

Alternate remedy to the Hague Convention on the Taking of Evidence & Pre-trial Discovery

*By Ginny Jetley Rautray**

The Indian Union Cabinet on 21st December, 2006 gave its approval to the proposal of accession to the Hague Convention of 18th March, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ('Convention') and the designation of Central Authorities under the Convention. The decision was taken to establish a uniform procedure for sending, receiving and executing requests for the taking of evidence to and from the other States Parties. The proposal was for designation of the Ministry of Law & Justice and the High Courts in all States and Union Territories within India as the Central Authorities under the Convention. India acceded to the Convention on 7th February, 2007. The Convention, which applies to member states, provides for taking evidence (a) by way of a letter of request; and (b) by diplomatic or consular agents and commissioners. The main objective of the Convention is to facilitate a standard procedure for taking evidence abroad and not to get rid of the existing procedures in the member state for executing a letter of request. Article 27 of the Convention provides that the Convention will not affect any existing law a contracting state may have on the subject.

Designation of the Central Authority.

For the purpose of Articles 2, 16 and 17 the Central Authority designated by India is the Ministry of Law & Justice and the High Courts in all States and Union Territories¹. The competent authority under Article 18 is the District Court within whose territory the evidence is to be taken² and for Article 8 it is the Central Authority and the concerned court³.

A Letter of Request is normally issued by a foreign court or a judicial authority to the Indian Central Authority i.e. the Ministry of Law & Justice of India at the following address:

Central Authority
The Ministry of Law and Justice
Department of Legal Affairs
Room No 439A, 4th Floor
A-Wing, Shastri Bhawan,
New Delhi-110001
India

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¹http://www.hcch.net/index_en.php?act=authorities.details&aid=715

²http://www.hcch.net/index_en.php?act=authorities.details&aid=716

³http://www.hcch.net/index_en.php?act=authorities.details&aid=717

The Central Authority is therefore responsible for receiving the letter of request from a judicial authority of another contracting state and transmitting the request to the authority competent to execute it (Article 2 of the Convention). Article 2 further provides that letter shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State. The provisions of the Convention provide that the letter of request should be executed 'expeditiously' and may be refused only in specific cases. However, often the Central Authority either fails to take effective measures to execute the letter of request or conveys no response to the judicial authority of another contracting state as to the fate of its request. Whether the parties to a civil or commercial action before a foreign court have an alternateremedy? The answer is yes.

The Alternate remedy.

Although India is a signatory to the Hague Convention, the Convention has not been enacted into a municipal law by the Indian Parliament to give effect to the treaty in terms of Article 253 of the Constitution of India, 1950. Consequently, the Indian Courts have held that it cannot take cognizance and execute the letter of request issued under the Convention. The Indian Supreme Court has ruled that an international treaty cannot be enforced in Indian courts, unless the Parliament makes a law giving effect to the treaty⁴. A reference by the foreign court to the Convention will not deprive the Indian Courts of its enabling power in Indian law to give effect to letter of request⁵. A party having approached the Central Authority may find itself in a position where he is either not being informed of the fate of the letter of request or the execution of the letter is delayed or it has been rejected without assigning any reason. Notwithstanding the earlier request to the Central Authority it is open to either party to request the judicial authority of the contracting state to issue a fresh letter of request for taking evidence directly to the High Court of the State in which the witness resides or carries on its business. The fresh letter of request addressed to the concerned High Court of the Indian State would be executable under the provisions of the Code of Civil Procedure, 1908 ('Code'). The power of the Court to appoint a Commissioner pursuant to a request made by a foreign court under the Code continues to be an effective and efficacious remedy for taking evidence. Such power extends to both oral testimony as well as production of documents through the named witnesses.

In *Aventis Pharmaceuticals Inc. v. Barr Laboratories Inc.*⁶, although the letter of request was issued in conformity with Article 3 of the Hague Convention by the United States District Court for the District of New Jersey to obtain evidence relating to the civil action pending before it, the Punjab and Haryana High Court entertained a petition filed under the provisions of Section 78 and Order 26 Rule 19 to 22 of the Code.

⁴State of West Bengal v. Kesoram Industries, (2004) 10 SCC 201.

⁵Upaid Systems Limited v. Satyam Computer Services, 163(2009)DLT45 (Delhi High Court).

⁶2009 (Suppl) Civil CC 154 (NULL) (Punjab & Haryana High Court).

Declarations by India under the Hague Convention.

India has made the following declarations in respect of Articles 4, 8, 16, 17, 18 and 23:

“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.”⁷

Pre-Trial discovery.

Article 23 of the Convention allows a contracting State to make a declaration to the effect “that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” Article 23, as interpreted, permit member states to ensure that a request for the production of documents is not in the nature of where one of the parties is trying to find out the kind of documents the other party to the proceeding may be in possession of. The request for productions of documents must be specific and substantiated.

The declaration made by India under Article 23 of the Hague Convention on Taking of Evidence Abroad in Civil or Commercial matters, very clearly stipulates that in case of a pre-trial discovery of documents which are likely to be in the possession, custody or power of a person,

⁷http://www.hcch.net/index_en.php?act=status.comment&csid=988&disp=resdn

the Republic of India cannot refuse the execution of a letter of request requiring the production of pre-trial discovery of documents which are specified in the concerned letter of request⁸.

In *Wooster Products Inc. v. Magna Tek Inc.*⁹, the Delhi High Court has observed:

“Even assuming for the sake of arguments that the intervener has a right to object, even then it is difficult to accept that there is any force in the objections raised by the intervener against issuance of commission. Learned Counsel for the intervener has drawn my attention to *Radio Corporation of America v. Rauland Corporation*, [1956] 1 All ER 549, *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*, [1978] 1 All ER 434 and *Re Asbestos Insurance Coverage cases*, [1985] All ER 716 and has submitted in the light of observations therein that the letter of request is in the nature of fishing inquiry by the petitioner and no commission should be issued by this Court and more so, unless relevance of documents and testimony of the witnesses is established before this court. These rulings are based upon peculiar provisions of English Law especially Evidence (Proceedings in other Jurisdictions) Act, 1975 and therefore cannot be of much help to the intervener. With respects to their Lordships, I must say that it would be difficult to accept or subscribe to the proposition raised by the learned Counsel for the intervener on the force of these rulings, inasmuch as the letter of request received in this court has to be disposed of in the light of law applicable to this court and not in accordance with English Law. 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. This court would not go behind the letter of request and enter upon an inquiry as to the jurisdiction of issuance of letter of request which has to be accepted and executed owing to reciprocity between two sovereign countries. The above mentioned provisions of law do not confer any power upon this court to go into the proprietary (propriety) of the letter of request or the questions of relevance or admissibility of the evidence. These questions of relevance and admissibility have had to be considered by the court issuing the letter of request and the very fact that the letter of request has been issued implies that it has been issued after taking into account the question of relevance and admissibility as well by the foreign court. This Court would not sit in appeal over the orders of foreign court on this aspect of the matter. Even accepting for the sake of arguments that the question of relevance has to be considered by this Court even then it would be difficult to say that the documents which are sought to be got produced through the letter of request are not relevant. The suit of the petitioner is for the recovery of damages for breach of contract on the plea that the respondent in that suit has committed breach of agreement with the petitioner and has entered into a contract for the same purpose with the intervener. Certainly the terms of contract between the respondent in that suit and intervener before this Court would be relevant for the purposes of arriving at the

⁸*Aventis Pharmaceuticals Inc. v. Dr. Reddy's Laboratories Inc.*, 2009(1)ALT362 (Andhra Pradesh High Court).

⁹AIR 1989 Delhi 6 (Delhi High Court).

quantum of damages by the foreign court in the suit pending before it and as such it cannot be said that the documents sought to be got produced by the commission would not be relevant. The intervener has no right to claim privilege about the documents which are sought to be got produced before the Local Commissioner in pursuance of the letter of request. Only persons who can claim privilege in respect thereof are the respective witness who are required to produce documents and for that reason as well I find no substance in the request of the intervener.”

Relevance or admissibility of the evidence.

The Andhra Pradesh High Court in Aventis Pharmaceuticals case (supra) held that Order 26 Rule 19 and 20 of the Code does not confer any power upon the Indian Court 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 Indian Court will proceed on the assumption that the very fact the letter of request had been issued evinces that the foreign court has taken into account the question of relevance and admissibility of the documents sought to be produced.

Conclusion.

Even though India became a signatory to the Hague Convention in 2007, the Convention has not been given full effect in accordance with provisions of Article 253 of the Constitution of India. The Indian Parliament is yet to enact an implementing statute. However, the absence of a special enactment to give effect to the Convention cannot be a fetter to the Courts power to execute the letter of request under Section 78 and Order 26, Rules 19 to 21 of the Code. Thus, delay or inaction by the Central Authority of India cannot preclude a fresh request being made to the Indian Court under the provisions of the Code.