

# Hague Convention - Obtaining Evidence In England And Wales For Use In Another Jurisdiction



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## Introduction

Parties to proceedings in other jurisdictions often need access to evidence located in England and Wales.

This guide explains how to obtain evidence in England and Wales for use in another jurisdiction.

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## Letters of Request

The High Court is entitled to make an order for evidence to be obtained in England and Wales if a request for such evidence is made by a foreign court.

In order to commence the process of evidence collection in England and Wales, the foreign court must issue what is known as a Letter of Request (previously known as Letters Rogatory).

The Letter of Request should give details of:

- the solicitors instructed to act as agent in England and Wales (if any);
- the case (and if possible, append copies of the pleadings and any evidence already before the foreign court);
- the name and address of the witness required to give evidence;
- a list of questions for the witness or the subject matter of the questions;
- any specific documents the witness is required to produce;
- whether the evidence is to be taken on oath; and
- any special procedure that is required (e.g. how the examination is to be recorded)

Upon receipt of a Letter of Request the English court may make any such order for the obtaining of the requested evidence as is appropriate for the purpose of giving effect to the request of the foreign court.

The English court may make provision for, amongst other things, the examination of the witness either orally or in writing; the production of documents; and the inspection, photographing and preservation, custody or detention of any property.

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## The approach of the English courts

An English court will start from the principle that it is obliged to give effect to a request from a foreign court, unless it is satisfied that there is good reason not to.

The English court will first decide whether it has power to make an order to give effect to the request. Secondly, it will decide whether, as a

matter of discretion, it ought to make the order in the terms requested. However, in general terms, the discretion does not exist where the request is made by a court of a member state of the European Union, i.e. the court must give effect to the request if it has power to do so.

The English court has power to accept or reject the foreign court's request, in whole or in part, both in relation to oral evidence and/or documentary evidence. However, the English court should not restructure or rephrase the foreign court's request, so that the order becomes different from that which was originally requested by the foreign court.

The court will first ask itself whether the intended witness could reasonably be expected to be able to give the relevant evidence on the topics referred to in the request and secondly, whether that evidence is intended for use at the trial.

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## The three pre-conditions to making an order

There are three pre-conditions which must be fulfilled before an English court can make an order. Those pre-conditions are:

- There must be an application to the English court for an order for evidence to be obtained in England and Wales;
- The English court must be satisfied that such an application is made pursuant to a request by or on behalf of a foreign court; and
- The English court must be satisfied that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have begun or are contemplated.

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## The limitations on the powers of the English court

### No general disclosure of documents

The English court cannot make any order for general disclosure of documents. The English court can only order production of particular documents specified by the foreign court, i.e. individual documents separately described. General words like a request for "any memoranda, correspondence or other documents relevant thereto" or "any memoranda, correspondence or



other documents referred to therein” are too wide and may be struck out.

In making an order for the production of a particular document, the court must first be satisfied that the document exists and is likely to be in that person’s control. The burden of proof is upon the applicant.

### **Must be possible under English procedure**

The English court cannot make an order requiring any step to be taken or question to be asked, unless it could be taken or asked in obtaining evidence for use in civil proceedings in an English court.

## **The purpose of the evidence: use at trial only**

The evidence must be sought for the purpose of civil proceedings which either have been instituted or where institution is contemplated. The Letter of Request process cannot amount to pre-trial disclosure or be used for the purposes of generally “fishing” for evidence.

## **The examiner**

In order to take evidence to be used in a foreign jurisdiction, the English court must appoint an examiner who is “a fit and proper person”. The court normally appoints a practising lawyer to act as the examiner of the witness, and that person is drawn from a rota of examiners nominated by the Lord Chancellor.

## **Service on the witness**

The order for the witness to attend and be examined must be served on the witness. The witness is entitled to both conduct money and to payment of his expenses and loss of time.

## **Application to discharge/vary**

The English court will hear any objections the witness may have to the proposed order. An application may be made to vary or discharge the order by either the witness or any other party to the proceedings.

## **The examination**

The oral evidence given by a witness, known as a deposition, is given at a hearing.

Generally, the hearing will take place in public. However, the examiner has a discretion in this regard.

The examination will normally be conducted according to English law and procedure. However, a request by the foreign court that the deposition be taken in a certain manner should, if possible, be granted unless it is so contrary to established English procedures that it should not be permitted.

The person giving evidence before an examiner cannot receive legal advice while being examined. However, the witness can be represented at the examination and his lawyer has the right to object to any question asked. It is then for the examiner to rule upon any such objection.

## **The need for a detailed record**

The examiner must ensure that the evidence given by the witness is recorded in full. This is usually done by means of a shorthand writer. Alternatively, audio or video recordings can be used.

## **Refusal by a witness to answer a question**

If a witness objects to answering any question or where any objection is taken to any question, the examiner must record:

- the question;
- the nature of and grounds for the objection;
- any answer given; and
- his opinion as to the validity of the objection.

## **Non-attendance by a witness and refusal to co-operate generally**

While a witness usually attends voluntarily, the initial order for examination is not mandatory. There is no penal sanction for disobeying the initial order.

If a witness fails to attend an examination or refuses to:-

- be sworn in;
- answer any lawful question; or
- produce any document

the examiner will sign a certificate recording such failure or refusal.

The party who obtained the original order from the English court for the examination must file the certificate with the English court and may apply for a further order requiring that person to attend, to be sworn or to answer any question or produce any document as necessary. That further order may require the witness to pay any costs resulting from his failure or refusal.

If a second order of the court is obtained and the witness then fails to comply with that second order, he is in contempt of court and an order for committal may be sought.

## **Privilege**

A witness is entitled to claim privilege from giving evidence or producing any document on any grounds recognised under the English law or under the law of the foreign court.

The claim for privilege must be made by the witness at the time of his examination or at the time when the documents are required to be produced.

### **Privilege under English law**

The court will give effect to any claim for privilege recognised by English law, even though it may not be a ground recognised by the foreign court.

### **Privilege claimed under foreign law**

If evidence is taken in respect of which there is a request for privilege which is recognised only by the foreign court and not the English court, then that evidence must be contained in a separate document. However, the evidence (contained in that separate document) must not be transmitted to the foreign court before the claim for privilege is resolved.

After the examination, the examiner must send to the English court the deposition and a statement signed by the examiner setting out the claim for privilege.

On receipt of the examiner’s signed statement, the English court must retain the document containing that part of the witness’ evidence to which the claim for privilege relates. The English court will then send the signed statement and a request to the foreign court to determine the claim for privilege with the deposition (containing the non-disputed evidence).

If the claim for privilege is rejected by the foreign

court, the English court must send to the foreign court the witness' evidence to which the claim for privilege was made.

However, if the claim for privilege is upheld, the English court must send the document to the witness himself.

In both cases, the witnesses and the person who obtained the English order must be notified of the foreign requesting court's decision.

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## What happens to the deposition after it is taken?

The deposition of the witness will be sent to the person who obtained the order for the examination, and to the foreign court.

## Conclusion

Although the English court will seek to comply with Letters of Request from foreign courts, it should be appreciated that the above process contains a number of traps for the unwary.

In order to avoid those traps it would be prudent for English lawyers to be involved in reviewing Letters of Request before they are issued by a foreign court. This will help to ensure, for example, that only "relevant" evidence is requested (such relevance being determined in accordance with the rules applied in England).

Recent case law in England suggests that it will also help the process if the requesting court has given some consideration to issues of relevance and explained, in its Letter of Request, why the evidence sought is necessary to resolve the issues before the requesting court.

## For further information on this subject please contact:

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\*This guide assumes that the evidence obtained in England will be used in a country which is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, such as the USA.