# JURISDICTION AND EVIDENCE — AN ENGLISH PERSPECTIVE

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## I. THE JURISDICTIONAL REGIME IN EUROPE

The countries of Europe have entered into multilateral treaties to facilitate doing business in Europe. These treaties cover jurisdiction, enforcement of foreign judgments and choice of law. The individual states in the United States have analogous arrangements to facilitate doing business within the United States. However, due to what are perceived as extravagant awards of damages in the United States, most non-United States companies are afraid of that jurisdiction. It is often thought by the layman that the jurisdiction of other courts is not so wide. He may well be wrong.

### *A. Jurisdiction of the English Courts*

The English Courts have territorial jurisdiction in respect of England and Wales. Scotland, Northern Ireland, Isle of Man and the Channel Islands are separate jurisdictions.

The main legislation governing jurisdiction is the Civil Jurisdiction and Judgments Act 1982 (Act) which is "an act to make further provision about the jurisdiction of courts and tribunals in the United Kingdom and certain other territories and about the recognition and enforcement of judgments given in the United Kingdom or elsewhere . . . ."[1] This Act was passed to bring the Brussels Convention into effect in English Law. There is a similar Act and Convention applicable to most of the non-European Union European countries (the Lugano Convention) that was brought into effect by the civil Jurisdiction and Judgment Act 1992.

1. Civil Jurisdiction Judgments Act of 1982 (England).

Indeed, the wording of the respective Conventions are mostly identical, save that the Lugano Convention does not have an equivalent to Article 58.

### *B. Jurisdiction Under the Conventions*

The Conventions do away with the individual countries own rules on jurisdiction in relation to disputes to which the Conventions apply. However, the net of the courts of some countries can still be spread extremely wide. Provided that the Conventions do not apply, the German courts, for example, still have jurisdiction over anyone who has assets in Germany. The French courts will still assert jurisdiction on the grounds of nationality. The English courts also have extremely wide jurisdiction.[2]

### *C. The Basic Rule*

The primary basis of jurisdiction under the Convention is the domicile of the defendant. For the purposes of the Convention a person is domiciled in the state in which he resides or in which he has a substantial connection. A company is domiciled in the state in which it is incorporated, has its registered office or its central management and control.

Article 2 of the Convention provides, "subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state."[3]

### *D. Special Jurisdiction*

Article 5 of the Convention sets out a secondary basis of jurisdiction. It provides that

> a person domiciled in a Contracting State may, in another Contracting State, be sued:
>
> (1) in manners relating to a contract, in the Courts for the place of performance of the obligation in question; . . .
>
> . . .
>
> (3) in matters relating to tort, delict or quasi-delict in the Courts for the place where the harmful act occurred; . . .

2. *See infra* section III.

3. Brussels Convention, art. 2.

. . .

> (5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the Courts for the place in which the branch, agency or other establishment is situated . . . ."[4]

There are special provisions dealing with insurance and consumer contracts. Article 16 gives exclusive jurisdiction, regardless of domicile, to the courts of the relevant country in which:

> (i) the subject of the action is an object *in rem* or immovable property;
>
> (ii) the constitution, nullity or dissolution of companies or other associations or legal persons;
>
> (iii) the validity of entries in public registers;
>
> (iv) patents, trademarks;
>
> (v) enforcement of judgments (the courts of the country in which enforcement is sought).[5]

### *E. Jurisdiction Agreements*

The provisions set out above deal with the day to day jurisdiction of Courts in *civil and commercial matters*. Arbitration matters are among the few areas to which the Convention has no application. Article 17, however, provides:

> if the parties, one or more of whom is domiciled in the Contracting State, have agreed the Court, or the Courts of a Contracting State, are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, then those Courts shall have exclusive jurisdiction.[6]

The Article goes on to provide that such agreement must be in writing, evidenced in writing or be in accordance with the practices in a particular trade. It should however be noted that Article 17 also provides:

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4. *Id.* art. 5.
5. *Id.* art. 16.
6. *Id.* art. 17.

"if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention."[7]

### *F. Summary of Jurisdiction Under the Conventions*

In England, jurisdiction can only be taken by the English Court if proceedings can be served on the defendant or defendants. Where a defendant is domiciled in an European Union country, or most of the other European countries, the English courts jurisdiction is governed by the Conventions allowing service of proceedings to be made out of the jurisdiction without the leave of the Court.

### *G. Jurisdiction of the English Courts Where the Conventions Do Not Apply*

Where the defendant is not domiciled in a Convention country, the Convention does not apply. While the English court can exercise jurisdiction over a defendant present in England, leave must be obtained from the Court to serve proceedings out of the jurisdiction. The Court has discretion over decisions to grant leave to serve proceedings out of the jurisdiction and will only do so if the applicant for such leave shows that he has *a good, arguable case* on the merits. The principle circumstances in which service of a writ out of the jurisdiction is permissible are contained in Order 11 of the Rules of the Supreme Court (R.S.C.) which provide that the Court may allow service out of the jurisdiction, *inter alia*, if:

> (a) relief is sought against a person domiciled within the jurisdiction;
>
> (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
>
> (c) the claim is brought against a person duly served within or out of the jurisdiction, and a person out of the jurisdiction is a necessary or proper party thereto;
>
> (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages

7. *Id.*

or obtain other relief in respect to the breach of a contract, being (in either case) a contract which:

(i) was made within the jurisdiction, or

(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) is by its terms, or by implication, governed by English law, or

(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract;

(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction; or

(g) the claim is brought to enforce any judgment or arbitration award.[8]

There are numerous cases relating to the obtaining of leave to serve and the setting aside of service or writs out of the jurisdiction. The case-law shows that when exercising its discretion under Rules of Supreme Court Order 11, the Court must consider among other things:

(i) the general undesirability of subjecting a foreigner to the jurisdiction of the English court when no allegiance

8. *Rules of the Supreme Court*, ORDER 11 (England).

> is owed here particularly if the dispute has little to do with this country or the claim is dubious;
>
> (ii) whether the parties have agreed that the particular court should have exclusive jurisdiction over the dispute;
>
> (iii) where proceedings have already been begun in another court.
>
> (iv) which court can give most effective relief;
>
> (v) whether one party will suffer an unfair disadvantage in a particular jurisdiction[9]

This also has the same effect as Article 21 of the Convention which states:

> where proceedings involving the same cause of action between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may reinstate its proceedings if the jurisdiction of the other Court is contested;[10]

A defendant who has been served with proceedings, whether domiciled in England or not, can make an application to the Court disputing the jurisdiction of that court by applying for an order setting aside service of the writ, an order declaring that the writ has not been duly served, or an order discharging any order giving leave to serve the writ out of the jurisdiction. There may be further or other reasons indicating the fact that the English court is not the proper forum (*forum non conveniens*). It can be seen from the above that complicated, time-consuming and expensive disputes can arise over jurisdiction.

The English Court's discretion to decide upon the extent of its own jurisdiction is extremely wide. This is clearly illustrated by the following:

> With all respect to the Judge, I think that this reasoning confuses two different jurisdictions. One is the jurisdiction to try the issues in the Action. That is disputed. It derives from the Brussels Convention and the 1982 Act. It depends on whether the First Defendant was domiciled in the United Kingdom at the relevant date. The other is the jurisdiction to decide whether it has jurisdiction to try the

9. *Id.* ORDER 11.

10. Brussels Convention, *supra* note 3, art. 21.

> issues in the Action. This is an inherent jurisdiction. It does not derive from the Brussels Convention or the 1982 Act. Its existence is beyond dispute.
>
> The High Court is a Court of unlimited jurisdiction. This does not mean that its jurisdiction is universal and unrestricted. It means that, unlike inferior courts and tribunals, it has jurisdiction to decide the existence and limits of its own jurisdiction. It has an indisputable jurisdiction (of the second kind) to decide whether or not it has jurisdiction (of the first kind) to entertain substantive proceedings. If it decides that it has no jurisdiction (of the first kind) to entertain them, its decision is nevertheless one made within its jurisdiction (of the second kind). If it makes a mistake and erroneously assumes a jurisdiction (of the first kind) to entertain substantive proceedings which it does not truly possess, it makes an error of fact or law, but it is not one which goes to its own jurisdiction (of the second kind). It is inherent in the rule of law itself that somewhere in any judicial system there must be a court which possesses jurisdiction to determine the limits of its own jurisdiction.[11]

## II. ENFORCEMENT OF FOREIGN JUDGMENTS

### *A. Under a Treaty*

Since there is a uniform system of jurisdiction in the convention countries, it is easier to enforce judgments of other convention countries than those of non-convention countries. The conventions also deal with enforcement. Article 26 commences: "[a] judgment given in a Contracting State shall be recogni[z]ed in the other Contracting State without any special procedure being required."[12]

Furthermore, recognition and enforcement is not confined to final money judgments. However, injunctions and other orders of foreign courts will also be given effect.

There are limited grounds for resisting enforcement:

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11. Canada Trust Company v. Stolzenberg, [1997] 1 W.L.R. 1582.

12. Brussels Convention, *supra* note 3, art. 26.

(i) enforcement would be contrary to the public policy of the State in which enforcement is sought;

(ii) if the judgment was given by default and the defendant was not duly served;

(iii) if the judgment is irreconcilable with a judgment given between the same parties in the State in which recognition is sought;

(iv) that in order to arrive at its decision the court has decided a preliminary question concerning the rights or status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, will or succession in a way that conflicts with a rule of private international law of the State in which recognition is sought, unless the same result would have been reached by the application of the rules of private international laws of that State; or

(v) if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that the latter judgment fulfills the conditions necessary for its recognition in the State in which enforcement is sought.[13]

The rules for enforcing foreign judgments are set out in a statute containing almost identical rules to New York and a number of other states of the United States.

The procedure for registration of foreign judgments is that the judgment or certified copy, together with the translation if the original judgment is in a foreign language, is lodged with the High Court of Justice together with the affidavit in support of an application for the judgment to be registered.

The application is made *ex parte* by lodging papers with the Master's Secretary's Department. Assuming the conditions of the applicable Act are complied with, an order will be given for the judgment to be registered. Notice is then given to the defendant that the judgment has been registered and that the defendant has twenty one days in which to

13. *See generally id.* (emphasis added).

apply to set aside the registration. If an application is made there will be a hearing before the Master in the Queen's Bench Division of the High Court.

Under the Administration of Justice Act of 1920 and subsequent legislation, judgments obtained in the Superior Courts in many parts of Her Majesty's Dominions outside the United Kingdom may be registered. Under the Foreign Judgments (Reciprocal Enforcement) Act 1933, judgments obtained in the Courts of various foreign countries may also be registered in this Country. The 1933 Act allows the judgments of higher courts in the countries with which the United Kingdom has entered into bilateral treaties to be enforced by registration.

Registration of the judgment will be set aside if the court is satisfied:

> 1. [t]he judgment is not a judgment to which the Act applies or was registered in contravention of the provisions of the Act; or
>
> 2. The Courts of the Country of the original court had no jurisdiction (according to the English rules of private international law) in the circumstances of the case; or
>
> 3. The judgment debtor being the defendant in the proceedings in the original court did not, (notwithstanding that process may have been duly served on him in accordance with the law of the Country of the original court), receive notice of those proceedings in sufficient time to enable it to defend the proceedings and did not appear; or
>
> 4. The judgment was obtained by fraud; or
>
> 5. The enforcement of the judgment would be contrary to English public policy; or
>
> 6. The rights under the judgment are not vested in the person by whom the application for registration was made.[14]

The judgment may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had

14. Foreign Judgments Reciprocal Enforcement Act 1933 (England).

previously been the subject of a final and conclusive judgment by a Court having jurisdiction in the matter. This registration procedure is similar to that for registering judgments from Convention countries.

*B. At Common Law*

Judgments of countries with whom there is no treaty and which are not party to the Convention may be enforced by bringing an action on the judgment. The foreign judgment is the cause of action and an application can be made for summary judgment on the grounds that there is no defense to the action.

In order for a foreign judgment to be enforced the English Courts must be satisfied that the foreign court had jurisdiction according to the English rules of private international law.

In a nutshell, the English Courts' requirements for jurisdiction are that:

1. The defendant in the enforcement proceedings was resident or if a body corporate had a place of business (or perhaps was present) in the country of the foreign court which gave judgment; or

2. The defendant to the enforcement proceedings was plaintiff or counter-claimed in the proceedings in the foreign court; or

3. The defendant agreed to submit to the jurisdiction of the foreign court; or

4. The defendant submitted to the jurisdiction of the foreign court by taking an active step in the proceedings other than in relation to i) property which had been seized; or, ii) disputing the jurisdiction of the foreign court).

The leading case on the foreign law enforcement judgment is *Adams et al. v. Cape Industries plc and Capasco.*[15] I acted for the plaintiffs in that case which involved an attempt to enforce, at common law, judgments obtained in Texas by 206 plaintiffs injured by asbestos. The judgments were obtained against the defendants in the United States District Court for the Eastern District of Texas, Tyler Division, and proceedings were brought in the High Court of Justice in London to enforce the judgments. The court declined to enforce the judgment for the following reasons:

15. Adams v. Cape Industries plc and Capaso Limited, [1990] 2 W.L. R. 657.

> 1) The defendants were not present in the country of the foreign court when the proceedings were commenced; and
>
> 2) It would be contrary to natural justice/public policy to enforce the judgment on the grounds that there had been no proper judicial assessment of the damages.[16]

The court also found that the defendants, if they had been shown to be present in the United States, would have been present in Illinois, and that judgment given in Texas would not prevent the judgment from being enforced. This was because the issue was before a Federal Court, and a Federal Court is a court of the United States and not of the individual State in which it sit. In other words, the United States of America is a country for the purposes of English private international law! The appeal to the Court of Appeals was unsuccessful.

A further argument advanced in that case has Court of Appeal authority against it. The argument may however at some stage succeed before the House of Lords. As seen above, English Courts will allow service out of the jurisdiction in certain circumstances. They would then expect foreign Courts to enforce their judgments. The argument, based on reciprocity, is that English Courts should enforce foreign judgments in analogous circumstances. This argument rests heavily on the doctrine of the comity of nations.

### *C. An English Perspective of the United States*

The United States courts are perceived in Europe as exercising excessive jurisdiction. As we have seen above, the jurisdiction of the English court is extremely wide. I am not anti-American. I am a partner in an American law firm. The fear in Europe is of excessive and unpredictable jury award and multiple damages.

The English courts jurisdiction is as wide or possibly even wider than that of the United States courts, but there is less perception that the English courts are to be avoided and less ruffling of the feathers of other courts due to two factors — sensitivity and sovereignty. The English courts are sensitive to the notion that they should not be seen to be grabbing cases that do not belong in England and are sensitive to the sovereignty of foreign courts.

Furthermore, there is a danger that if United States courts claim jurisdiction in inappropriate cases those judgments will not be enforced.

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16. *Id.*

This could be because the United States court did not have jurisdiction or on the grounds of natural justice. One example is if service on a non-United States company had been effected by serving its United States subsidiary or, even worse, the Secretary of State.

Regarding service, the United Kingdom lodged no objection under Article 23 of the Hague Service Convention and service can therefore be effected directly. Instruct a solicitor to effect service of United States proceedings on an English company. It is quicker and more effective than going through official channels and any eventual judgment will be less likely to be unenforceable for lack of proper service.

## III. EVIDENCE

### *A. Introduction*

I suggest below the most appropriate procedures in particular cases; it is not an exhaustive review of the law or procedure. Evidence may be obtained in England and Wales for use in foreign proceedings without any formal order. In certain other countries the obtaining of evidence without the leave of the court is a criminal offense but the English Courts will not interfere with any procedure whereby witnesses appear voluntarily to give evidence or produce documents. In restricted circumstances production of documents may be contrary to English law.[17]

The United States is a prolific source of requests and therefore the means of obtaining evidence outside the United States under United States federal law is also set out in this guide.

### *B. The Methods of Obtaining Evidence in England and Wales*

Evidence may be collected in England and Wales for United States proceedings in the three ways described below.

#### 1. Voluntarily

Depositions can be taken and documentary evidence collected from any persons willing to appear voluntarily. This must be done in a way acceptable to the United States Court and depositions are frequently taken before the United States Consul.

#### 2. Pursuant to Rule 28(b) of the Federal Rules

Evidence can be obtained in any of the three ways set out in Rule 28(b):

17. *See* Protection of Trading Interest Act of 1989 (England).

1) On notice, before a person authorised to administer oaths in the place in which the examination is held, either by the law of that place or by U.S. law; or

2) Before a person commissioned by the English Court and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony; or

3) Pursuant to Letters Rogatory (known in England as *Letters of Request* and so referred to below).[18]

Further, a United States national or United States resident present in England or Wales may be subpoenaed pursuant to 28 U.S.C. §1783.

However; there may be a conflict between the obligation of a United States national or United States resident to comply with such a subpoena and local law. For example, in a London branch of a United States bank a subpoena would not be effective. A London branch of a United States bank should require the protection of an English Court Order before divulging any documents or information. There is also a limit to the subject matter jurisdiction of foreign courts.[19]

### 3. Pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The Hague Evidence Convention is working well in England. The statute passed to bring the convention into effect will probably enable an American attorney to collect more and better evidence than in any other country outside the United States.

The Evidence (Proceedings in other Jurisdictions) Act of 1975 was passed partly to give effect to the Hague Convention. The Act goes further than necessary for the purposes of the Convention and should be read in conjunction with Order 70 of the Rules of the Supreme Court to ascertain the boundaries within which evidence can be obtained pursuant to the Convention or for foreign proceedings generally and the procedure for obtaining such evidence. The procedure under The Hague Convention is the same for any country which is a party to it and indeed for any country which requests judicial assistance from the English Court.

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18. FED. R. CIV. PROC. 28(b).

19. *See* Mackinnon v. Donaldson, Lufkin & Jennrette Securities Corporation, [1986] 2 W.L.R. 453.

### *C. Letters of Request*

Letters of Request may be submitted either (i) through diplomatic channels, or (ii) by direct submission by English Solicitors. If English Solicitors are not instructed by the party seeking an Order for depositions or the production of documents the Treasury Solicitor will make an application to the Court for an Order but it is more prudent to instruct English Solicitors in case the witnesses resist the Order. It is also quicker to instruct Solicitors and to send the Letters of Request directly to them. An Order can then be obtained within a week, whereas transmission through diplomatic channels takes considerably longer.

### *D. Discovery and Fishing Expeditions*

Discovery in England and Wales is much narrower than the discovery which is allowed in the United States. English Courts will not countenance *fishing expeditions*. The English Court is prohibited from making an order requiring any particular steps to be taken unless they are steps which could be taken to obtain evidence for the purposes of civil proceedings in the English Court. The English rules distinguish between (i) evidence in the nature of proof to be used for the purposes of the trial and (ii) evidence in the nature of pre-trial discovery to be used for purposes of a train of inquiry which might produce evidence for trial. The English Court will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents and will not give effect to a request for those purposes.

The notes to the Rule of the Supreme Court state:

> the English Court will refuse to make an order in aid of a foreign request for evidence if it appears or to the extent to which it appears that that evidence is required, not for the purpose of proof at the foreign trial, where it is admissible and relevant to the issues in those proceedings, but for the purpose of discovery, something in the nature of a roving inquiry in which a party is seeking to 'fish out' some material which might lead to obtaining admissible evidence at the trial, even though the procedure of the foreign court permits such a practice, as does, for example, Rule 26 of the U.S. Federal Rules of Civil Procedure . . . . On the other hand, if the foreign request is for evidence in the nature of proof to be adduced at the trial, the English Court will give effect to such request and it may do so

> subject to modifications as to the disallowance of certain witnesses or documents.[20]

As a practical matter, it is becoming more and more difficult to obtain orders for United States proceedings as the procedure has been abused, and the English Court is wary of attempts to obtain pre-trial discovery and fishing expeditions. This was exemplified in the case of *State of Minnesota v. Philip Morris Incorporated and Others*. In that case the Court of Appeal set aside an order for evidence to be provided in England for use in United States tobacco litigation on the grounds that the Letter of Request was too wide and uncertain in its scope and that the request could not be made acceptable by amendment. The Court quoted Lord Denning MR from the *Westinghouse* case (*infra*), "[i]t is our duty and our pleasure to do all we can to assist that court, just as would expect the United States court to help us in like circumstances. Do unto others as you would be done by."

Nevertheless, the court went on to say,

> I have striven mightily to give effect to the Request, but reluctantly, and for the reasons given, have been unable to do so. In my judgment this is not a case where blue pencilling is appropriate, or where the introduction by this court of a safeguard in the form of a suitably worded limitation can provide adequate protection for the witnesses. Given the width of the Request, the formulation of a suitably worded limitation by this court is not, in my view, workable in the context of the proposed examinations. What is required is that the Request should be drafted in different terms.[21]

### *E. Proceedings Must have been Instituted or be Contemplated*

The English Court will not give effect to any request from a United States court unless proceedings have actually been instituted or proceedings are contemplated. In this context *contemplated* means that proceedings are imminent or pending.

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20. *See generally Rules supra* note 8, notes.

21. State of Minnesota v. Philip Morris Incorporated et.al., No. C1-94-8565 (Dist. Ct. Minn.).

### *F. General Principle*

Subject to the above, the general principle followed by the English Court in relation to requests from foreign courts is that the English Court will ordinarily give effect to a request so far as is proper and practicable and to the extent that is permissible under English Law.

### *G. No General Investigation*

General investigation *(as in Chapter 11 Bankruptcy Proceedings)* will not be allowed. Documents sought must be specifically listed and not referred to by general descriptions. Solicitors should be asked to advise on the form of the document request before the request is submitted to the United States Court. This will certainly save time in the long run, because if this procedure is not followed there may be contested hearings in England and possibly part or all of the request may be struck out.

### *H. No Discovery Order Against Non-Parties*

Section 2(4)(a) of the 1975 Act prohibits the English court from making an order against a stranger to the proceedings which requires him to make general discovery of documents. Such an order would be in the nature of a *fishing expedition* which is never allowed in the English court. The request for witnesses to be heard or documents to be produced must specify which evidence witnesses can give or the actual documents which are to be produced.

Section 2(4) of the 1975 Act states: "[a]n Order under this Section shall not require a person to produce any documents other than particular documents specified in the Order as being documents appearing to the Court making the Order to be, or likely to be, in his possession custody or power." The Court must be satisfied that the documents in question are in the possession, custody or power of the person against whom the Order is made. The burden of proving this fact is on the applicant.

### *I. Orders Available from the English Court*

The English Court has power to make orders for:

1) oral or written examinations of witnesses;
2) the production of documents;
3) inspecting, photographing or preserving property;
4) taking samples of property;
5) conducting experiments on property;
6) medical examination of persons;
7) taking blood samples.

Once an Order has been made by the English Court, depositions are taken in "the English manner" before an Examiner appointed by the Court.[22] The Examiner will be an English barrister. In order to facilitate the taking of depositions at a time convenient to the party requesting the Order, it is normally better to have an Examiner of the party's choice appointed rather than one of the Court Examiners who may not be available at the required time. This can only be done if the application for the Order is made by solicitors who will also make the appropriate arrangements for the examination — including providing a court reporter if required.

### *J. Videotaping*

Examinations may also be videotaped. Recently an application to set aside an Order for videotaping the taking of evidence was unsuccessful.[23] In that case Evans J. said:

> Two things are clear. (i) A video recording of evidence given in English Courts is not permitted. There is statutory recognition of tape recordings: photographs in Court are banned. In my judgment videotaping is not allowed. (ii) At the other extreme, evidence in the form of tape recordings and video recordings is capable of admission in English courts, just as photographs are commonly admitted.
>
> Here we have an intermediate situation. What is sought is videotaping outside the court, and it is proposed that the videotaping should be available to the court itself. That is parallel to the taking of tape recordings outside court of a shorthand transcript outside court. It is clearly something different from recording proceedings in the court itself. . . . Proceedings involving examination of witnesses outside court are not necessarily limited to the permitted methods of recording proceedings in court. It seems to me that the request by the Californian court is not inconsistent with the English mode.[24]

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22. *Rules*, *supra* note 8, ORDER 39.

23. J. Barber & Sons v. Lloyd's Underwriters,[1986] 2 All E.R. 845.

24. *Id.*

*K. Extra-Territoriality*

It is noteworthy that many of the leading cases on extra-territoriality are concerned with whether evidence should be produced for foreign proceedings. In *R. v. Grossman*, the Court of Appeal declined to make an order for disclosure of information held by a branch of Barclays Bank in the Isle of Man under Section 7 of the Bankers' Books Evidence Act 1879.[25] Lord Denning M.R. said:

> I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American Bank or any other Bank in the Isle of Man which is not subject to our jurisdiction. . . . It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man Government. It has customers there who are subject to Manx law. It seems to me that the Court here ought not in its discretion to make an Order against the Head Office here in request of the books of the branch in the Isle of Man in regards to the customers of that branch. It would not be right to compel the branch — or its customers — to open their books or to reveal their confidences in support of legal proceedings in Wales.[26]

The case of *MacKinnon* concerned an Order made against an American bank, which was not a party to the main action, requiring it to produce books and papers held at its Head Office in New York. These related to an account of one of the Defendants, a Bahamian company which had since the issue of the Writ been struck off the Register of Companies, and a subsequent subpoena duces tecum which was served on an Officer of the Bank at its London Office. Hoffman J. held that the Order and subpoena, taking effect in New York, were an infringement of the sovereignty of the United States, and, therefore, the English Courts should not require a foreign bank which owed a duty of confidence to its customers to produce documents outside the jurisdiction of the English Courts. Because the bank was regulated by the law of the country where the customer's account was kept (in this case the United States) and concerned business transactions outside that country's jurisdiction was material.

He said:

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25. R. v. Grossman [1973] Cr. App. R. 302.

26. *Id.*

> the need to exercise the Court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. . . . If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in an unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.[27]

He also referred to the decision of the New York Federal District Court in *Laker Airways v. Pan American World Airways*, where subpoenas served on English banks at their New York offices requiring them to produce documents relating to transactions in England were quashed and stated that: "this decision shows a welcome revival in a United States Court of sensitivity to foreign sovereign interests."[28]

Perhaps the best known case on the subject of such requests is *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*. In this case the House of Lords reversed a decision of the Court of Appeal which had upheld the implementation of Letters of Request issued by a Court in Virginia.

Viscount Dilhorne said:

> for many years now, the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that Country. This is not in accordance with international law and has led to legislation on the part of other States designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.[29]

## IV. PRIVILEGE AND DUTY OF CONFIDENTIALITY

### *A. Privilege*

The *Westinghouse* case also comments in detail on claims to privilege against production of documents sought under Letters of Request and differentiates between documents required for the purposes of civil

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27. Mackinnon v. Donoldson, Lofkin & Jennrette Securities Corporation [1987] 2 W.L.R. 453.

28. Laker Airways v. Pan American World Airways, 607 F.Supp. 324 (S.D.N.Y. 1985).

29. Rio Jinto Zino Corporation v. Westinghouse Electric Corporation [1978] A.C. 547.

proceedings and documents sought for the purpose of a Grand Jury investigation which might lead to criminal proceedings. Lord Wilberforce said:

> Now Section 5 of the 1975 Act provides for the obtaining of evidence for criminal proceedings but expressly the section only applies to proceedings which have been instituted (none have been instituted) and, impliedly, to a request by the Court in which the proceedings have been instituted. The case is therefore not within Section 5, and the procedure is an attempt to get the evidence in spite of that fact.[30]

A party wishing to obtain evidence for use in foreign proceedings should institute proceedings, or at least produce some evidence that proceedings are about to be commenced, before any application is made to the Court for an order.

### *B. Duty of Confidentiality*

*X A.G. v. A Bank* discussed the question of disclosure of documents in breach of the duty of confidentiality owed by a bank to its customers.[31] Leggatt J. referred to the case of *British Nylon Spinners Limited v. Imperial Chemical Industries Limited* and quoted the passage:

> The Courts of this Country will, in the natural course, pay great respect and attention to the Superior Court of the United States of America, but I conceive that it is nonetheless the proper province of English Courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty so to do for the protection of rights which are peculiarly subject to their protection. In so saying, I do not conceive that I am offending in any way against the principles of comity . . . .[32]

The Judge also referred to the comment of Denning L.J., The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here.

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30. *Id.*

31. X A.G. v. A Bank [1983] 2 All ER 464.

32. British Nylon Spinners Limited v. Imperial Chemical Industries Limited [1952] 2 All E.R. 780.

*X A.G. v. A Bank* was a case involving injunctions preventing a Bank from complying with subpoenas issued by an American Court in three actions. Although the proceedings were in chambers judgment was given in open court. Leggatt J. summarized as follows:

> On the one hand, there is involved in the continuation of the injunction impeding the exercise by the United States Court in London of powers which, by English standards, would be regarded as excessive, without in so doing causing detriment to the Bank; on the other hand, the refusal of injunctions, or the non-continuation of them, would cause potentially very considerable commercial harm to the plaintiffs, which cannot be disputed, by suffering the Bank to act for its own purposes in breach of the duty of confidentiality admittedly owed to its customers. . . . Any sanction imposed now on the Bank would look like pressure on this Court, whereas as it seems to me, it is for the New York Court to relieve against the dilemma, in which it turns out to have placed its own national, by refraining from holding it in contempt proceedings are issued.

Accordingly, it was ordered that the injunctions should continue. In *In Re the State of Norway* (No. 1 and No. 2) - Judgment 9th February 1989, Lord Goff upheld the decision of the Judge of the first instance stating that: witnesses should not be required to reveal the identity of a settlor in breach of a banker's duty of confidentiality unless the witness should have evidence that the settlor was acting as the nominee or agent of the tax payer.

### *C. Civil or Commercial Matter*

There was also much discussion of the practice relating to Letters of Request, possible infringement of United Kingdom sovereignty and extra-territoriality in *In Re the State of Norway (No.1)* and *In Re. the State of Norway (No. 2)* House of Lords (Judgment 9th February 1989).

There had previously been two cases in the Court of Appeal which to some extent resulted in conflicting decisions. The main issue was whether an action in the Sandefjord City Court in Norway to set aside an assessment of tax was a *civil or commercial matter*. The Court of Appeal in Norway (No. 1) had decided that this should be decided pursuant to the laws of the requesting Court and not the recipient Court of the Letters

Rogatory. In Norway (No. 2) the Court decided that it should be resolved pursuant to the law of the Court receiving the request.

The main speech in The House of Lords was given by Lord Goff who said:

> The words (civil or commercial matter) should be given their ordinary meaning, so that proceedings in any civil matter should include all proceedings other than criminal proceedings, and proceedings in any commercial matter should be treated as falling within proceedings in civil matters. On this simple approach, I do not see why the expression should be read as excluding proceedings in a fiscal matter . . . .

### *D. Comity*

It will be seen from the above cases that the English Courts are keen, in accordance with the principle of comity of nations, to give effect to requests for evidence from foreign courts. The English Courts are, however, jealous in protecting the sovereignty of the United Kingdom, and the border separating the willingness to assist foreign courts and the protection of sovereignty is not always clearly defined.

### *E. Practical Matters*

It is becoming increasingly difficult to obtain orders for witnesses to give evidence for foreign, especially United States, proceedings. Letters of Request must be drafted extremely carefully, and this applies even more to document requests. It takes some time to obtain evidence using official channels. The quickest way and the most likely to be effective is to draft the request in conjunction with an English solicitor experienced in the field and use that solicitor to make the application to the English court.