

Frequently Asked Questions (FAQ)

Short explanations on various aspects of the 1970 Evidence Convention.

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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; and
- 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 (the status table) as well as a spreadsheet showing acceptances of accessions to the 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 paragraphs 32 *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; and
- 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 a Consul or a 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 paragraphs 233 *et seq.*

6. Can information technology (IT) be used to facilitate the operation of the Convention?

Yes. The use of IT 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 the letter of the Convention constitutes an obstacle to the use of IT, 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 *et seq.*; 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 paragraphs 476 *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 513.

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 paragraphs 200 *et seq.* 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 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 requested 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 *et seq.*

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 *et seq.*

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 372 *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 400 *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 395 *et seq.*, and for giving reasons for refusal to execute Letters of Request, see paragraphs 471 *et seq.*

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)); and
- 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 352 *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 427 *et seq.*

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 347 *et seq.*

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 483 *et seq.*

29. From 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 permission to take evidence under Chapter II, see paragraphs 497 *et seq.*

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 495 *et seq.*

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 permission to take evidence under Chapter II, see paragraphs 497 *et seq.*

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 paragraphs 505 *et seq.*

33. What types of evidence may a Consul or 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 513 *et seq.*

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. 21(c)) (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 509 *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 527 *et seq.*

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 541 *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 546 *et seq.*

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 Article 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 453 *et seq.*

