447. In the case of doubt as to the scope of an Article 23 declaration, the requesting authority (or other person responsible for preparing the Letter of Request) should contact the Central Authority of the Requested State to determine what documents may be produced, and how the Letter of Request should be formulated.

e) Reciprocal effect of an Article 23 declaration

448. It is not clear whether an Article 23 declaration has reciprocal effect in the sense that a Contracting Party may be under no obligation to execute Letters of Request issued for the purpose of obtaining pre-trial discovery that emanate from a Contracting Party that has declared that it will not execute such Letters of Request itself. There is little commentary on this issue.

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635 Before the amendment of the Art. 23 declaration, the Bavarian Supreme Regional Court in Germany, in the case of *BayObLG, decision of November 6th– 2020 - 101 VA 130/20*, dealt with the issue of whether a Letter of Request for the purpose of obtaining evidence for pre-trial discovery in the United States District Court for the District of Delaware could be executed in Germany (at the time, Germany made a general, non-particularised Art. 23 declaration). It held that Art. 23 of the Convention only applies to "documents", *i.e.*, paper documents or electronically stored data or documents, but not to interrogation of persons, even if the person is to make a statement with reference to its existence, whereabouts or content.

636 See discussion of the New South Wales Court of Appeal in *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit.* note 129).

637 See, *e.g.*, *Evidence on Commission Act* 1995 (NSW), s. 32(6).

638 See the decision of the Superior Court of Justice (Brazil) in STJ, AgInt na CR No. 13193.

639 ABA, *Obtaining Discovery Abroad* (*op. cit.* note 23), p. 163.

640 In *Upaid Systems Ltd v. Satyam Computer Services* (*op. cit.* note 14), a Letter of Request had been addressed to India for the examination of certain witnesses. An action was brought to appoint an examiner (known under Indian law as a "commissioner") to execute the Letter of Request. The action was challenged by reference to India's Art. 23 declaration. The High Court of Delhi rejected the challenge, holding that to give effect to the reservation would be tantamount to giving effect to a treaty reservation that had not been enacted into Indian law. Accordingly, the Court found that "[s]o long as there is power to appoint a commissioner [under the *Code of Civil Procedure* Act, 1908], that a treaty is not made the subject of a special law would not constitute a fetter on such power of the [C]ourt, to issue letters of request". This approach was reiterated by the Court in *Mitre Sports Int'l Ltd v. Home Box Office, Inc*. (*op. cit*. note 442).

3. Partial execution

449. The Convention contemplates that a Letter of Request may be refused execution in part. This is clear from the wording of Article 12(1) ("[t]he execution of a Letter of Request may be refused *only to the extent that*…") and Article 13(2) ("[i]n every instance where the Letter is not executed in whole or in part"). Accordingly, in each case where part of a Letter of Request may be refused execution, the requested authority must still proceed with executing the remainder of the Letter of Request. A similar approach should be taken in cases where part of a Letter of Request is unexecutable following the methods and procedures under the law of the Requested State (see para. 293).

450. This approach has been expressly confirmed by the Special Commission, which has recommended that in cases where a Letter of Request appears to be partially non-compliant, the requested authority should, wherever appropriate, execute the portion of a letter that is not deficient rather than reject the entire request.[641] It is also followed by many Contracting Parties in practice.[642]

451. In the particular context of Letters of Request issued for the purposes of obtaining pre-trial discovery of documents, the Special Commission has specifically encouraged the practice of many Contracting Parties whereby a Letter of Request seeking the taking of oral evidence *and* pre-trial discovery of documents, subject to an Article 23 declaration, is still executed in respect of the oral evidence rather than the entire Letter of Request being rejected.[643] At the same time, there may be cases where the oral evidence is dependent on the production of documents, such that the taking of oral evidence is no longer practicable without the production of documents.[644] In other cases, however, the request for oral evidence may be seen as "free-standing" and therefore capable of execution.[645] In yet another case, the Higher Regional Court of Munich in Germany agreed to examine witnesses on the content of documents in execution of a Letter of Request even though the Letter of Request could not be executed insofar as it sought the production of documents contrary to Germany's Article 23 declaration.[646]

4. Unacceptable grounds for refusal

452. Without prejudice to the exhaustive nature of the grounds for refusal provided for in the Convention (see paras 399 *et seq.*), this section sets out some of the grounds on which a Requested State may not refuse to execute a Letter of Request that is compliant with the provisions of the Convention.

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641 C&R No 41 of the 2003 SC.

642 See, *e.g.*, the *Siemens* case (*op. cit*. note 83). Also see: *Tiffany (NJ) LLC v. Andrew*, No. 10 Civ. 9471 (RA) (HBP), 2012 WL 5451259, at *2-4 (S.D.N.Y. 7 November 2012) (United States), in which the Central Authority of the People's Republic of China produced only those documents which were deemed to have a "direct and close connection" with the proceedings, pursuant to its qualified Article 23 exclusion. In that case, the US Court rejected the application to compel production, noting that the decision of the Chinese Central Authority did not render the process futile, and that "its production [was] sufficient for plaintiffs to continue their investigation concerning the counterfeit goods at issue […]".

643 C&R No 52 of the 2009 SC.

644 This was the case in *Netbank v. Commercial Money Center* [2004] SC (Bda) LR 46, where the Supreme Court of Bermuda noted that "[t]ypically… oral examination relates almost exclusively to the requested documents, so, if the documents are not properly sought, oral examination falls away".

645 This was the conclusion in the case of *Charman v. Charman* (*op. cit*. note 254), where the Court of Appeal of England found that even if a Letter of Request were to be refused execution to the extent that it was issued for the purposes of obtaining pre-trial discovery of documents, the part of the Letter of Request seeking oral evidence could still be executed because it related to other matters beyond the documents sought.

646 *Siemens* case (*op. cit*. note 83). This approach was subsequently followed by the Higher Regional Court of Celle (*op. cit.* note 621). A similar approach was followed by the Supreme Court of the Netherlands in *Kilbarr Corp. v. Holland and Teeuwen* (*op. cit*. note 568), in which the Court held that although a witness could not be compelled to produce documents, the witness could be examined about their knowledge of the documents, their contents, and whether they were in the possession of a particular person.

i. Jurisdiction of the requesting authority

453. The requested authority may not refuse to execute a Letter of Request on grounds alone that, under its internal law, the Requested State claims exclusive jurisdiction over the subject-matter of the action before the requesting authority[647] or does not otherwise recognise the jurisdiction of the requesting authority (*e.g.*, in cases where parallel proceedings have been commenced in the Requested State concerning the same subject-matter (*lis pendens*)).[648] More generally, the requested authority may not review the jurisdiction of the requesting authority (in particular to issue the Letter of Request),[649] as this is a matter to be raised before the requesting authority.

ii. Non-recognition of right of action of the requesting authority

454. The requested authority may not refuse to execute a Letter of Request on grounds alone that the internal law of the Requested State does not admit a right of action on the subject-matter of the action before the requesting authority. This is expressly forbidden by the Convention (Art. 12(2)),[650] which extends not only to rights of action that are unknown to the internal law of the Requested State, but also to those to which it is opposed.[651] Moreover, the requested authority may not refuse to execute a Letter of Request on grounds alone that, under its procedural law, the action in the Requesting State would be inadmissible in the Requested State in the particular circumstances (*e.g.*, in cases where the subject-matter of the action is *res judicata* in the Requested State as a result of an existing judgment of that Contracting Party between the parties), regardless of whether the right of action itself is recognised.[652]

455. In South Africa, a blocking statute prohibits the execution of a Letter of Request connected to liability for damages resulting from the consumption, use or exposure to natural resources of that Contracting Party to the extent that the same liability does not arise under the law of South Africa.[653] The South African Law Reform Commission has found that this prohibition is not consistent with Article 12(2) of the Convention.[654] The Special Commission has emphasised that blocking statutes must remain within the limits of Article 12 of the Convention.[655]

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647 This is expressly forbidden by Art. 12(2) of the Convention. Art. 12(2) is substantially the same as Art. 13(2) of the 1965 Service Convention, which was inserted to address difficulties in practice encountered in the service of documents abroad. At the 1985 meeting of the Special Commission, several experts pointed out that the expression "exclusive jurisdiction over the subject-matter of the action" should be construed as referring to the adjudicatory rather than the legislative jurisdiction of the Requested State: Report of the 1985 SC (*op. cit*. note 24), Part I, § 3 D. Art. 12(2) was discussed by the Higher Regional Court of Frankfurt am Main (Germany) in a case concerning a Letter of Request issued by a court in Turkey seeking an order for a health assessment for use in custody proceedings. The execution of the request was opposed on the basis that under the *HCCH Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*, the courts of Germany had jurisdiction. In its 2008 decision (*op. cit*. note 104), the Court stated that it was irrelevant whether exclusive jurisdiction was conferred by treaty or internal law of the Requested State, and did not review the jurisdiction of the Turkish court.

648 *A.C. v. C.A.D.P. S.A.*, Trib. Sup. Chubut, 12 November 2002, No 21 (Argentina).

649 See, *e.g.*, *Re Int'l Power Industries N.V.* (*op. cit*. note 175).

650 This provision is a substantially verbatim copy of Art. 13(2) of the 1965 Service Convention. In a French case predating the Convention, a court executed a letter rogatory seeking evidence for the purposes of proceedings establishing paternity, even though at the time, French law prohibited such proceedings: *Lafolie c. Sarda*, Trib. Civ. Seine, Ch. 1, 13 July 1909, reported in *Rev. crit. D.i.p.* 1910, p. 844.

651 See Explanatory Report of the 1965 Service Convention (*op. cit*. note 54), p. 375.

652 This conclusion follows from the drafting history of Art. 13(2) of the 1965 Service Convention, on which Art. 12(2) of the 1970 Evidence Convention is based. The proposal to include this provision was made by the delegation of Germany in an attempt to overcome situations where the Requested State would refuse to execute requests for service on the grounds that the proceedings that were the subject of the request were not recognised *or were inadmissible*: see *Actes et documents de la Dixième session*, Tome III (*op. cit*. note 2), pp. 124, 192-4.

653 *Protection of Businesses* Act 99 of 1978, s. 1D.

654 *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters* (Project 121), Report of December 2006.

655 Report of the 1985 SC (*op. cit.* note 24), Part I, § 3 D.

iii. Public policy

456. The Convention does not provide a public policy (*ordre public*) ground for refusing to execute a Letter of Request. Instead, it provides that a Letter of Request may be refused execution to the extent that the Requested State considers that the execution of the Letter of Request would prejudice its sovereignty or security (Art. 12(1)(b)). As noted at paragraph 420, this ground for refusal is *narrower* than a public policy ground, and was specifically designed as an alternative to a public policy ground.[656]

457. Accordingly, the requested authority may not refuse to execute the Letter of Request on grounds alone of public policy considerations.[657] In particular, the Letter of Request may not be refused recognition on grounds alone that elements of the law or procedure in the Requesting State are different or unknown in the Requested State.[658] For example, the requested authority may not refuse to execute a Letter of Request issued in:

a. proceedings for collective redress, where the Requested State does not accommodate such proceedings in its internal law;

b. proceedings where punitive damages are claimed, where the Requested State does not allow for such damages to be claimed in its internal law;

c. proceedings for which certain costs may be ordered, where the Requested State does not allow for such costs to be ordered in its internal law; and

d. proceedings to enforce a particular right or obligation, where the Requested State does not recognise that right or obligation.[659]

458. The execution of a Letter of Request does not prejudice the ability of the Requested State to refuse to enforce any judgment resulting from the proceedings in the Requesting State on public policy grounds pursuant to its internal law or any applicable treaty.[660]

iv. Burdensome Letters of Request

459. The requested authority may not refuse to execute a Letter of Request on grounds alone that the execution is too burdensome on the requested authority or person from whom evidence is sought.[661] This is without prejudice to any applicable privileges or duties not to give evidence.[662]

v. Non-recognition of subsequent judgment

460. The requested authority may not refuse to execute a Letter of Request on grounds alone that the final decision expected in the proceedings in the Requesting State would not be recognised or

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656 See cases and commentary cited at note 574.

657 Interestingly, the implementing legislation in the United Kingdom (the *Evidence (Proceedings in Other Jurisdictions) Act 1975*) has been described as giving effect to the Convention "so far as [is] thought consistent with public policy", suggesting that any differences between the Convention and implementing legislation are a product of public policy considerations: see *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit.* note 136).

658 See decision of the Federal Constitutional Court of Germany concerning Art. 13(1) of the 1965 Service Convention: BVerfG (*op. cit.* note 573).

659 This was discussed by the Higher Regional Court of Frankfurt am Main (Germany) in its decision of 26 March 2008 (*op. cit.* note 104).

660 See, *e.g.*, Supreme Court of the Canton of Zurich, 21 April 2008 (*op. cit*. note 574). See also O. Capatina (*op. cit*. note 395), p. 371.

661 In *Warner Bros. v. Arutz Zahav*, M.C. (T.A.), 26 January 2004, C.D. 113/03, the Tel Aviv Magistrates Court (Israel) rejected a challenge to the execution of a Letter of Request on grounds that producing the documents sought would be time consuming and incur heavy costs.

662 In the United States, the Supreme Court has confirmed that a Letter of Request may be rejected if it is unduly intrusive or contains burdensome requests: *Intel Corp. v. Advanced Micro Devices, Inc*., (*op. cit.* note 190). Similarly, in the United Kingdom, a Letter of Request may be rejected if it is "oppressive" to the witness: *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit*. note 136, Court of Appeal of England).

enforced in the Requested State. This has been articulated by the Higher Regional Court of Frankfurt am Main in Germany[663] as well as by the House of Lords of the United Kingdom.[664] The execution of a Letter of Request does not prejudice the ability of the Requested State to refuse to enforce any judgment resulting from the proceedings in the Requesting State pursuant to its internal law or any applicable treaty.

vi. Lack of reciprocity

461. The requested authority may not refuse to execute a Letter of Request on grounds alone that the Requesting State has previously not executed a Letter of Request issued by the judicial authorities of the Requested State. By placing mutual judicial co-operation on a treaty footing, the Convention does away with the need for reciprocity in the taking of evidence (see para. 270). In a case before the Administrative Commission of the Supreme Court of the Canton of Zurich in Switzerland, a court in California had issued a Letter of Request seeking the examination of a witness in Switzerland.[665] The lower cantonal court had refused to execute the Letter of Request on the grounds that US authorities had refused to execute Letters of Request previously issued by the lower court in related proceedings. The Supreme Court found that the Letter of Request should be executed, holding that there was no room in the Convention for retaliatory measures.

vii. Relevance and admissibility of the evidence sought

462. The requested authority may not refuse to execute a Letter of Request for the taking of evidence on grounds alone that the evidence sought is not relevant to, or otherwise admissible in, the proceedings in the Requesting State. This much is confirmed in the case law of several Contracting Parties[666] as well as in the commentary.[667] As the New South Wales Court of Appeal in Australia has noted, reviewing the admissibility of evidence would "unduly lengthen the course of proceedings" and ultimately undermine the "practical scheme of international co-operation"

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663 OLG Frankfurt am Main, 26 March 2008 (*op. cit.* note 104).

664 Re State of Norway's Application (*op. cit.* note 80).

665 *Op. cit.* note 31.

666 For Australia, see *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit.* note 129129, New South Wales Court of Appeal). For Germany, see OLG Düsseldorf, 14 June 2006 (*op. cit.* note 591591)591. For the Hong Kong SAR, see *Prediwave Corp. & Another v. New World TMT Ltd* (*op. cit.* note 131131131, Court of Appeal). For India, see *Wooster Products, Inc. v. Magna Tek, Inc*. [1989] AIR 6. For the United Kingdom, see the decisions of the House of Lords in the *Westinghouse* case (*op. cit.* note 108108) and *Re Asbestos Insurance* (*op. cit.* note 615615). See also the case of *Atlantica Holdings Inc & Ors v. Sovereign Wealth Fund Samruk-Kazyna JSC & Anor* (*op. cit.* note 523523) where the English High Court followed the approach in *Re Asbestos Insurance* and stated that "[t]he starting point is the principle that the English court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues for trial [...] However, there are circumstances where the English Court can consider for itself the relevance of the evidence sought. These include where the relevance of the topics for examination in the request has obviously not been considered by the requesting court". The court found that the United States judge had considered the question of relevance and was satisfied that the topics of examination were relevant to the issues arising out of the United States proceedings and stated that "[i]n those circumstances, it would be contrary to comity, and to the proper approach indicated by the cases, for the English court to embark on a process of trying to second guess whether he was right or wrong in his determinations". In *Aureus Currency Fund v. Credit Suisse* (*op. cit.* note 144144), the English High Court also stated that the court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues of trial and there were limited circumstances where the court could consider the relevance of evidence sought, where the relevance of the topics for examination in the request was not considered by the requesting court. In *KG Bidco APS v. Procuritas Partners AB* (*op. cit.* note 523523523), the English High Court also followed the same approach, citing the case of *In Aureus Currency Fund*. For the United States, see, *e.g.*, *John Deere Ltd v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985). The Supreme Court has also held that a Letter of Request may not be refused execution on the grounds that the evidence sought is not "discoverable" under the law of the Requesting State (*i.e.*, whether the material sought is obtainable in proceedings regardless of its admissibility as evidence): *Intel Corp. v. Advanced Micro Devices, Inc.* (*op. cit.* note 190190). Case law also indicates that a Letter of Request should not be refused execution on grounds alone that the evidence is not actually needed: see, e.g., *Wadman v. Dick* (*op. cit.* note 345, Royal Court of Jersey), and the Federal Supreme Court of Switzerland of 20 August 2013 (*op. cit.* note 549).

667 L. Chatin (*op. cit.* note 115; B. Ristau (*op. cit*. note 184), § 2-2-4(9). See also commentary in G.B. Born & P.B. Rutledge, *International Civil Litigation in United States Courts*, 4th ed., United States of America, Aspen Publishers, Kluwer Law International, 2007, pp. 1003-04, 1006.

established under the Convention.[668]

463. That being said, the requested authorities in some Contracting Parties may review the relevance or admissibility of the evidence sought for the purposes of determining:

a. the applicability of the methods and procedures under the law of the Requested State to be followed pursuant to Article 9(1) – the methods and procedures of some Contracting Parties for obtaining evidence may be conditioned on the relevance or admissibility of the material sought, although the review of these matters carried out by the Requested State will generally only be summary;[669]

b. the applicability of an Article 23 declaration made by the Requested State – some Contracting Parties have incorporated an element of relevance into their particularised Article 23 declarations (see examples, paras 439-446).

viii. Authenticity of the Letter of Request

464. As noted at paragraph 215, the Requested State may not require a Letter of Request to be legalised or subjected to similar formality (Art. 3(3)) (*e.g.*, an Apostille under the 1961 Apostille Convention). Accordingly, the requested authority may not refuse to execute a Letter of Request on grounds alone that its authenticity has not been formally established. The drafters of the Convention were of the view that as long as the Letter of Request emanates from a judicial authority of the State of origin, its authenticity will be presumed.[670] If the requested authority has doubts as to the authenticity of the Letter of Request, it should resolve the issue directly with the requesting authority that purportedly issued the Letter of Request. As noted in paragraph 140, if the requested authority has doubts as to whether the Letter of Request has been issued by a "judicial authority", it may contact the Central Authority of the Requesting State to clarify the nature of the authority.

ix. Failure to obtain evidence under Chapter II

465. The requested authority may not refuse to execute a Letter of Request on grounds alone that the evidence had previously been sought to be obtained under Chapter II (Art. 22).

x. Incompetence of the requested authority

466. The Requested State may not refuse to execute a Letter of Request on grounds alone that the authority specified in the Letter of Request to take the evidence (or perform the judicial act sought) is not competent to execute the Letter of Request according to the rules of internal allocation of jurisdiction of that Contracting Party.[671] Article 6 of the Convention addresses this situation specifically, providing that the requested authority must forward the Letter of Request "forthwith" to the authority in the Requested State that is competent to execute it in accordance with the provisions of its own law.

xi. Use of evidence for other purposes

467. The requested authority may not refuse to execute a Letter of Request for the taking of evidence on grounds alone of a mere possibility that the evidence might be used for other purposes. This

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668 *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit.* note 129129).

669 In Australia, the review is limited to a "general determination of apparent relevance": *British American Tobacco Australia Services Ltd v. Eubanks* (*op. cit.* note 129). In England, the courts will look at the issue of the relevance "in broad terms": *First American Corp. v. Sheik Zayed Bin Sultan Al-Nahyan* (*op. cit*. note 136, Court of Appeal of England). The United States District Court for the Southern District of New York has recommended a "permissive" approach where relevance is in doubt: *In re Application of Sveaas*, 249 F.R.D. 96 (S.D.N.Y. 2008).

670 Report of the 1968 SC (*op. cit*. note 16), p. 59.

671 In particular, the ground for refusal in Art. 12(1)(a) does not apply to such a situation: see, *e.g.*, *AXA Mediterranean Int'l Holding v. ING Insurance Int'l B.V.*, report of P. Matet (*op. cit*. note 396).

issue arises particularly in cases where a Letter of Request seeks evidence for use in civil or commercial proceedings, and there is a possibility that the evidence will be subsequently used in proceedings that are not civil or commercial in nature (*e.g.*, regulatory and criminal proceedings). This approach has been accepted by the Special Commission[672] and is reflected in case law.[673]

468. At the same time, if the requested authority determines that the evidence is in fact intended for use for purposes outside the scope of the Convention, the Letter of Request may be refused on the grounds that it does not comply with the provisions of the Convention, including:

a. Article 1(1) – the system of Letters of Request only applies to "civil or commercial matters";[674] and

b. Article 1(2) – Letters of Request may only be used to obtain evidence that is intended for use in *judicial* proceedings.[675]

469. This position has also been accepted by the Special Commission,[676] which suggested that a requested authority may refuse to execute a Letter of Request where the evidence sought is *directly linked* to proceedings that are not civil or commercial in nature.

5. Giving reasons for a refusal to execute

470. In every instance where a Letter of Request is not executed in whole or in part, the requesting authority must be informed immediately and advised of the reasons (Art. 13(2)). This obligation extends to instances where the evidence is not obtained due to the invocation of a privilege or duty to refuse to give evidence (paras 371 *et seq.*)[677] and where a requested special method or procedure is not followed (paras 301 *et seq.*).

471. Unlike the 1965 Service Convention (Art. 6(2)), the 1970 Evidence Convention does not prescribe the form in which this advice is to be given. At the very least, the requesting authority should be advised of the ground(s) relied upon by the requested authority in refusing to execute the Letter of Request.

472. The requesting authority is advised through the same channel as that which is used for returning the documents establishing execution (see discussion at para. 394).

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672 Report of the 1978 SC (*op. cit.* note 94), Part I, § 1.

673 *Westinghouse* case (*op. cit.* note 108108); *Re Int'l Power Industries N.V.* (*op. cit.* note 175). *BCI Finances Pty Ltd (in liq) v. Commissioner of Taxation* (*op. cit.* note 117) further confirmed that it is the law of the forum that governs the use of the evidence obtained pursuant to a Letter of Request.

674 In this regard, see comments by Viscount Dilhorne in the *Westinghouse* case (*op. cit.* note 108108) ("I hope that the courts of this country will always be vigilant to prevent a misuse of the [C]onvention and will not make an order requiring evidence to be given by such persons unless it is clearly established that, even if it is required for civil proceedings, it is not also sought for criminal proceedings").

675 D. McClean (*op. cit.* note 79), p. 90.

676 Report of the 1978 SC (*op. cit.* note 94), Part I, § 1.

677 See note 551 for further discussion on the non-execution of Letters of Request in these instances.

PART 3. Consuls and Commissioners ("Chapter II")

I. Introduction

1. General

473. Prior to the drafting and entry into force of the 1970 Evidence Convention, customary international practice had long recognised that alternatives to the traditional letters rogatory process may be employed, if permitted by the internal law of the relevant States, to facilitate the taking of evidence for use in proceedings pending in a foreign State. The Convention does not necessarily reject or replace such practices and indeed recognises the utility of alternatives to traditional methods of international judicial assistance.

474. Indeed, rather than imposing additional formal requirements where none previously existed, Chapter II of the Convention provides a framework in which Contracting Parties may choose to continue these practices in a manner consistent with their legal systems. It also allows Contracting Parties that previously did not permit evidence to be taken on their territory other than by the traditional letters rogatory process, to enlarge the possible devices for the taking of evidence. In particular, traditional methods employed include the taking of evidence by diplomatic officers or consular agents, as well as by commissioners appointed for the purpose.[678] While the Convention itself does not exclude Contracting Parties from permitting any particular method of taking evidence, Chapter II explicitly provides for a Contracting Party to permit evidence to be taken in its territory by diplomatic officers and consular agents ("Consuls") or Commissioners. Under Chapter II, a Consul, or a person duly appointed as a Commissioner for the purpose, may, subject to the consent of the State of execution, take evidence in the State of execution, *i.e.*, "direct" taking of evidence.

2. Use of video-link

475. Nothing in the Convention precludes the use of information technology in taking evidence under Chapter II. Moreover, the Special Commission has recognised that the use of video-link and similar technologies in taking evidence from one State for use in proceedings in another is consistent with the framework of the Convention.[679] While the Convention does not specifically address such technologies, the Special Commission has noted that it does not preclude their use in facilitating the taking of evidence under Chapter II. The Special Commission has, however, also noted that such technologies may be available provided that their use is not forbidden in the State in which the evidence is to be taken, and provided that the necessary permission has been obtained where such permission is required. The use of information technology by Consuls and Commissioners may however be limited to the information technology available for public use in the State of execution.

476. The first (and most common) scenario for the use of video-link under Chapter II is where the video-link is established between a place in the State of origin where the Commissioner is located and the place in the State of execution where the testimony is being given. The Special Commission has expressly acknowledged this possibility, noting that Article 17 does not preclude a member of judicial personnel of the court of origin (or other duly appointed person), who is located in one Contracting Party, from examining a person located in another Contracting Party by video-link.[680]

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678 For a discussion of the history and evolution of the taking of evidence by commissioners appointed by courts in Ireland see *Moorview Developments Ltd v. First Active plc* [2008] IEHC 274. A historical discussion of the appointment of commissioners under English and Australian law may also be found in *Elna Australia Pty Ltd v. Int'l Computers (Australia) Pty Ltd* (*op. cit*. note 253) and *Indochina Medical Co. Pty Ltd v. Nicolai* (*op. cit.* note 138).

679 C&R Nos 42-44 of the 2003 SC, C&R No 55 of the 2009 SC, and C&R No 20 of the 2014 SC.

680 C&R No 20 of the 2014 SC.

477. Other alternative scenarios may include, for example, instances (*e.g.*, in the case of geographically large areas) in which a Consul or Commissioner could use video-link to examine a witness located at a (distant) location which is nonetheless still within the State of execution. In some rare cases, another (albeit unlikely) scenario could be envisaged, in which a Consul or Commissioner is located neither in the State of origin nor the State of execution, but in a third State (a Contracting Party), and is charged with taking evidence of the witness / expert physically located in the State of execution (*e.g.*, where the diplomatic mission of the State of origin accredited to the State of execution is located in a third State, see para. 478 below). Presumably in most such cases the Consul or Commissioner would travel to take the evidence, but it is possible that in some cases the evidence could be obtained via video-link.

478. In the case of a Consul this situation could theoretically be possible, because under Article 15 a Consul may take evidence "in the territory of another Contracting State and within the area where he [or she] exercises his [or her] functions". Therefore, when reading this Article in conjunction with Article 7 of the *Vienna Convention on Consular Relations*, which permits consular functions to be exercised from a post in another State, this would seem to allow for a possibility where a Consul may take evidence by video-link from a consular post of their sending State located not in the State of execution, but another Contracting Party to the 1970 Evidence Convention.[681]

479. A video-link may also be used to facilitate the presence and participation of the parties or representatives and the judicial personnel located in the State of origin in the taking of evidence by the Consul or Commissioner in the State of execution.

480. In order for a Consul or Commissioner to examine a witness / expert by video-link, a number of conditions must be satisfied. The State of execution must not have excluded (pursuant to Art. 33) the application of the relevant Article(s) of Chapter II. In addition, the person must either be a Consul accredited to the State of execution (Arts 15(1) and 16(1)) or have been duly appointed as a Commissioner (Art. 17(1)). In cases where prior permission is required, the Consul or Commissioner must comply with any conditions specified by the competent authority in granting its permission.

481. As the taking of evidence under Chapter II does not (necessarily) involve the authorities of the State of execution (except for the purposes of granting required permissions or providing assistance to obtain evidence by compulsion), the Commissioner could, in such cases, be responsible for arranging the video-link at both locations. This being said, some Contracting Parties have, by way of declaration, conditioned the taking of evidence by Consuls or Commissioners, requiring that the authorities of the State of execution have more control over the taking of evidence.[682]

II. Exclusion of Chapter II

1. Article 33 reservation

482. As noted at paragraph 31, Article 33 permits Contracting Parties to exclude in whole or in part the application of Chapter II by reservation. The reservation must be made at the time of signature, ratification or accession. Most Contracting Parties have made no reservation to exclude the application of Chapter II. Of those that have, the vast majority have excluded its application only in

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681 Art. 7, *Vienna Convention on Consular Relations* states "The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned".

682 See, *e.g.*, declarations of France and Germany, available on the Evidence Section of the HCCH website under "Contracting Parties".

part.[683]

2. Reciprocal effect

483. While making a reservation excluding Chapter II of the 1970 Evidence Convention does not automatically implicate a reciprocal unavailability of the provisions of Chapter II in other Contracting Parties that have chosen to make those methods available, any Contracting Party may apply the same exclusion of Chapter II on a reciprocal basis to any Contracting Party that has excluded its application at the time of the reservation of the latter (Art. 33(3)).

3. Withdrawal of reservation

484. Any Contracting Party that has excluded the application of Chapter II through a reservation under Article 33 may at any time withdraw its reservation. States that do so may not re-impose the reservation at a later date. Contracting Parties that have applied a reciprocal exclusion of Chapter II to reserving States may not continue to apply that exclusion once a reservation has been withdrawn.

The use of Chapter II

485. There is relatively little case law and data on the operation of Chapter II (in those Contracting Parties that have not excluded its operation under Art. 33).[684] This is largely a result of the fact that the judicial and administrative authorities of a State are not generally involved in the taking of evidence under Chapter II as compared to the taking of evidence under Chapter I. Moreover, there is generally no centralised body that oversees the operation of Chapter II within a particular Contracting Party to facilitate the collection of statistics.

486. Despite the limited availability of statistics, it appears that Chapter II is regularly used in practice. For many Contracting Parties, particularly common law States, the use of Chapter II to take evidence in their territory is preferred, at least in cases where evidence is to be taken from a willing witness.[685]

487. The taking of evidence abroad by Consuls in particular may also be performed under other treaties, in particular the *Vienna Convention on Consular Relations* (see discussion at para. 575), which continues to have full force (Art. 32).

III. Engagement of Consuls and Commissioners

488. The 1970 Evidence Convention does not provide an independent source of the power for a Consul or Commissioner to take evidence.[686] It therefore remains for the law of the State of origin to

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683 Pursuant to Art. 33(3) of the Convention, "any other State affected" (*e.g.*, the State of execution vis-à-vis the State of origin) may apply reciprocity. Therefore, it is recommended to verify whether both the State of origin and the State of execution have objected to the relevant provision of Chapter II. For a breakdown of Contracting Parties that have made an Article 33 reservation excluding in whole or in part the application of Chapter II, see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", available on the Evidence Section of the HCCH website.

684 See responses to questions 10 and 17 of the 2013 Questionnaire and question 8 of the 2008 Questionnaire.

685 In the United States, the *Federal Rules of Civil Procedure* seek to put the use of Letters of Request and Consuls and Commissioners on an equal footing, counteracting earlier case law according to which a Letter of Request would only be issued if the use of a Consul or Commissioner was shown to be impossible or impractical: see B. Ristau (*op. cit*. note 184), § 3-2-1(3).

686 This is succinctly stated in the Explanatory Report (para. 161): "It should also be emphasised that Chapter II grants no power to a consul to take evidence, it merely gives him a privilege. The law of the consul's State will determine whether he has the power to take evidence as part of his functions. It is conceivable that the domestic law of a certain State might

determine whether a Consul or Commissioner may be used to take evidence abroad in aid of proceedings and, if so, the procedures for their engagement or appointment and the parameters of their authority (including how the evidence is to be taken).

489. The use of Consuls and / or Commissioners is provided for in the law of many jurisdictions,[687] including Australia,[688] Cyprus,[689] France,[690] Germany,[691] China (Hong Kong SAR),[692] Israel,[693] Japan,[694] the Seychelles,[695] Slovakia,[696] South Africa,[697] the United Kingdom[698] and the United States.[699] In many common law States, the term "examiner" or "special examiner" is used for Commissioners and Consuls.[700]

490. There has also been a positive development in facilitating the taking of evidence by diplomatic agents or consular officers. In the European Union, amendments were made in the 2020 EU Evidence Regulation. According to its Recital 24, 25 and Article 21 of this Regulation, Member States may provide in their national law for their courts to be able to request their diplomatic agents or consular officers in the territory of another Member State, and within the area in which they are accredited, to take evidence at the premises of the diplomatic mission or consulate (except in exceptional circumstances). In that case, such persons can take evidence, without needing to make a prior request, by hearing, on a voluntary basis and without the use of coercive measures, nationals of the Member State which they represent in the context of proceedings in the courts of the Member State which they represent.

Commissioner appointed to take evidence abroad under Chapter II versus examiner appointed to execute Letter of Request under Chapter I

491. As noted at paragraph 273, some Contracting Parties (typically common law States) appoint "examiners" to execute Letters of Request under Chapter I. In some States (such as India), this device is referred to as a "commissioner". To avoid confusion, the provisions of Chapter II regarding the taking of evidence abroad by Commissioners do not apply to the execution of Letters of Request

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not authorise its consuls to take evidence in the State where they will exercise their functions. In such a situation, nothing in Chapter II will grant the consul a power which his own Government denies him. All that Chapter II can provide is that, if his own Government gives him the power to take evidence, the State of execution will permit him to exercise this power, upon the terms and conditions set forth in Chapter II".

687 As B. Ristau notes, the actual use of diplomatic officers (as opposed to consular officers) to take evidence is infrequent: Ristau, International Judicial Assistance (*op. cit*. note 184), § 5-3-1.

688 *Foreign Evidence Act 1994* (for proceedings in federal courts) and similar state legislation (for proceedings in state courts, such as the *Evidence on Commission Act 1995* of New South Wales).

689 *Civil Procedure Rules*, Order 37 (Evidence on commission or before examiner).

690 *Code of Civil Procedure*, art. 733 (Applicability subject to international conventions) and 734 (Diplomatic or consular authorities).

691 *Code of Civil Procedure*, Book 2, Chap. 1, Title 5, § 363(2) (Evidence taken abroad: Consul) in conjunction with the *Konsulargesetz* (Consular Act).

692 *Rules of the High Court*, Order 39, r. 2.(2) (Consul as "special examiner").

693 *Evidence Ordinance*, 1971, Chapter A, art. C ("examiner").

694 *Code of Civil Procedure*, art. 184(1) (Ambassador, minister or consul).

695 *Evidence Act*, Chapter 74, s. 11 (Rogation: "examiner") and 28(1) (Diplomatic or consular officers).

696 *Act No 97 of 1963 on Private International Law and Procedure*, § 59 (Consul).

697 *High Court Rules*, r. 38(3) (Commissioner).

698 *Civil Procedure Rules*, Part 34 (England) (Examiner of the court); *Rules of the Court of Judicature (NI) 1980*, Order 39, r. 2(2) (Northern Ireland) (Consul as "special examiner"); *Court of Session Rules*, r. 35.11 (Scotland) (Commissioner).

699 *Fed. R. Civ. Pro*. 28(b)(1). For Consuls, see also 22 U.S. Code of Laws 4215 and 22 Code of Federal Regulations §92.55. The use of Consuls and Commissioners is described further by the US Department of State in Volume 7 of the *Foreign Affairs Manual*.

700 As D. McClean (*op. cit*. note 79) notes, the order for the appointment of an examiner under the *Civil Procedure Rules* in England "is the modern equivalent of the long-obsolete practice of issuing a commission for the taking of evidence out of the jurisdiction": p. 125. In Australia, while the legislation still captures both practices (*e.g.*, s. 7(1) of the *Foreign Evidence Act 1994* refers to both the *appointment of an examiner* and the *issuance of a commission*), the rules of civil procedure refer to the more modern practice of appointing an examiner (*e.g.*, Division 29.2 of the *Federal Court Rules 2011* giving effect to the *Foreign Evidence Act 1994*).

by such "examiners" or "commissioners".

1. How is a Consul engaged?

492. The Convention does not define the term "consular agent" or "diplomatic officer". It is therefore for the law of each Contracting Party to determine who is a Consul of that Contracting Party.

493. Where the law of a State of origin provides for the use of Consuls to take evidence abroad, that law also determines what, if any, formal procedures must be followed in order to engage a Consul for that purpose. Such procedures may range from petitioning the Court of Origin to appoint a specific Consul, to a party informally making arrangements directly with the appropriate embassy or consulate. In some States, the procedures for engaging a Consul are the same as those for appointing a Commissioner (para. 495). In case of doubt, the Court of Origin or interested party should contact the consular services of the State of origin for further information on the use of Consuls to take evidence abroad. It is important to note that where permission is required for the Consul to take evidence (para. 496), such permission may be conditioned upon a particular procedure being followed (*e.g.,* engagement of a specific Consul).

2. Who may be appointed as a Commissioner?

494. The Convention does not define the term "Commissioner" or specify any particular legal prerequisite as to what constitutes a Commissioner for the purpose of taking evidence under the Convention. Accordingly, it is left to the law of the State of origin to determine who may be appointed as a Commissioner. The appointment of a Commissioner may also be made by an authority of the State of execution, depending on the relevant legal provisions. In practice, a Commissioner is often a legal practitioner (whether located in the State of origin or State of execution), but may be a judicial official (including the presiding judge) or a court reporter.[701] In some States, Consuls may be appointed as Commissioners[702] (in which case, even though the law of the State deems the Consul to be taking evidence as a Commissioner, the Convention deems the Consul to be taking evidence as a Consul, and therefore under Arts 15 and 16 rather than under Art. 17).

3. How is a Commissioner appointed?

495. Commissioners are generally appointed by the Court of Origin.[703] However, nothing in the Convention prohibits a Commissioner from being appointed by an authority of the State of execution

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701 In practice, the commissioner is often a court reporter who is not affiliated with either party. In England, a barrister or solicitor-advocate who has been practising for a period of not less than three years may be appointed as a commissioner (known as "examiners"): *Civil Procedure Rules*, r. 34.15. In *Peer Int'l Corp. v. Termidor Music Publishers Ltd* [2005] EWHC 1048 (Ch), the court noted that "there is nothing that bars a High Court judge who is hearing the case in England appointing himself to be the special examiner". In that case, the presiding judge appointed themself as examiner to take evidence of a witness in Cuba in the United States, any person may be appointed as a commissioner, including private persons: S. Devine & C. Olsen, "Taking Evidence Outside of the United States", (1975) 55 *B.U. L. Rev*. 368, p. 371. A case in the United States involved the appointment, by agreement of the parties upon order of the court to use the procedures provided for in Chapter II of the Convention, of "a former member of the French Constitutional Court with extensive expertise in French law and discovery issues" as commissioner: *Kristen Behrens, Esq., et al. v. Arconic Inc. et al.*, No. 2:19-cv-02664, Baylson J. (E.D. Pa. 16 September 2020). See also N. Lenoir, "Le droit français de la prevue et la protection contre les excès de l'activisme judiciaire international" (*op. cit.* note 60) on the case *Behrens v. Arconic, Inc*. (*op. cit.* note 63) where it was understood that in this case, the judge later appointed a commissioner to channel the transfer of evidence from France to the United States by selecting only documents related to the dispute or not posing any difficulty from the perspective of protection of personal data.

702 See, *e.g.*, for the United Kingdom, Practice Direction 34A, para. 5.8 ("A special examiner appointed under rule 34.13(4) may be the British Consul or the Consul-General or his deputy in the country where the evidence is to be taken…").

703 See, *e.g.*, Australia (*Foreign Evidence Act 1994*, s. 7(1)), England (*Civil Procedure Rules*, r. 34.13(4)), United States (*Fed. R. Civ. Pro*. 28(b)(1)(d)). The United States District Court for the Eastern District of Pennsylvania assumed that Art. 17 only provided for the taking of evidence by a Commissioner appointed by the State of execution: *In re Asbestos Products Liability Litigation*, No. 11-cv-31524, 2012 WL 3553406 (E.D. Pa. 13 August 2012). This decision is at odds with other cases and commentary.

if the law of that State provides for the appointment of Commissioners to take evidence.[704] Where a witness is sought to be examined and cross-examined by the representatives of each party, the law of the State of origin may provide for each representative to be appointed as a Commissioner. The Convention does not provide that the State of execution may condition the authority of the State of origin to appoint a Commissioner. There are certain specific requirements relating to permission from the State of execution, which are detailed in paras 496 *et seq*.

IV. Permission to take evidence

1. When is permission required?

496. A Consul may take evidence of nationals of the State of origin *without* the prior permission of the State of execution unless that State has declared that such permission to do so is required (Art. 15(2)). Conversely, the Consul may only take evidence of a national of the State of execution or of a third State *with* the prior permission of the State of execution unless that State has declared that prior permission is not required (Art. 16(2)).[705]

497. A Commissioner may only take evidence (regardless of the nationality of the person giving evidence) with the prior permission of the State of execution unless that State has declared that prior permission is not required (Art. 17(2)). For a breakdown of Contracting Parties that have made a declaration under Articles 15(2), 16(2) and 17(2), see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", available on the Evidence Section of the HCCH website.

498. The Special Commission has noted that such applications for permission to take evidence under Chapter II may be subjected to the same conditions of specificity required for Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as discussed at paragraph 426, notwithstanding the fact that Article 23 applies only to Chapter I.[706]

499. There has been positive development in ongoing efforts to reduce such requirements for permission. For example, in Switzerland, a draft federal decree which proposes to amend the Swiss declaration on Articles 15, 16 and 17 was under consultation. This amendment would permit the questioning or hearing of a person residing in Switzerland to be conducted by telephone or videoconference without prior approval from Swiss authorities, provided certain conditions are met. At the time of publication of this Handbook, the new proposal is subject to Parliament's approval.

2. Who must apply for permission?

500. The Convention does not specify who applies for permission, although the Explanatory Report assumes that the application will be made by the Consul or Commissioner.[707] In practice, permission is often applied for by the Court of Origin or the embassy or consulate of the State of origin. In case of doubt, the interested party should contact the designated competent authority or the Central Authority of the State of execution. Consuls with experience in the State of execution may also be able to provide guidance to practitioners from the States they represent.

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704 This was acknowledged by the Amsterdam Court of Appeal of the Netherlands in *Vereniging van Effectenbezitters (Association of Security Holders) v. Koninklijke Ahold N.V.*, Hof. Amsterdam, 24 November 2005JOR 2006/6. It is also contemplated in the Explanatory Report, para. 182 ("a commissioner may be appointed either by the judicial authority of the State of origin or the judicial authority of the State of execution"). If a Commissioner is sought to be appointed by an authority of the State of execution, this would presumably be done pursuant to a request from the Court of origin.

705 For a discussion of the reasons behind the different regimes for nationals and non-nationals of the State of origin, see Report of the 1968 SC (*op. cit*. note 16), pp. 63-4.

706 C&R No 19 of the 2014 SC.

707 Explanatory Report, paras 169 and 176.

501. The Convention does not prescribe any form for applying for permission, which remains a matter for the State of execution.[708] Some States, such as Switzerland, have published detailed instructions for applying for permission.[709] While there is no Model Form for requesting permission under Chapter II (as this remains a matter for the State of execution), some experts have considered that the Model Form for Letters of Request under Chapter I may be useful when applying for permission to take evidence under Chapter II. In such cases, the Model Form should be adapted accordingly.[710]

502. Where the request is for evidence to be taken by video-link, the request for permission should specify this and whether any assistance would be required from the State of execution.[711] The Model Form may be used for this purpose.

3. Who gives the permission?

503. Permission is given by the competent authority designated by the State of execution. Permission may be given generally (*i.e.,* the Consul or Commissioner need not request permission for each case in which they seek to take evidence) or on a case-by-case basis. Where permission is required for evidence taken of nationals of the State of origin (Art. 15), permission is given on a case-by-case basis.

4. Conditions to the grant of permission

504. In granting its permission, the competent authority may lay down such conditions as it deems fit (Art. 19). These may include:

a. fixing the time or place for the taking of the evidence;[712]

b. fixing a time period for taking the evidence;

c. requiring reasonable advance notice of the time and place of the taking of the evidence to be provided to the competent authority;

d. the presence of a representative of the competent authority or other persons at the taking of the evidence;[713]

e. defining and limiting the scope and subject-matter of the examination;

f. defining and limiting the documents or other objects to be produced; and

g. defining and limiting the scope of the entry and inspection of real property.

505. As noted at paragraph 496 *et seq*, applications for permission to take evidence under Chapter II may be subjected to the same conditions of specificity required for Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as discussed at paras 426 *et seq*.

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708 France and the Netherlands have each specified the conditions for applying for permission under Chapter II in their respective declarations. For the text of these declarations, go to the "status table" on the Evidence Section of the HCCH website and click on the hyperlink in the column entitled "Res/D/N". In some cases, permission is applied for using a modified Letter of Request form that is used to obtain evidence under Chapter I.

709 See the fact sheet published by the Federal Office of Justice entitled "Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland", available online at: < https://www.rhf.admin.ch/dam/data/rhf/zivilrecht/wegleitungen/mb-beweiserhebung-commissioners-e.pdf > [last consulted on 9 April 2024].

710 Annex 4, "Guidelines for completing the Model Form".

711 For more information on the types of possible assistance, including testing the equipment prior to the hearing and reserving appropriate facilities, see Annex 6, along with Country Profiles of the relevant Contracting Party.

712 For example, France has declared as a general condition that evidence taken pursuant to Arts 16 and 17 must be taken in the precinct of the embassy of the State of origin.

713 For example, the Netherlands has declared that the competent authority may decide for the evidence to be taken under the supervision of a designated judge.

506. However, the competent authority may not lay down conditions that are inconsistent with other provisions of Chapter II governing the taking of evidence, in particular the provisions in Article 21.[714] For example, the competent authority may not limit the kinds of evidence that the Commissioner may take (contrary to Art. 21(a)), or limit the manner provided for by the law of the State of execution (contrary to Art. 21(d)).[715] Nor can the competent authority specify as a condition that persons concerned cannot be represented by legal counsel.[716] Moreover, as noted at paragraphs 494 and 495 the Convention does not provide that the State of execution may condition who may be appointed as a Commissioner for the purpose of taking evidence, or the authority of the State of origin to appoint a Commissioner.

507. In the context of using video-link, such use must not be prohibited by the law of the State of execution (Art. 21(d)).

V. The taking of evidence

508. As a basic rule, evidence is taken under Chapter II in accordance with the law of the State of origin. At the same time, where prior permission is required, the Consul or Commissioner must comply with any conditions that the competent authority has laid down in granting its permission for the evidence to be taken (Arts 16(1)(b), 17(1)(b) and 19), and this includes requirements of content and form. For example, the State of execution may require that a video-link be prepared in a particular manner as a condition for granting permission (*e.g.*, that it be arranged by a particular person, that a particular location be used, that particular equipment or technical support be used, or that particular personnel be in attendance, such as an official of the State of execution).

1. Notification of the witness

509. The 1970 Evidence Convention assumes that the Consul or Commissioner will notify the witness in writing, requesting them to give evidence at a particular time and place. The Convention requires the request to be in the language of the State of execution, or accompanied by a translation into that language, unless the recipient of the request is a national of the State of origin. It also requires the request to inform the recipient that:

a. the witness is entitled to be legally represented (Art. 20 and Art. 21(c)); and

b. the witness is not compelled to appear or to give evidence, unless the State of execution has made a declaration under Article 18, or the law of that State provides for measures of compulsion to be taken against the witness to assist the taking of evidence by Consuls or Commissioners (as the case may be).

510. In practice, the witness is often contacted by the party seeking to have the evidence taken prior to the engagement or appointment of the Consul or Commissioner to determine that the witness is willing to give evidence. This may be required by a law of the State of origin as a condition to the engagement or appointment of the Consul or Commissioner. The State of execution may also require confirmation that the witness is willing to give evidence as a condition to granting permission (see para. 504).

511. In addition to the requirements mentioned above, in the case of use of video-link, the witness should also be informed that evidence will be taken by video-link and whether the parties, representatives or judicial personnel will be present via video-link. Where the witness is contacted

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714 See discussion in Explanatory Report, paras 198 and 204-8.

715 In one case in Italy, the Court of Appeal of Brescia found that the taking of evidence by a Commissioner could not be challenged on the basis that the questions to be put to the witnesses had not been specified in the application for permission: *Stanadyne Automotive S.p.A. v. Traverso* (*op. cit.* note 620).

716 Explanatory Report, para. 211.

by the party seeking to have evidence taken prior the engagement or appointment of the Consul or Commissioner to determine that the witness is willing to give evidence, it is of the utmost importance that the witness is aware that the taking of evidence will be conducted by video-link.

2. Types of evidence

512. The Convention provides that the Consul or Commissioner may take all kinds of evidence which are not incompatible with the law of the State of execution or contrary to any permission granted (Art. 21(a)). Traditionally, Consuls and Commissioners have been used to obtain witness testimony,[717] however the law of the State of origin may provide for a Consul or Commissioner to take other types of evidence, such as the inspection of documents or other property, real or personal. In many common law States, the law still only provides for the use of Consuls and Commissioners to examine witnesses. As noted at paragraph 63, Chapter II only provides for the taking of evidence; it does not provide for the performance of "other judicial acts".

513. The term "incompatible" should be given the same meaning as in Article 9(2), which, as discussed at paragraph 305, assumes a *very high threshold*. This was confirmed by the Court of Appeal of Rome in Italy, which found that incompatibility in the sense of Article 21(a), like in the sense of Article 9(2), required some constitutional inhibition or absolute statutory prohibition.[718]

3. Methods and procedures

514. The Convention provides that evidence may be taken in the manner provided by the law applicable to the Court of Origin provided that such manner is not forbidden by the law of the State of execution (Art. 21(d)).[719] This allows the Consul or Commissioner to ensure that the evidence is taken in a manner such that it is utilisable in proceedings in the Court of Origin.[720]

515. The methods and procedures for taking evidence are prescribed by the law of the State of origin (*e.g.*, in consular regulations and / or rules of civil procedure), and are supplemented in a particular case by instructions set out in the appointing document or commission. These methods and procedures may provide for:

a. the place of examination – as noted at paragraph 504, a particular place may be fixed by the competent authority in granting permission (in cases where prior permission is required);

b. the examination of witnesses on the basis of specific questions or subject-matter (the questions or subject-matter will generally be specified in the document engaging the Consul or the commission);

c. the cross-examination of the witnesses – in some States, the Consul or Commissioner presides over the examination as a neutral supervisor,[721] whereas in others, it is the Commissioner that examines and cross-examines the witness;

d. the language of the examination and how interpreters are used (if needed);

e. employing a stenographer to take a verbatim transcript, or using audio / audio-visual

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717 D. McClean (*op. cit*. note 7979), p. 132.

718 CA Rome, 21 April 1995, *Riv. dir. int. priv. proc*. 1995, p. 753. In that case, the kinds of evidence sought by the Commissioner were witness testimony and documentary evidence, which the Court found were not "incompatible" with the internal law of Italy.

719 Although Consuls in particular may not be legal practitioners, the drafters of the Convention presumed that they would be generally familiar with the methods by which evidence is produced in the courts of the State of origin and would have the benefit of instructions set out in the consular regulations issued by the Ministry of Foreign Affairs of that State: see Report of the 1968 SC (*op. cit.* note 16), p. 68.

720 *Ibid*.

721 This is sometimes referred to as an "open commission": see discussion in the Report of the 1968 SC (*op. cit*. note 16), p. 69.

equipment to take a recording of the witness examination;

f. certifying that the recorded testimony is accurate and reliable; and

g. the handling and recording of objections made by a party or a witness.

516. Whether a particular manner of taking evidence is "forbidden" by the law of the State of execution will generally require a specific statutory prohibition against the taking of evidence in such a manner,[722] although some States may rely on general principles of procedural law such as due process to circumscribe the manner in which evidence is taken in their territory. In one case, the Court of Appeal of Brescia in Italy confirmed that the examination of witnesses by a lawyer rather than a judge, and the recording of the examination, were not "forbidden" by the law of Italy.[723]

4. Oaths and affirmations

517. The importance of the administration of the oath or affirmation should not be underestimated.[724] However, it should be noted that in some jurisdictions a witness cannot be compelled to swear or affirm the truth of their statements.[725] This being said, the absence of an oath or affirmation, may adversely affect the probative value of any evidence taken.

518. The Convention provides that a Consul or Commissioner may administer an appropriate oath or affirmation in order to take evidence, provided that this is not incompatible with the law of the State of execution or contrary to any permission granted (Art. 21(a)). If the law of the State of execution confers exclusive competence on a particular authority of that State to administer oaths (*e.g.*, a judge or notary), the administration of an oath by foreign Consul or Commissioner may be "incompatible" with that law, in which case the Consul or Commissioner may wish to call in the competent authority to administer the oath.

519. The right to administer an oath does not supersede any limitations imposed by the law of the State of origin (*e.g.*, pursuant to the rules of civil procedure, consular regulations or the terms of the commission). In other words, if a Consul or Commissioner is not authorised to administer oaths under the law of the State of origin, the Convention does not confer an independent authority to do so.

520. Several potential questions may arise, for example: whether the oath / affirmation must be administered by the Consul or Commissioner;[726] whether the oath / affirmation is required to be administered at the same location as the witness; whether it must be administered (albeit unlikely) by a competent person of the State of execution; [727] and whether the law requires that it be administered in conformity with the law of the State of origin or the law of the State of execution.[728]

521. Depending on national or international instruments, oaths / affirmations administered by Consuls or Commissioners may have extraterritorial effects in the State of execution.

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722 B. Ristau (*op. cit*. note 184184), § 5-3-2(3).

723 Stanadyne Automotive S.p.A. v. Traverso (*op. cit.* note 620620).

724 See, *e.g.*, the discussion of the Supreme Court of India concerning the sending of a Consul to administer an oath in *State of Maharashtra v. Dr Praful B Desai* (*op. cit*. note 218218). The presence of the officer while the witness was giving evidence was viewed by the Court as a safeguard ensuring the witness was not coached, tutored, or prompted.

725 Response of Switzerland to Part VI, q. (d) of the 2017 Country Profile Questionnaire (*op. cit.* note Glossary).

726 The majority of the Contracting Parties (where Chapter II applies) which have responded to the question on who administers the oath or affirmation when evidence is taken under Chapter II of the Convention expressed a preference for it to be administered by the Consul or Commissioner provided that it complies with the rules of the State of origin and is in accordance with Art. 21(a) and (d) of the Convention. See, *e.g.*, the responses of Australia, France, Germany, Lithuania, United Kingdom (England and Wales) and Venezuela to Part VI, q. (d) of the 2017 Country Profile Questionnaire (*ibid.*).

727 See, *e.g.*, the response of Switzerland to Part VI, q. (d) of the 2017 Country Profile Questionnaire (*ibid.*).

728 R. A. Williams (*op. cit.* note 224193224), p. 20; See, also, Synopsis of Responses (*op. cit.* note 6), Part VI, q. (i).

In the context of execution by Video-link

522. In the case of a Consul using video-link to take evidence under Chapter II, the Consul may administer the oath or take the affirmation in accordance with the domestic law of the sending State (*i.e.*, the State that the Consul represents) and, in some cases, only within the confines of the Embassy that the Consul represents.[729] For example, a Consul may take the oath of a witness while the parties and their representatives and judicial personnel are present via video-link, if the law of the sending State so provides. It should be noted that when evidence is taken by a Consul, this would presumably take place in the State of execution as that is where the Consul would be exercising their functions.

523. In the case of a Commissioner, the oath may be administered or affirmation taken by video-link from the State of origin (with the witness therefore swearing or affirming in the State of execution),[730] provided that the Commissioner is empowered to do so under the law of the State of origin.

5. Identification of witness / expert and other experts

524. Unlike Chapter I of the Convention, the law applicable to the procedures for the identification of a witness / expert under Chapter II is the law of the State of origin.[731] This is provided such procedures are not forbidden by the law of the State of execution (Art. 21(d)), and any conditions imposed by the State of execution at the time of granting permission (Arts 16(1)(b) or 17(1)(b)) are fulfilled. This is also relevant for all actors in the proceedings who are present, either physically or via video-link.

525. Given that the examination is conducted by the Consul or Commissioner, it logically follows that the Consul or Commissioner also formally identifies the witness. The most common procedure in Contracting Parties that apply Chapter II which have provided information to the Permanent Bureau, is the verification of the identity documents of the witness / expert (as opposed to administering an oath or affirmation as to their identity).[732] When video-link technology is used in proceedings, in some cases this may require more stringent procedures than in regular in-person proceedings.

6. Compulsion

526. The Convention does not permit Consuls or Commissioners to compel the giving of evidence.[733] Nor does it require the State of execution to provide assistance in order to obtain the evidence by

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729 See, *e.g.*, 22 U.S. Code § 4221.

730 Although not under the provisions of the 1970 Evidence Convention, an analogous cross-border example arises under the 2008 Trans-Tasman Agreement (*op. cit.* note 538538), where the Australian implementing legislation specifies that for the purposes of a remote appearance from Australia in relation to New Zealand proceedings, the place in Australia from which the remote appearance is made "is taken to be part of [the New Zealand] court or tribunal". The legislation further expressly permits a New Zealand court or tribunal (under Australian law) to administer an oath or affirmation to the person giving evidence remotely (from Australia). See *Trans-Tasman Proceedings Act 2010* (Cth), sections 59, 62. By contrast, in some instances, the oath may need to be administered in the State of execution and not where the Commissioner is located. See, *e.g.*, D. Epstein *et al*. (*op. cit.* note 93), para. 10.24, in which depositions by remote means are discussed, noting that the *Fed. R. Civ. P.* 30(b)(4) of the United States has on at least one occasion been interpreted as requiring the oath to be administered at the location of the witness. See also, *Fed. R. Civ. P.* 30(b)(4) Depositions by Oral Examination, by Remote Means, "The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions."

731 Responses of Germany and Venezuela to Part VII, q. (r) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

732 See, *e.g.*, the responses of Bulgaria, Estonia, South Africa and the United Kingdom (England and Wales) to Part VII, q. (r) of the 2017 Country Profile Questionnaire (*ibid.*).

733 It should be noted that neither the *Vienna Convention on Consular Relations* (discussed at para. 589589) nor other multilateral instruments recognise any domestic provision of law that would empower a Consul to compel the giving of evidence in the State where they exercise their functions.

compulsion.[734] Instead, it establishes a mechanism for the State of execution to agree to provide such assistance on a case-by-case basis (Art. 18).

527. In order for assistance to be provided, the following conditions must be met:

a. the State of execution has made a declaration under Article 18(1) that a Consul or Commissioner may apply for assistance;[735]

b. an application for assistance has been made to the competent authority designated by the State of execution;

c. the application complies with the conditions set out in the declaration; and

d. the application is granted by the designated competent authority.

528. Therefore, under Chapter II, the witness / expert is not compelled to give evidence unless the State of execution has made such a declaration and grants a request for assistance in obtaining evidence by compulsion (Art. 21(c)).

529. The Convention contemplates that the application for assistance will be made by the Consul or Commissioner, and accords the competent authority complete discretion in establishing the conditions for applications and in deciding whether to grant assistance. Moreover, in granting an application for assistance, the competent authority may lay down such conditions as it deems fit (Art. 19).

530. Where assistance is provided, the measures of compulsion applied by the State of execution must be:

a. appropriate, having regard to the nature of the evidentiary enquiry and any conditions laid down by the State of execution for the grant of assistance;[736] and

b. prescribed by the law of the State of execution for use in internal proceedings (there is no obligation to employ methods of compulsion permitted by the law of the State of origin if they differ from those permitted under the law of the State of execution).

531. In practice, the mechanism for providing assistance under Article 18 is rarely used, particularly as very few Contracting Parties have made the required declaration.[737] That said, nothing in Article 18 prevents the State of execution from providing assistance under the provisions of its own internal law (Art. 27(b)).

532. It should be noted that, under Article 22, a failure to obtain evidence using the procedures provided for in Chapter II neither excludes nor should have any bearing on a subsequent application being made to take the evidence in accordance with Chapter I.

Compulsion in the context of execution by video-link

533. When video-link is used in the context of Chapter II, those issues mentioned above in relation to Chapter I (see paras 314 *et seq.*) will also apply to video-link. Accordingly, in some cases a distinction may need to be drawn between compelling a witness / expert to give evidence and compelling the witness / expert to give that evidence specifically via video-link. Even if the authority

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734 Compare this to the taking of evidence under Chapter I, where the requested authority is required to apply certain measures of compulsion pursuant to Art. 10: see paras310 310 *et seq*.

735 For a breakdown of Contracting Parties that have made a declaration under Article 18(1), see the "Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention", available on the Evidence Section of the HCCH website.

736 See Explanatory Report, para. 193.

737 In response to question 76 of the 2008 Questionnaire, amongst the States that responded, even those responding States that had made a declaration indicated that no application for assistance had ever been made.

of a Contracting Party compels a witness to give evidence, it may not necessarily be able to compel the witness to use video-link to give that evidence.

534. In addition, a few of the Contracting Parties that apply Article 18 mentioned that the taking of evidence by video-link under Chapter II must be done on a voluntary basis.[738]

7. Presence, participation and representation

535. The Convention provides that any "person concerned" may be legally represented in the taking of evidence (Art. 20). This provision confirms the right of the witness to be legally represented (as will have been notified to the witness, see para. 509). On the other hand, it is also designed to allow the parties to the proceedings to be represented. The Explanatory Report notes that in certain circumstances, the employer of the witness or an insurance company or guarantor may be considered a "person concerned".[739]

536. As noted at paragraph 514, the law of the State of origin may contemplate the active participation of the representatives of the parties in the taking of evidence by Consul or Commissioner. Moreover, as noted at paragraph 504, the grant of permission to take evidence (in cases where prior permission is required) may be conditioned on the presence of a representative of the competent authority or other persons at the taking of the evidence.

537. The practice of Contracting Parties governing how diplomatic and consular officers take evidence, in particular whether the parties, their legal representatives, and judicial personnel may participate in the taking of evidence, varies. For at least one Contracting Party, the presence and active participation of legal representatives in the taking of evidence by Consuls is of significance because it is the legal representative who takes the deposition in the presence of the Consul, and in some instances the legal representative may even ask the Consul to absent themself.[740] In such instances, the primary role of the Consul is to verify the identity of and administer the oath to the witness and / or assist with the testimony by arranging for interpreters and stenographers if necessary.

In the context of execution by video-link

538. When conducting the witness examination by video-link, the Consul or Commissioner should do so in accordance with the law of the State of origin and Article 21 of the Convention. In instances where prior permission is required, any conditions that the State of execution has placed upon the granting of such permission must be complied with, including those which are related to presence of, for example, representatives of the competent authority of the State of execution. In addition, internal law or procedure may prescribe that the witness has a right to counsel or legal representation.

539. In cases where the presiding official of the court of origin (or other duly appointed person) has been appointed as a Commissioner to examine a person located in the State of execution by video-link, the parties and their representatives should be able to participate as if the examination were to take place in person in the State of origin ([provided it is not incompatible with the law of the State of execution and] unless any conditions specified by the State of execution would limit or hinder this possibility).

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738 Responses of the United Kingdom (England and Wales) and the United States to Part IV, q. (g) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary). The United States also added that in the context of a 28 U.S. Code § 1782(a) motion to request that a U.S. district court issue an order to compel a witness to provide evidence in aid of a foreign proceeding, "[i]t is unlikely a U.S. court will compel a witness to directly provide evidence by video-link to a foreign court".

739 Explanatory Report, para. 212.

740 B. Ristau (*op. cit.* note 184184), p. 326.

8. Costs

540. The taking of evidence by Consul and Commissioner may incur a range of costs, including:

a. fees for the services of the Consul or Commissioner;

b. travel and accommodation expenses of the Consul or Commissioner (these are likely to be higher in the case of a Commissioner, as the Consul will generally be based in the State of execution);

c. travel and accommodation expenses of witnesses;

d. hiring costs for the place where the evidence is taken (*e.g.*, room in an embassy or courtroom) and the use of any particular equipment (*e.g.*, video-link equipment);

e. fees for interpreters and stenographers; and

f. fees or costs for applying measures of compulsion.

541. Costs may also be incurred by the State of execution in cases where it provides assistance to the Consul or Commissioner to obtain the evidence by compulsion pursuant to Article 18.

542. The Convention does not explicitly address costs related to taking evidence under Chapter II. Consuls may be required by the law of their State to collect fees for the services they provide related to the taking of evidence.[741] In the case of Commissioners, costs are determined by internal law or by the terms of the commission.[742] The costs of taking evidence under Chapter II are generally borne by the party seeking the evidence to be taken.[743] Where costs are incurred by the State of execution for compulsion, that State may require reimbursement as a condition for the giving of permission or granting of an application for assistance (as the case may be).[744] Examples include the costs associated with the use of the facilities where a specific location is to be used, such as a courtroom, or other administrative costs.[745]

In the context of execution by video-link

543. Where video-link is used in taking evidence, there is the possibility that additional costs could be incurred. The use of video-link may also give rise to additional costs stemming from the rental of the location to conduct the video-link, staff costs, or hiring technical support.[746] It is up to the law of the State of origin to determine whether such costs must be borne by the parties. In general, these costs are borne by the party seeking the evidence to be taken.

544. In practice, Commissioners are expected to make all necessary arrangements for the taking of evidence. Where video-link is used, this may include finding a location for the examination of the witness, booking the video-link equipment, and finding the necessary technical support. Where circumstances dictate that assistance of the State of execution may be necessary (*e.g.*, in order to comply with conditions accompanying any permission granted), authorities are encouraged to provide assistance in arranging the taking of evidence by video-link, where possible and appropriate.

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741 In the United States, the schedule for fees for consular services is set out in 22 CFR 22.1 (this Schedule promulgates fees for judicial assistance services in both Convention and non-Convention contexts).

742 See Explanatory Report, para. 162. For example, in England, the fees for a Commissioner are set out in Practice Direction 34B.

743 See, Report of the 1968 SC (*op. cit.* note 16), p. 72.

744 This is contemplated in the Explanatory Report, para. 163.

745 Response of Switzerland to Part VII, q. (w) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

746 Responses of Bulgaria and Lithuania to Part VII, q. (w) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

9. Privileges and duties to refuse to give evidence and other safeguards

545. Article 21(e) of the Convention – in conjunction with Article 11 – provides that a person may refuse to give evidence to a Consul or Commissioner insofar as they have a privilege or duty to refuse to give the evidence under:

   a. the law of the State of execution;

   b. the law of the State of origin, provided that the privilege or duty has been specified in the document engaging the Consul or the commission (as the case may be) or confirmed by the Court of Origin (if requested to do so by the Consul or Commissioner);[747] or

   c. the law of a third State, provided that the State of origin has declared that it will respect the privilege and duties existing under the law of that State.[748]

546. In addition, Article 21 of the Convention provides several safeguards for a person requested to give evidence under Chapter II. First, the "kinds of evidence" that may be taken are restricted to kinds "not incompatible with the law of the State where the evidence is taken or contrary to any permission granted" (Art. 21(a)). As discussed at paragraphs 517 *et seq*, the administration of the oath or affirmation is restricted in the same way, by the same Article. Moreover, under Article 21(d), the "manner" in which the evidence is to be taken is that which is provided for by the law of the State of origin, but this is similarly subject to any incompatibilities with the law of the State of execution.

547. Second, Article 21(b) imposes a language-related safeguard, requiring that the request (*i.e.*, summons) made to the prospective witness is drawn up in, or accompanied by a translation into, the language of the State of execution. The only exception to this requirement is if the prospective witness is a national of the State of origin (presuming then comprehension of the language of the State of origin).

548. Third, Article 21(c) requires that the request also inform the prospective witness of their right to be legally represented (as enshrined in Art. 20 of the Convention) and, in any Contracting Party not having made an Article 18 declaration regarding compulsion (see paras 526-534), that the witness is "not compelled to appear or to give evidence".

549. Finally, Article 21(e) affords a further complement to the aforementioned safeguards, providing that the prospective witness may also invoke the same privileges and duties to refuse to give evidence set forth in Article 11 for Chapter I.

550. The above privileges and duties to refuse to give evidence are relevant to both contexts of taking evidence in a traditional manner and via video-link.

10. Penal provisions

551. The discussion at paragraph 387 on penal matters connected to the taking of evidence under Chapter I applies with necessary changes to the taking of evidence under Chapter II.

552. As discussed in paragraph 387 (in the context of Chapter I), the drafters of the Convention made the conscious decision to exclude all reference to penal matters (such as contempt of court or perjury) connected to the taking of evidence, while noting the potential for a jurisdictional overlap to arise in relation to such matters.

553. Under Chapter II of the Convention, as evidence is taken directly, the Consul or Commissioner would generally conduct proceedings under their own law (*i.e.*, the law of the sending State for a Consul

747 See Explanatory Report, para. 221.
748 For more on privileges and duties not to give evidence, see paras 371 *et seq* and 386.

or the law of the State of origin), to the extent that it is not contrary to the law of the State of execution, as provided for in Article 21(d), or any conditions specified in granting the permission (Art. 21(a)). As indicated by a small number of the Contracting Parties which responded to the 2017 Country Profile Questionnaire the permission granted by the State of execution may require that the summons clearly state that the non-appearance of the witness cannot lead to prosecution in the State of origin.[749]

In the context of execution by video-link

554. In terms of the use of video-link, by way of example, when a Commissioner located in the State of origin is taking evidence via video-link from a witness / expert located in the State of execution, it is possible for perjury and contempt laws of both the State of origin and the State of execution to apply to the witness / expert examination by video-link. This could potentially expose the witness / expert to multiple prosecutions. By contrast, it is equally possible that the law of neither the State of origin nor execution may apply, or that neither has effective jurisdiction to prosecute a witness / expert accused of perjury or contempt.[750]

555. This jurisdictional overlap could similarly occur when evidence is taken by a Consul under Chapter II. In such cases, the Consul administers the oath pursuant to the law of the State of origin, which may have specific "extra-territorial" application,[751] in that the oath / affirmation is considered, for all intents and purposes, to have the same effect as if it had been administered or taken within the territory of the State of origin.[752] This may raise issues of prosecution and enforcement as a subsequent sanction for perjury would only have effect in the State of origin.[753]

556. In the view of some commentators, this lack of regulatory clarity could have significant implications, including possibly diminishing the probative value of the entire testimony, bringing into question the effectiveness of any oath(s) / affirmation(s).[754] In the case of perjury, the issues arising are twofold: first, in the State of origin, whether a statement made abroad can amount to perjury; and second, in the State of execution, whether a statement made to a foreign court, Consul, or Commissioner can amount to perjury.[755] In the case of contempt, some commentators have suggested that contempt of court would likely be dealt with by the *lex fori*, given the "virtual presence" of the witness / expert in the courtroom.[756]

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749 See, *e.g.* the declarations made by France and Luxembourg available on the Evidence Section of the HCCH website (see path indicated in note 682).

750 This is evident from the Synopsis of Responses (*op. cit.* note 6), Part VI, q. (j). Contracting Parties which have responded were almost equally divided as to whether the law of the State of origin or the law of the State of execution would govern perjury when evidence is taken by video-link under Chapter II.

751 This possibility is acknowledged by Germany also in relation to evidentiary and criminal law, see response of Germany to Part VI, q. (d) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

752 See, *e.g.*, 22 U.S. Code § 4221: "[…] Every such oath, affirmation, affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto […]."

753 *Ibid.*, § 4221: "[…] If any person shall willfully and corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any Act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense […]."

754 See, *e.g.*, M. Davies (*op. cit.* note 194193), pp. 206, 229 (see, generally, pp. 221-227 on perjury, and pp. 228-232 on contempt of court).

755 *Ibid.*, pp. 221-222.

756 *Ibid.*, p. 228; R. A. Williams (*op. cit.* note 224), p. 19. The concept of contempt as known in common law States may not be fully implemented in the legal systems of some Contracting Parties. See the response of Germany Part VI, q. (d) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

557. If testimony by video-link is to compete with physical presence testimony in terms of judicial utility, resolving such uncertainties is of paramount importance. However, resolving the potential overlapping application of, or jurisdictional gaps between, different penal provisions is not addressed in the Convention. Instead, it is left to internal law, arrangements between Contracting Parties (*e.g.*, pursuant to mutual legal assistance agreements in criminal matters), or general principles of public international law.

11. Recommended practices

558. In addition to researching the requirements that are applicable to the taking of evidence by Consuls or Commissioners in a particular Contracting Party pursuant to Chapter II of the Convention, parties are encouraged to employ good practices to ensure the smooth execution of their requests. These include, but are not limited to:

a. providing sufficient time to obtain the necessary permissions from the designated competent authority when necessary;

b. determining the scope of services that Consuls are authorised to provide under the law of the States they represent;

c. ascertaining any limitations on the scope of assistance that the law of the State of execution imposes on Consuls and Commissioners, and presenting a request that appropriately conforms to such requirements;

d. including a statement from proposed witnesses indicating that they are willing to provide the evidence voluntarily as this may obviate any need for a competent authority designated to provide permission to independently ascertain the willingness of the witness(es);

e. determining the availability of stenographers and interpreters in a timely manner;

f. ascertaining the need, if any, for particular visas or work permits necessary for anyone to travel for the purpose of participating in the taking of evidence pursuant to Chapter II.[757]

[757] Many Contracting Parties that may not require visas for travel for the purpose of tourism do require visas for paid work, including persons travelling to participate in the taking of evidence under any provision of Chapter II of the Convention. Parties are encouraged to contact the nearest embassy of the State of execution in order to determine what, if any, visa requirements exist.

PART 4. Relationship with other Treaties, Regional Instruments, Internal law

I. General

559. The 1970 Evidence Convention is motivated by a desire to improve judicial cooperation among Contracting Parties.[758] In this spirit, the Convention seeks to operate harmoniously with other treaties and internal laws that provide more favourable and less restrictive rules of international judicial co-operation in the taking of evidence. The Convention achieves this goal through a series of provisions set out in Chapter III. Chapter III of the Convention contains specific provisions which address the relationship between the Convention and (i) other HCCH Conventions and Instruments (Arts 29-31); (ii) supplementary agreements (Art. 28); (iii) other international agreements dealing with the taking of evidence abroad (Art 32); and (iv) the provisions of internal law of Contracting Parties on taking of evidence (Arts 9, 21(d) and 27).

II. Relationship between the 1970 Evidence Convention and other HCCH Conventions and Instruments (Arts 29 – 31)

1. Relationship with the 1905 Civil Procedure Convention

560. Chapter II of the 1954 Civil Procedure Convention is a verbatim reproduction of Chapter II of the earlier *Convention of 17 July 1905 relating to civil procedure* (1905 Civil Procedure Convention), which also contains provisions on free judicial assistance. The 1954 Civil Procedure Convention replaces the 1905 Civil Procedure Convention in all respects in relations between States that are party to both the 1954 and the 1905 Conventions. Similarly, the 1970 Evidence Convention replaces Articles 8 to 16 of the 1905 Convention between States that are party to both Conventions (see Art. 29 of the 1970 Evidence Convention).

561. All Contracting Parties to the 1905 Civil Procedure Convention have joined either the 1954 Civil Procedure Convention or the 1970 Evidence Convention (or both). As a result, the 1905 Convention is no longer applicable between its Contracting Parties. The provisions of the 1970 Evidence Convention described in this section concerning the replacement and preservation of the 1954 Civil Procedure Convention, as well as the carrying forward of the supplementary agreements, apply equally to the 1905 Civil Procedure Convention.

2. Relationship with the 1954 Civil Procedure Convention

562. As noted at paragraph 9, the 1970 Evidence Convention was designed in part to improve the system of taking evidence abroad by letter of request under the 1954 Civil Procedure Convention. Many Contracting Parties to the 1970 Evidence Convention are also party to the 1954 Civil Procedure Convention. Article 29 of the 1970 Evidence Convention makes it clear that between Contracting Parties to the Convention that are also party to the 1954 Civil Procedure Convention, the former replaces the relevant provisions of the latter (*i.e.*, Chapter II, Arts 8 to 16). Accordingly, a Letter of Request which is issued by a Contracting Party that is party to the 1954 Civil Procedure Convention and the 1970 Evidence Convention to another Contracting Party that is also party to these two Conventions, will be governed by the 1970 Evidence Convention rather than by the 1954 Civil Procedure Convention.

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758 Preamble to the Convention.

563. Article 30 of the 1970 Evidence Convention expressly preserves the application of Article 24(2) of the 1954 Civil Procedure Convention, which deals with free judicial assistance in cases involving a person receiving legal aid. The reason for this is that the 1970 Evidence Convention does not cover legal aid. Accordingly, between two Contracting Parties that are both party to the 1954 Civil Procedure Convention and the 1970 Evidence Convention, Article 24(2) of the 1954 Convention will continue to apply, and therefore the Requested State may not require the Requesting State to reimburse any costs with the exception of expert fees, if the Letter of Request relates to the case of a person who has been granted the benefit of legal aid under the 1954 Civil Procedure Convention. If both Contracting Parties are also party to the 1980 Access to Justice Convention (which replaces the provisions of the 1954 Civil Procedure Convention on legal aid),[759] Article 13(1) of that Convention will apply to the provision of free judicial assistance instead of Article 24(2) of the 1954 Civil Procedure Convention.

564. The 1970 Evidence Convention does not affect the application of the 1954 Civil Procedure Convention for States that are not party to the 1970 Evidence Convention, or between two States where only one is a Contracting Party to the 1970 Evidence Convention.[760]

565. Like the 1970 Evidence Convention, the 1954 Civil Procedure Convention provides for supplementary agreements between States Parties that modify specific provisions of the letter of request system under that Convention.[761] Where the parties to a supplementary agreement are also Contracting Parties to the 1970 Evidence Convention, Article 31 of the 1970 Evidence Convention deems such agreements to be equally applicable to the Convention unless otherwise agreed by the Contracting Parties concerned.[762] For a list of such supplementary agreements of Contracting Party, check the "practical information" chart for that Contracting Party under "Central and other Authorities" on the Evidence Section of the HCCH website.

3. Relationship with the 1965 Service Convention

566. As noted at paragraph 76, the Letter of Request system under Chapter I of the 1970 Evidence Convention is not available for requests to serve documents. This matter is covered by the 1965 Service Convention.[763] Moreover, Letters of Request are not within the scope of the 1965 Service Convention and are therefore not subject to the transmission channels provided for under that Convention.[764]

567. The law of the Requested State may require the service of documents in order to execute the Letter of Request (*e.g.*, for the executing authority to summon a witness to give evidence). This act generally involves *domestic* service only (*e.g.*, the witness is served in the territory of the Requested State) and therefore the 1965 Service Convention is not invoked.[765]

568. The relationship between the 1965 Service Convention and the 1970 Evidence Convention was raised at the 2009 meeting of the Special Commission, in particular concerning the use of the

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759 See Art. 22 of the Access to Justice Convention.

760 A number of States that are party to the 1954 Civil Procedure Convention are not Contracting Parties to the 1970 Evidence Convention. An up-to-date list of Contracting Parties to the 1954 Civil Procedure Convention (the "status table") is available on the HCCH website under "Conventions".

761 These provisions concern the transmission channels for letters of request (Art. 9(4)), the language of the letter of request (Art. 10), and the costs for execution (Art. 16(2)). The object of providing for supplementary agreements was to make judicial co-operation in the taking of evidence more favourable and less restrictive as between the States concerned. For more on supplementary agreements under the 1970 Evidence Convention, see *infra,* paras 573-574.

762 Some of these supplementary agreements deal with matters other than those covered in the specific provisions in the 1954 Civil Procedure Convention that are subject to modification (as listed at note 761). Only the provisions of the supplementary agreements that deal with the transmission channels for letters of request, the language of the letter of request, and the costs for execution remain applicable by virtue of Art. 31 of the 1970 Evidence Convention.

763 For more on the operation of the 1965 Service Convention, see the Service Section of the HCCH website.

764 Federal Supreme Court of Switzerland, 1 May 2007, No 5P.17/2007.

765 The 1965 Service Convention applies only (but in all cases) "where there is occasion to transmit a judicial or extrajudicial document for service abroad" (Art. 1(1)).

1965 Service Convention to serve documents ordering a person abroad to give evidence (*e.g.*, a witness summons or subpoena). After a short discussion, the Special Commission concluded by inviting the Permanent Bureau to "study the issue of compelling persons under the threat of sanctions to provide evidence in the requesting State by use of a request for service under the 1965 Service Convention".[766] In the view of the Permanent Bureau, the interaction between the 1965 Service Convention and the 1970 Evidence Convention in this context can be summarised as follows:

a. The internal law of a State may permit a judicial authority to order a person abroad to give evidence in proceedings in that State (*e.g.*, by way of a witness summons or subpoena), or to order a person in the territory of that State to produce documents located abroad.[767] Failure to comply with such an order may give rise to sanctions under the internal law of that State (*e.g.*, contempt of court).

b. To the extent that (a) such an order is drawn up as a "judicial document", and (b) the law of the State where the action was initiated provides for the document to be served abroad, the 1965 Service Convention may apply to the transmission of that document.[768]

c. To the extent that this procedure does not involve a request to a foreign authority to take evidence, the Letter of Request system under Chapter I of the 1970 Evidence Convention does not apply.

d. It is sometimes difficult to determine whether a summons sent to a third party, *e.g.*, a witness located abroad, is subject to the 1965 Service Convention or the 1970 Evidence Convention. In the event of conflict between these two instruments, the 1970 Evidence Convention prevails, because it secures protection for the witness.[769]

e. As noted at paragraph 33, some States consider the taking of evidence, or the performance of another judicial act, on their territory by or on behalf of a foreign judicial authority to be a violation of their sovereignty. Some States also consider the service on their territory of orders from a foreign judicial authority to give evidence in foreign proceedings (*e.g.*, service of a witness summons or subpoena) to be a violation of their sovereignty. Under Article 13(1) of the 1965 Service Convention, a State may refuse to comply with a request for service if it deems that compliance would infringe its sovereignty or security.[770]

f. The service of an order to give evidence (*e.g.*, by way of a witness summons or subpoena) under the 1965 Service Convention does not entail the enforcement in the State of destination of any sanctions that may apply under the law of the State of origin for failure to comply with the order.

g. At the same time, the possibility of enforceable sanctions within the State of origin reinforces the importance of the "summary of the document to be served" and "warning" that have been recommended by the Fourteenth Session of the HCCH to accompany any document served abroad.[771]

569. Finally, the 1970 Evidence and 1965 Service Conventions may also interact in other contexts, for

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766 C&R No 40.

767 As noted during discussions at the 2009 meeting of the Special Commission, this is not possible in the United Kingdom, although it is possible in Australia subject to comity considerations.

768 See Service Handbook (*op. cit.* note 52), para. XX *et seq*. and XX. For the 1965 Service Convention to apply, the following requirements must be met: (1) the document is to be transmitted from one State Party to the Convention to another State Party for service in the latter; (2) an address for the person to be served is known; (3) the document to be served is a judicial or extrajudicial document; and (4) the document to be served relates to a civil and/or commercial matter.

769 *Ibid.*, para. XX.

770 *Ibid.*, para. XX *et seq*.

771 The text of the recommendation is available at: < http://www.hcch.net/index_en.php?act=publications.details&pid=26&dtid=2 > [last consulted on 9 April 2024].

example:

a. a Letter of Request may be issued requesting as evidence the response of a person to a judicial document that has been served in the territory of the Requested State – in this case, the service of the judicial document is executed under the 1965 Service Convention and the Letter of Request is executed under the 1970 Evidence Convention (assuming that both Conventions are in force as between the States involved);

b. a Letter of Request may be issued seeking information on the address of a person for the purposes of serving documents on that person[772] – if information is obtained and the address of the person is known, the 1965 Service Convention will apply to the service of the documents to that person (provided that the other elements of Art. 1(1) of the 1965 Service Convention are satisfied). In this case, a separate request under that Convention would also be necessary.

4. Relationship with other HCCH Conventions

570. The taking of evidence abroad may be sought in proceedings to which other HCCH Conventions apply, such as return applications under the 1980 Child Abduction Convention, a broad range of civil measures to protect children under the 1996 Child Protection Convention, and the variety of applications covered by the 2007 Child Support Convention.[773] As noted at paragraph 58, it is widely accepted that family law matters fall within the substantive scope of the Convention.

571. Unless otherwise provided in the relevant Convention, the 1970 Evidence Convention may apply to these proceedings. At the same time, the 1970 Evidence Convention does not derogate from any provisions in those treaties that cover the taking of evidence abroad (Art. 32).

572. In this regard, it is useful to refer to the 2007 Child Support Convention, which establishes a system of co-operation between Central Authorities that includes assistance with the taking of evidence. Article 6(2)(g) of that Convention provides that, in relation to applications under Chapter III, Central Authorities "shall take all appropriate measures… to facilitate the obtaining of documentary or other evidence", which may include obtaining evidence from abroad.[774] Moreover, Article 6(2)(c) provides for measures to be taken "to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets", which may equally involve obtaining evidence. These provisions constitute an alternative device for the taking of evidence abroad, which is designed to allow for evidence to be obtained with greater speed and simplicity.[775] They do not affect the 1970 Evidence Convention, which remains available to obtain evidence in aid of such applications. This is expressly recognised in Article 50 of the 2007 Child Support Convention.[776] Any recourse to the 1970 Evidence Convention would have to be in accordance with the provisions of that Convention (*e.g.*, the Letter of Request would still need to be issued and executed by a "judicial authority", and a Central Authority seeking to obtain evidence abroad by Letter of Request may not satisfy this requirement). It should also be noted that the Central Authority designated by a State under the 2007 Child Support Convention (or any other Convention) may be different from the Central Authority designated under the 1970 Evidence

772 As set out at note 155, some Contracting Parties have reported using the 1970 Evidence Convention to establish the address of the defendant in proceedings. On the other hand, some Contracting Parties might still regard address inquiries as not being judicial acts under the 1970 Evidence Convention.

773 *HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

774 For a discussion as to the types of assistance that could be provided by the Requested State in a manner that does or does not come within the 1970 Evidence Convention, see the Explanatory Report to the *HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* by A. Borrás and J. Degeling, paras 164-7, available on the Child Support Section of the HCCH website.

775 *Ibid*., para. 145.

776 *Ibid.*, paras 648-651.

Convention.

III. Relationship between the 1970 Evidence Convention and supplementary agreements

573. The 1970 Evidence Convention expressly acknowledges that Contracting Parties may enter into bilateral or multilateral agreements that derogate from specific provisions in the Convention (Art. 28). Despite the use of the term "derogate", the drafters intended that supplementary agreements would be used to establish provisions that are more favourable and less restrictive to international judicial co-operation in the taking of evidence.

574. A number of Contracting Parties have entered into supplementary agreements that effectively adapt the application of the Convention to their mutual relations. These agreements are distinct from treaties that establish separate, self-contained systems for the taking of evidence abroad (*e.g.*, in respect of a particular region or subject-matter). These treaties are addressed *infra* at paragraphs 575 *et seq.* below.

IV. Relationship between the 1970 Evidence Convention and other international agreements dealing with the taking of evidence abroad

575. Two or more Contracting Parties may be party to other bilateral or multilateral treaties that contain provisions on matters covered by the 1970 Evidence Convention.[777] Article 32 provides that the Convention does not derogate from these treaties, which continue to have full force.[778] This "give way" clause applies regardless of:

a. whether or not the other treaty was concluded before or after the Convention; and

b. whether or not the other treaty contains provisions that are more favourable and / or less restrictive to the taking of evidence than those under the Convention.[779]

576. Numerous bilateral treaties exist between Contracting Parties that contain provisions on the taking of evidence abroad.[780] These include treaties dealing specifically with judicial co-operation, as well as treaties on consular relations. Several judicial co-operation treaties have also been concluded under the auspices of regional organisations to which several Contracting Parties are party, including:

a. the 1974 Nordic Convention on Mutual Assistance in Judicial Matters among members of the Nordic Council;[781]

b. the 1975 Inter-American Convention on Letters Rogatory among members of the Organization

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777 These matters include, *e.g.*, the content, language, transmission and execution of Letters of Request, costs for execution, and the taking of evidence by Consul or Commissioner.

778 These other treaties may contain a "give way" clause that gives priority to the Convention.

779 *Cf.* Art. 8 of the 1961 Apostille Convention, which contains a "give way" clause in favour of other treaties but only to the extent that they contain provisions subjecting the authentication of public documents to formalities that are less rigorous than the formality provided for under the 1961 Apostille Convention.

780 At its meeting in 1978, the Special Commission noted the existence of "a whole network of bilateral conventions which are often more liberal than the [Evidence] Convention itself": Report of the 1978 SC (*op. cit*. note 94), Part I, § 8.

781 The Nordic Convention provides for the taking of evidence by way of a "request for assistance". The Convention contains provisions on the transmission of letters of request (Art. 1), the language of letters of request (Art. 2), the language of documents establishing the execution of the letter of request (Art. 3), and costs for execution (Art. 4).

of American States;[782] (see para. 579);

c. the 1975 Inter-American Convention on the Taking of Evidence Abroad and 1984 Additional Protocol among members of the Organization of American States;[783] (see para. 579);

d. the 1983 Riyadh Arab Agreement for Judicial Cooperation among members of the Arab League;[784]

e. the 1992 Las Leñas Protocol on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters among members of Mercosur;[785]

f. the 2009 Agreement on Judicial Cooperation and Assistance in Civil, Commercial, Labour, and Administrative Matters between Mercosur' Member States and the Republic of Bolivia and the Republic of Chile;[786]

g. the 1993 Minsk and 2002 Chisinau Conventions on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters among members of the Commonwealth of Independent States.[787]

For a list of bilateral and regional treaties to which a particular Contracting Party is party, check Country Profiles of each Contracting Party on the Evidence Section of the HCCH website.

577. In July 2019, the XXI Plenary Assembly of the Conference of Ministers of Justice of Ibero-American

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782 The Inter-American Convention on Letters Rogatory provides for the taking of evidence by way of letters rogatory. The Convention contains provisions on the transmission of letters rogatory (Art. 4), the language of letters rogatory (Art. 5), the language of documents establishing the execution of the Letter of Request (Art. 3), execution of letters rogatory (Arts 10-11), and costs for execution (Art. 12). It also provides for the taking of evidence by consular and diplomatic agents (Art. 13). The Convention allows a State to exclude the application of the Convention to letters rogatory for the taking of evidence by reservation (Art. 2(1)(b)). Two States have made such a reservation (United States and Venezuela). The 1979 Additional Protocol does not apply to letters rogatory for the taking of evidence (Art. 1). The full text of the Convention in English is available online at: < https://www.justice.gov/sites/default/filhttps://www.justice.gov/sites/default/files/civil/legacy/2014/08/08/Inter%20Amer%20Convention%20Text_.pdfes/civil/legacy/2014/08/08/Inter%20Amer%20Convention%20Text_.pdf > [last consulted on 9 April 2024].

783 The Inter-American Convention on the Taking of Evidence Abroad and Additional Protocol ("AP") provide for the taking of evidence by way of letters rogatory. The Convention and Additional Protocol contain provisions on the transmission of letters rogatory (Art. 11 and Art. 3 (AP)), the language of letters rogatory (Art. 10(1)(2) and Art. 2(2) (AP)), the content of letters rogatory (Art. 4 and Art. 2(1) (AP), which provides a model form), execution of letters rogatory (Arts 5, 6, 9 and 16 and Art. 4 (AP)), presence at execution (Art. 5 (AP)), privileges (Art. 12), and costs for execution (Art. 7 and Arts 6-8 (AP)). The Additional Protocol also provides for the taking of evidence by consular and diplomatic agents (Arts 9-13 (AP)).

784 The Riyadh Arab Agreement provides for the taking of evidence by way of a "rogatory commission". The Agreement contains provisions on the transmission of rogatory commissions (Art. 15(1)), the content and form of rogatory commissions (Art. 16), execution of rogatory commissions (Arts 17 to 19), and costs for execution (Art. 21). The Agreement also preserves the right to take evidence of nationals by consular and diplomatic agents (Art. 15).

785 The Las Leñas Protocol provides for the taking of evidence by way of a "request". The Protocol contains provisions on the transmission of requests (Art. 2), the language of requests (Art. 10), the content of requests (Arts 6-7), execution of requests (Arts 8, 9, 12 and 13), presence at execution (Art. 11), and costs for execution (Art. 15). A 1997 Supplementary Agreement provides model forms for communications under the Las Leñas Protocol, including for the request to take evidence (Form No 7). Moreover, a 2002 amendment to the Protocol provided additionally for letters of request to be transmitted by interested parties (Art. 10 of the revised Protocol). The full text of the Protocol in English is published in Vol. 2145 of the *United Nations Treaty Series*, p. 421, and is available online at: < http://treaties.un.org/doc/Publication/UNTS/Volume%202145/v2145.pdf > [last consulted on 9 April 2024].

786 The agreement is available at <mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=349ZYSq2AgqxLqPONEh+VA==> [last consulted on 9 April 2024]

787 The Chisinau Convention is a revised version of the Minsk Convention. The Minsk Convention provides for the taking of evidence by way of "letter of request". The Convention contains provisions on the transmission of letters of request (Art. 5), the language of letters of request (Art. 17), the content of letters of request (Art. 7), execution of letters of request (Arts 8 and 19), and costs for execution (Art. 18). The Minsk Convention also provides for the examination of nationals through diplomatic missions and consular offices (Art. 12). The full text of the Minsk Convention in English is published in Annex II to "The Relationship between the Judgments Project and Certain Regional Instruments in the Arena of the Commonwealth of Independent States", Prel. Doc. No 27 of April 2005, in *Proceedings of the Twentieth Session (2005),* Tome III, *Choice of Court*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 231 (also available on the HCCH website). The full text of the Chisinau Convention in Russian is available online at: < http://cis.minsk.by/page.php?id=614 > [last consulted on 9 April 2024].

Countries (COMJIB) was held in Medellín, Colombia. During this meeting Argentina, Brazil, Colombia, Chile, Paraguay, Portugal, Spain and Uruguay signed the Medellin Treaty concerning the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities, which was concluded in 2018 during the Extraordinary Plenary Assembly in La Antigua, Guatemala. The Medellin Treaty regulates the use of an electronic platform called "Iber@" and designates the platform as the "formal and preferential means of transmitting international legal cooperation requests between Central Authorities within the framework of the treaties in force between the parties."[788]

578. Unlike the supplementary agreements referred to in Articles 28 and 31 of the 1970 Evidence Convention, these regional treaties establish a separate and self-contained regime for the taking of evidence abroad.

1. The Inter-American regime

579. Two treaties providing for the taking of evidence abroad have been concluded under the auspices of the Organization of American States (OAS). The first is the 1975 Inter-American Convention on Letters Rogatory ("Letters Rogatory Convention"); the second is the 1975 Inter-American Convention on the Taking of Evidence Abroad ("Taking of Evidence Convention") and its 1984 Additional Protocol.

580. The Letters Rogatory Convention applies to letters rogatory for the service of documents and the taking of evidence. This Convention is supplemented by a 1979 Additional Protocol that only applies to the service of documents. Moreover, this Convention allows a State to exclude the application of the Convention to letters rogatory for the taking of evidence by reservation, an option that has been exercised by two States (United States and Venezuela).

581. The Taking of Evidence Convention applies exclusively to the taking of evidence. This Convention is supplemented by a 1984 Additional Protocol. At the time of printing, almost two-thirds of the Contracting Parties to the Taking of Evidence Convention were party to the Additional Protocol.

582. The Inter-American regime for the taking of evidence applies only among Ibero-American States, given that Canada is party to neither Convention and the United States is only party to the Letters Rogatory Convention and has excluded the application of that Convention to letters rogatory for the taking of evidence by reservation. All States that are party to the Letters Rogatory Convention are party to the Taking of Evidence Convention with the exception of Bolivia, Brazil, Spain and the United States. An up-to-date list of States that are party to the Inter-American Conventions is available on the OAS website < www.oas.org >.

583. Like the 1970 Evidence Convention, the Inter-American Conventions contain a "give way" clause that reserves the application of past and future treaties containing provisions regarding letters rogatory.[789] In practice, both regimes are used in parallel, and it is generally up to the authority making the request to elect which regime will apply in cases where both regimes are in force in the States concerned.

2. The 2020 EU Evidence Regulation

584. The 2020 EU Evidence Regulation, which has been partially applicable since 1 July 2022, applies between all Member States of the European Union (with the exception of Denmark). The Regulation provides for the taking of evidence either "indirectly" (evidence taken by the requested court, following a request from the requesting court) or "directly" (evidence taken by the requesting court

788 Medellin Treaty, Art 1.
789 Letters Rogatory Convention, Art. 15; Taking of Evidence Convention, Art. 14.

itself following authorisation by the Member State in which the evidence is to be taken). Under Article 19(5) of the Regulation, where direct taking of evidence is requested and the central body or competent authority of the requested Member State does not inform the requesting court whether the request is accepted within the deadlines set by the Regulation (after a reminder is sent), the request shall be considered accepted.

585. In addition, Article 20(1) of the Regulation provides that where the requesting court makes a request for direct taking of evidence of a person who is present in another Member State, that court shall take evidence using videoconferencing or other distance communications technology, provided that such technology is available and its use is considered appropriate.

586. As mentioned in paragraph 548, the Regulation also introduced a new provision under Article 21 where Member States may provide in their national law for their courts to be able to request their diplomatic agents or consular officers in the territory of another Member State, and within the area in which they are accredited, to take evidence without the need for a prior request, by hearing, without the use of coercive measures, nationals of the Member State which they represent, in the context of proceedings pending in the courts of the Member State which they represent.

587. To improve the efficiency and speed of cross-border court proceedings, Article 7 and 35(3) of the 2020 EU Evidence Regulation and its implementing Regulation[790] oblige Member States to use a decentralised IT system as a means of communication for the transmission and receipt of requests, forms and other communication under the Regulation from 1 May 2025 onwards.

588. Strictly speaking, the Regulation does not fall within the "give way" rule in Article 32 of the 1970 Evidence Convention. However, as a matter of EU law, the Regulation prevails over the Convention in relations between EU Member States that are party thereto,[791] yet only in relation to matters to which the Regulation applies (Art. 29(1) of the Regulation). Accordingly, the Convention continues to apply:

a. between a Contracting Party that is an EU Member State and a Contracting Party that is a non-EU Member State;

b. between Denmark and each other Contracting Party, including another Contracting Party that is an EU Member State; and

c. to matters to which the Regulation does not apply, but the Convention does apply.

3. Vienna Convention on Consular Relations

589. At a multilateral level, the taking of evidence abroad is also addressed in the *Vienna Convention on Consular Relations*.[792] Article 5 of this Convention identifies a non-exclusive list of consular functions that are recognised by the various States Parties, which includes "executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State" (Art. 5(j)). Operating as an "international agreement" of the type envisioned by Article 5(j) of the *Vienna Convention on Consular Relations*, the 1970 Evidence Convention establishes an agreed upon framework for the taking of evidence by consular officials. Nothing in the *Vienna Convention on Consular Relations* conditions the application of the Convention or creates any obligation for a State Party to make any particular declaration regarding how it will implement the Convention. Rather, Article 5(j) of the *Vienna Convention on Consular Relations* acknowledges that States Parties to that Convention may

790 Commission Implementing Regulation (*op. cit.* note 326).

791 Noting again that not all EU Member States are party to the Convention (Austria, Belgium and Ireland are not Contracting Parties).

792 Published in the *United Nations Treaty Series*, Vol. 596, p. 261.

choose to enter into agreements regarding the taking of evidence by consular officials. It also provides that absent such agreements, taking of evidence by consular officials must be done in a manner that is compatible with the law of the State in which they exercise their functions. The 1970 Evidence Convention contains similar limitations in Article 21(a) and (d) (see paras 508 *et seq.*).

4. Arrangements for use of video-link under other instruments

590. A number of instruments at the bilateral, regional and multilateral level make express provision for the use of video-link in the cross-border taking of evidence in judicial co-operation cases (*i.e.*, where the authorities in the place in which proceedings take place request the authorities in the place in which the witness is located for assistance in obtaining that evidence).

591. Notable examples of such instruments include:

a. the 2020 EU Evidence Regulation;[793]

b. the 2010 Ibero-American Convention on the Use of Videoconferencing in International Co-operation between Judicial Systems and its 2010 Additional Protocol relating to Costs, the Use of Languages and Transmission of Requests;[794]

c. the 2008 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement.[795]

592. In such instruments, the use of video-link is typically either recognised simply as a possible means of taking evidence,[796] or framed in more mandatory terms.[797] As noted above, it is important that by virtue of Article 32, the 1970 Evidence Convention does not derogate from other conventions that apply between Contracting Parties.[798]

593. As mentioned *supra*, in paragraph 584, the 2020 EU Evidence Regulation provides for the taking of evidence using videoconferencing or other distance communications technology where a request for direct taking of evidence of a person present in another Member State is made, provided that such technology is available and its use is considered appropriate.

594. The 2010 Ibero-American Convention on the Use of Videoconferencing in International Co-operation between Judicial Systems provides for a competent authority in one State Party to examine a witness located in another State Party by video-link upon request to the authorities of

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793 Arts 12(4) and 20. For more on the 2020 EU Evidence Regulation, see the Glossary. See also, Art. 5 of the EU Digitalisation Regulation provides for the participation of parties and their representatives in a hearing through videoconferencing or other distance communication technology in civil and commercial matters, which will become applicable from 1 May 2025. For another European example of a reference to the use of video-link in the taking of evidence, albeit in the context of a more restricted scope of subject matter, see, *e.g.*: *Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, Art. 8(1).

794 Art. 3(1) (hereinafter, "2010 Ibero-American Convention on the Use of Videoconferencing"). At the time of writing, this Convention and its Additional Protocol applied between Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Paraguay and Spain.

795 Art. 11, the full text of which is available at the following address: < http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2013/32.html > [last consulted on 12 April 2024]. Both States have enacted their own implementing legislation, respectively: *Trans-Tasman Proceedings Act 2010* (Cth) (Australia); *Trans-Tasman Proceedings Act 2010* (New Zealand).

796 See, *e.g.*, Art. 3(1) of the Ibero-American Convention on the Use of Videoconferencing and Art. 11(1) of the 2008 Trans-Tasman Agreement.

797 Art. 20 of the 2020 EU Evidence Regulation.

798 With regard to the 2020 EU Evidence Regulation, and as noted in para. 588, "[s]trictly speaking, the Regulation does not fall within the 'give way' rule in Article 32 of the 1970 Evidence Convention. However, as a matter of EU law, the Regulation prevails over the 1970 Evidence Convention in relations between EU Member States that are party thereto [noting also that not all EU Member States are party to the Convention], yet only in relation to matters to which the Regulation applies (Art. 29(1) of the Regulation)."

that other State.[799] The system established by the Ibero-American Convention and Protocol does not coincide with the Letter of Request system under Chapter I of the 1970 Evidence Convention to the extent that the former does not involve a request to a foreign authority to take evidence; rather, it is the authority in the State of origin that takes the evidence directly.

V. Internal law

1. Internal law on the taking of evidence

595. The 1970 Evidence Convention does not prescribe the methods and procedures for taking evidence. These remain a matter for internal law. At most, the Convention prescribes rules on which law governs the taking of evidence. As a basic outline:

a. in the case of evidence taken under Chapter I, the methods and procedures under the law of the Requested State apply (Art. 9(1)), although the methods and procedures of the Requesting State may be applied as a "special method or procedure" (Art. 9(2));[800]

b. in the case of evidence taken under Chapter II, the methods and procedures under the law of the State of origin apply (Art. 21(d)).[801]

2. Internal law on the cross-border taking of evidence

596. A key objective of the drafters of the Convention was to preserve all existing practices resulting from internal law that were more favourable and / or less restrictive to the taking of evidence.[802] To this end, Article 27 was inserted into the text, which provides that the Convention does not prevent a Contracting Party from permitting by its internal law or practice:

a. any act provided for in the Convention to be performed upon less restrictive conditions (Art. 27(b)); and

b. methods of taking evidence other than those provided for in the Convention (Art. 27(c)).[803]

i. Requested State / State of execution

597. Article 27 is addressed to the internal law and practice of the State in whose territory the evidence is to be taken (*i.e.*, the Requested State or the State of execution).[804] The reference to internal law or practice makes it clear that the proposed act or method of taking evidence need not be expressly

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799 The Ibero-American Convention contains provisions on the content of requests (Art. 4(2)), and conduct of the examination by video-link (Art. 5). An Additional Protocol concluded at the same time contains additional provisions on the costs for establishing the video-link and conducting the examination (Art. 1), the language of requests (Art. 2), and the transmission of requests by electronic means (Art. 3). The full text of the Convention in Spanish is available online at: < http://www.comjib.org/wp-content/uploads/imgDrupal/Convenio-Videoconferencia-ES-publicaciones_1.pdf > [last consulted on 10 April 2024]. The text of the Additional Protocol in Spanish is available online at: < http://www.comjib.org/wp-content/uploads/imgDrupal/Protocolo-Videoconf-ES-publicaciones.pdf > [last consulted on 10 April 2024].

800 For more on the methods and procedures to be followed under Chapter I, see paras 276 276*et seq*.

801 For more on the methods and procedures to be followed under Chapter II, see paras 514 *et seq*514516.

802 Explanatory Report, para. 6.

803 Art. 27(a), which provides that a Contracting Party may declare that Letters of Request may be transmitted to its judicial authorities through channels other than the main channel, is discussed at paras 233 *et seq*.

804 Explanatory Report, para. 233. See also *Harwood v. Priestley* [1997] TASSC 15 (13 March 1997), where the Supreme Court of Tasmania (Australia) noted, with reference to the possibility for a commissioner to take evidence in the United States pursuant to US internal law, that "it seems clear to us that neither these nor any other provisions of the Convention can be taken as limiting or controlling the facilities which individual countries may provide by domestic legislation to achieve these ends". *Cf. Aérospatiale* case, where the Supreme Court of the United States noted that "[o]n its face, the term 'Contracting Party' [in the chapeau to Art. 27] comprehends both the [R]equesting [S]tate and the [R]eceiving [S]tate": *op. cit*. note 32, p. 537, note 24. As previously noted by the Permanent Bureau, this position has been criticised: see Prel. Doc. No 10 of December 2008 (*op. cit.* note 3838, para. 31 and note 46).

provided for in the internal law.[805]

598. In practice, the acts and methods contemplated in Article 27 are carried out in a number of States. For example, in the United States, the parties to foreign proceedings and their representatives may take evidence of a voluntary witness located in US territory without the intervention of US authorities.[806] A similar approach is taken in other common law jurisdictions, such as England and Australia.[807] Moreover, the assistance of US courts in taking evidence in aid of foreign proceedings (pursuant to 28 U.S.C. § 1782(a)) is available at the request of any "interested person", as well as foreign administrative and quasi-judicial tribunals,[808] and, in some instances, foreign arbitral tribunals imbued with governmental authority by a State.[809]

599. Conversely, in a number of States, internal law does not permit evidence to be taken in their territory by methods other than those provided for in the Convention (or in some other applicable treaty). As noted at paragraph 39, some Contracting Parties have enacted "blocking statutes" to this effect.

600. The law of a State may restrain the ability of parties to take advantage of more favourable and / or less restrictive provisions of the law of another State on the taking of evidence in that other State. Such was the view of a district court in Israel, which issued an order restraining a party from continuing proceedings in the United States for assistance under internal law of the United States for the production of documents for use in proceedings before the district court on the basis that the party should only apply to the Israeli court for the taking of evidence under the Israeli Legal Assistance Law.[810] A different approach was taken by the House of Lords in the United Kingdom, which considered that nothing in English procedural law prevented a party from seeking assistance under US internal law for the inspection of documents in the possession of a non-party.[811] A similar position has been expressed by the courts of the Netherlands.[812]

ii. Requesting State / State of origin

601. Article 27 does not address the internal law and practice of the State which is seeking to obtain evidence abroad (*i.e.*, the Requesting State or the State of origin).[813] The extent to which the Convention preserves such internal law and practice is linked to the question of the mandatory character of the Convention, which is discussed at paras 33 *et seq*.

602. In practice, several States do apply their internal law to obtain evidence abroad by methods other than those provided for in the Convention.[814] These methods include the taking of depositions and requests for production of documents as part of pre-trial discovery, and the petitioning of a judicial authority to issue a witness summons or subpoena ordering a person abroad to attend a hearing to give testimony or produce documents.[815] In some of these States, the availability of such

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805 This should overcome the uncertainty associated with the corresponding provision in the 1965 Service Convention (Art. 17), which refers only to what the "internal law of a Contracting Party permits". This has given rise to conflicting case law, chiefly among courts in the United States. As noted in the Service Handbook (*op. cit.* note 52, para. XX), certain courts, based on a narrow construction of this provision, consider that only the forms of transmission expressly permitted by the Contracting Party are allowed, whereas others consider that the provision is to be construed to allow any mechanism that the internal law does not expressly prohibit.

806 B. Ristau (*op. cit.* note 184), § 2-2-3. See also 28 U.S.C. § 1782(b).

807 See, *e.g.*, Attorney General's Department, "Taking Evidence in Australia for Foreign Court Proceedings" (*op. cit*. note 343).

808 *Intel Corp. v. Advanced Micro Devices, Inc*. (*op. cit*. note 190).

809 See discussion at note 251. In particular, note that in the decision of the Supreme Court of the United States in *ZF Auto. US, Inc. v. Luxshare, Ltd*, it was held that 28 U.S.C. § 1782(a) does *not* extend to overseas private arbitration.

810 Cited in T. Einhorn (*op. cit*. note 47).

811 *South Carolina Insurance Co. v. Assurantie Maatschappij 'de Zeven Provincien'* [1987] AC 24.

812 *Convex cs. v. Duizendstraal cs*., Hof. Amsterdam, 24 October 1996, *NIPR* 1997, 120.

813 Prel. Doc. No 10 (*op. cit*. Note 38), para. 33; D. McClean (*op. cit.* note 79).

814 See cases cited at note 47 .

815 See discussion at note 767.

methods may be subject to considerations of comity and the sovereignty of a foreign State[816] or considerations of jurisdiction over the person from whom evidence is sought. In yet other States, the only method for obtaining evidence abroad is by international judicial assistance whether under treaty (*e.g.,* the Convention or some other judicial co-operation treaty) or by traditional diplomatic channel.

3. Use of video-link under internal law

603. By virtue of Article 27, the Convention does not prevent the use of internal law to take evidence by video-link under less restrictive conditions.

604. Among States that use video-link for cross-border witness testimony, the legal bases for such use under national law can vary. Some States have amended their laws to enable the taking of evidence by video-link in domestic and / or international cases.[817] While other States have no specific provisions in this regard, the taking of evidence by video-link may be allowed pursuant to general rules for the taking of evidence or other domestic law, although mostly for domestic cases.[818]

605. One Contracting Party has passed legislation to permit the direct taking of evidence[819] by video–link under Chapter I of the Convention as it is of the view that the Convention does not provide for this

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816 *Gloucester (Sub-Holdings 1) Pty Ltd v. Chief Commissioner of State Revenue* (*op. cit.* note 115) (concerning the service of a subpoena abroad to obtain evidence of a non-party witness); Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (applying the balancing exercise described in the Aérospatiale case, *op. cit.* note 32).

817 See, *e.g.*, responses to Part II, q. (a) and (b) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary), responses of Australia (incl., *e.g.*, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), which facilitates the taking of evidence, and the making of submissions, by audio links and audio visual links in relation to proceedings before a court in the state of New South Wales); Brazil (Resolution of the National Council of Justice No 105/2010 establishes rules on how to conduct and document hearings by video-link; Law 11.419/2006 on the electronic judicial procedure; Arts 236, 385, 453, 461 and 937 of the new Code of Civil Procedure provide for the use of videoconferences); China (Hong Kong SAR) (Order 39 and 70 of the Rules of the High Court (Cap. 4A) and Part VIII of the Evidence Ordinance (Cap. 8) provide for the taking of witness testimony by way of a "live television link"); Czech Republic (a new amendment to its Code of Civil Procedure is expected to be enacted soon, which will introduce new specific rules on video-link); Estonia (Section 350 (2) of the Code of Civil Procedure); Finland (Code of Judicial Procedure 4/1734 provides for the taking of evidence by video-link in domestic matters); Germany (Section 128a of the Code of Civil Procedure on the examination of parties, witnesses and experts using image and sound transmission); Hungary (Act III of the Code of Civil Procedure and Decree of the Minister of Justice No 3/2016 (II.22) on the use of closed-circuit telecommunication network in civil procedures for the purposes of trial and hearing of persons); Israel (Art. 72 of the Israeli Civil Procedure Regulations. 2018 allows a court to order that a witness examination be conducted outside Israel, upon the fulfilment of certain conditions, including, when there is no objection by the foreign country to conduct a hearing testimony in this manner within its territory); Korea (Republic of) (Arts 327-2, 339-3, 340 and 341 of the *Civil Procedure Act* and Arts 95-2 and 103-2 of the *Enforcement Rule of the Civil Procedure Act*, which provide for the taking of evidence by video-link if a court deems it proper; and the *Act on Special Cases Concerning Video Trials* (Act No 5004 of 6 December 1995)); Latvia (Art. 703 of *Civil Procedure Law* and the internal rules issued by the Ministry of Justice No 1-2/14 videoconferencing equipment booking and procedures for the use in legal proceedings provide for the taking of evidence by video-link as well as rules regarding interpretation and identification of the persons involved); Poland (Arts 235-2, 1131-6 and 1135(2)-4 of Code of Civil Procedure, regulation of the Minister of Justice on the devices and technical means enabling taking of evidence from the distance in civil proceedings, and the regulation of the Minister of Justice on the detailed actions of courts in cases falling in the scope of international civil and criminal proceedings in international relations); Portugal (Arts 456, 486, 502, and 520 of the *Code of Civil Procedure* govern the collection of evidence by videoconference from experts, witnesses, and parties); Singapore (Section 4(1) of the *Evidence (Civil Proceedings in Other Jurisdictions) Act 1979*, 2020 Revised Edition allows the General Division of the High Court to make an order (including to use video-link) for the indirect taking of evidence in Singapore; Slovenia (Art. 114a of the *Code of Civil Procedure* provides for the taking of evidence by videoconference if the parties agree); United States (28 U.S. Code § 1782(a) provides that a U.S. district court may order a witness to give evidence in aid of a foreign proceeding, although it would be unlikely that a U.S. court will compel a witness to directly provide evidence by video-link to a foreign court; this provision does not preclude a voluntary witness located in the United States from directly providing evidence by video-link to a foreign court (see 28 U.S. Code § 1782(b)). For more information, see the Synopsis of Responses (*op. cit.* note 6), Part II, q. (a). Moreover, the following States have adopted court rules addressing the use of video-link in both domestic and international cases: Argentina (Acordada 20/13 of 2 July 2013 – docket No 2267/13 of the Supreme Court, allowing the use of video-link when it would not be appropriate for the witness or expert witness to attend the hearing or when they are unable to do so, and establishing rules on the use of video-link); Uruguay (Acordada 7784 of 10 December 2013 of the Supreme Court recognises the importance of the use of video-link and sets out specific rules on how to conduct the taking of evidence by such means).

818 See, *e.g.*, the responses of Bulgaria, China (Macao SAR), Croatia, Norway and Venezuela to Part II, q. (a) and (b) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary).

819 For more on the distinction between direct and indirect taking of evidence, see Annex 1.

possibility.[820]

606. Despite the increasing use of video-link in legal proceedings worldwide, the Contracting Party in whose territory the witness is located may nonetheless have concerns related to its sovereignty, as the testimony is de facto being provided in its territory for the purposes of foreign judicial proceedings.[821] As such, the permission of the Contracting Party concerned may in some cases be required in order for the examination by video-link to take place, a process that may be facilitated by the operation of judicial co-operation treaties.[822] Some Contracting Parties, however, have no objection to the use of video-link to examine a witness in their territory and consider it to be permitted by Article 27 of the Convention.[823]

607. Whether or not permission is required, there may be additional restrictions in place specifically for the use of video-link and as such, it is important to consider relevant legislation, case law, regulations, or protocols which are in effect for the Contracting Parties concerned.[824] For example, a court order may be required in order to make use of video-link in the taking of evidence.[825] For some Contracting Parties, the ability to use video-link is subject to the mutual consent of the parties

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820 France (Decree No 2017-892 of 6 May 2017 introduces the possibility to directly execute Letters Rogatory under Chapter I of the Convention by video-link provided certain conditions are met).

821 See also, *infra*, para. 258.

822 It is important to note that even where video-link is not being used in an examination, permission of the State(s) concerned may still be required, as is the case under Chapter II of the Convention (see paras 496 *et seq.*).

823 See, *e.g.*, responses to Part II, q. (a) of the 2017 Country Profile Questionnaire (*op. cit.* Glossary), responses of the United States (28 U.S. Code § 1782(b), see, *supra*, note 817) and the United Kingdom (*Evidence (Proceedings in Other Jurisdictions) Act 1975*, Sections 1 and 2 relating to an application for assistance including the examination of witness, read in conjunction with Civil Procedure Rule 32.3, permitting the use of video-link).

824 For all the advantages of the information technology, the various approaches taken with respect to the use of video-link differ greatly from one Contracting Party to another (and sometimes even between jurisdictions of the same Contracting Party). For example, in China (Hong Kong SAR), the Court of Appeal in *Raj Kumar Mahajan v. HCL Technologies (Hong Kong) Ltd* [2010] 5 HKLRD 119 declared that video-link evidence is "an exception rather than the rule". In the United States, Fed. R. Civ. P. 43(a) permits the taking of live trial testimony in open court by video-link subject to "good cause in compelling circumstances" in domestic litigation. U.S. courts have found that this standard has been met in a number of different instances. See, *e.g.*, the District Court of Tennessee in *DynaSteel Corp. v. Durr Systems, Inc.*, No. 2:08-cv-02091-V, 2009 WL 10664458, at *1 (W.D. Tenn. 26 June 2009) (finding that "good cause" was established when the non-party witness was beyond the subpoena power of the court in a non-jury trial); the District Court of the District of Colombia in *U.S. v. Philip Morris USA, Inc*., No. CIV.A. 99-2496 (GK), 2004 WL 3253681, at *1 (D.D.C. 30 August 2004) (permitting video-link because of logistical difficulties of bringing the witnesses from Australia to the United States with their attorneys); the District Court of Connecticut *Sawant v. Ramsey*, No. 3:07-cv-980 (VLB), 2012 WL 1605450, at *3 (D. Conn. 8 May 2012) (finding that the inability of the witness to travel for health reasons constitutes "good cause" and "compelling circumstances"). In addition, trial testimony by video-link may only be allowed if appropriate safeguards have been put in place. This includes, for example, allowing the court and counsel of both parties to question and examine the witness by video-link and having a suitable official to administer the oath. See, *e.g.*, *DynaSteel Corp. v. Durr Systems, Inc.* and *Sawant v. Ramsey* (cited above); *In re Rand International Leisure Products, LLC*, (*op. cit.* note 218) (conditioning the taking of evidence by video-link to several practical and technical requirements). This is distinct from a deposition of a voluntary witness by video-link for use in foreign litigation, given that such a deposition is an out-of-court testimony. Such depositions are proper and do not violate United States law, and thus may be arranged for privately by the foreign authorities and the voluntary witness in the United States (see Office of International Judicial Assistance of the U.S. Department of Justice*, OIJA Evidence and Service Guidance* (*op. cit.* note 161)). Courts in Australia have adopted two divergent approaches in considering whether to grant leave for the use of video-link to obtain witness testimony, and ultimately "what will best serve the administration of justice…[whilst]…maintaining justice between the parties": *Kirby v. Centro Properties* [2012] FCA 60. The first approach has developed as many judges have embraced video-link technology for its convenience, such that video-link will be permitted unless a compelling case is made to warrant its denial. In *Tetra Pak Marketing Pty Ltd v. Musashi Pty Ltd* [2000] FCA 1261, an expert witness giving scientific and possibly controversial evidence was granted leave to appear by video-link because the Court considered that video-link should be permitted "in the absence of some considerable impediment telling against its use in a particular case". By contrast, in other cases a more cautious approach has been adopted, placing the onus on the applicant to actively demonstrate good reason for the use of video-link. In *Campaign Master (UK) Ltd v. Forty Two International Pty Ltd (No. 3)* (2009) 181 FCR 152, the Court refused to allow video-link because the witness provided no reason for non-attendance and the evidence went to a key issue. Leave was also refused in *Stuke v. ROST Capital Group Pty Ltd* (*op. cit.* note 103) because the witness' evidence was highly controversial and interpretation was required. The legal restrictions on the use of video-link may also extend to preclude the use of video-link where the facilities available do not meet the requisite technical specifications: see, *e.g.* Australia, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42G, which provides the minimum technical requirements that must be met before a court may direct that a witness give evidence by video-link. For more technical and security aspects, see Annex 7.

825 See Synopsis of Responses (*op. cit.* note 6), Part II, q. (a) and (b).

to the proceedings.[826]

4. Internal law on the use of evidence

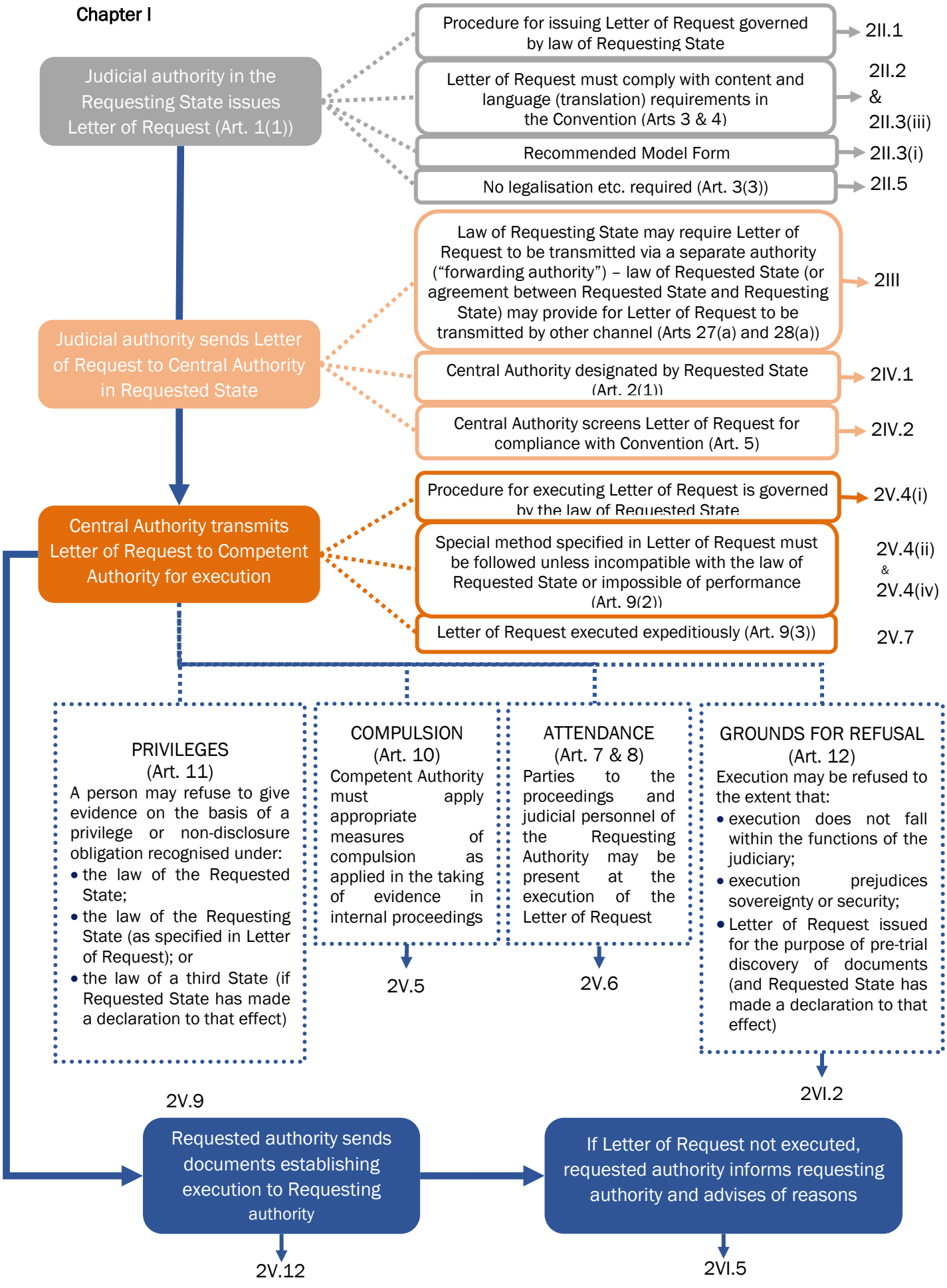
608. The Convention does not prescribe rules on the use of evidence obtained under the Convention in the proceedings in the Requesting State / State of origin. In particular, it does not contain rules on the authentication of foreign public documents, or on the adducing, admissibility and probative value of the evidence. Nor does it impose any restrictions on the use of evidence obtained. These remain a matter for the law of the forum or other applicable treaties.[827]

826 *Ibid.*, Part IV, q. (e): only a small number of Contracting Parties which have responded reported requiring the consent of the parties to use video-link to take evidence.

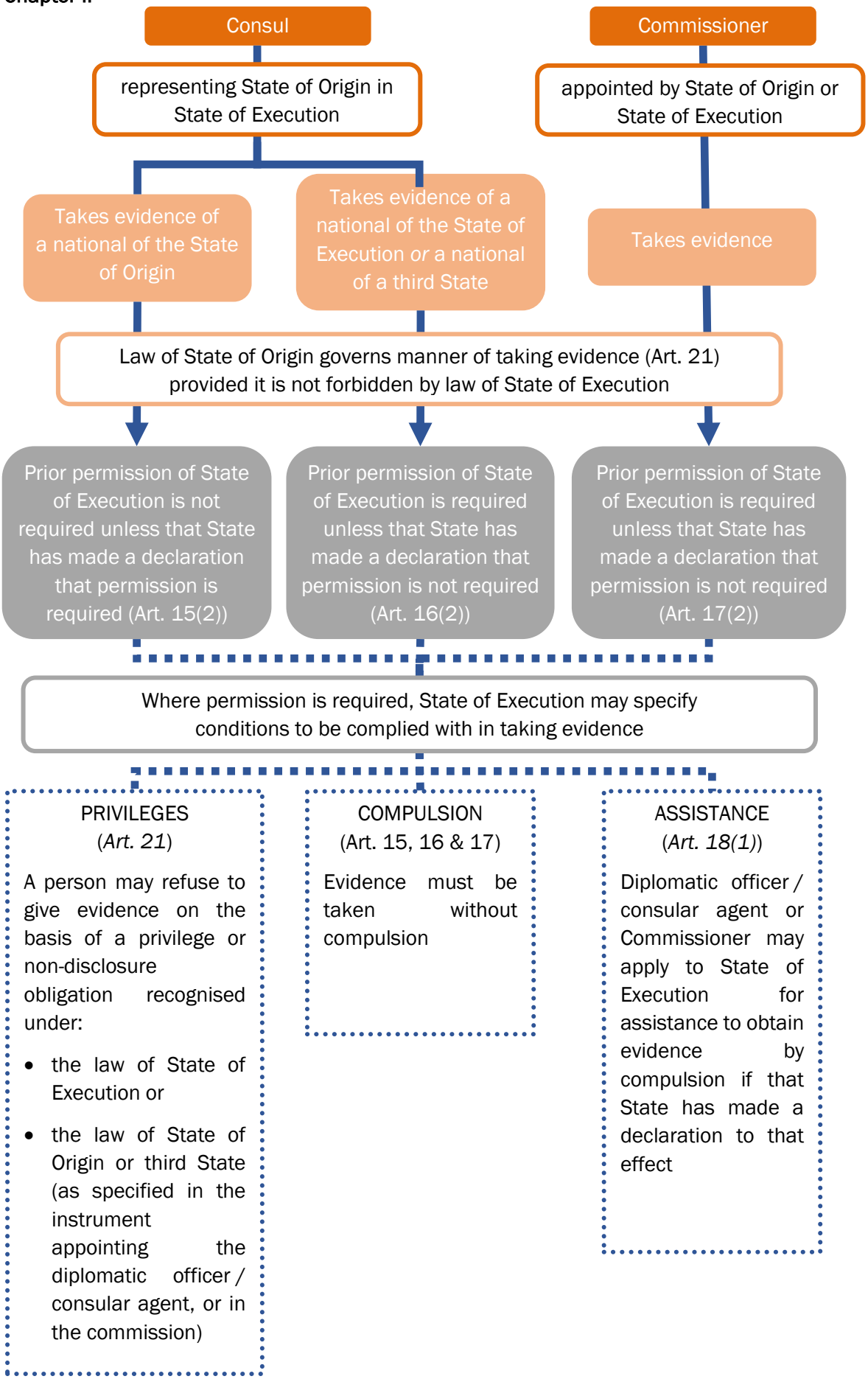
827 For example, the authentication of foreign public documents produced may be covered by the 1961 Apostille Convention. In Australia, the use of evidence obtained under the 1970 Evidence Convention is governed by legislation, *e.g.*, s. 8 of the *Evidence on Commission Act 1995* (NSW), as discussed by the New South Wales Court of Appeal in *Indochina Medical Co. Pty Ltd v. Nicolai* (*op. cit*. note 138). In Scotland, it is governed by r. 35.14 of the *Court of Session Rules*. In the United States, *Fed. R. Civ. Pro*. 28(b)(4) provides that deposition evidence obtained pursuant to a Letter of Request under the 1970 Evidence Convention may be used even though it is taken in a form other than that which is required in the United States (*e.g.,* it is not transcribed verbatim or taken under oath). Nevertheless, the court remains free to attach less probative value to the evidence. The law of the Requesting State / State of origin may also condition the admissibility of the evidence on whether or not it was obtained in conformity with the Convention. For example, in Banco Holandés Unido v. González de Domínguez, CN Com. (*Sala* D), 9 November 2009, No 519/1993, *secretaria* No 26, the National Court of Appeals for Commercial Matters of Argentina observed that there was no doubt as to the validity of evidence taken abroad by Letter of Request executed under the 1970 Evidence Convention.

ANNEXES

Annex 1 – Explanatory charts on the operation of Chapter I and Chapter II


Chapter I
Judicial authority in the Requesting State issues Letter of Request (Art. 1(1))
Procedure for issuing Letter of Request governed by law of Requesting State
2II.1
Letter of Request must comply with content and language (translation) requirements in the Convention (Arts 3 & 4)
2II.2 & 2II.3(iii)
Recommended Model Form
2II.3(i)
No legalisation etc. required (Art. 3(3))
2II.5
Judicial authority sends Letter of Request to Central Authority in Requested State
Law of Requesting State may require Letter of Request to be transmitted via a separate authority ("forwarding authority") – law of Requested State (or agreement between Requested State and Requesting State) may provide for Letter of Request to be transmitted by other channel (Arts 27(a) and 28(a))
2III
Central Authority designated by Requested State (Art. 2(1))
2IV.1
Central Authority screens Letter of Request for compliance with Convention (Art. 5)
2IV.2
Central Authority transmits Letter of Request to Competent Authority for execution
Procedure for executing Letter of Request is governed by the law of Requested State
2V.4(i)
Special method specified in Letter of Request must be followed unless incompatible with the law of Requested State or impossible of performance (Art. 9(2))
2V.4(ii) & 2V.4(iv)
Letter of Request executed expeditiously (Art. 9(3))
2V.7
PRIVILEGES (Art. 11)
A person may refuse to give evidence on the basis of a privilege or non-disclosure obligation recognised under:
• the law of the Requested State;
• the law of the Requesting State (as specified in Letter of Request); or
• the law of a third State (if Requested State has made a declaration to that effect)
COMPULSION (Art. 10)
Competent Authority must apply appropriate measures of compulsion as applied in the taking of evidence in internal proceedings
2V.5
ATTENDANCE (Art. 7 & 8)
Parties to the proceedings and judicial personnel of the Requesting Authority may be present at the execution of the Letter of Request
2V.6
GROUNDS FOR REFUSAL (Art. 12)
Execution may be refused to the extent that:
• execution does not fall within the functions of the judiciary;
• execution prejudices sovereignty or security;
• Letter of Request issued for the purpose of pre-trial discovery of documents (and Requested State has made a declaration to that effect)
2VI.2
2V.9
Requested authority sends documents establishing execution to Requesting authority
2V.12
If Letter of Request not executed, requested authority informs requesting authority and advises of reasons
2VI.5

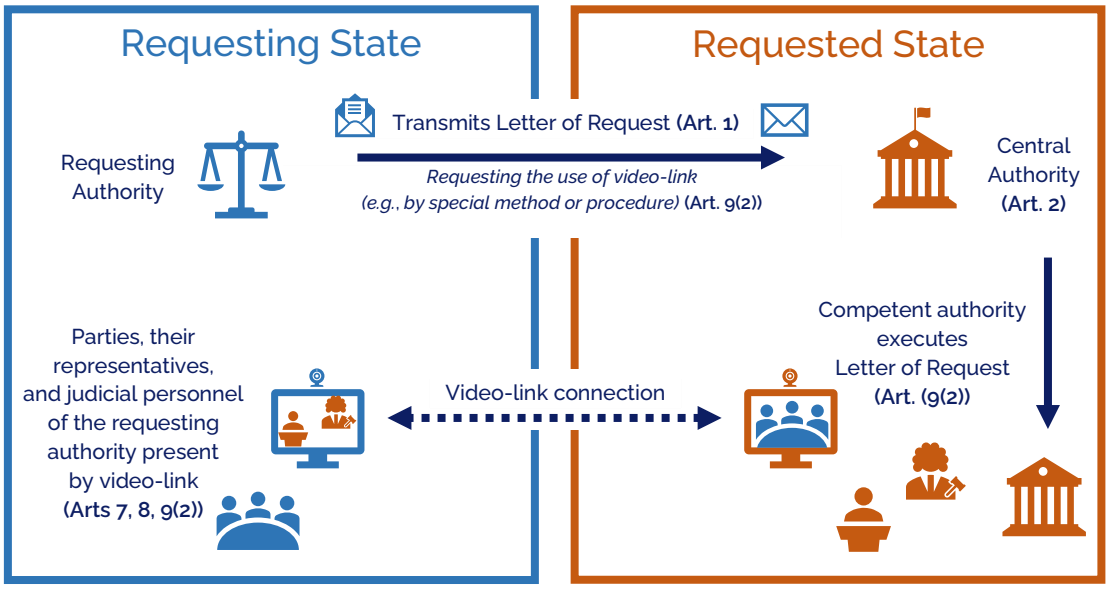
Chapter II


Consul
representing State of Origin in State of Execution
Commissioner
appointed by State of Origin or State of Execution
Takes evidence of a national of the State of Origin
Takes evidence of a national of the State of Execution or a national of a third State
Takes evidence
Law of State of Origin governs manner of taking evidence (Art. 21) provided it is not forbidden by law of State of Execution
Prior permission of State of Execution is not required unless that State has made a declaration that permission is required (Art. 15(2))
Prior permission of State of Execution is required unless that State has made a declaration that permission is not required (Art. 16(2))
Prior permission of State of Execution is required unless that State has made a declaration that permission is not required (Art. 17(2))
Where permission is required, State of Execution may specify conditions to be complied with in taking evidence
PRIVILEGES
(Art. 21)
A person may refuse to give evidence on the basis of a privilege or non-disclosure obligation recognised under:
• the law of State of Execution or
• the law of State of Origin or third State (as specified in the instrument appointing the diplomatic officer / consular agent, or in the commission)
COMPULSION
(Art. 15, 16 & 17)
Evidence must be taken without compulsion
ASSISTANCE
(Art. 18(1))
Diplomatic officer / consular agent or Commissioner may apply to State of Execution for assistance to obtain evidence by compulsion if that State has made a declaration to that effect

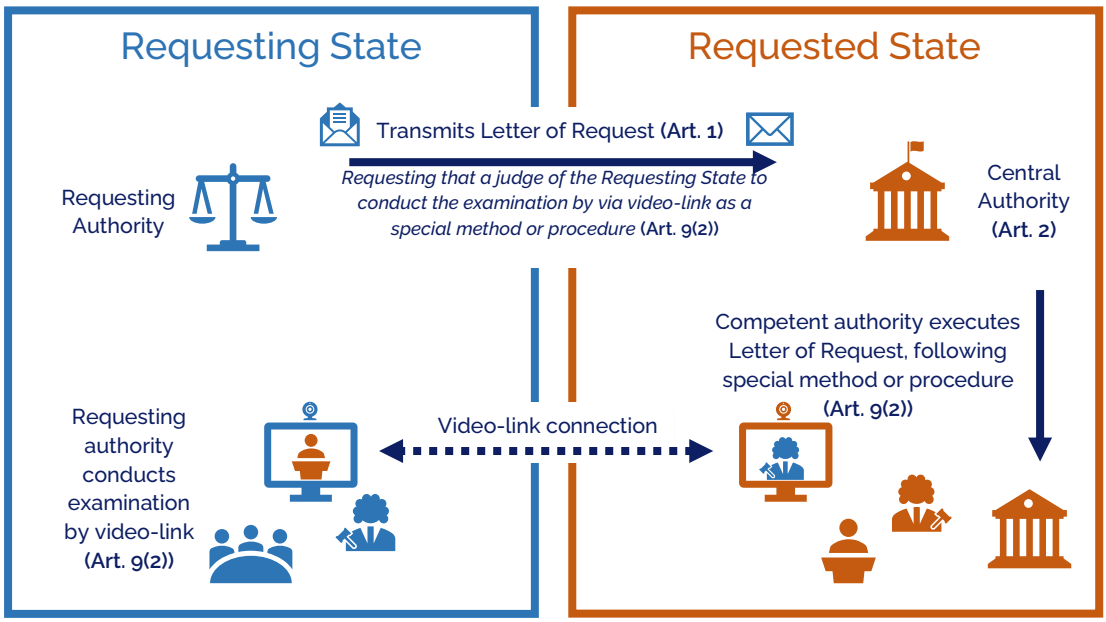
Annex 2 – Explanatory charts on Use of Video-Link

Use of Video-link under Chapter I

Indirect taking of evidence (possible use of video-link under Arts 7, 8, 9)

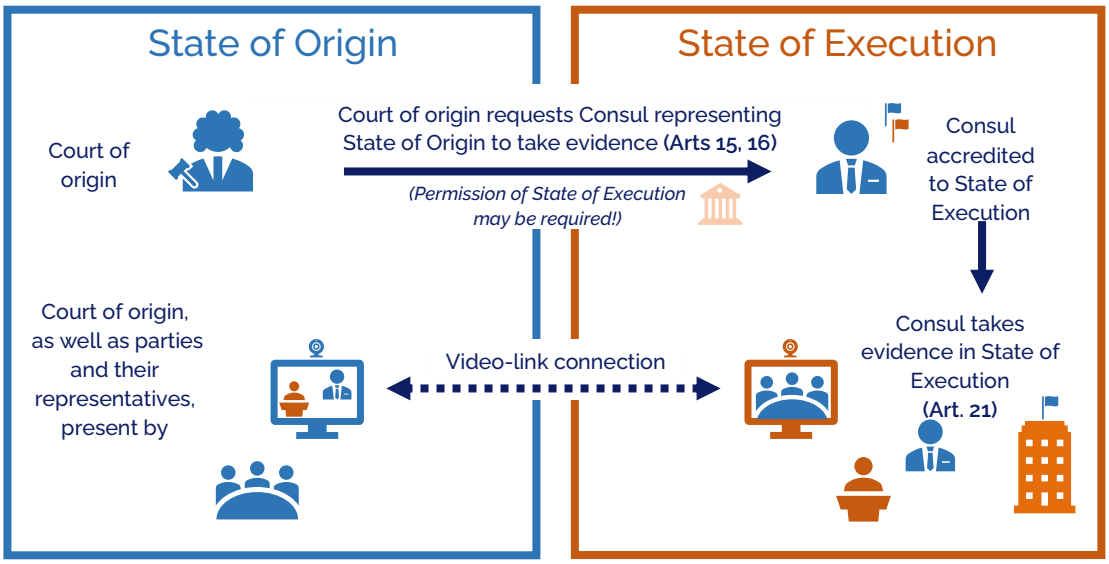


Direct taking of evidence (possible in some States under Art. 9(2))

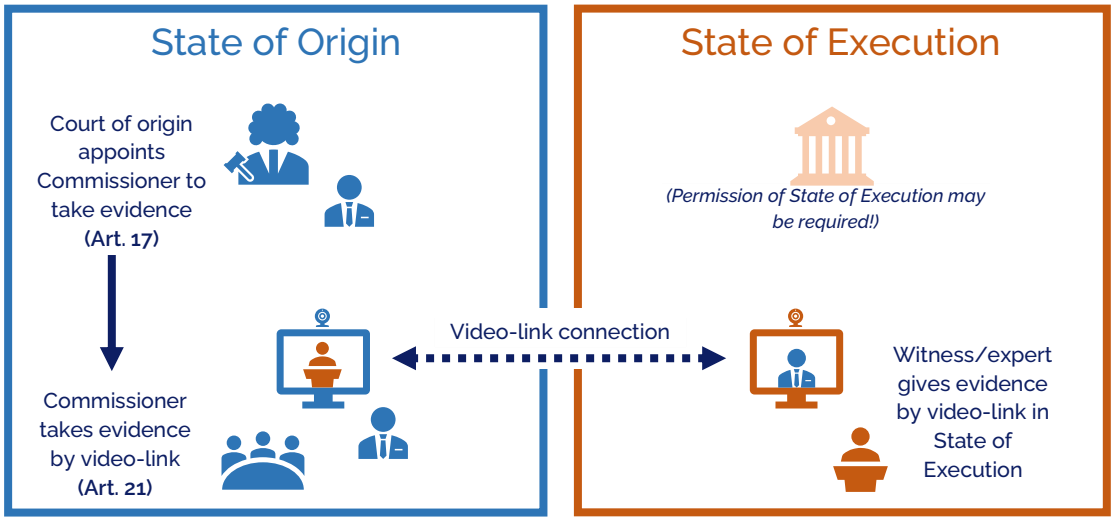


Use of Video-link under Chapter II*

Direct taking of evidence by a Consul (Arts 15, 16, 21)



Direct taking evidence by a Commissioner (Arts 17, 21)



* Under Art. 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the Status Table for the Evidence Convention, in column entitled “Res/D/N/DC”.

Annex 3 – Text of the Convention

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

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 1

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 organise 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

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1 This Convention, including related materials, is accessible on the Evidence Section of the HCCH website. For the full history of the Convention, see HCCH, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves à l'étranger*, The Hague, Imprimerie Nationale, 1970, p. 219.

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) 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 legalisation 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 authorised 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 authorised 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

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 authorisation 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.

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 Contracting 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 authorised 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 Articles 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 authorised 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) 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

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

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 specialised agency of that Organisation, 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 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 18th day of March, 1970, 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.

Annex 4 – Recommended Model Form (with Instructions for Completion)

GUIDELINES FOR COMPLETING THE MODEL FORM

Filling out the fields: Complete this form electronically. Use plain language and avoid using unnecessary legal or technical language. Spell out dates in full (*e.g.*, "1 January 2024"). If the Letter of Request is being prepared by a party to the proceedings, consider engaging counsel in the Requested State to advise on the drafting of the Letter of Request. If a particular item does not apply, insert "not applicable" or "n/a" or otherwise indicate that this item is not applicable. The notes accompanying this form provide further information on filling out each field.

These Guidelines are to be used when completing Letters of Request, however, they may also be useful when applying for permission to take evidence under Chapter II of the Evidence Convention. In such cases, the Model Form should be adapted accordingly.

Content: This form is designed to ensure that the Letter of Request complies with the minimum content requirements set out in Art. 3(1) of the Convention. It also makes provision for additional content to be specified that may assist the execution of the Letter of Request.

Attachments: Attachments may be used. The notes accompanying this form indicate some situations in which it might be convenient to do so. Attachments should be clearly identified and referenced in the Letter of Request, and they should be securely fastened to the completed form.

Language: The completed form (*including attachments*) must be in the language of the Requested State, or must be accompanied by a translation into that language (Art. 4(1)). However, the Requested State may permit or require a different language to be used (Art. 4(2)-(4)). To find out the particular language requirements for the Requested State, check the Country Profile for that State.

Format: The Letter of Request may be issued in paper or electronic form in accordance with the law of the Requesting State. If the requesting authority wishes to issue the Letter of Request in electronic form (*e.g.*, as a PDF file), it should first check the Country Profile or, if necessary, with the Central Authority of the Requested State that such a form will be accepted.

Copies: In general, a Letter of Request should be furnished in *duplicate*, except if it is issued in electronic form. If in doubt, contact the Central Authority of the Requested State. To find out the contact details of the Central Authority, check the Country Profile for the Requested State.

No legalisation: The Letter of Request does not need to be legalised (or apostillised) (Art. 3(3)).

Terminology: In this form:

Central Authority means the authority designated by a Contracting Party to receive Letters of Request from the Requesting State, and to transmit them to the requested authority.

Convention means *HCCH Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, the full text of which is available on the Evidence Section of the HCCH website.

Hague Conference on Private International Law (or HCCH) means the intergovernmental organisation under whose auspices the Convention was negotiated and adopted.

Letter of Request means the device used to request the obtaining of evidence or the performance of some other judicial act under the Evidence Convention.

Country Profile an online profile containing practical and country-specific information about a Contracting Party to the Convention, which is available on the Evidence Section of the HCCH website.

Requested authority means the authority that executes the Letter of Request.

Requested State means the State to which the Letter of Request is addressed.

Requesting authority means the authority that issues the Letter of Request.

Requesting State means the State from which the Letter of Request is issued.

Further information: For further information on obtaining evidence abroad under the Convention, visit the Evidence Section of the HCCH website. Detailed explanations on the operation of the Convention are provided in the *Practical Handbook on the Operation of the Evidence Convention*, which may be ordered via the Evidence Section.

LETTER OF REQUEST

COMMISSION ROGATOIRE

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

Convention HCCH du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale

1	Sender Expéditeur	Insert the name, postal address, telephone number and e-mail address of the authority transmitting the Letter of Request
2	Central Authority of the Requested State Autorité centrale de l'État requis	Insert the name of the Central Authority (if known) and name of the Requested State (e.g., "Central Authority of [insert name of State])"
3	Person to whom the executed request is to be returned Personne à qui les pièces constatant l'exécution de la demande doivent être renvoyées	Insert the name and postal address of the person (e.g., the Requesting Authority, Central Authority of the Requesting State)
4	Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request Indiquer la date limite à laquelle l'autorité requérante désire recevoir la réponse à la commission rogatoire	
	Date Date limite	Insert the date
	Reason for urgency Raison de l'urgence	Insert the reason

In conformity with Article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

En conformité de l'article 3 de la Convention, le requérant soussigné a l'honneur de présenter la demande suivante :

5	a	Requesting authority (Art. 3(a)) Autorité requérante (art. 3(a))	Insert the name, postal address, telephone number and e-mail address of the Requesting Authority
	b	To the Competent Authority of (Art. 3(a)) À l'Autorité compétente de (art. 3(a))	Insert the name of Requested State
	c	Names of the case and any identifying number Nom de l'affaire et numéro d'identification de l'affaire	Insert the name and number of the case

6		Names and addresses of the parties and their representatives (including representatives in the Requested State) (Art. 3(b)) Identité et adresse des parties et de leurs représentants (y compris représentants dans l'État requis) (art. 3(b))	
	a	Plaintiff Demandeur	Insert the name and address of the plaintiff/claimant/applicant to the proceedings
		Representatives Représentants	Insert the name and address of the representatives of the plaintiff/claimant/applicant
	b	Defendant Défendeur	Insert the name and address of the defendant/respondent to the proceedings
		Representatives Représentants	Insert the name and address of the representatives of the defendant/respondent

	c	Other parties *Autres parties*	Insert the name and address of any other party (e.g. third party defendant, intervener)
		Representatives Représentants	Insert the name and address of the representatives of the other party

7	a	Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (Art. 3(c)) Nature et objet de l'instance (divorce, filiation, rupture de contrat, responsabilité du fait des produits, etc.) (art. 3(c))	Describe the nature of the proceedings for which the Letter of Request is being issued, and whether the proceedings have been commenced
	b	Summary of complaint Exposé sommaire de la demande	Insert the summary of the action brought by the plaintiff/claimant/applicant
	c	Summary of defence and counterclaim Exposé sommaire de la défense ou demande reconventionnelle	Insert the summary of any defence and/or counterclaim
	d	Other necessary information or documents Autres renseignements ou documents utiles	Specify any other information, or attach any other documents, that may assist the Requested Authority in executing the request

8	a	Evidence to be obtained or other judicial act to be performed (Art. 3(d)) Actes d'instruction ou autres actes judiciaires à accomplir (art. 3(d))	Specify the evidence to be obtained or the judicial act to be performed. Specifics of the evidence sought should be provided in items 9-11

b	Purpose of the evidence or judicial act sought But des actes à accomplir	Insert the statement about the purpose of the evidence or other judicial act sought. Where evidence is sought, specify how the evidence relates to the case, and how it will be used in those proceedings

9	Identity and address of any person to be examined (Art. 3(e)) Identité et adresse des personnes à entendre (art. 3(e))	Where witness examination is sought, insert name and address of each witness

10	Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (Art. 3(f)) Questions à poser ou faits sur lesquels les personnes susvisées doivent être entendues (art. 3(f))	Where witness examinaton is sought, specify either the questions, or the statement of subject-matter

11	Documents or other property to be inspected (Art. 3(g)) Documents ou objets à examiner (art. 3(g))	Insert the description of documents or other property

12	Any requirement that the evidence be given on oath or affirmation and any special form to be used (Art. 3(h)) Demande de recevoir la déposition sous serment ou avec affirmation et, le cas échéant, indication de la formule à utiliser (art. 3(h))	If evidence is sought, specify whether the evidence is to be given on oath and, if so, any special form of oath required

13	Special methods or procedure to be followed (*e.g.*, oral or in writing, verbatim transcript or summary, cross-examination, etc.) (Arts 3(i)	Specify the special method or procedure

	and 9) Formes spéciales demandées (déposition orale ou écrite, procès-verbal sommaire ou intégral, “cross-examination”, etc.) (art. 3(i) et 9)	

14	Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (Art. 7) Demande de notification de la date et du lieu de l’exécution de la requête, de l’identité et de l’adresse de la ou des personnes à informer (art. 7)	Specify whether the parties or their representatives are to be present at execution and, if so, specify the name and address of the person(s) to be notified (e.g. the Requesting Authority, the parties and their representatives)

15	Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (Art. 8) Demande d’assistance ou de participation des magistrats de l’autorité requérante à l’exécution de la commission rogatoire (art. 8)	If judicial personnel of the Requesting Authority are to be present at execution, insert the request for authorisation

16	Specification of privilege or duty to refuse to give evidence under the law of the Requesting State (Art. 11(b)) Spécification des dispenses ou interdictions de déposer prévues par la loi de l’État requérant (art. 11(b))	Specify any privilege or duty under the law of the Requesting State that may be invoked by the person giving evidence

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	Insert the name and address of the person responsible for reimbursement (e.g. Requesting Authority, particular party or its representative)

	borne by Les taxes et frais donnant lieu à remboursement en vertu de l'article 14, alinéa 2 et de l'article 26 seront réglés par	

Date of request Date de la requête	Insert the date

Signature and seal of the requesting authority Signature et sceau de l'autorité requérante	

NOTES

Item 1: The law of the Requesting State determines which authority sends the Letter of Request to the Requested State. In some States, the requesting authority itself sends the Letter of Request abroad, or arranges for it to be transmitted abroad (*e.g.,* by the moving party or its representative). In other States, the Letter of Request is first transmitted to a centralised authority (generally the Central Authority of the Requesting State designated to receive Letters of Request from abroad), which itself sends the Letter of Request abroad.

Item 2: In some States, a Letter of Request may be sent directly to the requested authority, thereby bypassing the Central Authority. If this is the case, insert the name of the requested authority instead of the name of the Central Authority. To find out whether Letters of Request may be transmitted directly to the requested authority, check the Country Profile for the Requested State.

Item 3: The documents establishing the execution of a Letter of Request are sent to the requesting authority by the same channel that the requesting authority used to send the Letter of Request.

Item 4: The Requested State is required to execute the Letter of Request expeditiously. In some cases, the Letter of Request may need to be executed and returned within a particular timeframe. Use this item to specify any such timeframe and explain the urgency. In some States, the authorities will endeavour to give special expedited processing to urgent requests, although there is no guarantee that the Letter of Request will be executed within the specified timeframe. To find out how long it generally takes for a Letter of Request to be executed in the Requested State, check the Country Profile for that State. Alternatively, contact the Central Authority of the Requested State. Bear in mind that execution may be delayed due to factors that are beyond the control of the authorities of the Requested State (*e.g.,* the availability and willingness of a person to give evidence).

Item 5a: A Letter of Request may only be issued by a judicial authority. The law of the Requesting State determines which judicial authorities are competent to issue Letters of Request.

Item 5b: The requesting authority is not expected to identify the requested authority. This will be done by the Central Authority of the Requested State. The law of the Requested State determines which authority is competent to execute the Letter of Request. In most States, Letters of Request are executed by judges, magistrates or other judicial officers. In other (typically common law) States, Letters of Request are often executed by court-appointed examiners, which are typically private legal practitioners. Competence to execute the Letter of Request may depend on the place of execution (*e. g.*, the location of the person giving evidence, or the location of the property).

Item 5c: The case may be cited using the style of the Requesting State.

Item 6: If there is only a single party to the proceedings, only item 6a needs to be completed. Consider including an e-mail address for the parties and/or their representatives to facilitate future correspondence with the requested authority (particularly if the parties and/or their representatives are to be present at execution – see item 14). If there are multiple plaintiffs or defendants, consider specifying only the lead plaintiff or defendant, using the style of the Requesting State.

Item 7a: The amount of information provided depends on the proceedings and the evidence being sought. As far as possible, describe the nature of proceedings in a precise manner, and in such a way as to ensure that a foreign authority unfamiliar with litigation practices in the Requesting State would understand the request.

Items 7b and c: Pay close attention to describing the pleadings that give rise to the Letter of Request (*i.e.*, the pleadings in support of which the evidence is sought). Detailed information may be necessary where a person is sought to be examined about a particular subject-matter (see item 10).

Item 7d: Other documents may include judicial decisions that specify the nature and details of the evidence being sought. Remember that any attachment to the Letter of Request will need to comply with the language requirements.

Item 8a: Where evidence is to be obtained, use items 9 to 11 to specify the evidence sought. Obtaining particular material or performing particular acts may be outside the functions of the judiciary of the Requested State, in which case the Letter of Request risks being refused execution. If in doubt, refer to the Country Profile for the Requested State, or contact the Central Authority of the Requested State.

Item 8b: This item is particularly important for Letters of Request issued in proceedings in common law jurisdictions, in cases where (a) the production of documents is sought, and (b) the Requested State has declared that it will not execute Letters of Request issued for the purpose of pre-trial discovery of documents. To find out whether the Requested State has made such an "Article 23 declaration", refer to the "*Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention*". Where metadata of documents stored electronically is sought, specify clearly what type of information is needed, *e.g.*, the authorship of a specific document, the number of times a document has been accessed and by whom, etc. In such cases, avoid requesting as evidence a hard drive or another computer device as that would likely be considered a "fishing expedition".

Item 9: Providing complete and accurate information on the person to be examined is important to allow the requested authority to readily identify and notify that person. For a natural person, specify a residential address. The nationality, profession, date of birth of the person and the identification number may also be specified (if known). Where evidence is sought from a legal person, specify an authorised office and/or officeholder and the registration number. Where evidence is sought from multiple persons, a separate Letter of Request may need to be issued for each person. If in doubt, contact the Central Authority of the Requested State to check whether separate Letters of Request are needed.

Item 10: Questions should be drafted in a *clear and concise manner*, and should avoid vague and uncertain concepts that may not be understood by the requested authority. In addition, questions should be precise and sufficiently specific. Vague or imprecise questions needlessly complicate the task of the requested authority in examining the witness or expert and may elicit unhelpful responses. The subject-matter of the examination should be clearly defined, bearing in mind that the requested authority is unlikely to know more about the case than that which is specified in the Letter of Request (see item 7). The wider the scope of the subject-matter, the greater the need to give particulars. Questions may be specified in an attachment, in which case, ensure that the attachment is clearly identified and insert a reference to the attachment. Remember that any attachment to the Letter of Request will need to comply with the language requirements.

Item 11: Documents and property should be specifically identified. For documents, specify the

author, recipient, subject-matter, and date (where known), as well as the name and address of the person from whom the documents or property are to be produced. Avoid describing the documents as any and all documents within a class. The Requested State may have declared that it will not execute a Letter of Request issued for the purposes of pre-trial discovery of documents. To find out whether the Requested State has made such an "Article 23 declaration", refer to the "*Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH Evidence Convention*". Further information may also be available on the Country Profile for that State.

Item 12: The law of the Requesting State may require evidence to be given on oath or affirmation. It may also require a special form of oath or affirmation (*e.g.*, the use of particular words, or the use of a particular person to administer the oath). The requested authority is required to follow a request that evidence be given on oath or affirmation, and that a special form be used, unless it is (a) incompatible with the internal law of the Requested State, or (b) impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. To avoid delays from the request not being followed, use this item to specify whether evidence may be taken in accordance with domestic procedure in the Requested State. If in doubt as to whether a particular oath or affirmation may be administered, contact the Central Authority of the Requested State.

Item 13: Evidence will be obtained applying the methods and procedures prescribed by the law of the Requested State, which may be *significantly different* to those prescribed under the law of the Requesting State. Nevertheless, the requesting authority may ask the requested authority to follow a *special method or procedure*, to ensure that the evidence is obtained in a form that can be used in the proceedings; in such a case, the Convention requires that the requested authority follow this *special method or procedure* requested by the requesting authority, unless that method or procedure is (a) incompatible with the internal law of the Requested State, or (b) impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. Examples of common requests include the taking of a written witness statement, the production of a verbatim transcript of oral examination, and the examination and cross-examination of a witness by the parties or their representatives. Pay close attention to clearly specifying the method or procedure to avoid delays in execution. It may be useful to provide an extract of the relevant law or guidelines of the Requesting State by way of an attachment to the Letter of Request. Remember that any attachment to the Letter of Request will need to comply with the language requirements.

Item 14: This item facilitates the implementation of Article 7 of the Convention, which entitles the parties and their representatives to be present at the execution of the Letter of Request, either in person or by video-link.

Item 15: This item facilitates the implementation of Article 8 of the Convention, which provides that members of the judicial personnel of the requesting authority may be present at the execution of the Letter of Request if (a) the Requested State has made a declaration to that effect, and (b) prior authorisation by a competent authority designated in the declaration is granted (if such authorisation is required by the Requested State). Judicial personnel may be present at the execution of a Letter of Request either in person or by video-link. To find out whether the Requested State has made a declaration and the content of that declaration, check the Country Profile for that State.

Item 16: This item facilitates the implementation of Article 11(1)(b) of the Convention, which provides that a person may invoke a privilege or duty to refuse to give the evidence under the law of the Requesting State if the privilege or duty has been specified in the Letter of Request.

Pay close attention to clearly specifying the privilege or duty to avoid delays in execution. It may be useful to provide an extract of the relevant law of the Requesting State by way of an attachment to the Letter of Request. Remember that any attachment to the Letter of Request will need to comply with the language requirements.

Item 17: The execution of the Letter of Request only gives rise to reimbursement of particular costs, such as fees paid to experts and interpreters, costs occasioned by the use of a "special method or procedure" (Art. 14(2)), and certain costs for which the Requested State is required to request reimbursement because of constitutional limitations (Art. 26). To find out whether the Requested State requires reimbursement for these costs, check the Country Profile for that State.

Annex 5 – Checklist for Preparing a Letter of Request

Checklist

To ensure that the Letter of Request is completed correctly, please ensure that:

☐ All fields of the relevant parts of the Model Form are filled out.

☐ Contact details for the sender, including telephone, fax numbers and e-mail address are provided.

☐ Contact details for the receiving authority (Central Authority of the Requested State) are provided.

☐ Where necessary, the list of questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined is enclosed.

☐ Where necessary, judicial decisions that specify the nature and details of the evidence being sought are attached.

☐ Duplicates of the Letter of Request are enclosed (unless submitted in electronic form).

☐ Where required, a translation of the Letter of Request and its attachments are provided.

☐ Where a special method or procedure has been requested for the taking of evidence, an extract of the relevant law or guidelines of the Requesting State are attached to the Letter of Request.

☐ Where a privilege or duty to refuse to give evidence has been specified, an extract of the relevant law of the Requesting State is attached to the Letter of Request.

☐ The form is duly stamped and/or signed.

Annex 6 – Preparing for and Conducting Hearings Using Video-Link

Background note:

In preparation of the earlier *1970 Evidence Convention Guide to Good Practice: The Use of Video-link* (Guide), the Permanent Bureau circulated a Country Profile Questionnaire (2017 Country Profile Questionnaire) to National and Contact Organs of Members, and to non-Member Contracting Parties to the Convention. Responses of the States were analysed [1] and subsequently included in the Guide. Each response received was uploaded to the HCCH website. Given the subsequent development of national or regional laws and practices, previous State responses will only be referred to in this Annex, where relevant.

Introduction

1. The use of video-link technology in the taking of evidence abroad cannot be addressed from a purely legal perspective – a holistic, interdisciplinary approach is needed.

2. A comprehensive study in one Contracting Party found that the outcomes and effectiveness of video-link in facilitating justice are inextricably linked to service delivery and practical implementation, serving only to reinforce that the way in which video-link systems are designed, operated and used, matters.[2] Moreover, laws themselves can dictate or influence various practical and technical aspects.

3. In order to assist those seeking the use of video-link when preparing requests, Central Authorities are encouraged to publish general information about organisational requirements, booking systems, equipment and technical capabilities, and / or contact information of the individual or division responsible for the execution of a request for the taking of evidence involving video-link, and share it with relevant authorities. If not already in place, Central and other Authorities are also encouraged to establish targeted guidelines and protocols, which outline domestic processes and allocate clearly the responsibilities associated with: scheduling and reserving the appropriate facilities; conducting tests and maintenance; initiating, controlling and ending the video-link connection; as well as collecting feedback afterwards.[3] In order to minimise the risk of secure IT infrastructure being hacked or otherwise compromised, some authorities may choose to share specific and sensitive information only upon request, if the relevant State authority deems it necessary or appropriate to do so.

1. Consideration of potential practical obstacles

4. Certain practical obstacles were mentioned in the responses to the 2017 Country Profile Questionnaire. It would appear that the most fundamental practical difficulties have arisen under Chapter II of the 1970 Evidence Convention.

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1 For analysis, see Synopsis of Responses (*op. cit.* note 6).

2 For a full discussion of this study, which was carried out in Australia, see E. Rowden *et al.* (*op. cit.* note 222), p. 10.

3 Guidance on videoconferencing in cross-border proceedings (*op. cit.* note 195).

5. Practical obstacles under Chapter I primarily include the unavailability of videoconferencing equipment and support resources, the quality of transmission and compatibility of systems, as well as time differences between the Requesting State and the Requested State.[4]

6. Practical obstacles under Chapter II are more diverse and complex. Unlike Chapter I of the Convention (where the place where evidence is taken is usually the courts), the location of the taking of evidence under Chapter II may vary depending on the Article being invoked given that either a diplomatic or consular mission (Arts 15 and 16), or a Commissioner (Art. 17) may be entrusted with this task. In particular, because diplomatic and consular missions are many and may have different resources (*e.g.*, access to and speed of the Internet connection) and facilities (*e.g.*, videoconferencing equipment), it may be more difficult to determine their availability for the taking of evidence under Chapter II.

7. Consideration should be given to the fact that the location where evidence will be taken by video-link under Chapter II needs to be accessible, well-equipped, sufficiently staffed with IT experts or with remote IT assistance, and where applicable, comply with the conditions specified in the permission granted by the competent authority of the State of execution and any security concerns of the State of origin.

8. With respect to the taking of evidence by diplomatic officers or consular agents, not all States responding to the 2017 Country Profile Questionnaire allowed the use of video-link in their respective diplomatic and consular missions to assist in the taking of evidence under Chapter II of the Convention.

9. The States that have *not* objected to the relevant Article of Chapter II, but *do not* allow the use of video-link to assist in the taking of evidence under Chapter II in their diplomatic or consular missions (or only do so in exceptional circumstances), have provided the following reasons:[5] the inability or the lack of capacity of authorities or diplomatic and consular missions to provide assistance with the taking of evidence by video-link; the lack of technical equipment; the lack of practice, regulation or involvement of their diplomatic and consular missions in this topic; the impossibility of the consular services processing outgoing requests, and security concerns.

10. A few States mentioned that the usual procedure is to refer the applicant or parties to commercial suppliers such as conference centres, with one State noting that such arrangements must be agreed privately and do not involve the Central Authority.

11. The States that have *not* objected to the relevant Article of Chapter II, and *do* allow the use of video-link to assist in the taking of evidence under Chapter II in their diplomatic or consular missions, mentioned some of the following practical difficulties:[6] the limited availability of videoconferencing equipment or of a

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4 See Synopsis of Responses (*op. cit.* note 6).

5 More details, see Synopsis of Responses (*op. cit.* note 6).

6 More details, see Synopsis of Responses (*op. cit.* note 6).

suitable room at the diplomatic or consular mission, and the need for security clearances conducted by a diplomatic mission to assess whether a person to be heard is a physical or security threat.

12. Further, one responding State indicated that in most of its diplomatic and consular missions, the videoconferencing equipment is located in secured areas where only officials are allowed. However, this responding State also noted that Skype could be an option and further clarified that in the future, videoconferencing equipment might also be available in the public areas of diplomatic and consular missions.[7]

13. With regard to the taking of evidence by a Commissioner, the location should not pose many difficulties as the Commissioner is able to choose the appropriate location and may thus choose a conference centre or a hotel with appropriate facilities and staff. However, where applicable, the location must comply with the conditions specified in the permission by the competent authority of the State of execution.

14. In this regard, it should be noted that some States condition the taking of evidence under certain Articles of Chapter II to a location / room to which the public has access,[8] a condition which may not be fulfilled where the restricted areas of diplomatic and consular missions (or a private hotel room in the case of the Commissioner) are used.

15. As a generally recommended practice, those preparing to submit a video-link request should make enquiries with the relevant authority to confirm that there are no practical obstacles or limitations to the execution of a request to use video-link in the taking of evidence (especially under Chapter II).

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7 See Synopsis of Responses (*op. cit.* note 6).
8 See declarations of France, available on the Evidence Section of the HCCH website.

2. Scheduling and testing

16. The requesting and requested authorities should consult one another with respect to scheduling and pre-testing.[9] Those organising the video-link should consider aspects including the availability of the participants, the facilities and equipment to be used, and the presence of staff or a third party to provide technical support. It is recommended that authorities keep a central register of facilities, equipment, as well as the relevant support staff, to facilitate the process of assessing which spaces are available at the scheduling stage.[10]

17. In setting the time of day for video-link proceedings, any difference in time zones between the locations of all parties involved should be taken into account and specified when confirming the arrangements.[11] Moreover, when scheduling both pre-testing and video-link hearings for the taking of evidence, it should be kept in mind that operating outside normal business hours may result in increased costs.

18. The streamlining of procedures can also benefit the making and rescheduling of bookings, the seeking of requisite permissions from a given authority, and obtaining the consent of parties or other participants. Authorities are encouraged to make use of secure online tools to facilitate this. [12]

19. The equipment and working parameters at all sites should be tested regularly, particularly in advance of a video-link hearing, to verify interoperability and the proper functioning of the equipment. [13] This should be done far enough in advance to provide technicians adequate time to make necessary adjustments. [14] Whether or not adjustments are made during the tests, ultimately it remains for the presiding official to determine if the hearing can proceed, or if additional modifications or support are necessary.[15]

20. Authorities are also encouraged to carry out tests of the connection prior to a hearing, as well as conduct regular maintenance of the equipment.

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9 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 10.

10 E. Rowden *et al.* (*op. cit.* note 222), p. 52.

11 Listing the relevant times in both local and Coordinated Universal Time (UTC) can assist in this regard, taking into consideration possible daylight saving time (DST) adjustments. Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 17.

12 E. Rowden *et al.* (*op. cit.* note 222), pp. 52-53.

13 See, *e.g.*, *London Borough of Islington v. M, R (represented by his guardian)* [2017] EWHC 364 (Fam), where the High Court of Justice of England and Wales (Family Division) (United Kingdom) emphasised the importance of testing the video-link equipment before the hearing. For an example of a "Test Plan", see "Handshake" Project, "D2.2 Test Plan", pp. 8-9.

14 E. Rowden *et al.* (*op. cit.* note 222), p. 55. See, also, Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p.11, recommending test the equipment and the connections at least one day before the actual videoconference.

15 E. Rowden *et al.* (*op. cit.* note 222), p. 55.

3. Technical support and training

21. As effective technical support is critical to video-link operations, it is of the utmost importance that the technical support staff are involved as early as possible when organising a hearing during which video-link is to be used.

22. For proceedings under Chapter I, generally the requesting authority should ensure that sufficient technical support is provided at the local site, while the requested authority has the same responsibility at the remote site. For proceedings under Chapter II, the Consul or Commissioner is generally responsible for making such arrangements at both sites. These responsibilities may be distributed slightly differently depending on which of the connection types is being used, for example if a videoconferencing bridge is being provided by a third party.

23. Appropriate operators and support personnel should be on site at both locations during the hearing (or at least available via a third party if a bridging service is being employed) in order to operate the equipment and respond to any technical difficulties that may arise. Training in troubleshooting and applicable equipment maintenance procedure is also recommended for others, such as legal staff and interpreters, who may need to operate the technology (even incidentally).[16]

24. Given the vast differences in the structure of judicial systems and the resulting difficulties in determining the right contact person, it may be beneficial to publish (*e.g.*, on the national website(s)) specific technical contact points either within the Central Authority (Chapter I), or other technical contacts who can assist the consul or commissioner (Chapter II).[17] These contact points are also encouraged to maintain regular communication with each other, even if not in the context of a specific case or hearing, so as to share best practices. Over time this will help to improve efficiency, reduce costs and further facilitate the use of information technology under the Convention.

25. As a generally recommended practice, authorities are encouraged, where applicable, to provide the necessary contact details to ensure each participant in a video-link hearing has access to appropriate technical support.

26. It is recommended that any staff member who may be involved in controlling or operating video-link equipment is given at least a basic level of training.

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16 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195).

17 See "Handshake" Project, "D3 Recommendations on the practical application of technical standards for cross-border videoconferencing", p. 23.

4. Reservation of appropriate facilities

27. Facilities need to be reserved at both the local and remote sites. As noted above, for proceedings under Chapter I, the requested authority and the requesting authority are each responsible for preparing the respective locations for the video-link, whereas for proceedings under Chapter II, the Consul or Commissioner is generally responsible for making arrangements for the preparations at both locations.

28. Just as the sites may vary, *e.g.*, a courtroom, conference room, or specialised videoconferencing facility, so too may the practical requirements, *e.g.,* equipment for the use of documents and / or exhibits, or procedures to ensure confidential communications between a witness / expert and his or her legal representative. There may also be legal restrictions and / or practical limitations on the type of location or site that can be used for the purposes of taking evidence by video-link. For example, from a practical perspective, it can be required that the location for taking evidence, which can be any hearing room, be located in a court building; or a specifically designated room be within the relevant court building; or the hearing room must be in a court for general witnesses, though in the case of evidence being given by an expert witness, another site (outside of a court) may also be used; or the location, which can be in either a court or the facility of another authority, be a separate room.

29. In addition, requirements may stem from either the applicable internal law or international agreements, or the presiding official can impose additional requirements where necessary. Those submitting the request should, therefore, carefully consider the equipment and facilities that are available, to ensure specific needs are met.

30. In this respect, while not every type of hearing will be able to be conducted using the same courtroom set-up, there are nonetheless some general aspects that should be considered to ensure the appropriate facilities are reserved. For example, the use of a location where intrusions or disruptions can be minimised, as well as the need for a safe and secure waiting area for the witness / expert (if necessary, with an entry that is separate from the public or main entry).[18]

31. Communication between the relevant staff (especially technical staff) is therefore vital to ensure that adequate facilities are available and, if necessary, reserved. Some authorities may also have a designated booking system for facilities, so it is advisable to check with the relevant Contracting Party.

32. As a generally recommended practice, authorities should confirm any requirements or restrictions in relation to the facilities to be reserved, such as the type of hearing room (*e.g.*, courtroom, conference room) or the location of that room (*e.g.*, in a court building, in a diplomatic or consular mission, in a hotel).

33. Authorities should verify whether the facilities need to be reserved in advance and are encouraged to make use of online tools to facilitate the reservation

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18 E. Rowden *et al.* (*op. cit.* note 222), pp. 56, 62-63.

process.

4.1 Use of documents and exhibits

34. The presentation of documents or exhibits is governed by the law of the Requested State (Chapter I) or the law of the State of origin (Chapter II). According to the applicable law, the parties should, in advance of the hearing, attempt to agree on which documents or exhibits will be required, and establish a deadline for the identification of exhibits (*e.g.*, several days before the hearing) in order to compile a bundle of the relevant documents to be made available at both sites prior to the hearing.[19] Alternatively, documents may be made available through shared electronic document repositories.[20] To the extent possible, any documents and / or exhibits to be referred to during the proceedings should also be provided to interpreters in advance of the hearing.[21]

35. Where permitted under the applicable law, arrangements may also need to be made to accommodate the introduction of additional documents or exhibits during the hearing. Where appropriate, the presentation of any such documents or exhibits should be done by a court official or some other impartial person.[22] This may be carried out via a document camera,[23] a digital screen-sharing function or by other means, which may be needed to allow private discussions between the witness and his or her lawyer related to the document or exhibit.[24]

36. As a generally recommended practice, if documents or exhibits are to be used, an appropriate medium for formally sharing and presenting these prior to, or during the hearing, should be agreed upon and arranged.

4.2 Private communications

37. There may be situations in which confidential consultations are required, for example between the witness and his or her legal representative(s), or between the legal representative(s) and the examiner or judicial personnel.[25] Although it would be preferable to have the lawyer be able to sit with their client,[26] where these actors are not present at the same location, means should be available (*e.g.*, secure phone lines, mobile phones, or separate videoconferencing equipment) to permit them to speak privately without others overhearing.

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19 See, *e.g., Federal Commissioner of Taxation v. Grbich* (1993) 25 ATR 516, where the Federal Court of Australia stated that providing a document bundle to the witness ahead of the examination eliminates "procedural hurdles to conducting a sound interrogation in court".

20 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 21.

21 "Handshake" Project (*op. cit.* Glossary), p. 40.

22 "Handshake" Project (*loc. cit.* Glossary).

23 See, *e.g.*, United Kingdom Ministry of Justice, *Practice Direction 32 – Evidence*, Annex 3 "Video Conferencing Guidance", para. 18: where a document camera is to be used, the parties must inform the panel operator of the number and size of documents or objects (available at the following address: < https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32 > [last consulted on 14 March 2024]).

24 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195); "Handshake" Project (*op. cit.* Glossary), p. 20.

25 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 15.

26 "Handshake" Project (*loc. cit.* Glossary).

Microphones and in some instances cameras that are connected to the main video-link may also need to be switched off during such a consultation.

38. This supplementary line of communication may also need to be used if there are issues with the connection quality or other technical problems, or in the case of some other reason to interrupt the hearing (*e.g.*, illness).[27] Similarly, it could be used to allow confidential communication with the remote participant both prior to and following the actual examination (*e.g.*, to brief the participant and discuss protocols or to give final instructions).[28]

4.3 Special cases

39. There are certain instances where additional considerations are warranted due to the nature of the examination or the relationship of the person to be examined with other participants. While this may be more common in criminal proceedings,[29] it may nonetheless be relevant to proceedings in civil and commercial matters. Examples include cases where evidence is to be obtained from vulnerable persons, such as children, the elderly, or persons with a mental or physical condition or disability. In these instances, video-link technology can be of significant benefit, as the witness can give evidence without the stress, inconvenience, discomfort or intimidation that may result from being physically present in the courtroom.[30]

40. Additional aspects may also need to be considered and, if necessary, adjustments made in order to facilitate the taking of evidence in such delicate circumstances. The actual process may also need to be modified according to the applicable law, for instance by having the witness give evidence to the presiding official in the absence of the parties, or by having a psychologist or similar expert on hand to assist in monitoring the witness.[31]

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27 E. Rowden *et al.* (*op. cit.* note 222), p. 63.

28 *Ibid.*, p. 56.

29 "Handshake" Project (*op. cit.* Glossary), p. 21.

30 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195). It should also be noted that the High Court of Justice (England and Wales) in the United Kingdom has held that it did not consider the potential disadvantages of video-link (*e.g.*, limits to the assessment of credibility) to be any further exacerbated purely by virtue of the use of the technology with respect to vulnerable witnesses or those requiring interpretation: *Kimathi & Ors v. Foreign and Commonwealth Office* [2015] EWHC 3684 (QB).

31 "Handshake" Project (*op. cit.* Glossary), p. 35.

5. Use of interpretation

41. If interpretation is needed for a witness or expert, those organising the video-link should consider the qualifications, training and experience of the interpreter in the specific context of the use of video-link technology and the conduct of the hearing.[32] Many Contracting Parties have a system of registration for qualified or sworn interpreters and translators.[33]

42. In the context of taking evidence, consecutive interpretation is typically used, and is preferred where the interpreter and the witness or expert are in two different locations, principally because of the ease of clarification or intervention, particularly from the presiding official.[34] Simultaneous interpretation, which is more challenging, requires a booth and special equipment, and may even involve a pair of interpreters alternating.[35]

43. Consideration should also be given in advance to the location of any interpreters to be used for the hearing, *i.e.*, whether the interpreter will be at the remote site where the witness is present, or at the main site.[36] Under Chapter I, the interpreter who will be assisting the witness would generally be located in the Requested State, as the Letter of Request is executed following the methods and procedures of this State (unless a specific method or procedure is requested). When evidence is taken by video-link by a Commissioner, the interpreter may be in the State of origin or the State of execution. It should also be noted that in some cases, in order to ensure high-quality interpretation services, an interpreter may be appointed who is located in neither the State of origin nor the State of execution, but a third State.

44. When the interpreter will be at the remote site (*i.e.*, co-located with the person giving evidence), the technical arrangements there, including acoustics and quality of sound, should be checked to ensure that the interpretation can be understood. If the interpreter is located at the main site and therefore not with the witness, maintaining a high-quality transmission is even more crucial. While the audio quality should obviously be of the highest possible standard, it is actually video quality that is of paramount importance, given the ability of interpreters to use lip movements, expressions and other non-verbal communication to avoid ambiguity and provide more accurate interpretation.[37] Whether located in the main courtroom, with the witness at the remote site, or some third location, the interpreter should always have a clear frontal view of all remote participants who will be speaking.[38]

45. Given the challenging nature of the video-link setting, it is recommended to engage interpreters specifically with appropriate qualifications and experience,

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32 See *Stuke v. ROST Capital Group Pty Ltd* (*op cit.* note 103), where the Federal Court of Australia was hesitant to permit the use of video-link to obtain evidence from a witness who required interpretation where the evidence related to a contentious or critical issue of fact.

33 For more information, see Country Profile of the relevant Contracting Party.

34 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 11.

35 *Ibid.*

36 Video Conferencing Guidance (*op. cit.* note 23), para. 8.

37 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 12.

38 "Handshake" Project (*op. cit.* Glossary), p. 37.

where possible.

46. Participants should decide, bearing in mind internal law requirements and any directions from the court, whether consecutive or simultaneous interpretation is to be used (the former is generally recommended in the context of video-link) and where the interpreter will be located (preferably at the same site as the witness).

6. Recording, reporting and review

47. When video-link technologies are used in the taking of evidence, some authorities and participants tend to favour recording the video proceedings, instead of relying on traditional transcription techniques.[39] As such, it should be no surprise that recording capability may be required,[40] and this should be taken into account when organising the video-link. In practice, some States continue to rely on transcripts and consider the recording of the testimony via audio or video to be a special method or procedure (for Chapter I requests), which would need to be approved by a court official of the Requested State on a case-by-case basis.[41]

48. For proceedings under Chapter I, the requested authority will follow its own law in determining how to record the hearing. The judicial authority may also request that the hearing be recorded following a specific method or procedure under Article 9(2) of the Convention. Where such a request is granted, the requesting authority is responsible for providing the recording equipment, if needed.

49. For proceedings under Chapter II, recording may generally be used consistent with procedures in the State of origin unless recording is forbidden by the law of the State of execution, or otherwise subject to conditions specified by the State of execution. If a court reporter is used at the main site to transcribe the proceedings, the reporter should be situated so that they can clearly see and hear the video-link.

50. In the execution of requests under both Chapters I and II, it is important to consider the relevant rules and procedures relating to the recording or report that is produced. The security of the actual live transmission is paramount, but the subsequent secure handling and storage of any recording or report produced is also of great importance.[42] In addition, authorities should consider how to incorporate or append any documentation or other exhibits to the final recording or report.[43] Often such recordings or reports are subject to the same rules and procedures for recordings or reports of hearings which do not make use of video-link.[44] In other instances, there may be specific requirements for the recording or reporting of a video-link examination including its handling or storage.[45]

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39 See R. A. Williams (*op. cit.* note 224), p. 22. See also, Synopsis of Responses (*op. cit.* note 6).

40 E. Rowden *et al.* (*op. cit.* note 222), p. 118.

41 See Synopsis of Responses (*op. cit.* note 6).

42 A court in India has prepared guidelines to ensure that suitable security arrangements are maintained in the handling and storage of the recording. See, *e.g.*, the High Court of Delhi, *Delhi High Court Rules*, 2018, Annexure B "Guidelines for the Conduct of Court Proceedings between Courts and Remote Sites", 6.9: "An encrypted master copy with hash value shall be retained in the Court as part of the record. Another copy shall also be stored at any other safe location for [back-up] in the event of [an] emergency. Transcript of the evidence recorded by the Court shall be given to the parties as per applicable rules. A party may be allowed to view the master copy of the [audio-visual] recording retained in the Court on application which shall be decided by the Court consistent with furthering the interests of justice."

43 "Handshake" Project (*op. cit.* Glossary), p. 19.

44 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195).

45 Some States have procedures in place for the handling and storage of the recording of the testimony, while in one State, the audio of the testimony is automatically recorded by the court in accordance with its code of civil procedure. See Synopsis of Responses (*op. cit.* note 6).

51. Taking technical equipment across borders may give rise to costs and may lead to customs problems in the State of execution if not all the necessary permits have been obtained.[46] Consult with the relevant State whether such equipment may enter its territory. Accordingly, it may be advisable to hire technical equipment in the State of execution.

52. In general, Embassies and Consulates are not in a position to provide the services of stenographers / interpreters or offer video / audio recording equipment. As such, the requesting party should make all the necessary arrangements in advance.[47]

53. Moreover, the mechanisms and procedures in place with respect to recording and reporting should not only be restricted to the substantive content of the evidence taken. Practical matters, in particular any issues or challenges should also be reported, in addition to general data about video-link usage by that particular authority or in that particular jurisdiction. In this way, regular adjustments to the operational aspects can be made, based on real experiences and recommendations.[48]

54. It is therefore of considerable benefit for authorities to keep accurate records of usage and to provide an adequate and accessible mechanism for collecting feedback from the participants in a video-link hearing, in order to review various aspects of the process, including the technology itself, the spaces used, the pre- and post-protocols, as well as the overall perceived experience, ultimately working towards a better allocation of resources and more efficient execution of proceedings involving video-link.[49]

55. As a generally recommended practice, participants should confirm how the proceedings will be recorded, noting that where possible and permitted, a video recording may be preferable to a written record. Authorities should ensure that the subsequent handling and storage of any recording or report produced is secure. Authorities should also ensure that live transmission by video-link is secure and if possible, encrypted.

56. Necessary arrangements should be made for recording equipment and / or for a stenographer or court reporter to attend the hearing.

    Where applicable, participants are encouraged to report any issues or challenges of a practical nature to the authorities concerned. Authorities are, as mentioned above, similarly encouraged to be proactive in seeking this feedback to further improve the provision of video-link services.

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46 D. Epstein *et al.* (*op. cit.* note 93), para. 10.25.

47 B. Ristau (*op. cit.* note 184), p. 328. It may also be of benefit to organise a back-up of the recording, which is an effective safeguard against any deterioration in the audio or video quality during the transmission. See, *e.g.*, United Kingdom Ministry of Justice, *Practice Direction 32 – Evidence* (*op. cit.* note 23), p. 15.

48 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 25.

49 E. Rowden *et al.* (*op. cit.* note 222), p. 77.

7. Environment, positioning and protocols

57. The rooms or spaces used can have a significant influence on the manner in which the hearing is conducted and ultimately the effectiveness of the proceedings. For a witness, the experience of providing evidence by video-link from a remote location may differ considerably from that of giving evidence in a courtroom, so it may be difficult to replicate the necessary atmosphere.[50] Nevertheless, while evidence is being taken, the space at the remote location should also be considered, for all intents and purposes, to be an extension of the courtroom itself.[51]

58. Stemming from this notion of an extension of the courtroom, the "Gateways to Justice" project[52] in Australia made a number of recommendations with respect to the environment, positioning and protocols as they relate to video-link. The project recommended that in order to preserve the requisite formal ambience, the presiding official should ensure that persons at the remote location are informed of expectations with respect to appropriate behaviour.[53]

59. In light of these considerations of atmosphere and behaviour, the physical rooms are often as important as the video-link technology being used. The layout of the room at the remote location should therefore also be organised so as to enhance the witness' feeling of participating in a traditional courtroom setting.[54] As such, the "Gateways to Justice" project further recommended that, with a view to achieving optimum conditions and where resources and capabilities allow, courts and other facility providers should adopt an approach that integrates the technical aspects with both the architecture and physical environment, and namely that:

    a. the hearing room at both sites be large enough to accommodate all the participants and, where applicable, attending members of the public;
    b. additional design factors be taken into account, such as appropriate lighting and décor, proper acoustics, controlled temperature, and the positioning of both the participants and equipment; and
    c. reconfiguration, adaptation or at the very least "fine-tuning" of the space be factored in irrespective of whether the rooms have been designed with video-link use in mind.[55]

60. Experience shows that the lighting requirements of spaces to be used for video-link are some of the most onerous from a design perspective. This is principally because the spaces at each location involved in the video-link need to have a

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50 For example, in *Campaign Master (UK) Ltd v. Forty Two International Pty Ltd (No. 3)* (*op. cit*. note 824), the Federal Court of Australia voiced concerns that permitting the use of video-link technology detracts from some important effects associated with giving evidence in a courtroom, highlighting that a witness may be less aware of the "solemnity of the occasion and of his or her obligations".

51 See, *e.g.*, *Trans-Tasman Proceedings Act 2010* (Cth), section 59.

52 See, *supra*, the discussion at note 222.

53 E. Rowden *et al.* (*op. cit.* note 222), pp. 63-64.

54 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 18.

55 E. Rowden *et al.* (*op. cit.* note 222), pp. 53, 57, vi.

combination of both brighter lighting in specific areas, to fully show facial features and expressions of participants, but also slightly darker lighting for the rest of the environment, so as not to inhibit the view of the screens displaying the other connected locations.[56] Organisers thus need to consider the use of direct lighting on the faces of all participants at all locations, in addition to ensuring that the regular lighting in each room is free from reflections, shadow and glare.[57]

61. From an acoustic perspective, those responsible for the video-link facility should ensure that the space is designed to both minimise the intrusion of noise and distraction, but also to confine sound inside the space, for confidentiality and privacy reasons.[58] Further, in order to maximise the intelligibility of that which is being said during the hearing, factors such as reverberation time, sound absorption and sound diffusion should also be considered.[59]

62. The participants should be situated in the room so that they are facing the camera when speaking, which is imperative to promoting good communication. This will help determine the number of cameras needed and their positioning.[60] Where a courtroom is not used, the individual conducting the hearing may need to determine where participants sit. If an interpreter is present, they should be placed with a clear view of the facial and lip movements of those speaking.

63. The main objective of a video-link hearing is to make the setting seem as close as possible to an in-person hearing, which is especially important when considering the positioning of the equipment. Thus, cameras should be positioned so as to permit those who are speaking to face the camera directly maintaining eye-contact,[61] and enabling the observation of body language, corresponding facial expressions, and gestures, which are important in assessing the demeanour and credibility of the speaker.[62]

64. It is equally important that there be an adequate number of video monitors of sufficient size, placed so that all participants at one site can see the speaker at the other site with a similar viewing angle and distance. The participants must be able to see the witness or expert, and that individual must be able to see who is asking the questions and anyone else commenting on the testimony. The perceptions and views are of particular importance, in order to give the participants an appropriate sense of "presence", while ensuring objectivity by framing the different participants on screen in an identical manner.[63] There should also be an adequate number of microphones, positioned to ensure that speakers can be clearly heard and to minimise sound interference.[64]

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56 J. R. Benya, *Lighting for Teleconferencing Spaces*, Lutron Electronics, Inc., 1998, cited in M.E. Gruen and C.R. Williams (*op. cit.* note 193), p. 16.
57 "Handshake" Project (*op. cit.* Glossary), p. 22; E. Rowden *et al.* (*op. cit.* note 222), pp. 122-123.
58 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 18.
59 "Handshake" Project (*op. cit.* Glossary), pp. 21-22.
60 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 12.
61 E. Rowden *et al.* (*op. cit.* note 222), p. 120.
62 For a discussion of the effect of video-link technology on assessing the credibility of a witness, see also, *supra*, note 218.
63 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), pp. 19, 21.
64 E. Rowden *et al.* (*op. cit.* note 222), p. 118.

65. While the spaces being used and the surrounding environment are of the utmost importance, there may also be the need for specific protocols or directions from the presiding official, including in relation to entrances and exits, equipment position and control, as well as speaking order and seating arrangements.[65]

66. Based on the above, and as a generally recommended practice, conditions in all of the rooms or spaces to be connected during the hearing should be optimised for the use of video-link, including the room size, layout, access, acoustics, and lighting.

67. The equipment should be set up in such a way to emulate an "in-person" hearing, ensuring an appropriate number of cameras and microphones so that each participant can be seen and heard with minimal difficulty or disruption.

7.1 Control of cameras / audio

68. The presiding official at the main site should ideally have full control of the equipment during the proceedings,[66] with the assistance of technical support staff if necessary, for example to adjust the cameras or microphone volume as desired, ultimately ensuring that each person speaking at the either site can be clearly seen and heard. It is recommended that if possible, a tracking camera that can be directed at the person speaking be used, as well as another camera that can provide an overview of the hearing room from the opposite end.

69. For the benefit of the presiding official who has ultimate control of the video / audio system during the hearing, it is recommended that the operation be as user-friendly as possible and limited to the basic requisite options.[67] To the extent that different camera views or different audio settings are available, it is preferable for a series of these options to be set as standard configurations in the system prior to the hearing.[68]

70. As a generally recommended practice, a user-friendly interface is recommended, to enable easy operation of the equipment, preferably by the presiding official.

7.2 Protocol for speaking

71. Given the added complexity of a video-link as compared to a traditional in-person hearing, additional protocols may be required to ensure that the actual hearing can proceed smoothly. In the absence of a formal protocol, the presiding official should remind participants of the aspects warranting additional consideration due to the changed conditions of a video-link.

72. In particular, when using video-link technology, there is typically a brief delay between the receipt of the picture and the accompanying sound, even with the

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65 See, *e.g.*, Video Conferencing Guidance (*op. cit.* note 23), paras 12, 19 and 20.

66 See, *e.g.,* Video Conferencing Guidance (*op. cit.* note 23), para. 19.

67 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195).

68 E. Rowden *et al.* (*op. cit.* note 222), p. 57.

best technology currently available.[69] This is because the audio and video signals are transmitted separately, which causes looping and interference.[70] It may be useful to alert participants to this prior to the commencement of the hearing, so as to minimise talking over each other. The presiding official may consider explaining at the outset the procedure for interrupting the other party or objecting to questions during the hearing. Participants should also be reminded to speak directly into the microphones.

73. These aspects are extremely important if an interpreter is present, as there may be additional need to interrupt to ask questions or to seek clarification, in which case it is particularly useful to have the presiding official coordinate the order in which people speak.[71] When interpretation is being used, participants should also be conscious of speaking at an appropriate pace, articulating and projecting their voice, as well as using clear language that minimises jargon, colloquialisms or other expressions that may be lost in translation.[72]

74. As a generally recommended practice, to minimise disruption from possible delays in the connection, authorities may wish to consider a speaking protocol for participants during the hearing, especially if interpretation is to be used.

7.3 Protocol in case of breakdown of communications

75. During the hearing, technicians should be present or at least "on-call" and available to address any technical problems as they arise. Depending on the type of connection, personnel may need to be at both the main site and the remote site, for example, or if a third-party bridging service is being used, reachable via that service. Both the technicians and the participants should also be able to reach a helpdesk for external technical support if further assistance is needed.

76. While it is essential to have such contingencies in place in advance, participants should also be informed of the appropriate protocol for reporting a technical problem to the presiding official at any stage during the hearing and should remain alert to any such issues.[73]

77. If the hearing is disrupted by a breakdown of communications between the sites that cannot be readily resolved, the presiding official should have the authority, unless otherwise specified in the law under which the proceedings are being conducted, to determine whether to terminate the video-link session and reschedule it at a later date.[74]

78. As a generally recommended practice, all participants should be made aware of

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69 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 195).

70 M. Dunn and R. Norwick (*op. cit.* note 225), p. 2.

71 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), pp. 11-12.

72 "Handshake" Project (*loc. cit.* Glossary).

73 E. Rowden *et al.* (*op. cit.* note 222), p. 71.

74 For example, in granting leave or an order allowing for the use of video-link in the proceedings, the court may establish a protocol in the event of a breakdown of communications, as was articulated in the final provision of the order by the United States District Court for the District of Connecticut in *Sawant v. Ramsey* (*op. cit.* note 824).

the procedure for alerting the presiding official of technical difficulties encountered during the hearing and of the contact details for the technical support staff, including the third-party bridging service, if applicable.

Annex 7 – Technical and Security Aspects

Introduction

1. Technology moves much faster than the law, creating disparities that exacerbate issues of compatibility between systems in the context of modern judicial co-operation. In some parts of the world, technological developments have been transforming our courtrooms and case management systems for over a decade, with the "Handshake" Project demonstrating that certain European States are even able to "virtualise" proceedings entirely under their national civil code.[1]

2. This segment aims to address many of the aspects associated with information technology and security in the context of cross-border video-link use. Given the fast-paced nature of technological developments, it, however, should not be viewed as comprehensive, but as pertinent on the date of publication. Authorities and users are encouraged to, as much as possible, keep pace with such developments to ensure that high quality infrastructure is maintained. If new equipment or technologies are to be implemented, the Council of the European Union has recommended that a pilot programme first take place, and if successful, that the implementation take place in separate stages or phases.[2]

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1 M. Davies (*op. cit.* note 194), p. 205; "Handshake" Project (*op. cit.* Glossary), p. 22.

2 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 13.

1. Adequacy of equipment

3. The use of video-link technology certainly has the power to revolutionise the manner in which evidence is taken, particularly in cross-border situations, far more than telephone and audio-based technologies ever could. This is because video-link allows not only the verbal evidence to be heard from a remote location, but also an assessment of crucial aspects of non-verbal communication, including body language and facial expressions.[3]

4. The main objective of a video-link hearing is to emulate an in-person hearing in so far as is possible. It thus follows that the great utility of video-link is undermined if the equipment being used is not of an adequate standard; the main advantages are lost and the limitations are exacerbated.[4]

5. In fact, as shown in several responses to the 2017 Country Profile Questionnaire, it is actually a requirement that the video and audio are of sufficient quality for the presiding official to clearly see and hear the person appearing by video-link, especially when that person is a witness.[5]

6. In addition to ensuring that the equipment is of adequate quality, those responsible should also ensure that the staff at each stage of the process have adequate knowledge of the technological infrastructure in place.[6] For example, those reviewing requests may need to liaise with other staff in order to determine whether the request for video-link can be practically carried out, given the facilities and infrastructure available in that particular authority or region. This knowledge will not only greatly facilitate the selection and allocation of appropriate facilities by administrative or legal staff, but also improve the co-operation between authorities, particularly when technical staff need to determine the interoperability of systems.

7. In general terms, the video-link equipment itself will either be integrated into a location (*i.e.*, fixed) or capable of being transported to different locations (*i.e.*, portable). Whereas fixed equipment usually offers increased functionality, portable equipment may be a more cost-effective solution, in particular for locations where video-link is not frequently used.

8. As a generally recommended practice, authorities are encouraged to use equipment of the best available quality in order to emulate an in-person hearing, to the extent possible.

9. Staff responsible for making arrangements should be aware of the technological capabilities and facilities, including which locations are equipped with the necessary technology.

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3 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 4.

4 Both the court and parties to proceedings suffer disadvantages where the technology is faulty or breaks down. See, *e.g.*, *Stuke v. ROST Capital Group Pty Ltd* (*op cit.* note 103) , where the Federal Court of Australia discussed the inability to determine "whether a delay in giving a response to a critical question is due to evasiveness or uncertainty on the part of the witness or merely difficulties with the transmission".

5 See Synopsis of Responses (*op. cit.* note 6).

6 "Handshake" Project (*loc. cit.* Glossary).

1.1 Use of licensed software

10. The use of licensed software is advantageous principally because of the availability of technical support, and the practice of authorities confirms that its use is preferred.

11. In practice, different software may be used depending on the nature of the request, as the authorities and locations involved would be different depending on whether it is a request under Chapter I or Chapter II.

1.2 Use of commercial providers

12. With the increased use of readily available instant messaging software applications which allow audio and video transmission in real time, a question has arisen as to whether a commercial provider (such as Skype) may be used for taking evidence by video-link and whether it provides a sufficient level of security in the transmission.

13. Some States use commercial providers such as Skype and Skype for Business, or Polycom RealPresence (mobile or desktop) for the taking of evidence by video-link, others only allow it exceptionally and only if requested by the court of origin. [7] Many States do not allow it under any circumstances.

14. One State indicated that it would be possible to take evidence via a commercial provider once the secure network of the courts is able to take IP connections (as currently only incoming ISDN calls are allowed), although this would be at the discretion of the judge on a case-by-case basis.

15. Some of the concerns that have been expressed by States with regard to the use of commercial providers are as follows: a secured connection established individually between the requesting and the requested authorities is preferred; a commercial provider may store the content of the video-link, a situation which should be avoided; Skype or other commercial providers are not integrated into the video-conferencing infrastructure of the relevant authorities.

16. As a generally recommended practice, those seeking to use video-link technology in the taking of evidence should verify whether the use of widely available commercial providers is permitted by the States relevant authorities.

17. If using a commercial provider for the taking of evidence, participants and authorities are encouraged to ensure the appropriate security measures are in place.

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7 See Synopsis of Responses (*op. cit.* note 6).

2. Minimum technical standards

18. While it is of course important that the components are of the highest possible standard, as with any type of technological infrastructure, the technology enabling video-link can only ever be as strong as its weakest link. As such, a holistic approach is needed when determining requisite quality and standards for each component.

19. As a point of departure, it is important to note the four principal ways in which a video-link connection may be established, namely: "directly" between the systems, via a videoconferencing "bridge", or by either extending the main courtroom out to the remote point, or conversely, bringing the remote point into the main courtroom system. Each has its advantages, but usage depends primarily on the types of systems and capabilities at each site involved.

20. First, in order to establish an effective, direct video-link connection, the equipment at each location must be interoperable (*e.g.*, the network type and codec protocols).[8] To ensure this, the equipment used should, where applicable, conform to recognised industry standards, namely those recommended by the International Telecommunication Union's Telecommunication Standardization Sector (ITU-T).[9] The advantages of this direct "point-to-point" style calling is that the functionality and full range of capabilities of the systems are preserved, such as the use of multiple cameras and / or screens.

21. Second, to the extent that equipment is not interoperable, the sites are connected using different networks or incompatible protocols, or more than two sites are to be linked, a bridging service may need to be employed.[10] A videoconferencing bridge (sometimes simply called a "bridge", also known as a multi-point control unit (MCU) or "gateway") is the combination of software and hardware which creates a virtual meeting room and acts as a "bridge" by linking the sites and performing conversions where necessary (*e.g.*, converting the network signal, codec protocols or audio / video definition).[11] The "bridge" may either be built into the video-link infrastructure at a given site, or provided by a third party which may also offer additional services, such as dialling out to the sites and monitoring the connection and overall quality. As such, some authorities may prefer to have a bridge incorporated into its own infrastructure, to avoid potential security issues with having a third party provide the bridging service. Irrespective of how this is managed, the most important consideration is that the MCU be configured to appropriately handle incoming and outgoing calls, where security practices or protocols allow. For example, it is recommended that an MCU be configured to allow direct dialling out to the foreign endpoint and similarly to enable dialling in from foreign endpoints.[12] This will avoid a situation where both authorities' MCUs permit only incoming calls, essentially creating an impasse, with neither MCU able to establish a connection.[13]

22. The final two options operate in a similar fashion, the third option being where the courtroom video-link system is "extended out" to the remote site via remote connection, and an installed application at the remote site dials into the in-built codec of the main courtroom. This, however, requires the courtroom not only to support IP network connections but also to be connected to the internet, which may give rise to security concerns for some authorities.

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8 See, *e.g.*, 2.1 and 2.2.

9 The ITU-T standards are issued as "recommendations", and are accessible from the "Recommendations by series" list, available at the following address: < https://www.itu.int/ITU-T/recommendations/index.aspx? > [last consulted on 15 March 2024].

10 "Handshake" Project, "D2.1 Overall Test Report", pp. 18-19.

11 It is important to note that if the bridge provides effective transcoding capability, the persons will be connected via the videoconferencing bridge "at the highest speed and the best possible quality that their individual system can support" (as a result, participants may enjoy different quality levels of video and audio). If effective transcoding is not provided, the bridge will establish the connections at the lowest common denominator (*i.e.*, the slowest connection).

12 "Handshake" Project (*op. cit.* Glossary), p. 24.

13 The tests conducted in the context of the "Handshake" Project have also shown that if both endpoints of a video-link call are dialling out from an MCU, problems such as looping or termination of the connection may arise. See, "Handshake" Project (*ibid.*), pp. 17-18.

23. By contrast, the fourth option to establish a video-link connection is to incorporate the remote site into the main courtroom video-link system, but simply as an "auxiliary" input, which allows the remote site to connect, all the while keeping it securely confined and distinct from the main courtrooms video-link system.

24. Whichever technological solutions are employed, the following are recommended "minimum" technical standards to ensure a connection of sufficient quality, which will ultimately facilitate the provision of access to justice for those participating remotely, as compared to those appearing in-person.

25. Thus, technical standards in any video-link system should be considered holistically, to ensure each component supports the effective operation of the system.

26. As a generally recommended practice, of the principal ways in which a video-link connection may be established, authorities are encouraged to consider using a videoconferencing bridge or multipoint control unit (MCU) either incorporated into the system or via a third-party service, in order to alleviate concerns of interoperability, particularly when a cross-border connection is to be established.

2.1 Codec

27. The codec is a key component of the video-link system and should be compatible with the other components in the system. Video-link systems generally comprise both a video codec and an audio codec, as well as a data or text codec.

28. From the responses to the 2017 Country Profile Questionnaire, it is evident that there are a diverse range of codecs available.[14] For example, at the time of writing, the mostly used are either Cisco codecs (including from Cisco Tandberg) or Polycom codecs. Other codecs in use are produced by manufacturers such as Aethra, Avaya, AVer, Google, Huawei, LifeSize, Openmeetings, Sony, and Vidyo.

29. Whichever manufacturer is selected, the codecs to be used should conform to the ITU-T standards, or an equivalent. The ITU-T standards for video codecs are defined in recommendations H.261, H.263, H.264 and H.265.[15] The audio codec standards of the ITU-T are outlined in recommendations G.711, G.719, G.722, G.722.1, G.723.1, G.728, and G.729.[16] Other audio codecs in use include: AAC-LD, SPEEX, HWA-LD, Siren, and ASAO. The standard for a data codec (*e.g.*, to transmit captioning or text via video-link) is covered by recommendation T.120.[17]

30. As a generally recommended practice, codecs should conform with the relevant industry standards, enabling at minimum simultaneous audio and video transmission. Since information technology will continue to develop, users are advised to follow or use updated codes, if available.

2.2 Networks

31. The most commonly used networks for video-link transmissions are Integrated Services Digital Network (ISDN) and Internet Protocol (IP).[18] ISDN, which initially was the accepted means for video-link, provides digital communication over a telephone line. By contrast, IP, which uses the Internet for transmission, has become the predominant network for videoconferencing, as it typically provides a greater bandwidth, allowing for better video and audio quality.[19]

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14 See Synopsis of Responses (*op. cit.* note 6), Part III, q. (b).

15 See List of "Recommendations by series" (*op. cit.* note 9), Series H.

16 *Ibid.*, Series G.

17 See List of "Recommendations by series" (*op. cit.* note 9), Series T.

18 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 6-7.

19 "Handshake" Project (*op. cit.* Glossary), p. 18.

32. In the context of ISDN, there is not a single global standard, and therefore different forms of the technology exist. However, videoconferencing systems that use ISDN automatically convert to a common standard, which is established in ITU-T recommendation H.320, an overarching recommendation for video and audio transmission via an ISDN.[20] By contrast, the conversion is not necessary for IP, as the standard is consistent globally, via Internet communications. The ITU-T has promulgated a recommendation in this respect: H.323. Session Initiation Protocol (SIP) is an alternative IP standard that is also in use.

33. The outcomes of the "Handshake" Project highlight several other important aspects relating to the network parameters. First, "Gatekeeper" software should ideally be incorporated into the videoconferencing system to manage the network (including prefixing and dialling) and its interaction with a firewall.[21] Second, to the extent that equipment is not interoperable or connected to different networks (*i.e.*, ISDN to IP connections), a videoconferencing bridging service may need to be employed.[22] Third, such a bridge may also be needed in order to co-ordinate video-link use involving three or more discrete endpoints, or to manage multiple video-link calls simultaneously.[23]

34. As a generally recommended practice, it is recommended that an IP network be used, with ISDN (if available) being reserved for use as a back-up or contingency.

35. If possible, authorities are encouraged to equip the network with multi-point capabilities.

2.3 Bandwidth

36. The supply of sufficient bandwidth is both one of the most important, and potentially one of the most expensive components of video-link service delivery. Codecs can provide adequate picture and sound quality only with sufficient bandwidth. Video-link systems should be designed with this in mind, ensuring the highest possible bandwidth capacity, even if the bandwidth may later be limited in practice by network or internet bandwidth capabilities.[24] Similarly, even for systems with the highest bandwidth capabilities, the reliability and performance of the network connection should be kept in mind, as the slightest interruption or inconsistency may inhibit the ability of the system to deliver the best possible service. For example, the tests conducted during the course of the "Handshake" Project confirmed that the bandwidth capacity of an ISDN connection is much lower (*i.e.*, with a slower transmission speed, typically around 384 kilobits per second) than that of an IP network connection (*i.e.*, typically 1.5 megabits per second, at minimum),[25] which is why such systems should remain a secondary or "back-up" solution.

37. Most videoconferencing equipment today allows high definition (HD) transmissions (generally 720-1080 lines of resolution) and the bandwidth requirement for such a transmission for a single point-to-point call is a minimum of 1.2-1.5 megabits per second.[26] Logically then, as Gruen and Williams observe, multiple-point calls require greater bandwidth, essentially multiplying the bandwidth by at least the number of points required (*e.g.*, 5 megabits per second for a four-point connection).[27] The conclusions of the "Handshake" Project similarly recommended that the bandwidth of any video-link system should thus be great enough to support the maximum number of required sessions to be offered simultaneously during peak periods.[28] It

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20 See List of "Recommendations by series" (*op. cit.* note 9), Series H.
21 "Handshake" Project (*op. cit.* Glossary), p. 25.
22 *Ibid*.
23 "Handshake" Project (*op. cit.* Glossary), p. 17.
24 E. Rowden *et al.* (*op. cit.* note 222), p. 121.
25 "Handshake" Project (*op. cit.* Glossary), p. 19.
26 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 8-9.
27 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 9.
28 For IP connections, the Project further recommended an additional buffer within the "guaranteed priority bandwidth" (*i.e.*, the minimum bandwidth, plus 20%). See, "Handshake" Project (*loc. cit.* Glossary).

should be noted that these concerns can, in part, be mitigated through the use of a videoconferencing bridge (as discussed above at para. 21), although the bridge itself must have sufficient bandwidth.

38. In practice, authorities may see a diverse range of potential bandwidths and transmission speeds, even within the two main types of network connection.[29] As noted above, the main determinant is the type of network being used, as IP network connections typically permit a significantly greater bandwidth capacity.

39. As a generally recommended practice, authorities are encouraged to provide their network with the maximum possible bandwidth capacity.

2.4 Encryption

40. While it may ordinarily seem more essential in criminal cases, cross-border video transmissions in civil and commercial matters should equally be made secure from illegal interception by third parties, using means proportionate to the sensitivity of the matter.[30] The use of a firewall and / or an ISDN network can minimise the risk of illegal access to the transmission, though IP connections have for some time been favoured over ISDN.[31]

41. Whichever network is used, the "Handshake" Project concluded that additional means of minimising unauthorised access, such as the encryption of the actual signals being transmitted, is strongly recommended.[32] In practice, some forms of additional security or encryption are often engaged,[33] such as the AES (advanced encryption standard),[34] which is more commonly used. Other methods of encryption depend on the type of network and system being used, but are generally consistent with the ITU-T standard in recommendation H.235.[35]

42. In addition, in order to minimise issues of compatibility caused by the use of different methods of encryption, it is also recommended that the "auto" or "best effort" encryption setting is selected on the device.[36] Depending on the networks used, the requesting and requested authorities may even need to agree upon a specific method of encryption (*e.g.*, in the case of an IP network).

43. As a generally recommended practice, encryption of signals to the industry standard is recommended.

2.5 Audio (Microphones and Speakers)

44. The hearing room should generally have an audio system connected to the video-link equipment, including adjustable volume and with sufficient speakers to broadcast the sound clearly throughout the room (*i.e.*, not relying solely on the speakers that normally are found on the video display).[37] To the extent possible, microphones should be provided at the location of each speaking participant in the room, but positioned in such a way to minimise distraction or hindrance.[38]

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29 See, generally, Synopsis of Responses (*op. cit.* note 6), Part III, q. (b).
30 "Handshake" Project (*op. cit.* Glossary), p. 19.
31 See, *e.g.*, M. Reid, "Multimedia conferencing over ISDN and IP Networks using ITU-T H-series recommendations: architecture, control and coordination", *Computer Networks*, vol. 31, 1999, p. 234.
32 "Handshake" Project (*loc. cit.* Glossary).
33 See Synopsis of Responses (*op. cit.* note 6).
34 See, *e.g.*, United States National Institute of Standards and Technology (NIST), "Announcing the Advanced Encryption Standard (AES)", *Federal Information Processing Standards Publication*, vol. 197, 2001.
35 See List of "Recommendations by series" (*op. cit.* note 9), Series H.
36 "Handshake" Project (*loc. cit.* Glossary).
37 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 12.
38 E. Rowden *et al.* (*op. cit.* note 222), p. 118.

45. Ultimately, as identified during a comprehensive study in one Contracting Party, there are five key aspects to be considered when selecting an appropriate audio system: intelligibility; naturalness of tone; amplification (without feedback); source localisation; and acoustic comfort.[39]

46. As a generally recommended practice, authorities are encouraged to install an additional audio system to enhance the sound quality of the existing video-link equipment. It is also recommended that the hearing room be equipped with a sufficient number of microphones and speakers to accommodate all actors.

2.6 Video (Cameras and Screens)

47. In terms of camera capabilities, a variety of views is recommended, including close-up or wide-angle views that are pre-set where available.[40] Experience in the European Union has shown that where possible, cameras should have the requisite "pan" "tilt" and "zoom" functions, keeping in mind the need to preserve an in-proportion display, as well as the possibility that the presiding official may require more options or views than other participants.[41]

48. Given that, as some commentators have noted, there is particular significance attached to the ability of presiding officials to assess demeanour and nuance in video-link proceedings,[42] both cameras and screens should be equipped to support the highest possible definition. Tests within the European Union have shown that the recommended parameters for high definition are a minimum of 720p with a 1280x720 pixel resolution, and a frame rate of 25-30 frames per second.[43] According to ITU-T recommendation H.265, the newer standard established for high efficiency video coding supports resolutions as high as 8192x4320 pixels (encompassing both 4K and 8K),[44] but the ability of a videoconferencing system to make use of such ultra-high definition is largely dependent on the bandwidth that is available.[45]

49. The optimal size of the screen will depend upon factors such as the size of the hearing room and whether the display is split or full-screen. It is generally desirable if the image is close to life-size, which provides a clear picture of the individual.[46]

50. Screens should have a minimum resolution of the Wide Extended Graphics Array (WXGA) standard.[47]

51. Depending on the requirements of the presiding official, the parties, the person being examined, or other interested persons, the hearing may necessitate the use of screens with a "split-screen" capability. In practice, most authorities will be able to have facilities which can "split" or "multiple" screen, allowing multiple video channels within a single video-link transmission.[48] The display of two (or more) images is facilitated by the standard established by ITU-T recommendation H.239.[49]

52. In addition, in practice, the camera(s) being used must have the capacity to capture a view of the whole room or all participants, in particular the presiding official and the person(s) appearing by video-link. It may also be required that the camera must not be moved during the hearing and the

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39 For a full discussion of this study, which was carried out in Australia, see E. Rowden *et al.* (*op. cit.* note 222), p. 117.
40 *Ibid.*, p. 58.
41 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), pp. 18-19. See also E. Rowden *et al.* (*op. cit.* note 222), pp. 120-121.
42 See, *e.g.*, R. A. Williams (*op. cit.* note 224), p. 21.
43 "Handshake" Project (*loc. cit.* Glossary).
44 See List of "Recommendations by series" (*op. cit.* note 9), Series H.
45 "Handshake" Project (*op. cit.* Glossary), p. 27.
46 M. E. Gruen and C. R. Williams (*op. cit.* note 193), p. 12.
47 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 195), p. 19.
48 See Synopsis of Responses (*op. cit.* note 6).
49 See List of "Recommendations by series" (*op. cit.* note 9), Series H.

time must be continuously displayed on screen.[50]

53. In some cases, a document camera or other presentation or screen-sharing capability may be desirable or necessary to permit the display of documents or exhibits. In such cases, parties seeking to rely on these viewing capabilities during proceedings conducted by video-link should make appropriate enquiries with the requested authority in advance.

54. Participants and authorities are encouraged to check additional requirements in advance of the hearing (such as a view of the whole room, split-screen capabilities, or document cameras).

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50 See Synopsis of Responses (*op. cit.* note 6).

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