

# WITNESSES, DEPOSITIONS GENERALLY AND TAKING OF EVIDENCE IN MEMBER STATES OF THE EUROPEAN UNION

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## I WITNESSES AND DEPOSITIONS

### 24.1 Scope of this Chapter

- (1) This Chapter provides –
  - (a) for the circumstances in which a person may be required to attend court to give evidence or to produce a document; and
  - (b) for a party to obtain evidence before a hearing to be used at the hearing.
- (2) This Chapter, apart from rule 24.10(2) to (4), does not apply to proceedings in a magistrates' court.

(Rules 34.16 to 34.21 and 34.24 of the CPR apply to incoming requests for evidence.)

### 24.2 Witness summonses

- (1) A witness summons is a document issued by the court requiring a witness to –
  - (a) attend court to give evidence; or

- (b) produce documents to the court.
  - (2) A witness summons must be in the form set out in Practice Direction 24A.
  - (3) There must be a separate witness summons for each witness.
  - (4) A witness summons may require a witness to produce documents to the court either –
    - (a) on the date fixed for a hearing; or
    - (b) on such date as the court may direct.
  - (5) The only documents that a summons under this rule can require a person to produce before a hearing are documents which that person could be required to produce at the hearing.
- (Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes.)

### **24.3 Issue of a witness summons**

- (1) A witness summons is issued on the date entered on the summons by the court.
- (2) A party must obtain permission from the court where that party wishes to –
  - (a) have a summons issued less than 7 days before the date of the final hearing;
  - (b) have a summons issued for a witness to attend court to give evidence or to produce documents on any date except the date fixed for the final hearing; or
  - (c) have a summons issued for a witness to attend court to give evidence or to produce documents at any hearing except the final hearing.
- (3) A witness summons must be issued by –
  - (a) the court where the case is proceeding; or
  - (b) the court where the hearing in question will be held.
- (4) The court may set aside<sup>(GL)</sup> or vary a witness summons issued under this rule.

### **24.4 Time for serving a witness summons**

- (1) The general rule is that a witness summons is binding if it is served at least 7 days before the date on which the witness is required to attend before the court.
- (2) The court may direct that a witness summons is binding although it is served less than 7 days before the date on which the witness is required to attend before the court.
- (3) A witness summons which is –
  - (a) served in accordance with this rule; and
  - (b) requires the witness to attend court to give evidence,
 is binding until the conclusion of the hearing at which the attendance of the witness is required.

(Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes.)

### **24.5 Who is to serve a witness summons**

- (1) Subject to paragraph (2), a witness summons is to be served by the party on whose behalf it is issued unless that party indicates in writing, when asking the court to issue the summons, that that party wishes the court to serve it instead.

- (2) In proceedings to which Part 14 (procedure for applications in adoption, placement and related proceedings) applies, a witness summons is to be served by the court unless the court directs otherwise.
- (3) Where the court is to serve the witness summons, the party on whose behalf it is issued must deposit, in the court office, the money to be paid or offered to the witness under rule 24.6.

#### **24.6 Right of witness to travelling expenses and compensation for loss of time**

At the time of service of a witness summons the witness must be offered or paid –

- (a) a sum reasonably sufficient to cover the expenses of the witness in travelling to and from the court; and
- (b) such sum by way of compensation for loss of time as may be specified in Practice Direction 24A.

#### **24.7 Evidence by deposition**

- (1) A party may apply for an order for a person to be examined before the hearing takes place.
- (2) A person from whom evidence is to be obtained following an order under this rule is referred to as a 'deponent' and the evidence is referred to as a 'deposition'.
- (3) An order under this rule is for a deponent to be examined on oath before –
  - (a) a judge;
  - (b) an examiner of the court; or
  - (c) such other person as the court appoints.

(Rule 24.14 makes provision for the appointment of examiners of the court.)

- (4) The order may require the production of any document which the court considers is necessary for the purposes of the examination.
- (5) The order must state the date, time and place of the examination.
- (6) At the time of service of the order the deponent must be offered or paid –
  - (a) a sum reasonably sufficient to cover the expenses of the deponent in travelling to and from the place of examination; and
  - (b) such sum by way of compensation for loss of time as may be specified in Practice Direction 24A.
- (7) Where the court makes an order for a deposition to be taken, it may also order the party who obtained the order to serve a witness statement or witness summary in relation to the evidence to be given by the person to be examined.

(Part 22 (evidence) contains the general rules about witness statements and witness summaries.)

(Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes.)

#### **24.8 Conduct of examination**

- (1) Subject to any directions contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a final hearing.

- (2) If all the parties are present, the examiner may conduct the examination of a person not named in the order for examination if all the parties and the person to be examined consent.
- (3) In defended proceedings under Part 7 (matrimonial and civil partnership proceedings), the examiner may conduct the examination in private if of the view that it is appropriate to do so.
- (4) Save in proceedings to which paragraph (3) applies, the examiner will conduct the examination in private unless of the view that it is not appropriate to do so.
- (5) The examiner must ensure that the evidence given by the witness is recorded in full.
- (6) The examiner must send a copy of the deposition –
  - (a) to the person who obtained the order for the examination of the witness; and
  - (b) to the court where the case is proceeding.
- (7) The court will give directions as to service of the deposition on the other party.

#### **24.9 Enforcing attendance of witness**

- (1) If a person served with an order to attend before an examiner –
  - (a) fails to attend; or
  - (b) refuses to be sworn for the purpose of the examination or to answer any lawful question or produce any document at the examination,
 a certificate of that person's failure or refusal, signed by the examiner, must be filed by the party requiring the deposition.
- (2) On the certificate being filed, the party requiring the deposition may apply to the court for an order requiring that person to attend or to be sworn or to answer any question or produce any document, as the case may be.
- (3) An application for an order under this rule may be made without notice.
- (4) The court may order the person against whom an order is made under this rule to pay any costs resulting from that person's failure or refusal.

(Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes. Rule 35.4(1)(d) relates specifically to this rule.)

#### **24.10 Use of deposition at a hearing**

- (1) A deposition ordered under rule 24.7 may be given in evidence at a hearing unless the court orders otherwise.
- (2) A party intending to put in evidence a deposition at a hearing must file notice of intention to do so on the court and the court will give directions about serving the notice on every other party.
- (3) The party must file the notice at least 21 days before the day fixed for the hearing.
- (4) The court may require a deponent to attend the hearing and give evidence orally.
- (5) Where a deposition is given in evidence at the final hearing, it is treated as if it were a witness statement for the purposes of rule 22.19 (availability of witness statements for inspection).

(Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes. Rule 35.4(1)(e) relates specifically to this rule.)

#### **24.11 Restrictions on subsequent use of deposition taken for the purpose of any hearing except the final hearing**

- (1) This rule applies to proceedings under Part 7 (matrimonial and civil partnership proceedings) or Part 9 (financial remedies).
- (2) Where the court orders a party to be examined about that party's or any other assets for the purpose of any hearing except the final hearing, the deposition may be used only for the purpose of the proceedings in which the order was made.
- (3) However it may be used for some other purpose –
  - (a) by the party who was examined;
  - (b) if the party who was examined agrees; or
  - (c) if the court gives permission.

#### **24.12 Where a person to be examined is out of the jurisdiction – letter of request**

- (1) This rule applies where a party wishes to take a deposition from a person who is –
  - (a) out of the jurisdiction; and
  - (b) not in a Regulation State within the meaning of Chapter 2 of this Part.
- (2) The High Court may order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.
- (3) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.
- (4) The High Court may make an order under this rule in relation to county court proceedings.
- (5) If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.
- (6) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.
- (7) If the High Court makes an order for the issue of a letter of request, the party who sought the order must file –
  - (a) the following documents and, except where paragraph (8) applies, a translation of them –
    - (i) a draft letter of request;
    - (ii) a statement of the issues relevant to the proceedings; and
    - (iii) a list of questions or the subject matter of questions to be put to the person to be examined; and
  - (b) an undertaking to be responsible for the Secretary of State's expenses.
- (8) There is no need to file a translation if –
  - (a) English is one of the official languages of the country where the examination is to take place; or
  - (b) a practice direction has specified that country as a country where no translation is necessary.

(Rules 35.3 and 35.4 contain rules in relation to evidence arising out of mediation of cross-border disputes. Rule 35.4(1)(f) relates specifically to this rule.)

### **24.13 Fees and expenses of examiner of the court**

- (1) An examiner of the court may charge a fee for the examination.
- (2) The examiner need not send the deposition to the court unless the fee is paid.
- (3) The examiner's fees and expenses must be paid by the party who obtained the order for examination.
- (4) If the fees and expenses due to an examiner are not paid within a reasonable time, the examiner may report that fact to the court.
- (5) The court may order the party who obtained the order for examination to deposit in the court office a specified sum in respect of the examiner's fees and, where it does so, the examiner will not be asked to act until the sum has been deposited.
- (6) An order under this rule does not affect any decision as to the party who is ultimately to bear the costs of the examination.

### **24.14 Examiners of the court**

- (1) The Lord Chancellor will appoint persons to be examiners of the court.
- (2) The persons appointed must be barristers or solicitor-advocates who have been practising for a period of not less than 3 years.
- (3) The Lord Chancellor may revoke an appointment at any time.

## **II TAKING OF EVIDENCE – MEMBER STATES OF THE EUROPEAN UNION**

### **24.15 Interpretation**

In this Chapter –

‘designated court’ has the meaning given in Practice Direction 24A;

‘Regulation State’ has the same meaning as ‘Member State’ in the Taking of Evidence Regulation, that is all Member States except Denmark;

‘the Taking of Evidence Regulation’ means Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.

### **24.16 Where a person to be examined is in another Regulation State**

- (1) This rule applies where a party wishes to take a deposition from a person who is –
  - (a) outside the jurisdiction; and
  - (b) in a Regulation State.
- (2) The court may order the issue of a request to a designated court (‘the requested court’) in the Regulation State in which the proposed deponent is.
- (3) If the court makes an order for the issue of a request, the party who sought the order must file –
  - (a) a draft Form A as set out in the annex to the Taking of Evidence Regulation (request for the taking of evidence);

- (b) except where paragraph (4) applies, a translation of the form;
  - (c) an undertaking to be responsible for costs sought by the requested court in relation to –
    - (i) fees paid to experts and interpreters; and
    - (ii) where requested by that party, the use of special procedures or communications technology; and
  - (d) an undertaking to be responsible for the court's expenses.
- (4)** There is no need to file a translation if –
- (a) English is one of the official languages of the Regulation State where the examination is to take place; or
  - (b) the Regulation State has indicated, in accordance with the Taking of Evidence Regulation, that English is a language which it will accept.
- (5)** Where article 17 of the Taking of Evidence Regulation (direct taking of evidence by the requested court) allows evidence to be taken directly in another Regulation State, the court may make an order for the submission of a request in accordance with that article.
- (6)** If the court makes an order for the submission of a request under paragraph (5), the party who sought the order must file –
- (a) a draft Form I as set out in the annex to the Taking of Evidence Regulation (request for direct taking of evidence);
  - (b) except where paragraph (4) applies, a translation of the form; and
  - (c) an undertaking to be responsible for the court's expenses.

