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This article is intended to be a general, nonexhaustive review of the law relating to obtaining evidence in England and Wales for use in United States proceedings. Furthermore, where the procedure for collecting evidence is not specifically stated to be pursuant to U.S. law, the methods explored in this article can be used to collect evidence for proceedings in any foreign court. Many of the cases on this subject deal at great length with the principles of extra-territoriality and comity. Whilst the procedure is clear cut, the important differences between English and American discovery rules usually result in U.S. requests being drawn too widely to be acceptable to English courts. To avoid the expense and delay of rejection, one must have regard to English substantive law. Therefore, it will usually be desirable to seek advice from English lawyers at an early stage to ensure acceptance by the English court. Nevertheless, it is hoped that this article will identify potential problems and pitfalls, and offer guidance on the procedure to be adopted.

Before submitting a document request to a U.S. court for formal presentation to the English court, U.S. lawyers should submit a draft of their request to English solicitors for advice on whether a request in that form will be acceptable to the English court. This procedure will ultimately save time, for if the request is contested in a hearing in England the result may be that part or all of it could be struck out.

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In England there is generally no bar to a witness voluntarily giving evidence or producing documents. Unlike many countries where the obtaining of evidence without leave of the court is a criminal offence,[1] the English court will only interfere in the voluntary giving of evidence in particular circumstances. One example is the Protection of Trading Interests Act 1980, which gives power to the Secretary of State to prohibit compliance with extra-territorial orders or requests for documents or testimony.[2]

Under U.S. law, evidence may be collected in England and Wales for proceedings in the U.S. in the three following ways:

(1) *Voluntarily.* This method assumes the willingness of the witness to collaborate without having to resort to coercion. There is, however, the requirement of formality, which means that any deposition must be taken in a way that is acceptable to the U.S. court. As a result it will usually be taken before the U.S. Consul.

(2) Where the evidence is to be collected from a U.S. national or resident who happens to be in England or Wales, it must be obtained pursuant to Rule 28(b) of the Federal Rules.[3] Rule 28(b) sets out three ways in which evidence can be obtained:
   (a) *On notice,* before a person authorized to administer oaths in the place in which the examination is held, either by the law of that place or the law of the U.S.; or
   (b) *Before a person commissioned by the U.S. Court.* That person is invested *ex officio* with the power to administer any necessary oath and take testimony; or
   (c) *Pursuant to Letters Rogatory,* known in England as Letters of Request.

   In addition, any such resident or national of the U.S. may be subpoenaed subject to title 28 United States Code section 1783.[4] However, such an action will frequently give rise to a conflict between the U.S. request to comply with a subpoena and the local law in England, particularly where banks and bank accounts are concerned. In the recent English case of *MacKinnon v. Donaldson, Lufkin & Jennrette Securities Corp.*,[5] a London branch of a U.S. bank was subpoenaed unsuccessfully. Two reasons were given for preventing the bank from complying with the subpoena: (1) before divulging any documents or

1. *E.g.,* Switzerland.
2. Protection of Trading Interests Act, 28 & 29 Eliz. 2, ch. 11. § 2 (1980).
3. FED. R. CIV. P. 28(B).
4. 28 U.S.C. § 1783 (1982).
5. 1986 2 W.L.R. 453.

information, the branch would require the protection of an English court order to protect it from any allegations of breach of confidentiality, and, (2) there is a limit to the extent of subject matter over which a foreign court has jurisdiction.[6]

(3) *Non-U.S. Nationals or Residents.* Evidence can be obtained from anyone else who is not a U.S. national or resident pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[7] Both the U.S. and the U.K. are signatories to this Convention. Again, the procedure involves the use of Letters Rogatory, which can be submitted to England either through diplomatic channels or directly by English solicitors. The speediest of these methods is to instruct English solicitors directly when an Order for Depositions or the Production of Documents can be made within a few days. Submission through diplomatic channels involves instructing the Treasury Solicitor and obviously the whole process will take longer.

The Evidence (Proceedings in Other Jurisdictions) Act of 1975[8] was passed to give effect to the Hague Convention in English law. This Act actually goes further than is required by the Convention, and it must be read in conjunction with Order 70 of the Rules of the Supreme Court (RSC) to ascertain the boundaries within which evidence can be obtained and the procedure which must be followed.

English courts will generally honor a request from a foreign court so far as it is proper, practicable, and permissible under English law. In the case of discovery this is much narrower than that allowed in the United States, and the English court will not permit so-called "fishing expeditions." This is the name given to requests that are designed to "fish out" some material which might lead to obtaining admissible evidence for a trial. English courts adamantly refuse to make orders requiring any particular steps to be taken unless they are also steps that can obtain evidence for the purposes of English civil proceedings. The notes to the Rules of the Supreme Court state:

> [T]he 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 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 enquiry in which a party is seeking to "fish

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6. *Id.* at 461-62 and 464-65.

7. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Cmnd. 3991, 6726 ratified by the U.K. in 1976.

8. The Evidence (Proceeding in Other Jurisdiction) Act, 1975 23 & 24 Eliz. 2, ch. 34.

> out" some material which might lead to obtaining admissible evidence at the trial even though the procedure of the foreign court permit 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 to the trial, the English Court will give effect to such a request and it may do so subject to modifications as to the disallowances of certain witnesses or documents.[9]

For the same reason, the 1975 Act prohibits the making of an order for general discovery against a stranger to the proceedings.[10] It is essential to note that the only requests to which the English court will give effect are those where proceedings have actually been instituted or are contemplated. In this context "contemplated" means that the proceedings are either imminent or pending. Likewise, for discovery purposes, a general investigation will not be permitted and any documents sought must be specifically listed with such distinctiveness as would be sufficient for a subpoena duces tecum, *i.e.*, sufficiently specific for a person to put his hand on the document or file.

Section 2(4) of the 1975 Act states:

> An order under this section shall not require a person -
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> 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 act is on the applicant. The English court has power to make orders for:

(i) oral or written examinations of witnesses;
(ii) the production of documents;
(iii) inspecting, photographing, or preserving property;
(iv) taking samples of property;
(v) conducting experiments on property;
(vi) medical examination of a person; and
(vii) taking of blood samples.

Section 2(4) applies solely to documents. Oral evidence is not included, so the question that should be asked when considering oral evidence is, "Is it relevant and does it relate to the matters in

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9. R.S.C. 70/1-6/6.
10. Eliz., *supra* note 8, § 2(4)(a).

question?" The problem of how a witness knows whether his testimony is relevant may be overcome by having lawyers present when the witness gives his testimony.

A witness may claim privilege as a way of avoiding answering a question, as, at common law, a person is not bound to answer any question which may render that person liable to punishment or a penalty. The English rule that no one is bound to incriminate themself is preserved by Section 3 of the 1975 Act, while in the U.S. the rule is preserved by the fifth amendment. The 1975 Act states that a person shall not be compelled to give evidence which he would not be compelled to give in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

In England, if privilege is claimed because of risk of penalty, the procedure to be followed is governed by Order 39 Rule 5 RSC. Rule 5 provides that if a witness refuses to answer a question, an application can be made to the court to see whether such witness should be required to answer. If the privilege is claimed under the fifth amendment, the examiner will have to act in accordance with Order 70 Rule 6 RSC by taking down the evidence, sealing it up, and then sending it to the United States court, which will rule whether or not the claim to privilege is valid.

Once an order for discovery has been made by the English court, depositions will be taken according to English procedural rules before an examiner appointed by the court.[11] Such examinations may now be video-taped.[12]

It is interesting to note that many of the leading cases on extra-territoriality are concerned with whether or not evidence should be produced for foreign proceedings. In *R v. Grossman*,[13] the Court of Appeal declined to make an order for disclosure of information held by a branch of Barclays Bank Limited in the Isle of Man under section 7 of the Bankers Books Evidence Act 1879. 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 the 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. The branch of Barclays Bank in Douglas Isle of Man, should be considered as a different

11. R.S.C. 0.70, r. 4.
12. Barber J. and Sons v. Lloyds Underwriters, 1986 2 All E.R. 845.
13. 1973 Crim. App. 302, 307-08.

> entity separate from the head office in London. 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 respect 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.

Again a majority of those concerned were banks, where the need to exercise the court's discretion with due regard to the sovereignty of others is particularly important.

The case of *MacKinnon*[14] 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 documents related to an account of one of the defendants, a Bahamian company that had been struck off the Register of Companies since the writ's issuance. A subsequent subpoena duces tecum had been served on an officer of the bank at its London office. Hoffman J. held that the order and the subpoena taking effect in New York were an infringement of the sovereignty of the United States, and that the 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 court. Material to the court's holding were the facts that the bank was regulated by the law of the country where customers' accounts were kept (in this case the United States) and also that the relevant transactions occurred outside the English court's jurisdiction:

> 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 another such country, banks would be in an unhappy position of being forced to submit to whichever sovereign was to apply the greatest pressure.

The best known case in England on the subject of requests is *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*[15] In this case, the House of Lords revised a decision of the Court of Appeal which

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14. MacKinnon v. Donaldson, Lufkin & Jennrette Securities Corp., 1986 2 W.L.R. 453.
15. 1978 App. Cas. 547.

upheld the implementation of Letters Rogatory 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 including the United Kingdom 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.[16]

This case also comments in detail on claims to privilege against production of documents sought under Letters Rogatory and differentiates between documents required for the purposes of civil proceedings and documents sought for the purpose of a grand jury investigation that might lead to criminal proceedings. Lord Wilberforce said:

> Now the Act of 1975, Section 5, 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.[17]

From this passage it will be seen that any client wishing to obtain evidence for use in foreign proceedings should be told to 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.

The case of *X A.G. v. A Bank*[18] discussed the question of disclosure of documents in breach of a duty of confidentiality owed by a bank to its customers. Legatt J. referred to the case of *British Nylon Spinners Ltd. v. Imperial Chemical Indus. Ltd.*[19] and quoted with approval the following passage:

> The courts of this country will, in the natural course, pay great respect and attention to the superior courts of the United States of America, but I conceive that it is none the less the proper province of English courts, when their jurisdiction is invoked, not to refrain

16. *Id.* at 631.
17. *Id.* at 615.
18. 1983 2 All E.R. 464.
19. *Id.*, (quoting British Nylon Spinners Ltd. v. Imperial Chemical Indus. Ltd., 1952 2 All E.R. 780.

> 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 . . . .

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."[20]

X A.G. involved injunctions which had been granted to plaintiffs 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. Legatt 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 the 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 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 if contempt proceedings are issued.[21]

Another extremely useful English case is that of *The Estate of the Deceased Ship Owner Anders Jahre v. The Government of the State of Norway*,[22] which deals in depth with the practice relating to Letters of Request and possible infringements of U.K. sovereignty and extraterritoriality. In this case a Norwegian Magistrate had issued a letter of request requiring two English subjects to give oral evidence and produce documents in proceedings to nullify a supplementary retrospective tax assessment raised on a deceased Norwegian's estate by the Norwegian tax authorities.

The question arose as to whether the application related to the purposes of a "civil or commercial matter" within the meaning of

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20. *Id.* at 473.
21. *Id.* at 480.
22. 1986 1 Lloyd's Rep. 496.

Section 9(1) of the Evidence (Proceedings in Other Jurisdiction) Act of 1975. At first instance the Court said it did.

On appeal to the Court of Appeal, Kerr L.J. provided a helpful guide to determine whether or not requests would be considered by the English court to be within the 1975 Act and Order 70 RSC. The relevant questions are:

(1) are the proceedings civil proceedings which will fall within the ambit of the 1975 Act?
(2) would compliance with the Letter of Request be contrary to public policy or any settled principles accepted by the English court?
(3) does the request or compliance with it infringe the jurisdiction of the U.K. or is it prejudicial to its sovereignty?
(4) is the testimony required for a dual purpose such that one use would be bona fide for civil proceedings and the other would infringe the sovereignty of the U.K.?
(5) is it a "fishing expedition" and if the request is too wide, would it be appropriate to cut it down?
(6) would a witness be ordered to break his duty of confidentiality by answering the questions raised?
(7) and finally, apart from the issues of jurisdiction, what would be the proper exercise of the court's discretion?

The prospective witnesses then applied to set aside the order and the Court of Appeal held that foreign proceedings concerning the correctness of a tax assessment were not "proceedings in any civil or commercial matter" for the purposes of Section 9(1). Therefore, the High Court had no jurisdiction under Section 1 of the Act to accede to an application made in pursuance of a request issued by the foreign court or tribunal for evidence to be obtained for the purposes of those proceedings.

In summary, to obtain an order pursuant to the Hague Convention the terms of the 1975 Act must also be complied with and U.S. lawyers should ensure that:

1. the evidence is to be used in proceedings which are contemplated or pending — not in order to see if there is a case;
2. the request is specific.

The balancing act to be carried out by the English court frequently gives rise to problems. On the one hand it must consider the desirable policy of assisting a foreign court, and on the other hand it must consider the opposing principle that the court will give great weight to the desirability of upholding the duty of confidence in relationships in which it is clearly entitled to recognition and respect. It can be seen from the foregoing that the English court is keen, in accordance

with the principle of comity of nations, to give effect to requests for evidence from foreign courts. The English court, however, jealously protects the sovereignty of the United Kingdom, and the line separating its willingness to assist foreign courts and the protection of sovereignty is not always clearly defined.