

TSol's Guide to Letters of Request





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Table of Contents

	Page
1. Introduction	5
2. The Present Law	6
3. How to deal with a Letter of Request	8
4. What should be set out in the Letter of Request?	10
5. Steps to take in London cases	11
6. Possible objections by a Witness	12
7. Arranging the examination and obtaining the Order	13
8. Scope of the examination	15
9. Conduct of the examination	16
10. The swearing of Witnesses etc	16
11. Examination Procedure	16
12. Who questions the witness?	17
13. Foreign lawyers	18
14. Admissibility and compellability	18
15. Blood and DNA tests	20
16. Officers and Servants of the Crown	21
17. Expenses and recoveries	22
18. Criminal cases	24
19. Copies of depositions	24
20. Country cases	24
21. EC Regulation No. 1206/2001	25
Appendix A: List of Examiners (London)	28
Appendix B: List of Examiners (Country)	29
Appendix C: Form of Oath and Affirmation	30
Appendix D: Memorandum for Agents	32
Appendix E: Video Conference Instructions	37

Introduction

- 1.1 For the purposes of determining a civil or commercial matter before it, a court or tribunal, "the requesting court", exercising jurisdiction in another part of the United Kingdom or in a Country or territory outside the United Kingdom may need the evidence of a witness resident in England or Wales. Any reference to a "witness" in this booklet should be read as "witnesses" where appropriate. The reference to a "Civil or commercial matter" is very wide and covers many types of proceedings, including for example, road traffic accident cases, commercial and shipping disputes and divorce and paternity proceedings. It clearly does not include criminal matters as to which see paragraph 18 below.
- 1.2 It may be possible for the requesting court to obtain the necessary evidence without seeking the assistance of the authorities in England or Wales. Where the witness is willing to give evidence, it may be possible for arrangements to be made for him to attend before a consular officer or an examiner from the Country where the litigation is taking place. There will however inevitably be cases where the witness is unwilling to give evidence, so that some form of compulsory procedure is necessary. In most cases however the compulsory procedure is necessary where the litigation is taking place in a Country, which regards the taking of evidence as an exercise of official authority; which cannot be delegated to the parties to the proceedings and therefore requires the assistance of a Court in the Country where the witness is resident.
- 1.3 The Letter of Request (previously called a Commission Rogatoire) is the means by which the requesting court can obtain evidence from a witness resident in England or Wales with the assistance of the Courts in this Country.
- 1.4 Prior to 1907 the practice in England and Wales, on receipt of a Letter of Request, was that an application had to be made to the English Court by a person duly authorised on behalf of the foreign court or tribunal. This practice was laid down in the Rules of the Supreme Court then in force, Order 37 Rule 54. This gave rise to dissatisfaction on the part of the French authorities. If an English Court wanted evidence from a witness resident in France, it issued a Letter of Request, which was forwarded through the Foreign Office to the French Government, and the French Government and French Courts then took all necessary action to obtain the evidence and return it, through the diplomatic channels, to the English Court. There was no requirement in France for

an application to the French Courts by a person authorised by the English Court. There was thus a lack of reciprocity, which at the end of 1906 led the French Ambassador in London to write to the Foreign Office, with a Letter of Request from a French Court, and express the hope that it could be executed in the same way that the French Courts had executed recent English Letters of Request. This prompted the Foreign Office to write to the Lord Chancellor's Department and ask that Department to devise some means by which complete reciprocity could be secured, not only between this Country and France, but also other Countries with whom the same difficulty arose.

- 1.5 This resulted in the addition of a new rule to the then Rules of the Supreme Court, Order 37 Rule 60, which provided that, where a Letter of Request was transmitted to the High Court through the Foreign Office with an intimation that effect should be given to it without requiring an application to be made on behalf of the party to the litigation in the foreign country, the Senior Master should transmit it to the Treasury Solicitor who would take the necessary steps to give effect to it.
- 1.6 The doctrine necessitating such a rule is that the English Courts will not act of their own motion, so there must be an applicant who seeks to give effect to the Letter of Request. If the parties do not appoint solicitors to act for them and make the necessary application, the matter falls to be dealt with by the Treasury Solicitor.

The Present Law

- 2.1 Prior to 1976, Letters of Request in civil and commercial matters were dealt with under Victorian legislation, the Foreign Tribunals Evidence Act 1856 and the Evidence by Commission Acts 1858 and 1870. This legislation was repealed by the Evidence (Proceedings in Other Jurisdictions) Act 1975, the 1975 Act, which came into force on the 4th May 1976, pursuant to the Commencement Order 1976 No. 429 (C. 13). The 1975 Act, read with Part 34 of the Civil Procedure Rules 1998, provide a single comprehensive self-contained code for obtaining evidence in England and Wales in foreign proceedings where the assistance of the High Court is sought. This booklet is intended to provide practical guidance for members of the Treasury Solicitor's Office who are charged with giving effect to Letters of Request, but it is important that the reader should be aware of the provisions of the 1975 Act and of Part 34 of the Civil Procedure Rules 1998.

2.2 The 1975 Act introduced new provisions enabling the High Court to assist in obtaining evidence for requesting courts. The powers of the High Court are set out in Section 2, and can be summarised as follows:

- (i) Subsection (1) contains the general power to obtain evidence, and subsection (2) sets out the following particular powers:
 - (a) for the examination of witnesses, either orally or in writing;
 - (b) for the production of documents;
 - (c) for the inspection, photographing, preservation, custody or detention of any property;
 - (d) for the taking of samples of any property and the carrying out of any experiments on or with any property
 - (e) for the medical examination of any person,
 - (f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

As to a witness's right to refuse to give evidence, see paragraph 14 below.

2.3 The impetus behind the enactment of the 1975 Act was the conclusion of the Hague Convention on the taking of evidence abroad in civil matters, Cmd. 6727, presented to Parliament in March 1977, which is available from our Library¹. At the date of this booklet, the following countries have acceded to the Hague Convention, in addition to the United Kingdom²:

Argentina	Hong Kong SAR	Russian Federation
Australia	Hungary	Seychelles
Barbados	Israel	Singapore
Belarus	Italy	Slovak Republic
Bulgaria	Kuwait	Slovenia
China	Latvia	South Africa
Cyprus	Lithuania	Spain
Czech Republic	Luxembourg	Sri Lanka
Denmark	Mexico	Sweden
Estonia	Monaco	Switzerland
Finland	The Netherlands	Turkey
France	Poland	Ukraine
Germany	Portugal	United States of America
Greece	Romania	Venezuela

¹ or online at:- http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=82

² An up to date list of Countries to which the Convention applies can be found at:- http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=82

2.4 Apart from the Hague Convention, the United Kingdom has Bilateral Conventions with the following countries:

Austria	Greece	Portugal
Belgium	Hungary	Romania
Bosnia & Herzegovina	Iraq	Serbia & Montenegro
Croatia	Israel	Slovakia
Czech Republic	Italy	Slovenia
Denmark	Latvia	Spain
Estonia	Lithuania	Sweden
Finland	The Netherlands	Turkey
France	Norway	
Germany	Poland	

It will be seen that some Countries are parties both to the Hague Convention and to a Bilateral Convention. As with the Hague Convention the Bilateral Conventions are available from our Library.

2.5 The fact that a Country is not party either to the Hague Convention or to a Bilateral Convention does not prevent its Courts from seeking the assistance of the High Court in obtaining evidence here, as assistance may be given as a matter of mutual judicial cooperation between countries.

2.6 The main practical significance of the Convention, so far as this Office is concerned, is in relation to the recovery of costs and expenses incurred in executing a Letter of Request, see paragraph 17. It may however occasionally be necessary to refer to the Convention pursuant to which the request has been made if for example an unusual procedure is requested.

How to Deal with a Letter of Request

- 3.1 A Letter of Request is sent by the requesting court to either the Senior Master of the Supreme Court, Queen's Bench Division or one of the Designated Civil Judges, see paragraph 21.2(1). For the purpose of this booklet reference to the Senior Master should be read as "Designated Senior Judge" where appropriate. In Hague Convention cases, it is sent to the Senior Master direct, in other cases it is sent through diplomatic channels. If the Letter of Request does not name an agent in this Country charged with taking the necessary steps for its execution, the Foreign Process Section of the Masters' Secretary's Department, acting on behalf of the Senior Master, will instruct the Treasury Solicitor. In most cases, the Foreign Process Section use a standard letter, describing the enclosures, identifying the relevant Convention, asking the Treasury Solicitor to give effect to the request, and, on completion, notify them of the amount of expenses payable pursuant to the relevant Convention.
- 3.2 It should be emphasised that, in giving effect to the request, the Treasury Solicitor is not acting on behalf of the parties to the proceedings before the requesting court. If further instructions are needed as the matter progresses, they should be obtained, through the Foreign Process Section, from the Senior Master.
- 3.3 The letter from the Foreign Process Section should enclose the Letter of Request from the requesting Court in the original foreign language, together with a certified true translation. The Letter of Request will usually give an outline of the case, and may be accompanied by copies of the pleadings and evidence before the requesting court. Sometimes the Letter of Request will indicate that a witness is to be asked to identify or authenticate a document or documents. You must check that there is a translation of the Letter of Request and copies of any specified document(s) and report to the Foreign Process Section if any of these are missing. If the witness is required to produce a document, it must be clearly identified Section 2 (4) (b) of the 1975 Act. The 1975 Act does not permit general discovery, pre-action discovery or discovery against a 3rd party. The Letter of Request should also be checked to see that it is not too widely drawn. A Letter of Request should be designed to establish allegations of fact rather than to simply elicit information that might lead to a train of inquiry which may produce evidence for the trial. Full details and authorities can be found in the editorial comment to part 34 of the Civil Procedure Rules 1998 in the Civil Procedure Volume 1 (the White Book).
- 3.4 It is essential that the case officer should carefully study all the documents. Particular attention should be paid to the formal parts, which often state whether the requesting court wishes to be informed of the date, time and place of the examination. If the requesting court does wish to be informed, you must bear this in mind when fixing the date for the examination and allow enough time, say 6 weeks, for the transmission of this information via the Foreign Process Section. If, as is sometimes the case the Letter of Request also stipulates a time limit for taking the evidence, and there is insufficient time for an examination to be arranged and the deposition prepared and returned to the requesting court this should be drawn to the attention of the Foreign Process Section immediately. The formal sections sometimes provide the names of solicitors representing the parties in this Country, and indicate that they should be allowed to attend the examination. Sometimes there is a request that the evidence be taken in some particular manner, e.g. not on oath. All such matters should be noted, as they are material to the proper conduct of the case.

What Should be Set Out in the Letter of Request?

- 4.1 The Letter of Request should set out the name and address of the witness, a list of questions the witness will be required to answer, and/or the substance of the matter upon which evidence is required, in accordance with paragraph 6.3 of the Practice Direction to Part 34 of the Civil Procedure Rules 1998. It should be noted in this connection that the translation may contain ambiguities or inaccuracies. As however the accuracy of the translation has been certified as correct, the matter of obtaining an alternative one is rather delicate. If it is considered, after consultation with your supervising officer, that a better translation is essential, the papers should be returned to the Foreign Process Section with a request that one be obtained through the appropriate channel.
- 4.2 If a witness lives in or near London, the execution of a Letter of Request is dealt with entirely by this Office, and the hearing takes place before an Examiner who is normally one of a panel of Examiners of the High Court – see Appendix A. The Examiners are practising barristers or solicitors appointed from time to time by the Department for Constitutional Affairs.
- 4.3 If a witness lives some distance from London, e.g. more than 20 miles from the Office, the Letter of Request is dealt with through agents, and either the District Judge of the County Court near the witness's residence or one of the Examiners on the panel – see Appendix B, is invited to take the examination. The handling of these cases is dealt with in paragraph 20.
- 4.4 In some cases, evidence will be required from both a witness in London and one outside London. One will be heard by an Examiner in London, the other by a District Judge or Examiner local to that witness. Where there are a number of witnesses to be examined, some living in London and some in the country, it may prove more convenient for them all to be examined in London.
- 4.5 Where it appears from the papers that there are solicitors in this Country who have been acting on behalf of a witness, the first approach to the witness should be made through those solicitors. Sometimes no witness is identified and the Letter of Request asks simply for evidence from "the representative of X Ltd", or something to that effect. The firm named must then be asked to nominate a responsible person to give the evidence requested.

Steps to Take in London Cases

- 5.1 Write to the witness, or his solicitors as indicated in paragraph 4.5,
 - (a) Explain that proceedings are pending in the requesting court and the witness is required to give evidence.
 - (b) Ask the witness to provide details of any dates in the next 6 weeks or so when he is not available, but note the contents paragraph 3.4.
 - (c) Where the witness may need to look up records or carry out research to enable him to answer any of the questions or for any other acceptable reason the witness desires to be informed beforehand of the nature of the questions to be put to him, the case officer may furnish the information or send the witness a copy of that part of the Letter of Request which deals with the matters to be put to him. In any event the witness must be served with a copy of the Letter of Request at the time of service of the order – see paragraph 7.9.
- 5.2 Sometimes the letter goes unanswered. If so a reminder should be sent by Recorded Delivery. If this is also unanswered, check the address in the usual directories. If these do not help, consult your supervising officer as to whether to:
 - (a) report back to the Foreign Process Section on the basis that the witness's correct address cannot be traced, or
 - (b) proceed on the basis that the witness has received the letters, and arrange the examination without further attempts to consult the witness. In the latter event personal service of the Order will be necessary, see paragraph 7 generally as to arranging an examination, and paragraph 7.10 as to personal service.
- 5.3 Examination of London witnesses takes place at the Treasury Solicitors Office in one of the conference rooms.
- 5.4 Witnesses should be asked in the letter accompanying the copy Order, see paragraph 7.9, to report to reception on arrival. It may occasionally be necessary to take the evidence of a witness in prison or hospital, or at his home.

Possible Objections by a Witness

6. Witnesses are unlikely to be familiar with the Letter of Request procedure and may not even have an inkling, from the title of the action on the letter, what the matter is about. Consequently, although for the most part witnesses attend and give evidence freely their initial reaction may be one of inquiry, suspicion or non-cooperation, and one or more of the following questions or objections may be raised:
 - (a) "What is this all about?" Often a Letter of Request does not indicate clearly what the issues are before the requesting court, but usually the case officer can provide an outline of the matter concerned to assist the witness.
 - (b) "Am I obliged to attend?" Here it is necessary to explain that an Order will be made compelling the witness's attendance, and there will be a penal sanction in the case of non-attendance. This is dealt with more fully in paragraph 7.
 - (c) "I don't know anything, or can't remember anything about this." The witness should be told that, even if he thinks he cannot contribute anything, he must attend the examination to testify to that effect.
 - (d) "I can't remember clearly without further documentation". This is a perfectly valid objection if the relevant events took place a long time ago or involved complicated or detailed commercial transactions. The case officer must consider whether it would be reasonable for the witness to see either the whole Letter of Request, or part of it, or some document annexed to it.
 - (e) "Must I testify?" This is dealt in paragraph 14.
 - (f) "May I bring a solicitor?" The answer to this is "Yes" but the solicitor will not be able to examine the witness, or take any active part in the examination except to advise the witness on questions of privilege. The witness may not claim his solicitors costs as part of his expenses.
 - (g) "I can't leave the house". If for any physical reason the witness cannot leave his house, he must obtain a doctor's certificate and the examination will be arranged to take place at his home.
 - (h) "Who are you acting for?" The witness is frequently under the illusion that the Treasury Solicitor is acting for one party or the other. It must be made clear that the Treasury Solicitor has a completely neutral role and is acting at the request of the requesting court and not for any party.

Arranging the Examination and Obtaining the Order

- 7.1 In London cases at the same time as writing to the witness, paragraph 5.1, a ballot for an Examiner form should be completed and passed to the court clerk for delivery to the Clerk of the Rota of Examiners at the High Court.
- 7.2 Once a date for the examination has been agreed with the Examiner's clerk a conference room should be reserved.
- 7.3 As soon as the date for the examination has been fixed a letter should be sent to the Foreign Process Section giving the date, time and place of the examination.
- 7.4 Sometimes the witness or Examiner are for some reason unable to attend on the agreed date. Any alteration to the examination date should be notified to the Foreign Process Section immediately.
- 7.5 The officer dealing with the case prepares the letter to the Court applying for the Order to examine the witness. The letter together with the original Letter of Request and any other documents exhibited to it and 3 top copies of the Order should be passed to the court clerk, who will lodge them with the Masters' Secretary 's Department. There is no Court fee payable.
- 7.6 The Letter of Request may specify that the evidence is to be taken on oath. If the Letter of Request does not indicate whether the evidence is to be taken on oath or not, it should be assumed that it will be on oath. If the Letter of Request specifically states that evidence on oath is not required, then the first paragraph of the letter should end with the following words:

"in accordance with the said Letter of Request by which it appears that the evidence of the said witness is not required upon oath or affirmation"

The words "upon oath or affirmation" should be crossed out of the Order and after the words "pertaining to the examination and cross-examination of witness" there should be added "save that the examination is not to be taken upon oath or affirmation ".

- 7.7 The letter will be endorsed by the Master with his Order within a day or two of the papers being left with the Masters' Secretary's Department. The Masters' Secretary's Department arranges for the order to be stamped and returns the sealed Order, Letter of Request, and any exhibits.
- 7.8 Occasionally the Master will refuse the application. He will endorse his reasons for refusal on the letter, which will be returned by the Masters' Secretaries' Department with the papers. In such a case you should consult your supervising officer as to how to proceed.
- 7.9 An appeal from the Master's Order is most unlikely. Any case in which there is an appeal should be referred to your supervising officer.
- 7.10 Send a copy of the Order and Letter of Request to the witness setting out fully in the covering letter details of the arrangements that have been made for the examination. At the same time a remittance must be sent in respect of conduct money. This should be sufficient to cover the return fare and if appropriate any meals or refreshments reasonably necessary. It is usual to round up the figure to a convenient sum. The witness should be told that a claim for any additional expenses, such as lost earnings, should be made after the examination has been completed.
- 7.11 If from previous correspondence it seems that the witness is unlikely or unwilling to attend to give evidence, the Order, Letter of Request and conduct money should be served personally. It should be appreciated that if a witness unexpectedly fails to attend, after service has been effected through the post, it will be necessary to start with the strict procedure of personal service.
- 7.12 In line with CPR 34.5 the Order should be served on the witness at least 7 days before the examination.
- 7.13 Send the original Order and all original documents to the Examiner's Clerk with an appropriate covering letter.
- 7.14 Arrangements should be made for a shorthand writer to be present at the examination and prepare a transcript of the evidence. The Mechanical Recording Unit at the High Court has a list of authorised members of the tape transcription panel and one of these firms should be employed for this purpose.

- 7.15 The correspondence or oral communications between this Office and the witness will generally make it clear whether the services of an interpreter will be required at the examination. Where necessary a translator for the appropriate language can be found from the website of the Institute of Linguists³, which provides a free online search of their database of members according to language, area of expertise etc.
- 7.16 A witness may fail to attend to give evidence. In this event, the Examiner should be asked to adjourn the matter to a later date, and a letter in fairly strong terms should be served personally on the witness pointing out that the Court has the power to compel attendance. It must be remembered however that there may be a very good reason for non-attendance, such as sickness, and the letter must be phrased discreetly. If he again fails to attend the matter should be reported fully to the Masters' Secretaries' Department so that the matter can be placed before the Senior Master for instructions. No proceedings for committing a witness should be undertaken without the approval of the Senior Master and if such proceedings are approved you must inform your supervising officer.

Scope of the Examination

- 8 Consider beforehand what questions may be relevant and make notes where necessary. In practice it will be found that the examination does not always proceed on the basis of detailed questions prepared in advance, as the answers to one question may suggest and/or lead on to an unforeseen question while the examination is in progress. It is nevertheless helpful to prepare an outline beforehand. Discretion must be used in asking questions to ensure that they are within the ambit of the Letter of Request. Whilst it may be necessary to extract, from the material in the Letter of Request, more precise questions than those set out in the Letter, and to ask supplementary questions to clarify or elucidate the answers to earlier questions, it is of particular importance not to go beyond the proper scope of the examination in any case. To do so where the examination is attended by the legal representative of only one of the parties to the proceedings could give rise to justified complaint. It may well be that the other party has only refrained from arranging representation in the belief that the examination will be strictly confined to the limits of the Letter of Request and would have wished to be represented if the scope were to be in any way widened.

³ <http://www.iol.org.uk/linguist/translator1.asp?r=PVEMOVMAAH>

Conduct of the Examination

- 9.1 The Examiner is responsible for the overall conduct of the examination and will where applicable administer the oath to the witness.
- 9.2 Examinations will normally be held in public but the Examiner has discretion to conduct it in private if it is considered appropriate CPR 34.9 (3) and CPR 39.2 (3) as to the grounds for holding a hearing in private.

The Swearing of Witnesses etc

- 10.1 It is the duty of the Examiner to administer the oath and it is the duty of the case officer to ensure that the proper facilities are available bearing in mind the likely religion of the deponent. Roman Catholics sometimes prefer swearing on the Douai Bible. Orthodox Jews will swear on the Pentateuch, and Muslims on the Koran. The New Testament, Douai Bible, Pentateuch and Koran are available from our Library. A witness may affirm instead of swearing.
- 10.2 It should be remembered that an oath or affirmation should be taken by any shorthand writer or interpreter employed.
- 10.3 The Form of Oaths can be found in Appendix C.

Examination Procedure

- 11.1 Normally the examination will be conducted according to English law and procedure, but Article 9 of the Hague Convention provides that a request that a special method or procedure be followed should be complied with unless this is incompatible with the law of the State of execution, in this case English law. A special method or procedure most frequently takes the form of special rules of privilege, which the requesting Court requires to be read to the witness before the examination.
- 11.2 The procedure to be followed in taking the deposition is set out in paragraphs 4.1 to 4.12 of the Practice Direction to CPR Part 34. If a shorthand writer is employed there is no need for the deposition to be signed by the witness as the Order provides that this is not necessary where a shorthand transcript is taken of the evidence. If the deposition has been taken in longhand the Examiner will read it over to the witness and then ask him to sign it in his presence. The examination can be tape recorded. In these circumstances the case officer should arrange for the tape to be transcribed for certification by the Examiner.
- 11.3 The Order requires the Examiner to return the original Order, Letter of Request and signed deposition to the Senior Master.

Who Questions the Witness?

- 12.1 Where neither party to the action is legally represented at the examination, the case officer will conduct the questioning of the witness before the Examiner.
- 12.2 If legal representatives (who may include Counsel as well as solicitors) attend, the conduct of the examination should be on the following lines:
- (a) The questioning of the witness in accordance with the Letter of Request will be conducted by the case officer. This is an invariable rule not to be departed from even when the lawyer for the party whose witness is under examination attends. He may contend that he should have the right to examine the witness "in chief". There is no such right in examinations pursuant to a Letter of Request, but see sub paragraph (c) below.
 - (b) The witness may then be questioned by the lawyer for the other party, if he so wishes, cross-examination.
 - (c) The witness may then be questioned by the lawyer for the party on whose behalf his examination has been sought, if he wishes to do so, re examination.
 - (d) The case officer may then in his discretion, but generally only after consulting the Examiner and obtaining his approval, ask further questions to elucidate any points that remain obscure.
- 12.3 If only one of the parties sends a lawyer to the examination the conduct of the examination should be on the following lines:
- (a) If the witness is called at the instance of the party who is represented, the case officer should conduct the questioning, and questioning by the lawyer for the party should only exceptionally be allowed bearing in mind the danger of widening the scope of the examination, see paragraph 8. The case officer should if necessary intervene to advise the Examiner as to the position.
 - (b) If the lawyer appears for the other party to the proceedings, normal cross-examination will be allowed following the case officer's questioning. Whether any re-examination by the case officer should follow is a matter for his discretion, bearing in mind that he represents neither party, and subject to the approval of the Examiner.

- 12.4 The application of the procedure described in paragraphs 12.2 and 12.3 will present no difficulty when it is clear at whose instance the evidence of the witness has been requested. Sometimes however it will not be clear which, if either, of the parties requested the evidence or whether the requesting court acted of its own motion. The adversary system of litigation is unknown in some foreign countries. In these legal systems it is for the judge to decide what evidence he wants and take the necessary steps to obtain it. In such cases it will be difficult to decide whose witness the witness is, and how to deal with any lawyers who may have attended to represent the parties. Which lawyer should put his questions first in such cases must be left to the Examiner to decide. He should of course be given as much assistance as possible.
- 12.5 Occasionally it may happen that a lawyer attends, with or without prior warning, to watch the interests of a witness although the witness is not a party to the proceedings. The lawyer may even be instructed by someone else, for example the witness' employer, who anticipates that he may become implicated in the dispute and wishes to observe the progress of the examination. Such a lawyer may be allowed to remain on condition that he does not participate in the examination. In exceptional circumstances the lawyer may be allowed to intervene e.g. to claim privilege in respect of a document or in respect of certain aspects of the witness' oral evidence.

Foreign Lawyers

- 13.1 The Senior Master has decided, with the agreement of the Bar Council, that foreign lawyers have a right of audience at these examinations where English lawyers are also in attendance. Under certain Conventions there are provisions for the lawyers of the parties to attend and put questions in person. Such cases are very rare and none have been received in recent years.
- 13.2 If any case arises in which it is clear that foreign lawyers will be attending without English lawyers being present, the Senior Master should be informed before the examination. It will be for him to decide whether an approach should be made to obtain the sanction of the Bar Council.

Admissibility and Compellability

- 14.1 Questions may be admitted which may reasonably be expected to throw light upon the matters in issue without a strict regard to English rules of admissibility.
- 14.2 Section 3 of the 1975 Act provides however that a witness shall not be compelled to give evidence which he could not be compelled to give either in civil proceedings before our own Courts, or in civil proceedings before the requesting court. The latter exemption is subject to conditions set out in Section 3(2)(a), to the effect that the exemption shall not apply unless a claim to it is supported by a statement contained in the Letter of Request. There is a further exemption in Section 3(2)(b) where the applicant for the Order concedes it, but this will not be applicable to a case in which the Treasury Solicitor is the applicant for the Order as he will not be in a position to make any concession relating to compellability in the requesting court.
- 14.3 A witness may attend before the Examiner but refuse to give evidence and perhaps refuse to be sworn for the purposes of the examination. Two cases fall to be considered:
- (a) the witness does not seek to argue that he is entitled in law to refuse to give evidence, and simply declines to assist the Examiner. The Examiner should be asked to make a note certifying the witness's refusal. He should then adjourn the examination to enable the Treasury Solicitor to obtain the instructions of the Senior Master, and, if the Senior Master so instructs, to proceed with enforcement action. The Examiner should explain to the witness the procedure that will be followed.
 - (b) the witness objects to answer questions on the grounds that he is not compelled to do so. The witness may rely on a well established ground such as legal professional privilege or self-incrimination, or seek to invoke some argument based on confidentiality or irrelevance. It is not open to the Examiner to rule on the objection. He should be asked to make a note in the deposition of the question or questions asked and the ground of the witness's objection. He should then adjourn the examination to enable the Treasury Solicitor to obtain the instructions of the Senior Master, and, if the Senior Master so instructs, to proceed to gain the witness's compliance with the Order. Again, the Examiner should explain to the witness the procedure that will be followed.

- 14.4 To avoid the expense and delay involved in enforcement action an attempt should be made to clarify the position, before arranging the examination, where it is clear from the Letter of Request itself, or from the response of the proposed witness, that objection may be taken to any questions in the Letter of Request. A Letter of Request asking that evidence be obtained from a practising barrister or solicitor should always be carefully considered before an examination is arranged. If the possibility of an objection clearly arises, and it is reported to the Senior Master, he may feel able to communicate with the requesting Court with a view to excluding the objectionable questions from the Letter of Request.
- 14.5 You should consult your supervising officer about any matters arising under paragraphs 14.3 and 4.
- 14.6 A witness cannot refuse to answer questions relating to paternity in paternity proceedings.
- 14.7 In proceedings for divorce where the wife has given birth to a child, both husband and wife are permitted to give evidence of intercourse or non-intercourse after marriage with a view to establishing that a child born in wedlock is or is not the child of the husband.

Blood and DNA Tests

- 15.1 It sometimes happens in paternity cases that the requesting court asks that a witness undergo a blood or DNA test. Blood tests are permissible under Section 2(2)(f) of the 1975 Act. Such a request should therefore be included in the Order but subject to the express provision that there should be no blood test without the consent of the witness. The English court will not order a blood test without consent. In this case the penultimate paragraph of the Order should conclude with the words "there being no blood test without the consent of the witness".
- 15.2 It is practice to explain to the witness:
- (a) that the requesting court has requested a test:
 - (b) that he cannot be compelled to submit to such a test:
 - (c) that if he does submit to a test it:
 - (i) may show that he is not the father of the child in question
 - (ii) may show that he could be the father, and
 - (iii) cannot show that he is the father.

- 15.3 If on examination the witness admits paternity there is no need to proceed with the blood test. If he denies paternity but agrees to undergo a test the Examiner should make a note of the fact in the deposition adding the words "provided that this is at no expense to myself". The witness should be told that arrangements will be made for the test to be carried out in this Country and that the Masters' Secretaries' Department will contact him direct at a later date to make the necessary arrangements.
- 15.4 If he does not agree to arrangements being made in this way it will be for the witness to make the arrangements himself.
- 15.5 The 1975 Act makes no reference to DNA tests, probably because the technique only became available after the Act came into force. Section 20 (1) of the Family Law Reform Act 1969 and CPR RSC 0.112 allows the Court to direct the taking of bodily samples for use in scientific tests in order to determine paternity. The Senior Master is of the view that a Foreign court can apply to do anything that would be lawful in this Country. It would seem therefore that if a DNA test is sought by the Letter of Request a similar course to that set out in paragraphs 15.1, 15.3 and 15.4 should be followed. Paragraph 15.2 would not seem to be relevant as DNA tests are much more precise in determining paternity than blood tests.

Officers and Servants of the Crown

- 16 Section 9(4) of the 1975 Act states:
"Nothing in this Act shall be construed as enabling any court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown".
- 16.1 The effect of this provision is that there is no power to order the taking of evidence from any person in his capacity as an officer or servant of the Crown.
- 16.2 If it appears that the requesting court is seeking evidence from an officer or servant of the Crown, it is necessary to consider whether he is required to give evidence in that capacity or in his private capacity. If it is the former capacity, for example where evidence is required from an Army driver in connection with an accident involving a vehicle he was driving in the course of duty, the Letter of Request should be returned to the Foreign Process Section with a letter drawing their attention to Section 9(4). On the other hand, if evidence is required from a civil servant who witnessed an accident while he was on a foreign holiday, his examination may be ordered because he is not being asked to give evidence in his capacity as a civil servant.
- 16.3 In any case in which a question arises as to the possible application of Section 9(4) of the 1975 Act you should consult your supervising officer.

Expenses and Recoveries

17.1 Expenses:

- 17.1.1 The fees payable to Examiners are those set out in the Practice Direction to Part 34 of the Civil Procedure Rules on Fees for Examiners of the Court.
- 17.1.2 In country cases, a District Judge of the local County Court will often act as Examiner. Where he is a full time official on salary, no fees whatever, whether by way of remuneration to the Examiner or court fees, are payable in respect of any work the District Judge may do in connection with a Letter of Request. If, however, an Examiner of the Court is appointed the fee payable will be as set out in paragraph 17.1.1 above.
- 17.1.3 VAT is payable on Examiner's fees if the Examiner is registered.
- 17.1.4 Traveling and other reasonable anticipated expenses should be paid to the witness at the same time as the Order is sent to or served on him. Any other expenses, e.g. a claim for loss of earnings, should be paid if they are considered reasonable, and if possible proof should be obtained from the witness, e.g. a certificate from his employer confirming loss of earnings.
- 17.1.5 The question of fees for professional or expert witnesses can give rise to difficulties. If such a claim appears probable e.g. from a doctor, lawyer or scientist, the matter should be taken up with them at the earliest possible stage. It must be remembered that such persons often have to give some time and thought to the matters upon which they are required to give evidence before they actually attend before the Examiner. If the fees suggested appear to be excessive the authority of the Senior Master should be sought before agreeing to make payment. If necessary the Senior Master will refer the question to the Taxing Judge or to the requesting court. As a general principle witnesses are entitled to the same fees and expenses as are payable in a similar action in the English courts.
- 17.1.6 Where a shorthand writer or interpreter is employed, his charges must of course be met.

17.2 Recoveries:

- 17.2.1 What is recoverable will depend on whether the Letter of Request is received pursuant to a Convention, and if so on the provisions of the Convention.
- 17.2.2 Under the bilateral Conventions, the fees and expenses of the witnesses, including expert witnesses, the Examiner, interpreter and shorthand writer are recoverable. Where it has been necessary to employ a process server, the cost of doing so is recoverable.
- 17.2.3 Under Article 14 of the Hague Convention and article 18 of EC Regulations No. 1206/2001 only fees paid to experts and interpreters can be recovered, unless the requesting Court has asked for a special procedure to be adopted, in which case the extra expense attributable to that procedure is recoverable.
- 17.2.4 Where the requesting court is in a country which is a party both to a bilateral Convention and to the Hague Convention, the Senior Master treats a request as having been made under the bilateral Convention unless the requesting court has indicated that it is made under the Hague Convention.
- 17.2.5 Where the requesting court is in a country which has no bilateral Convention with the United Kingdom, and is not a party to the Hague Convention, the practice is to recover expenses as though the request were made under a bilateral Convention.
- 17.2.6 No costs are recoverable for work done by the Treasury Solicitor. Where agents are employed their account should be sent to Accounts Branch for payment in the usual way.
- 17.2.7 In every case where costs are recoverable a letter should be sent to the Masters' Secretaries' Department, which will arrange for recovery from the foreign authorities in due course. It is important to ensure that all items are included in this letter as it is embarrassing for the Senior Master to have to re-open a matter with the foreign authorities after a claim by the Treasury Solicitor has been submitted and paid.

Criminal Cases

- 18 The Treasury Solicitor will normally only act in civil or commercial matters. The Home Office deals with criminal matters⁴. A request to act in a criminal matter should be referred to your supervising officer. It is sometimes difficult to draw the line between civil or commercial and criminal matters. In some countries for example a civil claim by an injured party may be made within the framework of criminal proceedings. Careful consideration should always be given to any case in which there are indications that the proceedings are criminal proceedings. If necessary, guidance should be sought from the Senior Master. If doubt should arise during the actual conduct of the examination, the Examiner should be requested to adjourn the hearing to enable the Treasury Solicitor to obtain further instructions from the Senior Master.

Copies of Depositions

- 19.1 A deponent who has had his evidence recorded by an examiner and who asks for a copy of his statement and who is prepared to pay for the document to be copied should be permitted to have a copy.
- 19.2 The parties and their solicitors are by their submission to the jurisdiction of the requesting court bound by the practices and procedures of that court and accordingly should seek a copy of the statement from that court.

Country Cases

- 20.1 When the Letter of Request first comes in, it will be apparent whether the witness's place of residence makes it appropriate to pass the case to agents, see paragraph 4.3.
- 20.2 If the request proves to be a country case, the Treasury Solicitor instructs local agents to act, explaining the circumstances, and enclosing copies of the Letter of Request and any other relevant material received from the Masters' Secretaries' Department. The agents should also be sent a copy of the Memorandum for Agents – see Appendix D. The agents will need to be alerted to the need for proper facilities for swearing, paragraph 10.1, if it seems likely that special facilities will be needed.
- 20.3 The agents should contact the witness, arrange a date for the

⁴ Home Office, Judicial Co-Operation Unit, 2 Marsham Street, London SW1P 4DF
telephone no. 020 7035 4848 fax no. 020 7035 4745

examination with the Examiner, and in due course write to the Treasury Solicitor confirming or correcting, if necessary, the names and address of the witness and giving the proposed date, time and place of the examination, which will have been arranged to meet, as far as possible, the convenience of the both the Examiner and witness, and the names and designation of the Examiner, if not a District Judge. The Treasury Solicitor will then obtain the Order for examination in the usual way.

- 20.4 The original Order and Letter of Request together with copies of both are sent to the agents, who pass the original documents to the Examiner and serve the copies on the witness. The examination of the witness then proceeds.
- 20.5 On receipt of the agents' account it should be submitted for payment in the usual way. A note of any recoverable expenses is then sent to the Masters' Secretaries' Department, see paragraph 17.2 as to what expenses are recoverable.

EC Regulation No. 1206/2001

- 21.1 This Regulation⁵ came into force on the 1st January 2004 and brings in a number of changes to the procedure set out above in respect of Letters of Request from Regulation States, all EC Member States⁶ except Denmark.
- 21.2 The principle changes are:
- (1) Article 2 provides for Letters of Request to be sent by the court of the Regulation State to one of the courts nominated by the UK, the one geographically nearest to the witness. The nominated Courts for England and Wales are the Civil Justice Centres at Birmingham, Bristol, Cardiff, Leeds and Manchester in addition to the High Court in London. Full details of the nominated Courts and the areas they cover can be found in the manual⁷.
 - (2) Article 4 provides for the Letter of Request to be in a certain form, a specimen is set out in Form A of the Regulation.
 - (3) Under Article 5 each Member State is required to nominate a language, other than its own, in which it will accept Letters of Request without a translation. The UK has nominated French. So a Letter of Request in French will not have to be accompanied by a translation into English. When such a Letter of Request is received it has been agreed that the Treasury Solicitor will arrange for its translation.
 - (4) Article 6 provides that the Letter of Request be transmitted by the swiftest possible means which a Member State has indicated it will accept. The manual provides the fax numbers of the nominated Courts for England and Wales.

⁵ http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/oj_1174_20010627_en.pdf.

A practise guide can be found at:- http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf

⁶ Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Spain, Sweden, and The Netherlands

⁷ http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_tev_uki.pdf

- (5) Article 7 (1) requires acknowledgement of receipt of the Letter of Request by the receiving court within 7 days. Article 7 (2) allows the receiving court to forward the Letter of Request to another competent court if it does not fall within its jurisdiction. In each case Form B is used to notify the court of the Regulation State.
- (6) If the Letter of Request is not complete Article 8 requires the receiving court to notify the court of the Regulation State as soon as possible and in any event within 30 days using Form C.
- (7) By Article 9 if the receiving court has notified the court of the Regulation State under Article 8 that the Letter of Request is incomplete the time limit for execution set out in Article 10 will not start to run until the further information is received.
- (8) Article 10 sets out a time limit of 90 days for execution of the Letter of Request. The Senior Master is of the view that execution occurs when the witness gives his evidence. If it is not possible to execute the Letter of Request within 90 days Article 15 provides for notification of the delay and its reasons to the court of the Regulation State, Form G.
- (9) Article 10 also allows the court of the Regulation State to request the use of communications technology, e.g. videoconferencing and teleconference, unless this is incompatible with the law of the Member State.
- (10) Articles 11 and 12 require the representatives of the parties and the court of the Regulation State to be notified of the date of and be allowed to attend the examination; Form F is used in both cases.
- (11) Article 13 provides that coercive measures may be used. The Order currently in use already carries a penal notice.
- (12) Article 14 sets out the grounds for refusal to execute the Letter of Request. A witness has a right to refuse to give evidence if this is allowed under the rules of (a) the receiving court or (b) the court of the Regulation State, if this right has been specified in the Letter of Request or confirmed by that Court.
- (13) Subject to this execution of the Letter of Request may only be refused if:
 - (a) It does not fall within the scope of Article 1
 - (b) Its execution would not be a function of the judiciary of the receiving court
 - (c) the court of the Regulation State does not provide the further information requested under Article 8

- (14) The receiving court cannot refuse to execute the Letter of Request on the basis that under its law it has exclusive jurisdiction of the subject matter of the action or its law does not allow such a right of action.
- (15) If execution is refused on any of the above grounds the court of the Regulation State must be informed of the reason using Form H.
- (16) Article 16 sets out the procedure for returning the Letter of Request to the court of the Regulation State, Form H.
- (17) Article 17 deals with the direct taking of evidence. Again the Letter of Request needs to be in a specified form, Form I. This procedure can only be used on a voluntary basis. The Article encourages the use of communications technology. The receiving court has 30 days to notify the court of the Regulation State if the request is accepted and if necessary under what conditions, Form J.
- (18) Article 18 provides that in general no fees are payable except those paid to experts and interpreters or of any special procedure adopted under Article 10. Presumably this means that the fee paid to translate any Letter of Request submitted in French will be recoverable.

21.3 In light of these changes and to relieve the pressure on District Judges' it was envisaged that Examiners of the Court would sit as Examiners. There are however a number of areas of the Country that are not covered by the panel and in these cases it will still be necessary to ask the local District Judge to sit as Examiner.

21.4 It should be remembered that these changes only relate to Letters of Request from Regulation States. Letters of Request from all other Countries will continue to be dealt with as set out in the earlier paragraphs of this Memorandum.

Appendix A

EXAMINERS OF THE COURT (London)

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Appendix B

EXAMINERS OF THE COURT (Country)

Name	Preferred address	Home Area	Daytime Contact No.
Anthony James Verduyn	St Philip's Chamber, 55 Temple Row, Birmingham, B2 5LS	Birmingham	0121.246.7000
Ian David Grainger	Chambers of Lord Grabiner QC, 1 Essex Court, Temple, London, EC4Y 9AR	London	020-7583-2000
Robert Drewry Holdsworth	(home) 44 Britannia Square, Worcester, Worcestershire, WR1 3DN		01905 23133
Fiona Patricia Dickie (Ms)	(home) 26 Whitmore Gardens, Kensal Rise, London NW10 5HH		020 8960 7899
Anitra Hussain (Ms)	(home) 4a St Stephens Road, Yiewsley, West Drayton, Middlesex, UB7 7RL		01895 431 881
Cenydd Iorwerth Howells	(home) 16 Copse Edge Avenue, Epsom, Surrey, KT17 4HS		0207 404 5055
Adrian Laurence Robert Jack	Enterprise Chambers, 9 Old Square, Lincoln's Inn, London, WC2A 3SR	London	020 7405 9471
Cheryl Stephanie Jones (Miss)	No 5 Chambers, 4th Floor, 199 Strand, London, WC2R 1DR	Bedfordshire	0207 420 7518
Kevin Frank Walters	(home) Magnolia House, Winchester Hill, Romsey, Hampshire, SO51 7NL		01794 512710/521377
Ralph David Richard Wynne-Griffiths	(home) Faith House, Southstoke Lane, Southstoke, Bath, BA2 5SH		0117 927 3366
Michel Jospheh Leon Asiangul	(home) 3 Crown Road, Frien Barnet, London, N10 2HY		020.7404.5787
James Frederick Drake	Chambers of Gavin Keatley QC, 7 King's Bench Walk, Temple, London, EC4Y 7DS	London	020 7910 8300
Chirag Karia	Chambers of Nigel Teare QC, 4 Essex Court, Temple, London, EC4Y 9AJ	London	020.7653.5653
Michael Mark	(home) 35 Shepherds Hill, Highgate, London, N6 5QJ		020 8340 8743
Jonathan Maurice Holmes	(home) The Old Vicarage, Wittonstall, Northumberland, DH8 9JN		020 7405 9471
Frederick Duncan Banning	Smithson Clarke, 31-39 High Bridge, Newcastle Upon Tyne, NE1 1EW	Tyne and Wear	0191 241 4563
Peter Giles Caldin	(home) Manor Farm, Salford, Chipping Norton, Oxfordshire, OX7 5YL		020.7653.5653
Iain John Gerald MacLaughlan	Chadwick Lawrence LLP, 13 Railway Street, Huddersfield HD1 1JS	Sheffield	01484-468-333/519 999
Helen Margaret Waller (Mrs)	(home) 5 Mercer Way, Nantwich, Chester, CW5 5YD		01244 348282

When he was a Recorder Mr Howells sat on the Wales & Chester Circuit and was authorised to hear cases in Welsh. He is happy to travel to Wales on reasonable notice

Mr Holdsworth is happy to travel in the South West on reasonable notice

Appendix C

FORM OF OATH AND AFFIRMATION

Oaths

The Oaths Act 1978 (the Act) provides for the form in which a Christian and a Jew should take an oath.

The usual form of oath, set out in Section 1 (1) of the Act, is:

"I swear by Almighty God that ... followed by the words of the oath prescribed by law".

The use of the phrase "followed by the words of the oath prescribed by law" is a little misleading as it suggests that the words can be found somewhere else in the Act, in another statute or in the rules of the Court. This is not in fact the case.

In 1927 the King's Bench Judges approved the following form of oath for use in Civil and Criminal Courts:

I swear by Almighty God that the evidence, which I shall give, shall be the truth, the whole truth and nothing but the truth.

This form is still in use today.

Although Section 1 (3) provides for persons of other religious beliefs, no guidance is given on the form of the oath. The Judicial Studies Board has issued notes for guidance, which include the form of the most common oaths taken by witnesses other than those taking the oath on the New Testament. These are:

Hindu (Taken on the Gita)

I swear by the Gita that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Jew (Taken on the Old Testament)

I swear by Almighty God that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Muslim/Follower of Islam (Taken on the Koran)

I swear by Allah that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Sikh (Taken on the Adi Granth)

I swear by Guru Nanak that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Quaker or Moravian Witness (affirmation)

I, being of the people called Quakers/United Brethren called Moravians do solemnly, sincerely and truly declare and affirm that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Shorthand Writer

I swear by Almighty God that I will truly take down in shorthand the evidence given in this matter and make a true and accurate transcript thereof to the best of my skill and ability

Interpreter

I swear by Almighty God that I will well and faithfully interpret, and true explanation make, of all such matters and things as shall be required of me, according to the best of my skill and understanding

The Koran, Gita and Adi Granth should be kept wrapped or in a suitable container and only removed by the witness.

The usual practice is for the testament to be held in the right hand although the Act only requires that the testament be held in the "uplifted" hand.

If the appropriate holy book is not available the witness should be invited to affirm.

Affirmation

The form of Affirmation is:

I _____ do solemnly, sincerely and truly declare and affirm that the evidence which I shall give, shall be the truth, the whole truth and nothing but the truth

Appendix D LETTERS OF REQUEST MEMORANDUM FOR AGENTS

1. The practice with regard to this type of work is to be found in Part 34 of the Civil Procedure Rules 1998 (see Volume 1 of Civil Procedure, the White Book).
2. The Treasury Solicitor is concerned in a certain proportion of these Letters of Request by virtue of the provisions of Paragraph 6.4 of the Practice Direction to Part 34.
3. Cases where the witness resides in or near London are undertaken by the Treasury Solicitor, but cases in the country are usually passed to Agents. In such cases Agents are asked first of all to contact the witness to arrange a convenient day for the examination. In cases where it will be necessary for the witness to look up records or carry out research to enable him to answer any of the questions, and in cases where for any other sufficient reason the witness desires to be informed beforehand of the nature of the questions, the Agent may, at his discretion, furnish the information, or allow the witness to have a copy of that portion of the Letter of Request which deals with the matter to be put to the witness. Very often the christian names of the witness are either omitted or wrongly given in the Letter of Request. The witness should therefore be asked to verify what are his full names.
4. In any case in which in the opinion of the Agent the services of an interpreter are required he should report to the Treasury Solicitor who will give directions as to the person to be employed.
5. Part 34.18 provides that the Examiner may be any fit and proper person nominated by the person applying, in these cases the Treasury Solicitor. Wherever possible the District Judge of the local county court should be invited to take the examination. This judicial officer is a full time public servant on salary so no fees are payable and any question on this point should be referred back to the Treasury Solicitor before any payment is made. If, however, the examiner is a part time officer or a barrister or solicitor or if any other person is nominated, an arrangement should be made with him that he will accept the fees provided for by Practice Direction – Fees for Examiners of the Court to Part 34.

Using the formula set out in the Practice Direction the current fees are:–

	£
(a) Upon giving the appointment to take an examination	141-64
(b) For each hour or part thereof occupied in the examination	70-82
(c) All reasonable travelling and other expenses including charges for the rooms (other than the examiner's Chambers) where the examination is taken.	

These are the current fees but they may be reviewed annually.

The Agent must not make any arrangement for the payment of fees on a scale higher than that referred to in this paragraph without previous reference to the Treasury Solicitor.

No Court fees are payable on Letters of Request and any difficulty arising in this connection should be referred to the Treasury Solicitor. Any claim by a witness to a fee for giving evidence as an expert must be referred to the Treasury Solicitor.

6. When the Agent has fixed a convenient day and time, he should communicate this to the Treasury Solicitor, giving also the full christian and surnames and address of the witnesses and of the Examiner if not a District Judge and specifying the place where the examination will be held. If possible at least 21 days should be allowed between this communication and the proposed examination, to give time to obtain the Order mentioned in the next paragraph. Sometimes the Foreign Court issuing the Letter of Request desires an opportunity of allowing the parties to be represented at the examination and in these cases it is of course necessary to allow more time.
7. The Treasury Solicitor then obtains an Order for the witnesses' attendance, and sends it to the Agent with the necessary copies for service and the original Letter of Request from the Foreign Court, together with any other original papers.
8. The Agent should pass the originals to the Examiner, serve a copy of the Order and Letter of Request upon the witnesses, pay them the necessary conduct money and afterwards attend and conduct the examination. Usually the questions which are to be asked are specified in the Letter of Request, but this is not always so. The Agent is to use his discretion in asking any further questions which may arise out of the witness's answers, remembering that he represents neither party but the Foreign Court only.
9. The procedure to be followed in taking the deposition is set out in paragraphs 4.1 to 4.12 of the Practice Direction to Part 34 of the Civil Procedure Rules 1998. If the Examiner takes down the deposition in manuscript a typewritten copy should be prepared. If it is impracticable to obtain the signature of the witness to the typescript the Examiner should return both the signed manuscript and a typescript, certified by the Examiner to be a true copy of the manuscript. Alternatively if it is felt appropriate a shorthand writer may be engaged.
10. On completion of the examination, it is the Examiner's duty to send the signed depositions with the original Order and Letter of Request as soon as possible to either the Senior Master, Foreign Process Section, Room E10, Royal Courts of Justice, Strand, London WC2A 2LL or the appropriate designated Civil Judge. The Agent should notify the Treasury Solicitor that the Examination has been completed and at the same time inform him of all amounts paid (e.g., Examiner's fees, conduct money, interpreter's fee, etc.). The Examiner should indorse the original deposition with a note authenticated by his signature certifying the number of hours employed on the examination and the fees (if any) received in respect thereof.
11. The Agent should ascertain whether lay witnesses have any claims for attending the examination and should deal with them by paying reasonable travelling and subsistence expenses and any loss of wages covered by an employer's certificate. The Agent should also pay the Examiner's fees and the approved fees of expert witnesses, and then send an account of his charges and disbursements to the Treasury Solicitor.

The following notes may be useful to the Agent in connection with the conduct of the examination. The notes have been prepared in conjunction with the Senior Master of the Supreme Court of Justice but are not intended to be anything more than a guide.

Scope of Examination

12. Very often the questions to be asked of the witness will be detailed in the Letter of Request, but this is not always so. In the latter event the Agent should carefully prepare the questions beforehand which seem to him to cover the terms of the Request. These questions must then be put to the witness, but the Agent may in such cases use his discretion to ask supplementary questions to clarify the answers given. The supplementary questions are to be limited to matters intended to clarify or elucidate the evidence. If, when the Foreign Court receives the evidence, it is not considered sufficiently comprehensive, a further Letter of Request can be issued. It is particularly important if the examination is attended by the legal representative of one only of the parties to the proceedings to ensure that the scope of the examination is not allowed to be widened: for it may well be that the other party to the proceedings has only refrained from arranging for legal representation in the belief that the examination would be confined to the narrow limits indicated in the Letter of Request and had he realised that these would be relaxed would have arranged to be represented. If necessary an adjournment should be sought to enable reference to be made to the Treasury Solicitor.

Conduct of the Examination

- (a) The likelihood is that the Agent will encounter no intervention from any legal representative of either of the parties to the civil proceedings concerned. In such cases the Agent will conduct the questioning of the witness without any other persons (apart from himself, the witness and the Examiner and, possibly, a shorthand-writer or interpreter) being present at the examination.
- (b) A variation from the normal situation outlined in (a) above is for the Agent to encounter at the hearing legal representatives of the parties who have come to attend the hearing. In many cases indeed the Letter of Request will have asked for notification in advance of the date fixed for the hearing so that representatives of the parties may, if they wish, attend. If such representatives (who may include Counsel as well as solicitors) do attend, the conduct of the examination should be along the following lines:—
- (i) the questioning of the witness in accordance with the Letter of Request will be conducted by the Agent. (This is an invariable rule, not to be departed from even when the legal representative of the party whose witness is under examination contends that he should have the right to examine the witness "in chief");
 - (ii) the witness will then be questioned by the legal representative of the other party (if he so desires);
 - (iii) the witness will then be questioned (if desired) by the representative of the party on whose behalf his examination has been sought; and
 - (iv) the Agent may then at his discretion (but generally only after consulting the Examiner and obtaining his approval) ask further questions to elucidate any points which remain obscure.

- (c) If only one of the parties sends a legal representative to the examination, the following procedure should be followed:–
- (i) If the witness is called for the party who is represented, the Agent should conduct the questioning, and questioning by the representative of the party should be only exceptionally allowed, bearing in mind the last two sentences of paragraph 12 above. The Agent should if necessary intervene to advise the Examiner as to the position.
 - (ii) If the legal representative appears for the other party to the proceedings normal cross-examination will be allowed, following the Agent's questioning. Whether any "re-examination" by the Agent should follow will depend on the circumstances, the discretion of the Agent (bearing in mind that he represents neither party) and the decision of the Examiner.
- (d) As regards (b) and (c) above, it will often be apparent from the Letter of Request that it was instigated by one or other of the parties to the proceedings. In this case the application of the procedure prescribed in (b) and (c) will present no difficulty. In other cases, however, it may not be clear which of the parties has desired the evidence to be taken. Indeed it may be that the Letter of Request was initiated by the Foreign Court itself, of its own motion. It will then be difficult to decide whose witness the witness is and how to deal with any lawyers who may attend to represent the parties. In such cases the Agent must leave it to the Examiner to decide in what order to allow questioning by the lawyers, giving the Examiner such assistance as he can, if so desired.
- (e) It sometimes occurs that the witness is in fact a party to the proceedings. In this case the procedure for his examination will nevertheless follow the pattern set out in (a), (b) or (c) above, according to circumstances.
- (f) Occasionally, it may happen that a lawyer attends with or without prior warning, to watch the interests of the witness, even though the witness is not a party to the proceedings. The lawyer may even be instructed by someone else, e.g., the witness's employer, who anticipates that he may become implicated in the dispute and wishes to observe the progress of the examination. Such lawyer may be permitted to be present, provided that he does not participate in the examination but attends purely in a "watching" capacity. There may, however, be exceptional circumstances where the lawyer may indeed be allowed to intervene, e.g., to claim "privilege" in respect of a document or in respect of a certain aspect of the witness's oral evidence.
- (g) The Senior Master has decided, with the agreement of the Bar Council, that foreign lawyers have a right of audience at these examinations. Under certain Conventions, e.g., that with Norway, there are provisions for the lawyers to the parties to attend and put questions *viva voce*. In such cases the questions are not set out fully in the Letter of Request, but only the subject-matter of the dispute.

English translations of Letters of Request

14. The Foreign text of the Letter of Request will always be accompanied by an English translation, certified by the Court or country of origin to be an accurate translation.

Nevertheless the translation may contain ambiguities or inaccuracies. If there is any question of obtaining a better translation, the Treasury Solicitor will, if such a translation is essential, return the papers to the Senior Master with a request that he should take the matter up through the appropriate channels with the Court or country of origin.

Admissibility

15. The English Court will ordinarily give effect to Letters of Request so far as it is proper and practicable and to the extent that it is permissible under English Law. The right of a witness to claim privilege under either English Law or the Law of the requesting Court is preserved. Evidence can only be taken in the "English mode" but this does not mean that it should be limited to what is admissible in English Courts. The Foreign Court should be afforded the fullest possible help and questions should be admitted which may reasonably be expected to throw light upon the matters in issue without a strict regard to English rules of admissibility.

Refusal to answer when liable to answer

16. Where a witness refuses to answer any questions which he is liable to answer, he should be informed that it will be for the Senior Master to decide whether an application should be made to a Judge in Chambers for an Order compelling him to answer. The examination should, however, be completed in all other respects and adjourned sine die. The Agent should then report the matter to the Treasury Solicitor who will take it up with the Senior Master for him to decide whether or not an application should be made to a Judge.

Enforcing attendance of witnesses

17. Sometimes difficulty is experienced with regard to getting the witness to attend for examination. The Order directing the witness to attend for examination will be endorsed with a penal notice. No steps should be taken to enforce the attendance of the witness, without the prior approval of the Treasury Solicitor.

Evidence not under oath

18. Where the Letter of Request intimates that the evidence is not required under oath, it will be for the Master who makes the Order to decide whether this is permissive or mandatory.

In a case where the Master has decided that the evidence should not be taken on oath the words "upon oath or affirmation" will be struck out from the usual form of Order, High Court Form No.93 in the Civil Procedure Forms Volume, and after the words "... according to the rules and practice of Her Majesty's High Court of Justice pertaining to the examination and cross-examination of witnesses" there will be added "save that the evidence is not to be taken upon oath or affirmation".

Provision of witness statements

19. A deponent who has had his evidence recorded by an examiner and who asks for a copy of his statement and who is prepared to pay for the document to be copied should be permitted to have a copy.

The parties and their solicitors are by their submission to the jurisdiction of the Foreign Court bound by the practices and procedures of that court and accordingly should seek a

Appendix E: Video Conference Instructions

REQUESTS FROM EU MEMBER STATES FOR WITNESS EVIDENCE TO BE TAKEN BY VIDEO CONFERENCE

1. Requests from EU Member States (except Denmark) may be made for evidence to be taken in England and Wales under Council Regulations (EC) No 1206/2001, which governs the taking of evidence in civil and commercial matters – a copy is attached for reference. This includes the taking of evidence by videoconference where that is available. Despite the title of the Regulation evidence may be sought for family or civil proceedings. Over the coming months courts with video conferencing facilities may expect to receive a request for a videoconference for evidence taking purposes. This Business Information item sets out what is expected of:
 - The court of the Member State requesting evidence by video conference (the requesting court),
 - the Central Body (for England and Wales this is the Foreign Process Section at the Royal Courts of Justice (RCJ)
 - the courts in England and Wales that can accept requests from other Member States under the Regulation – the RCJ, Birmingham Civil Justice Centre, Bristol County Court, Cardiff Civil Justice Centre, Leeds County Court and Manchester County Court (the receiving courts)
 - courts in England and Wales with video conferencing facilities (video conferencing courts).

2. The requesting court will provide:
 - in writing the agreement of the witness of his willingness to provide evidence by video conference;
 - a contact number for the witness
 - details of at which court at which the witness wishes to give evidence (the requesting court will be given a list of courts with the necessary equipment);
 - the language in which the evidence will be taken (it is for the requesting court to deal with any translation issues);
 - arrange for payment for the video conference – see Article 18 of the Regulation the only costs that can be levied from the requesting court are fees paid to experts and interpreters and Article 10 the use of communications technology including video conferencing and any special procedure e.g. about tests etc.
 - contact details for resolving problems in relation to the video conference

Note that any evidence given must be on a voluntary basis. The requesting court will send this information together with a request form A or I from the Regulation to the receiving court.

3. The receiving court will, if the request is rejected, inform the requesting court accordingly – the video conferencing courts will not be involved. If the request is agreed the receiving court will
 - complete and send once copy of form J of the Regulation to the requesting court;
 - send a copy of the form and a letter to the court at which the videoconference is to take place.
4. The copy form is sent to the video conferencing court so that the switchboard and any relevant official (listing officer, diary manager, videoconference technician etc.) are alerted to expect a call from the requesting court to arrange the videoconference. It is possible that the arrangements may be made by letter and the post opening team should be made aware of this.
5. The video conferencing court, on receipt of the requesting court's call or letter, will agree arrangements for the video conference which should, except with the provisions outlined in this item, be made in accordance with Annex 3 of Practice Direction 32. In particular the video conferencing court may wish to verify:
 - the language for the video conference
 - that any necessary translators are available;
 - whether an oath is to be administered and if so if there are any special features;
 - that the requesting court is aware that they must pay for the facility and the cost scales;
 - whether the witness has any special requirements e.g. wheelchair access, a loop system etc.
6. An Usher will be needed to:
 - Receive the witness;
 - Sit the witness down;
 - Explain the process and give the witness any papers;
 - Switch on the machine and;
 - Swear the witness in;
 - Provide the appropriate book upon which the Oath is to be taken.
7. There should be no need for an English or Welsh Judge to be present when the evidence is taken and the number of these requests is thought to be few.

Problem solving

8. The witness does not appear. The video conferencing court should inform the requesting court accordingly.
9. The witness subsequently arrives. The video conferencing court should inform the requesting court accordingly.
10. The Regulation specifies that the giving of evidence is voluntary. A witness can decide not to give evidence at any point of the videoconference. Advise the requesting court accordingly.
11. The witness wants a lawyer present – this is permissible, but the requesting court should be advised accordingly.
12. The witness wants an interpreter – this is permissible. The requesting court will be responsible for any costs incurred.
13. Oaths, time zones, recording equipment etc. are dealt with in Annex 3 of Practice Direction 32.

