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TAKING OF EVIDENCE

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Chapter 7 – Taking of Evidence

BROOKE MARSHALL AND NADIA DE ARAUJO*

Abstract

In cross-border litigation, matters of evidence are of utmost importance. The success of a case before any court will inevitably depend on a party's ability to prove or disprove facts in issue. When the testimony of a person or documents in their possession are located in a foreign state, there is a potential for a conflict of laws, one exacerbated by the distinct approaches which civil law and common law systems take to evidence and its collection. The Hague Convention of 18 March 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters seeks to limit the potential for conflicts to arise. It does so by creating cooperative procedures and reducing some of the issues arising from the letters rogatory system which preceded it. Notwithstanding, practice shows that the Convention has not achieved uniformity as to its interpretation and application by Contracting States. Accordingly, the problem of taking evidence abroad remains a live and controversial one. This Chapter analyzes key issues in the Convention framework and the approaches taken by both civil law and common law jurisdictions. It is structured into two sections: the first sets out the Convention's scope and explains the procedures it provides for the taking of evidence. The second examines some uncertainties and interpretative inconsistencies which continue to attend the Convention, specifically the contours of Article 23 and the mandatory (or non-mandatory) character of the Convention. The chapter suggests that residual confusion as to what is evidence, as opposed to discovery, continues to affect the Convention. It argues that problems of a practical nature, chiefly delay, explain why a number of common law states continue to interpret the Convention as non-mandatory, preferring to rely on their internal law processes for the taking of evidence abroad.

Keywords: Cross-border litigation, conflict of laws, civil law, common law, foreign evidence

Introduction

In cross-border litigation, most matters of evidence are, as the medieval rule commands, questions of procedure governed by the law of the forum.[1] Where, however, the testimony of a person or documents in their possession are located in a foreign State, comity and pragmatism require regard to be had to the law of that foreign State.[2] In such circumstances, there is the potential for a conflict of laws; one exacerbated by the distinct approaches which civil law and common law systems take to evidence and its collection.[3] In the former, evidence is mostly written; which evidence is to be gathered and how that is done is primarily

a function of a trial judge or court officer.[4] In the latter, evidence is primarily oral; which evidence is obtained and presented to the court is largely an issue for the parties.[5] The potential for conflict is further exacerbated by the fact that the taking of evidence in common law countries is generally accompanied by a process, unknown to civil ones, which 'may lead

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[1] See generally ch 8 in this volume: R Garnett, 'Substance and Procedure', text accompanying note 6 and section 4.

[2] R Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) [8.01].

[3] See generally, D McClean, 'Judicial Cooperation: Resolving the Differing Approaches' in VR Abou-Nigm and MBN Taquela (eds), *Diversity and Integration in Private International Law* (Edinburgh University Press, 2019) 128–131.

[4] D McClean, *International Co-operation in Civil and Criminal Matters*, 3rd edn (Oxford University Press, 2012) 4–5. References to the approach of 'common law' and 'civil law' jurisdictions in this chapter are necessarily very general.

[5] ibid.

to the discovery of evidence'.[6] It is amplified by the division between the courts of Commonwealth common law countries and those in the USA, as to the permissible subjects and objects of that process.

The Convention of 18 March 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters (the Convention) seeks to limit the potential for conflicts to arise by creating cooperative procedures and reducing the 'formal and technical obstacles' of the letters rogatory system which preceded it.[7] The Convention provides for the application of the procedural laws of the place from which the evidence is sought, while accommodating certain procedural laws of the forum, at the latter's request. The Convention also facilitates the prevention of its misuse, allowing Contracting States to declare that it shall not be used for pre-trial document 'discovery' undertaken on their territories.[8]

This chapter examines whether the Convention adequately responds to the problems it was designed to address. It first explores how the Convention treats the issue of the taking of foreign evidence. It then identifies several uncertainties which persist in the Convention framework. The chapter suggests that residual confusion as to what is evidence, as opposed to discovery, continues to affect the Convention and that problems of a practical nature, chiefly delay, explain why a number of common law states continue to interpret the Convention as non-mandatory, preferring to rely on their internal law processes for the taking of evidence abroad.

I – Foreign Evidence and the Convention

This section sets out the Convention's scope before explaining the key procedures it provides for the taking of evidence abroad.

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[6] L Collins, 'The Hague Evidence Convention and Discovery: A Serious Misunderstanding' (1986) 35 *ICLQ* 765, 768.

[7] ibid 774.

[8] In the sense of material designed to lead to the discovery of evidence rather than evidence sought during the pre-trial discovery phase: Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Evidence Convention*, 3rd edn (HCCH, 2016) [325]; see section II(A) below.

A. Scope

The Convention is intended to facilitate the taking of *evidence* for use in court *proceedings, commenced or contemplated*.[9] Although the Convention does not define the term 'obtain evidence', there is common law and civil law support for the view that this means the collection of material to prove or disprove facts in, or expected to be in, issue.[10]

The Convention only applies to *civil and commercial matters*.[11] However, as in other HCCH conventions, this term is not defined. Thus, countries may interpret it in a broad manner (generally the case in common law States) or more restrictively, as usually happens in civil law States.[12] Considering possible issues that could arise from this divergence, the 2014 Special Commission recommended that the term be 'interpret[ed] liberally and in an autonomous manner', consistently with the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the 1965 Service Convention).[13]

The Convention's scope is also limited to the taking of (testimonial or documentary) evidence and to requests for performing other judicial acts within the territory of the Requested Contracting States. Though *other judicial acts* is also not defined, the Convention does not apply to cases of service of judicial and extrajudicial documents or to recognition and enforcement of judicial foreign decisions.[14] In these cases, the requesting State might benefit from the Service Convention or the 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[15] That said, the use of the Service

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[9] Convention on the taking of evidence abroad in civil or commercial matters (adopted 18 March 1970, entered into force 7 October 1972) 847 UNTS 231 (Convention) Art 1.

[10] *British American Tobacco Australia Services Ltd v Eubanks for the United States of America* (2004) 60 NSWLR 483, [33]. See also, from a civil law perspective, E Fongaro, *La loi applicable à la prevue en droit international privé* (LGDJ, 2004) 1.

[11] Art 1.

[12] Permanent Bureau, *Handbook* (n 8), 76–77.

[13] Permanent Bureau, 'Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014)' (May 2014) (Conclusions and Recommendations (2014)) [40] www.hcch.net/en/publications-and-studies/details4/?pid=6405&dtid=2.

[14] Art 1.

[15] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019) www.hcch.net/en/instruments/conventions/specialised-sections/judgments.

Convention to serve a subpoena, a judicial act, for the purposes of obtaining discovery will be met with a refusal by the Central Authorities of those states that have made an Article 23 declaration[16] under the Evidence Convention,[17] at least in terms that would preclude it.[18] It is also likely to be met with a refusal by the Central Authorities of those states which have made no declaration but from whose perspective the Convention is mandatory,[19] given that a subpoena for the taking of evidence is a judicial act within the Convention's scope.[20]

B. Procedures

The Convention provides for the taking of evidence abroad through a Requested Court, via a letter of Request, in chapter I and directly by consuls or commissioners in chapter II.

i. Letters of request – ch I

Where evidence is sought under chapter I of the Convention, a court (or other judicial authority)[21] in one Contracting State must[22] transmit a Letter of Request to the relevant body of the Contracting State in which the witness is found,[23] known as the 'Central Authority'.[24]

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[16] See section II(A) below.

[17] See generally M Davies et al, *Nygh's Conflict of Laws in Australia*, 10th edn (LexisNexis Butterworths 2020) [11.35].

[18] M Legg and J Kang, 'Accessing Third Party Documents in a Foreign Jurisdiction by Subpoena: The *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc* Class Action' (2017) 41 *Melbourne University Law Review* 392, 409–410.

[19] See section II(B) below.

[20] See *Glouchester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1419, [56].

[21] Although the Convention does not define 'judicial authority', the Commission in charge of its drafting decided that 'all courts of arbitration were excluded' by that term: PW Amram, 'Rapport Explicatif de M. Ph. W. Amram' in Bureau Permanent (ed), *Actes et documents de la onzième session 7 au 26 octobre 1968: tome IV, Obtention des preuves à l'étranger* (Imprimerie Nationale, 1970) 202, 216.

[22] The fact that States may make a declaration under Art 27(a), to depart from the procedure established by Art 2, strongly suggests that transmission of the Letter through a Central Authority is obligatory for evidence collected via ch I.

[23] Art 11(1).

[24] See ch 7 in this volume: The Hague Permanent Bureau, 'The Role of National Organs, Central and Competent Authorities in the Implementation and Operation of HCCH Conventions'.

That Central Authority will then send the letter to the competent authority within its State[25] to execute the letter, so that the evidence can be obtained from the witness.

a. Transmission

Each Contracting State nominates a Central Authority charged with the receipt and transmission of letters of request.[26] Alternatively, the Convention allows courts of Requesting States to bypass the Central Authority of the Requested State and send requests directly to the 'judicial authority' of the Requesting State if they make a declaration allowing for court-to-court transmission.[27] Surprisingly few States have made such a declaration,[28] even though many allow for this via other instruments to which they are party.[29] The Convention is silent as to how letters of request are to be transmitted – as at 2016, only a minority of Contracting Parties accepted the transmission of letters electronically,[30] though it is reasonable to expect this to have changed since the 2020 COVID-19 pandemic. The letter should generally specify the questions to be put to the witness or, with particularity, the subject-matter of the examination, as well as any documents to be inspected,[31] in addition to a number of basic matters.[32] A model Letter of Request is available on the Hague Conference website.

b. Execution

The Convention obliges the competent authority of the Requested State to 'execute' (ie give effect to) the letter. The identity of this authority differs among Contracting States and need

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[25] Art 2(1).

[26] Art 2(1).

[27] Arts 27(a), 28(a). For Federal States and States with territorial units or administrative regions, see Art 24.

[28] At the time of writing, only Denmark and Mexico had made a declaration.

[29] See, eg Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) [2020] OJ L405/1 (Recast EU Evidence Regulation), Art 3(1).

[30] Permanent Bureau, *Handbook* (n 8), [145].

[31] Art 3(f)(g); ibid [128].

[32] eg Art 3(a)–(d) and the translation requirements in Art 4.

not be a judge.[33] That authority will obtain the evidence, in accordance with its own law.[34] This means that the law of the Requested State will determine inter alia how the witness is prepared and examined, including as to whether the witness can be cross-examined by the competent authority of the Requested State, as well as whether the witness may appear before that authority remotely via audio or video link.[35] The law of the Requested State will also regulate the production of documents, including as to whether non-parties must produce them.[36] If, however, according to the law of the Requested State the court itself cannot take the evidence, for example in England and Wales,[37] the 'Requested authority' of the Requested State must obtain the consent of the Requesting authority before appointing a person to take the evidence.[38]

Equally, the competent authority Requested State court must apply any special method or procedure requested by the Requesting State (at the latter's cost),[39] unless it is 'incompatible' with the law of the Requested State – because of a 'constitutional inhibition or some absolute statutory prohibition'[40] – or impossible in light of its practice or procedures, or practical difficulties.[41] Special methods or procedures which are regularly requested include the taking of testimony in a particular form, or on oath or affirmation,[42] engaging a stenographer to take a transcript, and asking that a judge of the Requesting State examine the

[33] In the United Kingdom, it is the Master of the court (a judge). Even in civil law countries, such as France, competent authorities include persons designated as commissioners by the French Government. See, eg McClean, *International Cooperation* (2012) 95. The nature of a 'competent authority' was discussed by the 1978 Special Commission, concluding that the term includes 'not only courts and judges ..., but likewise other persons (commissioners, notaries public, *notaires*, lawyers) insofar as these persons are given the specific case[sic] under their laws attributes of a judicial authority'. Permanent Bureau, *Report on the work of the Special Commission on the operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (HCCH, 1978), [5] www.hcch.net/en/publications-and-studies/details4/?pid=3308&dtid=2.

[34] Art 9(1).

[35] Permanent Bureau, *Handbook* (n 8) [213].

[36] ibid [214].

[37] McClean (n 4), 95 (noting that barristers are regularly appointed as examiners).

[38] Art 14(3).

[39] Art 14(2).

[40] Amram, 'Rapport Explicatif' (n 21), 208. See also McClean (n 4), 97.

[41] Art 9(2).

[42] Permanent Bureau, *Handbook* (n 8), [137], [220].

witness, or that the witness be subject to cross-examination by the parties' lawyers[43] or an examiner.[44] The Requested State can refuse to execute the letter if doing so would prejudice its sovereignty or security[45] or if documents are requested for the purposes of pre-trial discovery.[46] Once taken, the competent authority forwards the evidence to the requesting court.[47]

Although the methods in chapter I are traditionally understood as facilitating the indirect taking of evidence, some Contracting States will accede to a Convention request for the direct taking of evidence via video link. [48] This allows for a judge or the parties' lawyers, physically present in the Requesting State, to examine or cross-examine the witness, physically present in the Requested State, via video link. As at November 2019, some Requested States allowed this as a 'special' method or procedure under the Convention,[49] while other Requested States allowed it under their internal law, as permitted by the Convention.[50] Some Requested States still did not allow it at all, considering chapter II to be the only permissible form of direct evidence-taking in line with the Convention.[51] It should be noted that, where the Convention is applied,[52] it is not enough that the internal law of the *Requesting* State allows for the direct taking of evidence via video link;[53] it is the internal law of the *Requested* State that must allow it.[54]

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[43] ibid [220].

[44] ibid [231].

[45] Art 12(b).

[46] Again, in the sense that the material is sought in order to lead to the discovery of evidence. A State cannot refuse to execute a request merely because it seeks evidence during the phase called pre-trial discovery. See section II(A).

[47] Art 13.

[48] Cp Recast EU Evidence Regulation, Art 20, which expressly provides for this possibility.

[49] Art 9(1), (2).

[50] Art 27(b).

[51] Permanent Bureau, *Guide to Good Practice on the Use of Video-Link under the Evidence Convention* (HCCH, 2020) 47-49.

[52] Whether the Convention *must* be applied is considered in Section IIB below.

[53] eg *Federal Court of Australia Act 1976* (Cth) s 47A.

[54] Art 27(b); Permanent Bureau, 'The Mandatory/ Non-Mandatory Character of the Evidence Convention (Preliminary Document no. 10 of December 2008)' (2008) (Mandatory/ Non-Mandatory) [30]-[33] https://assets.hcch.net/upload/wop/2008pd10e.pdf.

c. Witness' Rights and Obligations

An unwilling witness shall be compelled to give evidence under the law of the Requested State.[55] A witness may invoke privileges or duties or obligations not to give evidence either under the laws of the Requesting State, if specified in the letter of request, or under the laws of the Requested State.[56] A witness can rely on the laws of a third State, only to the extent that the Requested State has specified this in a declaration.[57] This would allow, for instance, a Swiss witness requested to give evidence in the Netherlands (the Requested State) to invoke a duty of confidentiality under Swiss banking law, in circumstances where Switzerland is the not the Requesting State.[58]

ii. Consuls and commissioners – ch II

Unlike the Convention's letter of request procedure, which cannot be excluded, the possibility in chapter II of the Convention for evidence to be taken by consuls or commissioners is optional. Several Contracting States have made a reservation excluding it, in whole or in part.[59]

a. Consul

In chapter II,[60] the Convention provides for the taking of evidence by consular agents and diplomatic officers. Article 15 sets some conditions which shall be met by the officer or agent and by the request. Therefore, (a) the consul may only act within the territory in which they exercise their functions; (b) there shall be no use of compulsion against the person from whom the evidence is to be taken, except when 'appropriate assistance' is requested to the competent authority of the State of execution;[61] (c) the consul can only take evidence of nationals from the State which they represent in the State of execution; and (d) the evidence required is in

[55] Art 10; Amram (n 21), 208.

[56] Art 11(a)(b). See, eg *Renfield Corp v E Remy Martin & Co SA*, 98 FRD 442, 443-444 (D Del 1982).

[57] Art 11(2). At the time of writing, Bulgaria, Estonia and the Netherlands had each made declarations.

[58] See McClean (n 4), 99.

[59] Art 33. For a breakdown, see HCCH, *Table reflecting applicability of Articles 15, 16, 17, 18 and 23 of the Hague Evidence Convention* (June 2017) https://assets.hcch.net/docs/627a201b-6c7a-4dc2-86ad-c1da582447d4.pdf.

[60] Arts 15–22.

[61] However, this possibility is only available in the territory of Contracting States, which made a declaration in that regard pursuant to Art 18. At the time of writing, Armenia, Belarus, Cyprus, Czech Republic, Greece, India, Italy, Kazakhstan, Serbia, Slovakia, the UK and the USA had made declarations.

aid of a proceeding already commenced in the courts of the State that they represent (and not in aid of 'contemplated' judicial proceedings). Unlike the general rule set by Article 1, the consul can only take *evidence* and cannot practice any other 'judicial act' ordinarily performed by the competent authority of the Requested State.

Moreover, Article 15 enables Contracting States to declare that a consul may take evidence only after the competent authority, designated by the Requested State has granted permission, on a case-by-case basis.[62] At the time of writing, Andorra, Australia, Denmark, Iceland, Kazakhstan, Liechtenstein, Norway, Portugal, Sweden, and Switzerland follow this exception.

When issuing the permission, the designated authority can, according to Article 19, lay down conditions for the taking of evidence. Some examples are given by the provision itself, such as defining a time and place where the consul may act; or requiring that reasonable advance notice is given of the place, date, and time of the taking of the evidence so that a representative of the authority can be present.[63]

The convention enables a consul to collect evidence, fulfilling the same conditions as Article 15, from nationals of the State where they exercise their functions and of third States.[64] However, in this case, the general rule is that prior permission must be given by the competent authority of the State of execution. The authority may grant general permission for the taking of all evidence in a given case or specific permission for the taking of certain evidence only, depending on the particularities of the case. Yet, a Contracting State may declare that evidence can be taken without prior permission.[65] Finland, the Netherlands and United States have made the declaration. In other countries such as Germany, Singapore, Spain, the United

[62] The 'competent authority', referred to in ch II of the Convention, may not be the same as the one referred to in Art 1. The Contracting States which have not made a declaration excluding the application of ch II specifically informed the competent authority to execute requests pursuant to each ch of the Convention. See further HCCH, 'Authorities – 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters' (*HCCH*) https://www.hcch.net/en/instruments/conventions/authorities1/?cid=82.

[63] According to the Convention's Explanatory Report, the presence of a representative of the authority at the examination by the consul may be justified for different reasons, including the wish to protect the person against examination, which violates the sovereignty and security of the State of execution (as in Art 12), or which does not comply with the privileges or duties of the witness (as in Art 11): Amram (n 21), 213-214.

[64] Art 16.

[65] See McClean (n 4), 101. See also Amram (n 21), 212.

Kingdom and Czech Republic, permission is not required in some circumstances or is subject to reciprocity.

Pursuant both to Article 15 and 16, the consul will apply the law of the Requesting State in the proceeding for taking the evidence, to the extent that it is compatible with the law of the State of execution (including the permissibility of video-link) and does not violate its sovereignty and security.[66] Also, the request for a person to appear or to give the evidence shall comply with administrative rules provided by Article 21, which encompass, among others, language requirements and the need to inform the person that they may be legally represented and not compelled to appear or to give the evidence.

b. Commissioner

The Convention also allows the taking of evidence by a commissioner, which could be appointed by the court of the State of origin or by the courts of the State of execution.[67]

The commissioner will have to fulfill all the same conditions, set by Article 16, when taking the evidence from persons located in the State where they exercise their functions. The commissioner is not authorised to use compulsion against the witness, except when an application is made to the competent authority in the State of execution, and the evidence must be in aid of a proceeding already commenced in the courts of the State of origin.

Moreover, the general rule is that permission should be sought in the competent authority of the State of execution, which will determine the conditions under which the evidence will be taken. Contracting States may declare otherwise, as in Article 16. No such permission is required in France, the United States, Spain (under certain circumstances), and in the United Kingdom (subject to reciprocity).

As in the case of Articles 15 and 16, the commissioner will apply the law of the State of origin to the extent that is compatible with the law of the State of execution.[68] In all methods provided by chapter II, video-link may be used to facilitate the taking of evidence and the presence and participation not only of the witness, but also of the parties, their representatives and of the judicial personnel or authority of the State of origin and the State

[66] Art 12.

[67] Art 17. This is a well-known practice in the United States, especially in its 'relations with France and United Kingdom', whereby foreign judges are appointed to collect evidence in their own languages and under their own procedures: McClean (n 4), 102.

[68] Art 21(a), (d).

of execution. However, in the cases where the State of execution made a declaration that a prior permission is required, 'such presence or participation will be subject to any conditions specified when permission is granted'.[69]

c. Witness' Rights and obligations

In all cases under Articles 15 to 17, the persons from whom the evidence must be taken shall be legally represented.[70] According to Article 21(c), an unwilling witness is not compelled to give evidence unless the consul or the commissioner has applied to the competent authority of the State of execution and that State has made a declaration pursuant to Article 18.

Also, Article 21(e) permits the witness to invoke privileges or duties not to testify, as provided under the law of the State of execution or the law of the State of origin.

II – Uncertainties and interpretative inconsistencies

A longstanding uncertainty attending the Convention is the extent to which it is relevant to discovery as distinct from evidence (section II(A)). A related interpretative uncertainty, still reflected in inconsistent State practice, is whether or not the Convention is mandatory (section II(B) below).

A. Contours of Article 23

There appears to be some residual confusion among Contracting States as to how the distinction between what is properly evidence (*toute acte d'instruction*) for the purposes of the Convention and what is discovery is to be drawn. This misunderstanding continues to lead some States to apply Article 23 of the Convention to refuse the execution of letters of request even where they are 'sufficiently substantiated' and where the 'production of documents ... are specified in the request, or otherwise reasonably identified'.[71]

As is well known, the possibility of States making an Article 23 declaration arose out of a UK proposal based on a fear that, despite the scope of the Convention being limited to

[69] Permanent Bureau, *Video-Link* (n 51), 68.

[70] Art 20.

[71] Permanent Bureau, 'Conclusions and Recommendations (2014)', [18].

evidence,[72] it might nonetheless be used to facilitate US pre-trial *discovery*[73] against *non-parties*.[74] When a Commonwealth common lawyer speaks of US pre-trial discovery, they are typically referring, disapprovingly, to the US practice of parties taking oral testimony (depositions) from *potential non-party witnesses* which can be used to identify *potentially relevant* documents that may then lead to the identification of evidence.[75] Generally speaking, discovery in Commonwealth jurisdictions refers to the process of parties collecting documents *from each other* which are *directly relevant* to the issues raised by the pleadings or in the affidavits. This latter process is also known as *inter partes* disclosure (confusingly also sometimes called *inter partes* 'discovery') and can occur at several stages of the litigation. Discovery in Commonwealth jurisdictions can, however, also refer to the process of parties collecting *potentially relevant* documents *from each other*, which may then lead to the identification of evidence.

Accordingly, the key distinction between US-style discovery and Commonwealth-style discovery is that the former applies to the obtaining of potentially relevant documents from *non-parties*[76] whereas the latter does not.[77] It is this distinction which explains why the United Kingdom worded its declaration under article 23 in the terms that it did.[78] In formulating its declaration in what has been described as 'qualified' terms due to the express reference to 'documents', the UK did not intend to suggest that the Convention could nonetheless be used to facilitate the taking of pre-trial oral testimony, in the nature of material designed to lead to the discovery of evidence, from non-party witnesses.[79] Nor did it intend

[72] See section I(A) above.

[73] See H van Loon, 'Embracing Diversity – The Role of the Hague Conference in the Creation of Universal Instruments' in Abou-Nigm and Taquela (eds) *Diversity* (2019), 31, 39.

[74] Collins, 'Misunderstanding' (1986) 775; cf Amram (n 21), 204 which refers only to *inter partes* disclosure.

[75] Collins (n 6), 776.

[76] AF Lowenfeld, 'International Litigation and the Quest for Reasonableness' (1994) 245 *Hague Collected Courses* 196-197.

[77] Collins (n 6), 769-771.

[78] ibid 775.

[79] *British American Tobacco* (n 10), [27]. But see Permanent Bureau, 'Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague, Apostille and Evidence Service Conventions (28 October to 4 November 2003)' (November 2003) (Conclusions and Recommendations 2003), [35] https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf which states that 'the scope of the provision should not be extended to oral testimony' by which it presumably means 'should not be extended to oral testimony *that is in the nature of evidence*'.

to suggest, according to Collins, that the Convention could be used to facilitate *inter partes* disclosure.[80] A number of Contracting States formulated their declarations in the same terms as the United Kingdom; [81] others transposed the language of article 23.[82]

Although, in principle, the distinction between evidence and discovery for the purposes of the Convention is clear, in practice it is sometimes less easy to draw. Both common and civil law authority supports the view that this determination is to be made by considering, inter alia, the terms of the letter of request, including the breadth or generality of the order which the applicant proposes the Requested Court should make.[83] The legislation implementing the Convention into UK law provides that an order shall not require a person to state *which* documents, relevant to the proceedings, are in their control or to produce any documents 'other than particular documents specified in the order'.[84] In practice, this means that a request for 'monthly bank statements for the year 1984 relating to … account' would succeed, because it is a request for evidence, whereas a request for 'all [of the witness'] bank statements for 1984' would fail, because it is a request for discovery. [85] How relevant the information sought is to the issues in the foreign proceedings is important to determining whether that information is evidence or discovery, although the Requested Court should generally rely on the Requesting Court's determination of this issue.[86] The stage at which the

[80] Collins (n 6), 784.

[81] Cyprus, Denmark, Finland, Norway and Sweden. By the time of the US proposal, there was no public suggestion or any document indicating that the US delegation was proposing a convention to obtain anything different than evidence in the strict sense: ibid 774. However, 'perhaps as part of an effort to extend the scope of the Convention', the US persuaded some countries to change their declaration, to reflect the more restrictive terms of the United Kingdom's. The US delegation later revealed that 'unless American litigants could obtain assistance from the Contracting States during the pre-trial stage of a civil suit in the United States, the Convention would turn into a one way street as far as the United States was concerned': ibid 781–782.

[82] eg Andorra, Armenia, Brazil, Bulgaria, Croatia, Germany, Greece, Portugal and Spain.

[83] eg (Brazil) STJ AgInt na CR 14548 / EX [2020], where the Superior Court of Justice granted the *exequatur* to a letter of request from the US because (a) the requested documents were extensively identified and (b) the letter explained the relevance of the evidence to the foreign proceeding. For a French perspective, see K Mehtiyeva, *La notion de cooperation judiciaire* (LGDJ, 2020), 70–71.

[84] Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK) s 4.

[85] *Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331 (HL) 337–8 (Lord Fraser).

[86] *Atlantica Holdings Inc v Sovereign Wealth Fund Samruk-Kazyna JSC* [2019] EWHC 319 (QB), [2019] 4 WLR 62, [53].

information is sought is also relevant, though the fact that it is sought at the procedural stage described as 'discovery', is not alone decisive.[87]

In sum, the Convention is not intended to be used for US-style discovery from non-party witnesses. Nor is it intended to be used for *inter partes* discovery of documents, in circumstances where the forum court has personal jurisdiction over the parties, but the purpose of that process is to collect potentially relevant documents which may lead to the identification of evidence rather than collect documents directly relevant to the facts in issue. *Pace* Collins, the Convention would appear to apply to the latter. The view that the Convention applies to the discovery of documents directly relevant to the facts in issue, in part, explains why the US Supreme Court in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa* arrived at the conclusion that the Convention has a non-mandatory character:[88] if the Convention were mandatory, reasoned the court, the ordinary pre-trial discovery of documents, where the court has personal jurisdiction over the *parties*, would be subject to other Contracting States' authorities.[89]

B. Convention's character: the only, the first or the last resort?

An unresolved debate since 1985 is whether the Convention *must* be applied whenever *evidence* within its scope is to be taken or obtained abroad. [90] States are divided as to whether a Contracting State court may, for instance, use its internal law to subpoena an unwilling party or non-party witness, resident in another Contracting State, seeking to compel them to give evidence in the forum or to produce documentary evidence situate outside the forum,

[87] *Gredd v Arpad Busson* [2003] EWHC 3001 [42] adopted in *British American Tobacco* (n 10), [42].

[88] The majority of the Court considered that international comity requires that courts, should conduct a case- by-case analysis by reference to a number of factors, including sovereignty interests, the likelihood that recourse to the Convention 'will prove to be effective', the level of intrusiveness of the discovery procedure, and the need to protect foreign litigants from unnecessary or burdensome discovery requests: 482 US 522, 542-546 (1987). See generally GB Born, 'The Hague Evidence Convention Revisited: reflections on its role in U.S. civil procedure' (1994) 57 *Law and Contemporary Problems* 77, 78–80.

[89] *Aérospatiale* (n 88), 539-540.

[90] For detailed analysis, see Permanent Bureau, 'Mandatory/ Non-Mandatory' (2008), [8].

notwithstanding the jurisdictional challenges subpoenas may present.[91] Though the Recast EU Evidence Regulation is non-mandatory[92] and thus does not prevent these possibilities,[93] countries which tend to view the Convention as mandatory[94] are overwhelmingly civil law systems. Countries which tend to view the Convention as non-mandatory are generally common law systems.[95] Those States which consider it to be mandatory have enacted blocking statutes, penalising a person for seeking or transmitting evidence without the State's permission, to try to force other Contracting States to use the Convention.[96] Those States which consider the Convention to be non-mandatory have sought to bypass its mechanisms in favour of internal law,[97] relying on an interpretation of the Convention which allows for this.[98]

Principles of treaty interpretation do not resolve the deadlock. Chapter I of the Convention provides that 'a judicial authority of a Contracting State *may* … request the competent authority of another … to obtain evidence'.[99] Similarly, Chapter II provides that 'a diplomatic officer or consular agent … *may*' and 'a commissioner … *may*' take evidence.[100]

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[91] In both the private international law and public international law sense. As to the former, see generally HM Malek (ed) *Phipson on Evidence*, 19th edn (Sweet and Maxwell, 2018) [8-34], [8-37]; *Ives v Lim* [2010] WASCA 136 [18]; *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc (No 2)* (2016) 245 FCR 362 [30]–[34]. As to the latter, see generally A Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in S Allen et al (eds) *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press, 2019) 331–332, 346–347; Opinion of Advocate General Jääskinen, Case C-170/11 *Lippens v Kortekaas* EU:C:2012:311, paras 29, 65.

[92] Case C-332/11 *ProRail BV v Xpedys NV* EU:C:2013:87, paras 43-46, 55 (interpreting the predecessor Regulation).

[93] *Lippens* (n 91), [39], followed in Cour de cassation, Belgique, 25.04.2013, aff. *Fortis Luxembourg Vie c. G.R.*, n° C.11.0103.F/1, 32-33; Cour de cassation, Belgique, 26.04.2018, *Banque de Luxembourg c. A.C, A.D.L.*, n° C.16.0192.N/1 [6].

[94] See Suisse, Tribunal fédéral, 02.02.2017, 5A 566/2016 [2.1]; Permanent Bureau, *Handbook* (n 8), [20] (providing a survey of State practice).

[95] Permanent Bureau, *Handbook* (n 8), [20].

[96] ibid [26].

[97] ibid [254] noting that 'Delays may cause States to lose faith in the effectiveness of the Convention, and may prompt parties to seek alternative solutions to obtaining evidence abroad outside the Convention ….'

[98] States rationalising their behaviour by reference to the international law norm from which they seek to depart is a long-standing practice: JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn (Clarendon Press, 1963) 42.

[99] Art 1.

[100] Arts 15–17.

The ordinary meaning[101] of the permissive term 'may'[102] could indicate that the Convention is optional or that the mechanisms in chapters I and II are alternatives, but that States must use either one.[103] Purposive interpretation supports both possibilities.[104] On the one hand, the fact that a purpose of the Convention is to facilitate the taking of evidence, not to hamper it, supports a non-mandatory interpretation.[105] On the other, the fact that an objective of the Convention was to 'reconcile' divergent approaches to the taking of evidence[106] tells in favour of its mandatory application.[107] Contextual interpretation is equally unhelpful: the minutes of the Special Commission meetings among Contracting Parties, at which this issue was discussed, clearly show the Contracting Parties have not reached a subsequent agreement regarding the interpretation of the Convention on this point.[108] Moreover, subsequent practice by Contracting States' courts is divisive.[109] Finally, the Convention's French version, which uses the term '*peut*', discloses no difference in meaning with the English and thus does nothing to resolve the ambiguity.[110]

The Conclusions of the 2009 Special Commission record that this 'point of difference between Contracting Parties … has not been an obstacle to the effective operation of the

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[101] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31(1).

[102] Arts 1, 15–17; "*peut*" in the French version.

[103] See also G Bermann, 'The Hague Evidence Convention in the Supreme Court: A Critique of the *Aérospatiale* decision' (1989) 63 *Tulane Law Review* 525, 531.

[104] VCLT (n 101), Art 31(1).

[105] Permanent Bureau, 'Mandatory/ Non-Mandatory' (n 54), [40]–[41].

[106] Special Commission, 'Rapport de la Commission speciale établi par M. Ph. W. Amram' in Bureau Permanent (ed), *Actes et documents de la onzième session 7 au 26 octobre 1968: tome IV, Obtention des preuves à l'étranger* (Imprimerie Nationale, 1970) 55.

[107] M Seibl, 'Evidence, procurement of' in J Basedow et al (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing, 2017) 709, 718. But see Permanent Bureau, 'Mandatory/ Non-Mandatory' (n 54), [38]–[39].

[108] cf VCLT (n 101), Arts 31(1), (3)(a). See, eg Permanent Bureau, 'Conclusions and Recommendations 2003', [37]; Permanent Bureau of the Hague Conference on Private International Law, 'Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague, Apostille and Taking of Evidence and Access to Justice Conventions (2 to 12 February 2009)' (February 2009) (Conclusions and Recommendations 2009), [53] https://assets.hcch.net/upload/wop/jac_concl_e.pdf.

[109] cf VCLT (n 101), Arts 31(1), (3)(a), (b).

[110] cf ibid Art 33(4).

Convention'.[111] One may query the extent to which that is so, given that one determinant for the effective operation of any Convention must be the extent to which it is used. In 1989, the Special Commission recommended a principle of first resort: recourse should first be had to the provisions of the Convention when evidence abroad is being sought.[112] This seems to be an eminently sensible approach in theory, but it has not yielded much success in practice;[113] Indeed, recent case law suggests the Convention is instead used as a last resort:[114] if evidence can be directly taken via video-link under the laws of both the forum and foreign State, some Contracting States' courts will administer an oath or affirmation from the forum, swear in an interpreter in the forum and have the witness give evidence from the foreign country via video-link; it is only if this is not possible that recourse to the Convention will be had.[115]

The best solution to the deadlock may ultimately be to resolve the underlying causes for it. Chief among them, for common lawyers, is the issue of delay in the Convention's procedures.[116] Others are the desire of common law counsel and judges to question the witness, without the presence or aid of judges or interpreters in another Contracting State, and to control the process, for example, to give directions to the witness about how they give their evidence to ensure its integrity.[117] From a civil law perspective, a key cause of a proliferation of blocking statutes, to try to force compliance with their mandatory interpretation of the Convention, is related to the uncertainty canvassed in the previous section. It is to ensure that any material obtained in their territories is properly evidence rather than US-style discovery and that such material is obtained only with their permission.[118] Given recent developments in United States law, which narrow the circumstances in which a US court can exercise personal jurisdiction (a pre-requisite for an order of discovery under internal law), it has been argued that US courts will seek to rely on the Convention more

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[111] Permanent Bureau, 'Conclusions and Recommendations 2009', [53].

[112] Permanent Bureau, *Handbook* (n 8), [25].

[113] cf *Aérospatiale* (n 88), 533-534, 548 (rejecting it by a 5-4 majority).

[114] eg *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] FCA 539 [2]–[4], [20].

[115] eg *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* [2020] FCA 1153.

[116] eg *Motorola Solutions* (n 114), [2].

[117] One party's lawyer, acting as an interpreter in the foreign court, is obviously inappropriate and would justify the forum court appointing its own interpreter (eg *Auken* (n 115), [55]). But that is quite different from an independent interpreter being engaged by the foreign Contracting State and present alongside the witness, as the Convention contemplates.

[118] See also K Mehtiyeva, *La notion de coopération judiciaire* (LGDJ, 2020), 72.

often.[119] If that is right, it will reduce the significance of the mandatory/ non-mandatory debate in the United States, but it will make the need to distinguish between evidence and discovery under the Convention more acute.

Conclusion

The taking of evidence abroad is one of the most controversial fields in international judicial cooperation. The 1970 Evidence Convention began as a proposal of the US delegation to the Hague Conference on Private International Law and has become one of the HCCH's most widely adopted instruments.[120] The Convention's modest goal, upon its inception, was to establish a more 'efficient' method for the taking of evidence abroad than the system of letters rogatory.[121] The loftier goal of the Convention was to bridge the gap between common law and civil law States' perspectives regarding cross-border evidence collection.

While there is a little doubt that the Convention has already achieved the first goal, attainment of the second remains a pursuit in progress. First, the difference between evidence, in the strict sense, and discovery of material which may lead to the identification of evidence remains problematic. Misunderstanding and misinterpretation of Article 23 of the Convention, and what is in form, though not in substance, a qualified declaration made by the UK and adopted by other States, make it a persistent issue.

Secondly, Contracting States disagree over the Convention's terms. While most civil law countries tend to interpret the Convention's methods for taking of evidence within their territory as mandatory, many common law countries perceive the Convention as an instrument to facilitate cooperation between States, not as one excluding recourse to internal practices where they are more expeditious.

Responsibility for remedying these issues falls to the Contracting States. Requesting States' judicial authorities ought to be sensitive to the concept of what evidence is and is not under the Convention and to the precise terms in which their letters are expressed. Equally,

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[119] D Zambrano, 'A Comity of Errors: the Rise, Fall, and Return of International Comity in Transnational Discovery' (2016) 34 *Berkeley Journal of International Law* 157, 163–164, 192–193.

[120] At the time of writing, it had 63 Contracting States: HCCH, 'Status Table - 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters' (*HCCH*, 4 March 2020) www.hcch.net/en/instruments/conventions/status-table/?cid=82.

[121] McClean (n 4), 74.

Requested States' Central Authorities should be cautious about rejecting a request that is in form, but not in substance, a 'pre-trial discovery' request.[122] A preference to use internal procedures in lieu of the Convention because of delays in processing Convention requests can be dealt with by technology: electronic transmission methods, court-to-court transmission,[123] and the direct taking of evidence via video-link under or through the Convention[124] each hold promise. The Hague Conference's Permanent Bureau is facilitating the use of these technologies.[125] Other problems are more intractable. Reluctance on the part of courts to examine witnesses in the presence of foreign judges or through the mouthpiece of a foreign interpreter, may suggest a lack of trust in other Contracting States' institutions on which the Convention depends. Conversely, reluctance on the part of governments to allow for a foreign judge to examine a witness directly under the Convention, via video-link, may reflect a concern based on sovereignty which only serves to encourage the infringement of that sovereignty: the more Requested States impose obstacles to the use of technology under the Convention, the more Requesting States will turn towards their internal procedures for the taking of evidence via video-link, relying on a non-mandatory interpretation of the Convention, as justification.

Notwithstanding, there is hope that the Convention will help to foster internationalism, tolerance, and the administration of justice, and that comprehension of its procedures, coupled with technology, might help.

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[122] (in the sense of Art 23). See Permanent Bureau, *Handbook* (n 8), [66]; Collins (n 6), 769.

[123] See nn 27–30.

[124] See nn 49–50, 66.

[125] Permanent Bureau, *Video-Link* (n 51); Permanent Bureau, 'Use of Information Technology in the Transmission of Requests under the Service and Evidence Conventions (Preliminary Document no. 9 of January of 2019)' (2019) https://assets.hcch.net/docs/97d961a9-4356-4fca-bdd9-00451a81716a.pdf; HCCH Council on General Affairs and Policy, 'Council on General Affairs and Policy (5-8 March): Conclusions and Recommendations Adopted by Council' (2019) [40] https://assets.hcch.net/docs/c4af61a8-d8bf-400e-9deb-afcd87ab4a56.pdf.