

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

Purpose of the Convention

The Evidence Convention establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters, between States Parties.¹ The Convention provides an effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence, via (i) *Letters of Request*, and (ii) *diplomatic or consular agents* and *Commissioners*,².

Letters of Request (Chapter I)

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

A requested authority unable to execute the Letter of Request itself may appoint a suitable person to do so (this applies particularly where execution is sought in common law countries; the court addressed may be unable to perform the Letter of Request itself because its procedural rules leave the collection of evidence to the parties). The person to be questioned or requested to produce evidence is entitled to assert a privilege or duty to refuse to give evidence under either the law of the Requesting State or the law of the Requested State.

A Letter of Request shall be executed “expeditiously” and may be refused only in specific cases. Lastly, the execution of the Letter of Request may not give rise to any reimbursement of taxes or costs; however, the Requested State may require the Requesting State to reimburse fees paid to experts and interpreters, as well as costs occasioned by the use of a special procedure requested by the Requesting State.

Diplomatic or Consular agents, Commissioners (Chapter II)

Chapter II of the Convention allows diplomatic or consular agents and Commissioners to take evidence, which may be subject to the prior permission of the appropriate authority of the

¹ For a comprehensive and updated list of Contracting States to the Convention, follow the link entitled “Updated list of Contracting States (status table)” on the “Evidence Section” of the HCCH website at < www.hcch.net >. An explanation of the status table is also available by following the link entitled “How to read the status table” on the Evidence Section.

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

State in which the evidence is to be taken. States may exclude, in whole or in part, the application of Chapter II. It is therefore critical to check whether a State has made a reservation in this respect.³ Subject to the relevant permission, the representative or Commissioner may take evidence, insofar as their proposed actions are compatible with the law of the State of execution, and may also have power to administer an oath or affirmation. The consular or diplomatic agent or Commissioner may not compel the person requested to give evidence. The Convention provides, however, that States may, by declaration, authorise diplomatic or consular agents or Commissioners to apply to the competent authority for appropriate assistance to obtain the evidence by compulsion. Unlike Letters of Request, the taking of evidence pursuant to Chapter II is, as a rule, performed in accordance with the manner required by the law of the Court before which the action is initiated. Cross-examination, during which the witness is questioned by counsel for both parties, is also permitted. However, if the manner in which the evidence is taken is forbidden by the law of the State of execution, it may not be used. Lastly, the person required to give evidence may, in the same way as pursuant to a Letter of Request, assert a privilege or duty to refuse to give evidence.

Pre-trial discovery (Art. 23)

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

Due to existing misunderstandings of the nature of pre-trial discovery, the 2003, 2009 and 2014 meetings of the Special Commission clarified the nature and purpose of this procedure and invited States that have made a general, non-particularised declaration to revisit their declarations.⁴

Practical Handbook on the Operation of the Evidence Convention (3rd Edition, 2016)

The Practical Handbook offers detailed explanations on the general operation of the Evidence Convention as well as authoritative commentaries on the major issues raised by practice over the past forty-five years. This edition of the Handbook marks a substantial change in concept and content as compared with previous editions. To order the Handbook, see the "[Evidence Section](#)" of the HCCH website.

Monitoring of the Convention

The practical operation of the Convention has been reviewed by several Special Commissions (in 1978, 1985, 1989, 2003, 2009 and 2014). The Special Commissions have confirmed the continuing global interest in this Convention and reaffirmed its practical utility. A model Letter of Request was adopted at the 1978 Special Commission and amended in 1985. The latest version of the Model Form is available on the "Evidence Section" of the HCCH website.

For additional information, please visit the "[Evidence Section](#)" of the HCCH website at <www.hcch.net> or contact the Permanent Bureau of the HCCH.

³ A list of States that have excluded in whole or in part the application of Chapter II is available on the "Evidence Section" of the HCCH website.

⁴ See Nos 29-34 of the Conclusions and Recommendations of the 2003 Special Commission, Nos 51 and 52 of the Conclusions and Recommendations of the 2009 Special Commission, and Nos 18 and 19 of the Conclusions and Recommendations of the 2014 Special Commission; a list of States that have made a declaration pursuant to Art. 23 of the Convention is available on the "Evidence Section" of the HCCH website.