

**L'OBTENTION DES PREUVES PAR LIAISON VIDÉO
EN VERTU DE LA CONVENTION PREUVES DE LA HAYE**

établi par le Bureau Permanent

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**THE TAKING OF EVIDENCE BY VIDEO-LINK
UNDER THE HAGUE EVIDENCE CONVENTION**

drawn up by the Permanent Bureau

*Document préliminaire No 6 de décembre 2008
à l'intention de la Commission spéciale de février 2009 sur le fonctionnement pratique des
Conventions de La Haye Apostille, Notification, Preuves et Accès à la justice*

*Preliminary Document No 6 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*

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INTRODUCTION

1. The use of modern technology – in particular the use of video-links – to facilitate and further improve the taking of evidence under the Hague Evidence Convention will be an important topic at the upcoming Special Commission meeting on the practical operation of the Evidence (and Apostille, Service and Access to Justice) Convention to be held in The Hague in February 2009. This document is designed to prepare and assist these discussions, in particular as regards the *legal bases* for the taking of evidence by video-links under the Evidence Convention and possible *future work* that may be undertaken by the Permanent Bureau in this field.

2. The use of video-link technology (also known as videoconference, video teleconference or visual collaboration) allows parties situated at great distances from one another to communicate instantaneously with real-time audio and visual display. A video-link therefore creates the possibility that a witness could be examined in one State by persons physically located in another State.

3. Video-link technology offers great opportunities to further the purpose and objects of the Evidence Convention. Technology of this character promises to reduce much of the expense and logistical difficulties associated with the taking of evidence abroad, while at the same time increasing the levels of communication and cooperation between States Parties. While the use of video-link technology remains in its early stages, it is clear from the responses to the 2008 Questionnaire on the Operation of the Evidence Convention¹ that almost all States Parties consider that *the taking of evidence by video-link is consistent with the framework of the Evidence Convention*. This not only confirms the Conclusions and Recommendations of the 2003 Special Commission meeting,² but also amounts to a near-unanimous repudiation of the view that evidence by video-link is only possible by either amending or bypassing the Convention.³

4. The Permanent Bureau notes that some States have in place domestic laws allowing the taking of evidence abroad by video-link from a willing witness situated abroad by procedures outside the Convention. This practice may be seen by some States to amount to a modern version of the practice of some States to simply send a lawyer abroad to take a deposition or statement from a willing witness. Many States Parties consider that conduct of this character violates their sovereignty or is otherwise unacceptable, and it was to resolve precisely these difficulties that the Evidence Convention was first negotiated. It follows that there is a strong need to adapt the Convention to the modern realities of video-link evidence. This document, therefore, focuses on the taking of evidence by video-link *under the Hague Evidence Convention*; it does not address the use of video-link technology to take evidence *outside* the Convention.

¹ Questionnaire of May 2008 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters*, Prel. Doc. No 1 of May 2008. The replies of responding States are available, together with a synopsis of replies, and an analysis thereof, on the website of the Hague Conference at < www.hcch.net >.

² "Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003)", available at < www.hcch.net >.

³ 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" (2007) 55 *American Journal of Comparative Law* 205, and M. Davies "Taking Evidence by Video-Link under the Hague Evidence Convention" in T. Einhorn and K. Siehr (eds) *Intercontinental cooperation through private international law: Essays in memory of Peter E. Nygh* (2004) at p. 69.

5. Furthermore, as video-link technology becomes more widely available, this technology will be of increasing and especial importance to transnational litigation. It is therefore essential that the 2009 Special Commission sets out some clear guidelines to make certain that this important field of practice develops in a way that ensures the continuing relevance of the Evidence Convention, and safeguards its smooth and efficient operation.

6. States responding to the Questionnaire were widely supportive of the Permanent Bureau preparing a Guide to Good Practice for the taking of evidence by video-link under the Evidence Convention.⁴ It is hoped that the debate stimulated by this paper will shape the Permanent Bureau's work on that document, together with ongoing consultation with interested States.⁵

7. Part I of this document considers the legal bases upon which evidence may be taken by video-link under the Evidence Convention. Part II then considers some of the new legal and practical questions that arise in the case of evidence by video-link, and suggests steps that may be taken in the future to establish a sound, practicable, and agreeable framework for the taking of evidence by video-link under the Evidence Convention. Part III notes some of the practical issues that will need to be addressed by a Guide to Good Practice. The document concludes by proposing some possible preliminary draft Conclusions and Recommendations on the subject matter for consideration by the Special Commission.

Part I – Legal Questions

8. In this Part, the Permanent Bureau sets out its view on the legal bases upon which video-link evidence may be taken under the Evidence Convention. This analysis is premised upon the view, confirmed by the 2003 Special Commission,⁶ that the open and functional language of the Evidence Convention enables the Convention to evolve with time and to benefit from technological developments.

9. The analysis that follows is focussed upon Convention and the law and practice of the Requested State. In theory, consideration should also be given to the law of the Requesting State; in practice, however, the question of video-link evidence will only arise if the taking of such evidence is permitted under the law of the Requesting State. The following analysis proceeds, therefore, upon the premise that the law of the Requesting State permits the taking of evidence by video-link.

Chapter I

Articles 7 and 8 – Presence of Parties and their Representatives, and Judicial Personnel of the Requesting State

10. Article 7 of the Convention makes provision for the parties and their representatives to be present at the execution of the letter of request. The Permanent Bureau submits that the notion of *presence* should be understood to encompass the possibility of presence *by video-link*. Video-link allows all of the activities and advantages

⁴ Of the 26 States Parties that had responded to the Questionnaire by 1 December 2008, 17 States and the European Community considered that a Guide to Good Practice would be sufficient. By contrast, only three States considered that an additional protocol was necessary (Australia, Mexico and Turkey).

⁵ The Permanent Bureau also recognises the important work undertaken by the European Union on the issue of video-conferencing under the "e-justice" initiative: see, *e.g.*, Ministry of Justice of the Republic of Slovenia, "Video-conferencing: Cross-Border Video-conferencing Implementation and Deployment Handbook" (2008).

⁶ *Op. cit.* (note 2), Conclusions and Recommendations, Nos 4, 42 and 43.

that presence offers: it allows the parties and their representatives to observe the execution of the request in real time and, where permitted, to participate by asking questions. Interpreted in this way, Article 7 permits parties and their representatives to be present at the execution of the letter of request by video-link.

11. Similarly, Article 8 of the Convention makes provision for the judicial personnel of the requesting authority to be present at the execution. Applying the same approach, this Article should also be understood as allowing judicial personnel to be present by video-link.

12. It can therefore be concluded that Articles 7 and 8 offer a pathway for the presence by video-link of parties and their representatives, as well as judicial personnel of the requesting authority. This pathway is, however, somewhat limited. In particular, the efficacy of this pathway depends upon the Requested State permitting the parties, representatives and judicial personnel to be present by video-link. These articles in no way give parties the right to be present by video-link. The most that can be said is that presence by video-link is not incompatible with the Convention.

13. Articles 7 and 8 differ in one regard: Article 7 grants the requesting judicial authority the right to request that the parties and their representatives attend the execution of the Letter of Request; whereas Article 8 permits judicial personnel of the Requesting State to be present at the execution of the Letter of Request only where a State has made a declaration to this effect. Twenty-four⁷ of the 45 Contracting States have made a declaration under Article 8 allowing the presence of judicial personnel.

14. The Permanent Bureau respectfully suggests that it may be desirable for all States Parties to revisit the question of their Article 8 declaration or absence thereof: those States Parties that have made an Article 8 declaration may wish to consider revisiting their declaration so as to state expressly that they also allow presence by video-link; and those States Parties that have made no Article 8 declaration may wish to consider making such a declaration that is expressed only to apply to presence by video-link.

15. Where permitted by the Requested State, presence (appearance) by video-link would offer a useful and cost effective alternative to physical presence, saving parties the expense and difficulty of travelling abroad. Moreover, in the clear majority of States where the parties, their representatives and judicial personnel are permitted to participate in the proceedings (by, for example, asking follow up questions), video-link allows such participation to occur.

16. Accordingly, Articles 7 and 8 permit parties to be present by video-link at the execution of the Letter of Request, but place no obligation upon the State of Execution to allow such presence.

Article 9(1) – Execution under the Law of the Requested State

17. Article 9(1) of the Convention provides that the Letter of Request will be executed in accordance with the law of the State of Execution. Responses to the Questionnaire suggest that, in many States, evidence by video-link is becoming, or is already, possible. Accordingly, in States where this is possible, it appears that video-link evidence could be taken pursuant to Article 9(1).

⁷ Australia, Belarus, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, India, Israel, Italy, Lithuania, Netherlands, Romania, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and the United States of America.

18. Again, however, the possibility of taking evidence by video-link under Article 9(1) depends upon such evidence being permitted by the law of the State of Execution.

Article 9(2) – Evidence According to a Special Method

19. Article 9(2) provides that the executing authority must “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”.

20. This article provides a pathway whereby the requesting authority may request that evidence be taken by video-link. First, evidence by video-link is clearly a “special method or procedure” capable of being requested by a requesting authority. Second, Article 9(2) restricts the capacity of the requested State to refuse to execute a Letter of Request in accordance with a special method or procedure unless:

- (i) the method or procedure is incompatible with the internal law of the State of execution; or
- (ii) the method or procedure is impossible of performance by reason of either:
 - (a) internal practice and procedure; or
 - (b) practical difficulties.

21. The responses to the Questionnaire make it clear that many States have video-conferencing facilities available in at least some of their courtrooms. It may be deduced from this fact that, where such facilities exist, some rules or procedures exist governing the possibility of evidence by video-link. In the view of the Permanent Bureau, where this is the case, the taking of video-evidence will be neither incompatible with internal law, nor impossible of performance. Accordingly, a request that evidence be taken by video-link should therefore not be refused. The following paragraphs explain this position.

22. The concept of “incompatibility” was explained in the Explanatory Report to the Convention, which provides:

“To be ‘incompatible’ with the internal law of the State of execution does not mean ‘different’ from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition.”.⁸

23. Clearly, for those States that make video-link facilities available in court rooms, there can be no such constitutional inhibition, nor any absolute statutory prohibition against the taking of evidence by video-link. Accordingly, there can be no reason why there would be any constitutional inhibition or statutory prohibition of the use of video-link to allow evidence to be taken for foreign proceedings.

24. This view is further strengthened by Conclusion and Recommendation No 43 of the 2003 Special Commission,⁹ which provides:

⁸ Explanatory Report by Ph. Amram in *Actes et documents de la Onzième session*, Tome IV, *Obtention des preuves*, p. 202 at p. 208.

⁹ 2003 Special Commission, *op. cit.* (note 2).

"The SC stressed where a special method or procedure is requested for the taking of evidence (Art. 9(2)), the *exception* for methods that are 'incompatible with the internal law of the State of execution or [...] impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties' should be interpreted narrowly to permit, to the greatest possible extent, the use of modern information technology."

25. For these reasons, the Permanent Bureau concludes that, where a State has video-link facilities available in its court rooms, it cannot be said that the taking of evidence pursuant by video-link to a request for a special method under Article 9(2) is inconsistent with the law of the Requested State.

26. The expression "impossible of performance" was also explained in the Explanatory Report, which detailed that the negotiating States chose this formulation and rejected the alternative possibility of using the expression "impracticable". The Report explained:

"There is a clear difference between 'impracticable' and 'impossible of performance'. The latter is a much heavier burden to assume. This was deliberate. The basic intent is to maximize international cooperation and to minimise the possibilities of refusal to cooperate. It is not sufficient for the foreign practice to be 'difficult' to administer or 'inconvenient'; compliance must be truly 'impossible'." ¹⁰

27. Again, in those States where video-conferencing facilities are available in courts, it cannot possibly be said that the taking of evidence by video-link is impossible. It follows, therefore, that the use of video-link to allow evidence to be taken abroad would also not be impossible – at least in most cases.

28. It is conceivable that even where a State does have video-conferencing facilities available, a witness may be situated very far from any courtroom that offered such facilities, in which case the taking of evidence by video-link may well be impossible. Similarly, if there is an incompatibility between the video-link technologies used by the Requesting State and the Requested State, then the taking of evidence by video-link may be impossible; although one suspects that such incompatibilities could ordinarily be resolved. This leads to the conclusion that – subject to availability and subject to technology – the taking of evidence by video-link would not be impossible.

29. Accordingly, where a State has video-conferencing facilities available in its courts, it is likely that no basis exists under the Convention for that State to refuse a request for evidence to be taken by video-link.

30. For these reasons, the Permanent Bureau takes the view that, where a State has video-conferencing facilities available in its courtrooms, it is required by the Convention to execute a Letter of Request that requests that evidence be taken by video-link, subject to the availability of video-link equipment, and subject to the compatibility of technology of the Requested and Requesting States.

¹⁰ Explanatory report, op. cit. (note 8).

Chapter II

31. The taking of evidence by video-link is more straightforward under Chapter II of the Convention. Articles 15 and 16 provide that a diplomatic officer or consular agent of a Contracting State may, in certain circumstances, take evidence without compulsion in the area in which he or she exercises his or her functions.

32. Similarly, Article 17 permits a duly appointed Commissioner to take evidence without compulsion, subject to certain conditions.

33. There is nothing in the Convention to suggest that a video-link could not be utilised at the time that evidence is taken by a diplomatic or consular agent under Articles 15 and 16, or by a Commissioner under Article 17. Article 21 sets out the only restrictions that are placed upon the taking of such evidence. Relevantly, such evidence must not be incompatible with the law of the State where the evidence is taken (Art. 21(1) *a*)); and must not be forbidden by the law of the State where the evidence is taken (Art. 21(1) *d*)). The word "incompatible" should be given the same interpretation in Chapter II as in Chapter I.¹¹

34. The only basis, therefore, upon which it could be said that video-link evidence could not be taken under Chapter II is if the State in which the evidence is to be taken has implemented measures to prevent evidence being so taken. It is therefore possible that the State in which evidence is to be taken may refuse to grant permission for diplomatic officials, consular agents and commissioners to take evidence by video link (where such permission is required by Arts 15, 16 and 17). Similarly, if the State in which the evidence is to be taken has forbidden diplomatic officials, consular agents and commissioners to take evidence by video link, then evidence cannot be so taken (Art. 21(1) *d*)).

35. It follows that video-link evidence may be taken under Chapter II, provided that the State in which the evidence is to be taken has not implemented steps to prevent evidence from being so taken.

Conclusions

36. The foregoing analysis leads the Permanent Bureau to the following conclusions, which may possibly form the basis for a Recommendation and Conclusion of the Special Commission:

- The Convention *permits* parties and their representatives, and also judicial personnel of the requesting authority, to be present by video-link at the execution of the Letter of Request (Arts 7 and 8).
- Convention *permits* a letter of request to be executed by video-link where the law of the requested State permits video-link evidence (Art. 9(1)).
- The Convention *requires* a State to execute a Letter of Request asking that evidence be taken by video-link, if the requested State has video-link facilities in some or all of its courtrooms, subject to the availability of video-link equipment, and subject to the compatibility of technology of the Requested and Requesting States (Art. 9(2)).
- The Convention *permits* video-link evidence to be taken by a diplomatic official, consular agent or commissioner, provided that adequate permission has been granted, and provided that the practice is not forbidden by the State in which the evidence is to be taken (Arts 15, 16, 17 and 21).

¹¹ Whilst the Explanatory Report (*op. cit.*, note 8) is silent on this point, we believe that this is the only sensible interpretation.

Part II – New Legal and Practical Questions

37. The foregoing analysis confirms the view that video-link evidence can be taken under the Evidence Convention. This does not, however, answer the question whether the Convention in its present form offers the best, or indeed a sufficiently comprehensive, framework by which such evidence can be taken. In the Questionnaire, the Permanent Bureau inquired of States whether they considered that an additional protocol was necessary, or whether a guide to good practice was sufficient. An overwhelming majority of responding States favoured a Guide to Good Practice.¹² For now, therefore, the Permanent Bureau will proceed upon the basis that these questions should be addressed by a Guide to Good Practice.

38. The taking of evidence abroad by video-link raises a number of novel questions about how evidence by video-link should be implemented under the Convention. These considerations arise from the fact that the participants to the taking of evidence are located in two jurisdictions, and therefore potentially engage two legal systems rather than one. It is therefore necessary to determine which law would apply to certain questions, including:

- the administration of an oath, and possible sanctions for perjury that may result as a consequence; and
- contempt of court proceedings.

39. It has been suggested that the potential overlap of two legal systems in these questions poses an insuperable barrier to the taking of evidence by video-link under the Evidence Convention as it stands.¹³ The responses to the Questionnaire suggest that most States Parties do not share this view; nor does the Permanent Bureau.

40. It would appear that very few problems will arise in practice from the interaction of the two legal systems where evidence abroad is taken by video-link under the Evidence Convention. And where such problems arise, they may be solved by proceeding *in exactly the same way as the situation where evidence is taken without video-link*. Thus, where such evidence is taken under Chapter I, it remains the case that the evidence is taken by a Competent Authority in the Requested State. There is no reason why the laws of the Requested State would not continue to apply to all aspects of that process. Similarly, where such evidence is taken under Chapter II, it remains the case that the evidence is taken in the foreign State, by a diplomatic officer, consular agent, or commissioner located in the foreign State. Again, the law of the foreign State should apply.

41. It is true that, where evidence is taken by video-link, some of the participants will be located outside the territory of the State in which the evidence is taken. While this may pose theoretical difficulties, it does not raise any new problems in practice. In particular, the parties and their representatives who take part in the proceedings are outside the territory of the State in which the Evidence is taken, and are therefore beyond its jurisdiction. This raises the question of what should be done if the parties or their representatives commit contempt in the face of the foreign court. It would seem, however, that a very simple solution is available to the executing court: it can simply sever the video-link, just as it could ask for the physical removal of disruptive persons who are physically located in the courtroom. In practice, this threat is likely to be

¹² See note 4.

¹³ Davies, *op. cit.* (note 3), suggesting that an amending Protocol is required.

sufficient to persuade parties and their representatives to co-operate with the foreign court.

42. It follows that few new legal questions arise if evidence is taken by video-link under the Convention. More questions do arise, however, in the different case where a court situated in one State takes evidence by video-link from a witness situated abroad without the assistance of a court or any other person situated in the State where the witness is located.¹⁴ This is not a situation that would appear to be currently possible using the procedures of the Convention (all of which presuppose the presence of an intermediary in the foreign State), yet it appears to be a practice that occurs in some States.¹⁵ It may be, therefore, that should States Parties wish to establish an international framework pursuant to which such evidence may be taken, an additional protocol to the Convention would be necessary. This is a matter upon which delegates to the Special Commission may wish to reflect.

Conclusions

43. The Permanent Bureau recognises that novel legal questions will arise in the case of taking evidence by video-link, but considers that:

- The law of the place where the evidence is taken should apply to proceedings by video-link. In particular, this law should apply to the administration of oaths, the rules relating to perjury, and contempt of court.
- Few difficulties will arise in practice by reason of the fact that some participants in the taking of evidence are beyond the territorial jurisdiction of the place where the evidence is taken. If such parties disrupt proceedings, the video-link can be severed.

44. The Permanent Bureau proposes to consider these matters in the Guide to Good Practice, which will be drafted in close co-operation with interested States. The Guide is likely to include a legal analysis of how the law of the place of execution may be applied where evidence is taken by video-link, together with a discussion of how such matters will operate in practice.

Part III – Practical Issues

45. The Permanent Bureau notes that a Guide to Good Practice on the taking of evidence by video-link under the Evidence Convention will require the consideration and solution of a number of practical issues – principally issues of co-ordination. These issues include establishing best practices for:

- the determination of the time of the video-link, taking account of time-differences that may arise;
- the co-ordination and interface of different technologies;
- technical standards to be used;
- a procedure for the connection of the video-link at the commencement of the evidence-taking;
- the use of interpreters during the video-link; and
- procedures allowing or prohibiting the recording of the proceedings.

46. The Permanent Bureau invites interested States to share their good practices addressing these issues, with a view to preparing a Guide to Good Practice.

¹⁴ It is in this case that the questions considered by Davies, *op. cit.* (note 3), truly arise.

¹⁵ *Ibid.*

Preliminary draft Conclusions for consideration by the Special Commission

In light of the foregoing, the Permanent Bureau submits the following preliminary draft conclusions for consideration by the Special Commission:

1. The Special Commission confirms the findings of the meeting of 2003 and concludes that the taking of evidence by video-link is consistent with the current framework of the Evidence Convention. In particular, the Special Commission considers that:

- The Convention *permits* parties and their representatives, and also judicial personnel of the requesting authority, to be present by video-link at the execution of the Letter of Request (Arts 7 and 8).
- Convention *permits* a letter of request to be executed by video-link where the law of the requested State permits video-link evidence (Art. 9(1)).
- The Convention *requires* a State to execute a Letter of Request asking that evidence be taken by video-link, if the requested State has video-link facilities in some or all of its courtrooms, subject to the availability of video-link equipment, and subject to the compatibility of technology of the Requested and Requesting States (Art. 9(2)).
- The Convention *permits* video-link evidence to be taken by a diplomatic official, consular agent or commissioner, provided that adequate permission has been granted, and provided that the practice is not forbidden by the State in which the evidence is to be taken (Arts 15, 16, 17 and 21).

2. The Special Commission invites the Permanent Bureau, subject to resources, and in close co-operation with interested States, to prepare a Guide to Good Practice on the taking of evidence by video-link under the Evidence Convention. The Guide to Good Practice should consider the legal bases upon which such evidence may be taken, and also establish best practices for the practical steps required to take such evidence.

3. The Special Commission notes that the taking of evidence abroad by video-link using the procedures of the Evidence Convention raises a small number of new questions that arise from the interaction of the law of the place in which the evidence is taken, and the law of the place where the participants connected by video-link are located. The Special Commission considers that these issues do not impede the taking of evidence by video-link under the Evidence Convention, and can be solved by analogy with the case where evidence is taken without the aid of a video-link. Accordingly, the law of the place where the evidence is taken should govern the proceedings; in particular the administration of oaths, the laws relating to perjury, and the laws relating to contempt of court.

4. The Special Commission notes that some new questions of law and practice arise in the case where a court situated in one State takes evidence by video-link from a witness situated abroad without the assistance of a court or any other person situated in the State where the witness is located. This is not a situation that would appear to be currently possible using the procedures of the Convention (all of which presuppose the presence of an intermediary in the foreign State). The Special Commission recommends that States Parties give consideration to whether it would be desirable to establish an international framework pursuant to which video-link evidence may be taken in this manner.

5. The Special Commission urges those States Parties that have made declarations under Article 8 permitting the judicial personnel of the Requesting State to be present at the execution of the Letter of Request to consider revising their declaration to allow explicitly presence by video-link. Similarly, the Special Commission urges States Parties that have not made declarations under Article 8 to consider making such a declaration in terms limited to permitting presence by video-link.