



## Obtaining evidence in England for use in US proceedings

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Due to the increase in global trade and communication it is becoming increasingly evident that important evidence required for proceedings in the US will often be located in England. The English High Court has the power to give effect to the request of a US court to assist in obtaining evidence in England and Wales for use in US proceedings.

The English High Court is required by statute - the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the Act) - to assist countries which are a party to either the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or a country with which the UK has a Bilateral Convention. The US and UK have both ratified the Hague Convention. For example, the court may order:

- The examination of witnesses, either orally or in writing;
- The production of documents; and/or
- The inspection, photocopying, preservation, custody or detention of any property

There are three ways in which evidence may be obtained in England for use in US proceedings:

- By voluntary agreement
- By a Letter of Request through diplomatic channels
- By a Letter of Request under the Act

The most common way of obtaining such evidence in England is by the third method, a letter of request under the Act.

### Letters of Request

A letter of request should be prepared by the lawyers of the party desiring the production of evidence. This should be signed by the requesting US court and addressed to the Senior Master of the Queen's Bench Division of the High Court. There is no prescribed form of a letter of request, however under the Hague Convention it must comply with the convention and must specify:

- The evidence to be obtained
- The names and addresses of the persons to be examined, where appropriate
- The questions to be put or a statement of the subject matter about which they are to be examined
- The documents to be inspected

Every effort should be made to ensure that any questions asked require factual rather than opinion evidence. Witnesses of fact should not offer what is technically inadmissible opinion evidence – as a general rule, only a suitably qualified expert witness may give opinion evidence.

## Application

An application must be made to the English High Court. The application must be supported by written evidence usually in the form of a witness statement or an affidavit by the English solicitor appointed as agent.

## Limits to the Court's powers

It is worth noting that there are limits to the powers of the English High Court, therefore any letter of request should be carefully drafted with the following in mind:

The Court may not make an order:

- That required any step to be taken unless it is a step which can be required for the purpose of obtaining evidence for the purposes of English civil proceedings; or
- That requires any person :
  - To state what documents relevant to the foreign proceedings are in his possession, custody or power; or
  - To produce any documents other than particular documents specified in the order as being documents appearing to be (or likely to be) in his possession, custody or power

The English Court is not able to make an order against a third party to the proceedings requiring him to make general discovery of documents relevant to the proceedings. Such an order would be considered a "fishing expedition" which is not permitted by the English Court. It must also be considered that, whilst the discovery procedures may vary from state to state, in the US there is a tradition of oral discovery that has never developed in England. In this regard, Sir Richard Scott V-C commented in *First American Corp. v Al-Nahya*: "It is therefore clear, that, under the United States rules, the questioning of the intended witnesses can cover both the eliciting of admissible evidence and an investigatory search for information leading to a train of inquiry. The latter type of questioning would not be permitted in this country."

Letters of request should therefore be as detailed as possible in order to maximise the chances of obtaining an order.

## Order

The English Court will generally give an order requested if it is proper and practicable to do so and to the extent permissible by English law, as long as it is not vexatious, irrelevant to the proceedings, or if it amounts to an abuse of process.

The order will make provision for the practical arrangements for the taking of evidence, the form which this will take and any other relevant particulars.

If a witness fails or refuses to comply with the order the applicant may bring a further application without notice to compel the witness to attend. Failure to comply with such an order may be punished by a fine for contempt of court.

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### Further information

If you would like to have further information on any issue raised in this update please contact:

**Paul Friedman, Partner**  
*Dispute Resolution Group*  
 paul.friedman@clydeco.com



Clyde & Co  
 51 Eastcheap  
 London EC3M 1JP

Tel: +44 (0) 20 7623 1244  
 Fax: +44 (0) 20 7623 5427

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