



COLLYER BRISTOW

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

DEPOSITIONS- OBTAINING EVIDENCE FROM UK BASED WITNESSES FOR US COURT PROCEEDINGS

Hague Convention letters of request are an effective and common tool used by US litigants to obtain evidence and documents from potential witnesses in the UK where the witnesses are unwilling to give evidence voluntarily for US proceedings.

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WHAT ARE HAGUE CONVENTION LETTERS OF REQUEST?

The US and UK are signatories to the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970* (the "**Hague Convention**"). This means that litigants in US proceedings can ask the US court in which proceedings are already on foot to seek assistance from the High Court of England and Wales by issuing a "letter of request" to obtain evidence or documents from potential witnesses in the jurisdiction.

The procedure is begun by the relevant US court issuing a letter of request to the Senior Master of the High Court. The English court has powers to assist a foreign court under the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "**Act**").

The letter of request should, amongst other things, explain the relevance of the evidence / documents sought and provide details of the subject matter in relation to which the witness will be deposed and seek an order to compel the witness's attendance at a deposition. Many orders are obtained with relative ease as the English court will seek to assist its foreign counterparts unless it is provided with a compelling reason not to do so. The requesting party's English court application is invariably made without notice to the witness and so there is no real opportunity for the witness to raise any objections before the order is granted (unless they are forewarned).

CAN A WITNESS OBJECT AND ON WHAT GROUNDS?

Once the witness has been served with the order requiring their attendance at a deposition, they have only 7 days within which to apply for any variations to

that order, or to have it set aside entirely. The witness might be able to object to the order if, for example, the letter of request is vague or uncertain about the topics in relation to which the witness is to be deposed.

As the witness is entitled to know what their evidence will cover, such a request could be challenged on the grounds that it is oppressive and should properly have been refused by the English court, or must at least be narrowed in scope.

Under the Act, the English court can only order the taking of evidence for foreign proceedings where that evidence could have been obtained in English civil proceedings. As a consequence, because of the English court rules, the subject matter of such an order must be relevant to the issues for determination at trial (and can only be for used for that purpose). The order can therefore be challenged where the requesting party has failed to properly demonstrate why the evidence sought from the witness is relevant for trial and is not just a fishing expedition. In practice, succeeding with such objections can be difficult as the English court will generally defer to the US court's judgment on issues of relevance. For that reason, it is recommended that if a party to the underlying US litigation is concerned that evidence sought from a potential witness might fall outside the scope of what is relevant and necessary for trial, this should be raised with the US court before the letter of request is issued. It is to be noted that an English court may decline to make an order in circumstances where (a) the requesting court has plainly not considered the question of relevance; and (b) it is clear to the English court, even on a broad examination, that the evidence is not relevant.

It is important to bear in mind that the opponents in the underlying US litigation can themselves object to an order requiring a witness to be deposed to provide documents. For example, in the case of *Sakab Saudi Holding Co v Al Jabri & Ors, Re: HSBC & Ors* [2021]

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EWHC 3390 (QB), although the respondent banks did not object to an order requiring them to produce documents, the English court considered objections raised by the defendant in the underlying Canadian proceedings. The objecting party (defendant) argued that the applicant was on a “fishing expedition” because the documents were being sought for investigatory purposes rather than being relevant to issues in dispute at trial. Prior to issuing the letter of request, the Canadian court had made a Norwich Pharmacal order against various third parties, including English banks and also a law firm in England, requiring disclosure of certain categories of documents. A Norwich Pharmacal order requires a third party “mixed up” in the wrongdoing (usually innocently) to disclose information as to the identity of the wrongdoer. That order was not directly enforceable outside of Canada, and the English entities refused to provide voluntary disclosure. This led to issuance of the letter of request by the Canadian court. In the English court, it was argued that the documents were not sought because they were relevant to issues for trial in the Canadian proceedings, but pursuant to the Canadian court’s Norwich Pharmacal jurisdiction, so the issue of relevance to the trial was never considered by the judge in relation to the letter of request.

The English court noted the documents ordered to be produced under the Norwich Pharmacal order were primarily ordered for an investigatory purpose, however the range of the documents sought under the letter of request had been substantially cut down. The Canadian court order pursuant to which the letter of request was issued also stated in clear terms that the documents sought “*will be admissible and relevant at trial to establish the existence, nature and extent of the Fraudulent Scheme and of the Plaintiffs’ interest in such funds*”. The English court therefore concluded that the documents sought from the respondent banks were

relevant to the issues for trial and therefore disclosable. The court took a different view in relation to documents sought under the letter of request from the UK law firm. That is because there is also a burden on the applicant to establish that the documents sought in fact exist. In this case, the evidence produced by the applicant made it clear that they did not know whether documents existed within the requested category and that the applicant was merely ‘fishing’.

SOME PROCEDURAL ASPECTS

In addition to raising objections about the scope of the evidence sought, the witness may wish to ask the English court to restrict the duration of their proposed deposition, or challenge other procedural aspects. Witnesses may also wish to ask the court to ensure that they are provided with copies of any relevant documents well in advance of the deposition to aid their preparation.

A Hague Convention deposition will be conducted in the same way as taking evidence at an English High Court trial and the parties will be entitled to have English legal representation. However, the questions at the deposition will be asked by the parties’ US lawyers and allowance may be made in the court order for the fact that the taking of evidence in US proceedings is substantially different from English practice.

As a result, the deposition may involve a hybrid of US and English civil procedure, so it is important to ensure that all parties are clear on the rules of evidence which are to apply. For example, US lawyers are likely to be keen to ensure that the rules relating to leading questions and the taking of objections are clearly expressed in the English court order. Another procedural aspect is the generally, the witness should be given an opportunity to review and correct any errors in the transcript of their deposition before it is transmitted to the US court.

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Both the US and English rules about privilege apply in Hague Convention depositions. In the case of *Aureus Currency Fund and Credit Suisse Group AG v Mitesh Parikh* [2018] EWHC 2255 (QB), the witness objected to a deposition order, claiming it was oppressive because, in giving the requested evidence, he risked incriminating himself in an ongoing regulatory investigation. The Court rejected that argument, noting that a witness can always 'plead the 5th' in response to a question, relying on their right against self-incrimination under the US Constitution.

WHO PRESIDES OVER THE DEPOSITION?

As part of the English court order, an "Examiner" will be appointed by the court to oversee the deposition. He or she will usually be a practising barrister nominated by the requesting party. The Examiner plays only a limited quasi-judicial role during the deposition and has little power or discretion (save for the ability to rule on any privilege objections made under English law). Even so, it is nonetheless important to ensure that the Examiner nominated by the requesting party is impartial and experienced enough to be fit for the role.

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THE IMPORTANCE OF MOVING QUICKLY WITH OBJECTIONS

If a potential witness is minded to challenge a deposition order, they should instruct English solicitors as quickly as possible after being served. Although the deadline to apply for any variation of the order is 7 days from service, if lawyers are instructed early, it may be possible to extend that timeframe by agreement with the other parties.

In practice, it is the underlying US non-requesting party who usually approach English lawyers to act for a potential witness. We would recommend that English legal representation is obtained for witnesses as early as possible, rather than waiting until a witness is eventually served with the English deposition order. This may allow consideration of the US letter of request in advance of the requesting party's application to the English court and increases the chances of effectively varying the likely English court order. With enough time, it is generally possible to negotiate limits to the scope of questioning and agree other potentially contentious procedural issues without the need to make an application to the English court.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT



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