

T H E L A W R E F O R M C O M M I S S I O N
AN COIMISIÚN UM ATHCHOIRiÚ AN DLI

(LRC 16 - 1985)

REPORT ON THE HAGUE CONVENTION ON
THE TAKING OF EVIDENCE ABROAD IN
CIVIL OR COMMERCIAL MATTERS

IRELAND

The Law Reform Commission,
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

© Copyright The Law Reform Commission 1985
First Published 1985

REPORT ON THE HAGUE
CONVENTION ON THE TAKING OF EVIDENCE ABROAD
IN CIVIL OR COMMERCIAL MATTERS

CHAPTER 1: INTRODUCTION

In 1968, at its eleventh Session, the Hague Conference on Private International Law adopted a Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This Convention makes provision for the obtaining of evidence in one State pursuant to Letters of Request received from a judicial authority in another State and the taking of evidence in one State by commissioners appointed by courts in another State or by the diplomatic officers or consular agents of that State. Ireland was represented at the meetings of the Conference which adopted the Convention by the late Mr Roger Hayes, then an Assistant Secretary in the Department of Justice and subsequently a member of the Law Reform Commission. Special Commissions were convened on the operation of the Convention in 1978 and 1985, at both of which Ireland has been represented by Mr Charles Lysaght, Research Counsellor to the Commission.

The Convention has been ratified by Czechoslovakia, Denmark, Finland, France, The Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, the United Kingdom and the United States.¹ Cyprus, Barbados and Singapore have acceded to it. Spain and Switzerland have

¹ Pursuant to Article 40, the British government has declared that the Convention extends to certain territories for whose international relations it is responsible, viz. Sovereign Base Area of Akrotiri and Dhekelia (in the Island of Cyprus), Cayman Islands, Falkland Islands and its Dependencies, Gibraltar, Hong Kong and the Isle of Man. The United States has made a similar declaration in respect of Guam, Puerto Rico and the Virgin Islands.

4

signed, subject to ratification.

In this Report the question of Ireland's adherence to the Convention is considered and recommendations made as to the legislation to be enacted if Ireland is to become party to it.

CHAPTER 2: THE PRESENT LAW

The normal method of securing the presence of witnesses at a trial is by the service of a sub-poena ad testificandum on that witness.¹ Where it is proposed to put documents in evidence a sub-poena duces tecum is served on the person in possession of them requiring that person to bring them into court and to produce them. Service is effected by delivering a copy of the sub-poena, indorsed with the name of the solicitor or party issuing it and producing the original at the same time.² If the person on whom the subpoena is to be served is out of the jurisdiction no sub-poena may be issued. Consequently it seems that a witness who wishes to avoid giving evidence need only remove himself from the jurisdiction while the proceedings are pending to avoid being compelled to give evidence pursuant to a sub-poena. Where documents are outside the jurisdiction but there is a person within the jurisdiction in whose possession they are, it would appear that there is power to compel that person to produce those documents. But it has been held recently in the context of bankers' books that while there is jurisdiction to make an order compelling an Irish bank to produce an account outside the jurisdiction for inspection this should not be done as it would involve "a conflict of jurisdiction,

¹ See Rules of the Superior Courts, Order 39, rules 25 to 34; Appendix D, Part 1.

² Rules of the Superior Courts, Order 39, rule 33.

which should be avoided in the interest of the comity of courts".³

However, although the normal processes of compelling evidence are ineffective in the case of witnesses outside the jurisdiction, there is provision by which the courts may order the taking of evidence abroad where the witness is willing and, under the long-standing practice of Letters of Request, foreign courts may compel evidence required for proceedings before a court in Ireland.

The law governing the circumstances in which a court in Ireland may request evidence to be taken abroad in proceedings before them is contained in the Rules of Court. Under Order 39, rule 4 of the Rules of the Superior Courts⁴, the High Court may request evidence to be taken on oath before any person

³ Chemical Bank v Mac Cormack [1983] ILRM 350, a case where application was made for the inspection of entries in the books of Allied Irish Banks Ltd in New York under the Bankers' Books Evidence Act, 1879. It was also held that as the Act could not be interpreted as having extra-territorial effect, the Court had no jurisdiction to order inspection in New York.

⁴ S.I. No. 72 of 1962.

in advance of the trial.⁵ Provision is made in the following rule for the issue of Letters of Request to the competent judicial authority in another State requesting the examination of a witness viva voce before them or such other person as according to their procedures is competent to take the examination of witnesses.⁶ The Form prescribed for such a Letter of Request is addressed by the Master of the High Court to the competent judicial authority of the foreign state requesting

"... the said witnesses (and such other witnesses as the agents of the plaintiff and the defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before you, or such other person as according to your procedure is competent to take the examination of witnesses, and that you will cause such witnesses to be examined (upon the interrogatories which accompany this letter of request)

⁵ Order 39, rule 4, provides:

"The Court may, in any cause or matter where it shall appear necessary, make any order for the examination upon oath before the Court, or any officer of the Court, or any other person, and at any place, of any witness, and may allow the deposition of such witness to be adduced in evidence on such terms (if any) as the Court may direct".

The corresponding provision for Circuit Court proceedings is contained in the Rules of the Circuit Court, 1950, Order 20(3) which provides:

"In any action, proceeding, or matter, where it shall appear necessary for the purposes of justice, an order may be made for the examination upon oath before the Court, or before any officer in the Office and nominated by the County Registrar, or by the Judge, or before any other suitable person and at any convenient place, of any witness or person, and the order may empower any party to any such action, proceeding, or matter, to give such examination or deposition in evidence therein on such terms, if any, as the Judge may direct."

⁶ Order 39, rule 5(1) provides:

"If in any case the Court shall so order, there shall be issued a request to examine witnesses in lieu of a commission; the Forms Nos. 1 and 3 in Appendix D, Part II, shall be used for such order and request, respectively."

viva voce touching the said matters in question in the presence of the agents of the plaintiff and defendant or such of them as shall, on due notice given attend such examination.

And I further have the honour to request that you will permit the agents of both the plaintiff and defendant or such of them as shall be present to be at liberty to examine and to cross-examine such witnesses.

And I further have the honour to request that you will be pleased to cause ... the evidence of such witnesses to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification"

Where an order is made for the issue of a request to examine a witness in a foreign country with which a convention exists, this Form may be varied⁷ but, in fact, there is no such convention in force. Order 39, rule 5(3) prescribes a Form to be used where an order is made for the examination

⁷ Order 39, rule 5(2) provides:

"Where an order is made for the issue of a request to examine a witness or witnesses in any foreign country, with which a convention in that behalf has been or shall be made, the following procedure shall be adopted:-

- (a) the party obtaining such order shall file in the Central Office an undertaking in the Form No. 2 in Appendix D, Part II. (This is an undertaking to be responsible for all expenses incurred by the Minister of Foreign Affairs in respect of the letter of request).
- (b) such undertaking shall be accompanied by -
 - (i) a request in the Form No.3 in Appendix D, Part II, with such variations as may be directed in the order for the issue thereof, together with a translation of such request into the language of the country in which the same is to be executed;
 - (ii) a copy of the interrogatories (if any) to accompany the request and a translation thereof;
 - (iii) a copy of the cross-interrogatories (if any) and a translation thereof.

of a witness or witnesses before the Irish Consular Authority in any foreign country with which a convention in that behalf has been made.⁸ The Form so prescribed reads:

"It is ordered that the Irish Consul or his deputy at.... be appointed as special examiner for the purpose of taking the examination, cross-examination, and re-examination, viva voce, on oath or affirmation, of witnesses on the part of the at aforesaid. The examiner shall be at liberty to invite the attendance of the said witnesses and the production of documents, but shall not exercise any compulsory powers. Otherwise such examination shall be taken in accordance with the procedure in Ireland ... (here follows provisions relating to notice to the parties) ... And that the depositions when so taken, together with any documents referred to therein, or certified copies of such documents, or of extracts therefrom, be transmitted by the examiner, under seal, to the Master of the High Court, Four Courts, Dublin, Ireland on or before ... there to be filed in the proper office. And that either party be at liberty to read and give such depositions in evidence of the trial of this action saving all just exceptions ...

*(Note - if the Convention requires that the invitation or notice to the witnesses must expressly state that no compulsory powers may be used, this requirement must be complied with)."*⁹

⁸ The only bi-lateral convention containing such a provision is the Consular Convention between Ireland and the United States of America 1950, Article 17 of which provides that

"a consular officer may, within his district, ... (g) take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory".

The Vienna Convention on Consular Relations 1963 to which Ireland is party and which is given the force of law in the State by the Diplomatic Relations and Immunities Act 1967 lists in Article 5(j) among the functions of a consular post "executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force, or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State".

⁹ Rules of the Superior Courts, Appendix D, Part 11, No.4.

But this procedure would not appear to preclude the making of an order under Order 39, rule 4 in much the same terms for an examination before an Irish Consular Authority in a foreign country with which there is no convention.¹⁰

It appears from the cases decided under the corresponding provision of the 1905 Rules of the Supreme Court of Judicature that the Court will order the taking of evidence on commission where a witness refuses to come to Ireland to testify.¹¹ Under Order 39, rule 17 of the Rules of the Superior Courts the Court may allow a deposition to be given in evidence without the consent of the party against whom it is offered if the deponent is "beyond the jurisdiction of the Court".¹² But in cases where a crucial witness is prepared to travel to Ireland to give evidence at the trial, the courts have been reluctant to make an order for the taking of evidence

¹⁰ See Independent Newspapers Ltd. v Irish Press Ltd (1938) 72 I.L.T.R. 11; Keane v Hanley /1938/ Ir. Jur. Rep.16; Leonard v Scofield /1938/ Ir. Jur.Rep. 31.

¹¹ See Rules of the Supreme Court (Ireland) 1905, Order XXXVII, rule 5; Keane v Hanley /1938/ Ir. Jur. Rep. 16 (Supreme Court); Independent Newspapers Ltd. v Irish Press Ltd. (1938) 72 I.L.T.R. 11 where an order was made by Johnston J. in the High Court for the examination on commission of "Mr John Dempsey who is a well-known boxer with, I understand, an international reputation".

¹² The full terms of Order 39, rule 17, are as follows:

"Except where by this Order otherwise provided or directed by the Court no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature of such certificate."

on commission.¹³

There have been no recent reported Irish cases on when a Letter of Request will be issued but presumably the same principles would apply as to the taking of evidence on commission. In fact the taking of evidence abroad on deposition before a trial is not a common feature of Irish litigation. It seldom achieves any saving in costs, even where the witness is abroad, as lawyers representing the parties have to attend for the purposes of re-examination and cross-examination.¹⁴ Consequently it is the usual practice to ask witnesses to come to Ireland to give their evidence. A further difficulty affecting Letters of Request is that courts in some foreign countries may not permit the examination of witnesses by parties and their lawyers. In such cases it would appear that no valid Letter of Request may issue to a foreign court as it would be impossible to comply with the requirement in the rules of court that "the witness shall be subject to cross-examination and re-examination".¹⁵ Additional practical difficulties would arise in the examination of witnesses where the Letter of

¹³ See Leonard v Scofield [1938] Ir. Jur. Rep. 31. However, in an earlier case, Esmonde v. Esmonde [1936] Ir. Jur. Rep. 58 the evidence of a crucial witness was ordered to be taken on commission in Dublin before he returned to his home in Newfoundland.

¹⁴ The Rules of the Superior Courts, Order 39, rule 10, provides:

"The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witness shall be subject to cross-examination and re-examination."

¹⁵ See Rules of the Superior Courts, Order 39, rule 10 quoted in footnote 11. Form No.3 in Appendix D, Part II, which must issue from the Master of the High Court when the taking of evidence by the foreign court is requested, includes a request to "permit the agents of both the plaintiff and defendant or such of them as shall be present to be at liberty to examine and to cross-examine such witnesses".

Request is directed to a court in a non-English speaking country which will not order the examination to be conducted in English. In practice, where evidence has to be taken abroad, Irish courts prefer to appoint a commissioner - who may be an Irish consul but is usually a barrister familiar with Irish legal procedures - rather than issue a letter of request to a foreign court.¹⁶ However, it is a difficulty with this procedure that some civil law countries do not permit the taking of evidence on their territory by commissioners or consuls.

When Letters of Request are received in Ireland from foreign courts effect is given to them under the Foreign Tribunals Evidence Act, 1856, section 1 of which provides as follows:

"Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order to command the attendance of any person to be named in such order, for the purpose of

¹⁶ In Leonard v Scofield /1938/ Ir. Jur. Rep. 31, decided in 1937 the High Court rejected the Plaintiff's application to appoint a New York Attorney to take evidence on commission and accepted the defendant's submission that the Irish Free State Consul at New York should be appointed. See also Independent Newspapers Ltd v Irish Press Ltd. (1938) 72 I.L.T.R. 11; Keane v Hanley /1938/ Ir. Jur. Rep. 16, in both of which the Irish Free State Consul was the person designated to take evidence on commission.

being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge."

There has been little case-law on this subject. In In re Chomatov Savings Bank,¹⁷ the High Court declined to give effect to a Letter of Request from Czechoslovakia because it was not proved that proceedings had been served on the defendant. Murnaghan J., who heard the case, stated that the cause of action should be set out in the grounding affidavit so that he could see whether it was a cause of action which could properly be implemented under the Constitution. In addition, he held that if the person to be examined was required to produce documents these documents should be mentioned in the affidavit. However the Supreme Court reversed this judgment and made the order sought. No reasons were given for the decision and Maguire C.J. who delivered the judgment said that the witness's "attitude before the Court and her decision to give evidence or withhold or produce documents is a matter for herself". It is not clear what was intended by this remark but it seems that the Court may have taken the view that objections to a Letter of Request should not be taken until the witness appears for examination.

In another case, some years later, the High Court refused a request from a German court to take evidence from an Irish respondent in divorce proceedings on the ground that it would

¹⁷ [1957] I.R. 355.

be repugnant to Article 41.3 of the Constitution to grant it.¹⁸ However the Supreme Court reversed the decision and granted the order sought.¹⁹

The Foreign Tribunals Evidence Act, 1856 has also been the subject of interpretation by the English courts. There it was held that no order should be made for the examination of witnesses for the purpose of pre-trial discovery as operated in the United States and any order to produce documents should be limited to such as are specifically identified.²⁰

Any person duly authorised by the foreign court or tribunal may apply to the High Court to have such evidence taken. In fact what usually happens is that a letter of request is forwarded to the Department of Foreign Affairs by the Embassy of the State where the proceedings are pending; the Department of Foreign Affairs transmits it to the Chief State Solicitor with an intimation that it is desirable that effect should be given to it without requiring an application to be made to the Court by the agents in Ireland of any of the parties to the

¹⁸ Article 41.3 provides:

1^o The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack.

2^o No law shall be enacted providing for the grant of a dissolution of marriage.

3^o No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

¹⁹ Hovells v Hovells, Irish Times, 1 August 1962.

²⁰ Burchard v Macfarlane [1891] 2 Q.B. 241; Radio Corporation of America v Banland Corporation [1956] 1 Q.B. 618.

action or matter in a foreign country.²¹ The Chief State Solicitor makes application to a Judge of the High Court who usually directs that the examination should take place before a district justice. At the actual examination before the district justice, the questions are put by Counsel briefed by the Chief State Solicitor.

This procedure is advantageous because the Foreign Tribunals Evidence Act, 1856, section 2 provides that a certificate of a diplomatic agent or consul is evidence "that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic agent or consul having jurisdiction in the matter so pending, and that such court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates".

The Act goes on to provide that a person giving evidence in pursuance of it on oath or affirmation who wilfully and

²¹ Rules of the Superior Courts (No.1), 1967, rule 1, provides:

Order 39, rule 44, shall be deleted and the following rule substituted therefor:

"Where a commission rogatoire, or letter of request, as mentioned in rule 39, is transmitted to the Chief State Solicitor by the Minister for External Affairs with an intimation that it is desirable that effect should be given to the same without requiring an application to be made to the Court by the agents in Ireland of any of the parties to the action or matter in the foreign country, the Chief State Solicitor may make such applications and take such steps as may be necessary to give effect to such commission rogatoire, or letter of request, in accordance with rules 39 to 43 (inclusive)."

By virtue of the External Affairs (Alteration of Name of Department and Title of Minister) Order 1971, references to the Minister for External Affairs in any enactment must be construed as references to the Minister for Foreign Affairs.

corruptly gives any false evidence "shall be deemed and taken to be guilty of perjury".²² Persons whose attendance is required are entitled to "the like conduct money and payment for expenses and loss of time as upon attendance at a trial".²³ A witness examined under the Act has "the like right to refuse to answer questions tending to criminate himself, and other questions" as a witness in an ordinary trial.²⁴ Similarly no person may be compelled to produce any writing or other document that he would not be compellable to produce in an ordinary trial.²⁵

Apart from evidence taken under the Foreign Tribunals Evidence Act, 1856 pursuant to an order of an Irish court, it is not lawful for anyone to take evidence on oath in aid of foreign proceedings. This is the effect of the Statutory Declarations Act 1835 which was in fact designed to prevent the development of oathbound organisations. Section 13 of that Act provides:

"It shall not be lawful for any justice of the peace or any other person to administer or cause or allow to be administered or ... to receive any oath, affidavit or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being; provided always that nothing herein contained shall be construed to extend to any oath, affidavit or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries..."

²² Section 3.

²³ Section 4.

²⁴ Section 5.

²⁵ Ibid.

CHAPTER 3 THE PROVISIONS OF THE CONVENTION

The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters provides in Chapter 1 for the taking of evidence in civil and commercial matters by the competent authority of a Contracting State pursuant to a Letter of Request received from the judicial authority of another Contracting State.¹ Such evidence must be "intended for use in judicial proceedings, commenced or contemplated".² Its exact scope is not further defined but it would appear that it includes the questioning of witnesses, who may give sworn or unsworn testimony, as well as the inspection of property or documents.³ It is doubtful if it includes the process known as pre-trial discovery under which parties may be granted permission to examine witnesses and obtain documents relevant to the case without being under any obligation to present them in evidence at the hearing of the case. Even if it does, a State party to the Convention is entitled to

¹ Article 1.

² Ibid.

³ See Article 3 which provides:-

" A Letter of Request shall specify -

(d) the evidence to be obtained ...

Where appropriate, the Letter shall specify, inter alia -

(e) ...

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;..."

limit its obligations in this regard by declaring that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.⁴ Each State party to the Convention must designate a Central Authority to receive Letters of Request and transmit them to the authority competent to execute them.⁵ Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language.⁶ As a general rule the judicial authority which executes a Letter of Request must apply its own law as to the methods and procedures to be followed.⁷ However it should follow a request that a special method or procedure be followed unless this is incompatible with its internal law or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.⁸ Letters of Request must be executed expeditiously.⁹ The witness called pursuant to the Letter of Request may refuse to give evidence in so far as he has a privilege or duty to refuse either under the law of the State of execution or the law of the State where the Letter of Request is issued.¹⁰ The State addressed may refuse to execute a Letter of Request only to the extent that it does not fall within the functions of its judiciary or if it considers that its sovereignty or security would be prejudiced thereby; execution may not be refused solely on the ground that under its internal law it claims exclusive

⁴ Article 23, considered further *infra*. pp. 22-23,34-35.

⁵ Article 2.

⁶ Article 4.

⁷ Article 9.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Article 11.

jurisdiction over the subject matter of the action or that its internal law would not admit a right of action on it.¹¹ It would not, therefore, be open to an Irish court to refuse to order the taking of evidence in divorce proceedings concerning Irish domiciled persons on the ground that such a divorce would not be recognised in Ireland. Also, where affiliation proceedings are taken in foreign courts against Irish citizens or Irish residents, evidence will be obtainable in Ireland pursuant to a Letter of Request under the Convention although the defendant has not entered an appearance in the proceedings and the judgment could not be enforced in Ireland. The State executing a Letter of Request is not entitled to recover any costs from the requesting State apart from fees paid to experts and interpreters and the costs occasioned by the use of a special procedure which has been requested.¹²

In Chapter II of the Convention, provision is made by which the diplomatic agents or consular agents of a State or a commissioner appointed by its courts may take evidence in the territory of another Contracting State. It is possible for a Party to insist that prior permission be obtained before such evidence is taken.¹³ Generally speaking, evidence taken pursuant to this Chapter is to be taken without compulsion but a State party may make a declaration that its competent authority will entertain applications "for appropriate assistance to obtain the evidence by compulsion".¹⁴

In assessing the likely benefits of the Convention to Ireland, the Commission has accepted that for reasons of cost it is

¹¹ Article 12.

¹² Article 14.

¹³ See Articles 15,16,17.

¹⁴ Article 18.

likely to remain the common practice in Irish litigation to invite foreign witnesses to travel to Ireland to give their evidence before the Court. The main utility of the Convention will be in cases where such witnesses are unwilling to do so. Although the obligation in the Convention to permit commissioners or consuls to take evidence in one's territory is hedged around with the possibility of restrictions, it may be predicted that States party to the Convention will be more likely to give the requisite permission when it is sought by another State which is party to the Convention. Heretofore, as noted, it has not been permissible to take evidence in this way in some civil law countries who regard it as a breach of their sovereignty. Where evidence is sought in the United Kingdom and the United States the Convention offers the opportunity of compelling evidence to be given before a commissioner or consul as both these countries have made declarations under Article 18 that a diplomatic officer, consular agent or commissioner may apply to the courts for appropriate assistance to obtain evidence by compulsion. In cases where a foreign State refuses to allow evidence to be taken on its territory by a commissioner or consul appointed to do so by an Irish court¹⁵ or where a witness resident abroad refuses to give evidence to such a commissioner or consul and cannot be compelled to do so under the local law, the Letter of Request procedure prescribed by the Convention is the only means for obtaining such evidence by compulsion. Apart from

¹⁵ In this context it should be noted that Singapore and the Federal Republic of Germany have excluded the application of Chapter II of the Convention. The latter has declared that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved. Portugal adopts a similar position while Denmark does not allow the taking of evidence in its territory by Commissioners.

cases where this procedure is used, it may be predicted that its existence will act as an inducement to witnesses to give evidence voluntarily.

It is possible that there will be more demand for the taking of evidence abroad in aid of Irish legal proceedings in the future. An increase in foreign trade must necessarily give rise to more litigation involving foreign witnesses. Matrimonial litigation, the volume of which has increased considerably in the last decade, often involves parties or witnesses who live outside Ireland. The Commission in its Working Paper on the Rule against Hearsay, has recommended that in cases where it would cause undue expense or inconvenience if a witness were to be examined by the parties it should be permissible for a Court to order the taking of evidence without making provision for lawyers representing each side to be present, so reducing the costs of the operation.¹⁶ If this recommendation is adopted, parties may be more inclined to request the taking of evidence abroad, especially on matters which are clearcut or not central to the case. Where the evidence sought consists of documents or other real evidence, and there is no need to examine witnesses, the facilities provided by the Convention are likely to be of most use.¹⁷

The Commission has also considered the obligations which will be assumed by Ireland upon becoming party to the Convention. At present, by virtue of the Foreign Tribunals Evidence Act,

¹⁶ Law Reform Commission, Working Paper No. 9 - 1980, The Rule against Hearsay, pp. 37, 38, 203.

¹⁷ See Chemical Bank v Mc Cormack [1983] ILRM 350 where Carroll J. stated that the appropriate procedure to obtain evidence of a bank account in New York was to issue a request to the appropriate American court.

1856, evidence is obtained at the request of a court in another State irrespective of whether that State would give effect to a similar request from an Irish court. To that extent the Convention imposes no extra burden. However if Ireland is to comply with the obligations of the Convention it would be necessary to amend the existing legislation so that evidence could be obtained in a number of cases where it is not obtainable at present, such as where proceedings have not commenced but are merely contemplated or where the evidence sought consists of unsworn testimony, the inspection or examination of property or the medical examination of persons none of which are provided for in the existing legislation. This does not seem to be objectionable especially as the Convention would permit a witness to enjoy every protection and privilege which would obtain if the evidence were sought in domestic litigation.¹⁸ Thus, if, as appears to be the case, blood tests will not be ordered against an unwilling person in proceedings before an Irish court,¹⁹ they will not be so ordered pursuant to a Letter of Request addressed to that court.

¹⁸ See Articles 10 and 11. Article 10 provides:-

"In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings".

Article 11 provides:-

"In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence -

- (a) under the law of the State of execution; or
- (b) under the law of the State of origin, ..."

¹⁹ See Law Reform Commission, Report on Illegitimacy (LRC4 - 1982), pp. 7-11, 111-120.

Under the Convention it is not permissible to recoup from the Requesting State all the costs of giving effect to a Letter of Request, as is done at present. But as the examination under the present procedure is invariably carried out by a district justice, for whose services no charge is made, the amounts involved are relatively trivial. As noted, the Convention allows the recovery of the fees paid to experts and interpreters or the costs occasioned by the use of a special procedure requested by the requesting State.

The implementation of Chapter II of the Convention would necessitate legislative provision to restrict or repeal the prohibition in the Statutory Declarations Act, 1835 on the administration of an oath for the purpose of taking evidence. It is considered that there is no objection to lifting this prohibition so as to allow evidence to be taken without compulsion in aid of foreign proceedings by a diplomatic officer, consular agent or a commissioner appointed by a foreign court, especially as the Convention permits the Irish government to reserve to itself the right to grant or refuse permission in the individual case. The question whether Ireland should make a declaration allowing for the obtaining of such evidence by compulsion is considered below.²⁰

It appears to the Commission that adherence to the Convention would confer occasional benefits in making evidence available in litigation before the courts in Ireland and the minimum obligations which are involved are acceptable. The Convention, moreover, represents a form of international co-operation which is conducive to the just resolution of litigation and is worthy of support on this ground. Consequently the Commission recommends that Ireland should

²⁰ See infra. pp 32-33.

become party to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The extent of the obligations undertaken depends somewhat on the reservations and declarations made on becoming party to the Convention. This and the form of the necessary domestic legislation will be considered in the succeeding chapters.

It should be noted that there has been disquiet in recent years as a result of demands for evidence made by the United States courts. This has arisen partly because it is felt that the claims to jurisdiction made by the United States are excessive, especially in the area of anti-trust laws. It has also arisen because of the system of pre-trial discovery in American litigation under which strangers to the litigation as well as the parties may be examined on oath in advance of the hearing or compelled to produce documents which might aid the preparation of the case by one of the parties.²¹ This has caused most States party to the Convention to make a declaration in accordance with Article 23 that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. The desirability of Ireland making such a declaration is considered below.²² Such a declaration would

²¹ See In re Anschuetz & Co, United States Court of Appeals, Fifth Circuit, 7 March 1985 where it was held that the Convention was not the exclusive mechanism for obtaining foreign evidence and did not therefore limit the application of the federal discovery rules. See also In re Westinghouse Electric Corporation Uranum Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2) /1978/ A.C. 547 and In re Asbestos Insurance Coverage Cases /1985/ 1 W.L.R. 331 where the House of Lords held that the effect of English legislation passed to give effect to the Convention, the Evidence (Proceedings in Other Jurisdictions) Act 1975, was that the documents sought by the Requesting Court had to be clearly indicated and shown to exist or have existed.

²² See infra. pp. 34-35.

not exclude applications for oral testimony under the pre-trial discovery process, although an argument has been made that evidence not required for the actual trial is not "evidence" to which the Convention is applicable.

Several states party to the Convention have enacted legislation aimed at countering what are perceived as extravagant United States requests for evidence. In Britain, under the Protection of Trading Act 1980, the Secretary of State is empowered to prohibit any person from complying with an order of a foreign court to produce any commercial document or commercial information. Such a prohibition may be imposed where the order infringes the jurisdiction of the United Kingdom, or is prejudicial to its sovereignty, security or international relations. It may also be imposed where the order is made for the purpose of proceedings which have not been instituted or which do not seek specific documents but a general discovery of documents. It is made an offence not to comply with the directions of the Secretary of State in such a matter. It is specifically provided that effect is not to be given to a Letter of Request if it is shown that it infringes the jurisdiction of the United Kingdom or is prejudicial to its sovereignty. A certificate from the Secretary of State is made conclusive evidence of these matters. In enacting this legislation the British government took the view that it was permissible under Article 12 of the Convention which allows the State addressed to refuse to execute a Letter of Request if it considers that its sovereignty or security would be prejudiced thereby.

The Commission recommends that our legislation should enable the Government to prevent the execution of a Letter of Request or other taking of evidence in the State where this would prejudice the sovereignty and security of the State.

CHAPTER 4 DESIGNATIONS, DECLARATIONS AND RESERVATIONS

If it is decided that Ireland should become party to the Convention it will be necessary to designate competent authorities for certain purposes specified in it. It will also be necessary to decide what reservations or declarations permitted by the Convention should be made by Ireland at the time of signature, ratification or accession. In this context it should be noted that under the general principles of international law the effect of any such reservation or declaration is that the obligations of other Contracting States vis-a-vis the reserving or declaring State are modified as well as vice-versa.

Article 2 provides that a Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Letters of Request must be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State. Most States party to the Convention have designated their Department of Justice as the Central Authority, but Italy, Sweden and the United Kingdom have designated their Department of Foreign Affairs. It might be felt that the Department of Foreign Affairs is an unnecessary link in the chain of executing a Letter of Request in Ireland and that the propriety or legality of such a request could be assessed in the Chief State Solicitor's Office before application is made to the court. However, it is considered that the intervention of a policy-forming agency of government, such as the Department of Foreign Affairs, is justified because the execution of a Letter of Request may be refused under Article 11 of the Convention if the State addressed

considers that its sovereignty or security would be prejudiced thereby. Also, if the present practice of channelling Letters of Request through the Department of Foreign Affairs were retained for non-Convention countries, it might create confusion if Letters of Request from countries party to the Convention were to be sent directly to the Chief State Solicitor. Accordingly the Commission recommends that Ireland should designate the Department of Foreign Affairs as its Central Authority under Article 2 of the Convention.

Article 4 provides that a Contracting State shall accept a Letter of Request to obtain evidence in either English or French, or a translation into one of these languages, unless it makes a reservation under Article 33. If we wish to persist in our present practice of requiring an English translation of any Letter of Request required to be executed here, it would be necessary to make the appropriate reservation. The United Kingdom has made such a reservation but the United States of America has not done so.¹ France has made a reservation that it will accept Letters of Request only if they are in French or translated into French. The Federal Republic of Germany and Portugal have made reservations that they will not accept Letters of Request in either English or French. Norway, Denmark, Finland and Singapore will not accept Letters of Request in French. Sweden, Czechoslovakia, Luxembourg, Israel, the Netherlands and Italy have made no reservation under Article 33 in respect of Article 4.2 and are, therefore, willing to accept Letters of Request in either English or French. Having regard to the attitude of

¹ The United States authorities have, however, stated that it is inadvisable to send a letter of request in French because the necessity of translating such documents into English may cause considerable delay as the Department of Justice has no translation services.

other countries, and the balance of convenience, it is recommended that a reservation should be made under Article 33 that Ireland will accept Letters of Request only if they are in Irish or English or translated into one of those languages.

Article 8 provides that a Contracting Party may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. But a State making such a declaration may provide in it for prior authorization by the competent authority designated by it. Of the States party to the Convention Norway, Czechoslovakia, Portugal and Singapore have made no declaration under this article. Denmark, the United States, Finland, the Federal Republic of Germany, Italy and the Netherlands have each made a declaration but have stipulated that prior authorization is required. France, Luxembourg, Sweden, Israel and the United Kingdom do not require prior authorization. In their reply to the Special Commission which met at The Hague in June 1978 to review the operation of the Convention, the British government indicated that while in practice there would be no objection to attendance of foreign judicial personnel under this Article, the approval of the Senior Master of the Supreme Court of Judicature should, as a matter of courtesy, be obtained beforehand.

While it is not possible to cite instances where Irish judges have desired to attend the examination abroad of witnesses in proceedings before them, it is conceivable that such a facility would be useful in cases where a witness whose credibility was

crucial declined to attend in court in Ireland to testify.²
It is recommended, therefore, that Ireland should make a declaration under Article 8 that the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a letter of request. It is not considered that any prior authorization should be required by the declaration but in the interests of convenience it might be stated that notice should be given to the competent authority in Ireland of the intended presence of any judicial personnel of the requesting authority. For this purpose it is considered that the Department of Foreign Affairs should be designated as the competent authority.

Under Article 11 a Contracting Party may make a declaration that it will respect the privileges and duties of witnesses existing under the laws of States other than the State requesting the evidence and that executing the letter of request. As the concept of a witness retaining privileges and duties under his law of nationality (which is the purpose of the provision) is unknown to our law, it is not considered that any declaration should be made under this Article.

² See Criminal Law (Jurisdiction) Act 1976, Section 12(4) which provides for the attendance of judges from Northern Ireland when evidence is taken on commission in Ireland for the purposes of certain criminal proceedings in Northern Ireland:

"The members of the court in Northern Ireland concerned and any officers of that Court designated by them shall be entitled to be present at each sitting of the Commissioner, and the Commissioner shall arrange his sittings so as to facilitate their presence and, subject to sub-section 6 (which deals with privileges and immunities of witnesses), shall comply with any request by those members to put any particular question or questions to the witness."

The British Criminal Jurisdiction Act 1975, Schedule 4, paragraph 3(1) contains a similar provision enabling any judge of a court in Ireland which has issued a letter of request to attend the examination of a witness in Northern Ireland.

Under Article 15, which provides for the taking of evidence without compulsion by a diplomatic officer or a consular agent from nationals of the State he represents, a Contracting State may declare that such evidence may be taken only if permission to that effect is given by the declaring State in the individual case. Only Denmark, Norway, Sweden and Portugal have made such a declaration.

It is not considered that the Irish government has any duty to monitor the treatment by foreign diplomats and consuls of their own nationals (even if they are also Irish citizens) which would necessitate requiring permission to take such evidence in the individual case. On the other hand, it is more convenient that an Irish diplomat or consul should be able to take evidence from an Irish citizen at the request of an Irish court without having to seek permission from the State to which he is accredited. There are safeguards for the witness in that the request to the person to appear or to give evidence must inform him that he is not compelled to do so and may, moreover, be legally represented.³ He is entitled to all the privileges to refuse to give evidence existing under the law of the State of execution and that of the State of origin.⁴ Accordingly, it is not considered that the Irish Government should make any declaration under Article 15.

Article 16 provides that a diplomatic officer or consular agent of a Contracting State may in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or

³ Article 21(e).

⁴ Article 21(e).

of a third State, in aid of proceedings commenced in the courts of a State which he represents, if he receives permission from a competent authority designated by the State in which he exercises his functions. However, it is open to a Contracting State to declare that evidence may be taken under this Article without its prior permission. The United States, the Netherlands and Finland have made such a declaration. The United Kingdom has declared that by its law and practice prior permission is not required in respect of the taking of evidence by diplomatic officers or consular agents of a Contracting State which does not require permission to be obtained for a British diplomat or consul to take evidence. Czechoslovakia has also made a declaration under Article 16 on condition of reciprocity. The Federal Republic of Germany, which incidentally does not permit the taking of evidence by diplomatic officers or consular agents in its territory if German nationals are involved, has declared that permission is not required where evidence is taken under this Article from a national of a third State who is also a national of the State of the requesting Court. But other States party to the Convention have not made any such declaration.⁵ This probably reflects a concern that they should be able to protect their own nationals against pressure on the part of foreign diplomats or consuls. For this purpose it is necessary that governments be informed of individual cases where evidence is being taken so that they can monitor developments and specify appropriate conditions.

Where evidence is taken under this Article the request must inform the person whose evidence is to be taken that he may be legally represented and that he is not compelled to appear

⁵ However, France and Luxembourg have made statements setting out the general conditions subject to which they will grant permission.

or to give evidence.⁶ A person requested to give evidence may refuse to do so in so far as he has a privilege or duty to do so under the law of the State of execution or the law of the State making the Request.⁷ The view may be taken that these requirements are sufficient to prevent abuses when evidence is taken under this Article. However, it is considered that a requirement of permission in the individual case would enable compliance with the Convention to be monitored more effectively. The Government has a special interest in protecting Irish citizens who are required to testify in foreign proceedings. As most States party have made no declaration under the article a declaration would not result in being able to obtain evidence for Irish proceedings without prior permission in these countries. The United Kingdom and the United States, who have made declarations waiving prior permission, are likely to give permission readily in the individual case if Ireland does likewise. Accordingly it is not considered that Ireland should make any declaration under Article 16.

If permission is required to take evidence under this Article, a competent authority will have to be designated for that purpose. It is considered that this should be an executive rather than a judicial authority as considerations of international relations and the character of the judicial system in the Requesting State may be relevant. Accordingly the Commission recommends that the Department of Foreign Affairs should be designated by Ireland as the competent authority to give the requisite permission to take evidence pursuant to Article 16.

⁶ Article 21(c).

⁷ Article 21(c).

Article 17 states that a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if he obtains permission from a competent authority designated by the State where the evidence is to be taken. However, it is provided that a Contracting State may declare that evidence may be taken under this Article without its prior permission. Most of the States party to the Convention have not made any declaration under this Article.⁸ The only exceptions are the United States, Finland and the United Kingdom which has made a declaration dependent on reciprocity as it did in the case of Article 16. For reasons similar to those advanced in the context of Article 16 it is not considered that Ireland should make a declaration that evidence may be taken under this Article without its prior permission. Accordingly the Commission recommends that the Department of Foreign Affairs should be designated by Ireland as the competent authority to give the requisite permission to take evidence pursuant to Article 17.

Article 18 provides that a Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17 may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion.

⁸ France, Luxembourg and the Netherlands have made statements setting out the general conditions subject to which they will grant permission.

The only States which have made a declaration under this Article are Italy, the United States, the United Kingdom and Czechoslovakia. In the case of the United Kingdom and Czechoslovakia, the declaration is stated to be applicable only to countries who have made a declaration affording reciprocal facilities under this article. The United Kingdom has designated the Senior Master of the Supreme Court of Judicature in England and Wales, the Crown Agent for Scotland and the Registrar of the Supreme Court of Northern Ireland in Northern Ireland as the competent authority to which application for assistance must be made under this article.

If evidence has to be taken abroad in proceedings before the courts of Ireland, it might be advantageous to be able to compel such evidence to be taken in English before an Irish consul or a commissioner appointed by the Irish court. Conversely, a foreign court taking evidence in Ireland may prefer to have it taken before a commissioner or consul in its own language which would not be possible under the Letter of Request procedure. However it may be considered undesirable to subject persons within the jurisdiction to a compulsory process at the hands of persons who are not part of the judiciary or under the control of the judiciary. In these circumstances the Commission recommends that Ireland should make a declaration under Article 18 but it should contain the condition that an application to obtain evidence under the article should be made only with the consent of the Minister for Foreign Affairs. As the competent authority to be designated under the article to grant the application for assistance has to "apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings" a court must be designated. In conformity with existing practice it is recommended that the High Court should be designated as the competent authority to whom application

is to be made for appropriate assistance to obtain evidence by compulsion pursuant to Article 18.

Article 23 provides for a declaration by a Contracting State that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. All the States party to the Convention except the United States, Czechoslovakia, Israel, Barbados and Cyprus have made a declaration under this Article. France, the Federal Republic of Germany, Italy, Luxembourg and Portugal have made unrestricted reservations while the remaining seven States party have made a restricted reservation along the lines of that made by the United Kingdom which reads:

"In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:-

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power."

Under such a reservation, where specific documents are sought by a foreign court, even at the pre-trial discovery stage, the Irish courts would have to secure their production. No objection is seen to this. Accordingly the Commission

recommends that Ireland should make a declaration that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries and containing a further declaration that the Irish authorities will not execute any Letter of Request which requires a person:

- (i) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession or power; or
- (ii) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession or power.

Singapore, Barbados and Cyprus have acceded to the Convention. In accordance with Article 40 a Contracting State must declare its acceptance of their accession if it is to become into force between them. Singapore has made a reservation excluding the application of the whole of Chapter II. It has also declared its understanding that the Convention does not include revenue or taxation matters. But the other two acceding States have made no declarations or reservations. Most of the Contracting States have declared their acceptance of all these accessions. The Commission recommends that Ireland should declare its acceptance of the accession of Singapore, Barbados and Cyprus to the Convention.

CHAPTER 5 : THE PROPOSED LEGISLATION

At present the taking of evidence for foreign courts in civil cases pursuant to Letters of Request is governed by the Foreign Tribunals Evidence Act, 1856 and Order 39, rules 39 to 44 of the Rules of the Superior Courts 1962. The following amendments of the law would be required to comply with Chapter 1 of the Convention:

- (i) The Foreign Tribunals Evidence Act, 1856 applies only to a civil or commercial matter which is pending before a court in a foreign country. To comply with Article 1 which refers to "commenced or contemplated proceedings" it would be necessary to provide for the taking of evidence pursuant to Letters of Request where proceedings are merely contemplated.
- (ii) The Foreign Tribunals Evidence Act, 1856 provides only for the examination upon oath of witnesses or the production of any writings or other documents. The evidence required under Article 1 may include the inspection or examination of property or, it seems, the medical examination of any person - including the taking of blood samples. The extension of the legislation to cover these cases need not, however, have the effect that persons would be compelled to give blood samples. Article 11 of the Convention states that a person may refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence under the law of the State of execution and at Irish law it seems that a person cannot be compelled to give blood samples for the purpose of

civil proceedings.¹

- (iii) The Foreign Tribunals Evidence Act, 1856 provides only for examination upon oath. Foreign courts sometimes require unsworn testimony to be taken. While the Irish authorities might be entitled to resist such a request under Article 9 of the Convention on the ground that it is a special method or procedure which is incompatible with Irish law, it is considered that legislative amendment would be more in the spirit of the Convention which seems to envisage sworn and unsworn evidence.² If unsworn testimony is to be taken, it would be necessary to provide that it is an offence knowingly to make false statements in the course of such testimony.
- (iv) The Foreign Tribunals Evidence Act, 1856 provides that a witness examined pursuant to a Letter of Request "shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the court by which or by a judge whereof or before a judge by whom the order for examination was made would be entitled to". To comply with Article 11 it would be necessary to provide not only for cases where a witness has a privilege or duty to refuse to give evidence under the law of execution but also for those where he has a privilege or duty to refuse to give the evidence under the law of the State from which the Letter of Request came. In the latter case the Convention

¹ See Law Reform Commission Report on Illegitimacy (LRC 4 - 1982) pp. 7-11, 117-120 where this question is discussed.

² See Article 3(h).

requires that the privilege or duty must be specified in the Letter of Request or otherwise confirmed to the requested authority by the requesting authority.

- (v) The Foreign Tribunals Evidence Act, 1856 contains no reference to the presence of parties and their representatives or the judicial personnel of the requesting authority at the execution of a Letter of Request, as required by Articles 7 and 8 of the Convention. As it is not clear that the general constitutional provision that justice must be administered in public would apply to the execution of Letters of Request for foreign courts, it is considered that legislation to give effect to the Convention should contain provisions making compliance with Articles 7 and 8 mandatory.
- (vi) The Foreign Tribunals Evidence Act, 1856 contains nothing about following "a request of the requesting authority that a special method of procedure be followed" which is obligatory under Article 9 unless "this is incompatible with the internal law of the State of execution or otherwise impossible or impracticable". To translate such a loose obligation into a mandatory rule is difficult. But some legislative direction is necessary. It is recommended that this should follow the terms of Article 9 as closely as possible.

It is considered that these changes are such that it would not be desirable to amend the Foreign Tribunals Evidence Act, 1856 piecemeal. Accordingly, it is recommended that it should be repealed and a new Statute should be enacted for the purpose of enabling Ireland to adhere to the Convention.

Provisions relating to perjury, the expenses of witnesses and their privileges substantially similar to those contained in Sections 3,4 and 5 of the 1856 Act should be included, although the terms need not be identical. In order to safeguard the rights and privileges of witnesses more effectively it is considered that there should be express provision that the evidence should be taken before a judge or district justice.

Article 12 of the Convention allows the execution of a Letter of Request to be refused where the State addressed considers that its sovereignty or security would be prejudiced thereby. Clearly this is a question more appropriate for decision by the executive than by the judiciary.³ No specific legislative provision in this regard would be required if the sole right to apply for the taking of evidence pursuant to a Letter of Request were vested in the Minister for Foreign Affairs. It is recommended that this should be done.

Under the existing law, as noted, effect is given to a Letter of Request irrespective of whether the courts in the country making the request would give effect to a similar Letter of Request from an Irish court. The question arises whether the proposed legislation should restrict the facility to other States party to the Convention. The Commission does not recommend that this should be done. If, as is recommended, the right to apply to the courts to give effect to a Letter of Request is exercisable only by the Minister for Foreign Affairs, it will then be possible to decide in

³ In the United Kingdom a court must refuse a request if the Secretary of State certifies that a request would be prejudicial to its security or sovereignty or infringe its jurisdiction. (See Evidence (Proceedings in Other Jurisdictions) Act 1975, Section 3(3); Protection of Trading Interests Act 1980, Section 47.

individual cases whether to give effect to Letters of Request from non-Convention countries and to impose terms as to the reimbursement of costs which are considered appropriate.

When enacting legislation to give effect to Ireland's obligations under the Convention to take evidence in aid of proceedings in foreign courts, it would be opportune to make similar provision for proceedings before certain international courts and tribunals. It is possible that such a facility may be required by the organs of the European Convention on Human Rights, the International Court of Justice or by some other international tribunal set up under an agreement to which Ireland is party. It is recommended that the Minister for Foreign Affairs should be empowered to make application to the High Court for the taking of evidence in aid of proceedings before any court or other body which in pursuance of an international agreement to which the State or Government is a party exercises jurisdiction of a judicial nature as if they were proceedings before a court in another State.

In the case of the Court of Justice of the European Communities, it is obligatory upon Ireland to make provision for taking evidence in aid of proceedings before it under Article 26 of its Statute which provides as follows:

"The court may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the rules of procedure. The documents drawn

up in compliance with the letters rogatory shall be returned to the court under the same conditions.

The court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties. "

Chapter I of the Supplementary Rules of the Court of Justice deals with letters rogatory. It provides as follows:

"Article 1

Letters rogatory shall be issued in the form of an order which shall contain the names, forenames, description and address of the witness or expert, set out the facts on which the witness or expert is to be examined, name the parties, their agents, lawyers or advisers, indicate their addresses for service and briefly describe the subject matter of the dispute. Notice of the order shall be served on the parties by the Registrar.

Article 2

The Registrar shall send the order to the competent authority named in Annex I of the Member State in whose territory the witness or expert is to be examined. Where necessary, the order shall be accompanied by a translation into the official languages of the Member State to which it is addressed.

The authority named pursuant to the first paragraph shall pass on the order to the judicial authority

which is competent according to its national law.

The competent judicial authority shall give effect to the letters rogatory in accordance with its national law. After implementation the competent judicial authority shall transmit to the authority named pursuant to the first paragraph the order embodying the letters rogatory, any documents arising from the implementation and a detailed statement of costs. These documents shall be sent to the Registrar of the Court.

The Registrar shall be responsible for the translation of the documents into the language of the case.

Article 3

The Court shall defray the expenses occasioned by the letters rogatory without prejudice to the right to charge them, where appropriate, to the parties."

The Minister for Justice has been named in Annex I as the competent authority of Ireland for the purposes of Article 2.

While under section 2 of the European Communities Act 1972 the Statute of the Court of Justice and its Rules of Procedure are part of the domestic law of the State some domestic provision is necessary by virtue of the requirement in Article 2 of the Supplementary Rules that letters rogatory shall be sent to the judicial authority which is competent according to a State's national law and that effect is to be given to the letters rogatory in accordance with that law. It would be possible to proceed by way of a regulation under the European Communities Act providing (1) that the High

Court is the competent judicial authority to make an order for the taking of evidence and any judge of the High Court or Circuit Court or justice of the District Court is the competent judicial authority to take evidence pursuant to letters rogatory and (2) that the relevant national law is contained in the legislation proposed in this Paper. However the Commission recommends that there should be provision in the proposed legislation enabling the Minister for Justice to apply to the High Court to make an order to give effect to letters rogatory from the Court of Justice of the European Communities and the general provisions of our national law contained in the proposed legislation would be applicable to it.

When framing legislation to give effect to this Convention it will be necessary to consider what action should be taken in respect of the taking of evidence in aid of criminal proceedings in a foreign State. At present this matter is governed by section 24 of the Extradition Act, 1870 (which was excepted from the general repeal of that Act in the Extradition Act, 1965) provides:

"The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Foreign Tribunals Evidence Act, 1856, and all the provisions of that Act shall be construed as if the term cause included a proceeding against a criminal: provided that nothing in this section shall apply in the case of any criminal matter of a political character."

It is clear that the operation of this section cannot survive the repeal of the Foreign Tribunals Evidence Act, 1856 to which it is related. It may be questioned whether a similar provision should be enacted in the proposed legislation. It imposes an extra burden on our courts and

reciprocal facilities offered by other States are of no benefit as evidence taken before a foreign court pursuant to a Letter of Request would not be admissible in criminal proceedings in Ireland.⁴ However, there might be criminal trials abroad involving Irish citizens where it would be desirable that the evidence of persons resident in Ireland be obtained in order to avert a miscarriage of justice. Any expenses involved could be recovered. If, as has been suggested, our law of evidence in criminal proceedings is amended to make depositions admissible, reciprocal facilities offered by other States would be of benefit.⁵ In view of these considerations it is recommended that the High Court should be empowered to order the taking of evidence in relation to criminal proceedings in a foreign country but such an order should be made only upon the application of the Minister for Foreign Affairs.

Except in cases where an order is made under the Foreign Tribunals Evidence Act, 1856 for the examination upon oath of a witness by a foreign diplomat or consul or a commissioner appointed by a foreign court, it is unlawful for any such person to take evidence on oath.⁶ In order to comply with Article 15 of the Convention it would be necessary to empower diplomatic officers and consular agents representing Convention countries to administer oaths to their own nationals in Ireland for the purpose of taking evidence from them in aid of proceedings commenced in the courts of the State which they represent. To comply with Article 16 it would be necessary to empower such diplomats and consuls

⁴ An exception to this is to be found in respect of evidence taken in Northern Ireland pursuant to a letter of request issued by a special criminal court under the Criminal Law (Jurisdiction) Act, 1976.

⁵ See Law Reform Commission Working Paper No.9, The Rule against Hearsay, pp. 36-8 where this matter is discussed.

⁶ Statutory Declarations Act 1835, section 13 which is set out supra.p.14.

to administer oaths in these circumstances in Ireland to Irish citizens or nationals of third countries in cases where the competent authority in Ireland gives its permission. To comply with Article 17 it would be necessary to empower commissioners appointed by courts in Convention countries to administer oaths for the purposes of taking evidence in aid of proceedings commenced in those courts in cases where the competent authority in Ireland gives its permission.

If, as has been recommended, the Irish government, by making no declaration under Articles 16 or 17, reserves the right to sanction the taking of evidence in individual cases, except where a diplomat or consul takes evidence from his own nationals, it is recommended that the requirement of consent from the Minister of Foreign Affairs should be incorporated in the legislation permitting the administration of oaths for the purposes of taking such evidence. If such consent is required in individual cases it is unobjectionable to extend the legislation to cover the taking of evidence in aid of civil proceedings in States not party to the Convention. The Irish authorities will then be able to give consent for the taking of evidence in aid of civil proceedings in foreign States not party to the Convention who are prepared to offer reciprocal facilities and to withhold consent where for any reason this is appropriate.⁷

⁷ In the United Kingdom, under section 1 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963, power was given to any person appointed by a court or other judicial authority of any foreign country to administer oaths for the purposes of taking evidence in civil proceedings. Such a provision goes beyond the basic obligations of the Convention under which the State of execution may reserve to its competent authority a discretion as to whether evidence may be taken by foreign diplomats, foreign consuls or commissioners appointed by foreign courts. It also extends the facility for obtaining evidence in this way in aid of foreign proceedings to States not party to the Convention.

It is not considered that any restrictions should be imposed by law on the taking of evidence without oath in aid of proceedings in a foreign court by foreign diplomatic officers, consular agents or commissioners appointed by that court. Such a law would involve difficult distinctions between the taking of evidence and the taking of pre-trial statements. Even if no such law is enacted, an obligation at international law to seek permission under Articles 16 and 17 of the Convention will remain.

It was recommended that Ireland should make a declaration under Article 18 that a diplomatic officer, consular agent or commissioner authorized to take evidence in aid of proceedings in a foreign court may apply to the Department of Foreign Affairs for appropriate assistance to obtain evidence by compulsion. Under the Foreign Tribunals Evidence Act 1856 the High Court may make an order for the taking of evidence before any person "on the application of any person shown to be duly authorized to make the application on behalf of such foreign court or tribunal".⁸ It is considered that some restriction should be placed on the court's power in

⁸ See Rules of the Superior Courts 1962, Order 39, rule 39:

"Where under the Foreign Tribunals Evidence Act, 1856, or the Extradition Act, 1870, section 24, any civil or commercial matter, or any criminal matter, is pending before a court or tribunal of a foreign country, and it is made to appear to the Court, by Commission rogatoire, or letter of request, or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction, the Court may, on the ex parte application of any person shown to be duly authorised to make the application on behalf of such foreign court or tribunal, and on production of the commission rogatoire, or letter of request, or other evidence pursuant to the Foreign Tribunals Evidence Act, 1856, section 2, or such other evidence as the Court may require, make such order or orders as may be necessary to give effect to the intention of the Acts above mentioned in conformity with the Foreign Tribunals Evidence Act, 1856, section 1."

this matter designed to ensure the concurrence of the executive arm of government which is likely to be better placed to assess factors which might make it inappropriate to facilitate the taking of evidence by compulsion by foreign diplomatic officers, consular agents or commissioners appointed by foreign courts. Accordingly, it is recommended that the order requiring a person to testify before a diplomatic officer, consular agent or commissioner should be made only upon application by the Minister for Foreign Affairs.

Legislative provision would also be necessary to implement Article 20 which stipulates that the persons concerned with the taking of evidence by a diplomatic officer, consular agent or commissioner appointed by a foreign court may be legally represented. Article 21 contains certain safeguards for persons requested to give evidence in this way. As these appear to be mandatory and not a matter within the discretion of any of the States concerned, it is considered that they should be the subject of legislative provision. Accordingly, it is recommended that provision be made that whenever evidence is taken in Ireland by a diplomatic officer, consular agent, or a commissioner appointed by a foreign court,

- (i) the parties to the proceedings and the persons giving evidence should be entitled to be legally represented;
- (ii) the request to a person to appear to give evidence should, unless the recipient is a national of the State where the action is pending for which the evidence is required, be drawn up in Irish or English or be accompanied by a translation into one of those languages;

- (iii) the request should inform the person whose evidence is sought that he may be legally represented at the taking of such evidence and, where such is the case, that he is not compelled to appear or to give evidence; and
- (iv) a person requested to give evidence should be entitled to refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence either under the law of the State where the evidence is taken or the law of the State where the proceedings for which the evidence is required are pending.

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

1. Ireland should proceed to signature and ratification of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970). [pp. 17-22].

2. Ireland should make the following reservation at the time of ratification:

In accordance with Article 33, the Government of Ireland excludes the application of paragraph 2 of Article 4 and reserves the right to accept a Letter of Request only if it is in Irish or English or translated into one of those languages. [p.26]

3. Ireland should make the following declarations at the time of ratification:

(a) In accordance with Article 8, the Government of Ireland declares that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. [p.27]

(b) In accordance with Article 18, the Government of Ireland declares that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17 may, with the consent of the Minister for Foreign Affairs, apply to the High Court for appropriate assistance to obtain such evidence by compulsion. [p.32]

(c) In accordance with Article 23, the Government of

Ireland will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. In accordance with this declaration the Irish authorities will not execute any Letter of Request which requires a person:

- (i) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession or power; or
- (ii) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession or power. [pp. 33-34]

4. In accordance with Article 2, Ireland should designate the Department of Foreign Affairs as its Central Authority for the purpose of the Convention. [p.25]

5. Ireland should designate the Department of Foreign Affairs as the competent authority to give the requisite permission to take evidence pursuant to Articles 16 and 17 of the Convention. [pp. 30-31]

6. Ireland should designate the High Court as the competent authority to whom application is to be made for appropriate assistance to obtain evidence by compulsion pursuant to Article 18 of the Convention. [pp. 32-33]

7. In accordance with Article 39, Ireland should declare their acceptance of the accession of Singapore, Barbados and

Cyprus to the Convention. ¶.34

8. The Foreign Tribunals Evidence Act, 1856 should be repealed and a new statute enacted on the lines of the General Scheme of a Bill set out in Chapter 7 so as to enable Ireland to adhere to the Convention. ¶.37

9. Under the proposed legislation

(i) The right to apply to the High Court for the taking of evidence pursuant to a Letter of Request should be vested in the Minister for Foreign Affairs ¶.38

(ii) The facility of obtaining evidence in Ireland pursuant to a Letter of Request should not be confined to States party to the Convention; ¶.38.

(iii) The Minister for Foreign Affairs should be empowered to make application to the High Court for the taking of evidence in aid of proceedings before any court or other body which in pursuance of an international agreement to which the State or Government is a party exercises jurisdiction of a judicial nature as if they were proceedings before a court in another State; ¶.39

(iv) there should be provision enabling the Minister for Justice to apply to the High Court to make an order to give effect to letters rogatory from the Court of Justice of the European Communities and the general provisions of our national law contained in the proposed legislation would be

applicable to it; p.42

- (v) the High Court should be empowered to order the taking of evidence in relation to criminal proceedings in a foreign country but such an order should be made only upon application by the Minister for Foreign Affairs; p.43
- (vi) a diplomatic officer or consular agent representing a State party to the Convention should be empowered to administer an oath to nationals of that State for the purpose of taking evidence from him in aid of proceedings pending in the courts of the State he represents; p.43
- (vii) a diplomatic officer or consular agent representing a foreign State should be empowered to administer an oath for the purpose of obtaining evidence in aid of proceedings pending in the courts of the State he represents provided the consent of the Minister for Foreign Affairs is obtained pp.43-44.
- (viii) a commissioner appointed by a court in a foreign State should be empowered to administer an oath for the purpose of obtaining evidence in aid of proceedings pending in the courts of that State provided the consent of the Minister for Foreign Affairs is obtained; p.44.
- (ix) the Minister for Foreign Affairs should be

empowered to apply to the High Court for an order requiring a person to give evidence before a diplomatic officer or consular agent of a foreign State or a commissioner appointed by a court in such a State; p.467

- (x) it should be provided that whenever evidence is taken by a diplomatic officer or consular agent of another State or by a commissioner appointed by a foreign court
 - (a) the parties to the proceedings and the person giving evidence should be entitled to be legally represented;
 - (b) the request to a person to appear to give evidence should, unless the recipient is a national of the State where the action is pending for which the evidence is required, be drawn up in Irish or English or be accompanied by a translation into one of those languages;
 - (c) the request should inform the person whose evidence is sought that he may be legally represented at the taking of such evidence and, where such is the case, that he is not compelled to appear or to give evidence; and
 - (d) a person requested to give evidence should be entitled to refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence either under the law of the State where the evidence is taken or the law

of the State where the proceedings for which
the evidence is required are pending.

CHAPTER 7: GENERAL SCHEME OF A BILL

Part 1 - Letters of Request

1.(1) Provide that upon application being made by the Minister for Foreign Affairs the court is satisfied that any foreign court has issued a letter of request requesting that evidence be taken in the State for the purposes of civil proceedings which have been instituted before such a foreign court or whose institution before that foreign court is contemplated, the Court may by order direct that the evidence be taken before such judge of the High Court or Circuit Court or justice of the District Court as is named in such order.

For the purposes of this section "a foreign court" shall include a court or tribunal of competent jurisdiction in another State or established pursuant to an international agreement to which the State is a party.

(2) Provide that evidence may be taken in relation to criminal proceedings which have been instituted in a foreign court in like manner as it may be obtained in relation to civil proceedings: provided that nothing in this sub-section shall apply in the case of any criminal proceedings of a political character.

2. Provide that where upon application being made by the Minister for Justice, the court is satisfied that in proceedings pending before the European Court of Justice, letters rogatory have been issued complying with Article 1 of the Supplementary Rules of Procedure of the European Court of Justice requiring that a witness or expert who is permanently resident in the State, shall be heard by the

judicial authority of the State, the court may by order require that the evidence be taken by such judge of the High Court or Circuit Court or justice of the District Court as is named in such order.

3.(1) Provide that any order made under sections 1 or 2 of this Act may be enforced in like manner as an order made by the court in a cause pending before it.

(2) Provide that the production of a Letter of Request purporting to be issued by a foreign court or the European Court of Justice shall be evidence that a Letter of Request was issued in those terms.

(3) Provide that an order made under section 1 or 2 of this Act shall provide for the taking of evidence in accordance with any special method or procedure requesting by the Requesting Court or the European Court of Justice unless this method or procedure is contrary to the law of the State or is otherwise impracticable.

(4) Provide that an order under section 1 or 2 of this Act may provide for a person to testify otherwise than on oath where this is required or permitted by the Letter of Request.

(5) Provide that an order under section 1 or 2 of this Act may provide for the taking of evidence otherwise than in public.

(6) Provide that an order under section 1 or 2 of this Act shall not require a person

(a) to state what documents relevant to the proceedings to which the order relates are or have been in his possession or power, or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be in his possession or power.

(7) Every person whose attendance shall be required by an order under section 1 or 2 of this Act shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial.

4.(1) Provide that a person giving evidence pursuant to an order made under section 1 or section 2 of this Act shall not be compelled to give evidence which he could not be compelled to give in similar proceedings in the State.

(2) Provide that a person giving evidence pursuant to an order under section 1 of this Act shall not be compelled to give evidence which he could not be compelled to give under the law of the State where the Requesting Court exercises jurisdiction, provided always that the privilege or duty not to give evidence has been specified in the letter of request or is otherwise confirmed on behalf of the requesting court.

(3) Provide that where an order is made for the taking of evidence under section 1 or section 2, the members of the court issuing the letter of request shall be entitled to be present at the taking of the evidence.

5.(1) Provide that if, when giving evidence upon oath or affirmation pursuant to an order made under section 1 or section 2 of this Act, a person gives evidence that if he had given evidence in proceedings in a court he would be guilty of perjury, he shall be guilty of that offence.

(2) Provide that if, when giving evidence (either orally or in writing) otherwise than on oath pursuant to an order made under section 1 of this Act a person makes a statement

(a) which he knows to be false in a material particular,
or

(b) which is false in a material particular and which he does not believe to be true,
he shall be guilty of an offence.

Part 2 - Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners

6. Provide that a diplomatic officer or consular agent of any Convention State assigned or accredited to Ireland shall have power in the State to administer oaths to nationals of the State he represents for the purposes of taking evidence for use in civil proceedings which have been commenced in the courts of that State.

7. A diplomatic officer or consular agent of any foreign State assigned or accredited to Ireland shall, with the consent of the Minister for Foreign Affairs, have power in the State to administer oaths for the purpose of taking evidence for use in civil proceedings which have been commenced in the courts of the State he represents.

8. A commissioner duly appointed by a court of competent jurisdiction in a foreign State to take evidence in the State in aid of civil proceedings commenced in that State shall, with the consent of the Minister for Foreign Affairs, have power in the State to administer oaths for the purposes of taking evidence for use in the aforesaid proceedings.

9. (1) Upon application being made by the Minister for Foreign Affairs, the Court is satisfied that a foreign court is desirous that evidence should be taken before a diplomatic officer or consular agent of that State or a commissioner appointed by the court, for the purposes of civil proceedings which have been commenced before that foreign court, the Court may by order direct that the evidence be taken on oath before such diplomatic officer, consular agent or commissioner.

(2) The production of a document purporting to be issued by a foreign court stating that it desires certain evidence to be taken shall be evidence of that fact.

(3) An order made under this section may provide for a person to testify otherwise than on oath where this is requested by the foreign court before which the proceedings are commenced.

(4) Provide that an order under this section may provide for the taking of evidence otherwise than in public.

(5) Provide that an order under this section shall not require a person

(a) to state what documents relevant to the proceedings to which the order relates are or have been in his possession or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be in his possession or power.

(6) Provide that every person whose attendance shall be required by an order under this section shall be entitled to

the like conduct money and payment for expenses and loss of time as upon attendance at a trial.

10. Whenever evidence is taken in the State (in aid of proceedings commenced in the courts of a foreign State) by a diplomatic officer or consular agent of that foreign State or a commissioner appointed by the court before whom the proceedings are pending the following provisions shall apply.

- (a) the parties in the proceedings and the person giving evidence may be legally represented at the taking of evidence.
- (b) the request to any person to give evidence shall be in writing and shall inform the person to whom it is addressed that he may be legally represented at the taking of the evidence and, save in the cases for which provision is made in section 9, that he is not compelled to give evidence.
- (c) the request to a person to give evidence shall, unless he is a national of the State in whose courts the action for which the evidence is required, is pending, be drawn up in or be accompanied by a translation into one of the official languages of the State.
- (d) Provide that a person giving evidence shall not be compelled to give evidence which he could not be compelled to give in legal proceedings in the State.
- (e) Provide that a person giving evidence shall not be compelled to give evidence which he could not be compelled to give under the law of the State

where the Requesting Court exercises jurisdiction.

11(1) Provide that if when giving evidence upon oath or affirmation before a diplomatic officer, consular agent or a commissioner duly appointed by a court of competent jurisdiction in a foreign State to take evidence in aid of civil proceedings commenced in that foreign State a person gives evidence that if he had given evidence in proceedings in a court he would be guilty of perjury, he shall be guilty of perjury.

(2) Provide that if when giving evidence otherwise than on oath pursuant to an order made under section 9 of this Act a person makes a statement

- (a) which he knows to be false in a material particular,
or
- (b) which is false in a material particular and which he does not believe to be true,

he shall be guilty of an offence.

APPENDIX XX. CONVENTION ON THE TAKING
 OF EVIDENCE ABROAD IN CIVIL OR
 COMMERCIAL MATTERS

(Concluded March 18, 1970)

The States signatory to present Convention,

Desiring to facilitate the transmission and execution of
Letters of Request and to further the accommodation of
the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil
or commercial matters,

Have resolved to conclude a Convention to this effect and
have agreed upon the following provisions:

CHAPTER I - LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a
Contracting State may, in accordance with the provisions
of the law of that State, request the competent
authority of another Contracting State, by means of a Letter
of Request, to obtain evidence, or to perform some other
judicial act.

A Letter shall not be used to obtain evidence which is not
intended for use in judicial proceedings, commenced or
contemplated.

The expression 'other judicial act' does not cover the
service of judicial documents or the issuance of any process
by which judgments or orders are executed or enforced, or
orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority
which will undertake to receive Letters of Request coming
from a judicial authority of another Contracting State and
to transmit them to the authority competent to execute them.
Each State shall organize the Central Authority in accordance
with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify-

- a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- b) the names and addresses of the parties to the proceedings and their representatives, if any;
- c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia-
- e) the names and addresses of the persons to be examined;
- f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- g) the documents or other property, real or personal, to be inspected;
- h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present.

This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence-

- a) under the law of the State of execution; or

- b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that-

- a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
- b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II - TAKING OF EVIDENCE BY
DIPLOMATIC OFFICERS, CONSULAR AGENTS
AND COMMISSIONERS

ARTICLE 15

In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if-

- a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In civil or commercial matters, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State, if-

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 18

A Contracting State may declare that a dipomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 and 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, inter alia, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 and 17 to take evidence-

- a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
- b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
- c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or give evidence;
- d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
- e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III - GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from-

- a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
- b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
- c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from -

- a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- b) the provisions of Article 4 with respect to the languages which may be used;
- c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- f) the provisions of Article 14 with respect to fees and costs;
- g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date,

inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following-

- a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
- d) any withdrawal or modification of the above designations and declarations;
- e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the day of entry into force of the Convention of the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories

mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the States which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following-

- a) the signatures and ratifications referred to in Article 37;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- c) the accessions referred to in Article 39 and the dates on which they take effect;
- d) the extensions referred to in Article 40 and the dates on which they take effect;
- e) the designations, reservations and declarations referred to in Articles 33 and 35;
- f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

