



# How to obtain evidence from England for use in a US civil or commercial trial

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# OBTAINING EVIDENCE FROM ENGLAND FOR USE IN A US CIVIL OR COMMERCIAL TRIAL

## 1. Introduction

Attorneys who are involved in international arbitration and litigation may already be aware that, in certain circumstances, English Courts will assist US Courts in obtaining evidence from witnesses resident in England. US Courts or Tribunals may ask for such assistance by issuing Letters of Request under the Hague Convention<sup>1</sup> in respect of evidence which is sought for trial in civil or commercial proceedings. The proceedings must have a trial either pending or contemplated.<sup>2</sup> Letters of Request may be submitted either through diplomatic channels or, what is generally regarded as the more efficient and direct method, by instructing English lawyers to engage the assistance of the English Court. Delivery of documents through diplomatic channels can take several months or more.

There are two other methods for obtaining evidence from witnesses resident in England:

- (1) Evidence may be collected from persons willing to provide it voluntarily without the intervention of the English Court. However, there is an attendant risk that witnesses later become unwilling to assist and that their evidence may be inadmissible in the home court.
- (2) Evidence may be collected from US nationals or persons entitled to permanent residence in the US pursuant to Para. 1783 of 28 United States Code. A brief overview of this method is included at the end of this note for completeness.

## 2. Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Act")

The Hague Convention was implemented in England and Wales by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Act"). The Act empowers and requires the English High Court to assist foreign courts in other Contracting States in civil or commercial proceedings by enabling evidence to be taken from witnesses in England and Wales for the purposes of the foreign proceedings.

The foreign court (the "Requesting Court") may ask for the evidence to be obtained by way of a Letter of Request (formerly known as a Letter Rogatory). This procedure applies to both oral evidence (depositions) and documentary evidence. Recognition of foreign Letters of Request by the English Court is governed by the English Court's procedural rules. However, the Act also contains a number of limitations on the assistance that the English Court can provide.

### a) Limitations Imposed by the Act

- i) *The evidence must be for use at a trial*  
"Evidence" means "testimony", and must accordingly be for use at a trial (not for the purposes of any preliminary hearing or pre-action information gathering).<sup>3</sup> The Act does not distinguish between oral testimony and the production of documents.<sup>4</sup>  
Before assisting the Requesting Court, the Court must be satisfied that the proposed witness has evidence to give which is relevant to the foreign proceedings. However, the Court will generally rely on the judgement of the Requesting Court as to what is and is not relevant evidence.<sup>5</sup>
- ii) *The Court will not permit a 'fishing expedition'*
  - The Court may not order steps to be taken for obtaining evidence (even if at the request of the foreign court) unless these steps are permitted in English civil proceedings.<sup>6</sup> Where a Letter of Request exceeds what is permitted, the Court may still be able to save the Request by 'editing' it, i.e. by restricting it to what is permitted. However, the Court will not rewrite a Request or substitute a new one. If the Court cannot save the Request by way of restriction, it will simply reject it in its entirety and the process will have to begin all over again.<sup>7</sup>
  - The Court will reject a Request which seeks general (rather than specific) disclosure of relevant documents or information. The two main bases for rejecting Requests are 'fishing'<sup>8</sup> (where the intention is to obtain information

rather than evidence for use at trial) and oppression (e.g. a request which is vague, uncertain or not relevant).<sup>9</sup>

Where documentary evidence is sought, the High Court will not compel a witness to produce documents for inspection other than “the particular documents specified in the Order”, and such documents must appear to be or be likely to be in the witness’ possession, custody or power.<sup>10</sup> The phrase “particular documents specified in the Order” is construed strictly.<sup>11</sup> The documents which are sought must be described precisely and as individual documents rather than as a class.<sup>12</sup>

So, for example, a request for “all of the deponent’s bank statements” would be rejected as too broad, whereas a more specific request such as “statements from the deponent’s account with Barclays Bank Sort Code: 11-22-33 Account Number: 1234567 between the dates of 01/01/01 and 01/01/05” is likely to be accepted as sufficiently specific.

The Court must also be satisfied that such documents exist and that they are likely to be in the witness’ possession or control.<sup>13</sup> A bare inference that documents B, C and D exist from the existence of document A will not be acceptable.<sup>14</sup>

- iii) The Court will not order a witness to provide any evidence which the witness could not be compelled to provide in civil proceedings within the jurisdiction of either the English Court or the Requesting Court<sup>15</sup>, or where compelling the witness to give evidence would be prejudicial to national security.<sup>16</sup>
- iv) The Court does not have the power 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”.<sup>17</sup>

## b) The Procedure

The initial requirements for Letters of Request are usually set out in the local or State rules applicable to the Requesting Court. It is recommended that the draft **Letter of Request** is scrutinised by an English lawyer before an application for its issue is made to the

Requesting Court so as to ensure that it meets the English Court’s requirements (a sample Letter of Request is attached). Once the Request has been issued by the Requesting Court, a sealed copy is required for the purposes of recognition.

An application to the Court for the enabling Order is usually made without notice to the other parties in the action or to the proposed witness. It must be supported by a witness statement containing the following:

- i) a copy of the sealed Letter of Request;
- ii) a detailed statement of the issues relevant to the proceedings;
- iii) a detailed list of questions or the subject matter of questions to be put to the proposed deponent (if oral testimony is being sought) and/or a detailed list of documents or items if documents are being sought;
- iv) a draft Order, which must include provisional details of where and when the depositions are to be held and who is to be appointed Examiner (see below); and
- v) where necessary, a translation into English of all documents to be served on the witness.

A sample **witness statement** is attached to this note.

The Court has power to make the following orders:

- i) oral or written examinations of witnesses;
- ii) the production of documents;
- iii) inspecting, photographing and/or preserving custody or detention of property;
- iv) taking samples of property;
- v) conducting experiments on property;
- vi) medical examination of persons;
- vii) taking blood samples.<sup>18</sup>

A sample Order is attached to this note.

#### **b) The choice of Examiner**

The English Court may order the examination to be taken before any fit and proper person nominated by the person applying for the order, an examiner of the court, or any other person whom the court considers suitable.<sup>19</sup> The appointed Examiner is usually an experienced and independent barrister. A barrister is a lawyer who has the right to plead as an advocate in an English superior court.

The choice of Examiner is important. Having an Examiner who is sympathetic and has the necessary experience will be a considerable advantage. It is recommended that an Examiner be nominated in the supporting affidavit as generally the Court is reluctant to change the identity of the Examiner, even when the choice is contested by the other side.

#### **d) The Examination**

Subject to any special directions contained in the Order, the appointed Examiner will confirm or change the provisional date, time and place for the evidence to be taken. All other arrangements will be made by the lawyer having conduct of the examination. The depositions will usually follow the normal practice in English proceedings. However, the English Court will usually support the Requesting Court's request for taking depositions in a different manner, unless this would be so contrary to English procedures that it ought not to be adopted.<sup>20</sup> As to the rules of evidence, the examination will follow those of the Requesting Court (if they are known).<sup>21</sup>

It is possible for the deposition to be conducted by video link (though this is not the preferable option) and to be recorded by video or tape for use at trial, but it is usual for the deposition to be transcribed, a copy of which must be signed by the Examiner. It is advisable to draft the enabling Order so as to allow the Deponent to approve and sign the transcript, and then forward it to the Examiner for signature.

#### **e) Privilege**

A witness is entitled to claim privilege from giving any evidence which he or she could not be compelled to give on any ground recognised under the law of England or under the law of

the country of the Requesting Court. This applies to both oral testimony and producing documents.

Generally, the English Court will make an Order to give effect to the Letter of Request and the claim to privilege will be taken by the witness at the time of his or her examination or at the stage the documents are required to be produced.

By way of example, an English company was entitled to claim privilege against self-incrimination<sup>22</sup> in respect of documents which, if produced, would have exposed the company to fines imposed by the Commission of the European Union for intentionally or negligently acting in breach of anti-trust legislation.<sup>23</sup>

Where the ground for claiming privilege is not recognised by English law, but is recognised by the law of the country of the Requesting Court, the claim to privilege must either be set out in a witness statement contained in the Request or else conceded by the applicant for the order. Otherwise, the witness will be required to give the evidence at the examination. In that case, the information alleged to be privileged will be kept separate from the rest of the evidence and will not be transmitted to the Requesting Court, unless that Court decides that, on the facts, there is no ground for claiming privilege.<sup>24</sup>

### **3. The US Civil Code**

As mentioned above, instead of issuing a Letter of Request, the US Court may utilise the provisions of para 1783 of 28 United States Code (copy of extract attached). The Code empowers a US Court to issue a subpoena which requires a witness to appear or produce a document (or thing) if the Court regards it as necessary in the interests of justice. Service of the subpoena should be in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.

This alternative method of obtaining evidence might be helpful in instances where the witness is willing to give evidence but perhaps needs the assurance of a subpoena to cover travel expenses. This method would not overcome issues of confidentiality and privilege arising under English law.

4. Attachments

(a)

IN THE [NAME OF COURT, E.G. CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT] IN  
AND FOR [NAME OF JURISDICTION, E.G. PINELLAS COUNTY, FLORIDA]

[Circuit/case No.]

Name of Plaintiffs,  
[e.g. John Doe and Jane Doe et al.]

Plaintiffs

v

Name of defendants  
[e.g. XYZ Corporation and Donald Duck]

Defendants

LETTER OF REQUEST FOR EXAMINATION OUT OF THE JURISDICTION

To the Senior Master of the Queen's Bench Division, Royal Courts of Justice, London.

I, [name of judge] [position, e.g. Circuit Court Judge] in [name of jurisdiction, e.g. Pinellas County, Florida], respectfully request the assistance of your court with regard to the following matters.

1. Full title of action, e.g:  
John Doe and Jane Doe, et al.  
v.  
XYZ Corporation and Donald Duck

followed by case/Circuit No.

2. Name of parties to the action, e.g:  
"In which John Doe and Jane Doe are plaintiffs/intervenors and XYZ Corporation and Donald Duck are defendants."

3. The names and addresses of the representatives or agents of the parties:

\_\_\_\_\_ Esq.  
[Name and Address of Firm]  
ATTORNEY FOR JOHN DOE

\_\_\_\_\_ Esq.  
[Name and Address of Firm]  
ATTORNEY FOR XYZ CORPORATION

\_\_\_\_\_ Esq.  
[Name and Address of Firm]  
ATTORNEY FOR JANE DOE

\_\_\_\_\_ Esq.  
[Name and Address of Firm]  
ATTORNEY FOR DONALD DUCK

4. Then give a detailed summary of the facts of the claim, stating what the plaintiffs are seeking from the defendants (e.g. damages for breach of contract amounting to \$\_\_\_\_\_). This section can be about a page long and will give the judge of the High Court a sufficient explanation why an order for examination of these particular witnesses is necessary.

5. **Statement**, e.g. "It is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties that you cause the following witnesses, who are resident within your jurisdiction, to be examined. The names and addresses of the witnesses are as follows:"

- a) \_\_\_\_\_
- b) \_\_\_\_\_
- c) \_\_\_\_\_

6. **Procedure**: e.g. "The witnesses should be examined on oath under your laws or the procedure of [US state/jurisdiction in which the claim is to be heard]. Otherwise they should be examined in accordance with whatever procedure your laws provide for in these matters."

7. **Guidance**: The letter of request should then give detailed guidance about the aspects of the claim upon which witnesses need to be examined. If any documents are required from these witnesses, then the documents must be specified. An English court will not grant an order for general disclosure of documents.

8. **Details**: "I confirm that it is proposed that the examination of each of the witnesses take place at [state location, e.g. Anglo-American Court Reporters, 150 Minorities, London, EC3N 1LS England, 011-44-207-264-2088] as follows:

- |                      |               |
|----------------------|---------------|
| a) Donald Duck.....  | Date and time |
| b) Mickey Mouse..... | Date and time |
| c) Roger Rabbit..... | Date and time |

9. **Form of deposition**: "Finally, I request that you will cause the evidence of the said witnesses to be reduced into writing and all documents produced on such examinations to be duly marked for identification and that you will be further pleased to authenticate such examinations by the seal of your court or in such way as is in accordance with your procedure and return the written evidence and documents produced to me addressed as follows:

[Name of judge  
Position, (e.g. 7th Circuit Court Judge)  
Court address]

Done in Chambers in [place court is located] this \_\_\_\_\_ day of \_\_\_\_\_ 200\_

[Seal of the Court]

[Name and position of judge]

(b)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT  
1975

AND IN THE MATTER OF RULES 34.17 – 34.21 OF THE CIVIL PROCEDURE RULES 1998

AND IN THE MATTER OF A CIVIL MATTER NOW PROCEEDING BEFORE [NAME OF  
COURT, E.G. CIRCUIT COURT OF THE SIXTH CIRCUIT] IN AND FOR [NAME OF  
JURISDICTION, E.G. PINELLAS COUNTY, FLORIDA] ENTITLED AS FOLLOWS:

[Name of Claimants, e.g. John Doe and Jane Doe et al.]

Claimants

-v-

[Name of Defendants, e.g. XYZ Corporation and Donald Duck]

Defendants

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WITNESS STATEMENT

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I, [FULL NAME OF SOLICITOR] a solicitor with [name of firm] will say as follows:

1. I am instructed by [name of US firm] to apply for an Order for the examination of the following witnesses, namely: -
  - a) [Witness 1 and address]
  - b) [Witness 2 and address]
  - c) [Witness 3 and address]

whose testimony in relation to the above matter the above-named foreign Court is desirous of obtaining, as appears by the Letter of Request, the original of which is now produced and shown to me at pages \_\_ and \_\_ in the attached bundle marked “[initials of solicitor 1]”. All page references below relate to the attached bundle.

2. It is proposed that the said witnesses be examined on oath by [name of examiner] regarding [subject of examination].
3. I set out in this paragraph a statement of the issues in the proceedings. The action concerns [outline of claim]. The Claimant seeks [details]. The Defendant asserts [details of defence].
4. I respectfully request leave be given to examine the above named deponents as outlined in the draft Order exhibited hereto at [give page numbers in bundle].

Signed ..... ..

[Position, e.g Member, Reed Smith LLP]

Date

(c)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT 1975  
AND IN THE MATTER OF RULES 34.17 – 34.21 OF THE CIVIL PROCEDURE RULES 1998

AND IN THE MATTER OF A CIVIL MATTER NOW PROCEEDING BEFORE [NAME OF COURT, E.G. CIRCUIT COURT OF THE SIXTH CIRCUIT] IN AND FOR [NAME OF JURISDICTION, E.G. PINELLAS COUNTY, FLORIDA] ENTITLED AS FOLLOWS:

[Circuit/case No.]

[Name of Claimants, e.g. John Doe and Jane Doe et al.]

Claimants

-v-

[Name of Defendants, e.g. XYZ Corporation and Donald Duck]

Defendants

UPON READING the witness statement of [name of UK solicitor] filed herein the \_\_ day of [month] 200\_ and the request exhibited, it appears that proceedings are pending in the [name of court] of the [name of jurisdiction] in the United States of America, and that such court wishes to obtain the testimony of [name of witnesses] on the matters set out relating to the said proceedings as described in the said Letter of Request.

IT IS ORDERED that the said witnesses do attend before [name of person conducting examination of witnesses, e.g. an English barrister] who is hereby appointed examiner herein, at [state location, date and time] or on such other day and time as the said examiner may appoint, and do there submit to be examined upon oath or affirmation, touching the testimony so required as aforesaid.

IT IS ALSO ORDERED that the said examiner do take down or cause to be taken down in writing the evidence of the said witnesses according to the rules of Her Majesty's High Court of Justice pertaining to the examination and cross-examination of witnesses and do request each and every witness to sign his deposition in the said examiner's presence and do sign the depositions taken in pursuance of this Order, and when so completed do send them together with this Order and the request, to the Senior Master, Queen's Bench Division, Royal Courts of Justice, Strand London WC2A 2LL for transmission to the court desiring the evidence of the said witnesses.

Dated:

(d) Para 1783 of 28 United States Code

- (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.
- (b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorised by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

5. Notes

- <sup>1</sup> The Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters (:Cmnd 3991, 1969). The UK legislation which gave effect to the Convention is the Evidence (Proceedings in Other Jurisdictions) Act 1975
- <sup>2</sup> Thus assistance will not be available, for example, where the US proceedings are in the nature of bankruptcy or liquidation proceedings, or in interlocutory applications, given the absence of a "trial" in the English sense.
- <sup>3</sup> *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547
- <sup>4</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.3(4)
- <sup>5</sup> *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547
- <sup>6</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.2(3)
- <sup>7</sup> *Re State of Norway's Application* [1987] 1 Q.B. 433
- <sup>8</sup> *Re State of Norway's Application* [1987] Q.B. 433, CA
- <sup>9</sup> *Atlanta Gas Light Co. v. Aetna Casualty & Surety*, unreported, February 7, 1993, David Steel Q.C.
- <sup>10</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.2(4)
- <sup>11</sup> *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] A.C. 547 at 609, 635, 644
- <sup>12</sup> *cf. The Lorenzo, Halcoussi* [1988] 1 Lloyd's Rep. 180; *Wakefield v. Outhwaite* [1990] 2 Lloyd's Rep. 157; *Panayiotou v. Sony Music* [1994] Ch. 142
- <sup>13</sup> *Re Asbestos Insurance Coverage Cases* [1985] 1 W.L.R. 331 at 337-338
- <sup>14</sup> *Rio Tinto Zinc*, *supra*, at 610
- <sup>15</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.3(1)
- <sup>16</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.3(3). A certificate of the Secretary of State to that effect is conclusive evidence of that fact.
- <sup>17</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.9(4)
- <sup>18</sup> Evidence (Proceedings in Other Jurisdictions) Act 1975, s.2(2)
- <sup>19</sup> CPR 34.18(1).
- <sup>20</sup> *J. Barker & Sons v. Lloyds Underwriters* [1987] Q.B. 103
- <sup>21</sup> *Desilla v. Fells* (1879) 40 L.T. 423 at 423-424
- <sup>22</sup> Section 14(1) of the Civil Evidence Act 1968
- <sup>23</sup> *Rio Tinto Zinc* (*supra*)
- <sup>24</sup> CPR 34.20

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