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Methods of obtaining evidence in Ireland

Obtaining evidence in Ireland for use in foreign proceedings

Due to the increase in global trade and international commercial transactions it has become increasingly evident that important evidence required for proceedings outside of Ireland will often be located in Ireland.

While depositions can be taken and documentary evidence collected from any persons willing to appear voluntarily, the situation is different when dealing with people whom are not willing to provide evidence voluntarily.

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention") makes provision for the obtaining of evidence in one State in respect of proceedings in another state, however, Ireland is not a signatory party to the Hague Convention and the Irish Courts do not have jurisdiction to entertain applications pursuant to the Hague Convention.

However, the Irish High Court has the power to give effect to the request of a foreign court to assist in obtaining evidence in Ireland for use in foreign proceedings.

The procedure governing the taking of evidence in civil or commercial matters to courts in the European Union (except Denmark) is governed by Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in

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civil or commercial matters (the “Evidence Regulation”) which became directly applicable in Ireland on 1st January 2004 and has been followed by the Rules of the Superior Courts (Evidence) 2007, which officially commenced the operation of the Regulation and European Communities (Evidence in Civil or Commercial Matters) Regulations 2008, which specify the District Court as competent to take evidence under the Evidence Regulation.

The procedure governing the taking evidence in respect of proceedings issued outside the European Union falls to be dealt the Foreign Tribunals Evidence Act 1856 (“the 1856 Act”) and Order 39 of the Rules of the Superior Courts.

The Evidence Regulation

The Evidence Regulation governs judicial cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters. It allows the taking of evidence from one member state to another, without recourse to consular and diplomatic channels.

This Regulation enables a simplified route by allowing direct contact between the courts in the member states.

If a party to judicial proceedings, whether anticipated or contemplated, in another member state seeks evidence from a witness resident in Ireland, the request must be lodged using the form specified in the Regulation, and must contain certain details, such as the name and address of the parties to the proceedings, the nature and subject matter of the case, a description of the taking of evidence to be performed. The request must be drafted in the official language of the Member State of the requested court or in any other language that the requested Member State has indicated it can accept. Ireland has indicated that it will only accept requests in the English language.

The request must be made to the Dublin Metropolitan District Court (being the designated requested court) or the Circuit and District Court Operations Directorate (being the designated Central Body).

The Evidence Regulation provides that requests for evidence should be complied with within 90 days of the request issuing and generally, a request for evidence can only be refused in exceptional circumstances, such as, where the taking of such evidence is at odds with the law of the requested state. If the requested court refuses to execute the request, this must be communicated within 60 days of receipt of the request.

The concept of the taking of evidence is not defined in the Evidence Regulation but is considered to include the production of documents. However it is generally accepted that the pre-trial discovery, comprising exploratory investigations (so called ‘*fishing expeditions*’), are excluded from the area of application of the Evidence Regulation, and requests for documentary evidence under the Evidence Regulation should not be framed so wide as to constitute requests for discovery and must be restricted to documents that could be used as evidence directly in proceedings.

If the order is granted, a subpoena to examine a witness (*subpoena ad testificandum*) is issued.

The 1856 Act and Order 39 of the Rules of the Superior Courts

Rule 39 of the Rules of the Superior Courts provides that under the 1856 Act, or the Extradition Act, 1870 any person duly authorised by a foreign court or tribunal may apply to the High Court to have such evidence taken on any matter pending before a court or tribunal.

The procedure envisages an application to be made based on letters rogatory. This is formal request from a court to a foreign court for some type of judicial assistance. The practice in Ireland is to address the letters rogatory to “The High Court Justice of Ireland” and there is no particular rules as to the precise form letters rogatory must take.

The most common route by which examination in Ireland of a witness in a matter pending before court is an application under Order 39, rule 44, where the letter of request/ letter rogatory are transmitted directly to the Chief State Solicitor, without the appointment of Irish lawyers, who conducts the *ex parte* application on behalf of the foreign court. Alternatively, Irish lawyers can make the application on behalf of the foreign court which has the added advantage of expediting the process and input into the appointment of the examiner.

The *ex parte* application is grounded on affidavit, which would set out the full circumstances in which the evidence is sought, exhibit letters of request/ *letter rogatory* and 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 under the 1856 Act and the Rules of the Superior Courts are met, the Court will make an order allowing the depositions to proceed and giving directions as appropriate.

The order has a provisional status and that 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.

It is important to note that general discovery of documents is not permissible under the 1856 Act. Rather, its provisions may only compel a witness to appear and produce documents in their possession, if the documents are ancillary to the necessary oral evidence they are giving. This position was endorsed by McCracken J in *Sabretech v Shannon Aerospace Limited* [1999] 2 IR 468 (“Sabretech”)

Accordingly, the Irish procedure is very different in scope to the procedure under the Hague Convention which permits evidence to be obtained which is intended “*for use in judicial proceedings*” and provides for the inspection of documents, and the Evidence Regulation, which allows, albeit more narrowly than the Hague Convention, the introduction of documents as “*evidence*”.

It has also been acknowledged by McCracken J in *Sabretech*, that although the Irish courts should assist foreign courts making requests, regard had to be shown where ceding to a letter rogatory might permit cross-examination by the respondent in advance of the hearing of Irish proceedings. It would be considerably more difficult for persons defending themselves against serious allegations like fraud, if the court was to exercise its jurisdiction here.

The recent decision of Mr. Justice Gerard Hogan in the case of *Jean Cornec v Susan Morrice* [2012 IEHC 376] has illuminated the criterion which will be applied by Irish Courts when dealing with an application made under the 1856 Act. In this case an application was made by two parties, the addressees of an order, to set aside the order made by the courts *ex parte* pursuant to the 1856 Act. In an excellent decision which considered, *inter alia*, the general right of journalists to protect their sources. Mr. Justice Hogan, commented that:

The Act of 1856 is, of course, a pre-Constitution statute which must, where necessary be read in a fashion which would make it conformable to the modern understanding of the requirements of fair procedures as prescribed by Article 40.3. It is absolutely clear that the courts cannot constitutionally make an order ex parte finally affecting the rights of the parties

In weighing the competing interests of the parties, and having regard to factors such as the constitutional right to freedom of expression under Article 40.6.1, the public interest in disclosure, relevance and whether or not the evidence could be considered “essential”, Mr. Justice Hogan ultimately declined to give effect to letters rogatory.

Whether or not this decision is a harbinger of a more restrictive test to be applied by the Irish judiciary in applications of this nature remains to be seen.

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