

**Letters of Request; Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and Taking of Evidence Abroad in Civil or Commercial Matters – an Indian perspective.**

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**A. Letter of Request – meaning of.**

Letters of Request / Rogatory is a formal communication in writing sent by the Court in which action is pending to a foreign court or Judge requesting the testimony of a witness residing within the jurisdiction of that foreign court may be formally taken thereon under its direction and transmitted to the issuing court making such request for use in a pending legal contest or action. This request entirely depends upon the comity of courts towards each other and usages of the court of another nation<sup>1</sup>.

India became a party to the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and also the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* in 2007.

**B. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965.**

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 [“Service Convention”] entered into force in India in 2007. India has made a reservation to the Convention objecting to service of process by mail, or directly on defendants through judicial officers in India (i.e. advocate or private process server) without the involvement of the designated Central Authority. Further, the documents for service must be written in English.

Under the Service Convention, a Central Authority is designated and all requests for service can be sent to it. The request for service of documents should be in English language or accompanied by an English translation. The service of judicial

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<sup>1</sup> Union of India v. W.N. Chadha, AIR 1993 Supreme Court 1082.

documents through diplomatic or consular channels is limited to the nationals of the State in which the documents originate.

The request should be modeled along the lines of the model annexed to the Hague Service Convention. The authority or judicial officer competent under the law of the state of origin must send the document to the Central Authority of the relevant state. The Central Authority would then either execute the service itself or arrange for it to be executed by other means provided in Article 5 of the Service Convention.

The Central Authority for service is the Ministry of Law and Justice, Department of Legal Affairs situated at 4th Floor, A-Wing, Shastri Bhavan, New Delhi, 110001, India<sup>2</sup>.

**C. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters [the Hague Convention].**

**(a) Objective of the Hague Convention:**

The Hague Convention was concluded to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods used for this purpose in order to improve mutual judicial co-operation in civil or commercial matters.

Signatories to the Hague Convention have agreed to discovery of documents and testimony. Under Hague Convention discovery of documents can be sought by means of a Letter of Request, issued by the court where the action is pending and transmitted to the “Central Authority” of the jurisdiction where the discovery is located. The Central Authority responsible for transmitting the request to the appropriate judicial body for a response (Articles 1 and 2). A Letter of Request can also be issued for seeking deposition testimony to be taken before a diplomatic or consular officer (Article 3).

The contracting States to the Hague Convention are required to establish a Central Authority responsible for accepting and processing Letters of Request from other contracting States.

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<sup>2</sup> See: [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=712](http://www.hcch.net/index_en.php?act=authorities.details&aid=712)

(b) **Central Authority designated under the Hague Convention:**

India, pursuant to Article 2 of the Hague Convention, has designated a Central Authority to receive Letters of Request from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. The Central Authority designated by India for this purpose is:

- The Ministry of Law and Justice and the High Courts in all states and union territories in India (under Articles 2, 16 and 17).
- The district court in whose territory the evidence is to be taken (under Article 18).
- The Central Authority and the relevant court (under Article 8).

The Ministry of Law and Justice, Department of Legal Affairs is situated at 4<sup>th</sup> floor, A-Wing, Shastri Bhavan, New Delhi, India.

(c) **Reservation / declaration made by India to the Hague Convention:**

India has spelt out its reservations ("declaration") under the Hague Convention in the following terms:

- All requests under the Convention shall be in the English language, or accompanied with an English translation.
- Subject to prior authorization of the Central Authority and the concerned court, members of the judicial personnel of the requesting Contracting Party may be present at the execution of a letter of request.
- Evidence by diplomatic officers or consular agents of Indian nationals or nationals of a third State under Article 16 of the Convention can be taken with the prior permission of the Central Authority.
- In accordance with Article 18, a diplomatic or consular officer or a commissioner authorized under Article 15, 16 and 17 may apply for appropriate assistance to obtain the evidence by compulsion to the District Court within whose territory the evidence is to be taken.

The Republic of India will not execute Letters of Request issued in pursuance of Article 23 of the Convention for the purpose of obtaining pre-trial discovery of documents, which requires a person to produce any documents other than

particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

(d) **Letter of Request:**

The Letter of request to take depositions should be modeled on the Hague Model Letter of Request and submitted to the Indian Central Authority designated for the Hague Convention<sup>3</sup>. Article 3 of the Hague Convention provides that a Letter of Request shall specify:

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia:

- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;
- (g) the documents or other property; real or personal, to be inspected;
- (h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- (i) any special method or procedure to be followed under Article 9.

A letter may also mention any information necessary for the application of Article 11. No legalization or other like formality may be required.

A Letter of Request coming from a judicial authority of a Contracting State will be received in another Contracting State by a designated Central Authority who

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<sup>3</sup> See: [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3309&dtid=2](http://www.hcch.net/index_en.php?act=publications.details&pid=3309&dtid=2)

shall then transmit the Letter to the authority competent to execute them. The Letter shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State (Article 2).

*Whom to address?* The Letter of Request must be addressed to the appropriate High Court in India within whose jurisdiction the witness resides. There are at present 21 High Courts for 28 States in India. The Request must clearly mention the address of the witness.

A Letter of Request cannot be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. A Letter of Request may be issued to obtain evidence or to perform some other judicial act, in civil or commercial matters, by a judicial authority of a Contracting State in accordance with the provisions of the law of that State to the competent authority of another Contracting State (Article 1). The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

(e) **The procedure for taking evidence in India:**

Upon issuance of a Letter of Request by a foreign court which is normally addressed to the High Court in the appellate jurisdiction in which the witness is situated, the concerned High Court would appoint a commissioner and issue a direction to him as it may deem fit and appropriate. The fee of the commissioner is normally borne by the party seeking to take evidence. The Commissioner would fix a date for recording of the evidence. The evidence is recorded in the manner desired by the foreign court. After the recording of the evidence the Commissioner would have to file the evidence with the High Court. The High Court would either forward it to the central government which would transmit it to the foreign court issuing the request or may allow the entire record of the Commissioner's report be transmitted by the applicant directly to the foreign court.

(f) **Pre-trial discovery of documents:**

Article 23 of the Hague Convention specifically provides that a contracting State could make a declaration "that it will not execute Letters of Request issued for

the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”

Contracting States which have executed a declaration under Article 23 are:

Argentina, Australia, Bulgaria, China, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Italy, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Romania, South Africa, Seychelles, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, Venezuela

(g) **Expression "Evidence" includes production of documents:**

The expression "Evidence" is confined to one or other mode of evidence and it extends to both oral testimony as well as production of documents through the named witnesses. The Delhi High Court in the Upaid Systems Ltd.<sup>4</sup> case held that there was nothing in Order 26 Rule 19 of the CPC to limit the language to only "oral evidence" and eschew documentary evidence which may come within the expression "evidence"; nor was there any warrant to interpret the provision in the light of subsequently ratified convention, with declaration, by India. Indian law even permits through Order 11 Rules 12 to 14 CPC, courts to direct disclosure/discovery of documents which may later be determined to be inadmissible or irrelevant<sup>5</sup>.

(h) **Approach of Indian courts:**

The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule of the Constitution of India. Even though the Indian Parliament has not enacted a special law to give effect to the Hague Convention, it would not take away the courts power to act on a Letter of Request in terms of the provisions of Order 26, Rules 19 to 22 of Code of Civil Procedure, 1908 (CPC)<sup>6</sup>. Further, Article 27 of the Hague Convention provides that the Convention would not affect any existing law a contracting state may have on the subject.

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<sup>4</sup> Upaid Systems Ltd. v. Satyam Computer Services, (2009) 164 DLT 45.

<sup>5</sup> M.L. Sethi v. R.P. Kapoor, AIR 1972 SC 2379.

<sup>6</sup> Upaid Systems Ltd. v. Satyam Computer Services, (2009) 164 DLT 45.

An international treaty entered into by India cannot become law of the land and it cannot be implemented unless Indian Parliament passes a law<sup>7</sup>. The Indian Supreme Court in Kesoram Industries case<sup>8</sup> relied on the decision in Corocraft Ltd. v. Pan American Airways Inc.<sup>9</sup>, wherein Lord Denning observed that it is the duty of the courts to construe the legislation so as to be in conformity with international law and not in conflict with it. It is one thing to say that legislation may be interpreted in conformity with international principles but is entirely a different thing to give effect to a treaty provision in the absence of municipal laws.

The Indian government has in its response to a questionnaire on the Hague Convention adopted the stand that the implementation of the convention into municipal laws of India is through section 78 and Order 26, Rule 19 to 22 of the CPC.

Section 78 of the CPC deals with commissions issued by foreign Courts and reads as under:

"Section 78: Commissions issued by foreign courts. Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of-

- (a) Courts situate in any part of India to which the provisions of this Code do not extend; or
- (b) Courts established or continued by the authority of the Central Government outside India; or
- (c) Courts of any State or country outside India".

Section 78 of the CPC must be read with Order 26 Rules 19 to 22. The object of Section 78(c) of CPC is to facilitate collection of evidence pursuant to a request received from a foreign court.

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<sup>7</sup> Article 253 of the Constitution of India. See: State of West Bengal v. Kesoram Industries, (2004) 10 SCC 201.

<sup>8</sup> State of West Bengal v. Kesoram Industries, (2004) 10 SCC 201.

<sup>9</sup> [1969] 1 All ER 82.

Order 26 Rule 16 provides for the powers of the commissioner including power to call for documents. Rule 16 refers to express powers of a commissioner to (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom he thinks proper to call upon to give evidence in the matter referred to him; and (b) call for and examine documents and other things relevant to the subject of inquiry. Rule 16 states:

"16. Powers of Commissioners.- Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,-

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order."

Order 26, Rules 19 to 22 of the CPC specifically deals with Letters of Request issued by a foreign court for taking evidence of witnesses residing in India. Rule 19 specifically deals with cases in which a High Court may issue commission to examine witness.

"19. Cases in which High Court may issue Commission to examine witness-(1) If a High Court is satisfied-

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceedings before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of Rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub- rule (1)-

- (a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central Government, or
- (b) by a letter of request issued by the foreign court and transmitted to the High Court through the Central Government, or
- (c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceedings."

Power to appoint a commissioner is established under Order 26, Rule 19 of CPC notwithstanding that the treaty is not incorporated into the municipal laws. A reading of Order 26, Rule 19 would reveal that the courts in India, upon receiving a request from a foreign court for assistance have to satisfy itself three conditions:

- (a) the proceeding is in the foreign court;
- (b) it is a "civil" (as opposed to a criminal proceeding) proceeding and;
- (c) the witness whose deposition is sought lives within its jurisdiction.

Rules 20, 21 and 22 of Order 26 of the Code of Civil Procedure read as follows:

"Rule 20: Application for issue of commission- The High Court may issue a commission under Rule 19:

- (a) upon application by a party to the proceedings before the foreign court, or
- (b) upon an application by a law officer of the State Government acting under instructions from the State Government"

Rule 21: To whom commission may be issued. A commission under Rule 19 may be issued to any court within the local limits of whose jurisdiction the witness resides, of where the witness resides within the local limits of

(the ordinary original civil jurisdiction of the High Court) to any person whom the court thinks fit to execute the commission.

Rule 22: Issue, execution and return of Commissions and transmission of evidence of foreign court.

The provisions of Rules 6, 15, sub-rule (1) of Rules 16-A, 17, 18 and 18-B of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Central Government, along with the letter of request for transmission to the foreign court."

The court within whose jurisdiction the witness resides will be the appropriate court to execute the letter of request. Simply because a witness has not been specified in the letter of request issued by a foreign court would not make the request unenforceable especially in the light of the language of Order 26 Rule 19 read along with Rules 17, 20, 21 and 22.

(i) **Conclusion:**

Order 26 Rule 19 and 20 do not confer any power upon Indian courts to go into a propriety of the letter of request or the questions of relevance or admissibility of the evidence. The questions of relevancy and admissibility are to be considered by the court issuing the letter of request. The very fact that the letter of request had been issued implies that it has been issued after taking into account the question of relevance and admissibility as well by the foreign court. Indian court would not sit in appeal over the orders of foreign court on this aspect of the matter<sup>10</sup>.

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<sup>10</sup> Aventis Pharmaceuticals Inc. and Amr Technology Inc., Power of Attorney Col. J. K.Sharma v. Dr. Reddy's Laboratories Inc., Andhra Pradesh High Court (Decided on: 8 December 2008). Also see: Wooster Products Inc v. Magna Tek Inc, (1988) 2 ARB LR 184 (Delhi) wherein the court observed: "The question of relevance has to be decided not in accordance with Indian Law but law of the Foreign Court where civil proceedings are pending and it would be beyond jurisdiction of this court to adjudicate upon the question of relevance of the said documents".