

Foreign evidence in Ireland

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A regular question we are asked by our international colleagues is how they can obtain evidence in Ireland with respect to proceedings their clients have issued in their own jurisdictions? But before we can answer that we need to know if the potential witness will provide the evidence voluntarily. A witness can provide evidence voluntarily in one jurisdiction for proceedings in another jurisdiction without the involvement of the Irish courts. So, the pertinent question in fact is how can we compel an Irish witness to give evidence in a foreign court.

The Hague Convention allows the courts in one signatory country to obtain evidence located in another signatory country for use in proceedings. Ireland is not a signatory to the Hague Convention. Therefore, the Irish courts do not entertain applications pursuant to the Hague Convention. The options available depend on where the request is coming from:

1. If the request is made by a court that is not an EU member state, the Foreign Tribunals Evidence Act of 1856 applies.
2. If the request is made by a court that is an EU member state, Council Regulation (EC) No 1206/2001 applies.

This governs cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the “Evidence Regulation”).

The Foreign Tribunals Evidence Act of 1856 (the “Act”)

Under the Act, an Irish court may, on the application of a foreign court or tribunal, direct that a witness in Ireland, attend to give evidence for use in the foreign proceedings.

Proceedings must be ongoing before a request for evidence can be made.

A letter of request, called letters rogatory, must be issued from the foreign court to the Irish court requesting assistance by directing the Irish witness to attend before it to give evidence.

An ex-parte application is made which is grounded on affidavit. This should set out the full

circumstances in which the evidence is sought and exhibit letters of request/letters rogatory. It should also make proposals as to the directions required from the high court to effect suitable arrangements for the deposition hearing.

If the court is satisfied that the various requirements are met, the court will make an Order allowing the depositions to proceed and give directions as appropriate.

The Order has a provisional status. The moving party carries the burden of making the application afresh in the event that the addressees of the order seek to have it set aside.

The examination is overseen by an examiner appointed by the Irish court and is subject to Irish evidential rules.

Points to note

In *Cutler v. Azur Pharma International* [2015] 1 I.R. 167, Judge Noonan summarised the applicable principles as follows:

(a) The starting point in such an application is that the court will use its best endeavours to give effect to a request for assistance from the courts of another jurisdiction (court's emphasis).

(b) While the enforcement of letters rogatory remains a matter of discretion, the default position is that they will be enforced absent some factor or factors which could convince the court to exercise its discretion otherwise.

(c) Before any such order could properly be granted, it would be necessary to establish that:

(i) the evidence proposed to be taken is relevant to the foreign proceedings;

(ii) the application is not oppressive;

(iii) the grant of the request would not override any established privilege or protection available to the prospective witness; and

(iv) the evidence so taken on commission is itself admissible under the law of the requesting state."

Variation of Order

In *Cutler v Azur*, Judge Noonan affirmed the Order but subject to variations. One such variation was: "it is both unnecessary and oppressive for KPMG to be required to produce documents which are in the possession of Azur and are the subject matter of the discovery order in the US proceedings. I will discuss with counsel the form of order to be made in this regard to avoid such duplication."

The court can modify the terms on which a request is granted if the request is considered to be overly broad or oppressive².

Set aside Order

Judge McCracken³ set aside an Order as it amounted to a discovery request which is not permissible under the 1856 Act. Rather, the documentation to be provided are the documents which are ancillary to the necessary oral evidence being given.

Participation

There may be a situation where your opposing party in foreign litigation is seeking evidence in Ireland. This may give rise to various issues for a party such as:

- ensuring that the documentation that the witness provides to the other party in advance of or during the deposition is not privileged; and/or
- that you want a right of cross examination at the deposition.

If these matters cannot be agreed between the parties, it may necessitate an application to the Irish courts.

The Evidence Regulations

Under the Evidence Regulations, a witness in another Member State can be compelled to give evidence in Irish proceedings.

Likewise, a person based in Ireland can be made to give evidence in another Member State and the Irish judiciary also have the ability to hear evidence on behalf of proceedings in another Member State.

In Ireland, a witness is usually compelled to give evidence through a legal instrument called a subpoena. However, a subpoena is usually only valid in the jurisdiction where it has been issued. An unwilling witness can avoid giving evidence by leaving the jurisdiction. The limitations of a subpoena are overcome in a European context by the Evidence Regulations.

Requests under the Evidence Regulations must comply with the format specified namely:

- The names and addresses of the parties involved in the case;
- The background of the proceedings; and
- A detailed description of the evidence that is required to be heard.

A request must be made in the official language of the Member State and/or any other language that they request. Applications made to Ireland for example are only required to be

made in English, despite Irish being the official language. The request is required to be submitted to the Dublin Metropolitan District Court, the designated requested court, or the Circuit and District Court Operations Directorate, which has been designated as the Central Body for applications Ireland receives.

A request received should be adhered to within 90 days of the request being received. Only in exceptional circumstances can a Member State refuse to comply with a request received, such as the request being illegal under the laws of that Member State. If such exceptional circumstances arise, the Member State that receives the request must communicate this to the requesting State within 60 days of the request being received.

The procedure for taking evidence is not defined but in practice it has been interpreted as covering the production of documents. Pre-trial discovery requests are however excluded. If an application under the Evidence Regulation is successful, a subpoena is granted.

If you have any queries relating to foreign evidence, please contact Ronan McGoldrick at ronan.mcgoldrick@ogier.com

2 *Ernst & Young Chartered Accountants v King*, unreported, Supreme Court, 28 November 2003

3 *Sabretech v Shannon Aerospace Limited* [1999] 2 IR 468

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