Rules of evidence (including cross-border evidence) in civil proceedings Q&A: UK (England and Wales)

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This resource is affected by Brexit. Although the UK left the EU on 31 January 2020, the UK will continue to be treated for most purposes as if it were still an EU member state during the transition period, and most EU law (including as amended or supplemented) will continue to apply to the UK (see *Brexit essentials: Q&As on agreements, timeframes and no deal: What happens during the transition period?*). This will mean, for example, the continued participation of the UK in the EU customs union and single market, the continued application of the four freedoms, and the continued application of the usual EU supervisory, judiciary and enforcement mechanisms, including CJEU jurisdiction.

The transition period will end on 31 December 2020 unless extended for up to one or two years before 11.00 pm (UK time) on 30 June 2020. Accordingly, the guidance contained in this resource remains materially valid and applicable. For more information, see *Practice notes, European Union (Withdrawal Agreement) Bill: Transition period*, *Brexit: transitional arrangements*, *Practice note, Brexit: implications for civil justice and civil co-operation* and *No deal Brexit: Civil justice and judicial co-operation: quick guide*. Some guidance on what might be the situation at the end of the transition period, and a basic summary on what happens at that point is to be found in *Brexit essentials: Q&As on agreements, timeframes and no deal: What happens at the end of the transition period?*

This Q&A provides an overview of the rules of evidence in civil proceedings, including rules on the disclosure obligations of the parties, admissibility of evidence, witness evidence, the standard of proof, as well as issues that arise in gathering cross-border evidence.

This Q&A provides country-specific commentary on *Practice note, Rules of evidence: a cross border overview*, and forms part of *Cross-border dispute resolution*.

Part 1- Rules of evidence in domestic proceedings

1. What are the main sources of the rules of evidence that regulate civil proceedings in your jurisdiction?

The Civil Procedure Rules (CPR), in particular Parts 31 to 35 and their accompanying Practice Directions (PDs), in addition to the Civil Evidence Acts of 1968, 1972 and 1995.

For proceedings that issued in the Business & Property Courts, a new disclosure pilot scheme (DPS) is currently operational until 31 December 2020. This is a new regime for disclosure and operates under PD51U. Brief references to the DPS will be made in this Q&A where relevant. For more information on the details of the scheme see *Toolkit, Disclosure Pilot Scheme*.

> 2. What are the discovery/disclosure obligations, if any, of the parties in relation to civil proceedings? What is the role of the courts in the evidence-taking process in your jurisdiction? Are there any other procedures in place for obtaining evidence from an adverse party and third parties?

Disclosure/discovery obligations

The obligations fall into two stages: disclosure and inspection (*CPR 31*).

Disclosure
A party must disclose documents which are or have been in its control (*CPR 31.8*) and which fall within the scope of the court's disclosure order (*CPR 31.5*). A party discloses a document by stating that it exists or has existed (*CPR 31.2*). The standard procedure is for each party to make and serve a list of documents on the other, using form N265 (*CPR 31.10*). The list must include a disclosure statement which:

- Sets out the extent of the search that has been made to locate documents which the party is required to disclose.
- Certifies that the party understands the duty to disclose documents.
- Certifies that to the best of its knowledge the party has carried out that duty.

For the purposes of disclosure, a "document" means anything in which information of any description is recorded (*CPR 31.4*) and extends to electronic documents. In Practice Direction 31B, para.1, "Electronic document" means any document stored in electronic form, including email and other electronic communications such as text messages, voicemail, word-processed documents, databases, documents stored on memory sticks and mobile phones, as well as documents stored on servers and back-up systems, Metadata and other embedded data.

A document will be considered within a party's control if:

- It is or has been in that party's physical possession.
- If that party has or had a right to possession of the document.
- If the party has or had a right to inspect or take copies of the document.

(*CPR 31.8.*)

An order for standard disclosure will require a party to disclose documents:

- On which they rely.
- Which adversely affect their own or another party's case or which support another party's case.
- Which they are required to disclose by an applicable PD.

(*CPR 31.6.*)

A party must disclose all the documents on which they intend to rely, but is only required to undertake a "reasonable search" for documents which fall within the second or third bullet points above (*CPR 31.7*).

A party need only disclose one copy of a document, but a copy which contains a modification, obliteration or other marking or feature which itself falls within the scope of the disclosure order must be treated as a separate document (*CPR 31.9*) (for example, a modification which adversely affects their own or another party's case, or which supports another party's case).

The parties in multi-track cases (generally, complicated claims with a value of GBP25,000 or more) are subject to additional obligations in relation to disclosure. Parties must file and serve a disclosure report not less than 14 days before the case management conference (CMC). The report should describe:

- What relevant documents exist or may exist.
- Where and with whom those documents are or may be located.
- How any relevant electronic documents are stored.
- The estimated costs of giving standard disclosure in the case.
- Which directions in relation to disclosure will be sought from the court.

(*CPR 31.5(3).*)

Inspection
The general rule is that a party has a right to inspect any document disclosed to it. There are three exceptions to this rule (*CPR 31.3*):

- Where the party disclosing the document has a right to withhold inspection of it. This will be the case where the document falls under a recognised type of legal professional privilege or without prejudice privilege. The disclosure list must indicate those documents in respect of which the party claims a right or duty to withhold inspection (*CPR 31.10(4)(a)*).
- Where the document is no longer in the control of the party who disclosed it. In this case the party should include in its disclosure list a description of those documents and what has happened to them (*CPR 31.10(4)(b)*).
- Where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents disclosed because they adversely affect their own or another party's case or which support another party's case. In this case the party must state in their disclosure statement that inspection of those documents would be disproportionate (*CPR 31.1(2)(b)*).

For more information on legal professional privilege see *Country Q&A, Legal privilege, confidentiality and professional secrecy Q&A: UK (England and Wales)*.

Role of the courts in evidence-taking process
The court will make a directions order (normally following a CMC) setting out which steps must be taken by the parties and when, in the run-up to the trial (*CPR 29.2*). This order will include provisions for the submission of evidence; for example, the dates by which witness statements and expert reports must be exchanged and filed.

The court has the discretion to limit or exclude otherwise admissible evidence (see *Question 5*).

At the trial, the judge will generally not adopt a major role in the giving of oral evidence by witnesses of fact and expert witnesses. This is chiefly undertaken by counsel for the parties, although the judge is free to ask questions at any point.

The Disclosure Pilot Scheme (DPS)

The DPS is a new scheme of disclosure and is independent of CPR 31 (apart from a few exceptions). It operates under PD51U.

The aim of the DPS is reduce the amount of disclosure provided by the parties and, as a result, the costs which are incurred during this aspect of the litigation process. Parties must consider disclosure at an earlier stage of the action than before and co-operate with the other side to agree a list of issues, thereby reducing the amount of disclosure given and the resulting costs. The pilot is designed for use in cases which have huge amounts of electronic data and technology assisted review. The scheme is under review and parties are urged to give feedback but the content and process is not expected to change dramatically when the pilot ends in December 2020.

Under the DPS the concept of standard disclosure has been removed; instead there is Initial Disclosure and Extended Disclosure using five different models. The parties are expected to agree a model for each issue in dispute. The models range from disclosure limited to a party's known adverse documents to a full chain of enquiry type discovery. The court will approve the models chosen at a case management conference. Parties are no longer expected to file a disclosure report but instead complete a disclosure review document together.

For more information on the details of the DPS, see *Practice note, The Disclosure Pilot Scheme in the B&PCs: some FAQs* .

Other mechanisms to obtain disclosure from an adverse party and third-parties

Mechanisms to obtain disclosure from adverse parties
Specific disclosure

If one party considers that the disclosure given by the other is inadequate, that party can apply to the court for an order for specific disclosure (*CPR 31.12 and PD 31A.5.1*). The court can grant an order under CPR 31.12, requiring a party to do one or more of the following:

- Disclose documents or classes of documents specified in the order.

- Carry out a search to the extent stated in the order.
- Disclose any documents located as a result of that search.

An application for specific disclosure should be made on Form N244 and should specify the documents or classes of documents sought as precisely as possible. The court will not agree a request that it views as a "fishing expedition". The applicant should explain why the documents are relevant to the issues of the case and why it is proportionate for them to be disclosed. The application should be supported by evidence, for example, of the applicant's grounds for believing that the documents sought exist and are within the respondent's control.

When considering whether to make the requested order, the court will take into account all the circumstances of the case, giving particular regard to the overriding objective (*PD 31A.5.4*). The overriding objective is the guiding principle to be followed by the English civil courts; essentially, that the court should deal with every case justly and at proportionate cost to both its value and its complexity.

Specific inspection

A party may apply for an order for specific inspection in two sets of circumstances:

- Where the disclosing party has identified a class of documents in its disclosure list but asserts that it will not allow inspection because it would be disproportionate to do so. The party to whom disclosure is being provided may challenge this assertion by applying to the court for an order permitting inspection of the document(s) under CPR 31.12(3). In the event that Party A wishes to challenge Party B's assertion that Party B has a right to withhold inspection of a document on the grounds of privilege, Party A may apply to the court to decide whether the claim to privilege should be upheld (*CPR 31.19(5)*).
- A party can also apply to the court to make an order for specific inspection based on its general case management powers under CPR 3.1.

Pre-action disclosure

CPR 31.16 gives the court express power to make an order for disclosure before proceedings have started, provided the application is supported by evidence and that all the following points apply:

- The respondent is likely to be a party to subsequent proceedings.
- The applicant is also likely to be a party to those proceedings.
- The documents sought would fall under the respondent's duty under standard disclosure.
- Disclosure before proceedings have started is desirable to:
    - dispose fairly of the anticipated proceedings;
    - assist the dispute to be resolved without proceedings; or
    - save costs.

Commonly, (though the court has discretion to vary this general rule) the applicant will be expected to pay the respondent's costs of:

- The application.
- Compliance with any order made.

(*CPR 46.1.*)

Mechanisms to obtain disclosure from third parties
Standard non-party disclosure

CPR 31.17 covers applications for disclosure by a person who is not a party to the proceedings (in relation to proceedings which are already in progress). Orders under this rule can only be made where both:

- The documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings.
- Disclosure is necessary in order to dispose fairly of the claim or to save costs.

(*CPR 31.17(3).*)

The list of documents sought must be sufficiently clear and specific, and the application must be supported by evidence. The general rule as to costs for applications for non-party disclosure is that the respondent will be awarded their costs of the application and of complying with the order (*CPR 46.1*).

Pre-action, non-party disclosure

CPR 31.18 expressly preserves the court's powers to make an order for disclosure against a party who is not a potential party to the proceedings, before proceedings have started. Such a disclosure order is made under the equitable jurisdiction of the court and is often known as a "Norwich Pharmacal" order (named after the claimant in a case where this form of order was established).

An application for a Norwich Pharmacal order is traditionally made in a situation where a party:

- Knows that wrongdoing has taken place against it.
- Does not know the identity of the ultimate wrongdoer.
- Can identify a third party who does know the identity of the ultimate wrongdoer.

The application is therefore made against the third party, seeking disclosure of the identity of the wrongdoer to enable the applicant to issue substantive proceedings against them. The order may be made against a party who is mixed up in, or is involved in the wrongdoing, whether innocently or not.

The applicant has a duty of full and frank disclosure to the court, such that the applicant must disclose all matters material to the court in deciding whether to grant an order and, if so, on what terms, and the general rule is that the applicant will be ordered to pay the respondent's legal costs of the application and the costs of complying with the order.

There is no clear rule as to whether a Norwich Pharmacal order can be obtained against a respondent in a foreign jurisdiction. It is in the court's discretion to decide whether such an order can be made in the circumstances before it. It may be more appropriate for parties seeking information from third parties based abroad to look to local law and procedure for assistance.

3. What are the rules of evidence regarding the burden or standard of proof in civil proceedings in your jurisdiction? Can the court draw any adverse inferences from failure to give evidence at trial?

Burden or standard of proof in civil proceedings

The standard of proof applied in all English civil cases is the balance of probabilities. In practice, this means that a litigant must adduce enough evidence to convince the court that the facts in issue on which the litigant relies are more likely to have occurred than not.

In most civil claims in the English courts, the burden of proof is on the claimant to establish the claim. One notable exception is in defamation claims, where the claimant only has to assert that a defamatory statement has been published and that it caused the claimant serious harm.

Adverse inferences for failure to give evidence at trial

The legal principles applicable to drawing adverse inferences from the failure of a witness to give evidence at trial have been summarised (by Brooke LJ in *Wisniewski v Central Manchester Health [1998] PIQR P324*), as follows:

- In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
- If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
- There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference, in other words, there must be a case to answer on that issue.
- If the reason for the witness’s absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of their absence or silence may be reduced or nullified.

4.Can challenges be made to the admissibility of evidence in courts? On what grounds? At what stage of the proceedings, can such challenges be made? Are there any exclusionary rules that permit parties to refuse to disclose a document or that prevents them from using certain types of evidence?

Applications to challenge the admissibility of evidence

Grounds

The main bases for challenging the admissibility of evidence are as follows:

- The evidence is not relevant.
- One of the exclusionary rules applies to the evidence (see below).
- The documents are privileged (see below).
- The evidence should be excluded under CPR 32.1 for case management reasons because of the overriding objective to deal with cases justly and at proportionate cost.

When to apply

Issues regarding admissibility of evidence can be considered by the judge at trial or at an earlier preliminary hearing. Usually such applications are dealt with by the trial judge.

Exclusionary rules of evidence

Opinion

The general rule is that a witness in civil proceedings should give evidence of facts and not of opinions. The two exceptions to this rule are contained in section 3 of the Civil Evidence Act 1972:

- A witness may give their opinion on a relevant matter on which they are qualified to give expert evidence.
- A witness may give a statement of opinion as a way of conveying relevant facts personally perceived by them, and it will be admissible as evidence of what they perceived.

Hearsay

The previous common law rule against the admission of hearsay evidence was effectively abolished by section 1(1) of the Civil Evidence Act 1995 (CEA). The CEA defines "hearsay" as,

"a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated." (See *Practice note, Hearsay evidence in civil litigation*.)

Nevertheless, certain safeguards remain in place under sections 2 to 4 of the CEA with respect to the use of hearsay evidence. These safeguards include notifying the other party of the intention to use hearsay evidence, and that the court is able to assess the circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence in estimating the weight (if any) to be given to it.

Privilege
A party should disclose all documents within their control that fall within the scope of standard disclosure. However, they will be able to refuse to permit inspection of documents which are legally privileged. See *Country Q&A, Legal privilege, confidentiality and professional secrecy Q&A: UK (England and Wales)*.

5. Do the courts in your jurisdiction have any discretion to exclude the admission of a document that is otherwise admissible?

Discretion of court to exclude evidence

The court has discretion to exclude otherwise admissible evidence under CPR 32.1(2). Under this rule, the court may control the evidence by giving directions as to:

- The issues on which it requires evidence.
- The nature of the evidence which it requires to decide those issues.
- The way in which the evidence is to be placed before the court.

More specifically, under CPR 32.2(3), the court may give directions:

- Identifying or limiting the issues to which factual evidence may be directed.
- Identifying the witnesses who may be called or whose evidence may be read.
- Limiting the length or format of witness statements.

There is no express limit on the court's discretion to control evidence, but it should be exercised in support of the overriding objective of enabling the court to deal with cases justly and in proportion to the costs involved and the complexity of the issues (*Grobbelaar v News Group Newspaper Limited, CA, 9 July 1999*).

6.Do witnesses of fact give oral evidence or can they submit written evidence, for example, a witness statement or an affidavit made under oath? What are the requirements for presenting written evidence? Do courts permit a witness to be cross-examined and re-examined by the lawyers?

Witness evidence – Oral and written

Requirements for the content of written evidence (witness statement or affidavit)
Witness statement

Witness statements are the standard form in which evidence is given in civil proceedings. The requirements for the format of a witness statement can be found in PD 32.17 to 32.25. These include (but are not limited to) the requirements that:

- The full name, address and occupation of the witness should be included.
- Formalities as to exhibits should be followed (found in PD 32.18.3 to 32.18.6).
- It is fully legible and typed on one side of the paper only.
- It has consecutively numbered pages.
- It has all dates expressed in figures.
- It is in the witness's own words.
- A statement should be included which confirms that the witness believes that all the facts in the witness statement are true (the "statement of truth").

CPR 32.14 provides that proceedings can be brought for contempt of court against a person if they make, or cause to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Affidavit

An affidavit is required in place of a witness statement in the following circumstances:

- If specifically required by the court, CPR or a PD.
- In an application for a search order.
- In an application for a freezing order.
- In an application for contempt of court.

(*PD 32.1.4.*)

The requirements for a valid affidavit can be found in PD 32.1 to 32.16 and closely follow the requirements for drafting witness statements. The key points of difference are:

- There are certain requirements as to the form of the heading (*PD 32.3*).
- The deponent must show in the affidavit whether they are a party to the proceedings or employed by a party to the proceedings (*PD 32.4.1(4)*).
- There are specific requirements as to how exhibits should be referenced (*PD 32.4.3*) and how to exhibit documents (*PD 32.11–32.15*).
- An affidavit should include a "jurat", which is a statement set out at the end of the document authenticating the affidavit. It must be signed and dated by the deponent and following immediately on from the text above it (that is, not on a separate page) (*PD 32.5.2*).

Oral evidence in support of written evidence

Whether or not witness evidence is to be written or oral depends on the type of hearing at which the evidence is to be used. CPR 32.2(1) provides that if the witness' evidence is to be used at a trial, the evidence should be oral and given in public. At any other hearing, the evidence should be given in writing.

At trial

Generally, the court will order a party to serve on the other parties a witness statement of the oral evidence which the serving party intends to rely on in relation to any issues of fact to be decided at trial. The witness statement contains the evidence which the witness would be allowed to give orally (*CPR 32.4*).

The party must still call the witness to give oral evidence unless either:

- The court directs otherwise.
- The party put the statement in as "hearsay evidence".

Where the witness is called to give oral evidence, their witness statement will stand as their evidence in chief unless the court orders otherwise (*CPR 32.5(2)*). This means that the witness is not taken through their evidence line by line by their own side's advocate; rather, the witness merely confirms that it is their evidence, signed by them, and will be asked to correct any errors that have come to light since signing it.

The witness is only allowed to amplify their statement or give evidence in relation to new matters with the permission of the court (*CPR 32.5(3)*). Permission is only granted where there is good reason not to confine the evidence of the witness to the contents of their witness statement.

The witness can be cross-examined on anything in their witness statement, whether or not it was referenced in their evidence in chief (*CPR 32.11*).

At other hearings

CPR 32.6 provides that the general rule is that evidence at a hearing other than the trial is to be by witness statement, unless the court, a PD or any other enactment requires otherwise. Examples of hearings other than a trial will include, among others:

- Hearings of summary judgment applications.

- Applications to extend time.
- Applications seeking security for costs.

Where a party wants to cross-examine a witness at a hearing other than a trial, it may apply to the court for permission to cross-examine the witness. If the witness does not attend as required, this evidence cannot be used without the court's express permission (*CPR 32.7*).

Timing for filing written witness evidence
Parties can serve written evidence with an interim application at any time after proceedings have started.

In relation to witness statements to be relied on at trial, it is important that parties follow directions and orders given by the court. If a party is late in filing a witness statement, it will not be allowed to call that witness to give evidence unless the court gives permission to do so (*CPR 32.10*).

The parties may also agree to extend the time period for filing witness statements by up to 28 days, provided a hearing date is not threatened as a result (*CPR 3.8(4)*).

If a party wishes to adduce further evidence after the time for filing the original evidence has expired, that party must apply to the court for permission to rely on the additional evidence.

Evidentiary value of witness evidence
In general, contemporaneous documentary evidence can be preferred over witness evidence relating to the same events occurring in the past. However, this is fact-specific and it is for the judge to assess both types of evidence and make a decision as to its value. A witness statement is generally the means of placing documentary evidence before the court at trial.

Cross-examination and re-examination

The evidentiary value of this is also considered on a case-by-case basis (see answer above).

7. Are witnesses immune from being sued for anything they say or do in their capacity as a witness? Can a witness be paid for giving evidence (for example, for their time and travel expenses)?

Witness immunity

Witnesses are protected from liability for things said or done:

- In the ordinary course of proceedings.
- Outside of court in preparing to give evidence (*Darker v Chief Constable of The West Midlands Police [2000] UKHL 44*).

Expert Witnesses

Expert witnesses owe their client a duty to act with reasonable skill and care. This duty must be balanced with their duty to the court. CPR 35.3 provides that it is the duty of experts to help the court on matters within their expertise; this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

The Supreme Court decision in *Jones v Kaney* abolished an expert witness's immunity from suit in respect of both their performance at trial and the contents of their expert reports (*[2011] UKSC 13*). However, an expert witness is still immune from claims against them by the opposing party (*Baxendale-Walker v Middleton & others [2011] EWHC 998 (QB)*).

Expenses

A solicitor is permitted to pay a witness:

- Reasonable expenses.
- Reasonable compensation for loss of time.
- Conduct money on service of a witness summons, to compensate for expenses incurred in attending court.

(*O(5.8) and IB(5.10), SRA Code 2011*.)

What amounts to "reasonable" compensation for loss of time is not clear from the case law. A solicitor must take care when dealing with witnesses demanding large sums of money for their testimony. The payment of a large sum may open a solicitor to personal criticism, alongside creating a risk that the judge will devalue a witness' evidence if the judge believes that the witness is being overpaid for their time.

It is not unusual for a witness who is an employee of a company to be paid their normal wages plus expenses while giving evidence on behalf of their employer.

A solicitor is not permitted to enter into an agreement with a witness that their pay will differ depending on the evidence they give (see *Energysolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC)*).

8. Do parties need to take any steps to certify the authenticity of documents before it can be admitted as evidence in court?

Documentary evidence - Certification of documents

A document can be adduced to court as two different forms of evidence:

- Real evidence (if it is produced as evidence that the document exists, or of the document's appearance).
- Documentary evidence (if it is produced to be used as evidence of its contents).

Either way, the document must be shown to be what it purports to be, by authentication. If it is relied on as documentary evidence, its contents must also be proved.

CPR 33.6 applies to evidence (such as a plan, photograph or model) which is not contained in a witness statement, affidavit or expert's report, evidence which cannot be given orally at trial or which is not hearsay evidence under rule 33.2. This evidence can only be used at trial where the party intending to put it in as evidence has given notice to all other parties. This notice must be given by the same date for serving witness statements, or if it forms part of an expert report, by the same date when the expert's report is served on the other party. Where a party has given notice that they intend to put in the evidence, they must give every other party an opportunity to inspect it and to agree to its admission without further proof.

If a party is seeking to rely on the document as proof of its contents, a hearsay notice under CPR 33.2 would also need to be served. To avoid any procedural deficiency, it is advisable to serve both notices.

Authenticity

A document is authenticated by being identified by a party as being what it purports to be. In practice, authenticity is often admitted, deemed or presumed. However, where authentication is required, it can be authenticated by:

- Proof of handwriting and signature.
- "Chain of custody" or "expert" evidence.

Deemed authenticity

The general rule is that a party is deemed to have admitted the authenticity of documents which have been disclosed to them, unless they take steps to dispute the documents' authenticity. This is achieved by serving notice that they would like the document to be proved at trial (*CPR 32.19*). The deadline for filing this notice is the last date for serving witness statements, or within seven days of disclosure, whichever is the later. (For an example of the application of CPR 32.19, see *Jones and another v Oven and another [2017] EWHC 1647 (Ch) at paragraph 14.*)

For documents which have not been disclosed under CPR 31, the parties should agree where possible that the documents contained in the trial bundle are authentic. If they cannot agree, they should inform the court. That way, it will be clear whether authenticity will need to dealt with prior to trial (see *Practice Note, Admissibility of evidence in civil proceedings: Deemed authenticity*).

Automatically authenticated documents

There are several types of document which are statutorily exempt from the need to be authenticated. These include certain public documents, records of a business or a public authority and ancient documents.

9. What measures can be employed under the rules of civil procedure in your jurisdiction to compel a witness who is not willing to give evidence in support of legal proceedings in your jurisdiction or abroad?

Unwilling witness

If a witness is unwilling to provide evidence, the party that wants to rely on that witness' evidence has two options:

- File a witness summary.
- Apply for a witness summons.

Witness summary

A witness summary (under CPR 32.9) is used where a witness statement is required but the party who would have given the witness statement is unable to do so. The summary identifies the witness and summarises the issues the evidence would have covered.

If a party wishes to use a witness summary, permission from the court must be sought (*CPR 32.9(1)(b)*). The application is made without notice.

In terms of format, the witness summary should follow the same format as a witness statement and include the witness' name and address.

The summary must be served within the period for service of the witness statement. If served late, the party wishing to rely on the summary will need to apply to the court for relief from sanctions (*CPR 3.9*) and for permission to use the summary.

In most cases, a witness summary will also need to be accompanied by a witness summons.

Witness summons

A witness summons is a document issued by the court requiring a witness either to:

- Attend court to give evidence.
- Produce documents to the court.

(*CPR 34.2.*)

The summons is binding if it is served at least seven days before the date on which the witness is required to attend the court. If the summons is served fewer than seven days before the hearing, it is possible for the court to direct that it is nevertheless binding (*CPR 34.5*).

A witness summons must comply with a number of requirements to be valid, including that:

- The summons must relate to an individual (that is, not a business).
- Any summons requiring a party to give oral evidence must be issued in good faith for the purpose of obtaining relevant evidence.
- Any summons relating to documents must identify the documents to which it relates, and those documents must be both admissible and relevant to the issues in the action.
- The documents requested must be in the actual possession or custody of the person to whom the summons is addressed.
- The request for documents must not be overly broad; it must be limited to what is reasonably necessary for fairly disposing of the issues in the action.

If a witness fails to comply with a witness summons, the consequence will depend on what court the matter is being heard in:

If the County Court, the witness may be liable to pay a fine of up to GBP1,000 (*section 55, County Courts Act 1984*).

If the High Court, the witness may be found to be guilty of contempt of court, which could result in committal or sequestration.

Any attempt to serve a witness summons outside English and Wales will not be binding.

The court has suggested that a witness summons may be used to retrieve information from a third party. In Richard v BBC and others, the court chose not to order third party disclosure, instead ordering the third party to either produce a witness statement providing a narrow class of information or to attend a hearing to provide information (*[2017] EWHC 724 (Ch)*).

10. Can courts in your jurisdiction appoint expert witnesses and, if so, what are the rules in this regard? Are parties allowed to appoint expert witnesses to present evidence in support of their case? How is expert evidence presented in the court?

Appointment of expert witnesses

Court experts
No party is able to call an expert or put in an expert's report without the court's permission (*CPR 35.4*).

Generally experts are appointed by the parties.

CPR 35.7 provides that, where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.

When considering whether to direct that expert evidence be given by a single joint expert, the court will take into account all the circumstances including whether:

- It is proportionate to have separate experts for each party.
- The instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost effective way than separately instructed experts.
- Expert evidence is to be given on the issue of liability, causation or quantum:
    - the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute, or there is likely to be a range of expert opinion;
    - a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any PD or relevant pre-action protocol;
    - questions put to the expert are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;
    - questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;
    - a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and
    - a claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

(*PD 35.7.*)

Generally, the single joint expert will be agreed between the parties, but if the parties are unable to agree then the court may give directions as to how the expert is to be selected or even select an expert itself.

If a single joint expert is appointed, the court may give directions about the payment of the expert's fees and expenses (*CPR 35.8*).

Party-hired experts
No party is able to call an expert or put in an expert's report without the court's permission (*CPR 35.4*).

In advance of the first CMC, a party will complete a directions questionnaire (DQ). In the DQ the parties are asked to set out whether they require expert evidence, the issue the party would like the expert to consider, and if known, the name of the expert they would like to instruct. A court may agree to this request at the CMC, if the other party has not previously consented to this.

The court is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (*CPR 35.1*).

Fees of a court-appointed expert

If a single joint expert is appointed by the court, the court may give directions as to how payment will be split. Often this will be shared between the parties.

Expert fees in the small claims track cannot exceed GBP750 (*PD 27.7*).

Role of party-appointed and court-appointed experts

The expert's overriding duty is to the court. This duty overrides any obligation that an expert may have to the instructing client.

Any evidence given by an expert should be the independent product of the expert and should not be influenced by the pressures of litigation. The expert is expected to assist the court by providing objective, unbiased opinion on matters within their expertise, and should not assume the role of an advocate or lawyer. Experts should make it clear when a question or issue falls outside of their expertise or if they are not able to reach a definitive opinion (*PD 35.2*).

Presentation of expert evidence- oral or written

CPR 35.5 provides that expert evidence is to be given in a written report unless the court directs otherwise. If a claim has been allocated to the small claims track or the fast track, the court will not direct that an expert should attend a hearing unless it is necessary to do so in the interests of justice.

Guidance is given in CPR 35.10 and PD 35 as to what should be included in an expert's report. The primary requirements are that the report must:

- Give details of the expert's qualifications.
- Give details of any literature or other material on which the expert has relied in making the report.
- Contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or on which those opinions are based.
- Make clear which of the facts stated in the report are within the expert's own knowledge.
- Contain a statement that the expert understands and has complied with their duty to the court.
- State the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- Where there is a range of opinion on the matters dealt with in the report, summarise the range of opinions and give reasons for the expert's own opinion.
- Contain a summary of conclusions reached and, where relevant, state any qualification necessary for those conclusions.
- Include a statement of truth in a particular form.

(*PD 35.3.*)

Part 2- Overseas evidence in domestic proceedings

11. What are the requirements for an application to obtain witness or documentary evidence abroad? Are there any rules relating to the admissibility of evidence obtained from outside the jurisdiction (for example, issues of hearsay in relation to witness evidence, and certification/authentication of documentary evidence)?

General requirements

Jurisdiction and relevant law

Letters of request between the various jurisdictions within the United Kingdom (that is, England and Wales, Scotland and Northern Ireland) are governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (EPOJA).

When the English court receives a letter of request from a non-EU court, EPOJA applies to the English court's handling of the request.

Where a letter of request is sent from a requesting court in one EU member state to a receiving court in another member state, the Taking of Evidence Regulation (the Regulation) applies (except in cases involving Denmark).

The Regulation only applies to civil and commercial matters and applies both where the requesting court asks the receiving court to take the evidence, and where the requesting court seeks to take the evidence directly in the other member state.

Where the procedures set out in the Regulation are followed, the Regulation applies whether the request is initiated by a party or by the court, and it applies to proceedings for interim measures, as well as substantive proceedings (*ProRail BV v Xpedys NV and others (Case C-332/11)*).

The Regulation continues to apply now that the UK has left the EU until the end of the transitional period on 31 December 2020, unless it is extended. If the UK and the EU are unable to agree a replacement to the Regulation, the EPOJA will apply to any request received from a remaining EU state at the end of the transitional period.

Under the UK-EU withdrawal agreement there is a post-Brexit transition period which, unless extended, will run until 31 December 2020 (see *Practice note, UK-EU withdrawal agreement: transition text: Duration of transition period and extension*). This will mean, for example, the continued participation of the UK in the EU customs union and single market, the continued application of the four freedoms, and the continued application of most EU law (including as amended or supplemented) and of the usual EU supervisory, judiciary and enforcement mechanisms, including CJEU jurisdiction. Consequently, for the most part, the commercial impact of Brexit will be delayed until expiry of this transition period (see *Practice note, Brexit essentials: Q&As on agreements, timeframes and no deal*).

Form/Application along with the documents

In England and Wales, an application for a letter of request is made to the High Court, even when the evidence is sought for County Court proceedings (*CPR 34.13*).

The application should be made on notice under CPR 23 (*PD 34A.5*). Practice form N244 may be used.

The application will be dealt with by the Senior Master of the Queen's Bench Division of the High Court.

The documents to be enclosed with the application

The application should include the following documents:

- A draft letter of request in the form set out in Annex A to PD 34A. A statement of the issues relevant to the proceedings.
- A list of questions or the subject matter of questions to be put to the proposed deponent.
- A translation of the above documents, unless the proposed deponent is in a country of which English is an official language or a PD has specified that country as a country where no translation is necessary.
- An undertaking to be responsible for the expenses of the Secretary of State.

(*PD 35A 5.3.*)

In addition to the documents listed above, the party applying for the order must file a draft order.

Once an order has been made, it is presented (as a further application to the Senior Master) at the Foreign Process Section (Room E16) at the Royal Courts of Justice, together with an undertaking for costs in the prescribed form (see Form PF78QB).

The Senior Master must sign off on the letter of request before transmission. Once that has been done the letter of request will be passed to the Foreign & Commonwealth Office for onward transmission to the receiving court. However, where the matter is urgent, it may be sent directly to the relevant court.

Note that if the evidence is required from a person within the jurisdiction of a US District Court then it may be possible to use a provision called section 1782 of title 28 of the US Code. This approach bypasses diplomatic channels and so obtaining the evidence required may be quicker and more direct.

Notice requirements
The application notice and supporting documents must be served on all parties as soon as is practicable after the application has been issued (*PD 23.4.1*).

Grounds
The English court has discretion whether to issue a request. The court will want to avoid delay, expense and inconvenience. In deciding whether to exercise its discretion, the court may consider, among other things:

- The relevance of the evidence sought.
- The health of the witness.
- The cost of obtaining the evidence.

- Whether providing the evidence sought would be illegal under the law of the receiving court.
- The court will consider whether the exercise of obtaining the evidence is likely to be, disproportionate in terms of cost, time and disruption to the benefit to be obtained.

Costs and expenses
The fee for the application is GBP100.

If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.

An examiner of the court may charge a fee for the examination (*CPR 34.14*). The examiner need not send the deposition to the court unless the fee is paid. The examiner's fees and expenses must be paid by the party who obtained the order for examination. If the fees and expenses due to an examiner are not paid within a reasonable time, the examiner may report that fact to the court.

The court may order the party who obtained the order for examination to deposit in the court office a specified sum in respect of the examiner's fees and, where it does so, the examiner will not be asked to act until the sum has been deposited.

Application and procedure irrespective of the applicable international instruments (if any)
The application and procedure set out above applies irrespective of whether or not an international convention applies (although there are slight differences where The Taking of Evidence Regulation applies; see *Part 4 – Legal framework governing cross-border evidence*).

While an English court may, in principle, issue a request to a court in a country with which the UK has no treaty relationship, a party seeking the issue of such a request should consider whether the receiving court is likely to comply with the request in the absence of any treaty obligations and, if so, how long it will take. Local law advice should be sought.

Admissibility of overseas evidence

There are no specific rules in the CPR regarding the admissibility of evidence obtained overseas. The judge will consider the evidence in the same way as evidence obtained in England and Wales, and will decide whether to allow it to be admitted (based on whether the correct application and procedure was followed to obtain it), and what weight should be allocated to it. For example, if a witness is able to provide a witness statement but is unable to attend trial, an application to the court should be made to adduce the statement as hearsay evidence. The judge will then decide the weight to be given to the evidence.

12. How can evidence be obtained from a witness who is willing to give evidence in support of legal proceedings in your jurisdiction, but is unable to (or not required to) attend trial? Do local laws in your jurisdiction permit evidence to be given by video-link, videoconference or depositions?

Willing witness (unable to travel)

It is possible to arrange for evidence to be given by video link or deposition.

The general rule is that witnesses should give their evidence at trial, orally and in public, subject to any order of the court, but the court has a discretion to order evidence to be taken by deposition before trial, or by video link (see below).

If a witness is unable to travel, a letter of request can ask for production of documents rather than oral evidence.

Video-link, teleconference or depositions

Video conferencing

CPR 32.3 provides that the court may allow a witness to give evidence through a video link or by other means. Annex 3 to PD 32 contains guidance on the use of video conferencing in the civil courts, especially in situations where the witness is located abroad.

Depositions

CPR 34.8 allows any party to apply for an order for a person to be examined before the trial. The court has discretion and there is no general rule as to when it should be exercised. The primary purpose is to obtain evidence from a witness whom it would be impossible to bring to the trial.

The evidence obtained is referred to as a deposition. The order will provide for examination before a judge, or an examiner of the court. It must be conducted in the same way as if the witness were giving evidence in court, and will therefore normally include cross-examination. The deposition may then be given in evidence at the trial. CPR 34.13 provides for the court to issue a letter of request to the judicial authority of the foreign country to arrange for the examination where the witness is in a foreign country.

Part 3- Evidence (within local jurisdiction) for use in foreign proceedings

> 13. Are there any national rules or laws, either in support of an international instrument or otherwise, that regulate the collection of evidence within your jurisdiction in support of foreign litigation? Can these be directly relied on to obtain evidence on the application of any interested person (without recourse to any diplomatic channels)?

National rules on collection of evidence in support of foreign litigation

The taking of evidence in the English courts from residents in England and Wales is largely governed by:

- CPR 34.22 to 34.23.
- PD 34.
- EPOJA (this governs the powers of the courts in England and Wales, Scotland and Northern Ireland to act in aid of each other and in aid of a court outside the UK).
- *Treasury Solicitor: Guide to Letters of Request (June 2007)* (the TSol Guide).
- European legislation; specifically, guidance contained in:
    - the European Commission's report on the application of the Taking of Evidence Regulation dated December 2007;
    - the European Parliament, Resolution on co-operation between the courts of the member states in the taking of evidence in civil and commercial matters (*INI/2008/2180*); and
    - the *European Commission: Practice guide for the application of the regulation on the taking of evidence*.

Following *ProRail BV v Xpedys NV and others,* courts are encouraged and happy to receive requests direct from courts of EU member states without recourse to the Taking of Evidence Regulation if it is simpler, more effective and quicker to do so *(Case C-332/11*).

Direct application

EPOJA governs the process national courts should follow on receipt of a request for evidence, whether from another jurisdiction within the United Kingdom (for example, a Scottish court to an English court) or between states (for example, a US court to an English court). EU member states can choose whether to make requests under the Taking of Evidence Regulation or under national legislation.

> 14. What is the procedure to enforce a request from a foreign court for witness/documentary evidence in your jurisdiction? Where no international instrument applies, what factors will the local courts consider in executing a request for evidence from another country?

Procedure to enforce a request for witness evidence in support of foreign litigation

Under EPOJA, courts are given a power (but not a duty) to comply with letters of requests from judicial authorities in other states and international judicial bodies. However, it has been said that "it is the duty and the pleasure of the [English] court to give all such assistance it can to the requesting court" (*United States of America v Philip Morris Inc [2004] EWCA Civ 330*).

The party making the request should instruct English solicitors to make the necessary application to the court.

CPR 34.17 states that an application for an order under EPOJA for evidence to be obtained must be made to the Senior Master of the Queen's Bench Division of the High Court, supported by written evidence, and accompanied by the original letter of request as a result of which the application is made (usually signed by the judge who made the request), and where appropriate, a translation of the request into English (see *PD 34A.6.3* for details of the evidence required). A Master is a procedural judge who deals with all aspects of a civil action until it is ready for trial by a trial judge.

The application is usually made without notice and the Senior Master will generally dispose of it without the need for a hearing.

If the party making the request has not instructed an English solicitor then the Senior Master will forward the request to the Treasury Solicitor, who may apply for the order.

The court may make the order as it sees fit to give effect to the request (so far as it wishes to do so). Section 2(2) EPOJA allows orders for the:

- Examination of witnesses.
- Production of documents.
- Inspection, preservation and custody of property.
- Taking of samples from, and the carrying out of experiments on, property.
- Medical examination of, and testing blood samples of, a person.

After the order is made, provided it was made without notice, the proposed witness is entitled to make an application under CPR 23 to amend or discharge the order.

The court will usually appoint a practising lawyer to act as the examiner, and that person is usually taken from a list of examiners selected by the Lord Chancellor. The fees and expenses of the examiner will be paid by the party that obtained the order for the examination.

Grounds

Requests will not be complied with unless they both:

- Relate to a "civil or commercial matter" under English law, as well as the law of the requesting court (see *Re State of Norway's Application (No. 2) [1990] 1 AC 723*).
- Do not require a person to give evidence which that person could not be compelled to give in English court proceedings.

Generally, the English court will accept a statement from the foreign court that the request is required for civil proceedings. However, if there is any uncertainty, the court is required to examine the request objectively by considering the nature of the testimony sought and what was said in the foreign court when the request for evidence was issued. The English court should not, however, take the foreign court's perspective on the purpose for which the evidence is required at face value.

The English court is entitled to withhold the order requested if it is satisfied that the application would be regarded as frivolous, vexatious or an abuse of the process of the court (see *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*).

The English court is also able to accept or reject the request in whole or in part. It should refuse to grant any sections which are unnecessary, either in relation to witnesses or documents or both. It should not grant a request if to give effect to it would be improper or impermissible under English law (*section 2(3), EPOJA*). For example, courts have refused to allow a "fishing expedition" that would not have been allowed in English proceedings (see *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*).

For a summary of the general principles which govern the approach of the English courts to applications, see also *Daric Smith v Philip Morris Companies Inc and others [2006] EWHC 916*.

Timeframe
There are no fixed guidelines. However, once an order has been made and an examiner appointed by the court, the party who made the application must serve the order on the respondent, who is usually the witness that will be examined. This must be done at least seven days before the examination (*CPR 34.5*).

Part 4 – Legal framework governing cross-border evidence

15. Is your jurisdiction a party to:

- The Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (The Taking of Evidence Regulation)?; and/or
- The Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention)?; and/or
- Any other international instruments or treaties on evidence?

The Taking of Evidence Regulation

Yes. Letters of request between courts within the EU (other than Denmark) are governed by the Taking of Evidence Regulation (1206/2001/EC) (the Regulation).

Under the UK-EU withdrawal agreement there is a post-Brexit transition period which, unless extended, will run until 31 December 2020 (see *Practice note, UK-EU withdrawal agreement: transition text: Duration of transition period and extension*). This will mean, for example, the continued participation of the UK in the EU customs union and single market, the continued application of the four freedoms, and the continued application of most EU law (including as amended or supplemented) and of the usual EU supervisory, judiciary and enforcement mechanisms,

including CJEU jurisdiction. As a consequence, for the most part, the commercial impact of Brexit will be delayed until expiry of this transition period (see *Practice note, Brexit essentials: Q&As on agreements, timeframes and no deal*).

The Hague Evidence Convention

Yes.

Any other international instrument(s)

Letters of request between the various jurisdictions within the UK (that is, England and Wales, Scotland and Northern Ireland) are governed by *EPOJA)*.

Bilateral conventions with the UK should also be considered, as they may provide assistance (or limitations) for taking evidence abroad.

The *Foreign and Commonwealth Office website* lists some of the bilateral civil procedure conventions to which the UK is a party .

Note, however, that this list is by no means exhaustive. It is advisable to contact the Foreign and Commonwealth Office Treaty section directly by telephone, as they maintain a list of all treaties to which the UK is a party and can provide information on whether a relevant treaty exists and how a copy can be located.

The Hague Evidence Convention

16. What are the reservations, declarations and notifications made by your jurisdiction under the convention?

Reservations, declarations and notifications

For a complete list of reservations, declarations and notifications made by the UK in relation to:

- Language of letter of request (*Article 4* and *Article 33*).
- Execution of letter of request in the presence of judicial personnel (*Article 8*).
- Evidence by diplomatic officers, consular agents and commissioners (*Article 15-17*).
- Pre-trial discovery (*Article 23*).

See *Status table, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

17. Please identify the following:

- (a) the Central Authority designated to receive letters of request (*Article 2*);
- (b) the appropriate authority designated to receive requests for permission to take evidence by diplomatic offers, consular agents or commissioners (where applicable) (*Article 15-17*),
- (c) appropriate authority designated to give appropriate assistance to diplomatic offers, consular agents or commissioners to obtain evidence by compulsion (where applicable) (*Article 18*),
- (d) any other authority designated to receive letters of request (*Article 24*)?

Central Authority

For contact details of the designated Central Authority and the additional authorities, see *Authorities, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

The Senior Master

For the attention of the Foreign Process Section

Room E16

Royal Courts of Justice

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18.What is the general time-frame within which a letter of request is normally executed within your jurisdiction?

Timeframe

For oral evidence, the time taken to process a request is usually up to 12 months. For documentary evidence, the time taken is usually between six and 12 months (*www.hcch.net/en/states/authorities/details3/?aid=526*).

19. Is prior authorisation of the Central Authority required for judicial officers (of the requesting court) to be present at the execution of the letters of request in your jurisdiction (provided that your jurisdiction has made the declaration under Article 8)? What is the procedure to obtain such authorisation?

Judicial personnel at the execution of letters of request

The UK has made a declaration under Article 8 that judicial officers of the requesting court may be present at the execution of letters of request in the jurisdiction.

No previous authorisation is required.

20. Apart from the procedure mentioned under *Question 14*, are there any other key methods and procedures followed under the laws of your jurisdiction to execute a letter of request under the convention (*Article 9*)?

There are two main procedures for executing a letter of request under the Hague Evidence Convention:

- By instructing English lawyers to apply for an order giving effect to the request. An application to the Senior Master of the Queen's Bench Division of the High Court can be made under section 2 of EPOJA and CPR 34.17. This is likely to be the most efficient method.
- By submitting the letter through diplomatic channels to the Secretary of State. The Secretary of State may then forward this to the Senior Master of the Queen's Bench Division of the High Court with a recommendation that effect be given to the request. The Senior Master will then send the request to the Treasury Solicitor, who may apply for an order under the 1975 Act (see PD 34A, 6.4).

It is also worth noting that neither the Hague Evidence Convention nor EPOJA affects the taking of evidence given voluntarily to foreign diplomatic or consular officers or other persons appointed by foreign courts to take evidence or to legal representatives taking evidence in this country for the purpose of proceedings abroad. There is in England no legal objection to the taking of evidence in this country for use outside the jurisdiction without the intervention of the High Court. So long as the witnesses are willing to attend to give evidence, the examination may be completed and the depositions returned to the foreign court without the intervention of the court in England. (For further information see White Book 2019, Sweet & Maxwell, – 34.16)

The Taking of Evidence Regulation

21. Please identify the Central body (*Article 3*), requested court(s), and competent authority(ies) under the Regulation?

Competent body, court(s) and authority(ies)

For a complete list of Central body, requested court(s), and competent authority(ies) under the Regulation, see *UK (England and Wales)*.

The Senior Master

For the attention of the Foreign Process Section

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Email: *foreignprocess.rcj@hmcts.gsi.gov.uk*

Website: *https://www.gov.uk/guidance/service-of-documents-and-taking-of-evidence*

22. What is the general timeframe for a request to be executed under the Regulation?

Timeframe

The Queen's Bench Division (QBD) is unable to advise on the average time of execution in the English court, but in each case works towards the 90-day deadline. The requesting court is free to signal on Form A that the application is urgent and ask the requested English court to expedite it. This is in line with the reference to "without delay" in Article 10(1). The Foreign Process Section of the QBD has advised that they would try to take note of this request but naturally cannot guarantee an expedited process (see *https://www.lw.com/thoughtLeadership/obtaining-evidence-in-english-court-for-use-in-another-eu-member-state*).

23. Do the laws in your jurisdiction permit the parties and, if any, their representatives, to be present at, or to participate in, the performance of the taking of evidence by the requested court (*Article 11*)?

Presence of parties and their representatives during the taking of evidence

PD 34A further provides that, once the Treasury Solicitor has made arrangements for the examination of a witness and the court has approved the time and place, details should be given:

"to such of

(a) the parties and, if any, their representatives; or

(b) the representatives of the foreign court,

who have indicated, in accordance with the Taking of Evidence Regulation, that they wish to be present at the examination."

The *TSol Guide* provides the following guidance:

- If legal representatives (who may include counsel as well as solicitors) attend, the conduct of the examination should be on the following lines:
    - the questioning of the witness in accordance with the letter of request will be conducted by the case officer;
    - the witness may then be questioned (cross-examined) by the lawyer for the other party;

- the witness may than be questioned (re-examination) by the lawyer for the party on whose behalf the witness' examination has been sought; and
- the case officer may then, in their discretion, but generally only after consulting the examiner and obtaining the examiner's approval, ask further questions to elucidate any points that remain obscure.

- If only one of the parties sends a lawyer to the examination, the conduct of the examination should be on the following lines:
  - if the witness is called at the request 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 (*paragraph 8, Tsol Guide*). The case officer should if necessary intervene to advise the examiner as to the position; and
  - 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 their discretion, bearing in mind that they represent neither party, and is subject to the approval of the examiner.

24. Do the laws in your jurisdiction permit representatives of the requesting court (designated judicial personnel), to be present at, or to participate in, the performance of the taking of evidence by the requested court (*Article 12*)?

Presence of judicial personnel of requesting court during the taking of evidence

The Senior Master, in agreement with the Bar Council, has decided that foreign lawyers have a right of audience at examinations of witnesses where English lawyers are also present. 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 the Senior Master to decide whether an approach should be made to obtain the sanction of the Bar Council. (For more information, see the *TSol Guide*.)

25. Where a request is made to the Central Body in your jurisdiction under Article 17 for the requesting court to take evidence directly, what conditions (if any) are imposed by the laws in your jurisdiction (*Articles 17(4) and (6)*)?

The English court should generally exercise its discretion to make the order asked for, unless it is satisfied that the application would be regarded as frivolous, vexatious or an abuse of the process of court (see *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*).

However, the English court has no inherent jurisdiction to act in aid of a foreign court; it derives its jurisdiction from the EPOJA and is therefore limited by the scope of that Act.

Requests will not be complied with unless they relate to a "civil or commercial matter" under English law as well as the law of the requesting court (see *Re State of Norway's Application (No. 2) [1990] 1 AC 723*), and do not require a person to give evidence which they could not be compelled to give for English court proceedings, for example in relation to privilege (*section 3, EPOJA*).

Requests will be refused if the court regards them as "fishing expeditions". The request should be seeking evidence for direct use in the commenced or contemplated proceedings, it should not be a wider 'investigatory' examination (*Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*). This does not mean, however, that the requesting party must know in advance what the witness will say. The question is rather whether the witness might have relevant evidence that could be used in the trial (*Land Rover North America Inc v Windh [2005] EWHC 432 (QB)*).

The English court has power to accept or reject the foreign request in whole or in part, whether as to oral or documentary evidence. It can and should delete from the request any parts that are excessive either as regards witnesses or as regards documents, and should decline to comply with a foreign request insofar as it is not proper or permissible or practicable under English law to give effect to it. It should not however, substitute a received request with a request of its own.

26. Which party is responsible for the fees and costs for experts, interpreters, the use of special procedure and communications technology (*Article 18*)?

Costs

In accordance with CPR 34.23, the party who seeks an order for evidence to be taken in another Regulation state must also file an undertaking to be responsible for the costs sought by the requested court in relation to fees for experts and interpreters and the use of special procedures and communications technology.

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