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1970 Evidence Convention

Guide to Good Practice

The Use of Video-Link

Hague Conference on Private International Law – Conférence de La Haye de droit international privé

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Guide to Good Practice

The Use of Video-Link

Guide to Good Practice on the Use of Video-Link under the Evidence Convention

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FOREWORD

On behalf of the Permanent Bureau of the HCCH, I am delighted to present this *Guide to Good Practice on the Use of Video-Link under the* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention).

The drafters of the Convention had the foresight to adopt an approach that is completely technology neutral – an approach which, as this Guide demonstrates, has stood the test of time. The use of technology to facilitate the operation of the Convention has ensured that it can keep pace with the realities of our rapidly changing world. Now, as the Evidence Convention nears its fiftieth anniversary, it continues to attract new Contracting Parties from across the globe.

Since the publication of 3rd edition of the Practical Handbook on the Operation of the Evidence Convention in 2016, the increasingly frequent use of video-link and videoconferencing technology has necessitated more detailed and more targeted guidance in this area.

The Guide draws upon the discussions of the Experts' Group on the Use of Video-Link and Other Modern Technologies in the Taking of Evidence Abroad, chaired by Chief Justice James Allsop of the Federal Court of Australia. The work of the Experts' Group was mandated by the HCCH Council on General Affairs and Policy, on the recommendation of the Special Commission on the Practical Operation of the Evidence Convention. It also incorporates references to responses provided by the authorities of Contracting Parties responsible for the implementation and day-to-day operation of the Convention.

At the Permanent Bureau, the main drafting and preparatory work was carried out by Ms Mayela Celis (former Principal Legal Officer) and Mr Brody Warren (Legal Officer). I also wish to thank Mr Keith Loken (Consultant on Secondment to the Permanent Bureau and former Assistant Legal Adviser for Private International Law at the Department of State of the United States of America) for his contributions to the preparation of the draft Guide. I am also grateful to the members of the Experts' Group for their insights and comments. Finally, a special thanks to Dr Gérardine Goh Escolar (First Secretary), Ms Rym Laoufi (former Legal Officer), and Ms Lydie De Loof (Publications Officer) for their work in finalising the Guide, as well as the many interns of the Permanent Bureau who were involved in this project. While they are too numerous to be listed here, I wish to acknowledge their contributions.

This Guide has been updated to November 2019. I recommend that readers consult the HCCH website on a regular basis for supplementary practical information and updates regarding the Convention.

Just as the Evidence Handbook continues to be widely used and cited, I am confident that this complement to the Handbook will prove equally valuable for the users of the Convention.

Christophe Bernasconi | Secretary General

TABLE OF CONTENTS

Introduction

"In an ever-expanding world filled with rapidly advancing technology, certain innovations can modify and facilitate some of the world's oldest traditions." [1]

1. This Guide addresses the use of video-link technology[2] in the cross-border taking of evidence under the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention).

2. The Evidence Convention was concluded at a time when the modern technologies of today were not widely used, yet the technology-neutral language adopted by the drafters allows for the use of such technologies. The Special Commission on the practical operation of the Evidence Convention has on several occasions reaffirmed that, just as for the other Legal Co-operation Conventions, neither the spirit nor letter of the Evidence Convention constitutes an obstacle to the use of new technologies and that the operation of the Convention can benefit from their use. The Special Commission has also noted that the use of video-link and similar technologies to assist in the taking of evidence is consistent with the current framework of the Convention.[3]

3. Many of the now over 60 Contracting Parties to the Evidence Convention do not consider there to be legal obstacles to using video-link to facilitate the taking of evidence under the Convention.[4] Among these Contracting Parties, while some are fully equipped to make use of video-link technology, others do not currently have the facilities to do so. For example, within the context of the European Union, despite the level of integration in the region and the strong support for increased use of video-link, the use of video-link remains "inconsistent" between the Member States.[5] In order to harness the true potential of the technology and to encourage its use in the broader international context of the Evidence Convention, there remains a need for further guidance to resolve the issues in this relatively uncharted territory.

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1 R. A. Williams, "Videoconferencing: Not a foreign language to international courts", *Oklahoma Journal of Law and Technology*, vol. 7, No 1, 2011, p. 1.

2 Throughout this Guide, "video-link" is used as an umbrella term encompassing the various technologies employed to enable videoconferencing, remote appearances, or any other form of video presence. For more on this term, see *infra* the section entitled *"What is video-link?"*.

3 C&R No 4 of the 2003 SC; C&R No 55 of the 2009 SC; C&R No 20 of the 2014 SC. See also "Conclusions & Recommendations (or "C&R")" in the Glossary.

4 See "Synopsis of Responses to the Country Profile Questionnaire on the Taking of Evidence by Video-link under the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)", available on the Evidence Section of the HCCH website under "Taking of evidence by video-link", Part V, q. (a); Part VI, q. (a); Part VII, q. (i) and (q) [hereinafter, "Synopsis of Responses"].

5 European Judicial Network in Civil and Commercial Matters, *Using videoconferencing to obtain evidence in civil and commercial matters under Council Regulation (EC) No 1206/2001 of 28 May 2001: A practical guide*, Brussels, European Union Commission, 2009, p. 6, available at the following address: < https://e-justice.europa.eu/content_ejn_s_publications-287-en.do?clang=en > [last consulted on 4 March 2020]. See also the recent efforts undertaken in the context of "Handshake" Project (2014-2017) of the Council of the European Union, as outlined in the Glossary and referred to throughout this Guide.

4. Against this background, at its May 2014 meeting, the Special Commission recommended, in response to a proposal made by Australia, that the Council on General Affairs and Policy of the HCCH establish an Experts' Group to investigate the issues that may arise with the use of video-link and other modern technologies in the taking of evidence abroad.[6]

5. When the Council on General Affairs and Policy (CGAP) next met in March 2015, it decided, pursuant to the recommendation of the Special Commission, to establish the Experts' Group, whose mandate was principally to explore potential ways to address the issues that may arise with the use of video-link and other modern technologies in the taking of evidence under the Evidence Convention, whether those issues be legal, practical or technical. The Experts' Group was also mandated to assess the desirability and feasibility of the various options available, taking into account current practice in and between States, as well as existing regional and international instruments.[7]

6. The Experts' Group[8] then met in December 2015 and determined that the primarily practical issues which arise would be best addressed by a Guide to Good Practice, which would be complemented by detailed and uniformly produced Country Profiles for each individual Contracting Party, for which information would be collected by circulating a questionnaire. The Group considered that the Guide would provide detailed commentary on the use of video-link and other modern technologies in the operation of the Convention, which would be principally based on the relevant Articles and would take a practical approach demonstrating to users how these technologies can and should be used under both Chapter I and Chapter II of the Convention.[9] The Experts' Group further recommended that a small subgroup be established for drafting purposes.

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6 C&R No 21 of the 2014 SC.

7 C&R No 9 of the 2015 CGAP.

8 The following experts were, at either all or parts of the stages, involved in the work of the Experts' Group, including the drafting of this Guide and Country Profile Questionnaire: **Andorra**: Sara DIÉGUEZ; **Australia**: James ALLSOP (Chair); **China (People's Republic of)**: Haibo GOU, Tailong WANG, Tanshuo XU, Yong ZHOU; **Colombia**: Maria José MONTAÑA CORREA, Lucia Teresa SOLANO RAMIREZ; **Czech Republic**: Jana VEDRALOVÁ; **European Union**: Jacek GARSTKA (European Commission), Jaana POHJANMÄKI (Council of the European Union), Xavier THOREAU (Council of the European Union), Susana Fonte (Eurojust), Csaba Sandberg (Eurojust); **Finland**: Anna-Lena HALTTUNEN; **France**: Camille BLANCO, Nicolas CASTELL, Marie VAUTRAVERS; **Germany**: Thomas KLIPPSTEIN, Stefanie PLÖTZGEN-KAMRADT, Nils SCHRÖDER, Dana TILLICH; **India**: Kajal BHAT; Japan: Masayoshi FURUYA; **Korea (Republic of)**: Ha-Kyung JUNG, Jongsun KANG; **Latvia**: Voldemārs KIZINO, Viktors MAKUCEVIČS, Madara RIEKSTA; **Lithuania**: Gintarė BUSTAEVIENĖ, Vaida PETRAVIČIENĖ; **Mexico**: Alejandro León VARGAS; **Norway**: Catherine WESTBYE-WIESE; **Netherlands**: Willem T. WASLANDER; **Poland**: Paweł KOSMULSKI, Anna SALWA; **Portugal**: Carlos GANDAREZ, Claudia Alexandra KONG, Nuno LÁZARO FONSECA; **Russian Federation**: Ivan MELNIKOV; **Slovenia**: Judita DOLŽAN; **Spain**: Alegría BORRÁS; **Sweden**: Freddy LARSSON, Mari-Ann ROOS; **Switzerland**: Silvia MADARASZ-GAROLLA; **Turkey**: Kansu KARA; **United Kingdom of Great Britain and Northern Ireland**: David COOK, Nic TURNER; **United States of America**: Ada E. BOSQUE, Daniel KLIMOW, Katerina OSSENOVA.

9 See "Report of the Experts' Group on the Use of Video-link and Other Modern Technologies in the Taking of Evidence Abroad", Prel. Doc. No 8 of December 2015 for the attention of the 2016 CGAP, p. 3 (available on the Evidence Section of the HCCH website).

7. In March 2016, CGAP endorsed the formation of the smaller subgroup of the Experts' Group, responsible for the development and drafting of this Guide, as well as the detailed Country Profiles which complement it.[10]

8. Shortly after, the subgroup began its work, in collaboration with the Permanent Bureau. Throughout this process, in the interests of giving appropriate consideration to geographical and jurisdictional diversity, and pursuant to the recommendations of the Experts' Group, the Permanent Bureau consulted external parties, namely the Council of Bars and Law Societies of Europe (CCBE), Eurojust, Ibero-American Network for International Legal Cooperation (IberRed) and the International Bar Association (IBA). This additional consultation ensured input from a broad variety of regions and legal traditions, including some which were not represented within the subgroup.

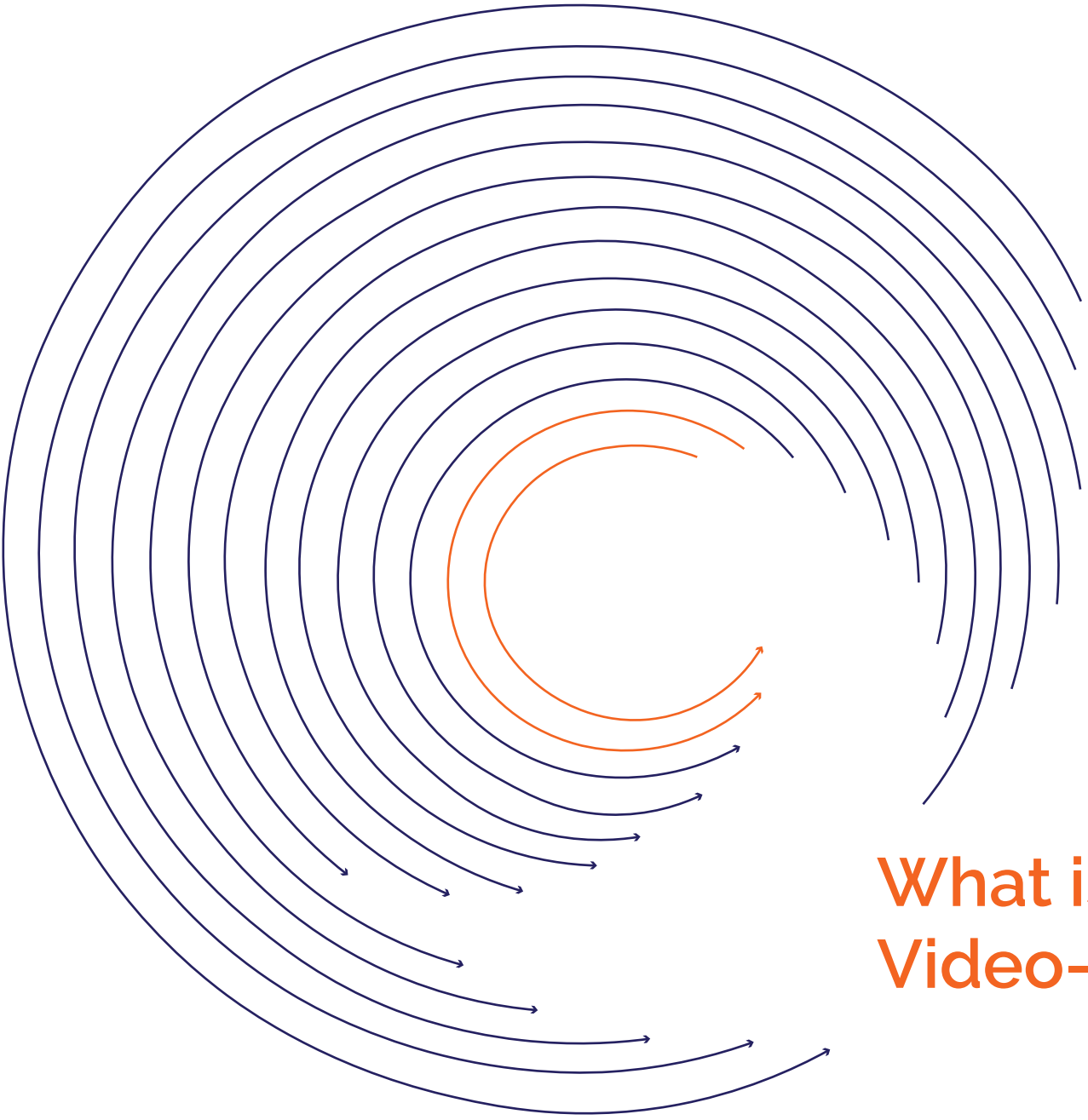
9. In February 2017, the Country Profile Questionnaire was circulated to the National and Contact Organs of the Members,[11] and to the non-Member Contracting Parties to the Evidence Convention and the content for the individual Country Profiles was uploaded to the HCCH website as responses were received.[12] Throughout 2017 and early 2018, the Permanent Bureau continued research and drafting of the Guide and following several rounds of drafting and consultation with the subgroup throughout 2018, the draft Guide was approved by the full Experts' Group in November 2018. It was then submitted to CGAP and received final approval in June 2019.[13]

10 C&R No 20 of the 2016 CGAP.

11 Pursuant to Art. 7(1) of the Statute of the HCCH, each Member State is required to designate a National Organ and each Member Organisation a Contact Organ, which acts as the primary contact point with the Permanent Bureau.

12 When the Country Profile Questionnaire was originally circulated, 35 responses were received from 33 Contracting Parties: Australia, Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, China (Hong Kong SAR and Macao SAR), Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Mexico, Norway, Poland, Portugal, Romania, Singapore, Slovenia, South Africa, Sweden, Switzerland, United Kingdom (England, Wales and Northern Ireland), United States, Venezuela. At the time of writing, this represented approximately 53% of the Contracting Parties to the Evidence Convention. The responses received are available on the Evidence Section of the HCCH website (see path indicated in note 4).

13 C&R No 38 of the 2019 CGAP.



What is Video-Link?

10. 'Video-link' refers to the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations. As this practice has gradually been introduced into procedural laws as well as into cross-border legal co-operation mechanisms, various legal definitions have been developed. Other terms commonly used to describe this practice, when used for the purpose of taking evidence, include "videoconferencing", "remote appearance" or "video presence".[14]

11. In the context of judicial proceedings, as video-link is not bound by traditional borders it allows the parties, their representatives and / or a witness to appear and / or testify before a court from another location within the same territory as the court, in a different territorial unit of the same State, or abroad.

12. By overcoming the distance between the court, the parties, their representatives and any witnesses, video-link offers potential reductions in time, cost, inconvenience, and the environmental impact of travelling to court,[15] as well as a means to overcome an inability of one or more persons to participate in the proceedings. This is of particular benefit in the case of expert witnesses, whose lack of availability can often give rise to scheduling delays.[16] In fact, in some instances the use of video-link may even render witness availability of far less significance among the factors considered in determining whether a court has jurisdiction in a particular matter.[17] The use of video-link can also provide more flexibility in the scheduling of proceedings, as well as in accommodating witnesses with certain physical or mental conditions, or witnesses who would be intimidated by a personal appearance in court, thereby improving access to justice. Together, all of these factors can contribute to better informed decisions and more efficient judicial proceedings.

13. Because the use of video-link may not be appropriate in all circumstances where a person is to appear and / or testify before a court, it continues to be regarded as a complement to (and not a substitute for) traditional methods of obtaining evidence (*i.e.*, personal attendance in the courtroom). This is principally because the level of personal interaction with the witness is inevitably less than that which occurs when the witness is physically present in the courtroom.[18] As such, the ability of participants

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14 Depending on the context and the source, there can be different nuances in the definitions ascribed to these and analogous terms. See, *e.g.*, the discussion of the difference between videoconferencing and telepresence in M. E. Gruen and C. R. Williams, *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings*, Administrative Conference of the United States, 2015, pp. 9-10, available at the following address: < https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings > [last consulted on 4 March 2020].

15 See, *e.g.*, Council of the European Union, "D1a: Judicial use cases with high benefits from cross-border videoconferencing", *Multi-aspect initiative to improve cross-border videoconferencing ("Handshake" Project;* for more on this project see the Glossary), 2017, p. 2; M. Davies, "Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation", *American Journal of Comparative Law*, vol. 55 (2), 2007, p. 206; Federal Court of Australia, *Guide to Videoconferencing*, 2016, p. 2, available at the following address: < http://www.fedcourt.gov.au/services/videoconferencing-guide > [last consulted on 4 March 2020].

16 Council of the European Union, "The availability of expert witnesses has been identified as one cause of delays", *Guide on videoconferencing in cross-border proceedings*, Luxembourg, Publications Office of the European Union, 2013, p. 6 [hereinafter, "Guide on videoconferencing in cross-border proceedings"], available at the following address: < https://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/ > [last consulted on 4 March 2020].

17 M. Davies (*op. cit.* note 15), p. 236.

18 Handshake Project (*op. cit.* note 15), p. 26.

to assess the demeanour and credibility of the witness may be impaired,[19] particularly where the technology and lack of proximity exacerbate differences of language or culture, leading to a loss of nuance. For example, a study across various appellate courts of one Contracting Party (United States) found that some judges believed they asked fewer questions when examining a witness by video-link and were less likely to interrupt an argument.[20] In some cases, the remoteness of the witness could also diminish the ability of the court to exercise control over the witness. Another concern is that of possible technical problems, so those responsible should ensure the availability of suitable facilities, equipment and support at all participating locations. Each of the potential issues associated with the use of video-link could compromise such fundamental aspects of the proceedings as the "right to a fair trial" or the "principle of immediacy", in addition to inhibiting or limiting access to justice.[21] Courts must therefore look beyond convenience alone to determine whether in the circumstances of the individual case, the use of video-link is, on balance, beneficial to the overall fair and efficient administration of justice.[22]

14. Accordingly, this Guide outlines best practices in the use of video-link which may address some of these challenges. These practices seek to enable users of the Evidence Convention to make the best possible use of technology currently available. In time, further advances in technology are expected to improve the process, ultimately maximising the benefits of using video-link technology in the taking of evidence abroad.

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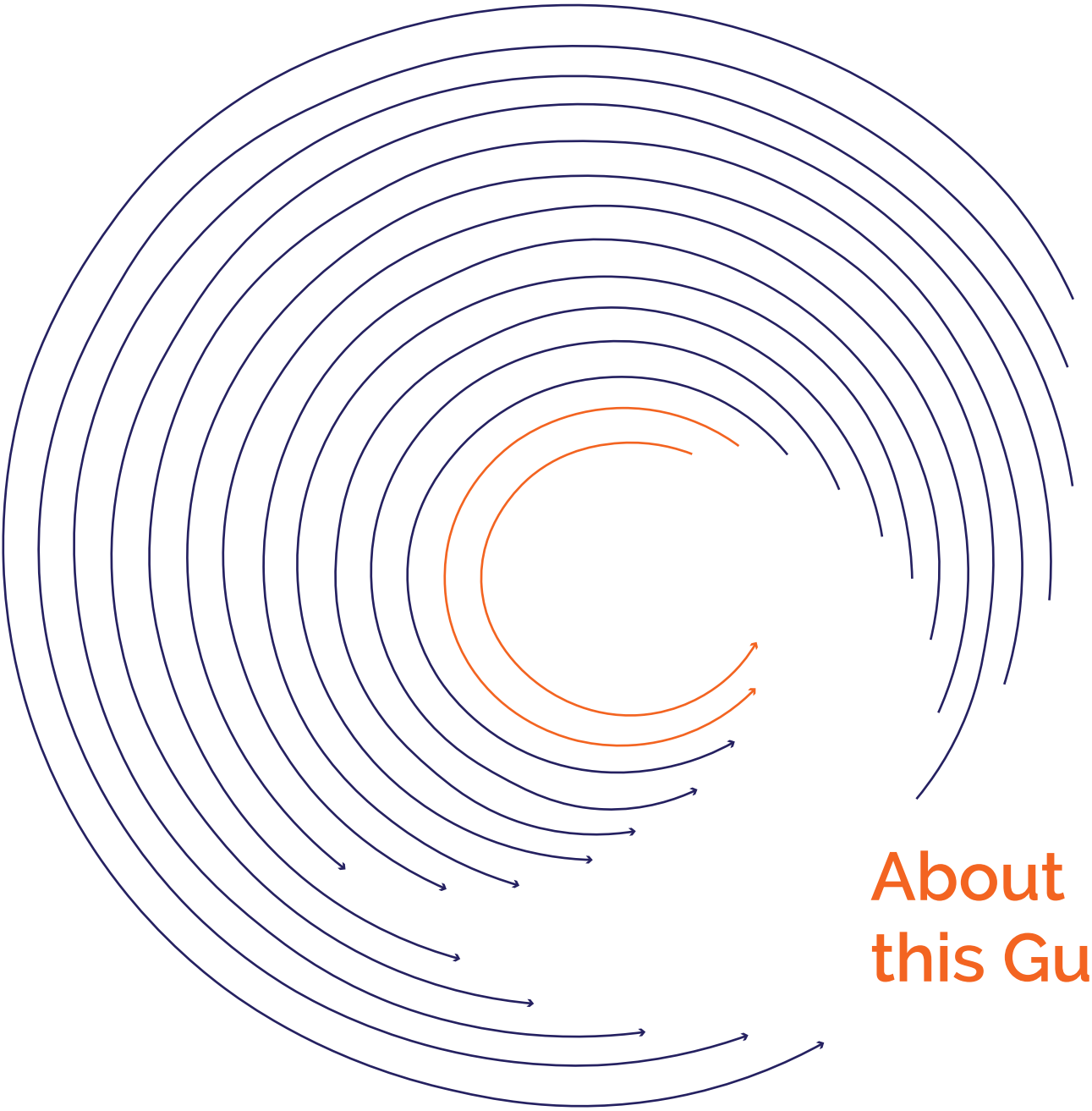
19 R. A. Williams (*op. cit.* note 1), p. 21. For a discussion of the effect of video-link technology on assessing the credibility of a witness, see also note 42.

20 M. Dunn and R. Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeals*, Federal Judicial Center, 2006, p. 13, available at the following address: < https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf > [last consulted on 4 March 2020].

21 Handshake Project (*op. cit.* note 15), pp. 26-27. The notion of immediacy is a general principle of procedural law in a number of States, in particular in Europe, encompassing the idea that evidence should be heard in its original and not derivative form (*i.e.*, "immediate" both in the temporal and corporeal sense). For a more detailed discussion of the principle of immediacy and its relationship with the use of video-link, see, *e.g.*, T. Ivanc, "Theoretical Background of Using Information Technology in Evidence Taking", in V. Rijavec *et al.* (eds), *Dimensions of Evidence in European Civil Procedure*, the Netherlands, Kluwer Law International, 2016, pp. 265-300; V. Harsági, "Evidence, Information Technology and Principles of Civil Procedure – The Hungarian Perspective", in C.H. van Rhee and A. Uzelac (eds), *Evidence in Contemporary Civil Procedure*, Cambridge, Intersentia, 2015, pp. 137-154.

22 Federal Court of Australia (*op. cit.* note 15), p. 2.



About this Guide

15. The principal focus of this Guide is the use of video-link technology under the Evidence Convention. In addition, it outlines experiences drawn from general national and international developments in this area, including references to internal law and other international agreements, where appropriate.

16. The scope of this Guide is principally limited to the use of video-link in the taking of testimonial evidence, this being the type of evidence which is most suitable to be taken by video-link technology and more commonly used / requested among jurisdictions. Depending on the applicable law, video-link may also be used to obtain evidence other than testimony, but its use for that purpose would appear to be more limited.[23]

17. It should also be noted that some responding States reported statutory provisions which limit the taking of evidence by video-link to obtaining testimony from a witness or a party. [24] Other responding States have expressed concern regarding the difficulties associated with obtaining documentary evidence by video-link. [25] Therefore, the focus of this Guide remains the obtaining of cross-border witness or expert testimony.[26]

18. Moreover, the scope of the Evidence Convention extends only to "civil and commercial matters" (for more on this term, see the Glossary), although certain logistical aspects and practical considerations in this Guide may be relevant to the use of video-link technology in more general terms. In addition, it has been observed in the European context that "the vast majority of cross-border [video-link] use is for civil and commercial cases, for witness testimony and other types of evidence-taking". [27] As such, this Guide is restricted to the context of civil and commercial matters and does not address the cross-border taking of evidence in criminal proceedings in detail.

19. The Guide is structured as follows:

Part A discusses initiating the use of video-link, including preliminary considerations, and explains the ways in which video-link may be used under the Convention focusing primarily on the legal aspects.

Part B concerns preparing for and conducting hearings in which video-link is used, including both legal and practical considerations.

Part C elaborates on technical and security aspects.

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23 Some States do not have restrictions on the type of evidence that can be obtained by video-link and as such may also use the technology to obtain documentary or other evidence. See, *e.g.*, Synopsis of Responses (*op. cit.* note 4), Part IV, q. (b) and (d).

24 See, *e.g.*, the response of France to Part IV, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

25 See, *e.g.* the response of Croatia to Part IV, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

26 As noted in the Glossary, for the purposes of this Guide, the term "witness" is considered to include both parties to the proceedings and third parties, from whom testimony is to be taken. However, it should be noted that in some Contracting Parties, such as the United States, "[c]ourts have displayed greater reluctance to allow testimony by [video-link][…] when the remote witness is also a party to the action": M. Davies (*op. cit.* note 15), p. 211.

27 The results of the "Handshake" project conducted by the European Council demonstrate that this majority can be as high as 80-90% of video-link use cases: "Handshake" Project (*op. cit.* note 15), p. 15.

Where applicable, each section is preceded by the suggested **Good Practices** relevant to that particular section or sub-section. These Good Practices appear in coloured boxes and are numbered differently to the paragraphs. They are also compiled in **Annex I**. **Annex II** contains explanatory charts showing how video-link may be used under the Convention (both in cases of indirect and direct taking of evidence), and **Annex III** provides a series of illustrative contextual examples.

The remaining **Annexes** include other important information, such as a new optional form specifically addressing video-link matters to be attached to the Recommended Model Form for Letters of Request (**Annex IV**), the full text of the Evidence Convention (**Annex V**), and relevant Conclusions and Recommendations of the Special Commission (**Annex VI**).

20. Throughout this Guide, reference is made to the individual **Country Profiles** for each Contracting Party. Due to the divergences in laws, practices and procedures across Contracting Parties concerning the use of video-link in the taking of evidence,[28] the Experts' Group determined that such Country Profiles were needed in order to provide more easily updatable, targeted guidance. The Country Profiles thus contain additional information, unique to each Contracting Party, concerning the use of video-link under the Evidence Convention, including relevant legislation, rules or regulations, useful links and contact details. These can be accessed via the Evidence Section of the HCCH website.

21. This Guide is intended to complement the 3rd edition of the **Practical Handbook on the Operation of the Evidence Convention** (hereinafter, "Evidence Handbook"),[29] which contains an Annex dedicated to the use of video-link (Annex 6). The Evidence Handbook is a comprehensive guide containing information concerning the operation of the Convention more broadly, including case law and commentary related to the Convention as a whole, not only the use of video-link technology. More information on purchasing copies of the Evidence Handbook is available on the Evidence Section and the Publications Section of the HCCH website: < www.hcch.net >.

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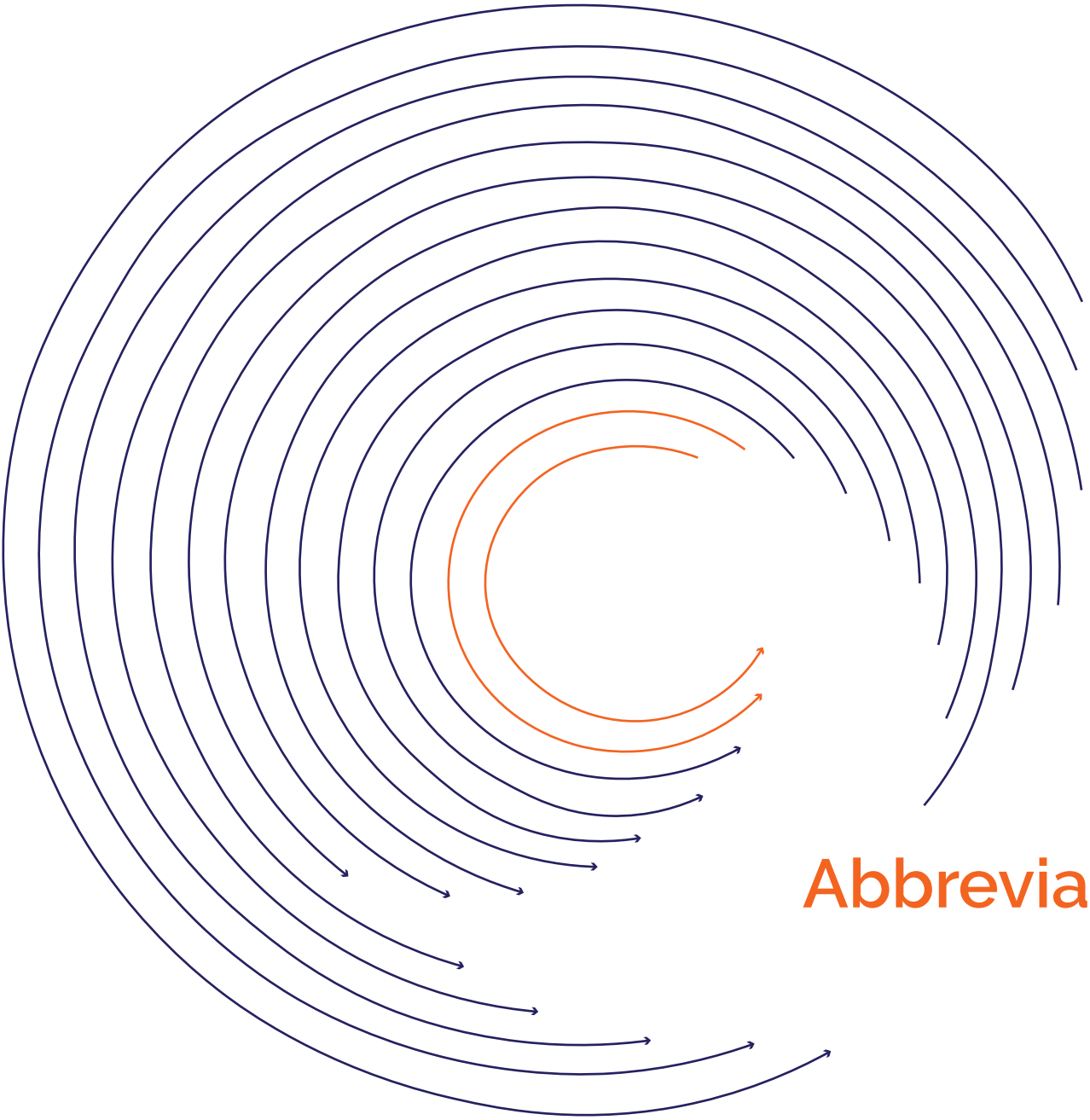
28 *Ibid.*, p. 20.

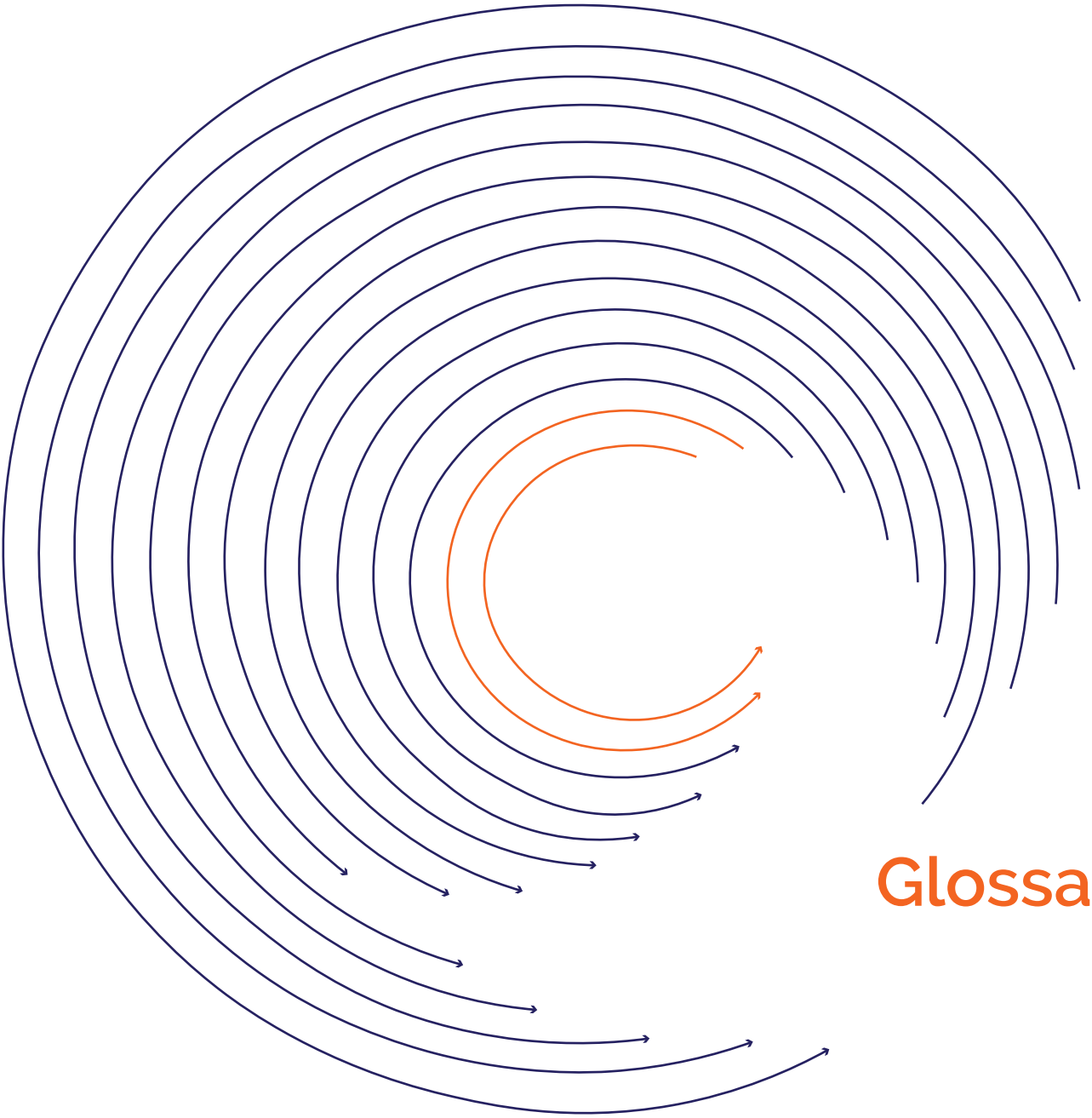
29 Permanent Bureau of the HCCH, *Practical Handbook on the Operation of the Evidence Convention*, 3rd ed., The Hague, 2016. See also the Glossary.



Abbreviations

ADSL	Asymmetric Digital Subscriber Line
AES	Advanced Encryption Standard
AIR	All India Reporter (India)
ATR	Australasian Tax Reports (Australia)
Bankr. E.D.N.Y.	U.S. Bankruptcy Court for the Eastern District of New York (United States)
BCSC	Supreme Court of British Colombia (Canada)
C&R	Conclusions & Recommendations (HCCH)
CCBE	Council of Bars and Law Societies of Europe
CGAP	Council on General Affairs and Policy (HCCH)
Codec	Coder-decoder
Comput. Netw.	*Computer Networks*
D. Conn.	U.S. District Court for the District of Connecticut (United States)
D.D.C.	U.S. District Court for the District of Colombia (United States)
EC	European Commission
EU	European Union
EWHC (Ch)	High Court of England and Wales (Chancery Division) (United Kingdom)
EWHC (QB)	High Court of England and Wales (Queen's Bench Division) (United Kingdom)
FCA	Federal Court of Australia
FCR	Federal Court Reports (Australia)
Fed. R. Civ. P.	Federal Rules on Civil Procedure (United States)
Fed. R. Evid. Serv.	Federal Rules of Evidence Service (United States)
HD	High Definition
HKEC	Hong Kong Electronic Citation (People's Republic of China)
HKLRD	Hong Kong Law Reports and Digest (People's Republic of China)
Hong Kong SAR	Hong Kong Special Administrative Region (People's Republic of China)
IberRed	Ibero-American Network for International Legal Cooperation
IBA	International Bar Association (IBA)
ID	Identity Document
IP	Internet Protocol
ISDN	Integrated Services Digital Network (ISDN)
ITU-T	International Telecommunication Union
LawAsia	Law Association for Asia and the Pacific

Macao SAR	Macao Special Administrative Region (People's Republic of China)
MCU	Multi-point Control Unit (MCU)
ONSC	Supreme Court of Ontario (Canada)
ONCJ	Ontario Court of Justice (Canada)
Res/D/N/DC	Reservations/Declarations/Notifications/Depositary Communications
SC	Special Commission (HCCH)
SIP	Session Initiation Protocol
SD	Standard Definition
S.D.N.Y.	U.S. District Court for the Southern District of New York (United States)
U.S.	United States (of America)
W.D. Tenn.	U.S. District Court for the Western District of Tennessee (United States)
WXGA	Wide Extended Graphics Array



Glossary

Central Authority

The authority designated by a Contracting Party pursuant to Article 2(1).

Chapter I

The provisions of the Convention dealing with the system of Letters of Request. Chapter I comprises Articles 1 to 14 of the Convention.

Chapter II

The provisions of the Convention dealing with the taking of evidence by Consuls and Commissioners. Chapter II comprises Articles 15 to 22 of the Convention. Under Article 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** for the Evidence Convention, in column entitled "Res/D/N/DC".

Civil or commercial matters

A term used to delimit the substantive scope of the Convention. The term "civil or commercial matters" is interpreted *liberally* and in an *autonomous* manner, and applied consistently across both the Evidence and Service Conventions.

Codec

A codec (shortened version of "coder-decoder") is a device which compresses the audio and video signals at one site into a digital signal that is transmitted to the other site, before being converted back to a readable audio and video format.[30]

Commissioner

For the purposes of Chapter II, a person engaged to take evidence (see in particular Art. 17).

Conclusions & Recommendations (or "C&R")

The Conclusions & Recommendations of various HCCH meetings. Throughout this Guide, most references are to the C&R of the Special Commission on the practical operation of the Evidence Convention, together with the year of the relevant meeting (*e.g.*, "C&R of the 2014 SC" refers to the Conclusions & Recommendations adopted by the 2014 meeting of the Special Commission). All relevant Conclusions & Recommendations of the Special Commission are reproduced in **Annex VI** and are also available on the Evidence Section of the HCCH website: < www.hcch.net >. Reference is also made to the C&R of other HCCH meetings, such as the annual meeting of the Council on General Affairs and Policy.

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[30] M. Dunn and R. Norwick (*op. cit.* note 20), p. 2; M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 5.

Consul

For the purposes of Chapter II, "Consul" is a term used to denote consular agents and diplomatic officers.

Consular agent

For the purposes of Chapter II, a person engaged to take evidence (see in particular Arts 15 and 16). For convenience, the term "Consul" is used in this Guide to denote consular agents and diplomatic officers.

Country Profile

A response to the *Country Profile Questionnaire* circulated by the Permanent Bureau to Contracting Parties in 2017, designed to complement the more general information provided in this Guide. Each individual "Country Profile", as well as a compilation of all responses ("Synopsis of Responses") are available via the Evidence Section of the HCCH website: < www.hcch.net >. References to "q." throughout this Guide refer to the questions in the Country Profile Questionnaire.

Direct taking of evidence

The procedure of taking of evidence whereby the authority in the Requesting State before which proceedings are pending conducts the witness / expert examination directly. *See also: "Indirect taking of evidence"; the distinction between direct and indirect taking of evidence is discussed at* **A1.2**; *Explanatory charts are included in* **Annex II**.

EU Evidence Regulation

A regulation in force among European Union (EU) Member States (with the exception of Denmark)[31] on the taking of evidence in civil or commercial matters. The full title of the EU Evidence Regulation is: *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*.[32]

Evidence Convention (or Convention)

An international treaty developed and adopted under the auspices of the HCCH, the full title of which is the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. The full text of the Convention is set out at **Annex V** and is also available on the Evidence Section of the HCCH website: < www.hcch.net >.

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[31] The United Kingdom remains bound by the EU Evidence Regulation until 31 December 2020, pursuant to the Withdrawal Agreement signed between the United Kingdom and the European Union and which entered into force on 1 February 2020.

[32] The full text of the Regulation is accessible from the EUR-Lex database, available at the following address: < http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32001R1206 > [last consulted on 4 March 2020].

Evidence Handbook

A publication of the HCCH, the full title of which is the *Practical Handbook on the Operation of the Evidence Convention*. The Evidence Handbook offers detailed explanations of various aspects of the general operation of the Evidence Convention as well as authoritative commentaries on the major issues raised in practice. This Guide should thus be seen a supplement to the Evidence Handbook. Unless otherwise stated, references in this Guide to the "Evidence Handbook" refer to the 3rd edition of the Handbook published in 2016. Information on purchasing the Handbook is available on the Evidence Section of the HCCH website: < www.hcch.net >.

Evidence Section

A section of the website of the HCCH dedicated to the Evidence Convention. The Evidence Section can be accessed via a link on the home page of the HCCH website < www.hcch.net >.

Explanatory Report

The report drawn up by Mr Philip W. Amram that describes the background and preparatory work of the Evidence Convention, and provides an article-by-article commentary on its text. The full text of the Explanatory Report is reproduced in Annex 3 of the **Evidence Handbook** and is also available on the Evidence Section of the HCCH website: < www.hcch.net >. The Explanatory Report was originally published in *Actes et documents de la Onzième session* (*Proceedings of the Eleventh Session*) *(1968)*, Tome IV, *Obtention des preuves à l'étranger* (pp. 202-216).

"Handshake" Project

A project conducted between 2014 and 2017 by the Expert group on videoconferencing of the Working Party on e-Law (e-Justice) within the Council of the European Union, the full name of which was *Multi-aspect initiative to improve cross-border videoconferencing*.[33] The stated aim of the project was "to promote the practical use of and to share best practice and expertise on the organisational, technical and legal aspects of cross-border videoconferencing (VC) in order to help improving the overall functioning of e-Justice systems in Member States and at European level."[34]

The outcomes and recommendations of the project have informed the drafting process of this Guide, in particular with respect to the practical and technical aspects. This was largely due to the extensive practical video-link tests that were conducted between various Member States of the European Union.

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33 The documentation and the outcomes of the project (.zip file) *"Multi-aspect initiative to improve cross-border videoconferencing"* are available at: < https://beta.e-justice.europa.eu/69/EN/general_information > [last consulted on 4 March 2020].

34 "Handshake" Project (*op. cit.* note 15), p. 2.

Hearing

For the purpose of this Guide, the term "hearing" is used to refer to any kind of examination of a witness from whom evidence is to be taken, whether occurring as part of proceedings in a court, or conducted outside of court. *See also, "Witness", "Consul" and "Commissioner".*

Indirect taking of evidence

The procedure of taking of evidence whereby an authority in the Requested State in whose territory the witness / expert is located conducts the witness / expert examination. *See also: "Direct taking of evidence"; the distinction between direct and indirect taking of evidence is discussed at* **A1.2***; Explanatory charts are included in* **Annex II.**

Integrated Services Digital Network (ISDN)

An ISDN is defined by the International Telecommunication Union as a type of "[network that provides or supports a range of different telecommunication services] that provides digital connections between user-network interfaces".[35]

International Telecommunication Union's Telecommunication Standardization Sector (ITU-T)

A sector of the International Telecommunication Union, responsible for "[assembling] experts from around the world to develop international standards known as ITU-T Recommendations, which act as defining elements in the global infrastructure of information and communication technologies".[36]

Internet Protocol (IP) Network

An IP Network is defined by the International Telecommunication Union as a type of "network in which IP is used as a layer protocol".[37]

Judicial authority

The term "judicial authority" is used in the Convention to describe: (a) the authority that issues Letters of Request (Art. 1(1)), and (b) the authority that executes Letters of Request (Art. 9(1)).

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35 International Telecommunication Union, "I.112: Vocabulary of terms for ISDNs", 1993, p. 6, available at: < https://www.itu.int/rec/T-REC-I.112-199303-I > [last consulted on 4 March 2020]. See also, *infra*, note 36 for more information on the ITU-T.

36 For more information on the ITU-T, see: < https://www.itu.int/en/ITU-T/about/Pages/default.aspx > [last consulted on 4 March 2020].

37 International Telecommunication Union, "Y.1001: IP framework – A framework for convergence of telecommunications network and IP network technologies", 2000, p. 3, available from: < https://www.itu.int/rec/T-REC-Y.1001-200011-I > [last consulted on 4 March 2020].

Letter of Request

For the purposes of Chapter I, a device used to request the obtaining of evidence or the performance of some other judicial act. In this Guide, "letter of request" (without capitalisation) refers to the device under other instruments (*e.g.*, the 1954 HCCH Civil Procedure Convention) or internal law for the taking of evidence or performance of some other judicial act (commonly known as "letters rogatory", and less frequently as a "rogatory commission").

Model Form

The model Letter of Request form recommended by the Special Commission. Fillable versions of the Model Form in both English and French are available from the Evidence Section of the HCCH website: < www.hcch.net >. A copy of the Model Form with instructions for completion is also set out at Annex 4 of the Evidence Handbook.

Practical information chart

The chart for a given Contracting Party, which is available on the Evidence Section of the HCCH website (< www.hcch.net >) under "Central and other Authorities", containing information about the practical operation of the Convention for that particular Contracting Party.

Requested authority

For the purposes of Chapter I, the authority that executes the Letter of Request. The Convention provides that a requested authority is a judicial authority of the Requested State that is competent to execute Letters of Request under its internal law.

Requested State

For the purposes of Chapter I, the Contracting Party to which a Letter of Request is, or will be, addressed.

Requesting authority

For the purposes of Chapter I, the authority that issues a Letter of Request. The Convention provides that the requesting authority is a judicial authority of the Requesting State that is competent to issue Letters of Request under its internal law.

Requesting State

For the purposes of Chapter I, the Contracting Party from which a Letter of Request is, or will be, issued.

Responding State

A Contracting Party to the Convention that submitted a response to the *Country Profile Questionnaire* circulated by the Permanent Bureau in 2017. Each individual response ("Country Profile"), as well as a compilation of all responses ("Synopsis of Responses") are available via the Evidence Section of the HCCH website: < www.hcch.net >.

Sending State

In this Guide, this term is used solely in the context of its meaning under the *Vienna Convention of 24 April 1963 on Consular Relations* (hereinafter, "Vienna Convention on Consular Relations"), referring to the State that sends a diplomatic or consular official to represent its interests abroad.

Special Commission (or "SC")

Special Commissions are set up by the HCCH and convened by its Secretary General to develop and negotiate new HCCH Conventions, or to review the practical operation of existing HCCH Conventions. In this Guide, "Special Commission" (or "SC") refers to the Special Commission that meets periodically to review the practical operation of the Evidence Convention.

State of Execution

For the purposes of Chapter II, the Contracting Party in the territory of which evidence is, or will be, taken.

State of Origin

For the purposes of Chapter II, the Contracting Party in the territory of which proceedings are commenced and in aid of which evidence is, or will be, taken. Where evidence is taken by a Consul, the State of Origin is also the State which the Consul represents. *See also: "Sending State".*

Status Table

An updated list of Contracting Parties that is maintained by the Permanent Bureau based on information received from the depositary. The status table is available on the Evidence Section of the HCCH website (< www.hcch.net >), together with explanations as to how to read and interpret it.

The status table includes important information relating to each Contracting Party, including:

a) the date of entry into force of the Convention for that Contracting Party;
b) the method by which it joined the Convention (*e.g.*, signature / ratification, accession, or succession);
c) for Contracting Parties joining by accession, whether the accession has been accepted by other Contracting Parties;
d) any extensions of application of the Convention;
e) the authorities it has designated under the Convention (*e.g.*, Central Authorities); and
f) any reservations, notifications, or other declarations it has made under the Convention.

For more on the above aspects, see the Evidence Handbook.[38]

Video-link technology (also known as videoconferencing technology)

Technology that allows two or more locations to interact simultaneously by two-way video and audio transmission. Please note that for the purposes of this Guide, the expression "video-link" encompasses the various technologies employed to enable videoconferencing, remote appearances, or any other form of video presence.

For more on the term "video-link", see supra *the section entitled "***What is video-link?***".*

Videoconferencing bridge (also known as a multi-point control unit (MCU) or "gateway")

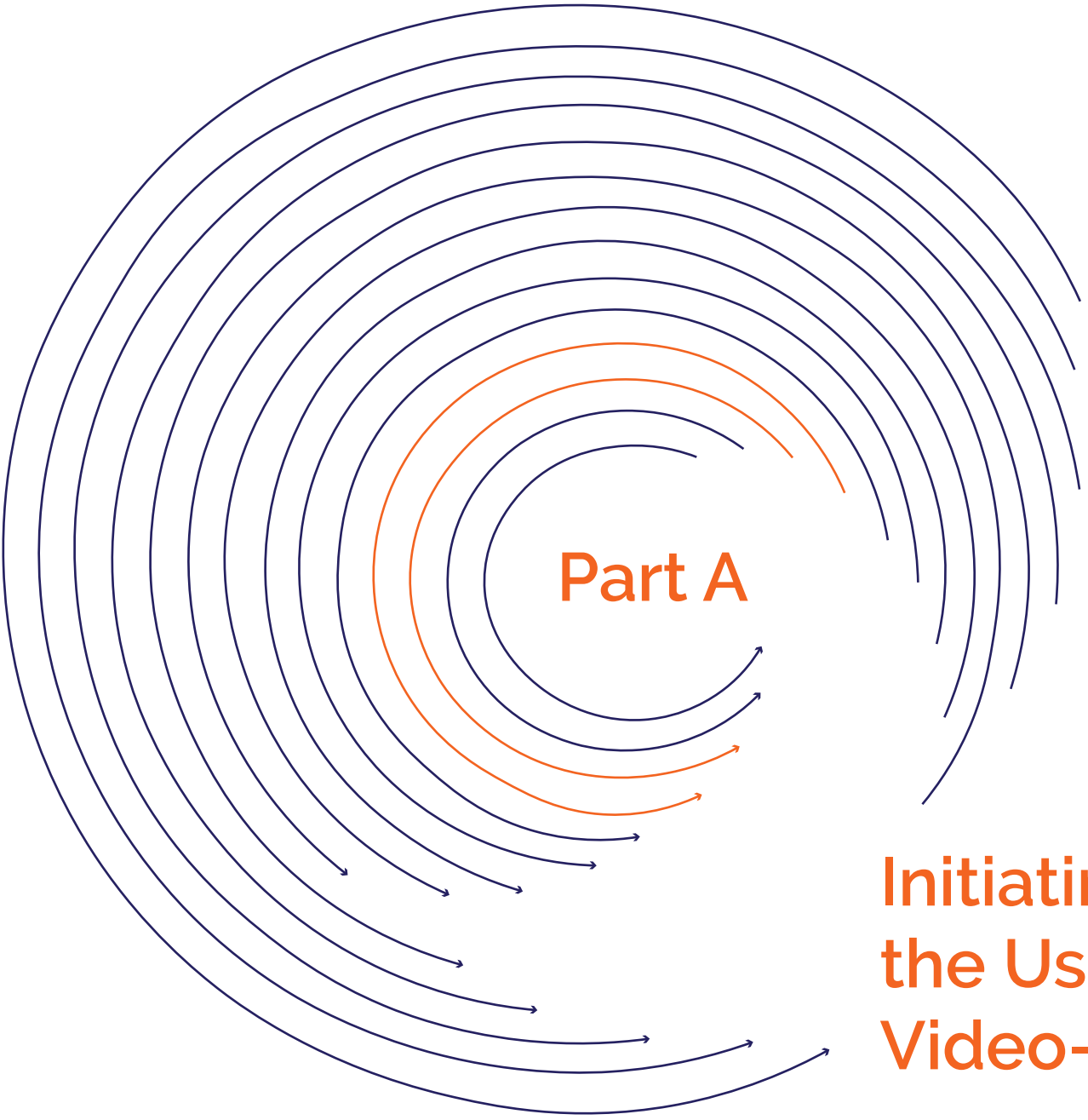
A combination of software and hardware which creates a virtual meeting room and acts as a "bridge" by linking the sites and performing conversions where necessary (*e.g.*, converting the network signal, codec protocols or audio / video definition).

For more on the term "videoconferencing bridge", see also **C2**.

Witness

For the purpose of this Guide, the term "witness" includes both parties to the proceedings and third parties, from whom testimony is to be taken.

[38] *Op. cit.* note 29.



Part A

Initiating the Use of Video-Link

A1 PRELIMINARY CONSIDERATIONS

22. As outlined in the introduction, while the Evidence Convention makes no specific reference to modern technologies such as video-link, it has long been established that the use of technology to assist in the effective operation of the Convention is permitted, and indeed, encouraged.[39] The use of video-link is permissible in both the execution of a Letter of Request under Chapter I and the execution of a request under Chapter II of the Convention. In particular, video-link may be used:

a. to facilitate the presence and / or participation of the parties to the proceedings, their representatives and judicial personnel at the taking of evidence; or

b. to facilitate the actual taking of the evidence (both direct and indirect taking of evidence).

For a more detailed explanation of the specific ways in which video-link may be used under each Chapter of the Convention, see **A2** *(Chapter I) and* **A3** *(Chapter II), below.*

23. The main objective of any video-link use should always be to ensure that the examination is able to proceed in a manner which is as close as possible to that which would occur if it were conducted in a physical courtroom.[40] In order to achieve this, the use of video-link in a particular case may therefore be subject to considerations of justice, [41] as determined by the court, as well as practical and technical considerations.

24. Considerations of justice may involve an assessment of the effect of the video-link on the credibility of the witness,[42] due to the reduced ability of the fact-finder to

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39 See C&R No 4 of the 2003 SC, C&R No 55 of the 2009 SC and C&R No 20 of the 2014 SC.

40 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), pp. 15, 17 ; Federal Court of Australia (*op. cit.* note 15), p. 9; N. Vilela Ferreira *et al.*, *Council Regulation (EC) no 1206/2001: Article 17º and the video conferencing as a way of obtaining direct evidence in civil and commercial matters*, Lisbon, Centre for Judicial Studies (*Centro de Estudos Judiciários)*, 2010, p. 14.

41 The interests of justice is a guiding principle for courts when determining whether to permit the use of video-link in taking evidence. For example, courts in the United Kingdom have embraced the concept that video-link may assist in pursuing the "overriding objective" in civil procedure for courts to take measures to achieve justice. See, *e.g.*, the High Court of Justice Queens Bench Division in *Rowland v. Bock* [2002] EWHC 692 (QB).

42 The extent to which an assessment of witness credibility may be impeded by video-link is not settled in jurisprudence. As such, it remains a relevant consideration for courts and those seeking to rely on the technology. The courts of a number of States have regarded video-link as not having a significant impact on the assessment of credibility. See, *e.g.*, *In re Rand International Leisure Products, LLC*, No.10-71497-ast, 2010 WL 2507634, at *4 (Bankr. E.D.N.Y. 16 June 2010) (Bankruptcy Court Eastern District of New York, United States), which found only a limited discernible impact of video-link technology on the ability to observe a witness' demeanour and to cross-examine; *Skyrun Light Industry (Hong Kong) Co Ltd v. Swift Resources Ltd* [2017] HKEC 1239 (Court of First Instance, Hong Kong SAR), noting that although there may be some impairment, there is nothing inherently unfair about the use of video-link to interrogate a witness; *State of Maharashtra v. Dr Praful B Desai* AIR 2003 SC KANT 2053 (Supreme Court of India), taking the view that when the technology works effectively, credibility can be assessed adequately. A similar position has also been taken by courts in non-Contracting Parties

assess the demeanour of the witness, or of the absence of the gravitas established by physical attendance in the courtroom. However, as discussed above, these concerns may be overcome or diminished in time by technological advances, increased use of equipment, and the resulting greater familiarity with their use.[43] The probative value of the testimony itself may also be deemed less when a video-link is used, depending on whether the relevant penal provisions (*e.g.*, relating to perjury or contempt) are enforceable in the place from which the witness is providing evidence.[44] Practical considerations may include organising access to video-link equipment or the costs of hiring and using video-link equipment. Technical considerations may range from specific operational aspects of the connection such as ensuring sufficient bandwidth and appropriate network settings, to the actual quality of the video and audio being transmitted.

25. Nevertheless, none of these considerations can be viewed in isolation. The successful use of video-link calls for a holistic approach which ensures the complementarity of the legal, practical and technical considerations.[45] To assume that traditional court practices and procedures can necessarily be applied in the same manner to proceedings where a video-link is involved, is to fundamentally underestimate the current limitations of the technology.[46] Adjustments, whether major or minor, will need to be made "to cater for limitations introduced by the technology being used, and the changed environment created by that technology and the geographic separation of participants".[47] As such, the legal, practical and technical considerations are each canvassed throughout this Guide.

A1.1 Legal bases

26. At the outset, it is important to note that generally there are three legal bases under which the taking of evidence by video-link may be requested / sought:

a. Under internal law, see paragraphs 27 *et seq.*
b. Under other instruments, see paragraphs 31 *et seq.*
c. Under the Evidence Convention, see paragraphs 34 *et seq.*

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to the Evidence Convention, such as Canada: see, *e.g.*, the Supreme Court of British Colombia in *Slaughter v. Sluys* 2010 BCSC 1576 and the Supreme Court of Ontario in *Chandra v. Canadian Broadcasting Corporation* 2016 ONSC 5385; *Paiva v. Corpening* [2012] ONCJ 88; *Davies v. Clarington* 2011 ONSC 4540. Nonetheless, the impact of video-link technology on assessing witness credibility remains a vexed question and courts in other States have been more cautious in their praise. See, in this regard note 55.

43 Some commentators have suggested that the issue of "decreased personal interactions" may be significantly diminished once users and participants "become accustomed to this mode of interaction": M. Dunn and R. Norwick (*op. cit.* note 20), pp. 16-17, N. Vilela Ferreira *et al.* (*op. cit.* note 40), pp. 17-18.

44 M. Davies (*op. cit.* note 15), p. 225. See also, **A2.9** (Chapter I) and **A3.8** (Chapter II).

45 E. Rowden *et al.*, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings,* University of Western Sydney, 2013, pp. 6, 10, 19. This report details the findings and recommendations of a three-year Australian Research Council Linkage Project: "Gateways to Justice: improving video-mediated communication for justice participants". The project involved a comprehensive review of the literature and legislation, actual site visits, as well as semi-structured interviews in controlled environments to assess different factors and influences.

46 See Federal Court of Australia (*op. cit.* note 15), p. 8.

47 *Ibid.*, p. 7, para. 3.15.

a. The use of video-link under internal law

1 By virtue of Article 27, the Convention does not prevent the use of internal law to take evidence by video-link under less restrictive conditions.

2 First, authorities should verify whether the taking of evidence by video-link is allowed under the internal law of the place where proceedings are pending.

3 Second, authorities should verify whether the taking of evidence by video-link is not contrary to the internal law of the place from which evidence is to be taken, including any existing "blocking statutes"[48] or criminal laws.

See the **Country Profile** *of the relevant Contracting Party.*

27. Among States that use video-link for cross-border witness testimony, the legal bases for such use under national law can vary. Some States have amended their laws to enable the taking of evidence by video-link in domestic and / or international cases.[49] While other States have no specific provisions in this regard, the taking of

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48 Blocking statutes penalise the seeking and / or communication of evidence without prior permission from the Contracting Party where the evidence is located, thereby channelling evidence gathering through the devices under the Evidence Convention or other applicable instrument. Sanctions for breaching these provisions range from fines to imprisonment. For a detailed discussion of the use of blocking statutes, see the Evidence Handbook (*op. cit.* note 29), paras 26 *et seq*.

49 See, *e.g.*, responses to Part II, q. (a) and (b) of the Country Profile Questionnaire (*op. cit.* note 12), responses of Australia (incl., *e.g.*, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), which facilitates the taking of evidence, and the making of submissions, by audio links and audio visual links in relation to proceedings before a court in the state of New South Wales); Brazil (Resolution of the National Council of Justice No 105/2010 establishes rules on how to conduct and document hearings by video-link; Law 11.419/2006 on the electronic judicial procedure; Arts 236, 385, 453, 461 and 937 of the new Code of Civil Procedure provide for the use of videoconferences); China (Hong Kong SAR) (Order 39 and 70 of the Rules of the High Court (Cap. 4A) and Part VIII of the Evidence Ordinance (Cap. 8) provide for the taking of witness testimony by way of a "live television link"); Czech Republic (a new amendment to its Code of Civil Procedure is expected to be enacted soon, which will introduce new specific rules on video-link); Estonia (Section 350 (2) of the Code of Civil Procedure); Finland (Code of Judicial Procedure 4/1734 provides for the taking of evidence by video-link in domestic matters); Germany (Section 128a of the Code of Civil Procedure on the examination of parties, witnesses and experts using image and sound transmission); Hungary (Act III of the Code of Civil Procedure and Decree of the Minister of Justice No 3/2016 (II.22) on the use of closed-circuit telecommunication network in civil procedures for the purposes of trial and hearing of persons); Israel (Art. 13 of the Evidence Ordinance 1971 allows a court to order that a witness examination be conducted outside Israel for the purpose of justice); Korea (Republic of) (Arts 327-2, 339-3, 340 and 341 of the *Civil Procedure Act* and Arts 95-2 and 103-2 of the *Enforcement Rule of the Civil Procedure Act*, which provide for the taking of evidence by video-link if a court deems it proper; and the *Act on Special Cases Concerning Video Trials* (Act No 5004 of 6 December 1995)); Latvia (Art. 703 of *Civil Procedure Law* and the internal rules issued by the Ministry of Justice No 1-2/14 videoconferencing equipment booking and procedures for the use in legal proceedings provide for the taking of

evidence by video-link may be allowed pursuant to general rules for the taking of evidence or other domestic law, although mostly for domestic cases.[50]

28. One Contracting Party has passed legislation to permit the direct taking of evidence by video-link under Chapter I of the Evidence Convention as it is of the view that the Convention does not provide for this possibility.[51]

For more on the distinction between direct and indirect taking of evidence, see **A1.2** *and* **Annex II**.

29. Despite the increasing use of video-link in legal proceedings worldwide, the Contracting Party in whose territory the witness is located may nonetheless have concerns related to its sovereignty, as the testimony is de facto being provided in its territory for the purposes of foreign judicial proceedings.[52] As such, the permission of the Contracting Party concerned may in some cases be required in order for the examination by video-link to take place, a process that may be facilitated by the operation of judicial co-operation treaties.[53] Some Contracting Party, however, have

evidence by video-link as well as rules regarding interpretation and identification of the persons involved); Poland (Arts 235-2, 1131-6 and 1135(2)-4 of Code of Civil Procedure, regulation of the Minister of Justice on the devices and technical means enabling taking of evidence from the distance in civil proceedings, and the regulation of the Minister of Justice on the detailed actions of courts in cases falling in the scope of international civil and criminal proceedings in international relations); Portugal (Arts 456, 486, 502, and 520 of the *Code of Civil Procedure* govern the collection of evidence by videoconference from experts, witnesses, and parties); Singapore (Section 4(1) of the *Evidence (Civil Proceedings in Other Jurisdictions) Act*, Chapter 98, Revised Laws of Singapore, allowing the High Court to make any order for the provision of obtaining evidence in Singapore as it deems appropriate, including the use of video-link); Slovenia (Art. 114a of the *Code of Civil Procedure* provides for the taking of evidence by videoconference if the parties agree); United States (28 U.S. Code § 1782(a) provides that a U.S. district court may order a witness to give evidence in aid of a foreign proceeding, although it would be unlikely that a U.S. court will compel a witness to directly provide evidence by video-link to a foreign court; this provision does not preclude a voluntary witness located in the United States from directly providing evidence by video-link to a foreign court (see 28 U.S. Code § 1782(b)). For more information, see the Synopsis of Responses (*op. cit.* note 4), Part II, q. (a). Moreover, the following States have adopted court rules addressing the use of video-link in both domestic and international cases: Argentina (Acordada 20/13 of 2 July 2013 – docket No 2267/13 of the Supreme Court, allowing the use of video-link when it would not be appropriate for the witness or expert witness to attend the hearing or when they are unable to do so, and establishing rules on the use of video-link); Uruguay (Acordada 7784 of 10 December 2013 of the Supreme Court recognises the importance of the use of video-link and sets out specific rules on how to conduct the taking of evidence by such means).

50 See, *e.g.*, the responses of Bulgaria, China (Macao SAR), Croatia, Norway and Venezuela to Part II, q. (a) and (b) of the Country Profile Questionnaire (*op. cit.* note 12).

51 France (Decree No 2017-892 of 6 May 2017 introduces the possibility to directly execute Letters Rogatory under Chapter I of the Evidence Convention by video-link provided certain conditions are met).

52 See also, *infra*, para. 66.

53 It is important to note that even where video-link is not being used in an examination, permission of the State(s) concerned may still be required, as is the case under Chapter II of the Evidence Convention (see **A3.2**).

no objection to the use of video-link to examine a witness in their territory and consider it to be permitted by Article 27 of the Convention.[54]

30. Whether or not permission is required, there may be additional restrictions in place specifically for the use of video-link and as such, it is important to consider relevant legislation, case law, regulations, or protocols which are in effect for the Contracting Parties concerned.[55] For example, a court order may be required in order to make

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54 See, *e.g.*, responses to Part II, q. (a) of the Country Profile Questionnaire (*op. cit.* note 12), responses of the United States (28 U.S. Code § 1782(b), see, *supra*, note 49) and the United Kingdom (*Evidence (Proceedings in Other Jurisdictions) Act 1975*, Sections 1 and 2 relating to an application for assistance including the examination of witness, read in conjunction with Civil Procedure Rule 32.3, permitting the use of video-link).

55 For all the advantages of the technology, the various approaches taken with respect to the use of video-link differ greatly from one Contracting Party to another (and sometimes even between jurisdictions of the same Contracting Party). For example, in China (Hong Kong SAR), the Court of Appeal in *Raj Kumar Mahajan v. HCL Technologies (Hong Kong) Ltd* 5 HKLRD 119 declared that video-link evidence is "an exception rather than the rule". In the United States, Fed. R. Civ. P. 43(a) permits the taking of live trial testimony in open court by video-link subject to "good cause in compelling circumstances" in domestic litigation. U.S. courts have found that this standard has been met in a number of different instances. See, *e.g.*, the District Court of Tennessee in *DynaSteel Corp. v. Durr Systems, Inc.*, No. 2:08-cv-02091-V, 2009 WL 10664458, at *1 (W.D. Tenn. 26 June 2009) (finding that "good cause" was established when the non-party witness was beyond the subpoena power of the court in a non-jury trial); the District Court of the District of Colombia in *U.S. v. Philip Morris USA, Inc.*, No. CIV.A. 99-2496 (GK), 2004 WL 3253681, at *1 (D.D.C. 30 August 2004) (permitting video-link because of logistical difficulties of bringing the witnesses from Australia to the United States with their attorneys); the District Court of Connecticut *Sawant v. Ramsey*, No. 3:07-cv-980 (VLB), 2012 WL 1605450, at *3 (D. Conn. 8 May 2012) (finding that the inability of the witness to travel for health reasons constitutes "good cause" and "compelling circumstances"). In addition, trial testimony by video-link may only be allowed if appropriate safeguards have been put in place. This includes, for example, allowing the court and counsel of both parties to question and examine the witness by video-link and having a suitable official to administer the oath. See, *e.g.*, *DynaSteel Corp. v. Durr Systems, Inc.* and *Sawant v. Ramsey* (cited above); *In re Rand International Leisure Products, LLC*, (*op. cit.* note 42) (conditioning the taking of evidence by video-link to several practical and technical requirements). This is distinct from a deposition of a voluntary witness by video-link for use in foreign litigation, given that such a deposition is an out-of-court testimony. Such depositions are proper and do not violate United States law, and thus may be arranged for privately by the foreign authorities and the voluntary witness in the United States (see Office of International Judicial Assistance of the U.S. Department of Justice, *OIJA Evidence and Service Guidance* (11 June 2018), available at the following address: < https://www.justice.gov/civil/evidence-requests > [last consulted on 4 March 2020]. Courts in Australia have adopted two divergent approaches in considering whether to grant leave for the use of video-link to obtain witness testimony, and ultimately "what will best serve the administration of justice…[whilst]…maintaining justice between the parties": *Kirby v. Centro Properties* [2012] FCA 60. The first approach has developed as many judges have embraced video-link technology for its convenience, such that video-link will be permitted unless a compelling case is made to warrant its denial. In *Tetra Pak Marketing Pty Ltd v. Musashi Pty Ltd* [2000] FCA 1261, an expert witness giving scientific and possibly controversial evidence was granted leave to appear by video-link because the Court considered that video-link should be permitted "in the absence of some considerable impediment telling against its use in a particular case". By contrast, in other cases a more cautious approach has been adopted, placing the onus on the applicant to actively demonstrate good reason for the use of video-link. In *Campaign Master (UK) Ltd v. Forty Two International Pty Ltd (No. 3)* (2009) 181 FCR 152, the Court refused to allow video-link because the witness provided no reason for non-attendance and the evidence went to a key issue. Leave was also refused in *Stuke v. ROST Capital Group Pty Ltd* [2012] FCA 1097 because the witness' evidence was highly controversial and interpretation was required. The legal restrictions on the use of video-link may also extend to preclude the use of video-link where the facilities available do not meet the requisite technical specifications: see, *e.g.* Australia, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42G, which provides the minimum technical requirements that must be met before a court may direct that a witness give evidence by video-link. For more technical and security aspects, see **Part C**.

use of video-link in the taking of evidence.[56] For some Contracting Parties, the ability to use video-link is subject to the mutual consent of the parties to the proceedings.[57]

b. The use of video-link under other instruments

4 As the Convention does not derogate from other instruments (Art. 32), authorities should verify whether any other bilateral or multilateral instruments may prevail in the particular case.

See the **Country Profile** *and / or* **Practical Information Chart** *of the relevant Contracting Party.*

31. A number of instruments at the bilateral, regional and multilateral level make express provision for the use of video-link in the taking of evidence in judicial co-operation cases (*i.e.*, where the authorities in the place in which proceedings take place request the authorities in the place in which the witness is located for assistance in obtaining that evidence).

32. Notable examples of such instruments include:

a. the *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters* (EU Evidence Regulation);[58]

b. the *2010 Ibero-American Convention on the Use of Videoconferencing in International Co-operation between Judicial Systems and its 2010 Additional Protocol relating to Costs, the Use of Languages and Transmission of Requests*;[59]

c. the *2008 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*.[60]

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56 See Synopsis of Responses (*op. cit.* note 4), Part II, q. (a) and (b).

57 *Ibid.*, Part IV, q. (e): only a small number of responding States reported requiring the consent of the parties to use video-link to take evidence.

58 Arts 10(4) and 17(4). For more on the EU Evidence Regulation, see the Glossary. For another European example of a reference to the use of video-link in the taking of evidence, albeit in the context of a more restricted scope of subject matter, see, *e.g.*: *Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, Art. 9(1).

59 Art. 3(1) (hereinafter, "2010 Ibero-American Convention on the Use of Videoconferencing"). At the time of writing, this Convention and its Additional Protocol applied between Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Paraguay and Spain.

60 Art. 11 (hereinafter, "2008 Trans-Tasman Agreement"), the full text of which is available at the following address: < http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2013/32.html > [last consulted on 4 March 2020]. Both States have enacted their own implementing legislation, respectively: *Trans-Tasman Proceedings Act 2010* (Cth) (Australia); *Trans-Tasman Proceedings Act 2010* (New Zealand).

33. In such instruments, the use of video-link is typically either recognised simply as a possible means of taking evidence,[61] or framed in more mandatory terms.[62] As noted above, it is important that by virtue of Article 32, the Evidence Convention does not derogate from other conventions that apply between Contracting Parties.[63]

c. The use of video-link under the Evidence Convention

5 Neither the spirit nor letter of the Convention constitutes an obstacle to the use of new technologies and the operation of the Convention can benefit from their use.[64]

6 Contracting Parties remain divided as to whether the Convention is of a mandatory character (*i.e.*, whether the Convention needs to be applied whenever evidence is to be taken abroad, be it in person or by video-link). This division of views notwithstanding, the Special Commission has recommended that Contracting Parties give priority to the Convention when evidence abroad is being sought (principle of first resort).[65]

7 Having resort to the Convention or other applicable treaties is generally consistent with the provisions of blocking statutes.[66]

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61 See, *e.g.*, Art. 3(1) of the Ibero-American Convention on the Use of Videoconferencing and Art. 11(1) of the 2008 Trans-Tasman Agreement.

62 Art. 17(4) of the EU Evidence Regulation.

63 With regard to the EU Evidence Regulation, and as noted in the Evidence Handbook (*op. cit.* note 29), para. 435, "[s]trictly speaking, the Regulation does not fall within the 'give way' rule in Article 32 of the Evidence Convention. However, as a matter of EU law, the Regulation prevails over the Evidence Convention in relations between EU Member States that are party thereto [noting also that not all EU Member States are party to the Convention], yet only in relation to matters to which the Regulation applies (Art. 21(1) of the Regulation)."

64 See C&R No 4 of the 2003 SC. See also, *e.g.*, C&R No 55 of the 2009 SC and C&R No 20 of the 2014 SC.

65 For an in-depth discussion of this principle and its history, see the Evidence Handbook (*op. cit.* note 29), paras 19-25.

66 See also, *supra*, note 48. Some Contracting Parties have enacted blocking statutes to prevent evidence from being taken in their territory for use in foreign proceedings other than under the Evidence Convention (or under some other applicable treaty). A recent example might arguably be the Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), see in particular Art. 48, which states that "[a]ny judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member state […]."

34. The taking of evidence abroad using video-link was discussed by the Special Commission at its meetings in 2009 and 2014. The Special Commission concluded that video-link could be used to assist in the taking of evidence under the Convention as set out below:

	Situation	Articles of the Convention
Chapter I	**Presence and participation at the execution of the Letter of Request** Where the parties to the proceedings, their representatives and / or judicial personnel of the requesting authority are located in the Requesting State and wish to be present by video-link during the taking of testimony and / or participate in the examination of the witness Video-link established between: • location in the Requesting State (*e.g.*, premises of the requesting authority); and • location where the Letter of Request is being executed (*e.g.*, courtroom in the Requested State). **Competent Authority** in the Requested State (*i.e.*, the requested authority) conducts the examination following the methods and procedure under the law of the Requested State, subject to any special method or procedure requested by the requesting authority.[67] *For more on the execution of a Letter of Request involving video-link, see* **A2.1** *For more on the presence (and potential participation) by video-link under Chapter I, of the parties, their representatives and / or judicial personnel specifically, see* **A2.5.**	Chapter I (Arts 7, 8 and 9)

67 The 2014 meeting of the Special Commission on the practical operation of the HCCH Service, Evidence and Access to Justice Conventions did not specifically discuss the direct taking of evidence under Chapter I of the Evidence Convention, *i.e.*, where the requesting authority requests that the examination be conducted by a judge of the Requesting State as a special procedure. This is distinct from the judge conducting the examination as an appointed Commissioner under Chapter II.

	Situation	Articles of the Convention
Chapter II	**Testimony taken by Consul or Commissioner**[68] Where the **Consul** representing the State of Origin exercising his or her functions in the State of Execution, or a duly appointed **Commissioner** uses video-link to take testimony of a person located in the State of Execution. Video-link established between: • location where the Consul is stationed (*e.g.*, embassy or consulate in the State of Execution) or where Commissioner operates (*e.g.*, courtroom in the State of Origin); and • location of witness in the State of Execution (*e.g.*, office or courtroom). **Consul** or **Commissioner** conducts the examination in accordance with its own law and procedure unless forbidden by the law of the State of Execution. A member of judicial personnel of the court of origin (or other duly appointed person) acting as a **Commissioner** under Art. 17, who is located in one Contracting Party, may examine a person located in another Contracting Party by video-link. *For more on the execution of a Chapter II request involving video-link, see* **A3.1** et seq. *For more on the presence (and potential participation) by video-link under Chapter II, of the parties, their representatives and / or judicial personnel specifically, see* **A3.4.**	Chapter II (Arts 15, 16, 17 and 21)
Other treaties or Internal law or practice	**Other methods of taking of evidence** (see **A1.1**) A Contracting Party may permit, by internal law or practice, methods of taking of evidence other than those provided for in the Evidence Convention. The Evidence Convention does not derogate from other conventions containing provisions regarding the taking of evidence abroad.	Arts 27(c) and 32

68 Under Art. 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the Status Table for the Evidence Convention, in column entitled "Res/D/N/DC".

35. As discussed above, the Convention seeks to operate harmoniously with other instruments and internal law that provide more favourable and less restrictive rules of international judicial co-operation in the taking of evidence, including the use of video-link to examine witnesses abroad. As a result, the Convention does not derogate from the use of bilateral, regional or multilateral instruments (Art. 32), such as the EU Evidence Regulation, the 2010 Ibero-American Convention on the Use of Videoconferencing and its Additional Protocol, or the 2008 Trans-Tasman Agreement, or prevent a Contracting Party from permitting evidence to be taken in its territory by video-link by its internal law or practice (Art. 27(c)).

A1.2 Direct vs indirect taking of evidence

8 Contracting Parties are divided as to whether direct taking of evidence is permitted under Chapter I of the Convention. Authorities should verify whether direct taking of evidence is permitted in the place where the evidence is located before filing a Letter of Request for this purpose.

See the **Country Profile** *of the relevant Contracting Party.*

9 Under Chapter II of the Convention, the Commissioner may take evidence in the State of Origin or in the State of Execution, subject to any conditions specified in the permission granted. Authorities should verify whether the State of Execution has made a reservation under Article 18 of the Convention.

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *for the Evidence Convention, in column entitled "Res/D/N/DC".*

10 Under Chapter II of the Convention, the Consul may take evidence by video-link of witnesses / experts who are at a distant location in the State of Execution, subject to any conditions specified in the permission granted. Authorities should verify whether this is possible in the relevant Contracting Party.

11 Irrespective of whether the evidence is taken directly or indirectly, the parties and representatives may be present by video-link.

36. With the increasing use of video-link and the ease with which evidence may be taken across borders, there are two different practices that have emerged in relation to the taking of evidence abroad. Evidence may be taken "directly" or "indirectly" depending on the authority which is taking the evidence.[69] This is not only a semantic distinction, but one that has important consequences in practice.

37. In general, existing instruments provide for the use of video-link to examine witnesses abroad in two ways, "directly" and "indirectly":

    a. the authority before which proceedings are pending (or a member of judicial personnel of that authority or a representative) conducts the witness examination by video-link with the permission and assistance of an authority of the State in whose territory the witness is located – in this sense, evidence is taken "directly" by video-link;[70] and

    b. an authority of the State in whose territory the witness is located conducts the witness examination and permits the requesting court (as well as the parties and / or their representatives) to be "present" at and / or participate in (but not conducting) the examination by video-link – in this sense, evidence is taken "indirectly" by video-link.[71]

38. As mentioned above, the Evidence Convention understandably makes no mention of video-link or of the possibility of direct taking of evidence under Chapter I, having been drafted at a time when computer technology and global air travel were at earlier stages of development, and indirect taking of evidence was the norm. In addition, the drafters could not have envisaged that under Chapter II evidence would eventually be taken by Commissioners physically located in the State of Origin using video-link.

39. In this regard, a question arises as to whether the Evidence Convention allows for the direct taking of evidence under Chapter I. While direct taking of evidence is permitted under Chapter II, it is debatable whether it would be permitted under Chapter I of the Convention. From a strict reading of Article 1 of the Evidence Convention, Chapter I would not appear to allow direct taking of evidence as it makes specific reference to the request to obtain evidence from a judicial authority of a Contracting Party to the competent authority of another Contracting Party. Consequently, while some Contracting Parties allow direct taking of evidence under Chapter I, others may consider its provisions to be a legal obstacle and therefore that the direct taking of evidence exceeds the scope of Chapter I of the Convention.

40. The Country Profiles reveal that the responding States are almost evenly divided as to whether evidence may be taken directly by video-link under Chapter I of the Convention. There is no clear trend in this regard. However, it is worth noting that many European States, as well as South Africa and Israel are of the view that direct

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69 For further discussion on the distinction between direct and indirect taking of evidence under other instruments, see Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), pp. 6, 9-10.

70 This approach is adopted in the Ibero-American Convention on the Use of Videoconferencing (in particular Art. 5), and Art. 17(4) of the EU Evidence Regulation.

71 EU Evidence Regulation, Arts 10-12.

taking of evidence by video-link may be possible under Chapter I, whereas most Latin American and Asian States, as well as the United States, are of the opposite view.[72]

41. As noted above in A1.1(b) concerning the use of video-link under internal law, one Contracting Party has passed legislation to permit the direct taking of evidence by video-link under Chapter I of the Evidence Convention as it is of the view that the Convention does not provide for this possibility.[73]

42. Under Chapter II, the Commissioner generally appointed by the State of Origin conducts the witness / expert examination. In such cases, it is considered that evidence is taken "directly". As indicated above, the Special Commission has agreed that a Commissioner may take evidence by video-link either from the State of Origin or the State of Execution.

43. In addition, in relation to diplomatic or consular missions, there may be instances (*e.g.* in the case of geographically large areas) in which a Consul could use video-link to examine a witness located at a (distant) location which is nonetheless still within the State of Execution.

44. By way of illustration, the table below sets out the possibilities with regard to the taking of evidence under the Evidence Convention:

	Practice	Articles of the Convention
Chapter I	Indirect taking of evidence (Direct taking of evidence under Art. 9(2), only available in some Contracting Parties)	Chapter I (Art. 9(1) and (2))
Chapter II	Direct taking of evidence **Commissioners** may take evidence by video-link either from the State of Origin or the State of Execution. **Consuls**, by nature of their function, will presumably be located in the State of Execution, from where they will take evidence by video-link.	Chapter II (Arts 15, 16 and 17)

72 See responses to Part V, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12). Responding States that consider that direct taking of evidence may be done by video-link under Chapter I of the Convention: China (Hong Kong SAR), Cyprus, Estonia, Finland, France, Greece, Israel, Malta, Poland, Portugal, Romania, Singapore, Slovenia, South Africa, Sweden, United Kingdom (England and Wales).

Responding States that consider that direct taking of evidence may not be done by video-link under Chapter I of the Convention: Belarus, Brazil, China (Macao SAR), Croatia, Czech Republic, Germany, Hungary, Latvia, Lithuania, Mexico, Republic of Korea, Switzerland, United States, Venezuela.

73 France (Decree No 2017-892 of 6 May 2017) (*op. cit.* note 51).

	Practice	Articles of the Convention
Internal law or practice	Direct and indirect taking of evidence	Arts 27(b) and (c), and 32

45. As indicated above, while Chapter I of the Evidence Convention would not appear to allow direct taking of evidence, the current trend in existing instruments on video-link is to allow it under provisions similar to Chapter I (likely for reasons of increased efficiency) provided specific *legal safeguards* have been satisfied. Such legal safeguards include but are not limited to:[74]

a. The request is made in writing, contains all the necessary information and is accepted by the competent authority;
b. The request falls within the scope of the relevant treaty;
c. The request is technically feasible;
d. The request is not contrary to national law or fundamental legal principles of the Contracting Parties involved;
e. The taking of evidence is performed on a voluntary basis without the need for coercive measures.

46. In addition, the European Union has reiterated that videoconferencing technology provides the "most efficient"[75] method by which to take evidence directly, at least among its Member States. Further, in its Country Profile, one responding State advised that in practice, direct taking of evidence by video-link is very common, indeed the norm, for both domestic and international cases.[76] However, it is not known how often direct taking of evidence is actually used in practice in other Contracting Parties, under either Chapter of the Evidence Convention.[77]

74 Art. 3 of the Ibero-American Convention on the Use of Videoconferencing and Art. 17(2) and (5) of the EU Evidence Regulation.

75 European Judicial Network in Civil and Commercial matters (*op. cit.* note 5), p. 6.

76 See the response of Portugal to Part II, q. (b) of the Country Profile Questionnaire, (*op. cit.* note 12).

77 See Synopsis of Responses (*op. cit.* note 4), Part V, q. (b); Part VI, q. (e).

A1.3 Legal restrictions on the taking of evidence

12 Taking of evidence by video-link is usually limited to witness / expert examination.

13 The same legal restrictions typically apply to a witness examination conducted by video-link as if the evidence were obtained in person. Authorities should look to the internal law of the relevant Contracting Party to verify if any additional restrictions are imposed.

14 Authorities are encouraged to provide information about the restrictions in their domestic legislations relating to the use of video-link for the taking of evidence (*e.g.* by reporting such provisions in their Country Profiles).

See the **Country Profile** *of the relevant Contracting Party.*

47. Several legal restrictions may apply to the taking of evidence under the Evidence Convention:

a. Under Chapter I, a request for a special method or procedure (such as the use of video-link) must be complied with unless it is incompatible with the internal law of the Requested State or it is impossible of performance. In addition, prior authorisation may be required to authorise the presence of judicial personnel of the Requesting State, whether this involves physical presence or via video-link.

b. Under Chapter II, permission may be required in order to obtain evidence by Consul or Commissioner, irrespective of whether or not the taking of evidence would be conducted by video-link.

48. Further, while the Convention provides clear guidance on the use of coercive measures and compulsion (discussed under **A2** and **A3** for Chapter I and Chapter II, respectively), for some Contracting Parties these coercive measures may extend only to compelling a witness to give evidence, not compelling that witness to give evidence specifically via a video-link.

49. Where these types of restrictions have been reported, they can be found in the Country Profile of the relevant Contracting Party. Some specific examples include other instruments or agreements which derogate from the Evidence Convention in relation to the use of video-link (see also Arts 28 and 32), any time limits or notice

requirements applicable to the use of video-link, as well as any restrictions on the taking of evidence when video-link is used.[78]

50. Responding States generally apply the same restrictions on the taking of evidence by video-link as they would do if evidence were obtained in person. With regard to the persons who may be examined by video-link, these are usually limited to witnesses (*i.e.*, the term witness understood in its broadest sense, see the Glossary). Other restrictions include: age (person is under 18 years of age), people with disabilities, relatives up to the third degree, spouses or partners, the ability of the witness to speak on behalf of an organisation or agency, etc.[79]

51. With regard to the location where evidence by video-link may be taken, it should be noted that in the majority of responding States the location is either the courtroom or the premises of the Embassy or Consulate, depending on the Chapter of the Convention invoked.[80] In addition, as noted in **B1** and **B4**, in the Country Profiles many responding States indicated that the location should be a hearing room within a court authority building, [81] and in some instances, this may even be a specifically designated room within the court building.[82]

For more on these matters, see **A2** *(Chapter I) and* **A3** *(Chapter II), and* **B4** *below.*

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78 Such restrictions may relate to the types of evidence which may be obtained by video-link, the persons who may be examined by video-link, locations in which evidence may be taken when video-link is used, or how the evidence that is taken by video-link is to be handled. See, *e.g.*, Synopsis of Responses (*ibid.*), Part IV, q. (b) and (d).

79 See Synopsis of Responses (*ibid.*), Part IV, q. (d).

80 See Synopsis of Response (*ibid.*), Part IV, q. (f).

81 See the responses of Australia (most states), Belarus, Bulgaria, Cyprus, Finland, France, Greece, Singapore (hearing room must be in a courtroom of the Supreme Court (only) if a Singapore Judicial Officer is to assist in taking the evidence), South Africa to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

82 See, *e.g.*, the responses of China (Hong Kong SAR – the Technology Court located in the High Court) and Malta (however, video-link can also be held in most Court Halls using portable video-link equipment) to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).

A2 THE USE OF VIDEO-LINK UNDER CHAPTER I

A2.1 Letters of Request

15 Letters of Requests may be executed by video-link pursuant to Article 9(1) or 9(2) of the Convention.

16 Article 9(1) sets out the default method or procedure to obtain evidence, for example, from a witness / expert located in a (distant) location within the requested authority's own territory.

17 Choosing to take evidence by video-link as a special method or procedure under Article 9(2) may have cost implications including in relation to the ability to seek reimbursement.

For more on Costs, see **A2.11** *(Chapter I) and* **A3.10** *(Chapter II).*

52. Under Chapter I, a judicial authority of the Requesting State issues a Letter of Request asking the Central Authority of the Requested State to obtain evidence via the appropriate judicial authority, *i.e.*, "indirect" taking of evidence.

53. The competent judicial authority in the Requested State (*i.e.*, the requested authority) then conducts the examination following the methods and procedure under the law of the Requested State (which may include the use of video-link), pursuant to Article 9(1) of the Convention. Alternatively, the requesting authority may wish to request the establishment of a video-link as a special method or procedure (Art. 9(2)). The requested authority is thus required to comply unless the establishment of the video-link is incompatible with the internal law of the Requested State, or impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.[83]

54. The typical video-link request under Chapter I would thus arise where the parties to the proceedings, their representatives, and / or judicial personnel of the requesting authority located in the Requesting State wish to be present by video-link during the

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[83] With regard to costs, see Art. 14(1) and (2) of the Evidence Convention:

"(1) The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

(2) Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2 […]"

With respect to practical difficulties, it has been noted that Art. 10(4) of the EU Evidence Regulation allows the courts concerned to agree on the provision of the necessary technical equipment if the requested court alone is unable to do so. See: M. Torres, "Cross-Border Litigation: 'Video-taking' of evidence within EU Member States", *Dispute Resolution International*, vol. 12(1), 2018, p. 76.

taking of testimony. The video-link would then be established between a location in the Requesting State (*e.g.*, premises of the requesting authority) and the location where the Letter of Request is being executed (*e.g.*, a courtroom in the Requested State) or alternatively, both locations would be connected via a virtual conferencing room. The establishment of the video-link is subject to the permission of the requested authority, as well as the availability of equipment and technical support.

55. Although less common, an alternative scenario may arise where (*e.g.*, in the case of geographically large areas), the witness / expert is within the Requested State but at another (distant) location from the judicial authority charged with taking the evidence. The competent authority in the Requested State may wish to conduct the witness / expert examination by video-link in accordance with its own internal law. Alternatively, if this is not contemplated, the requesting authority may wish to request the establishment of a video-link as a special method or procedure, in order to facilitate the taking of evidence and minimise the costs incurred by the Requested State in the execution of a Letter of Request. Should the parties to the proceedings, their representatives, and / or judicial personnel of the requesting authority also wish to be present, this may necessitate a third location to be included in a multipoint video-link and would be subject to the requirements stated above.

56. The possibility of taking evidence directly via video-link under Chapter I (*e.g.*, using Art. 9(2) of the Convention as a mechanism to do so) is controversial, with some Contracting Parties allowing this form of taking of evidence and others refusing to do so. In any case, at the time of writing, there is virtually no practice in this regard among the Contracting Parties to the Convention.

For more on the distinction between direct and indirect taking of evidence, see **A1.2** *and* **Annex II**.

For more on the various situations that can arise in practice, see the **Practical Examples** *in* **Annex III**.

57. In light of the above, it would seem that video-link technology is mainly used under Chapter I to allow the presence and participation of the parties to the proceedings, their representatives and / or judicial personnel in the execution of the Letter of Request. Although less common, it may also be used for the indirect taking of evidence when the witness or expert is located in a remote place in the Requested State.

A2.2 Content, form and transmission of the Letter of Request

18 Permission to conduct a video-link may be requested either in the Letter of Request itself or subsequently by informal means of communication. However, specifying this in the Letter of Request is recommended. It is also recommended that the Central Authority of the Requested State be contacted before formally filing the Letter of Request, to confirm whether the use of video-link is possible.

19 Authorities are encouraged to use the Model Form for Letters of Request and, where possible and appropriate, make use of electronic means to expedite the transmission of Letters of Request and / or enquiries.[84]

58. It is important to keep in mind that the video-link itself remains simply a means by which the Letter of Request can be executed. Consequently, the formal Letter of Request requirements must first be met before any aspect of the request to use video-link can be acted upon.

59. The requesting authority is encouraged to use the Model Form for Letters of Request, available on the Evidence Section of the HCCH website. In addition to the standard details about the matter at hand and the evidence sought, the Letter of Request should specify the requirements for the video-link, including whether additional assistance, equipment or facilities are available and / or required (*e.g.*, a document camera to facilitate the real-time transmission of documents between locations), along with the relevant technical details where applicable.

60. The Letter of Request may include a request that a special method or procedure be followed (Art. 9(2) of the Convention). If requested as a special method or procedure, information relating to the use of video-link should be included in item 13 of the Model Form.

61. In addition, items 14 and 15 of the Model Form should be completed with the relevant information if the parties to the proceedings, their representatives, and / or judicial personnel of the requesting authority located in the Requesting State wish to be present (in person or by video-link) during the taking of testimony. This is all the more important if they intend to be present by video-link, see **A2.5**.

62. Regardless of whether a special method or procedure is being requested, it is recommended that requesting authorities include with the Model Form an optional, video-link specific form, so as to expedite the handling of video-link requests and to avoid technical problems. This optional form is included in **Annex IV** of this Guide and contains the following information:

    a. Technical parameters of the video-link device(s): brand, type of endpoint or multipoint control unit, network type, address and / or hostname, type of encryption used (see also **Part C**);
    b. Full contact details of the technical contact person(s) (see **Part B3**).

For more information on the aspects to take into account in preparing for and conducting hearings via video-link, see **Part B**.

[84] For more information on the form of the Letter Request, including the Model Form, see the Evidence Handbook (*op. cit.* note 29), paras 142 *et seq.*

63. The Letter of Request must either be in the language of the authority requested to execute it (or accompanied by a translation into that language), or in English or French (unless the Requested State has made a reservation under Art. 33 of the Convention).

64. At its 2014 meeting, the Special Commission encouraged authorities to transmit and receive requests by electronic means, so as to facilitate the execution in an expeditious manner, as required by Article 9(3) of the Convention.[85]

A2.3 Responding to the Letter of Request

20 Central Authorities should promptly acknowledge receipt of Letters of Request and respond to enquiries (incl. on the use of video-link) from requesting authorities and / or interested parties.

65. While there is no Model Form for acknowledging receipt of the Letter of Request, the Special Commission has welcomed practices where Central Authorities promptly acknowledge receipt of Letters of Request and promptly respond to enquiries about the status of execution, in addition to maintaining good communication, including by e-mail.[86]

66. Of course, promptly acknowledging receipt and responding to status enquiries are only two examples of what are considered good communication practices. Efficient and, where possible, direct communication between the requesting authority and the relevant authority in the Requested State (generally the Central Authority) should also be encouraged, as it may facilitate, and in many cases expedite, the execution process where clarifications are needed due to differences in legal terminology and usage across jurisdictions.[87]

67. Irrespective of the outcome, the authorities of the Requested State are encouraged to make decisions relating to incoming Letters of Request as expeditiously as practicable.[88]

68. When responding to a Letter of Request relating to the use of video-link, it is for the requested authority to determine the time and place, specifying the relevant conditions for the video-link. Where possible, these should be determined in consultation with the requesting authority and, when finalised, communicated to the requesting authority in a timely manner.

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85 C&R No 39 of the 2014 SC.

86 *Ibid.*, C&R Nos 9 and 10.

87 C&R No 44 of the 2009 SC and C&R No 9 of the 2014 SC. See also in the European context, "Handshake" Project, "D1b Recommended step-by-step protocol for cross-border videoconferencing in judicial use-cases", pp. 16-17.

88 While the Evidence Convention does not impose a timeframe, in the context of the EU Evidence Regulation, the European Union recommends an ideal timeframe of 1 to 2 weeks for a decision to be taken (with a maximum of 30 days). See "Handshake" Project (*ibid.*), pp. 14, 16.

For more information on the aspects to take into account in preparing for and conducting hearings via video-link, see **Part B**.

A2.4 Notifying or summoning the witness / expert and other actors

21 The procedure for notifying or summoning the witness may vary depending on whether evidence is taken directly or indirectly. For proceedings under Chapter I, it is typically the Requested State that effects service or summons the witness / expert.

22 If and when direct taking of evidence is sought, it is recommended that requesting authorities ensure that the witness is willing to give evidence by video-link before filing a Letter of Request.

69. For proceedings under Chapter I involving the use of video-link, under Article 9, the requested authority is responsible for summoning the witness / expert in accordance with its own law and procedures.

70. From the Country Profiles, it appears that in the majority of responding States there are no special rules to be used in cases where the witness / expert is being notified or summoned to give evidence by video-link, as opposed to giving evidence in person.[89] This is usually the case where evidence is taken indirectly, *i.e.*, where the Requested State is taking the evidence.

71. That being said, one Contracting Party requires that the witness consent to give evidence by video-link, a requirement which is contained in the court order which is served upon the witness.[90] In another Contracting Party, the witness or expert is summoned by a simple letter, unless the requested court determines that a particular type of service must be used.[91]

72. It is worth noting that different rules may apply in Contracting Parties where *direct* taking of evidence under Chapter I is permitted. In such cases, the Requesting State (and not the Requested State) would be in charge of effecting service or delivering

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89 See, *e.g.*, the responses of Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Hungary, Israel, Latvia, Lithuania, Malta, Norway, Poland, Romania, Singapore, Slovenia, South Africa, Sweden to Part IV, q.(h) of the Country Profile Questionnaire (*op. cit.* note 12).

90 See the response of the United Kingdom (England and Wales) to Part IV, q.(h) of the Country Profile Questionnaire (*ibid.*).

91 See the response of Germany to Part IV, q.(h) of the Country Profile Questionnaire (*ibid.*).

the summons.[92] Moreover, other responding States have noted that a witness cannot be compelled by its courts to give evidence directly to a foreign tribunal by video-link (see also, **A2.6** below on coercive measures and compulsion).[93]

A2.5 Presence and participation at execution of Letter of Request

a. Presence of parties and / or their representatives (Art. 7)

23 The presence of parties and representatives *by video-link* is subject to permission, or to a special method or procedure under Article 9(2) of the Convention.

24 Requesting authorities should specify in the Letter of Request (in items 13 and 14 of the Model Form), whether the presence of the parties and representatives is requested to take place by video-link and if cross-examination will be required.

25 The active participation of the parties and their representatives in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

73. The Convention provides for the parties to the proceedings in the Requesting State and their representatives to be present at the execution of the Letter of Request.

74. If the parties and / or their representatives wish to be present by video-link at the execution of the Letter of Request, the requesting authority should specify this in items 13 and 14 of the Model Form for Letters of Request. Although the presence of the parties and / or their representatives at the execution of the request is, under Article 7 of the Convention, a right, this right does not necessarily extend to requiring the requested authority to establish a video-link to facilitate that presence. Accordingly, the establishment of the video-link to facilitate this presence is subject either to permission from the relevant authority or a special method or procedure being requested under Article 9(2). In the case of the latter, the requested authority is required to comply unless it would be incompatible with the internal law of the Requested State, or if it is simply not possible due to a lack of equipment or facilities.

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92 See, *e.g.*, the response of France to Part IV, q.(h) of the Country Profile Questionnaire (*ibid.*).

93 See, *e.g.*, the responses of Australia (one state), Switzerland and the United States to Part IV, q.(h) of the Country Profile Questionnaire (*ibid.*).

For more on matters concerning equipment, facilities and technical support, see **Parts B3, B4** *and* **C.**

75. In the Country Profiles, most responding States reported applying the same rules for the presence of the parties and their representatives irrespective of whether they are physically in a single location or present via video-link.[94] The active participation of the parties and their representatives in the hearing via video-link (*i.e.* not simple presence) in this case is determined by the internal law of the Requested State. In some responding States, the authorisation to actively participate remains at the discretion and direction of the presiding official in charge of the execution, in accordance with internal law.[95] Accordingly, in such circumstances, the extent to which the parties and their representatives may participate in the hearing via video-link is determined by the presiding official on a case-by-case basis.

76. Moreover, it should be noted that the majority of responding States allow cross-examination of a witness / expert by video-link by the representatives located in the Requesting State.[96] However, some require that cross-examination via video-link be specifically mentioned in the Letter of Request[97] and that questions be made indirectly through the judicial authority.[98] While some jurisdictions do not allow cross-examination by representatives of the Requesting State, a jurisdiction in one responding State indicated that cross-examination may be permitted if the practitioner of the Requesting State is also authorised to practice in its territory (*i.e.*, the Requested State).[99]

b. Presence of members of the judicial personnel (Art. 8)

26 Verify whether the Requested State has made a declaration under Article 8 of the Convention.

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *for the Evidence Convention, in column entitled "Res/D/N/DC".*

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94 See the responses of Belarus, Brazil, China (Hong Kong SAR), China (Macao SAR), Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Israel, Latvia, Lithuania, Malta, Mexico, Poland, Portugal, Romania, Singapore, Slovenia, South Africa, Sweden, United Kingdom (England and Wales) and Venezuela to Part V, q. (e) of the Country Profile Questionnaire (*ibid.*).

95 See, *e.g.*, the responses of Australia (two states), Brazil, France and Israel to Part V, q. (e) of the Country Profile Questionnaire (*ibid.*).

96 See the responses of Brazil, China (Hong Kong SAR), Cyprus, Estonia, Finland, France, Greece, Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Portugal, Romania, Singapore, Slovenia, South Africa, United Kingdom (England and Wales), Venezuela to Part V, q. (f) of the Country Profile Questionnaire (*ibid.*).

97 See, *e.g.*, the response of France to Part V, q. (f) of the Country Profile Questionnaire (*ibid.*).

98 See, *e.g.*, the response of Brazil to Part V, q. (f) of the Country Profile Questionnaire (*ibid.*).

99 Response of Australia (Queensland) to Part V, q. (f) of the Country Profile Questionnaire (*ibid.*).

27 In the absence of a declaration, presence of judicial personnel may nonetheless be possible in accordance with the internal law or practice of the Requested State.

28 When seeking authorisation from the Requested State, requesting authorities should clearly specify that the presence of the judicial personnel will take place by video-link and provide the relevant technical specifications of your video-link equipment.

29 The active participation of judicial personnel in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

77. Whether or not members of the judicial personnel of the Requesting State may be present at the execution of the Letter of Request, including by video-link, depends on whether the Requested State has made a declaration under Article 8 of the Convention permitting such participation. Where such a declaration has been made, prior authorisation by the designated competent authority may be required.

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *for the Evidence Convention, in column entitled "Res/D/N/DC".*

78. It is important to note that in the event that the Requested State has not made a declaration under Article 8, presence of judicial personnel may nonetheless be possible in accordance with the internal law or practice of the Requested State. In addition, two or more Contracting Parties may agree on a more liberal system for the presence of judicial personnel at the execution of a Letter of Request (Art. 28(c) – although this provision has been rarely used in practice, if at all).

79. Even if the judicial personnel may be present, actual active participation in the examination is another matter. As noted in Article 8, the prior authorisation of the competent authority may be required, and in some cases the participation of the judicial personnel of the Requesting State may be subject to the applicable court rules and the control of the presiding official.[100]

[100] See, *e.g.*, the responses of Australia (two states), Brazil and France to Part V, q. (g) of the Country Profile Questionnaire (*ibid.*).

A2.6 Coercive measures and compulsion

30 Unlike ordinary requests for judicial assistance, a witness cannot generally be compelled specifically to use video-link to give evidence.

80. In the context of coercive measures and compulsion, it is important to note that a distinction may need to be drawn between compelling a witness / expert to give evidence before a court and compelling the witness / expert to give the evidence using a particular medium (*i.e.*, by video-link). Therefore, depending on the scope of the measures of compulsion available to the requested authority under its internal law, it is entirely possible that a witness / expert may be compelled to give evidence before a court, but not compelled to use video-link to give that evidence.

81. Under Chapter I of the Evidence Convention, the requested authority must apply the same measures of compulsion under its internal law as it would in local proceedings (Art. 10). However, the witness may claim the right to refuse to give evidence in accordance with the law of either the Requested State (Art. 11(1)(a)) or the Requesting State (Art. 11(1)(b)) or, if specified by declaration of the Requested State, the law of a third State (Art. 11(2)).

82. From the Country Profiles, half of the responding States referred to their internal laws authorising the compelling of a witness / expert to appear before the court and they did so mainly in the context of Chapter I.[101] It is unclear, however, whether once before the court, the witness could be compelled to give that evidence by video-link.

83. In contrast, the other half of the responding States indicated that a witness or expert could not be compelled to use video-link to give evidence.[102] In particular, two responding States advised that their internal law does not contemplate using compulsion to force a witness to give evidence by video-link.[103] Another responding State mentioned that the taking of evidence by video-link is subject to the condition that the witness is not compelled to give evidence by video-link.[104]

84. One responding State further clarified that *if* evidence is being taken directly under Chapter I (as discussed in **A1.2**, above), the witness should give evidence voluntarily as compulsion is not available in such cases, not even to compel the witness to be present at the hearing.[105]

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101 Responses of Australia (three states), China (Hong Kong SAR), China (Macao SAR), Cyprus, Czech Republic, Hungary, Israel, Korea (Republic of), Lithuania, Mexico, Norway, Poland, Romania, and Singapore to Part IV, q.(g) of the Country Profile Questionnaire. Some of these responding States also provided information on compulsion in their responses to Part IV, q.(h) of the Country Profile Questionnaire (*ibid.*).

102 Responses of Australia (two states), Belarus, Croatia, Estonia, France, Germany, Greece, Malta, Portugal, Slovenia, South Africa, United Kingdom (England and Wales), United States, and Venezuela to Part IV, q.(g) of the Country Profile Questionnaire (*ibid.*).

103 Responses of Croatia and Slovenia to Part IV, q.(g) of the Country Profile Questionnaire (*ibid.*).

104 Response of the United Kingdom (England and Wales) to Part IV, q.(e) and (g) of the Country Profile Questionnaire (*ibid.*).

105 Response of France to Part IV, q.(g) of the Country Profile Questionnaire (*ibid.*), which makes reference to Art. 747-1 of the Code of Civil Procedure of France.

A2.7 Oath / affirmation

31 The administration of oaths or affirmations may vary depending on whether evidence is taken directly or indirectly. A specific form of oath or affirmation may be requested pursuant to Article 9(2) of the Convention.

32 Authorities should verify the relevant internal law requirements of either the Requested State, the Requesting State, or both, to ensure the admissibility of any evidence given.

85. As outlined above, in the execution of a request to take evidence indirectly under Chapter I of the Evidence Convention that makes use of video-link, the law of the Requested State applies (Art. 9(1)), including to the administration of oaths or affirmations. However, a specific form of oath or affirmation may be requested by the requesting authority (Art. 3(h)) as a special method or procedure (Art. 9(2)). The requested authority may also wish to explain to the witness the method of administering the oath or affirmation.

86. In contrast, if evidence is being taken directly under Chapter I (as discussed in **A1.2** above, and if permitted in the Requested State), it is usually the Requesting State which administers the oath or affirmation.[106] However, users should keep in mind that the administration of foreign oaths and affirmations may be considered a violation of the sovereignty of the Requested State.[107] Clarification on this point should be sought from the relevant competent authority.

For more information on oaths and affirmations, see the **Country Profile** *of the relevant Contracting Party.*

106 Response of Portugal to Part II, q.(a) and (b) of the Country Profile Questionnaire (*ibid.*).

107 For example, according to the Federal Office of Justice of Switzerland, "[t]he act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures always constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is regarded as a violation of Swiss sovereignty whether or not the persons affected by these legal procedures are willing to cooperate": *Guidelines on International Judicial Assistance in Civil Matters*, 3rd ed., Bern, January 2013, p. 20, available at the following address: < http://www.rhf.admin.ch > [last consulted on 4 March 2020]. See also M. Davies (*op. cit.* note 15), pp. 217-218.

A2.8 Identification of witness / expert and other actors

33 The identification of the witness / expert may vary depending on the jurisdiction.

34 More stringent procedures may be required if the Requesting State is to identify the witness / expert, given the use of video-link technology in the proceedings, and the distance between the requesting authority and the witness.

87. Similar to court proceedings where evidence is taken in person, the witness / expert would usually be required to show a valid identity document (ID) for the purposes of identification in video-link proceedings. [108] In some jurisdictions, the oath or affirmation as administered will be sufficient. [109] Under Article 9(1) of the Convention, these procedures are to be determined by the internal law of Requested State, unless otherwise requested via an Article 9(2) special method or procedure.

88. In the case of indirect taking of evidence, it is the Requested State that would conduct the identification of the witness. In contrast, in the case of direct taking of evidence by video-link, the identification of the witness may be conducted by the Requested State and / or the Requesting State. In the latter case, however, it may be that more stringent procedures are required to verify the identity of the witness / expert. In practice, a convenient way of doing so would be to request the witness / expert to show his or her ID card to the requesting judicial officer through the video camera. A document camera may also be used for this purpose.[110]

89. All other actors in the proceedings who are present, either physically or via video-link, will likely also need to have their identity appropriately verified. Once again, this is subject to the requirements of the law of the Requested State, unless requested as a special method or procedure. As such, the participants themselves are responsible for ensuring their ability to adhere to any the relevant laws or procedures in place in the Requested State with respect to identification.[111]

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108 See, *e.g.*, the responses of Belarus, China (Hong Kong SAR), Cyprus, Czech Republic, France, Germany, Hungary, Israel, Korea (Republic of), Lithuania, Malta, Mexico, Norway, Poland, Portugal, Singapore, Slovenia, South Africa, and Venezuela to Part VII, q. (j) of the Country Profile Questionnaire (*op. cit.* note 12).

109 See, *e.g.*, the responses of Australia (two states), Croatia, Romania, United Kingdom (England and Wales) to Part VII, q. (j) of the Country Profile Questionnaire (*ibid.*). In India, the Karnataka High Court in *Twentieth Century Fox Film Corporation v. NRI Film Production Associates Ltd* AIR 2003 SC KANT 148 required further documentation to establish the identity of the witness, in the form of an "identification affidavit" .

110 Response of Hungary to Part VII, q. (h) and (j) of the Country Profile Questionnaire (*ibid.*).

111 See "Handshake" Project (*op. cit.* note 87), p. 18.

A2.9 Penal provisions

35 Giving evidence by video-link is usually voluntary in nature, though perjury and contempt of court may be penalised.

36 In some cases, the operation of penal provisions of both (or multiple) jurisdictions involved may give rise to a jurisdictional overlap or gap.

90. The drafters of the Convention made the conscious decision to exclude all reference to penal matters connected to the taking of evidence, particularly *contempt of court* (*i.e.*, refusing to give evidence or disrupting proceedings) and *perjury* (*i.e.*, giving false testimony). At the same time, the drafters noted that these matters may involve a jurisdictional overlap as between the Requesting State and Requested State, whereby the person giving evidence would be subject to penal provisions in both.[112]

91. For example, generally the witness would be sworn or affirmed according to the laws of the Requested State. Accordingly, he or she would be subject to civil sanctions or prosecution there. If a particular oath or affirmation is used by way of a special method or procedure and the witness commits perjury or is in contempt of court, consideration should be given as to whether the witness could be sanctioned or prosecuted according to the laws of the Requesting State. It is equally possible that the penal provisions of neither the Requested or Requesting State would apply, or that neither would have jurisdiction to prosecute the witness concerned, thereby creating a jurisdictional void.

92. Resolving the potential overlapping application of, or jurisdictional gaps between, different penal provisions is not addressed in the Evidence Convention. Instead, it is left to arrangements between States (*e.g.*, pursuant to mutual legal assistance agreements in criminal matters),[113] internal law,[114] or general principles of public international law. It is therefore advisable that, prior to the hearing, the witness or expert should therefore be duly informed of the consequences of giving evidence that is false or misleading.[115]

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112 See Explanatory Report, paras 256-257.

113 See, *e.g.*, *Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*, O.J. C 197/1, Art. 10(8). See, also, *Trans-Tasman Proceedings Act 2010* (Cth), section 61, which is the relevant Australian legislation implementing the 2008 Trans-Tasman Agreement (*op. cit.* note 60). This provision assigns jurisdiction for contempt for persons in Australia appearing remotely in proceedings before a New Zealand Court.

114 For example, some states within Australia have legislation specifically addressing the jurisdictional overlap arising from the use of video-link technology when taking evidence. See, *e.g., Evidence (Miscellaneous Provisions) Act* 1958 (Victoria), section 42W; *Evidence (Audio and Audio Visual Links) Act* 1998 (New South Wales), section 5C.

115 "Handshake" Project (*loc. cit.* note 111). See, also, the responses of Australia (one state), Czech Republic and Venezuela to Part V, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12). In practice, some courts have pragmatically chosen to simply ignore or disbelieve the evidence when unable to sanction a witness who has committed perjury while giving evidence by video-link. See, *e.g.*, the Supreme Court of India in *State of Maharashtra v. Dr Praful B Desai* (*op. cit.* note 42).

A2.10 Privileges and other safeguards

37 A witness / expert may invoke privileges under Article 11 of the Convention.

38 However, as the taking of evidence using video-link remains, in many instances, voluntary, the witness / expert is not obliged to specifically use video-link to give evidence and may refuse to do so without the need of invoking any privilege or duty.

93. In cases where the witness is compelled to give evidence by video-link, or where there is a fact or communication that a witness / expert voluntarily giving evidence cannot disclose, a privilege or duty may be invoked on the basis of Article 11 of the Convention provided that it is contemplated under:

a. the law of the Requested State (Art. 11(1)(a));
b. the law of the Requesting State, if the privilege or duty has been specified in the Letter of Request or, at the instance of the requested authority, has been otherwise confirmed by the requesting authority (Art. 11(1)(b)); or
c. the law of a third State, subject to conditions (Art. 11(2)).

94. While privileges can generally be invoked just as they would for more traditional Convention requests for the taking of evidence, the use of video-link may give rise to more complex safeguards. These could include, but are not limited to, protective measures to ensure the safety of the witness / expert at the other location,[116] the right to legal representation and the ability to confer with this legal representative confidentially,[117] the right to be refunded for travel / accommodation costs and loss of revenue,[118] as well as the provision of interpretation. Many of these issues can be addressed when arranging the video-link.

For more information on the aspects to take into account in preparing and conducting hearings via video-link, see **Part B**.

116 Including, *e.g.*, ensuring that the witness / expert "is not instructed by other participants": "Handshake" Project (*ibid.*).

117 In some legal systems, it is not required for a witness to be assisted by a lawyer during the taking of evidence. See the responses of Malta and Mexico to Part V, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

118 See Art. 26 of the Evidence Convention. See also, the responses of Romania and Slovenia to Part V, q. (d) of the Country Profile Questionnaire (*ibid.*).

A2.11 Costs

39 The use of video-link in the execution of a Letter of Request may give rise to costs pursuant to Article 14(2).

40 Before requesting the use of video-link in the execution of a Letter of Request, verify whether any costs may be incurred in both the Requesting State and the Requested State and who would be responsible for bearing such costs.

See the **Country Profile** *of the relevant Contracting Party.*

95. Given that the costs associated with current video-link technologies can be high,[119] the issue of costs is perhaps more sensitive in the context of the video-link use than it otherwise is under the Convention.

96. Generally, the requested authority will execute the Letter of Request without any reimbursement of either taxes or costs of any nature (Art. 14(1)). The parties, their representatives and / or members of the judiciary of the requesting authority bear their own costs for being present at the execution.

97. If video-link is requested as a special method or procedure under Article 9(2), the requested authority may require reimbursement of costs occasioned by the use of the video-link, including transmission charges, and fees for the hire of equipment and technical support (Art. 14(2)).

98. Applicants should also bear in mind that even if the use of video-link is not specifically requested as an Article 9 special method or procedure, it is possible that the authority in the Requested State may nonetheless consider it to be such a request and may therefore seek reimbursement of at least some costs.

99. Other costs associated with the taking of evidence by video-link under Chapter I may include: booking fees and hourly rate for the use of video-link equipment, communication fees such as the use of internet or telephone, fees for technicians and external video-link service providers, fees for interpretation, judicial costs (incl. fees for the rental of a courtroom with video-link facilities and the use of a sheriff for service of subpoenas), and staff wages (*e.g.*, payment of overtime when holding a video-link outside office hours).[120] Some responding States reported charging a flat-

[119] R. A. Williams (*op. cit.* note 1), p. 21.

[120] See Synopsis of Response (*op. cit.* note 4), Part VII, q. (m).

rate fee for the use of video-link,[121] whereas others will charge on a case-by-case basis depending on the circumstances and resources such use would entail.[122]

100. Ultimately, while the Convention is quite clear on costs in general, it remains silent on the exact method(s) by which these are to be reimbursed. Practice shows that the requesting authority is usually responsible for bearing the costs occasioned by the use of video-link under Chapter I (incl. interpretation) and that the preferred payment method is by wire transfer.[123]

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121 See, *e.g.*, the responses of Australia (one state), Hungary (for video-link outside Budapest) and Malta to Part VII, q. (m) of the Country Profile Questionnaire (*op. cit.* note 12).

122 See, *e.g.*, the response of Brazil to Part VII, q. (m) of the Country Profile Questionnaire (*ibid.*).

123 See Synopsis of Responses (*op. cit.* note 4), Part VII, q. (n), (o), (p).

A3 THE USE OF VIDEO-LINK UNDER CHAPTER II

A3.1 Consuls and Commissioners

41 It is important to note that Contracting Parties are, by virtue of an Article 33 declaration, able to exclude the application of Chapter II, in whole or in part. Authorities should verify whether the relevant Contracting Party has made such a declaration.[124]

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *for the Evidence Convention, in column entitled "Res/D/N/DC".*

42 The most common scenario under Chapter II is where the Commissioner located in the State of Origin takes evidence by video-link in the State of Execution.

43 Where practically possible, the parties, their representatives and / or judicial personnel in the State of Origin are able to be present by video-link during the taking of evidence by a Commissioner or Consul, and / or participate in the examination of the witness. Such presence and participation will be permitted unless it is incompatible with the law of the State of Execution and would nonetheless be subject to any conditions specified when the permission is granted.

101. Under Chapter II, a Consul, or a person duly appointed as a Commissioner for the purpose, may, subject to the consent of the State of Execution, take evidence in the State of Execution, *i.e.*, "direct" taking of evidence.

102. The first (and most common) scenario is where the video-link is established between a place in the State of Origin where the Commissioner is located and the place in the State of Execution where the testimony is being given. The Special Commission has expressly acknowledged this possibility, noting that Article 17 does not preclude a member of judicial personnel of the court of origin (or other duly appointed person), who is located in one Contracting Party, from examining a person located in another Contracting Party by video-link.[125]

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[124] Pursuant to Art. 33(3) of the Convention, "any other State affected" (*e.g.*, the State of Execution vis-à-vis the State of Origin) may apply reciprocity. Therefore, it is recommended to verify whether both the State of Origin and the State of Execution have objected to the relevant provision of Chapter II.

[125] C&R No 20 of the 2014 SC.

103. Other alternative scenarios may include, for example, instances (*e.g.*, in the case of geographically large areas) in which a Consul or Commissioner could use video-link to examine a witness located at a (distant) location which is nonetheless still within the State of Execution. In some rare cases, another (albeit unlikely) scenario could be envisaged, in which a Consul or Commissioner is located neither in the State of Origin nor the State of Execution, but in a third State, and is charged with taking evidence of the witness / expert physically located in the State of Execution (*e.g.*, where the diplomatic mission of the State of Origin accredited to the State of Execution is located in a third State, see para. 104). Presumably in most such cases the Consul or Commissioner would travel to take the evidence, but it is possible that in some cases the evidence could be obtained via video-link.

104. In the case of a Consul this situation could theoretically be possible, because under Article 15 a Consul may take evidence "in the territory of another State and within the area where he[or she] exercises his[or her] functions". Therefore, when read in conjunction with Article 7 of the *Vienna Convention on Consular Relations*, which permits consular functions to be exercised from a post in another State, this would seem to allow for a possibility where a Consul may take evidence by video-link from a consular post of his or her sending State located not in the State of Execution, but another Contracting Party to the Evidence Convention.[126]

105. A video-link may also be used to facilitate the presence and participation of the parties or representatives and the judicial personnel located in the State of Origin in the taking of evidence by the Consul or Commissioner in the State of Execution. In the absence of a declaration by the State of Execution that permission is not required, such presence or participation will be subject to any conditions specified when permission is granted.

For more on attendance, presence and participation, see **A3.4**.

For more on the various situations that can arise in practice, see the **Practical Examples** *in* **Annex III**.

106. According to the Convention, in order for a Consul or Commissioner to examine a witness / expert by video-link, a number of conditions must be satisfied. The State of Execution must not have excluded (pursuant to Art. 33), the application of the relevant Article(s) of Chapter II. In addition, the person must either be a Consul accredited to the State of Execution (Arts 15(1) and 16(1)), or have been duly appointed as a Commissioner (Art. 17(1)). In cases where prior permission is required, the Consul or Commissioner must comply with any conditions specified by the competent authority in granting its permission.

107. The appointment of a Commissioner is usually made by the court of origin, but may also be made by an authority of the State of Execution, depending on the relevant legal provisions. However, the Convention does not provide for the State of Execution to condition the State of Origin's appointment of a Commissioner. There are also

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126 Art. 7, *Vienna Convention of 24 April 1963 on Consular Relations* states "The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned".

specific requirements relating to permission from the State of Execution, which are detailed in **A3.2**. Finally, the use of video-link must be provided for, either explicitly or implicitly, by the law of the State of Origin, and it must not be prohibited by the law of the State of Execution (Art. 21(d)).

108. The examination of the witness / expert under Chapter II is conducted in accordance with the law and procedure of the State of Origin unless this is prohibited by the State of Execution. As the taking of evidence under Chapter II does not (necessarily) involve the authorities of the State of Execution (except for the purposes of granting required permissions or providing assistance to obtain evidence by compulsion), the Commissioner could, in such cases, be responsible for arranging the video-link at both locations. This being said, some Contracting Parties have, by way of declaration, conditioned the taking of evidence by Consuls or Commissioners, requiring that the authorities of the State of Execution have more control over the taking of evidence.[127]

For more information on the aspects to take into account in preparing and conducting hearings via video-link, see **Part B**.

A3.2 Need for permission from the State of Execution

44 Under Article 15 of the Convention, permission *is not* required unless a Contracting Party has made a declaration. Authorities should verify whether the State of Execution has made a declaration under this Article.[128]

45 Under Articles 16 and 17 of the Convention, permission *is* required unless the Contracting Party has made a declaration that evidence may be taken without its prior permission. Authorities should verify whether the State of Execution has made a declaration under these Articles.[129]

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *of the Evidence Convention, in column entitled "Res/D/N/DC".*

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127 See, *e.g.*, declarations of France and Germany, available on the Evidence Section of the HCCH website under "Updated list of Contracting Parties".

128 See also, *supra*, note 124 in relation to reciprocity.

129 *Ibid.*

46 The request for permission should specify that evidence will be taken by video-link, and whether any specific assistance is required from the State of Execution. The Model Form may be used for this purpose.

47 Consuls and Commissioners must comply with the conditions specified by the State of Execution in granting its permission.

109. Pursuant to Article 15 of the Evidence Convention, a Consul may examine, without compulsion, a witness / expert who is a national of the State which the Consul represents (sending State), when the evidence is to be taken by the Consul acting in the area in which he or she exercises his or her functions. In order to do so, Article 15(2) requires that the Consul seek the permission of the State of Execution, though only if that Contracting Party has made a declaration to that effect. Where the Consul is to take evidence of a national of any other State, Article 16 applies.

110. A Consul (under Art. 16) or a person duly appointed as a Commissioner (under Art. 17) may, without compulsion, take evidence only if a competent authority designated by the State of Execution has given its permission, either generally or in the particular case (Arts 16(1)(a) and 17(1)(a)). This is unless the State of Execution in question has made a declaration that evidence may be taken without its prior permission (Arts 16(2) and 17(2)). The Consul or Commissioner must also comply with any conditions specified by the competent authority in its permission (Arts 16(1)(b) and 17(1)(b)).

111. As indicated in the Evidence Handbook, the Convention does not specify who applies for permission; in practice, permission is often applied for by the court of origin or the embassy or consulate of the State of Origin.[130] While there is no Model Form for requesting permission under Chapter II (as this remains a matter for the State of Execution), some experts have considered that the Model Form for Letters of Request under Chapter I may be useful when applying for permission to take evidence under Chapter II. In such cases, the Model Form should be adapted accordingly.[131] Importantly, the request for permission should specify that evidence will be taken by video-link and whether any assistance would be required from the State of Execution.

For more information on the types of possible assistance, including testing the equipment prior to the hearing and reserving appropriate facilities, see **Part B**, along with the **Country Profile** *of the relevant Contracting Party*.

130 Evidence Handbook (*op. cit.* note 29), para. 380.

131 *Ibid.*, Annex 4, "Guidelines for completing the Model Form".

112. As mentioned above, in cases where prior permission is required, the Consul or Commissioner must comply with any conditions specified by the competent authority in granting its permission, and this includes requirements of content and form. For example, the State of Execution may require that a video-link be prepared in a particular manner as a condition for granting permission (*e.g.*, that it be arranged by a particular person, that a particular location be used, that particular equipment or technical support be used, or that particular personnel be in attendance, such as an official of the State of Execution).

A3.3 Notification of the witness

48 In addition to the requirements laid down in Article 21(b) and (c) of the Convention, it is important for the Consul or Commissioner to notify the witness that evidence will be taken by video-link.

113. After obtaining the necessary permissions, the Consul or Commissioner will notify the witness in writing, requesting him or her to give evidence at a particular time and place.

114. In addition to informing the witness that evidence will be taken by video-link and whether the parties, representatives or judicial personnel will be present via video-link, such a request must:

a. unless the recipient is a national of the State of Origin, be drawn up in the language of the State of Execution or be accompanied by a translation into such language (Art. 21(b)), and;

b. inform the recipient that he or she may be legally represented and, if the State of Execution has not filed a declaration under Article 18, must inform the recipient that he or she is not compelled to appear or to give evidence (Art. 21(c)).

115. As indicated in the Evidence Handbook, in practice, the witness is often contacted by the party seeking to have evidence taken prior to the engagement or appointment of the Consul or Commissioner to determine that the witness is willing to give evidence.[132] In such cases, it is of the utmost importance that the witness is aware that the taking of evidence will be conducted by video-link.

[132] *Ibid.*, para. 388.

A3.4 Attendance, presence, participation of the parties, their representatives, and / or judicial personnel

49 If not contrary to the law of the State of Execution, the presence and active participation of the parties, their representatives, and judicial personnel by video-link should follow the same rules as if the evidence were taken in person in the State of Origin.

50 Judicial personnel of the court of origin may be appointed as a Commissioner to examine a person located in the State of Execution by video-link and may conduct the hearing in accordance with the domestic law of the State of Origin.

116. The Consul or Commissioner is to conduct the witness examination by video-link in accordance with the law of the State of Origin and Article 21 of the Convention. In instances where prior permission is required, any conditions that the State of Execution has placed upon the granting of such permission must be complied with, including those which are related to presence of, for example, representatives of the competent authority of the State of Execution. In addition, internal law or procedure may prescribe that the witness has a right to counsel or legal representation.

117. Unlike Chapter I, the active participation of the parties, their representatives, and / or judicial personnel is subject to the law of the State of Origin, provided it is not incompatible with the law of the State of Execution, and subject to any conditions specified by the State of Execution when granting permission. In particular, in cases where the presiding official of the court of origin (or other duly appointed person) has been appointed as a Commissioner to examine a person located in the State of Execution by video-link, the parties and their representatives should be able to participate as if the examination were to take place in person in the State of Origin (unless any conditions specified by the State of Execution would limit or hinder this possibility).

118. The practice of Contracting Parties governing how diplomatic and consular officers take evidence, in particular whether the parties, their legal representatives, and judicial personnel may participate in the taking of evidence, varies. For at least one Contracting Party, the presence and active participation of legal representatives in the taking of evidence by Consuls is of significance because it is the legal representative who takes the deposition in the presence of the Consul, and in some instances the legal representative may even ask the Consul to absent him or herself.[133] In such instances, the primary role of the Consul is to verify the identity of and administer the oath to the witness and / or assist with the testimony by arranging for interpreters and stenographers if necessary.

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133 B. Ristau, *International Judicial Assistance (Civil and Commercial)*, Washington, D.C., International Law Institute, Georgetown University Law Center, Vol. I, Part V, 2000 revision, p. 326.

A3.5 Coercive measures and compulsion

51 The witness / expert is not compelled to give evidence unless the State of Execution has made a declaration under Article 18 and the competent authority has granted the application to provide assistance to obtain the evidence by compulsion. Authorities should verify whether the State of Execution has made such a declaration.

To view the declarations or reservations made by a particular Contracting Party, see the **Status Table** *for the Evidence Convention, in column entitled "Res/D/N/DC".*

52 Even if the authority of a Contracting Party compels a witness to give evidence, it may not necessarily be able to compel the witness to *use video-link* to give that evidence.

119. Under Chapter II, the Convention does not permit Consuls or Commissioners to compel the giving of evidence. Instead, Article 18 allows a Contracting Party to declare that a Consul or Commissioner authorised to take evidence may apply to the competent authority (as designated by that Contracting Party) for appropriate assistance in obtaining evidence by compulsion, subject to such conditions as the declaration may contain. Therefore, under Chapter II, the witness / expert is not compelled to give evidence unless the State of Execution has made such a declaration and grants a request for assistance in obtaining evidence by compulsion (Art. 21(c)). From the Country Profiles of the responding States, approximately 25% permit the use of this mechanism.

120. As mentioned above in the context of Chapter I (see **A2.6**), in some cases a distinction may need to be drawn between compelling a witness / expert to give evidence and compelling the witness / expert to give that evidence specifically via video-link. In addition, from the Country Profiles, a few responding States that apply Article 18 mentioned that the taking of evidence by video-link under Chapter II must be done on a voluntary basis.[134]

121. It should also be noted that, under Article 22, a failure to obtain evidence using the procedures provided for in Chapter II neither excludes nor should have any bearing on a subsequent application being made to take the evidence in accordance with Chapter I.

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[134] Responses of the United Kingdom (England and Wales) and the United States to Part IV, q. (g) of the Country Profile Questionnaire (*op. cit.* note 12). The United States also added that in the context of a 28 U.S. Code § 1782(a) motion to request that a U.S. district court issue an order to compel a witness to provide evidence in aid of a foreign proceeding, "[i]t is unlikely a U.S. court will compel a witness to directly provide evidence by video-link to a foreign court".

A3.6 Oath / affirmation

53 The Consul or Commissioner has the power to administer an oath or take an affirmation under the law of the State of Origin insofar as it is not incompatible with the law of, or contrary to any permission granted by, the State of Execution (Art. 21(a) and (d)).

54 Depending on national or international instruments, oaths / affirmations administered by Consuls or Commissioners may have extraterritorial effects in the State of Execution.

122. The importance of the administration of the oath or affirmation should not be underestimated.[135] However, evidence under Chapter II is generally taken without the use of compulsion, and it should also be noted that in some jurisdictions a witness cannot be compelled to swear or affirm the truth of his or her statements.[136] This being said, the absence of an oath or affirmation, may adversely affect the probative value of any evidence taken.

123. In proceedings under Chapter II, the Consul or Commissioner has the power to administer an oath or take an affirmation insofar as this is not incompatible with either the law of, or contrary to any permission granted by, the State of Execution (Art. 21(a) and (d)). Several potential questions may arise, for example: whether the oath / affirmation must be administered by the Consul or Commissioner;[137] whether the oath / affirmation is required to be administered at the same location as the witness; whether it must be administered (albeit unlikely) by a competent person of the State of Execution; [138] and whether the law requires that it be administered in conformity with the law of the State of Origin or the law of the State of Execution.[139]

124. In the case of a Consul using video-link to take evidence under Chapter II, the Consul may administer the oath or take the affirmation in accordance with the domestic law of the sending State (*i.e.*, the State that the Consul represents) and, in some cases, only within the confines of the Embassy that the Consul represents.[140] For example, a Consul may take the oath of a witness while the parties and their representatives and judicial personnel are present via video-link, if the law of the sending State so

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135 See, *e.g.*, the discussion of the Supreme Court of India concerning the sending of a Consul to administer an oath in *State of Maharashtra v. Dr Praful B Desai* (*op. cit.* note 42). The presence of the officer while the witness was giving evidence was viewed by the Court as a safeguard ensuring the witness was not coached, tutored, or prompted.

136 Response of Switzerland to Part VI, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

137 The majority of responding States (where Chapter II applies) expressed a preference for this option provided that it complies with the rules of the State of Origin and is in accordance with Art. 21(a) and (d) of the Convention. See, *e.g.*, the responses of Australia, France, Germany, Lithuania, United Kingdom (England and Wales) and Venezuela to Part VI, q. (d) of the Country Profile Questionnaire (*ibid.*).

138 See, *e.g.*, the response of Switzerland to Part VI, q. (d) of the Country Profile Questionnaire (*ibid.*).

139 R. A. Williams (*op. cit.* note 1), p. 20; See, also, Synopsis of Responses (*op. cit.* note 4), Part VI, q. (i).

140 See, *e.g.*, 22 U.S. Code § 4221.

provides. It should be noted that when evidence is taken by a Consul, this would presumably take place in the State of Execution as that is where the Consul would be exercising his or her functions.

125. In the case of a Commissioner, the oath may be administered or affirmation taken by video-link from the State of Origin (with the witness therefore swearing or affirming in the State of Execution),[141] provided that the Commissioner is empowered to do so under the law of the State of Origin.

A3.7 Identification of witness / expert and other actors

55 The Consul or Commissioner is responsible for identifying the witness / expert in accordance with the law of the State of Origin, unless this is incompatible with either the law of the State of Execution or conditions attached to its permission.

126. Unlike Chapter I of the Evidence Convention, the law applicable to the procedures for the identification of a witness / expert under Chapter II is the law of the State of Origin.[142] This is provided that such procedures are not forbidden by the law of the State of Execution (Art. 21(d) of the Convention), and any conditions imposed by the State of Execution at the time of granting permission (Arts 16(1)(b) or 17(1)(b)) are fulfilled.

127. Given that the examination is conducted by the Consul or Commissioner, it logically follows that the Consul or Commissioner also formally identifies the witness. The Country Profiles indicate that the most common procedure in responding States that apply Chapter II is the verification of the identity documents of the witness / expert (as opposed to administering an oath or affirmation as to his or her identity).[143] Although not specifically reported in the Country Profiles, in some cases the use of

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141 Although not under the provisions of the Evidence Convention, an analogous cross-border example arises under the 2008 Trans-Tasman Agreement (*op. cit.* note 60), where the Australian implementing legislation specifies that for the purposes of a remote appearance from Australia in relation to New Zealand proceedings, the place in Australia from which the remote appearance is made "is taken to be part of [the New Zealand] court or tribunal". The legislation further expressly permits a New Zealand court or tribunal (under Australian law) to administer an oath or affirmation to the person giving evidence remotely (from Australia). See *Trans-Tasman Proceedings Act 2010* (Cth), sections 59, 62. By contrast, in some instances, the oath may need to be administered in the State of Execution and not where the Commissioner is located. See, *e.g.*, D. Epstein, J. Snyder & C.S. Baldwin IV, *International Litigation: A Guide to Jurisdiction, Practice, and Strategy*, 4th ed., Leiden / Boston, Martinus Nijhoff Publishers, 2010, para. 10.24, in which depositions by remote means are discussed, noting that the *Fed. R. Civ. P.* 30(b)(4) of the United States has on at least one occasion been interpreted as requiring the oath to be administered at the location of the witness. See also, *Fed. R. Civ. P.* 30(b)(4) Depositions by Oral Examination, by Remote Means, "The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions."

142 Responses of Germany and Venezuela to Part VII, q. (r) of the Country Profile Questionnaire (*op. cit.* note 12).

143 See, *e.g.*, the responses of Bulgaria, Estonia, South Africa and the United Kingdom (England and Wales) to Part VII, q. (r) of the Country Profile Questionnaire (*ibid.*).

video-link technology in proceedings may require more stringent procedures than in regular in-person proceedings.

128. It is likely that all other actors in the proceedings who are present, either physically or via video-link, will also need to have their identity appropriately verified. Once again, this is subject to the requirements of the law of the State of Origin, unless incompatible with either the law of the State of Execution or conditions attached to its permission.

A3.8 Penal provisions

56 Potential overlapping application of, or jurisdictional gaps between, different penal provisions are left to domestic and / or international instruments, as well as any applicable arrangements.

129. As discussed above in **A2.9** (in the context of Chapter I), the drafters of the Convention made the conscious decision to exclude all reference to penal matters (such as contempt of court or perjury) connected to the taking of evidence, while noting the potential for a jurisdictional overlap to arise in relation to such matters.

130. Under Chapter II of the Convention, as evidence is taken directly, the Consul or Commissioner would generally conduct proceedings under his or her own law (*i.e.*, the law of the sending State for a Consul or the law of the State of Origin), to the extent that it is not contrary to the law of the State of Execution, as provided for in Article 21(d), or any conditions specified in granting the permission (Art. 21(a)). In particular, as is the case in a small number of responding States, the permission granted by the State of Execution may require that the summons clearly state that the non-appearance of the witness cannot lead to prosecution in the State of Origin.[144]

131. By way of example, when a Commissioner located in the State of Origin is taking evidence via video-link from a witness / expert located in the State of Execution, it is possible for perjury and contempt laws of both the State of Origin and the State of Execution to apply to the witness / expert examination by video-link. This could potentially expose the witness / expert to multiple prosecution. By contrast, it is equally possible that the law of neither the State of Origin nor Execution may apply, or that neither has effective jurisdiction to prosecute a witness / expert accused of perjury or contempt.[145]

132. This jurisdictional overlap could similarly occur when evidence is taken by a Consul under Chapter II. In such cases, the Consul administers the oath pursuant to the law

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144 See, *e.g.* the declarations made by France and Luxembourg available on the Evidence Section of the HCCH website (see path indicated in note 127).

145 This is evident from the Country Profiles (see Synopsis of Responses (*op. cit.* note 4), Part VI, q. (j)). Responding States were almost equally divided as to whether the law of the State of Origin or the law of the State of Execution would govern perjury when evidence is taken by video-link under Chapter II.

of the State of Origin, which may have specific "extra-territorial" application,[146] in that the oath / affirmation is considered, for all intents and purposes, to have the same effect as if it had been administered or taken within the territory of the State of Origin.[147] This may raise issues of prosecution and enforcement as a subsequent sanction for perjury would only have effect in the State of Origin.[148]

133. In the view of some commentators, this lack of regulatory clarity could have significant implications, including possibly diminishing the probative value of the entire testimony, bringing into question the effectiveness of any oath(s) / affirmation(s).[149] In the case of perjury, the issues arising are twofold: first, in the State of Origin, whether a statement made abroad can amount to perjury; and second, in the State of Execution, whether a statement made to a foreign court, Consul, or Commissioner can amount to perjury.[150] In the case of contempt, some commentators have suggested that contempt of court would likely be dealt with by the *lex fori*, given the "virtual presence" of the witness / expert in the courtroom.[151]

134. If testimony by video-link is to compete with physical presence testimony in terms of judicial utility, resolving such uncertainties is of paramount importance. However, resolving the potential overlapping application of, or jurisdictional gaps between, different penal provisions is not addressed in the Evidence Convention. Instead, it is left to internal law, arrangements between States (*e.g.*, pursuant to mutual legal assistance agreements in criminal matters), or general principles of public international law.

For more information on the matters related to perjury and contempt under Chapter I, see also **A2.9**.

146 This possibility is acknowledged by Germany also in relation to evidentiary and criminal law, see response of Germany to Part VI, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

147 See, *e.g.*, 22 U.S. Code § 4221: "[…] Every such oath, affirmation, affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto […]."

148 *Ibid.*, § 4221: "[…] If any person shall willfully and corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any Act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense […]."

149 See, *e.g.*, M. Davies (*op. cit.* note 15), pp. 206, 229 (see, generally, pp. 221-227 on perjury, and pp. 228-232 on contempt of court).

150 *Ibid.*, pp. 221-222.

151 *Ibid.*, p. 228; R. A. Williams (*op. cit.* note 1), p. 19. The concept of contempt as known in common law countries may not be fully implemented in the legal systems of some Contracting Parties. See the response of Germany Part VI, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

A3.9 Privileges and other safeguards

57 Article 21 of the Convention provides several safeguards for the witness, including: the manner in which evidence is to be taken, the language in which the request should made to the witness, and the information that such a request should contain.

135. In addition to extending the privileges contained in Article 11 of the Convention, Article 21 of the Convention provides several safeguards for a person requested to give evidence via video-link under Chapter II. First, the "kinds of evidence" that may be taken are restricted to kinds "not incompatible with the law of the State where the evidence is taken or contrary to any permission granted" (Art. 21(a)). As discussed at **A3.6**, the administration of the oath or affirmation is restricted in the same way, by the same Article. Moreover, under Article 21(d), the "manner" in which the evidence is to be taken is that which is provided for by the law of the State of Origin, but this is similarly subject to any incompatibilities with the law of the State of Execution.

136. Second, Article 21(b) imposes a language-related safeguard, requiring that the request (*i.e.*, summons) made to the prospective witness is drawn up in, or accompanied by a translation into, the language of the State of Execution. The only exception to this requirement is if the prospective witness is a national of the State of Origin (presuming then comprehension of the language of the State of Origin).

137. Third, Article 21(c) requires that the request also inform the prospective witness of his or her right to be legally represented (as enshrined in Art. 20 of the Convention) and, in any Contracting Party not having made an Article 18 declaration regarding compulsion (see **A3.5**), that the witness is "not compelled to appear or to give evidence".

138. Finally, Article 21(e) affords a further complement to the aforementioned safeguards, providing that the prospective witness may also invoke the same privileges and duties to refuse to give evidence set forth in Article 11 for Chapter I.

For more information on the privileges and duties that may be invoked under Chapter I, see **A2.10**.

A3.10 Costs

58 The use of video-link may give rise to additional costs. Whether these costs are to be borne by the parties is determined by the law of the State of Origin.

See the **Country Profile** *of the relevant Contracting Party.*

139. While the Convention does not explicitly address the issue of costs for requests under Chapter II, there are a number of possible scenarios and in each, there is the possibility that additional costs could be incurred because of the use of video-link in taking evidence.

140. As outlined in the Evidence Handbook, there are a range of costs that may be incurred, including fees for the services of the Consul or Commissioner, fees for interpreters or stenographers, as well as associated travel and accommodation costs.[152] The use of video-link may also give rise to additional costs stemming from the rental of the location to conduct the video-link, staff costs, or hiring technical support.[153] It is up to the law of the State of Origin to determine whether such costs must be borne by the parties. In general, these costs are borne by the party seeking the evidence to be taken.[154]

141. In the case of Consuls, the law of the sending State may require (*i.e.*, the State of Origin) the collection of fees for involvement in the taking of evidence,[155] whereas for Commissioners the costs are often determined either by internal law or specified in the terms of the commission.[156] In cases where prior permission is required, the State of Execution may require the reimbursement of certain costs incurred in the involvement and / or assistance of the State of Execution as a condition for granting permission (*e.g.*, the costs associated with the use of the facilities where a specific location is to be used, such as a courtroom, or other administrative costs).[157] In addition, the State of Execution may require the reimbursement of costs in cases where it provides assistance to the Consul or Commissioner in obtaining evidence by compulsion.[158]

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152 Evidence Handbook (*op. cit.* note 29), paras 403 *et seq*.

153 Responses of Bulgaria and Lithuania to Part VII, q. (w) of the Country Profile Questionnaire (*op. cit.* note 12).

154 Evidence Handbook (*op. cit.* note 29), para. 405.

155 In the United States, the schedule for fees for consular services is set out in 22 CFR § 22.1 (this Schedule promulgates fees for judicial assistance services in both Convention and non-Convention contexts). In Australia, the fees for consular services, including "[a]dministering an oath or receiving a declaration or affirmation", are set out in the *Consular Fees Regulations* 2018.

156 In the United Kingdom (England), the fees for a Commissioner (known as "examiners of the court") are set out in Practice Direction 34B.

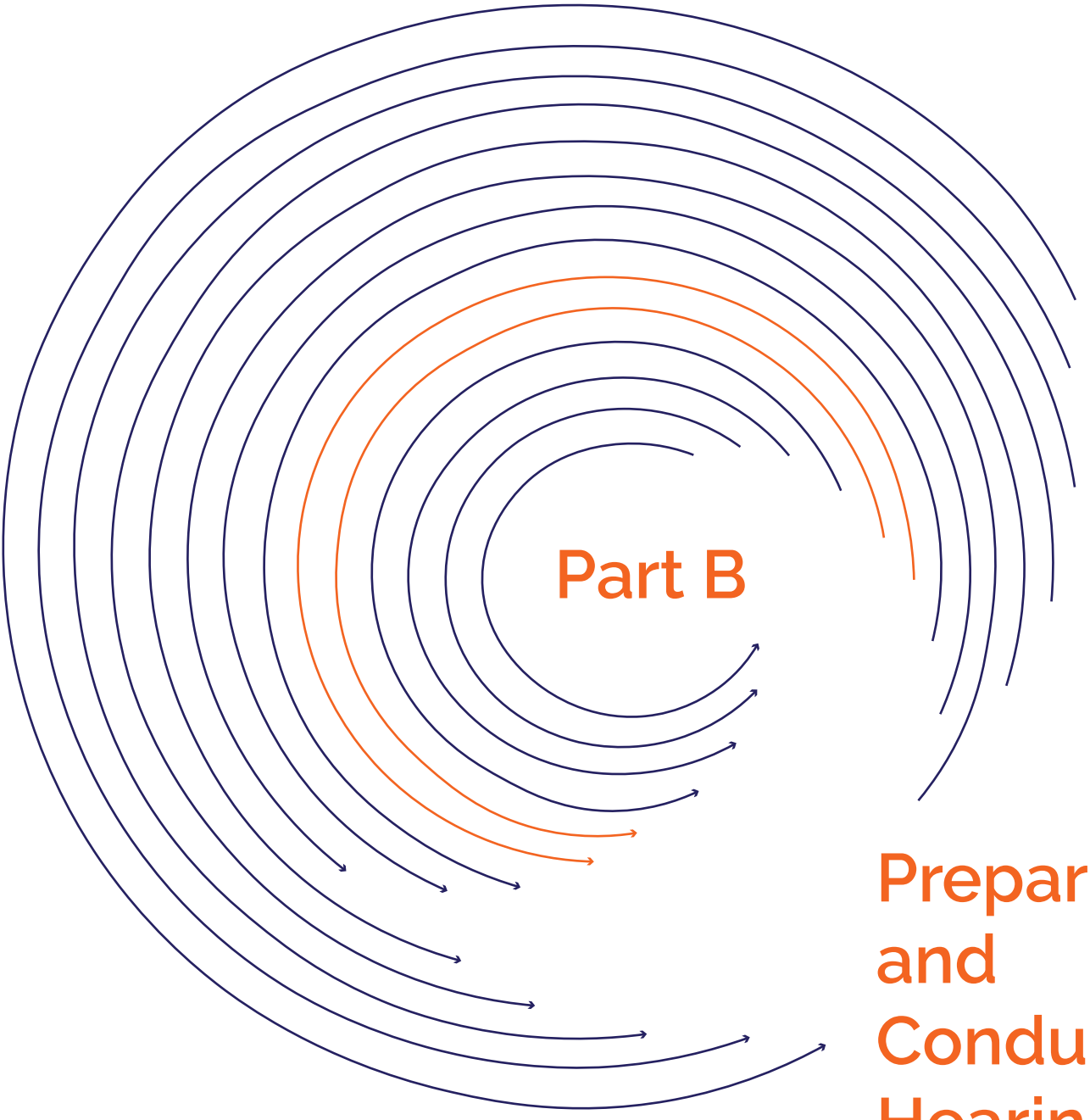
157 Response of Switzerland to Part VII, q. (w) of the Country Profile Questionnaire (*op. cit.* note 12).

158 This scenario is contemplated in the Explanatory Report, para. 163.

For more information on the use of compulsion under Chapter II, see **A3.5**.

142. In practice, Commissioners are expected to make all necessary arrangements for the taking of evidence. Where video-link is used, this may include finding a location for the examination of the witness, booking the video-link equipment, and finding the necessary technical support.[159] Where circumstances dictate that assistance of the State of Execution may be necessary (*e.g.*, in order to comply with conditions accompanying any permission granted), authorities are encouraged to provide assistance in arranging the taking of evidence by video-link, where possible and appropriate.

[159] Evidence Handbook (*op. cit.* note 29), Annex 6 "Guide on the use of video-links", paras 26 *et seq*.



Part B

Preparing for and Conducting Hearings using Video-Link

59 Where possible, authorities are encouraged to make general practical information and / or guidelines publicly available (preferably online) to assist those preparing to submit or execute a request using video-link. Where possible, authorities are invited to share such information with the Permanent Bureau for publication on the HCCH website. More specific and sensitive information may be made available to the parties involved upon request.

60 It is the responsibility of all actors in the preparation and the execution of a video-link to ensure effective communication is maintained.

143. As previously outlined, the use of video-link technology in the taking of evidence abroad cannot merely be addressed from a purely legal perspective – a holistic, interdisciplinary approach is needed (see **A1**).

144. A recent comprehensive study in one Contracting Party found that the outcomes and effectiveness of video-link in facilitating justice are inextricably linked to service delivery and practical implementation, serving only to reinforce that the way in which video-link systems are designed, operated and used matters.[160] Moreover, laws themselves can dictate or influence various practical and technical aspects, as will be discussed throughout **Parts B** and **C**.

145. In order to assist those seeking the use of video-link when preparing requests, Central Authorities are encouraged to publish general information about organisational requirements, booking systems, equipment and technical capabilities, and / or contact information of the individual or division responsible for the execution of a request for the taking of evidence involving video-link, and share it with the relevant authorities. If not already in place, Central and other Authorities are also encouraged to establish targeted guidelines and protocols, which outline the processes and allocate clearly the responsibilities associated with: scheduling and reserving the appropriate facilities; conducting tests and maintenance; initiating, controlling and ending the video-link connection; as well as collecting feedback afterwards.[161] In order to minimise the risk of secure IT infrastructure being hacked or otherwise compromised, some authorities may choose to share specific and sensitive information only upon request, if the relevant State authority deems it necessary or appropriate to do so.

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160 For a full discussion of this study, which was carried out in Australia, see E. Rowden *et al.* (*op. cit.* note 45), p. 10.

161 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 14.

146. Other useful information to consider publishing may include, for example, the principal languages of communication of the personnel involved, whether there are specific contact persons for technical advice and troubleshooting, or, more generally, whether the authorities in the State of Origin are in a position to provide organisational or venue assistance when the request is made under Chapter II. Much of this information has been made available on the individual Country Profiles for Contracting Parties.

147. Irrespective of the practical and procedural information already available, communication remains a critical aspect at all stages of the process: prior, during and following the hearing by video-link. In particular, it is essential that the role and legal position of each participant is clearly established, especially for the benefit of the witness.[162]

[162] "Handshake" Project (*op. cit.* note 15), p. 36.

B1 Consideration of potential practical obstacles

61 Those preparing to submit a video-link request should make enquiries with the relevant authority to confirm that there are no practical obstacles or limitations to the execution of a request to use video-link in the taking of evidence (especially under Chapter II).

See the **Country Profile** *of the relevant Contracting Party.*

148. From the Country Profiles, it would appear that the most fundamental practical difficulties have arisen under Chapter II of the Convention.

149. Practical obstacles under Chapter I primarily include the unavailability of videoconferencing equipment and support resources,[163] the quality of transmission and compatibility of systems,[164] as well as time difference between the Requesting State and the Requested State.[165] However, most responding States indicated that they had not experienced any practical obstacles.[166]

150. Practical obstacles under Chapter II are more diverse and complex. Unlike Chapter I of the Convention (where the place where evidence is taken is usually the courts), the location of the taking of evidence under Chapter II may vary depending on the Article being invoked given that either a diplomatic or consular mission (Arts 15 and 16), or a Commissioner (Art. 17) may be entrusted with this task. In particular, because diplomatic and consular missions are many and may have different resources (*e.g.*, access to and speed of the Internet connection) and facilities (*e.g.*, videoconferencing equipment), it may be more difficult to determine their availability for the taking of evidence under Chapter II.

151. Consideration should be given to the fact that the location where evidence will be taken by video-link under Chapter II needs to be accessible, well-equipped, sufficiently staffed with IT experts or with remote IT assistance, and where applicable, comply with the conditions specified in the permission granted by the competent authority of the State of Execution and any security concerns of the State of Origin.

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163 Responses of Australia, Bulgaria, Croatia (with regard to some authorities), Greece, Hungary, Switzerland and Venezuela to Part VII, q. (i) of the Country Profile Questionnaire (*op. cit.* note 12).

164 Responses of Germany and Poland to Part VII q. (i) of the Country Profile Questionnaire (*ibid.*).

165 Responses of Australia, France and Germany to Part VII, q. (i) of the Country Profile Questionnaire (*ibid.*).

166 Responses of Brazil, China (Hong Kong SAR), Croatia, Cyprus, Czech Republic, Estonia, Finland, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Norway, Portugal, Romania, Singapore, Slovenia, South Africa, Sweden, United Kingdom (England and Wales) to Part VII, q. (i) of the Country Profile Questionnaire (*ibid.*).

152. With respect to the taking of evidence by diplomatic officers or consular agents, it should be noted that not all responding States allow the use of video-link in their respective diplomatic and consular missions to assist in the taking of evidence under Chapter II of the Convention.

153. Responding States that have *not* objected to the relevant Article of Chapter II, but *do not* allow the use of video-link to assist in the taking of evidence under Chapter II in their diplomatic or consular missions (or only do so in exceptional circumstances), have provided the following reasons: the inability or the lack of capacity of authorities or diplomatic and consular missions to provide assistance with the taking of evidence by video-link,[167] the lack of technical equipment at the diplomatic and consular missions,[168] the lack of practice, regulation or involvement of their diplomatic and consular missions in this topic,[169] the impossibility of the consular services processing outgoing requests,[170] and security concerns.[171]

154. Two responding States mentioned that the usual procedure is to refer the applicant or parties to commercial suppliers such as conference centres,[172] with one of them noting that such arrangements must be agreed upon privately and do not involve the Central Authority.[173]

155. Responding States that have *not* objected to the relevant Article of Chapter II, and *do* allow the use of video-link to assist in the taking of evidence under Chapter II in their diplomatic or consular missions, mentioned some of the following practical difficulties: the limited availability of videoconferencing equipment[174] or of a suitable room at the diplomatic or consular mission,[175] and the need for security clearances conducted by a diplomatic mission to assess whether a person to be heard is a physical or security threat.[176] Some responding States indicated that there were practical obstacles to the use of video-link under Chapter II but did not specify what those were.[177]

156. Further, one responding State indicated that in most of its diplomatic and consular missions, the videoconferencing equipment is located in secured areas where only officials are allowed. However, this responding State also noted that Skype could be an option and further clarified that in the future videoconferencing equipment might also be available in the public areas of diplomatic and consular missions.[178]

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167 Response of Australia to Part VII, q. (q) and response of Switzerland to Part VII, q. (q) and (t) of the Country Profile Questionnaire (*ibid.*).

168 Responses of Slovenia and Greece to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

169 Responses of Israel and Finland to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

170 Response of Poland to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

171 Response of United States to Part VII, q. (u) of the Country Profile Questionnaire (*ibid.*).

172 Responses of the United Kingdom (England and Wales) (and therefore that taking of evidence using video-link at diplomatic missions is used only in exceptional circumstances) and the United States to Part VII, q. (t) of the Country Profile Questionnaire (*ibid.*).

173 Response of the United States to Part I, q. (b) of the Country Profile Questionnaire (*ibid.*).

174 Response of France to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

175 Response of Bulgaria to Part VII, q. (u) of the Country Profile Questionnaire (*ibid.*).

176 Response of the United Kingdom (England and Wales) to Part IV, q. (d) of the Country Profile Questionnaire (*ibid.*).

177 Response of the Czech Republic and South Africa to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

178 Response of Estonia to Part VII, q. (q) of the Country Profile Questionnaire (*ibid.*).

157. With regard to the taking of evidence by a Commissioner, the location should not pose many difficulties as the Commissioner is able to choose the appropriate location and may thus choose a conference centre or a hotel with appropriate facilities and staff. However, where applicable, the location must comply with the conditions specified in the permission by the competent authority of the State of Execution.

158. In this regard, it should be noted that some responding States condition the taking of evidence under certain Articles of Chapter II to a location / room to which the public has access,[179] a condition which may not be fulfilled where the restricted areas of diplomatic and consular missions (or a private hotel room in the case of the Commissioner) are used.

For more on the location from which evidence is to be taken, see **B4**.

[179] See declarations of France, available on the Evidence Section of the HCCH website (see path indicated in note 127).

B2 Scheduling and testing

62 When scheduling a hearing that will use video-link, authorities are encouraged to bear in mind differences in time zones and the implications of operating outside regular business hours, such as potentially increased costs and limited availability of support staff.

63 Authorities are also encouraged to carry out tests of the connection prior to a hearing, as well as regular maintenance of the equipment.

159. The requesting and requested authorities should consult one another with respect to scheduling and pre-testing.[180] Those organising the video-link should consider such aspects as the availability of the participants, the facilities and equipment to be used, and the presence of staff or a third party to provide technical support. It is recommended that authorities keep a central register of facilities, equipment, as well as the relevant support staff, to facilitate the process of assessing which spaces are available at the scheduling stage.[181]

160. In setting the time of day for video-link proceedings, any difference in time zones between the locations of all parties involved should be taken into account and specified when confirming the arrangements.[182] Moreover, when scheduling both pre-testing and video-link hearings for the taking of evidence, it should be kept in mind that operating outside normal business hours may result in increased costs.

161. The streamlining of the procedures can also be of great benefit to the making and rescheduling of bookings, the seeking of requisite permissions from a given authority, and obtaining the consent of parties or other participants. Authorities are encouraged to make use of secure online tools to facilitate this. [183]

162. The equipment and working parameters at all sites should be tested regularly, particularly in advance of a video-link hearing, to verify interoperability and the proper functioning of the equipment.[184] This should be done far enough in advance to provide technicians adequate time to make necessary adjustments.[185] Whether or

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180 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 10.

181 E. Rowden *et al.* (*op. cit.* note 45), p. 52.

182 Listing the relevant times in both local and Coordinated Universal Time (UTC) can assist in this regard, taking into consideration possible daylight saving time (DST) adjustments. Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 17; Federal Court of Australia (*op. cit.* note 15), p. 3.

183 E. Rowden *et al.* (*op. cit.* note 45), pp. 52-53.

184 See, *e.g.*, *London Borough of Islington v. M, R (represented by his guardian)* [2017] EWHC 364 (Fam), where the High Court of Justice of England and Wales (Family Division) (United Kingdom) emphasised the importance of testing the video-link equipment before the hearing. See, also, Federal Court of Australia, (*op. cit.* note 15), p. 7. For an example of a "Test Plan", see "Handshake" Project, "D2.2 Test Plan", pp. 8-9.

185 E. Rowden *et al.* (*op. cit.* note 45), p. 55. See, also, Federal Court of Australia (*op. cit.* note 15), p. 7, recommending a test link "at a suitable time in advance of the hearing", and an additional test a few hours prior to the hearing if necessary.

not adjustments are made during the tests, ultimately it remains for the presiding official to determine if the hearing can proceed, or if additional modifications or support are necessary.[186]

163. In practice, most responding States to the Country Profiles indicated that procedures are in place for conducting tests of the video-link connection,[187] especially prior to a hearing and usually by the technical staff or service provider. In addition, of the responding States that reported not having a formal procedure in place, most reported either that testing is nonetheless carried out or that technical support is provided prior to the hearing, but this is usually determined on a case-by-case basis.[188]

186 E. Rowden *et al.* (*op. cit.* note 45), p. 55.

187 Responses of Australia (most states), Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, China (Hong Kong SAR), Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Portugal, Romania, Singapore, Slovenia, South Africa, the United Kingdom (England and Wales), and Venezuela to Part III, q. (d) of the Country Profile Questionnaire (*op. cit.* note 12).

188 Responses of Mexico, Norway and Poland to Part III, q. (d) of the Country Profile Questionnaire (*ibid.*).

B3 Technical support and training

64 Authorities are encouraged, where applicable, to provide the necessary contact details to ensure each participant in a video-link hearing has access to appropriate technical support.

See the **Country Profile** *of the relevant Contracting Party or use the optional attachment to the* **Model Form** *for video-link evidence in* **Annex IV**.

65 It is recommended that any staff member who may be involved in controlling or operating video-link equipment is given at least a basic level of training.

164. As effective technical support is critical to video-link operations, it is of the utmost importance that the technical support staff are involved as early as possible when organising a hearing during which video-link is to be used.

165. For proceedings under Chapter I, generally the requesting authority should ensure that sufficient technical support is provided at the local site, while the requested authority has the same responsibility at the remote site. For proceedings under Chapter II, the Consul or Commissioner is generally responsible for making such arrangements at both sites. These responsibilities may be distributed slightly differently depending on which of the four main connection types is being used, for example if a videoconferencing bridge is being provided by a third party.

For more on these connection types, including the use of a videoconferencing bridge, see **C2**.

166. Appropriate operators and support personnel should be on site at both locations during the hearing (or at least available via a third party if a bridging service is being employed) in order to operate the equipment and respond to any technical difficulties that may arise. Training in troubleshooting and applicable equipment maintenance procedure is also recommended for others, such as legal staff and interpreters, who may need to operate the technology (even incidentally).[189]

[189] Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16).

For more on other technical and security matters, see **Part C**.

167. Given the vast differences in the structure of judicial systems and the resulting difficulties in determining the right contact person, it may be beneficial to publish (*e.g.*, in the Country Profile or on the national website(s)) specific technical contact points either within the Central Authority (Chapter I), or other technical contacts who can assist the consul or commissioner (Chapter II).[190] These contact points are also encouraged to maintain regular communication with each other, even if not in the context of a specific case or hearing, so as to share best practices. Over time this will help to improve efficiency, reduce costs and further facilitate the use of technology under the Convention.

[190] See questions in Part I b) and c) and Part II d) and e) of the Country Profile questionnaire (*op. cit.* note 12). See also, "Handshake" Project, "D3 Recommendations on the practical application of technical standards for cross-border videoconferencing", p. 23.

B4 Reservation of appropriate facilities

66 Authorities should confirm any requirements or restrictions in relation to the facilities to be reserved, such as the type of hearing room (*e.g.*, courtroom, conference room) or the location of that room (*e.g.*, in a court building, in a diplomatic or consular mission, in a hotel).

See **B1** *and* **A1.3**, *and the* **Country Profile** *of the relevant Contracting Party*.

67 Authorities should verify whether the facilities need to be reserved in advance and are encouraged to make use of online tools to facilitate the reservation process.

168. Facilities need to be reserved at both the local and remote sites. As noted above, for proceedings under Chapter I, the requested authority and the requesting authority are each responsible for preparing the respective locations for the video-link, whereas for proceedings under Chapter II, the Consul or Commissioner is generally responsible for making arrangements for the preparations at both locations.

169. Just as the sites may vary, *e.g.*, a courtroom, conference room, or specialised videoconferencing facility, so too may the practical requirements, *e.g.*, equipment for the use of documents and / or exhibits (see **B4.1**), or procedures to ensure confidential communications between a witness / expert and his or her legal representative (see **B4.2**). There may also be legal restrictions and / or practical limitations on the type of location or site that can be used for the purposes of taking evidence by video-link (see also **A1.3**). For example, from a practical perspective, many responding States indicated in the Country Profiles that the location for taking evidence can be any hearing room, as long as it is located in a court building.[191] Two responding States indicated that there is a specifically designated room within the relevant court building that should be used.[192] Another responding State reported that the hearing room must be in a court for general witnesses, though in the case of evidence being given by an expert witness, another site (outside of a court) may also

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191 See, *e.g.*, the responses of Australia (most states), Belarus, Bulgaria, Cyprus, Finland, France, Greece, Singapore (if a Singapore Judicial Officer is to assist in taking the evidence, must be in a courtroom of the Supreme Court), and South Africa to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

192 See, *e.g.*, the responses of China (Hong Kong SAR) and Malta to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).

be used.[193] Still another responding State indicated that the location can be in either a court or the facility of another authority, as long as it is a separate room.[194]

170. Other responding States indicated more broadly that requirements stem from either the applicable internal law or international agreements,[195] while another reported that the presiding official can impose additional requirements where necessary.[196] As such, those submitting the request should carefully consider the equipment and facilities that are available, to ensure specific needs are met. [197]

171. In this respect, while not every type of hearing will be able to be conducted using the same courtroom set-up, there are nonetheless some general aspects that should be considered to ensure the appropriate facilities are reserved. For example, the use of a location where intrusions or disruptions can be minimised, as well as the need for a safe and secure waiting area for the witness / expert (if necessary with an entry that is separate from the public or main entry).[198]

172. Communication between the relevant staff (especially technical staff) is therefore vital to ensure that adequate facilities are available and, if necessary, reserved. Some authorities may also have a designated booking system for facilities, so it is advisable to check the information provided on the Country Profile of the relevant Contracting Party.

B4.1 Use of documents and exhibits

68 If documents or exhibits are to be used, an appropriate medium for formally sharing and presenting these prior to or during the hearing should be agreed upon and arranged.

See **C2.6** *and the* **Country Profile** *of the relevant Contracting Party*.

173. The presentation of documents or exhibits is governed by the law of the Requested State (Chapter I) or the law of the State of Origin (Chapter II). According to the applicable law, the parties should, in advance of the hearing, attempt to agree on which documents or exhibits will be required, and establish a deadline for the identification of exhibits (*e.g.*, several days before the hearing) in order to compile a bundle of the relevant documents to be made available at both sites prior to the

193 Response of Korea (Republic of) to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).
194 Response of Hungary to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).
195 Responses of Sweden and Venezuela to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).
196 Response of Slovenia to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).
197 Federal Court of Australia (*op. cit.* note 15), p. 2.
198 E. Rowden *et al.* (*op. cit.* note 45), pp. 56, 62-63.

hearing.[199] Alternatively, documents may be made available through shared electronic document repositories.[200] To the extent possible, any documents and / or exhibits to be referred to during the proceedings should also be provided to interpreters in advance of the hearing.[201]

174. Where permitted under the applicable law, arrangements may also need to be made to accommodate the introduction of additional documents or exhibits during the hearing. Where appropriate, the presentation of any such documents or exhibits should be done by a court official or some other impartial person.[202] This may be carried out via a document camera,[203] a digital screen-sharing function or by other means, such as via facsimile, which may be needed to allow private discussions between the witness and his or her lawyer related to the document or exhibit.[204] In the Country Profiles, two responding States reported that document cameras may be permitted or indeed required by the presiding official, to the extent necessary.[205]

B4.2 Private communications

69 Additional (confidential) lines of communication may be advisable or necessary, for example if a party / witness and his or her legal representative are participating from different locations.

175. There may be situations in which confidential consultations are required, for example between the witness and his or her legal representative(s), or between the legal representative(s) and the examiner or judicial personnel.[206] Although it would be preferable to have the lawyer be able to sit with his or her client,[207] where these actors are not present at the same location, means should be available (*e.g.*, secure phone lines, mobile phones, or separate videoconferencing equipment) to permit them to speak privately without others overhearing. Microphones and in some instances cameras that are connected to the main video-link may also need to be switched off during such a consultation.

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199 See, *e.g., Federal Commissioner of Taxation v. Grbich* (1993) 25 ATR 516, where the Federal Court of Australia stated that providing a document bundle to the witness ahead of the examination eliminates "procedural hurdles to conducting a sound interrogation in court".

200 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 21.

201 "Handshake" Project (*op. cit.* note 15), p. 40.

202 "Handshake" Project (*loc. cit.* note 111).

203 See, *e.g.*, United Kingdom Ministry of Justice, *Practice Direction 32 – Evidence*, Annex 3 "Video Conferencing Guidance", p. 18: where a document camera is to be used, the parties must inform the panel operator of the number and size of documents or objects (available at the following address: < https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32 > [last consulted on 4 March 2020]).

204 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16); "Handshake" Project (*op. cit.* note 190), p. 20.

205 See, *e.g.*, the responses of Hungary and Slovenia to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

206 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 15.

207 "Handshake" Project (*loc. cit.* note 111). It should also be noted that some legal systems do not require a witness to be assisted by a lawyer during the taking of evidence, see, *supra*, note 117.

176. This supplementary line of communication may also need to be used if there are issues with the connection quality or other technical problems, or in the case of some other reason to interrupt the hearing (*e.g.*, illness).[208] Similarly, it could be used to allow confidential communication with the remote participant both prior to and following the actual examination (*e.g.*, to brief the participant and discuss protocols or to give final instructions).[209]

B4.3 Special cases

70 In special circumstances, additional participants or additional security / protective measures may be needed, in particular in the case of vulnerable witnesses.

177. There are certain instances where additional considerations are warranted due to the nature of the examination or the relationship of the person to be examined with other participants. While this may be more common in criminal proceedings,[210] it may nonetheless be relevant to proceedings in civil and commercial matters. Examples include cases where evidence is to be obtained from vulnerable persons, such as children, the elderly, or persons with a mental or physical condition or disability. In these instances, video-link technology can be of significant benefit, as the witness can give evidence without the stress, inconvenience, discomfort or intimidation that may result from being physically present in the courtroom.[211]

178. Additional aspects may also need to be considered and if necessary, adjustments made in order to facilitate the taking of evidence in such delicate circumstances. The actual process may also need to be modified according to the applicable law, for instance by having the witness give evidence to the presiding official in the absence of the parties, or by having a psychologist or similar expert on hand to assist in monitoring the witness.[212]

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208 E. Rowden *et al.* (*op. cit.* note 45), p. 63.

209 *Ibid.*, p. 56.

210 "Handshake" Project (*op. cit.* note 15), p. 21.

211 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16). It should also be noted that the High Court of Justice (England and Wales) in the United Kingdom has held that it did not consider the potential disadvantages of video-link (*e.g.*, limits to the assessment of credibility) to be any further exacerbated purely by virtue of the use of the technology with respect to vulnerable witnesses or those requiring interpretation: *Kimathi & Ors v. Foreign and Commonwealth Office* [2015] EWHC 3684 (QB).

212 "Handshake" Project (*op. cit.* note 15), p. 35.

B5 Use of interpretation

71 Given the challenging nature of the video-link setting, engaging only interpreters with appropriate qualifications and experience is recommended, where possible.

72 Participants should decide, bearing in mind internal law requirements and any directions from the court, whether consecutive or simultaneous interpretation is to be used (the former is generally recommended in the context of video-link) and where the interpreter will be located (preferably at the same site as the witness).

179. If interpretation is needed for a witness or expert, those organising the video-link should consider the qualifications, training and experience of the interpreter in the specific context of the use of video-link technology and the conduct of the hearing.[213] Many Contracting Parties have a system of registration for qualified or sworn interpreters and translators.[214]

180. In the context of taking evidence, consecutive interpretation is typically used, and is preferred where the interpreter and the witness or expert are in two different locations, principally because of the ease of clarification or intervention, particularly from the presiding official.[215] Simultaneous interpretation, which is more challenging, requires a booth and special equipment, and may even involve a pair of interpreters alternating.[216]

181. Consideration should also be given in advance to the location of any interpreters to be used for the hearing, *i.e.*, whether the interpreter will be at the remote site where the witness is present, or at the main site.[217] Under Chapter I, the interpreter who will be assisting the witness would generally be located in the Requested State, as the Letter of Request is executed following the methods and procedures of this State (unless a specific method or procedure is requested). When evidence is taken by video-link by a Commissioner, the interpreter may be in the State of Origin or the State of Execution. It should also be noted that in some cases, in order to ensure high-quality interpretation services, an interpreter may be appointed who is located in neither the State of Origin nor the State of Execution, but a third State.

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213 Federal Court of Australia (*op. cit.* note 15), p. 3. See also, *Stuke v. ROST Capital Group Pty Ltd* (*op cit.* note 55), where the Federal Court of Australia was hesitant to permit the use of video-link to obtain evidence from a witness who required interpretation where the evidence related to a contentious or critical issue of fact.

214 For more information, see the Country Profile of the relevant Contracting Party.

215 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 11.

216 *Ibid.*

217 Federal Court of Australia (*op. cit.* note 15), p. 3.

182. When the interpreter will be at the remote site (*i.e.*, co-located with the person giving evidence), the technical arrangements there, including acoustics and quality of sound, should be checked to ensure that the interpretation can be understood. If the interpreter is located at the main site and therefore not with the witness, maintaining a high-quality transmission is even more crucial. While the audio quality should obviously be of the highest possible standard, it is actually video quality that is of paramount importance, given the ability of interpreters to use lip movements, expressions and other non-verbal communication to avoid ambiguity and provide more accurate interpretation.[218] Whether located in the main courtroom, with the witness at the remote site, or some third location, the interpreter should always have a clear frontal view of all remote participants who will be speaking.[219]

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218 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 12.

219 "Handshake" Project (*op. cit.* note 15), p. 37.

B6 Recording, reporting and review

73 Participants should confirm how the proceedings will be recorded, noting that where possible and permitted, a video recording may be preferable to a written record. Authorities should ensure that the subsequent handling and storage of any recording or report produced is secure.

See the **Country Profile** *of the relevant Contracting Party.*

74 The necessary arrangements should be made for recording equipment and / or for a stenographer or court reporter to attend the hearing.

75 Authorities should ensure that the live transmission by video-link is secure and if possible, encrypted.

For more on encryption, see **C2.4**.

76 Where applicable, participants are encouraged to report any issues or challenges of a practical nature to the authorities concerned. Authorities are similarly encouraged to be proactive in seeking this feedback to further improve the provision of video-link services.

183. When video-link technologies are used in the taking of evidence, some authorities and participants tend to favour recording the video proceedings, instead of relying on traditional transcription techniques.[220] As such, it should be no surprise that recording capability may be required,[221] and this should be taken into account when organising the video-link. This being said, some responding States continue to rely on transcripts and consider the recording of the testimony via audio or video to be a special method or procedure (for Chapter I requests), which would need to be approved by a court official of the Requested State on a case-by-case basis.[222]

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220 Responses of China (Macao SAR) (with some exceptions, *e.g.*, the deposition should be reduced in writing if there is a confession of the deponent), Czech Republic, Lithuania and Norway to Part VII, q. (f) of the Country Profile Questionnaire (*op. cit.* note 12). See also, R. A. Williams (*op. cit.* note 1), p. 22.

221 E. Rowden *et al.* (*op. cit.* note 45), p. 118.

222 Responses of France, Germany, Malta and Korea (Republic of) to Part VII, q. (f) of the Country Profile Questionnaire (*op. cit.* note 12).

184. For proceedings under Chapter I, the requested authority will follow its own law in determining how to record the hearing. The judicial authority may also request that the hearing be recorded following a specific method or procedure under Article 9(2) of the Convention. Where such a request is granted, the requesting authority is responsible for providing the recording equipment, if needed.

185. For proceedings under Chapter II, recording may generally be used consistent with procedures in the State of Origin unless recording is forbidden by the law of the State of Execution, or otherwise subject to conditions specified by the State of Execution. In some responding States, parties are free to make a recording of the testimony via audio or video under this Chapter as long as they provide the means.[223] If a court reporter is used at the main site to transcribe the proceedings, the reporter should be situated so that he or she can clearly see and hear the video-link.

186. In the execution of requests under both Chapters I and II, it is important to consider the relevant rules and procedures relating to the recording or report that is produced. The security of the actual live transmission is paramount (see **Part D**, below), but the subsequent secure handling and storage of any recording or report produced is also of great importance.[224] In addition, authorities should consider how to incorporate or append any documentation or other exhibits to the final recording or report.[225] Often such recordings or reports are subject to the same rules and procedures for recordings or reports of hearings which do not make use of video-link.[226] In other instances, there may be specific requirements for the recording or reporting of a video-link examination including its handling or storage.[227]

187. Taking technical equipment across borders may give rise to costs and may lead to customs problems in the State of Execution if not all the necessary permits have been obtained.[228] Consult with the relevant State whether such equipment may enter its territory. Accordingly, it may be advisable to hire technical equipment in the State of Execution.

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223 Responses of the United States and the United Kingdom (England and Wales) to Part VII, q. (g) of the Country Profile Questionnaire (*ibid.*).

224 A court in India has prepared guidelines to ensure that suitable security arrangements are maintained in the handling and storage of the recording. See, *e.g.*, the High Court of Delhi, *Delhi High Court Rules*, 2018, Annexure B "Guidelines for the Conduct of Court Proceedings between Courts and Remote Sites", 6.9: "An encrypted master copy with hash value shall be retained in the Court as part of the record. Another copy shall also be stored at any other safe location for [back-up] in the event of [an] emergency. Transcript of the evidence recorded by the Court shall be given to the parties as per applicable rules. A party may be allowed to view the master copy of the [audio-visual] recording retained in the Court on application which shall be decided by the Court consistent with furthering the interests of justice."

225 "Handshake" Project (*op. cit.* note 87), p. 19.

226 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16).

227 Some States have procedures in place for the handling and storage of the recording of the testimony. See the responses of Croatia, Lithuania, Slovenia, Sweden and the United Kingdom (England and Wales) to Part VII, q. (f) and (g) of the Country Profile Questionnaire (*op. cit.* note 12). In one State, the audio of the testimony is automatically recorded by the court in accordance with its code of civil procedure (see the response of Portugal to Part VII, q. (g) of the Country Profile Questionnaire (*ibid.*)).

228 D. Epstein *et al.* (*op. cit.* note 141), para. 10.25.

188. In general, Embassies and Consulates are not in a position to provide the services of stenographers / interpreters or offer video / audio recording equipment. As such, the requesting party should make all the necessary arrangements in advance.[229]

For more on Costs specifically, see **A2.11** *(Chapter I) and* **A3.10** *(Chapter II).*

189. Moreover, the mechanisms and procedures in place with respect to recording and reporting should not only be restricted to the substantive content of the evidence taken. Practical matters, in particular any issues or challenges should also be reported, in addition to general data about video-link usage by that particular authority or in that particular jurisdiction. In this way, regular adjustments to the operational aspects can be made, based on real experiences and recommendations.[230]

190. It is therefore of considerable benefit for authorities to keep accurate records of usage and to provide an adequate and accessible mechanism for collecting feedback from the participants in a video-link hearing, in order to review various aspects of the process, including the technology itself, the spaces used, the pre- and post-protocols, as well as the overall perceived experience, ultimately working towards a better allocation of resources and more efficient execution of proceedings involving video-link.[231]

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229 B. Ristau (*op. cit.* note 133), p. 328. It may also be of benefit to organise a back-up of the recording, which is an effective safeguard against any deterioration in the audio or video quality during the transmission. See, *e.g.*, United Kingdom Ministry of Justice, *Practice Direction 32 – Evidence* (*op. cit.* note 203), p. 15.

230 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 25.

231 E. Rowden *et al.* (*op. cit.* note 45), p. 77.

B7 Environment, positioning and protocols

77 Conditions in all of the rooms or spaces to be connected during the hearing should be optimised for the use of video-link, including the room size, layout, access, acoustics, and lighting.

78 The equipment should be set up in such a way to emulate an "in-person" hearing, ensuring an appropriate number of cameras and microphones so that each participant can be seen and heard with minimal difficulty or disruption.

191. The rooms or spaces used can have a significant influence on the manner in which the hearing is conducted and ultimately the effectiveness of the proceedings. For a witness, the experience of providing evidence by video-link from a remote location may differ considerably from that of giving evidence in a courtroom, so it may be difficult to replicate the necessary atmosphere.[232] Nevertheless, while evidence is being taken, the space at the remote location should also be considered, for all intents and purposes, to be an extension of the courtroom itself.[233]

192. Stemming from this notion of an extension of the courtroom, the "Gateways to Justice" project[234] in Australia made a number of recommendations with respect to the environment, positioning and protocols as they relate to video-link. The project recommended that in order to preserve the requisite formal ambience, the presiding official should ensure that person or persons at the remote location are informed of the expectations with respect to appropriate behaviour.[235]

193. In light of these considerations of atmosphere and behaviour, the physical rooms are often as important as the technology being used. The layout of the room at the remote location should therefore also be organised so as to enhance the witness' feeling of participating in a traditional courtroom setting.[236] As such, the "Gateways to Justice" project further recommended that, with a view to achieving optimum conditions and where resources and capabilities allow, courts and other facility providers should adopt an approach that integrates the technical aspects with both the architecture and physical environment, and namely that:

a. the hearing room at both sites be large enough to accommodate all the participants and, where applicable, attending members of the public;

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232 For example, in *Campaign Master (UK) Ltd v. Forty Two International Pty Ltd (No. 3)* (*op. cit.* note 55), the Federal Court of Australia voiced concerns that permitting the use of video-link technology detracts from some important effects associated with giving evidence in a courtroom, highlighting that a witness may be less aware of the "solemnity of the occasion and of his or her obligations".

233 See, *e.g.*, *Trans-Tasman Proceedings Act 2010* (Cth), section 59, as discussed above at note 141.

234 See, *supra*, the discussion at note 45.

235 E. Rowden *et al.* (*op. cit.* note 45), pp. 63-64.

236 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 18.

b. additional design factors be taken into account, such as appropriate lighting and décor, proper acoustics, controlled temperature, and the positioning of both the participants and equipment; and

c. reconfiguration, adaptation or at the very least "fine-tuning" of the space be factored in irrespective of whether the rooms have been designed with video-link use in mind.[237]

194. Experience shows that the lighting requirements of spaces to be used for video-link are some of the most onerous from a design perspective. This is principally because the spaces at each location involved in the video-link need to have a combination of both brighter lighting in specific areas, to fully show facial features and expressions of participants, but also slightly darker lighting for the rest of the environment, so as not to inhibit the view of the screens displaying the other connected locations.[238] Organisers thus need to consider the use of direct lighting on the faces of all participants at all locations, in addition to ensuring that the regular lighting in each room is free from reflections, shadow and glare.[239]

195. From an acoustic perspective, those responsible for the video-link facility should ensure that the space is designed to both minimise the intrusion of noise and distraction, but also to confine sound inside the space, for confidentiality and privacy reasons.[240] Further, in order to maximise the intelligibility of that which is being said during the hearing, factors such as reverberation time, sound absorption and sound diffusion should also be considered.[241]

196. The participants should be situated in the room so that they are facing the camera when speaking, which is imperative to promoting good communication. This will help determine the number of cameras needed and their positioning.[242] Where a courtroom is not used, the individual conducting the hearing may need to determine where participants sit. If an interpreter is present, he or she should be placed with a clear view of the facial and lip movements of those speaking.

197. As mentioned in **A1** and discussed below in **C1** (*Adequacy of Equipment*), the main objective of a video-link hearing is to make the setting seem as close as possible to an in-person hearing, which is especially important when considering the positioning of the equipment. In the Country Profiles, one responding State made specific reference to the fact that the participants should be able to "[…] clearly see, hear and understand what is happening [both] in the courtroom and in the room where the interviewee is", and also emphasised the need for all participants to see both a general room view but also the more detailed aspects of their mutual communication, including "verbal [communication], body language, corresponding facial expressions, [and] gestures."[243] As such, cameras should be positioned so as to permit those who are speaking to face the camera directly maintaining eye-

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237 E. Rowden *et al.* (*op. cit.* note 45), pp. 53, 57, vi.

238 J. R. Benya, *Lighting for Teleconferencing Spaces*, Lutron Electronics, Inc., 1998, cited in M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 16.

239 "Handshake" Project (*op. cit.* note 190), p. 22; E. Rowden *et al.* (*op. cit.* note 45), pp. 122-123.

240 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 18.

241 "Handshake" Project (*op. cit.* note 190), pp. 21-22.

242 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 12.

243 Response of Lithuania to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

contact,[244] which is important in assessing the demeanour and credibility of the speaker.[245]

198. It is equally important that there be an adequate number of video monitors of sufficient size, placed so that all participants at one site can see the speaker at the other site with a similar viewing angle and distance. The participants must be able to see the witness or expert, and that individual must be able to see who is asking the questions and anyone else commenting on the testimony. The perceptions and views are of particular importance, in order to give the participants an appropriate sense of "presence", while ensuring objectivity by framing the different participants on screen in an identical manner.[246] There should also be an adequate number of microphones, positioned to ensure that speakers can be clearly heard and to minimise sound interference.[247]

199. While the spaces being used and the surrounding environment are of the utmost importance, there may also be the need for specific protocols or directions from the presiding official, including in relation to entrances and exits, equipment position and control, as well as speaking order and seating arrangements.[248]

B7.1 Control of cameras / audio

79 A user-friendly interface is recommended, to enable easy operation of the equipment, preferably by the presiding official.

200. The presiding official at the main site should ideally have full control of the equipment during the proceedings,[249] with the assistance of technical support staff if necessary, for example to adjust the cameras or microphone volume as desired, ultimately ensuring that each person speaking at the either site can be clearly seen and heard. It is recommended that if possible, a tracking camera that can be directed at the person speaking be used, as well as another camera that can provide an overview of the hearing room from the opposite end.

201. For the benefit of the presiding official who has ultimate control of the video / audio system during the hearing, it is recommended that the operation be as user-friendly as possible and limited to the basic requisite options.[250] To the extent that different camera views or different audio settings are available, it is preferable for a series of

244 E. Rowden *et al.* (*op. cit.* note 45), p. 120.

245 For a discussion of the effect of video-link technology on assessing the credibility of a witness, see also, *supra*, note 42.

246 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), pp. 19, 21.

247 E. Rowden *et al.* (*op. cit.* note 45), p. 118.

248 Federal Court of Australia (*op. cit.* note 15), p. 8.

249 *Ibid.*

250 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16).

these options to be set as standard configurations in the system prior to the hearing.[251]

For more on technical requirements in relation to audio and video, see **C2.5** *and* **C2.6**.

B7.2 Protocol for speaking

80 To minimise disruption from possible delays in the connection, authorities may wish to consider a speaking protocol for participants during the hearing, especially if interpretation is to be used.

202. Given the added complexity of a video-link as compared to a traditional in-person hearing, additional protocols may be required to ensure that the actual hearing can proceed smoothly. In the absence of a formal protocol, the presiding official should remind participants of the aspects warranting additional consideration due to the changed conditions of a video-link.

203. In particular, when using video-link technology, there is typically a brief delay between the receipt of the picture and the accompanying sound, even with the best technology currently available.[252] This is because the audio and video signals are transmitted separately, which causes looping and interference.[253] It may be useful to alert participants to this prior to the commencement of the hearing, so as to minimise talking over each other. The presiding official may consider explaining at the outset the procedure for interrupting the other party or objecting to questions during the hearing. Participants should also be reminded to speak directly into the microphones.[254]

204. These aspects are extremely important if an interpreter is present, as there may be additional need to interrupt to ask questions or to seek clarification, in which case it is particularly useful to have the presiding official coordinate the order in which people speak.[255] When interpretation is being used, participants should also be conscious of speaking at an appropriate pace, articulating and projecting their voice, as well as using clear language that minimises jargon, colloquialisms or other expressions that may be lost in translation.[256]

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251 E. Rowden *et al.* (*op. cit.* note 45), p. 57.

252 Guide on videoconferencing in cross-border proceedings (*loc. cit.* note 16).

253 M. Dunn and R. Norwick (*op. cit.* note 20), p. 2.

254 Federal Court of Australia (*op. cit.* note 15), p. 8.

255 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), pp. 11-12.

256 "Handshake" Project (*loc. cit.* note 15).

B7.3 Protocol in case of breakdown of communications

81 All participants should be made aware of the procedure for alerting the presiding official of technical difficulties encountered during the hearing and of the contact details for the technical support staff, including the third-party bridging service, if applicable.

205. During the hearing, technicians should be present or at least "on-call" and available to address any technical problems as they arise. Depending on the type of connection, personnel may need to be at both the main site and the remote site, for example, or if a third-party bridging service is being used, reachable via that service. Both the technicians and the participants should also be able to reach a helpdesk for external technical support if further assistance is needed.

206. While it is essential to have such contingencies in place in advance, participants should also be informed of the appropriate protocol for reporting a technical problem to the presiding official at any stage during the hearing and should remain alert to any such issues. [257]

207. If the hearing is disrupted by a breakdown of communications between the sites that cannot be readily resolved, the presiding official should have the authority, unless otherwise specified in the law under which the proceedings are being conducted, to determine whether to terminate the video-link session and reschedule it at a later date.[258]

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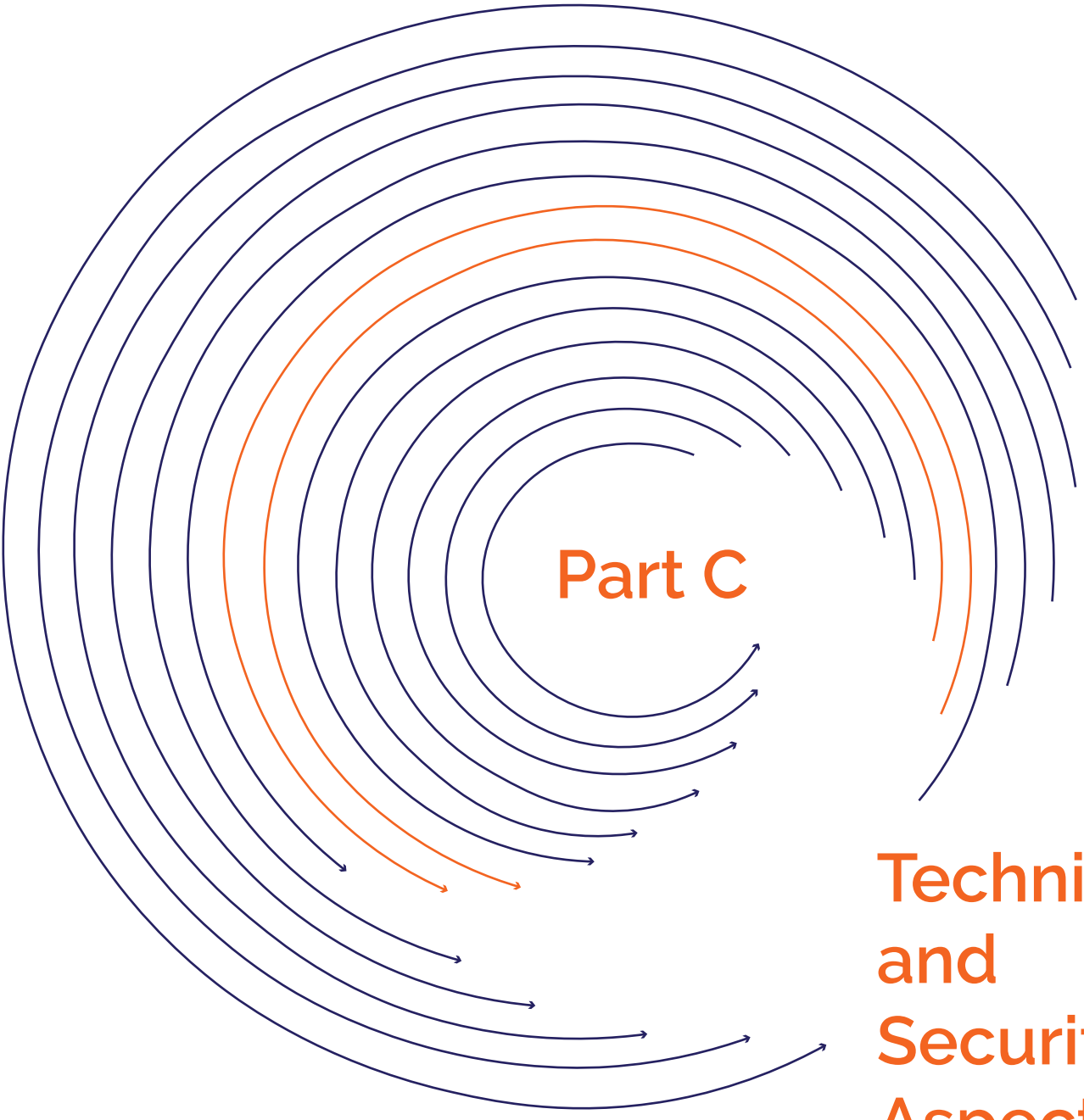
257 Federal Court of Australia (*op. cit.* note 15), p. 8; E. Rowden *et al.* (*op. cit.* note 45), p. 71.

258 For example, in granting leave or an order allowing for the use of video-link in the proceedings, the court may establish a protocol in the event of a breakdown of communications, as was articulated in the final provision of the order by the United States District Court for the District of Connecticut in *Sawant v. Ramsey* (*op. cit.* note 55).



Part C

Technical and Security Aspects

C1 ADEQUACY OF EQUIPMENT

C2 MINIMUM TECHNICAL STANDARDS

208. Technology moves much faster than the law, creating disparities that exacerbate issues of compatibility between systems in the context of modern judicial co-operation. In some parts of the world, technological developments have been transforming our courtrooms and case management systems for over a decade, with the "Handshake" Project demonstrating that certain European States are even able to "virtualise" proceedings entirely under their national civil code.[259]

209. This part of the Guide aims to address many of the conventional aspects associated with consideration of technology and security in the context of cross-border video-link use. Given the fast-paced nature of technological developments, it should not be viewed as comprehensive, but was accurate at the date of publication. Authorities and users are encouraged to, as much as possible, keep pace with such developments to ensure that high quality infrastructure is maintained. If new equipment or technologies are to be implemented, the Council of the European Union has recommended that a pilot programme first take place, and if successful, that the implementation take place in separate stages or phases.[260]

259 M. Davies (*op. cit.* note 15), p. 205; "Handshake" Project (*op. cit.* note 15), p. 22.

260 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 13.

C1 Adequacy of equipment

82 Authorities are encouraged to use equipment of the best available quality in order to emulate an in-person hearing, to the extent possible.

83 Staff responsible for making arrangements should be aware of the technological capabilities and facilities, including which locations are equipped with the necessary technology.

210. The use of video-link technology certainly has the power to revolutionise the manner in which evidence is taken, particularly in cross-border situations, far more than telephone and audio-based technologies ever could. This is because video-link allows not only the verbal evidence to be heard from a remote location, but also an assessment of crucial aspects of non-verbal communication, including body language and facial expressions.[261]

211. As mentioned above (**A1**), the main objective of a video-link hearing is to emulate an in-person hearing in so far as is possible. It thus follows that the great utility of video-link is undermined if the equipment being used is not of an adequate standard; the main advantages are lost and the limitations are exacerbated.[262]

212. In fact, in the Country Profiles, some responding States reported that it is actually a requirement that the video and audio are of sufficient quality for the presiding official to clearly see and hear the person appearing by video-link, especially when that person is a witness.[263]

213. In addition to ensuring that the equipment is of adequate *quality*, those responsible should also ensure that the staff at each stage of the process have adequate *knowledge* of the technological infrastructure in place.[264] For example, those reviewing requests may need to liaise with other staff in order to determine whether the request for video-link can be practically carried out, given the facilities and infrastructure available in that particular authority or region. This knowledge will not only greatly facilitate the selection and allocation of appropriate facilities by administrative or legal staff, but also improve the co-operation between authorities, particularly when technical staff need to determine the interoperability of systems.

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261 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 4.

262 Both the court and parties to proceedings suffer disadvantages where the technology is faulty or breaks down. See, *e.g.*, *Stuke v. ROST Capital Group Pty Ltd* (*op cit.* note 55) , where the Federal Court of Australia discussed the inability to determine "whether a delay in giving a response to a critical question is due to evasiveness or uncertainty on the part of the witness or merely difficulties with the transmission".

263 See, *e.g.*, the responses of Australia, Finland, Hungary, Israel and Poland to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

264 "Handshake" Project (*loc. cit.* note 190).

For more on technical support and training of staff, see **B3**.

214. In general terms, the video-link equipment itself will either be integrated into a location (*i.e.*, fixed) or capable of being transported to different locations (*i.e.*, portable). Whereas fixed equipment usually offers increased functionality, portable equipment may be a more cost-effective solution, in particular for locations where video-link is not frequently used.

C1.1 Use of licensed software

84 The use of licensed software is advantageous principally because of the availability of technical support, and the practice of authorities confirms that its use is preferred.

215. In the Country Profiles, the majority of responding States indicated that they use licensed software, which ensures support for technical and security matters, when taking evidence by video-link.[265] Some of the licensed software used by responding States are Cisco infrastructure (including Cisco Jabber),[266] Lifesize,[267] Polycom,[268] Skype for Business,[269] Sony IPELA Video Communication System,[270] Tandberg,[271] Telkom,[272] and Vidyo conference.[273] One responding State indicated that it uses free software.[274]

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265 *I.e.*, 23 responding States. See the responses of Belarus, Bosnia and Herzegovina, Bulgaria, China (Hong Kong SAR), Croatia, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Norway, Poland, Portugal, Romania, Singapore, South Africa, and Sweden to Part III, q. (a) of the Country Profile Questionnaire (*op. cit.* note 12).

266 See, *e.g.*, responses of Australia (one state), Bosnia and Herzegovina, Germany (some states), Norway and Sweden to Part III, q. (a) and (b) of the Country Profile Questionnaire (*ibid.*).

267 Response of Belarus and Germany (some states) to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*).

268 Responses of Australia (one state), Czech Republic, Germany (some states), Malta and Singapore to Part III, q. (a) and (b) of the Country Profile Questionnaire (*ibid.*).

269 Response of Israel to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*).

270 Response of Germany (some states) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

271 *Ibid.*

272 Response of South Africa to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*).

273 Response of Korea (Republic of) to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*).

274 Response of Response of Venezuela to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*) (indicating that Venezuela uses Apache Openmeetings software, Version 3.0.6 Release).

216. Moreover, different software may be used depending on the nature of the request, as the authorities and locations involved would be different whether it is a request under Chapter I or Chapter II. For example, one responding State noted that while it generally does not use licensed software under Chapter I, it may sometimes occur under Chapter II.[275]

C1.2 Use of commercial providers

85 Those seeking to use video-link technology in the taking of evidence should verify whether the use of widely available commercial providers is permitted by the States relevant authorities.

86 If using a commercial provider for the taking of evidence, participants and authorities are encouraged to ensure the appropriate security measures are in place.

217. With the increased use of readily available instant messaging software applications which allow audio and video transmission in real time, a question has arisen as to whether a commercial provider (such as Skype) may be used for taking evidence by video-link and whether it provides a sufficient level of security in the transmission.

218. While in the Country Profiles some responding States reported using commercial providers such as Skype[276] and Skype for Business,[277] or Polycom RealPresence (mobile or desktop)[278] for the taking of evidence by video-link, others only allow it exceptionally and only if requested by the court of origin.[279] Many responding States do not allow it under any circumstances.[280]

219. One responding State indicated that it would be possible to take evidence via a commercial provider once the secure network of the courts is able to take IP connections (as currently only incoming ISDN calls are allowed), although this would be at the discretion of the judge on a case-by-case basis.[281]

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275 Response of the United Kingdom (England and Wales) to Part III, q. (a) of the Country Profile Questionnaire (*ibid.*).

276 Responses of Australia (one state), Brazil, Israel, Malta and Mexico to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

277 Responses of Israel and Portugal to Part III, q. (a) and (c) of the Country Profile Questionnaire (*ibid.*). The response of Portugal also indicated that where evidence may be taken via commercial providers, the use of Skype would be suggested because of its interoperability with Skype for Business.

278 Response of Singapore to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

279 Responses of Finland and Poland to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

280 Responses of Australia (two states), Belarus, Bosnia and Herzegovina, Bulgaria, China (Hong Kong SAR), Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Hungary, Latvia, Norway, Slovenia, Sweden and Switzerland to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

281 Response of the United Kingdom (England and Wales) to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*) For a discussion of IP and ISDN (both of which are types of networks), see **C2.2**.

220. Some of the concerns that have been expressed by responding States with regard to the use of commercial providers are as follows: a secured connection established individually between the requesting and the requested authorities is preferred;[282] a commercial provider may store the content of the video-link, a situation which should be avoided;[283] Skype or other commercial providers are not integrated into the video-conferencing infrastructure of the relevant authorities.[284]

282 Response of Poland to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

283 Response of China (Hong Kong SAR) to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

284 Response of Latvia to Part III, q. (c) of the Country Profile Questionnaire (*ibid.*).

C2 Minimum technical standards

87 Technical standards in any video-link system should be considered holistically, to ensure each component supports the effective operation of the system.

88 Of the principal ways in which a video-link connection may be established, authorities are encouraged to consider using a videoconferencing bridge or multipoint control unit (MCU) either incorporated into the system or via a third-party service, in order to alleviate concerns of interoperability, particularly when a cross-border connection is to be established.

221. While it is of course important that the components are of the highest possible standard, as with any type of technological infrastructure, the technology enabling video-link can only ever be as strong as its weakest link. As such, a holistic approach is needed when determining requisite quality and standards for each component.

222. As a point of departure, it is important to note the four principal ways in which a video-link connection may be established, namely: "directly" between the systems, via a videoconferencing "bridge", or by either extending the main courtroom out to the remote point, or conversely, bringing the remote point into the main courtroom system. Each has its advantages, but usage depends primarily on the types of systems and capabilities at each site involved.

223. First, in order to establish an effective, direct video-link connection, the equipment at each location must be interoperable (*e.g.*, the network type and codec protocols).[285] To ensure this, the equipment used should, where applicable, conform to recognised industry standards, namely those recommended by the International Telecommunication Union's Telecommunication Standardization Sector (ITU-T).[286] The advantages of this direct "point-to-point" style calling is that the functionality and full range of capabilities of the systems are preserved, such as the use of multiple cameras and / or screens.

224. Second, to the extent that equipment is not interoperable, the sites are connected using different networks or incompatible protocols, or more than two sites are to be linked, a bridging service may need to be employed.[287] As indicated in the Glossary, a videoconferencing bridge (sometimes simply called a "bridge", also known as a multi-point control unit (MCU) or "gateway") is the combination of software and hardware which creates a virtual meeting room and acts as a "bridge" by linking the sites and performing conversions where necessary (*e.g.*, converting the network

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285 See, *e.g.*, **C2.1** and **C2.2**.

286 The ITU-T standards are issued as "recommendations", and are accessible from the "Recommendations by series" list, available at the following address: < https://www.itu.int/ITU-T/recommendations/index.aspx? > [last consulted on 4 March 2020].

287 "Handshake" Project, "D2.1 Overall Test Report", pp. 18-19.

signal, codec protocols or audio / video definition).[288] The "bridge" may either be built into the video-link infrastructure at a given site, or provided by a third party which may also offer additional services, such as dialling out to the sites and monitoring the connection and overall quality. As such, some authorities may prefer to have a bridge incorporated into its own infrastructure, to avoid potential security issues with having a third party provide the bridging service. Irrespective of how this is managed, the most important consideration is that the MCU be configured to appropriately handle incoming and outgoing calls, where security practices or protocols allow. For example, it is recommended that an MCU be configured to allow direct dialling out to the foreign endpoint and similarly to enable dialling in from foreign endpoints.[289] This will avoid a situation where both authorities' MCUs permit only incoming calls, essentially creating an impasse, with neither MCU able to establish a connection.[290]

225. The final two options operate in a similar fashion, the third option being where the courtroom video-link system is "extended out" to the remote site via remote connection, and an installed application at the remote site dials into the in-built codec of the main courtroom. This, however, requires the courtroom not only to support IP network connections but also to be connected to the internet, which may give rise to security concerns for some authorities.

226. By contrast, the fourth option to establish a video-link connection is to incorporate the remote site into the main courtroom video-link system, but simply as an "auxiliary" input, which allows the remote site to connect, all the while keeping it securely confined and distinct from the main courtrooms video-link system.

227. Whichever technological solutions are employed, the following are recommended "minimum" technical standards to ensure a connection of sufficient quality, which will ultimately facilitate the provision of access to justice for those participating remotely, as compared to those appearing in-person.

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288 It is important to note that if the bridge provides effective transcoding capability, the persons will be connected via the videoconferencing bridge "at the highest speed and the best possible quality that their individual system can support" (as a result, participants may enjoy different quality levels of video and audio). If effective transcoding is not provided, the bridge will establish the connections at the lowest common denominator (*i.e.*, the slowest connection). For further information, see Polycom, White Paper, *An Introduction to the Basics of Video Conferencing*, 2013, available at the following address: < http://www.polycom.com/content/dam/polycom/common/documents/whitepapers/intro-video-conferencing-wp-engb.pdf > [last consulted on 4 March 2020].

289 "Handshake" Project (*op. cit.* note 190), p. 24.

290 The tests conducted in the context of the "Handshake" Project have also shown that if both endpoints of a video-link call are dialling out from an MCU, problems such as looping or termination of the connection may arise. See, "Handshake" Project (*ibid.*), pp. 17-18.

C2.1 Codec

89 Codecs should conform with the relevant industry standards, enabling at minimum simultaneous audio and video transmission.

228. The codec, which is defined in the Glossary, is a key component of the video-link system and should be compatible with the other components in the system. Video-link systems generally comprise both a video codec and an audio codec, as well as a data or text codec.

229. From the Country Profiles, it is evident that there are a diverse range of codecs available.[291] Most responding States indicated that either Cisco codecs (including from Cisco Tandberg) or Polycom codecs are used by their authorities.[292] Other codecs in use, as reported by the responding States, are produced by manufacturers such as Aethra, [293] Avaya, [294] AVer, [295] Google, [296] Huawei, [297] LifeSize, [298] Openmeetings,[299] Sony,[300] and Vidyo.[301]

230. Whichever manufacturer is selected, the codecs to be used should conform to the ITU-T standards, or an equivalent. The ITU-T standards for video codecs are defined in recommendations H.261, H.263, H.264 and H.265.[302] The audio codec standards of the ITU-T are outlined in recommendations G.711, G.719, G.722, G.722.1, G.723.1, G.728, and G.729.[303] Other audio codecs in use in responding States include: AAC-LD,[304]

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291 See Synopsis of Responses (*op. cit.* note 4), Part III, q. (b).

292 For Cisco (and / or Cisco Tandberg) codecs, see the responses of Australia (one state), Belarus (certain courts), Bosnia and Herzegovina, Bulgaria, China (Hong Kong SAR), France, Germany (some locations), Latvia, Norway and Sweden in Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12). For Polycom codecs, see the responses of Australia (one state), Czech Republic, Estonia, Finland, Germany (some locations), Hungary, Malta, Singapore, Slovenia, and the United Kingdom (England and Wales) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

293 Responses of Cyprus and Romania (see Annex II) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

294 Response of China (Hong Kong SAR) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

295 Response of Bulgaria to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

296 Response of Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

297 Response of Lithuania to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

298 Responses of Belarus (certain courts) and Germany (some locations) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

299 Response of Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

300 Responses of Croatia and Germany (some locations) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

301 Response of Korea (Republic of) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

302 See List of "Recommendations by series" (*op. cit.* note 286), Series H.

303 *Ibid.*, Series G.

304 Responses of Bosnia and Herzegovina, Lithuania, Romania and Sweden to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

SPEEX,[305] HWA-LD,[306] Siren,[307] and ASAO.[308] The standard for a data codec (*e.g.*, to transmit captioning or text via video-link) is covered by recommendation T.120.[309]

C2.2 Networks

90 It is recommended that an IP network be used, with ISDN (if available)[310] being reserved for use as a back-up or contingency.

91 If possible, authorities are encouraged to equip the network with multi-point capabilities.

231. The most commonly used networks for video-link transmissions are Integrated Services Digital Network (ISDN) and Internet Protocol (IP).[311] ISDN, which initially was the accepted means for video-link, provides digital communication over a telephone line. By contrast, IP, which uses the Internet for transmission, has become the predominant network for videoconferencing, as it typically provides a greater bandwidth, allowing for better video and audio quality.[312]

232. In the Country Profiles, the majority of responding States indicated that both the IP and ISDN connections are used to enable video-link.[313] Some responding States reported using exclusively the IP network.[314]

233. In the context of ISDN, there is not a single global standard, and therefore different forms of the technology exist. However, videoconferencing systems that use ISDN

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305 Response of Korea (Republic of) to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

306 Response of Lithuania to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

307 Response of Singapore to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

308 Response of Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*) (this particular codec is also known as "Nellymoser").

309 See List of "Recommendations by series" (*op. cit.* note 286), Series T.

310 In the coming years, ISDN will be phased out in large parts of Europe. Some EU Member States have already completed the migration from ISDN to IP-based networks, with others expected to complete the migration by 2025 at the latest. See, Electronic Communications Committee (ECC) of the European Conference of Postal and Telecommunications Administrations (CEPT), *ECC Report 265: Migration from PSTN/ISDN to IP-based networks and regulatory aspects*, 2017, available at the following address: < https://www.ecodocdb.dk/download/754b9fdf-e4c5/ECCRep265.pdf > [last consulted on 4 March 2020].

311 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 6-7. See also, the Glossary.

312 "Handshake" Project (*op. cit.* note 190), p. 18.

313 Responses of Australia (some states reported having either ISDN or IP only), Brazil, China (Hong Kong SAR), Croatia, Cyprus, France (in the process of transitioning from ISDN to IP, with 75% already completed), Germany, Korea (Republic of) (using Asymmetric Digital Subscriber Line (ADSL) to connect to the service provider), Latvia, Lithuania, Norway, Poland, Portugal, Singapore, Slovenia, Sweden and the United Kingdom (England and Wales) to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

314 Reponses of Belarus, Bosnia and Herzegovina, Bulgaria, Czech Republic (uses ISDN for testing), Estonia, Finland, Hungary, Israel, Malta and Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

automatically convert to a common standard, which is established in ITU-T recommendation H.320, an overarching recommendation for video and audio transmission via an ISDN.[315] By contrast, the conversion is not necessary for IP, as the standard is consistent globally, via Internet communications. The ITU-T has promulgated a recommendation in this respect: H.323, which is a standard applied in many responding States. [316] Session Initiation Protocol (SIP) is an alternative IP standard that is also used in many responding States.[317]

234. The outcomes of the "Handshake" Project highlight several other important aspects relating to the network parameters. First, "Gatekeeper" software should ideally be incorporated into the videoconferencing system to manage the network (including prefixing and dialling) and its interaction with a firewall.[318] Second, to the extent that equipment is not interoperable or connected to different networks (*i.e.*, ISDN to IP connections), a videoconferencing bridging service may need to be employed (as discussed above at para. 224).[319] Third, such a bridge may also be needed in order to co-ordinate video-link use involving three or more discrete endpoints, or to manage multiple video-link calls simultaneously.[320] In the Country Profiles, a majority of the responding States indicated that multipoint connections are possible within the systems of their authorities.[321]

315 See List of "Recommendations by series" (*op. cit.* note 286), Series H.

316 Responses of Bosnia and Herzegovina, China (Hong Kong SAR), Cyprus, Czech Republic, Finland, France, Germany (some locations), Hungary, Israel, Malta, Portugal, Singapore and Slovenia to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

317 Responses of Bosnia and Herzegovina, China (Hong Kong SAR), Czech Republic, Finland, France, Germany (some locations), Israel, Malta, Portugal (in development) and Sweden to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

318 "Handshake" Project (*op. cit.* note 190), p. 25.

319 *Ibid.* See also, the response of the United Kingdom (England and Wales) (uses a secure network with "bridging link") to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

320 "Handshake" Project (*op. cit.* note 190), p. 17. See, *e.g.*, the responses of Latvia, Norway, Portugal and Sweden to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*), which make specific reference to an MCU.

321 Responses of Australia (two states), Belarus, Brazil (in most cases), Bosnia and Herzegovina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France (via a bridging service of the Ministry of Justice), Germany (some locations), Hungary, Israel, Korea (Republic of) (up to 100 participants), Latvia, Lithuania (up to 46 participants), Malta, Norway, Poland (not in all courts), Portugal, Romania, Singapore, Slovenia (up to 20 participants), Sweden (up to 5 participants per unit, or more via the MCU), and Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

C2.3 Bandwidth

92 Authorities are encouraged to provide their network with the maximum possible bandwidth capacity.

93 Depending on the network, the recommended bandwidth is currently a minimum of 1.5-2 megabits per second for IP networks (or at least 384 kilobits per second for ISDN networks).

235. The supply of sufficient bandwidth is both one of the most important, and potentially one of the most expensive components of video-link service delivery. Codecs can provide adequate picture and sound quality only with sufficient bandwidth. Video-link systems should be designed with this in mind, ensuring the highest possible bandwidth capacity, even if the bandwidth may later be limited in practice by network or internet bandwidth capabilities.[322] Similarly, even for systems with the highest bandwidth capabilities, the reliability and performance of the network connection should be kept in mind, as the slightest interruption or inconsistency may inhibit the ability of the system to deliver the best possible service. For example, the tests conducted during the course of the "Handshake" Project confirmed that the bandwidth capacity of an ISDN connection is much lower (*i.e.*, with a slower transmission speed, typically around 384 kilobits per second) than that of an IP network connection (*i.e.*, typically 1.5 megabits per second, at minimum),[323] which is why such systems should remain a secondary or "back-up" solution.

236. Most videoconferencing equipment today allows high definition (HD) transmissions (generally 720-1080 lines of resolution) and the bandwidth requirement for such a transmission for a single point-to-point call is a minimum of 1.2-1.5 megabits per second.[324] Logically then, as Gruen and Williams observe, multiple-point calls require greater bandwidth, essentially multiplying the bandwidth by at least the number of points required (*e.g.*, 5 megabits per second for a four-point connection).[325] The conclusions of the "Handshake" Project similarly recommended that the bandwidth of any video-link system should thus be great enough to support the maximum number of required sessions to be offered simultaneously during peak periods.[326] It

322 E. Rowden *et al.* (*op. cit.* note 45), p. 121; Federal Court of Australia (*op. cit.* note 15), p. 2.

323 "Handshake" Project (*op. cit.* note 190), p. 19.

324 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 8-9. See also, the responses of Bulgaria, China (Hong Kong SAR), Estonia, France, Germany, Hungary, Latvia, Malta, Norway, Poland, Portugal, and Slovenia to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12), all of which reported having either high definition (HD) capabilities or *both* high and standard definition (HD / SD) capabilities. See also, Responses of Belarus and Croatia, which reported having only standard definition (SD) capabilities to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

325 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 9.

326 For IP connections, the Project further recommended an additional buffer within the "guaranteed priority bandwidth" (*i.e.*, the minimum bandwidth, plus 20%). See, "Handshake" Project (*loc. cit.* note 323).

should be noted that these concerns can, in part, be mitigated through the use of a videoconferencing bridge (as discussed above at para. 224), although the bridge itself must have sufficient bandwidth.

237. In the Country Profiles, responding States reported a diverse range of potential bandwidths and transmission speeds, even within the two main types of network connection.[327] Many responding States reported maximum capacities of 2 megabits per second or higher,[328] with the highest reported bandwidth capacity being 8 megabits per second (for an IP connection).[329] As noted above, the main determinant is the type of network being used, as IP network connections typically permit a significantly greater bandwidth capacity.

C2.4 Encryption

94 Encryption of signals to the industry standard is recommended, with the practice of authorities confirming that it is widely used.

95 If encryption is used, it should be set to "automatic" or "best effort" to minimise compatibility issues with other types of encryption.

238. While it may ordinarily seem more essential in criminal cases, cross-border video transmissions in civil and commercial matters should equally be made secure from illegal interception by third parties, using means proportionate to the sensitivity of the matter.[330] The use of a firewall and / or an ISDN network can minimise the risk of illegal access to the transmission, though IP connections have for some time been favoured over ISDN.[331]

239. Whichever network is used, the "Handshake" Project concluded that additional means of minimising unauthorised access, such as the encryption of the actual signals being transmitted, is strongly recommended.[332] In the Country Profiles, most responding States reported employing some form of additional security or encryption.[333] The most common reported type of encryption among responding

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327 See, generally, Synopsis of Responses (*op. cit.* note 4), Part III, q. (b).

328 See, *e.g.*, the responses of Belarus, Bosnia and Herzegovina, China (Hong Kong SAR), Czech Republic, France, Hungary, Lithuania, Malta, Poland, and Portugal to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

329 Response of Lithuania to Part III, q. (b) of the Country Profile Questionnaire (*ibid.*).

330 "Handshake" Project (*op. cit.* note 15), p. 19.

331 See, *e.g.*, M. Reid, "Multimedia conferencing over ISDN and IP Networks using ITU-T H-series recommendations: architecture, control and coordination", *Computer Networks*, vol. 31, 1999, p. 234.

332 "Handshake" Project (*loc. cit.* note 323).

333 *I.e.*, 22 responding States. See the responses of Belarus, Bosnia and Herzegovina, Bulgaria, China (Hong Kong SAR), Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany (some locations), Hungary, Israel, Korea (Republic of), Latvia, Lithuania, Malta, Norway, Portugal, Romania, Slovenia, and Sweden to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

States was that of the AES (advanced encryption standard),[334] which is in use in approximately half of the responding States.[335] Other methods of encryption depend on the type of network and system being used, but are generally consistent with the ITU-T standard in recommendation H.235.[336]

240. In addition, in order to minimise issues of compatibility caused by the use of different methods of encryption, it is also recommended that the "auto" or "best effort" encryption setting is selected on the device.[337] Depending on the networks used, the requesting and requested authorities may even need to agree upon a specific method of encryption (*e.g.*, in the case of an IP network).

C2.5 Audio (Microphones and Speakers)

96 Authorities are encouraged to install an additional audio system to enhance the sound quality of the existing video-link equipment.

97 It is recommended that the hearing room be equipped with a sufficient number of microphones and speakers to accommodate all actors.

241. The hearing room should generally have an audio system connected to the video-link equipment, including adjustable volume and with sufficient speakers to broadcast the sound clearly throughout the room (*i.e.*, not relying solely on the speakers that normally are found on the video display).[338] To the extent possible, microphones should be provided at the location of each speaking participant in the room, but positioned in such a way to minimise distraction or hindrance.[339]

242. Ultimately, as identified during a comprehensive study in one Contracting Party, there are five key aspects to be considered when selecting an appropriate audio system: intelligibility; naturalness of tone; amplification (without feedback); source localisation; and acoustic comfort.[340]

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334 See, *e.g.*, United States National Institute of Standards and Technology (NIST), "Announcing the Advanced Encryption Standard (AES)", *Federal Information Processing Standards Publication*, vol. 197, 2001.

335 Responses of Belarus, Bosnia and Herzegovina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany (some locations), Korea (Republic of), Lithuania, Norway, Portugal, Romania, Slovenia, and Sweden to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

336 See List of "Recommendations by series" (*op. cit.* note 286), Series H. See, *e.g.*, the responses of Lithuania (H.235), Portugal (H.235), and Romania (H.233, H.234, H.235) to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

337 "Handshake" Project (*loc. cit.* note 204).

338 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 12.

339 E. Rowden *et al.* (*op. cit.* note 45), p. 118. See also, the response of Hungary to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12), which indicated that two microphones are available per video-link set.

340 For a full discussion of this study, which was carried out in Australia, see E. Rowden *et al.* (*op. cit.* note 45), p. 117.

C2.6 Video (Cameras and Screens)

98 To the extent possible, cameras should be equipped with functions for panning, tilting and zooming.

99 It is recommended that cameras and screens be able to broadcast high definition video (720p), supporting a resolution of at least 1280x720 pixels.

100 Participants and authorities are encouraged to check additional requirements in advance of the hearing (such as a view of the whole room, split-screen capabilities, or document cameras).

243. In terms of camera capabilities, as mentioned above (**B7.1**), a variety of views is recommended, including close-up or wide-angle views that are pre-set where available.[341] Experience in the European Union has shown that where possible, cameras should have the requisite "pan" "tilt" and "zoom" functions, keeping in mind the need to preserve an in-proportion display, as well as the possibility that the presiding official may require more options or views than other participants.[342]

244. Given that, as some commentators have noted, there is particular significance attached to the ability of presiding officials to assess demeanour and nuance in video-link proceedings,[343] both cameras and screens should be equipped to support the highest possible definition. Recent tests within the European Union have shown that the recommended parameters for high definition are a minimum of 720p with a 1280x720 pixel resolution, and a frame rate of 25-30 frames per second.[344] According to ITU-T recommendation H.265, the newer standard established for high efficiency video coding supports resolutions as high as 8192x4320 pixels (encompassing both 4K and 8K),[345] but the ability of a videoconferencing system to make use of such ultra-high definition is largely dependent on the bandwidth that is available (see also **C2.3**).[346]

245. The optimal size of the screen will depend upon factors such as the size of the hearing room and whether the display is split or full-screen. It is generally desirable if the image is close to life-size, which provides a clear picture of the individual.[347]

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341 *Ibid.*, p. 58.

342 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), pp. 18-19. See also the response of Germany to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12); E. Rowden *et al.* (*op. cit.* note 45), pp. 120-121.

343 See, *e.g.*, R. A. Williams (*op. cit.* note 1), p. 21.

344 "Handshake" Project (*loc. cit.* note 323).

345 See List of "Recommendations by series" (*op. cit.* note 286), Series H.

346 "Handshake" Project (*op. cit.* note 190), p. 27.

347 M. E. Gruen and C. R. Williams (*op. cit.* note 14), p. 12.

Screens should have a minimum resolution of the Wide Extended Graphics Array (WXGA) standard.[348]

246. Depending on the requirements of the presiding official, the parties, the person being examined, or other interested persons, the hearing may necessitate the use of screens with a "split-screen" capability. In the Country Profiles, the large majority of responding States reported having "split" or "multiple" screen capabilities, allowing multiple video channels within a single video-link transmission.[349] The display of two (or more) images is facilitated by the standard established by ITU-T recommendation H.239.[350]

247. In the Country Profiles, many responding States indicated that the camera(s) being used must have the capacity to capture a view of the whole room or all participants, in particular the presiding official and the person(s) appearing by video-link.[351] One responding State also reported that the camera must not be moved during the hearing and the time must be continuously displayed on screen.[352]

248. As noted in **B4.1**, in some cases, a document camera or other presentation or screen-sharing capability may be desirable or necessary to permit the display of documents or exhibits. In such cases, parties seeking to rely on these viewing capabilities during proceedings conducted by video-link should make appropriate enquiries with the requested authority in advance.

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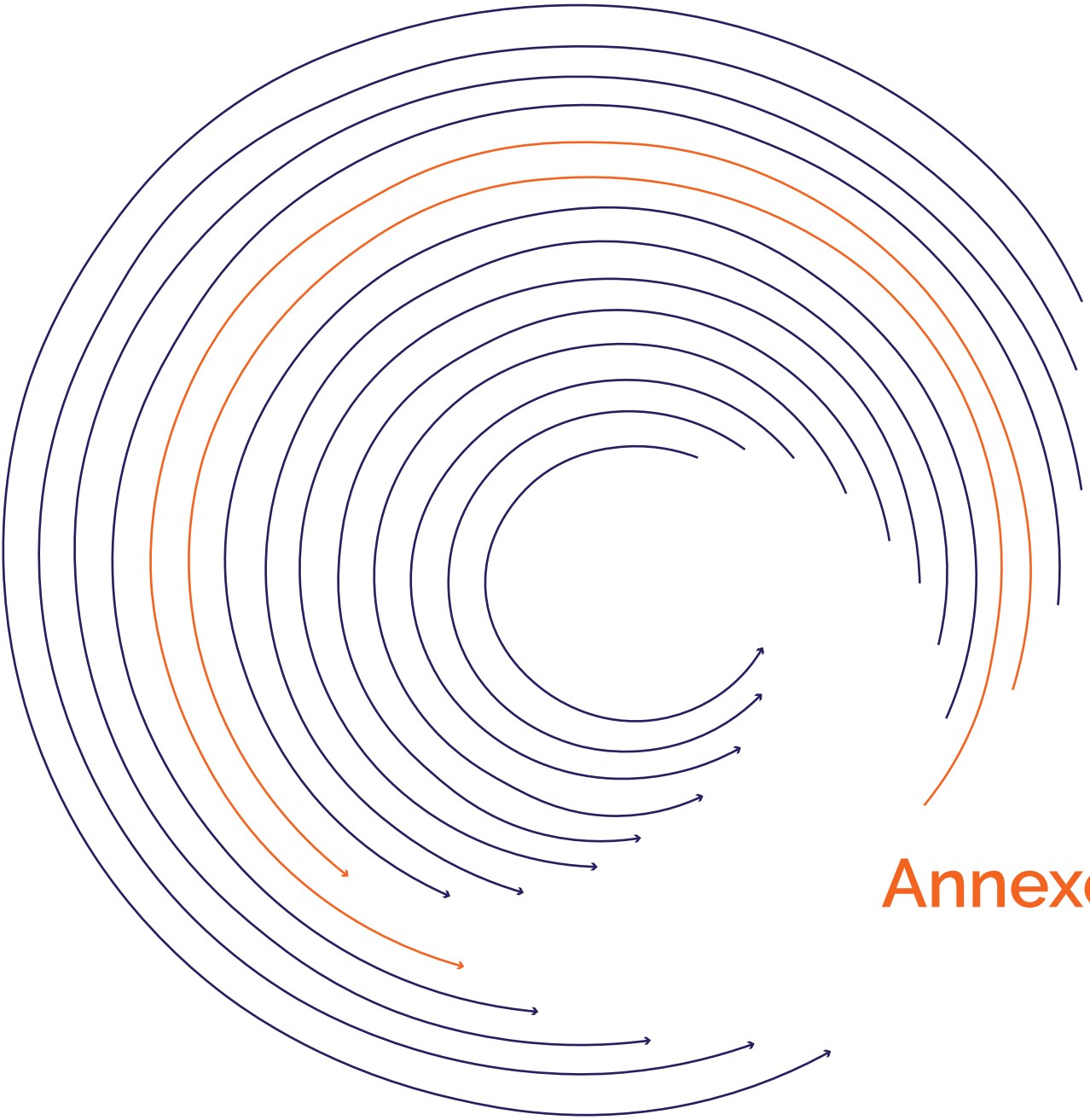
348 Guide on videoconferencing in cross-border proceedings (*op. cit.* note 16), p. 19.

349 See, the responses of Australia (most states), Belarus, Brazil (in most cases), Bosnia and Herzegovina, Bulgaria, China (Hong Kong SAR) (in one location only), Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany (some locations), Hungary, Israel, Korea (Republic of) (up to 8 split-screen capability), Latvia (up to 16 split-screen capability), Lithuania, Malta, Norway (depending on the equipment), Portugal, Romania, Singapore, Slovenia, Sweden, and Venezuela to Part III, q. (b) of the Country Profile Questionnaire (*op. cit.* note 12).

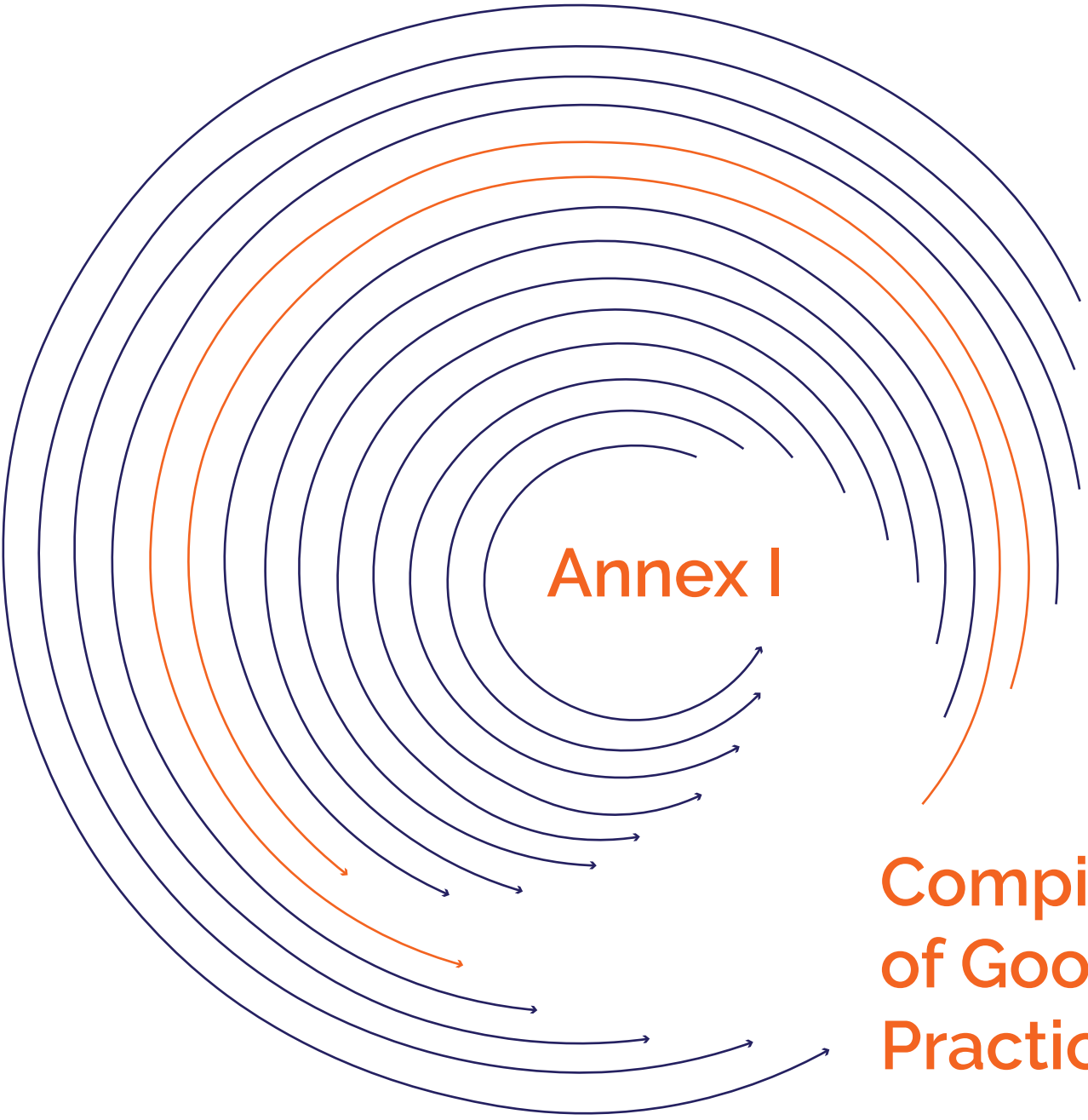
350 See List of "Recommendations by series" (*op. cit.* note 286), Series H.

351 See, *e.g.*, the responses of Australia, Finland, Germany, Hungary, Portugal and the United Kingdom (England and Wales) to Part III, q. (e) of the Country Profile Questionnaire (*op. cit.* note 12).

352 See the response of Hungary to Part III, q. (e) of the Country Profile Questionnaire (*ibid.*).



Annexes



Annex I

Compilation of Good Practices

PART A INITIATING THE USE OF VIDEO-LINK

A1 PRELIMINARY CONSIDERATIONS

A1.1 Legal bases

a. The use of video-link under internal law

1 By virtue of Article 27, the Convention does not prevent the use of internal law to take evidence by video-link under less restrictive conditions.

2 First, authorities should verify whether the taking of evidence by video-link is allowed under the internal law of the place where proceedings are pending.

3 Second, authorities should verify whether the taking of evidence by video-link is not contrary to the internal law of the place from which evidence is to be taken, including any existing "blocking statutes" or criminal laws.

b. The use of video-link under other instruments

4 As the Convention does not derogate from other instruments (Art. 32), authorities should verify whether any other bilateral or multilateral instruments may prevail in the particular case.

c. The use of video-link under the Evidence Convention

5 Neither the spirit nor letter of the Convention constitutes an obstacle to the use of new technologies and the operation of the Convention can benefit from their use.

6 Contracting Parties remain divided as to whether the Convention is of a mandatory character (*i.e.*, whether the Convention needs to be applied whenever evidence is to be taken abroad, be it in person or by video-link). This division of views notwithstanding, the Special Commission has recommended that Contracting Parties give priority to the Convention when evidence abroad is being sought (principle of first resort).

7 Having resort to the Convention or other applicable treaties is generally consistent with the provisions of blocking statutes.

A1.2 Direct vs indirect taking of evidence

8 Contracting Parties are divided as to whether direct taking of evidence is permitted under Chapter I of the Convention. Authorities should verify whether direct taking of evidence is permitted in the place where the evidence is located before filing a Letter of Request for this purpose.

9 Under Chapter II of the Convention, the Commissioner may take evidence in the State of Origin or in the State of Execution, subject to any conditions specified in the permission granted. Authorities should verify whether the State of Execution has made a reservation under Article 18 of the Convention.

10 Under Chapter II of the Convention, the Consul may take evidence by video-link of witnesses / experts who are at a distant location in the State of Execution, subject to any conditions specified in the permission granted. Authorities should verify whether this is possible in the relevant Contracting Party.

11 Irrespective of whether the evidence is taken directly or indirectly, the parties and representatives may be present by video-link.

A1.3 Legal restrictions on the taking of evidence

12 Taking of evidence by video-link is usually limited to witness / expert examination.

13 The same legal restrictions typically apply to a witness examination conducted by video-link as if the evidence were obtained in person. Authorities should look to the internal law of the relevant Contracting Party to verify if any additional restrictions are imposed.

14 Authorities are encouraged to provide information about the restrictions in their domestic legislations relating to the use of video-link for the taking of evidence (*e.g.* by reporting such provisions in their Country Profiles).

A2 THE USE OF VIDEO-LINK UNDER CHAPTER I

A2.1 Letters of Request

15 Letters of Requests may be executed by video-link pursuant to Article 9(1) or 9(2) of the Convention.

16 Article 9(1) sets out the default method or procedure to obtain evidence, for example, from a witness / expert located in a (distant) location within the requested authority's own territory.

17 Choosing to take evidence by video-link as a special method or procedure under Article 9(2) may have cost implications including in relation to the ability to seek reimbursement.

A2.2 Content, form and transmission of the Letter of Request

18 Permission to conduct a video-link may be requested either in the Letter of Request itself or subsequently by informal means of communication. However, specifying this in the Letter of Request is recommended. It is also recommended that the Central Authority of the Requested State be contacted before formally filing the Letter of Request, to confirm whether the use of video-link is possible.

19 Authorities are encouraged to use the Model Form for Letters of Request and, where possible and appropriate, make use of electronic means to expedite the transmission of Letters of Request and / or enquiries.

A2.3 Responding to the Letter of Request

20 Central Authorities should promptly acknowledge receipt of Letters of Request and respond to enquiries (incl. on the use of video-link) from requesting authorities and / or interested parties.

A2.4 Notifying or summoning the witness / expert and other actors

21 The procedure for notifying or summoning the witness may vary depending on whether evidence is taken directly or indirectly. For proceedings under Chapter I, it is typically the Requested State that effects service or summons the witness / expert.

22 If and when direct taking of evidence is sought, it is recommended that requesting authorities ensure that the witness is willing to give evidence by video-link before filing a Letter of Request.

A2.5 Presence and participation at execution of Letter of Request

a. Presence of parties and / or their representatives (Art. 7)

23 The presence of parties and representatives *by video-link* is subject to permission, or to a special method or procedure under Article 9(2) of the Convention.

24 Requesting authorities should specify in the Letter of Request (in items 13 and 14 of the Model Form), whether the presence of the parties and representatives is requested to take place by video-link and if cross-examination will be required.

25 The active participation of the parties and their representatives in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

b. Presence of members of the judicial personnel (Art. 8)

26 Verify whether the Requested State has made a declaration under Article 8 of the Convention.

27 In the absence of a declaration, presence of judicial personnel may nonetheless be possible in accordance with the internal law or practice of the Requested State.

28 When seeking authorisation from the Requested State, requesting authorities should clearly specify that the presence of the judicial personnel will take place by video-link and provide the relevant technical specifications of your video-link equipment.

29 The active participation of judicial personnel in the hearing via video-link (*i.e.*, not simple presence) is determined by the internal law of the Requested State. Internal law may permit the requested court to exercise its discretion in this regard on a case-by-case basis.

A2.6 Coercive measures and compulsion

30 Unlike ordinary requests for judicial assistance, a witness cannot generally be compelled specifically to use video-link to give evidence.

A2.7 Oath / affirmation

31 The administration of oaths or affirmations may vary depending on whether evidence is taken directly or indirectly. A specific form of oath or affirmation may be requested pursuant to Article 9(2) of the Convention.

32 Authorities should verify the relevant internal law requirements of either the Requested State, the Requesting State, or both, to ensure the admissibility of any evidence given.

A2.8 Identification of witness / expert and other actors

33 The identification of the witness / expert may vary depending on the jurisdiction.

34 More stringent procedures may be required if the Requesting State is to identify the witness / expert, given the use of video-link technology in the proceedings, and the distance between the requesting authority and the witness.

A2.9 Penal provisions

35 Giving evidence by video-link is usually voluntary in nature, though perjury and contempt of court may be penalised.

36 In some cases, the operation of penal provisions of both (or multiple) jurisdictions involved may give rise to a jurisdictional overlap or gap.

A2.10 Privileges and other safeguards

37 A witness / expert may invoke privileges under Article 11 of the Convention.

38 However, as the taking of evidence using video-link remains, in many instances, voluntary, the witness / expert is not obliged to specifically use video-link to give evidence and may refuse to do so without the need of invoking any privilege or duty.

A2.11 Costs

39 The use of video-link in the execution of a Letter of Request may give rise to costs pursuant to Article 14(2).

40 Before requesting the use of video-link in the execution of a Letter of Request, verify whether any costs may be incurred in both the Requesting State and the Requested State and who would be responsible for bearing such costs.

A3 THE USE OF VIDEO-LINK UNDER CHAPTER II

A3.1 Consuls and Commissioners

41 It is important to note that Contracting Parties are, by virtue of an Article 33 declaration, able to exclude the application of Chapter II, in whole or in part. Authorities should verify whether the relevant Contracting Party has made such a declaration.

42 The most common scenario under Chapter II is where the Commissioner located in the State of Origin takes evidence by video-link in the State of Execution.

43 Where practically possible, the parties, their representatives and / or judicial personnel in the State of Origin are able to be present by video-link during the taking of evidence by a Commissioner or Consul, and / or participate in the examination of the witness. Such presence and participation will be permitted unless it is incompatible with the law of the State of Execution and would nonetheless be subject to any conditions specified when the permission is granted.

A3.2 Need for permission from the State of Execution

44 Under Article 15 of the Convention, permission *is not* required unless a Contracting Party has made a declaration. Authorities should verify whether the State of Execution has made a declaration under this Article.

45 Under Articles 16 and 17 of the Convention, permission *is* required unless the Contracting Party has made a declaration that evidence may be taken without its prior permission. Authorities should verify whether the State of Execution has made a declaration under these Articles.

46 The request for permission should specify that evidence will be taken by video-link, and whether any specific assistance is required from the State of Execution. The Model Form may be used for this purpose.

47 Consuls and Commissioners must comply with the conditions specified by the State of Execution in granting its permission.

A3.3 Notification of the witness

48 In addition to the requirements laid down in Article 21(b) and (c) of the Convention, it is important for the Consul or Commissioner to notify the witness that evidence will be taken by video-link.

A3.4 Attendance, presence, participation of the parties, their representatives, and / or judicial personnel

49 If not contrary to the law of the State of Execution, the presence and active participation of the parties, their representatives, and judicial personnel by video-link should follow the same rules as if the evidence were taken in person in the State of Origin.

50 Judicial personnel of the court of origin may be appointed as a Commissioner to examine a person located in the State of Execution by video-link and may conduct the hearing in accordance with the domestic law of the State of Origin.

A3.5 Coercive measures and compulsion

51 The witness / expert is not compelled to give evidence unless the State of Execution has made a declaration under Article 18 and the competent authority has granted the application to provide assistance to obtain the evidence by compulsion. Authorities should verify whether the State of Execution has made such a declaration.

52 Even if the authority of a Contracting Party compels a witness to give evidence, it may not necessarily be able to compel the witness to *use video-link* to give that evidence.

A3.6 Oath / affirmation

53 The Consul or Commissioner has the power to administer an oath or take an affirmation under the law of the State of Origin insofar as it is not incompatible with the law of, or contrary to any permission granted by, the State of Execution (Art. 21(a) and (d)).

54 Depending on national or international instruments, oaths / affirmations administered by Consuls or Commissioners may have extraterritorial effects in the State of Execution.

A3.7 Identification of witness / expert and other actors

55 The Consul or Commissioner is responsible for identifying the witness / expert in accordance with the law of the State of Origin, unless this is incompatible with either the law of the State of Execution or conditions attached to its permission.

A3.8 Penal provisions

56 Potential overlapping application of, or jurisdictional gaps between, different penal provisions are left to domestic and / or international instruments, as well as any applicable arrangements.

A3.9 Privileges and other safeguards

57 Article 21 of the Convention provides several safeguards for the witness, including: the manner in which evidence is to be taken, the language in which the request should made to the witness, and the information that such a request should contain.

A3.10 Costs

58 The use of video-link may give rise to additional costs. Whether these costs are to be borne by the parties is determined by the law of the State of Origin.

PART B PREPARING FOR AND CONDUCTING HEARINGS USING VIDEO-LINK

59 Where possible, authorities are encouraged to make general practical information and / or guidelines publicly available (preferably online) to assist those preparing to submit or execute a request using video-link. Where possible, authorities are invited to share such information with the Permanent Bureau for publication on the HCCH website. More specific and sensitive information may be made available to the parties involved upon request.

60 It is the responsibility of all actors in the preparation and the execution of a video-link to ensure effective communication is maintained.

B1 Consideration of potential practical obstacles

61 Those preparing to submit a video-link request should make enquiries with the relevant authority to confirm that there are no practical obstacles or limitations to the execution of a request to use video-link in the taking of evidence (especially under Chapter II).

B2 Scheduling and testing

62 When scheduling a hearing that will use video-link, authorities are encouraged to bear in mind differences in time zones and the implications of operating outside regular business hours, such as potentially increased costs and limited availability of support staff.

63 Authorities are also encouraged to carry out tests of the connection prior to a hearing, as well as regular maintenance of the equipment.

B3 Technical support and training

64 Authorities are encouraged, where applicable, to provide the necessary contact details to ensure each participant in a video-link hearing has access to appropriate technical support.

65 It is recommended that any staff member who may be involved in controlling or operating video-link equipment is given at least a basic level of training.

B4 Reservation of appropriate facilities

66 Authorities should confirm any requirements or restrictions in relation to the facilities to be reserved, such as the type of hearing room (*e.g.*, courtroom, conference room) or the location of that room (*e.g.*, in a court building, in a diplomatic or consular mission, in a hotel).

67 Authorities should verify whether the facilities need to be reserved in advance and are encouraged to make use of online tools to facilitate the reservation process.

B4.1 Use of documents and exhibits

68 If documents or exhibits are to be used, an appropriate medium for formally sharing and presenting these prior to or during the hearing should be agreed upon and arranged.

B4.2 Private communications

69 Additional (confidential) lines of communication may be advisable or necessary, for example if a party / witness and his or her legal representative are participating from different locations.

B4.3 Special cases

70 In special circumstances, additional participants or additional security / protective measures may be needed, in particular in the case of vulnerable witnesses.

B5 Use of interpretation

71 Given the challenging nature of the video-link setting, engaging only interpreters with appropriate qualifications and experience is recommended, where possible.

72 Participants should decide, bearing in mind internal law requirements and any directions from the court, whether consecutive or simultaneous interpretation is to be used (the former is generally recommended in the context of video-link) and where the interpreter will be located (preferably at the same site as the witness).

B6 Recording, reporting and review

73 Participants should confirm how the proceedings will be recorded, noting that where possible and permitted, a video recording may be preferable to a written record. Authorities should ensure that the subsequent handling and storage of any recording or report produced is secure.

74 The necessary arrangements should be made for recording equipment and / or for a stenographer or court reporter to attend the hearing.

75 Authorities should ensure that the live transmission by video-link is secure and if possible, encrypted.

76 Where applicable, participants are encouraged to report any issues or challenges of a practical nature to the authorities concerned. Authorities are similarly encouraged to be proactive in seeking this feedback to further improve the provision of video-link services.

B7 Environment, positioning and protocols

77 Conditions in all of the rooms or spaces to be connected during the hearing should be optimised for the use of video-link, including the room size, layout, access, acoustics, and lighting.

78 The equipment should be set up in such a way to emulate an "in-person" hearing, ensuring an appropriate number of cameras and microphones so that each participant can be seen and heard with minimal difficulty or disruption.

B7.1 Control of cameras / audio

79 A user-friendly interface is recommended, to enable easy operation of the equipment, preferably by the presiding official.

B7.2 Protocol for speaking

80 To minimise disruption from possible delays in the connection, authorities may wish to consider a speaking protocol for participants during the hearing, especially if interpretation is to be used.

B7.3 Protocol in case of breakdown of communications

81 All participants should be made aware of the procedure for alerting the presiding official of technical difficulties encountered during the hearing and of the contact details for the technical support staff, including the third-party bridging service, if applicable.

PART C TECHNICAL AND SECURITY ASPECTS

C1 Adequacy of equipment

82 Authorities are encouraged to use equipment of the best available quality in order to emulate an in-person hearing, to the extent possible.

83 Staff responsible for making arrangements should be aware of the technological capabilities and facilities, including which locations are equipped with the necessary technology.

C1.1 Use of licensed software

84 The use of licensed software is advantageous principally because of the availability of technical support, and the practice of authorities confirms that its use is preferred.

C1.2 Use of commercial providers

85 Those seeking to use video-link technology in the taking of evidence should verify whether the use of widely available commercial providers is permitted by the States relevant authorities.

86 If using a commercial provider for the taking of evidence, participants and authorities are encouraged to ensure the appropriate security measures are in place.

C2 Minimum technical standards

87 Technical standards in any video-link system should be considered holistically, to ensure each component supports the effective operation of the system.

88 Of the principal ways in which a video-link connection may be established, authorities are encouraged to consider using a videoconferencing bridge or multipoint control unit (MCU) either incorporated into the system or via a third-party service, in order to alleviate concerns of interoperability, particularly when a cross-border connection is to be established.

C2.1 Codec

89 Codecs should conform with the relevant industry standards, enabling at minimum simultaneous audio and video transmission.

C2.2 Networks

90 It is recommended that an IP network be used, with ISDN (if available) being reserved for use as a back-up or contingency.

91 If possible, authorities are encouraged to equip the network with multi-point capabilities.

C2.3 Bandwidth

92 Authorities are encouraged to provide their network with the maximum possible bandwidth capacity.

93 Depending on the network, the recommended bandwidth is currently a minimum of 1.5-2 megabits per second for IP networks (or at least 384 kilobits per second for ISDN networks).

C2.4 Encryption

94 Encryption of signals to the industry standard is recommended, with the practice of authorities confirming that it is widely used.

95 If encryption is used, it should be set to “automatic” or “best effort” to minimise compatibility issues with other types of encryption.

C2.5 Audio (Microphones and Speakers)

96 Authorities are encouraged to install an additional audio system to enhance the sound quality of the existing video-link equipment.

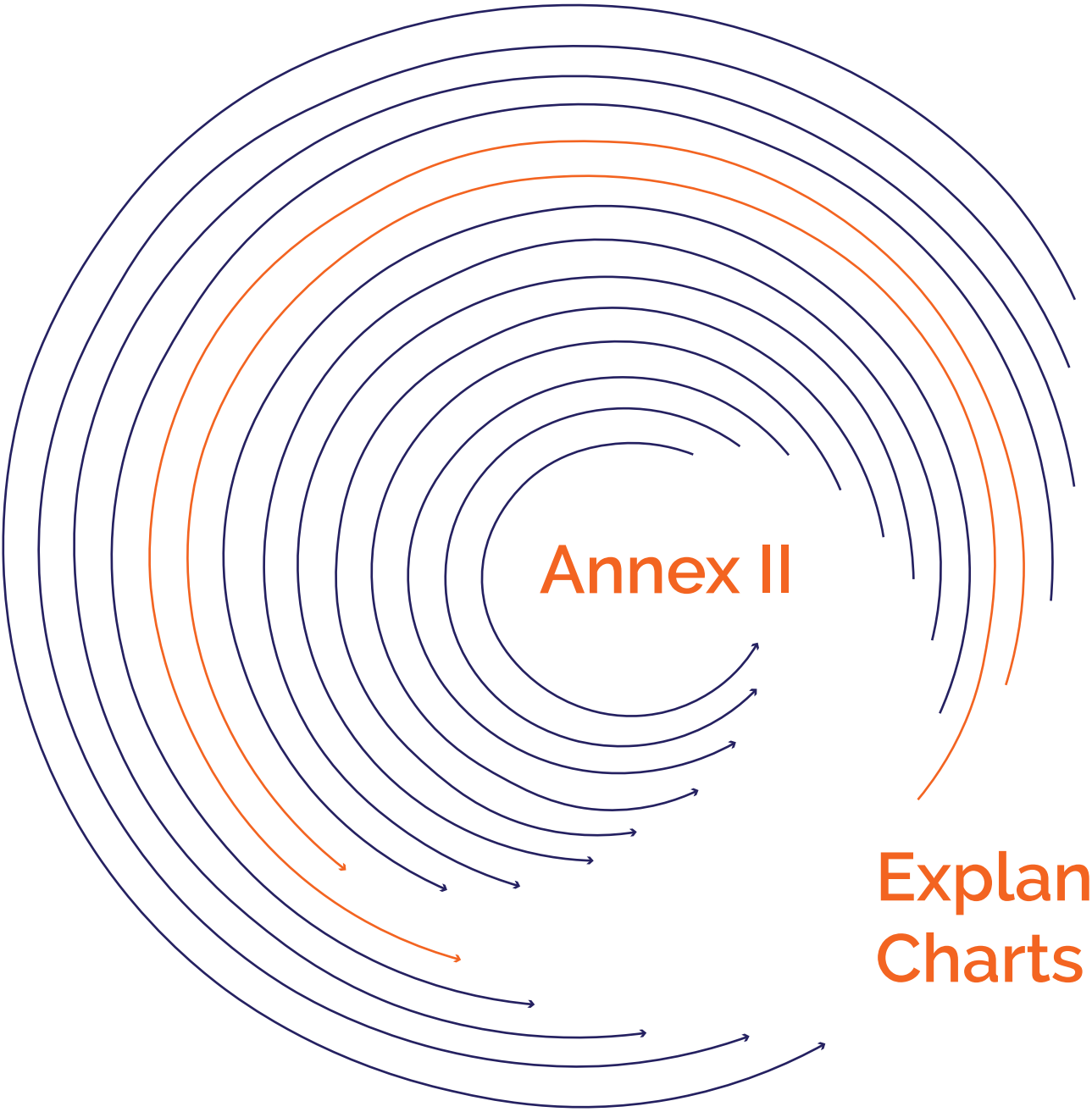
97 It is recommended that the hearing room be equipped with a sufficient number of microphones and speakers to accommodate all actors.

C2.6 Video (Cameras and Screens)

98 To the extent possible, cameras should be equipped with functions for panning, tilting and zooming.

99 It is recommended that cameras and screens be able to broadcast high definition video (720p), supporting a resolution of at least 1280x720 pixels.

100 Participants and authorities are encouraged to check additional requirements in advance of the hearing (such as a view of the whole room, split-screen capabilities, or document cameras).

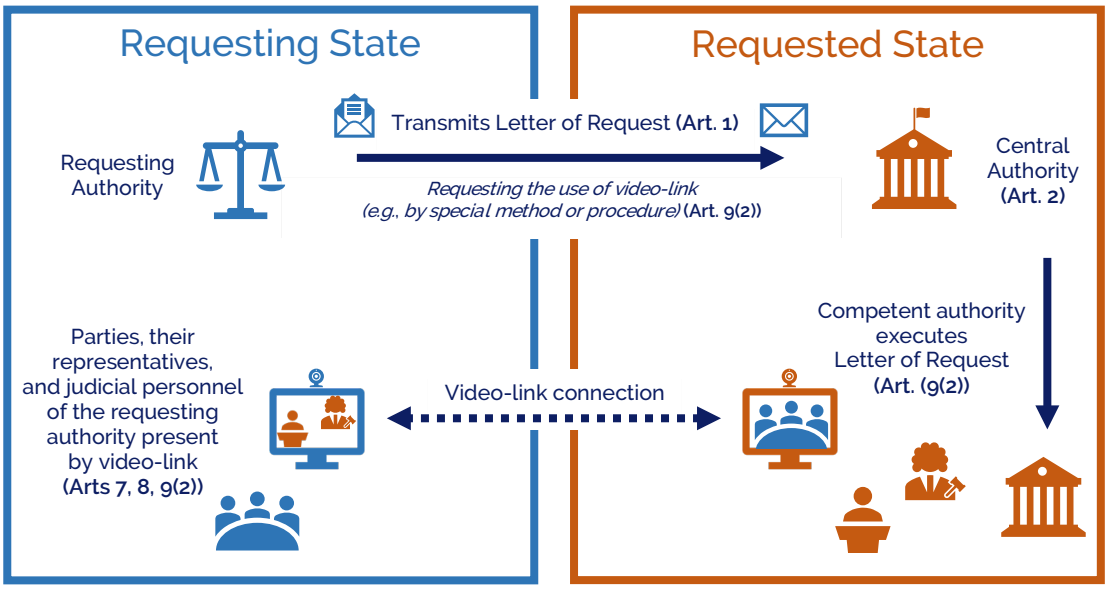


Annex II

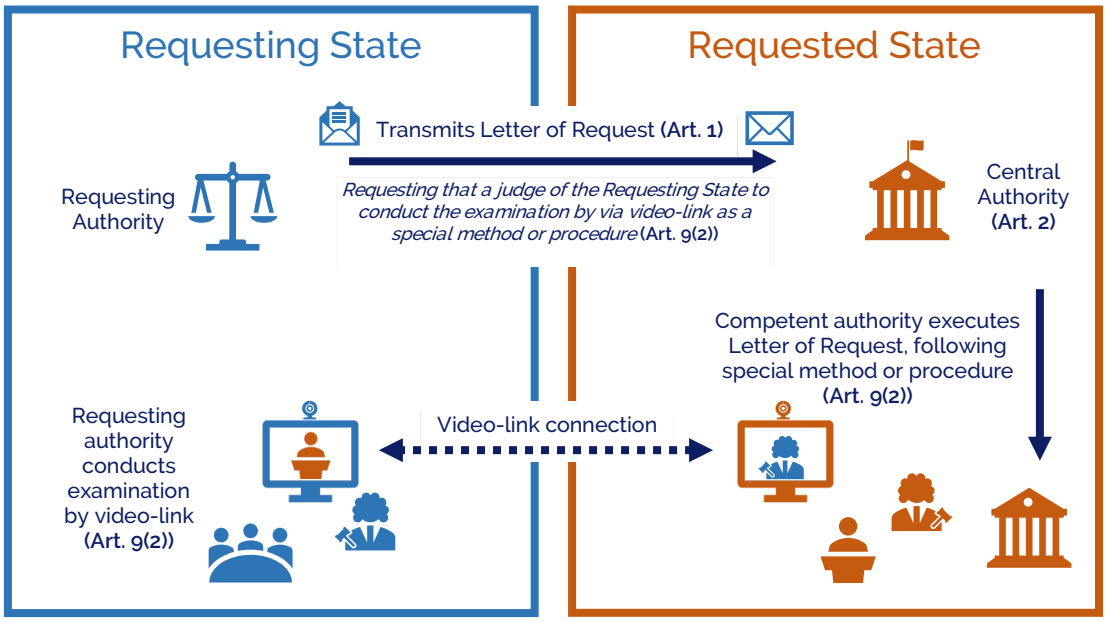
Explanatory Charts

Use of Video-link under the Evidence Convention
Chapter I

Indirect taking of evidence (possible use of video-link under Arts 7, 8, 9)

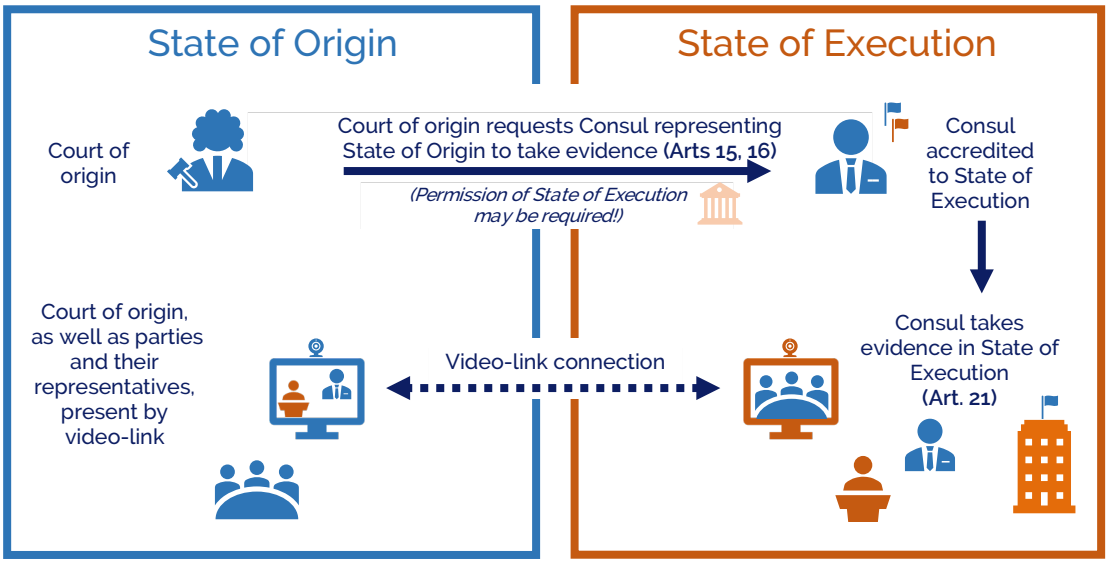


Direct taking of evidence (possible in some States under Art. 9(2))

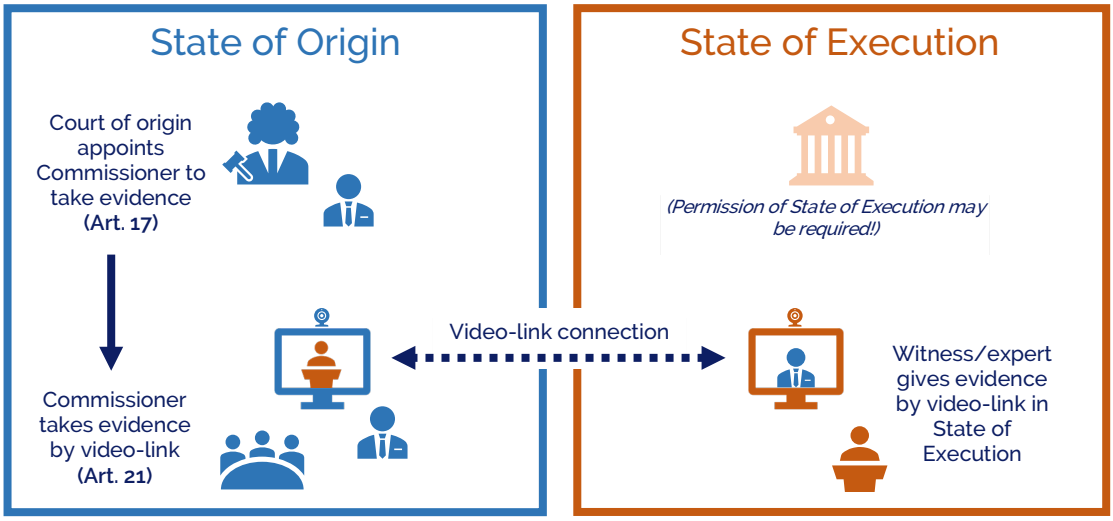


Use of Video-link under the Evidence Convention Chapter II[1]

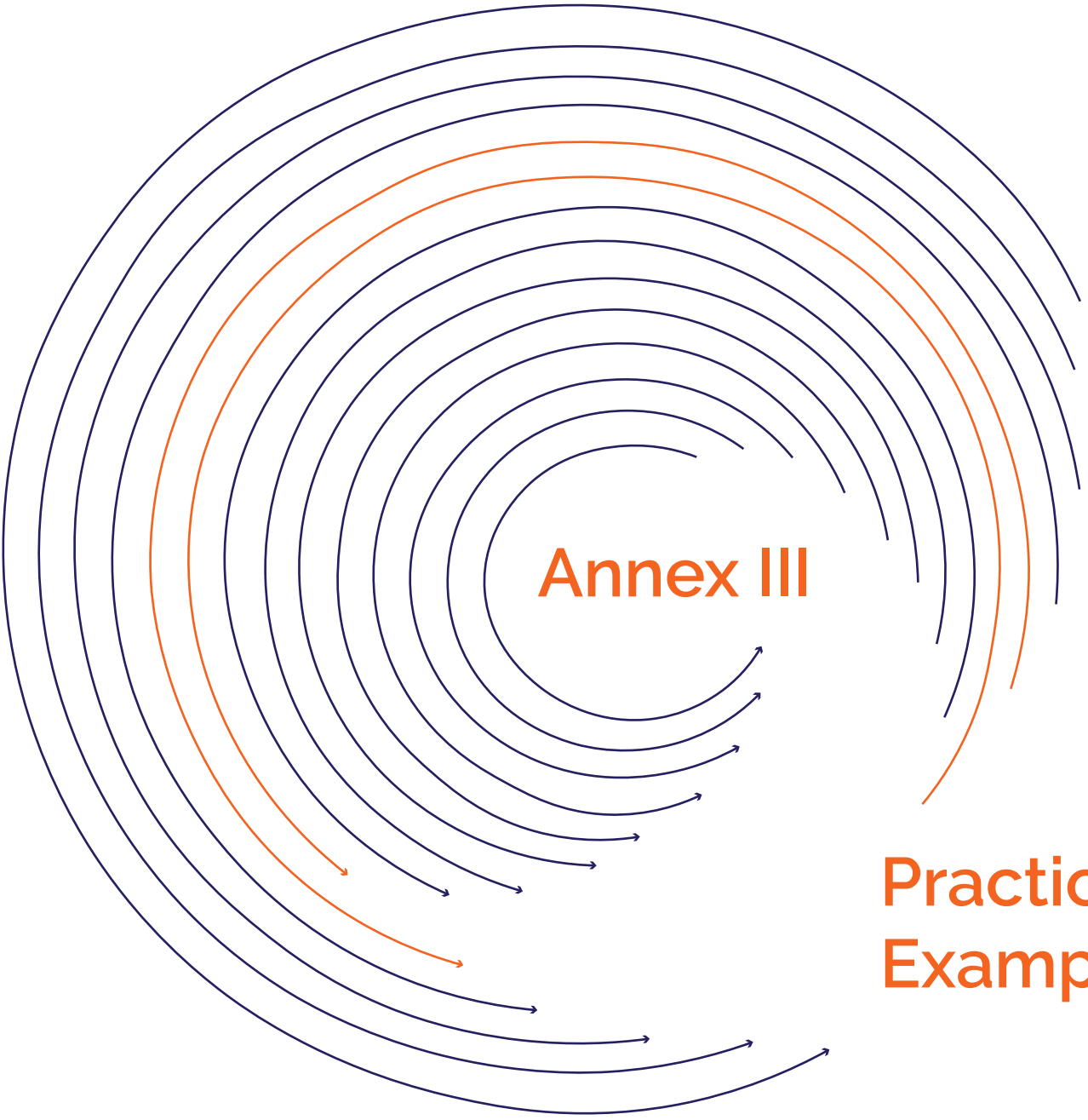
Direct taking of evidence by a Consul (Arts 15, 16, 21)



Direct taking evidence by a Commissioner (Arts 17, 21)



[1] Under Art. 33 of the Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. To view the declarations or reservations made by a particular Contracting Party, see the Status Table for the Evidence Convention, in column entitled "Res/D/N/DC".



Annex III

Practical Examples

I. The Use of Video-Link under Chapter I of the Evidence Convention

Example (1)

(i) A civil lawsuit is before a court in State X.

(ii) Testimony is needed from a witness who resides in State Y.

(iii) The presiding judge in State X (the Requesting State) issues a Letter of Request asking the Central Authority (designated under the Evidence Convention) of State Y (the Requested State) to obtain the testimony via the appropriate competent authority in State Y.

(iv) In the Letter of Request, the requesting authority in State X has requested that a special method or procedure be followed under Article 9 of the Convention, asking that the representatives of the parties be permitted to ask follow-up questions and that the testimony be transcribed verbatim. The requested authority in State Y must comply with this Article 9 request unless it is incompatible with the internal law of the Requested State or impossible by reason of internal practice and procedure, or practical difficulties.

(v) After the Letter of Request has been transmitted, the parties to the lawsuit agree on the use of a video-link permitting them to observe in State X the testimony to be given to the competent judicial authority in State Y. The requesting authority in State X thus contacts the Central Authority in State Y, which confirms that the judicial authorities in State Y have the necessary facilities and that the examination of the witness is possible by video-link.

(vi) The requesting authority in State X then completes the optional attachment to the Model Form for video-link evidence and submits it to the Central Authority of State Y.

(vii) The Central Authority of State Y accepts the Letter of Request and forwards it to the competent judicial authority, noting that the Letter of Request should be executed with the provision of a video-link connection.

(viii) The competent judicial authority establishes that the witness in State Y is willing to give evidence, so the request is able to be executed without resorting to measures of compulsion.

(ix) The competent judicial authority in State Y executes the Letter of Request, conducting the examination of the witness according to its own laws, methods and procedures (including, *e.g.*, how the oath / affirmation is administered), but complying with the Article 9 special method or procedure requests made by the requesting authority in State X.

(x) The proceedings are broadcast by video-link to a courtroom in State X, where the parties and their legal representatives are present, as they are permitted to be pursuant to Article 7.

(xi) Although State Y has not made a declaration under Article 8 with respect to the presence of judicial personnel of the requesting authority, the domestic rules of the Requested State nonetheless permit their presence. Accordingly, the judge in State X is also present during the hearing via video-link.

(xii) The law of State Y does not prohibit either of the special requests made by State X, so to the extent that they are also possible, they will be complied with.

(xiii) In this instance, interpretation is needed and it has been agreed that the requesting authority in State X will arrange for a qualified interpreter from its national register to be located with the parties, their representatives and the judicial personnel in State X.

(xiv) While the law of State Y does not permit the parties, their legal representatives, and / or judicial personnel in State X to actively participate throughout the proceeding, pursuant to the request made as an Article 9 special method or procedure, the legal representatives of the parties are permitted to ask follow-up questions, provided that they are asked through the presiding judge in State Y, making use of the interpretation in State X.

(xv) As per the request under Article 9, arrangements are made (by whichever authority is best-placed to do so) for a stenographer or court reporter to be present to transcribe the proceedings verbatim. The verbatim transcript of the proceedings is prepared and is then transmitted to the requesting authority in State X, along with the documents establishing execution pursuant to Article 13.

(xvi) Generally, the requested authority will execute the Letter of Request without any reimbursement of costs, except for, under Article 14(2), fees to be paid to experts and / or interpreters or costs occasioned by the use of a special method or procedure. In this instance, there is no need to reimburse State Y for the fees paid to the interpreter because the interpreter was organised by the authority in State X. The requests made by the judicial authority in State X for a stenographer or court reporter to produce the verbatim transcript as a special method or procedure will likely give rise to additional costs to be reimbursed. As the use of the video-link was not requested under Article 9 and was simply an informal request to the Central Authority of State Y, the costs associated with the use of the video-link facilities may not necessarily be required to be reimbursed, depending on the internal law and procedure of the Requested State. However, it is possible that State Y may consider that an informal request to use video-link falls nonetheless within the scope of Article 9(2) and the costs would therefore need to be reimbursed.

Example (2)

(i) A family lawsuit is before a court in State X.

(ii) Testimony is needed from a witness who resides in State Y.

(iii) The parties to the lawsuit agree on the use of a video-link permitting them to observe in State X the testimony to be given to the appropriate competent authority in State Y.

(iv) The presiding judge in State X (the Requesting State) issues a Letter of Request asking the Central Authority (under the Evidence Convention) of State Y (the Requested State) to obtain the testimony via the appropriate competent authority in State Y. In the Letter of Request, the requesting authority in State X asks for the testimony to be taken via video-link and to be video-recorded as a special method or procedure under Article 9. Further, the requesting authority in State X has included an additional Article 9 request to cross-examine the witness. The requested authority in State Y must comply with these Article 9 requests unless incompatible with the internal law of the Requested State or the requests are impossible by reason of internal practice and procedure, or practical difficulties.

(v) The Central Authority of State Y accepts the Letter of Request and forwards it to the competent judicial authority, noting that as it is not incompatible with the internal law and the judicial authority has the requisite facilities to render the video-link possible (and able to be recorded), the Letter of Request must thus be executed using a video-link connection. In addition, the internal law of State Y is not incompatible with the request for cross-examination and although not frequently used, it is possible.

(vi) The judicial authority in State Y summons the witness but he or she does not appear. As a result and pursuant to Article 10, the judicial authority turns to the provisions of its domestic law, which provide for it to issue a subpoena requiring the witness to give testimony subject to a penalty for non-compliance. In compliance with the subpoena, the witness appears before the court.

(vii) State Y has declared, under Article 8 of the Evidence Convention, that judicial personnel of the requesting authority may also be present, subject to prior authorisation by a competent authority. In this instance, the competent authority (which is also the Central Authority) in State Y has given its permission for the judicial personnel of State X to be present by video-link.

(viii) The competent judicial authority in State Y conducts the examination of the witness according to the methods and procedures of the Requested State, including in relation to the oath or affirmation administered.

(ix) As per the Article 9 request for a special method or procedure, the proceedings are also broadcast by video-link to a courtroom in State X, where the parties and their legal representatives are present. Pursuant to the other part of the Article 9 request, cross-examination is conducted by the representative of one of the parties in State X by asking his or her questions directly to the witness. An interpreter located in State X translates both the questions of the representative and the answers provided by the witness.

(x) In accordance with the request made under Article 9, the proceedings are also video-recorded. In consultation with the requesting authority in State X, the competent judicial authority in State Y arranges for the video recording to be encrypted and digitally transmitted back to the requesting authority in a secure manner and one that is compatible with the internal law of both States.

(xi) Generally, the requested authority will execute the Letter of Request without any reimbursement of costs, except for, under Article 14(2), fees to be paid to experts and / or interpreters or costs occasioned by the use of a special method or procedure. In this case, because the use of the video-link and the subsequent video recording were requested under Article 9 as a special method or procedure, the costs associated with the use of the video-link facilities and subsequent encryption / transmission are likely to also be required to be reimbursed.

Example (3)

(i) A commercial lawsuit has been filed in a court in State X.

(ii) Testimony is to be taken from a witness who resides in State Y.

(iii) The legal representatives for one of the parties ask the Court to send a Letter of Request to obtain evidence from the witness in State Y, by taking the testimony via video-link.

(iv) The court in State X (as the requesting authority) sends the Letter of Request to the Central Authority of State Y (as the requested authority), including an Article 9 special method or procedure request for the evidence to be taken directly by the Requesting State via video-link.

Example 3A

(v) By virtue of the internal law of State Y, direct taking of evidence is not permitted under Chapter I of the Convention. As such, the Article 9 special method or procedure cannot be executed, as it is incompatible with the law of the Requested State.

(vi) After having informed the requesting authority in State X, the requested authority in State Y thus proceeds (in consultation with the requesting authority) to execute the Letter of Request indirectly, using its own laws and procedures. The competent authority in State Y thus conducts the examination using questions from the requesting authority (likely provided by the legal representatives of the parties) in State X.

Example 3B

(v) By virtue of the internal law of State Y, direct taking of evidence is permitted under Chapter I of the Convention. Therefore, the Article 9 special method or procedure should be able to be fulfilled.

(vi) The requested authority in State Y assesses the request and grants permission for evidence to be taken directly, on the condition that: the witness be located in a courtroom in State Y; that the examination be conducted by the requesting court; and that a judicial official from State Y be present to carry out certain tasks and supervise the proceedings.

(vii) The legal representatives in State X, in consultation with the requesting authority in State X, make the necessary practical arrangements as per the conditions attached to the permission of the requested authority in State Y. This includes informing the witness, and liaising with State Y to reserve a courtroom at an appropriate date and time, as well as to arrange for the attendance of a judicial official from State Y.

(viii) To assist in the direct taking of evidence, an interpreter is also engaged in State X.

(ix) At the beginning of the video-link hearing, the judicial official representing State Y identifies the witness.

(x) A judicial official of the requesting authority in State X and the judicial official present and representing State Y each then inform the witness of the privileges that may be invoked during the hearing, in accordance with the laws and procedures of State X and State Y, respectively.

(xi) The evidence is taken in accordance with the laws and procedures of State X, as the testimony is being taken directly by the requesting court in State X.

(xii) In accordance with the conditions imposed by the Central Authority in State Y, the judicial official of State Y is responsible for supervising the proceedings, in particular ensuring that the witness is at no point coerced or otherwise coached when giving evidence.

(xiii) A court reporter in State X prepares a report of the testimony.

II. The Use of Video-Link under Chapter II of the Evidence Convention

Note: Under Article 33 of the Evidence Convention, a Contracting Party may exclude, in whole or in part, the application of Chapter II. These examples assume that the State of Execution has not made such an exclusion, and that the State of Origin has not filed a reservation to which the "non-objecting" State of Execution nonetheless applies reciprocity pursuant to Article 33(3).

Example (4)

(i) A family lawsuit is before a court (the court of origin) in State X.

(ii) Testimony is needed from a witness who resides in State Y.

(iii) As the witness is also a national of State X, the parties and the court of origin agree that a Consul of State X (the State of Origin) who exercises his or her functions in State Y (the State of Execution) shall take the testimony of the witness.

(iv) The parties request that a video-link be established so that the examination of the witness conducted by the Consul is broadcast to a courtroom in State X, where the parties and their legal representatives are present.

(v) The use of video-link is explicitly provided for by the law of State X, and it is also not prohibited by the law of State Y.

(vi) As the witness is a national of State X, pursuant to Article 15 there is no need to seek permission of the designated competent authority in State Y.

(vii) The witness is willing to give evidence and, being a national of State X, is fluent in the language of the court of origin. As such, neither compulsion nor interpretation is at issue in this instance.

(viii) However, because State Y is a geographically large State and the witness is in a location a significant distance from the city in which the Consul is based, the Consul decides (in consultation with the court of origin) that it would be more efficient for a three-way video-link to be established. The video-link thus connects the court of origin in State X, the Consul representing State X located at the Embassy in State Y, and the witness who is also in State Y, but at a different, distant location and in the presence of another person competent to identify the witness and to ensure that the witness remains free from coaching and / or coercion at all times.

(ix) The examination of the witness is conducted in accordance with the law and procedure of the State of Origin, to the extent that it is not prohibited by the State of Execution.

(x) As per the request of the parties and pursuant to the law of State X, the parties, their legal representatives, and / or judicial personnel of the State or Origin are present during the hearing by video-link, as it is not prohibited by the law of the State Y.

(xi) The Consul, as empowered by the State of Origin, administers the oath / affirmation as this is not incompatible with the law of the State of Execution.

(xii) In this instance, costs are borne by the party seeking evidence to be taken.

Example (5)

(i) A civil lawsuit is before a court (the court of origin) in State X.

(ii) Testimony is needed from a witness who resides in State Y.

(iii) A Commissioner is appointed by the court of origin in State X (the State of Origin) to take the testimony of the witness located in State Y (the State of Execution).

(iv) The parties to the lawsuit agree that the Commissioner will remain in State X and use a video-link to obtain the testimony from the witness in State Y, as the use of technology is foreseen in the law of the State of Origin.

(v) In addition, the use of video-link must not be prohibited by the law of the State of Execution. In this case, the law of State Y permits the use of video-link to facilitate the taking of evidence.

(vi) State Y has made a declaration under Article 17 reiterating that the prior permission of its designated competent authority will be required. The representatives of the parties proceed to seek permission from the competent authority of State Y.

(vii) The competent authority grants permission, subject to the condition that the witness be identified by an official of the competent authority before the testimony is taken.

(viii) The Commissioner is responsible for making the necessary practical arrangements, as well as sending the request to the witness, advising of the date, time, location and any other relevant information.

(ix) As the witness is willing and agrees to give evidence, there is no need to consider matters relating to compulsion.

(x) In this case, interpretation is needed for both the Commissioner and the witness. The Commissioner arranges for a qualified interpreter to be present with the witness in State Y.

(xi) The Commissioner conducts the examination of the witness in accordance with the law and procedure of the State of Origin, unless this is incompatible with the law of the State of Execution. It is conducted via video-link from a site in State X, where the parties and their legal representatives are also present, as they are entitled to be under the law of State X.

(xii) The Commissioner, as empowered by the law of State X as the State of Origin, administers the oath / affirmation via video-link, as this is not incompatible with the law of State Y as the State of Execution.

(xiii) The participation of the parties and their legal representatives (including any cross-examination or follow-up questions), is similarly determined with reference to the law of State X, insofar as it is not incompatible with the law of State Y.

(xiv) As is generally the case, the costs of the proceeding (including the costs of interpretation and venue hire) are borne by the party seeking evidence to be taken.

Example (6)

(i) A commercial lawsuit is before a court (the court of origin) in State X.

(ii) Testimony is needed from a witness who resides in State Y.

(iii) A Commissioner is appointed by the court of origin in State X (the State of Origin) to take the testimony of the witness located in State Y (the State of Execution).

(iv) The Commissioner is a lawyer located in State Y and fluent in both the languages of State X and State Y.

(v) As the use of technology is foreseen in the law of the State of Origin, the parties petition the court of origin to permit the Commissioner to use a video-link when taking the evidence of the witness in State Y, with the parties and their representatives observing the proceedings from their location in State X.

(vi) In addition, the use of video-link must not be prohibited by the law of the State of Execution. In this case, the law of State Y does not prohibit the use of video-link.

(vii) State Y has not made any declaration under Article 17. As such, in the absence of a declaration giving permission generally, the prior permission of its designated competent authority will be required for this particular case.

(viii) The competent authority grants permission, but conditions its permission, requiring that the evidence be taken in a courtroom in State Y in the presence of a judicial official of State Y.

(ix) The Commissioner is responsible for making the necessary practical arrangements, as well as sending the request to the witness, advising of the date, time, location and any relevant information.

(x) After informing the witness, the Commissioner realises that the witness is unwilling to give evidence. As State Y has made an Article 18 declaration, the Commissioner is able to supplement the original request with an additional request for assistance of the competent authority in obtaining the evidence by compulsion.

(xi) The competent authority grants the Commissioner's request and thus applies the appropriate measures of compulsion as prescribed by its law to ensure the attendance of the witness.

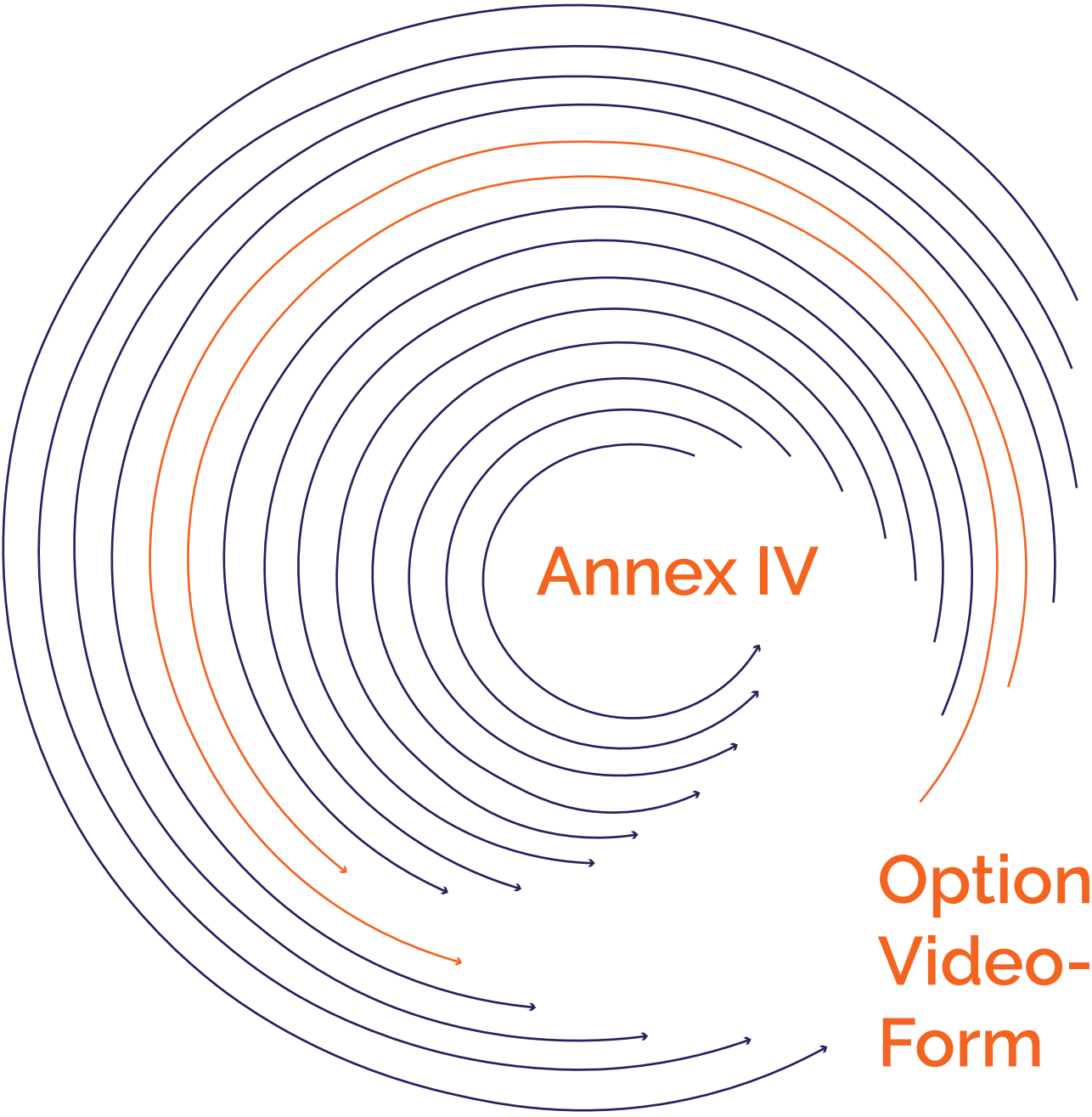
(xii) The Commissioner then conducts the examination of the witness in accordance with the law and procedure of the State of Origin, unless this is incompatible with the law of the State of Execution. It is conducted in the courtroom of State Y, with the parties and their legal representatives also present via video-link from State X, as they are entitled to be under the law of State X.

(xiii) The Commissioner, as empowered by the law of State X as the State of Origin, administers the oath / affirmation, as this is not incompatible with the law of State Y as the State of Execution.

(xiv) The participation of the parties and their legal representatives (including any cross-examination or follow-up questions), is similarly determined with reference to the law of State X, insofar as it is not incompatible with the law of State Y.

(xv) In this case, as the Commissioner is fluent in the languages of both State X and State Y, interpretation may not be needed, but possibly might be used for the benefit of those present via video-link in State X.

(xvi) As is generally the case, the costs of the proceeding (for example those costs arising from use of the courtroom or compelling the witness to appear) are borne by the party seeking evidence to be taken.



Annex IV

Optional Video-Link Form

This form is intended to be used as an attachment to the Recommended Model Form for Letters of Request, available on the Evidence Section of the HCCH website

LETTER OF REQUEST – OPTIONAL FORM FOR VIDEO-LINK EVIDENCE

COMMISSION ROGATOIRE – FORMULAIRE FACULTATIF POUR DES PREUVES PAR LIAISON VIDEO

Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale

Technical Parameters of the video-link device(s)
Paramètres techniques des appareils de liaison vidéo

1.	**Device brand and model** *Marque et modèle de l'appareil*	Insert name of video-link device brand to be used by the Requesting State
2.	**Type of control unit** *Type d'unité de commande*	Please note that a multipoint control unit is recommended. *Veuillez noter qu'une unité de commande multipoint est recommandée.* ☐ Endpoint *Point de terminaison* ☐ Multipoint

<table>
<tr>
<td>3.</td>
<td>Type of network
Type de réseau

Examples of IP and ISDN parameter sequences are provided on page 3.

Des exemples de séquences de paramètres IP et RNIS sont donnés en page 3</td>
<td>Please note that an IP network is the recommended network.
Veuillez noter qu'un réseau IP est le réseau recommandé.
<table>
<tr><th>IP (SIP or/ou H.323)</th><th>ISDN / RNIS</th></tr>
<tr><td>IP address:
Adresse IP :

Insert IP address

Hostname:
Nom de l'hôte :

Insert hostname (including fully qualified domain name)

Extension number:
Numéro de poste :

Insert extension (if applicable)</td><td>ISDN number:
Numéro RNIS :

Insert ISDN number

Extension number:
Numéro de poste :

Insert extension (if applicable)</td></tr>
<tr><td colspan="2">Additional comments:
Autres remarques :

Insert any relevant comments or notes here</td></tr>
</table>
</td>
</tr>
<tr>
<td>4.</td>
<td>Virtual Room (via Multipoint Control Unit)
Salle virtuelle (via une unité de commande multipoint)</td>
<td>Please fill out only if a virtual meeting room will be used.
Ne compléter que si une salle de réunion virtuelle sera utilisée.

Address / Hostname
Adresse / Nom de l'hôte

Insert address and / or hostname (including fully qualified domain name)

PIN
Code d'accès

Insert access PIN for virtual room</td>
</tr>
<tr>
<td>5.</td>
<td>Codec
Codec</td>
<td>Insert details of coder-decoder used.</td>
</tr>
</table>

6.	**Type of encryption** *Type de chiffrement*	Insert details on type of encryption used (*e.g.* AES, 3DES) and the bit used (*e.g.* 128 bits, 192 bits) Will the 'automatic' or 'best effort' setting be used? *Le paramètre « automatique » ou « au mieux » sera-t-il utilisé ?* ☐ Yes / *Oui* ☐ No / *Non*

Details of technical contact person(s)
Coordonnées des interlocuteurs techniques

These are contact persons in addition to those mentioned in the Letter of Request, specifically for technical matters (if applicable).
Il y a des interlocuteurs techniques outre ceux qui sont mentionnés dans la Commission rogatoire, en particulier pour les questions techniques (le cas échéant)

7a.	**Contact Person 1** *Interlocuteur 1*	7b.	**Contact Person 2** *Interlocuteur 2*
	Name *Nom*		**Name** *Nom*
	Position *Fonction*		**Position** *Fonction*
	Email		**Email**
	Phone *Téléphone*		**Phone** *Téléphone*
	Languages *Langues*		**Languages** *Langues*

Following the completion of the Multi-aspect initiative to improve cross-border videoconferencing ("Handshake" Project), the Council of the European Union provided the following example sequences to assist users with different types of network connections:[1]
À la suite de la conclusion du projet « Handshake » (Multi-aspect initiative to improve cross-border videoconferencing), *le Conseil de l'Union européenne a donné les exemples de séquences suivants pour aider les utilisateurs en fonction des types de connexions réseau* :

Examples of parameter sequences and delimiters for starting a videoconference
Exemples de séquences de paramètres et de délimiteurs pour lancer une visioconférence

Depending on the brands of the devices involved – different parameter sequences may need to be used.
Dépendent de la marque des appareils – il sera peut-être nécessaire d'utiliser différentes séquences de paramètres.

Using IP:
IP :

Hostname / IP-address followed by extension number with delimiter ## :
111.22.33.4##5656
Hostname / IP-address followed by extension number with delimiter # : 111.22.33.4#5656

Nom de l'hôte/adresse IP suivi du numéro de poste avec le délimiteur ## :
111.22.33.4##5656
Nom de l'hôte/adresse IP suivi du numéro de poste avec le délimiteur # : 111.22.33.4#5656

Using SIP:
SIP :

Extension number followed by hostname / IP-address with delimiter @ :
5656@videoconf.host.eu
5656@111.22.33.4

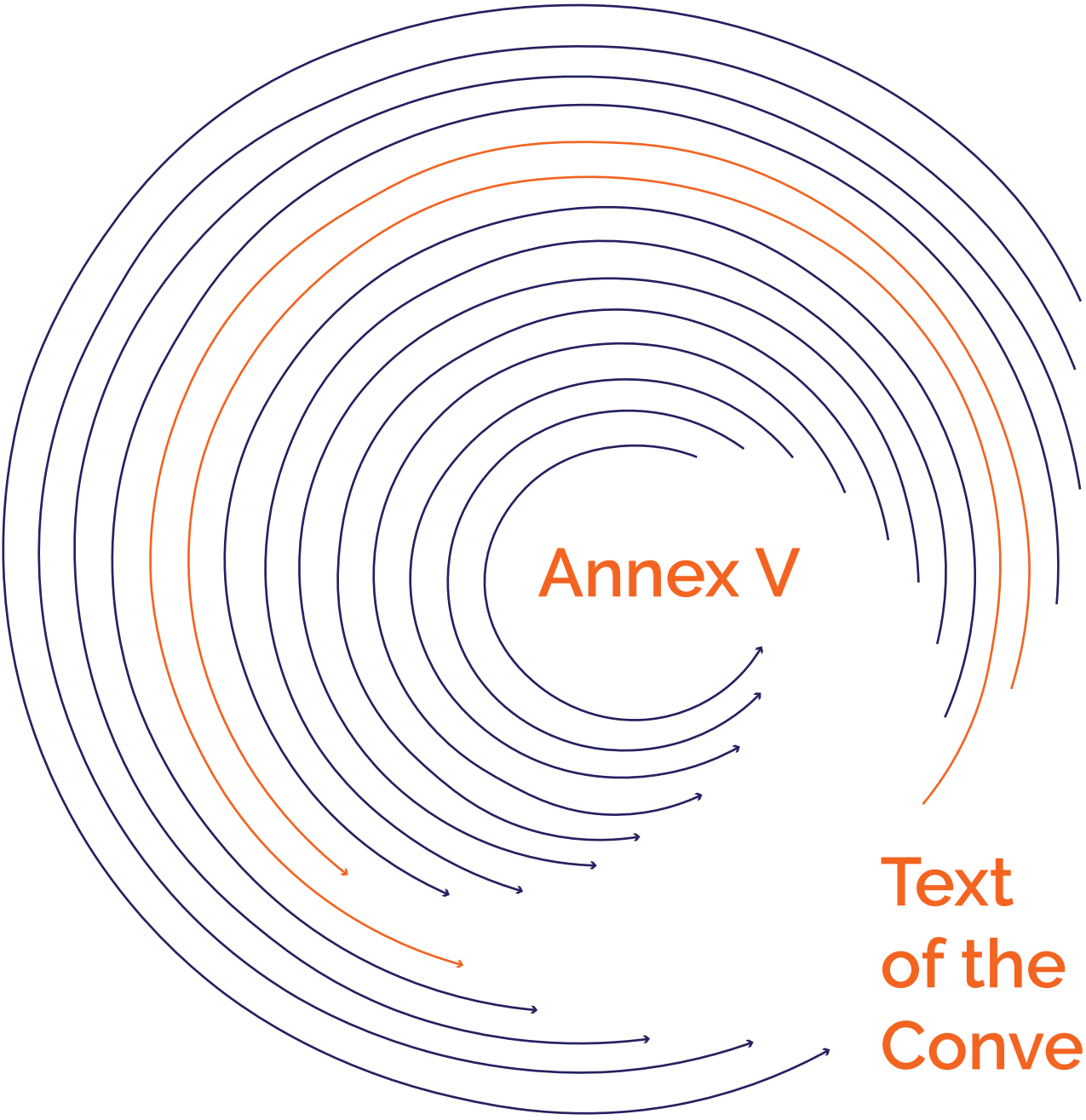
Numéro de poste suivi du nom de l'hôte/de l'adresse IP avec le délimiteur @ :
5656@videoconf.host.eu
5656@111.22.33.4

ISDN sequences:
Séquences RNIS :

ISDN number and extension number together: + 43 1 0000895656
ISDN number and extension number separated by a delimiter # : + 43 1 000089#5656

Numéro RNIS et numéro de poste ensemble : + 43 1 0000895656
Numéro RNIS et numéro de poste séparés par un délimiteur # : + 43 1 000089#5656

[1] "Handshake" Project, "D4: Form for requesting / confirming a cross-border videoconference", p. 20.



Annex V

Text of the Convention

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions -

CHAPTER I - LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify -
a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;

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[1] This Convention, including related materials, is accessible on the Evidence Section of the HCCH website. For the full history of the Convention, see HCCH, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves*, (219 pp.).

c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* -
e) the names and addresses of the persons to be examined;
f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
g) the documents or other property, real or personal, to be inspected;
h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence -

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that -

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II - TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the

evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if -

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence -

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III - GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from -

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from -

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
b) the provisions of Article 4 with respect to the languages which may be used;
c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
f) the provisions of Article 14 with respect to fees and costs;
g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following -

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

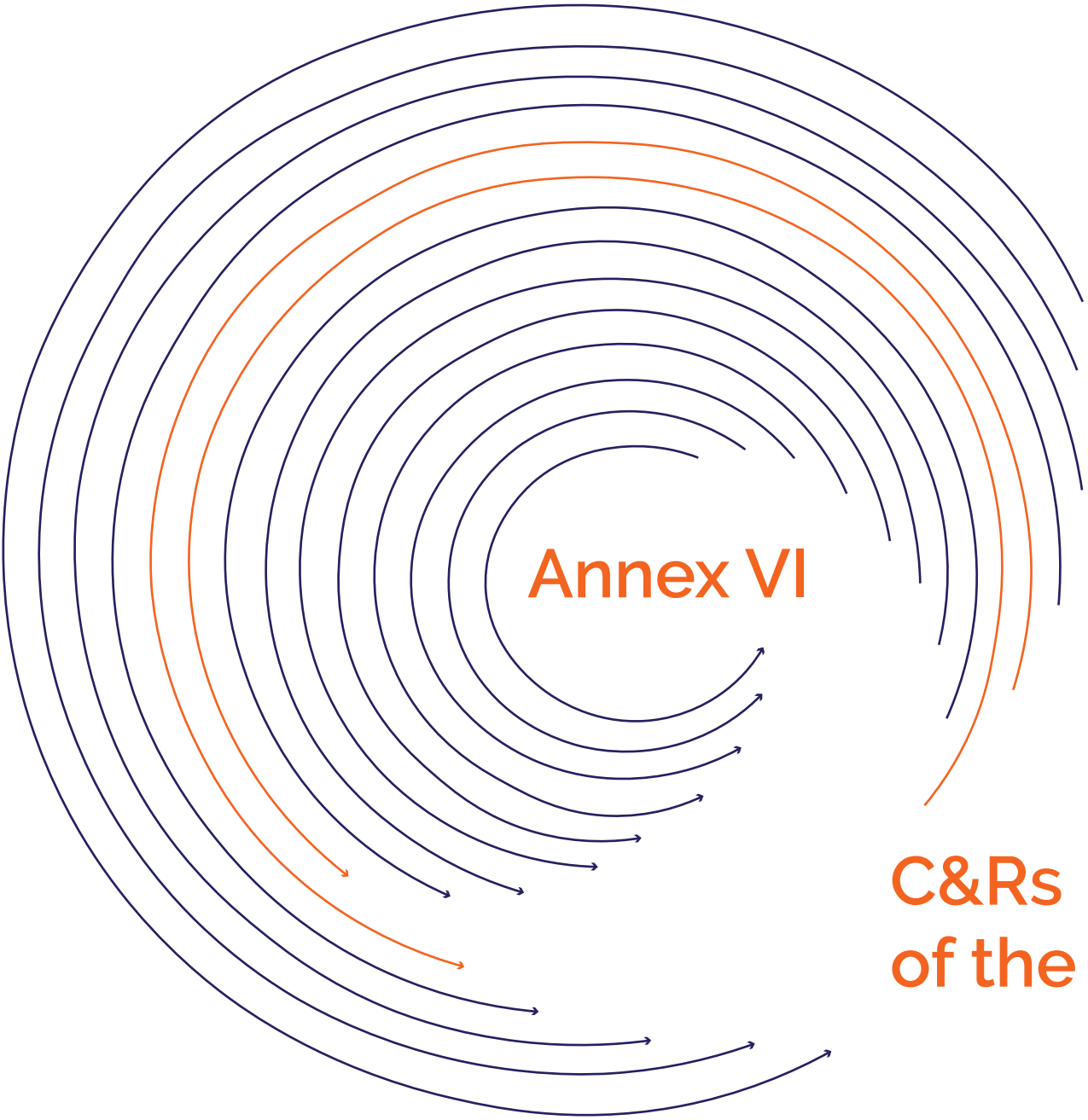
Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following -

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.



Annex VI

C&Rs of the SC

2003 Meeting

C&R No 4

The SC emphasised that the Apostille, Evidence and Service Conventions operate in an environment which is subject to important technical developments. Although this evolution could not be foreseen at the time of the adoption of the three Conventions, the SC underlined that modern technologies are an integral part of today's society and their usage a matter of fact. In this respect, the SC noted that the spirit and letter of the Conventions do not constitute an obstacle to the usage of modern technology and that their application and operation can be further improved by relying on such technologies. The Workshop held prior to the SC (*i.e.*, on 27 October 2003) clearly revealed the means, possibilities and advantages of using modern technologies in subject matters falling within the scope of the Conventions.

C&R No 42

The SC expressed general support for the use of modern technologies to further facilitate the efficient operation of the Convention. The SC noted that there seems to be no legal obstacle to the usage of modern technologies under the Convention. However, the use of some techniques may be subject to different legal requirements in different States (*e.g.*, obtaining the consent of all parties involved in the execution). In this respect, the SC recommended that States party make relevant information on legal requirements relating to specific techniques available to the Permanent Bureau.

C&R No 43

The SC stressed where a special method or procedure is requested for the taking of evidence (Art. 9(2)), the exception for methods that are "incompatible with the internal law of the State of execution or […] impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties" should be interpreted narrowly to permit, to the greatest possible extent, the use of modern information technology.

C&R No 44

The SC stressed that early informal contact among appropriate authorities to coordinate the presentation and execution of Letters of request might be facilitated by the use of modern information technology such as e-mail.

2009 Meeting

C&R No 44

The SC encourages better communication between Central Authorities and between requesting authorities and the relevant Central Authority at all stages of the execution of a Letter of Request. Any informal communication may be carried out by any appropriate means, including e-mail and fax.

C&R No 55

The SC recalls the Conclusions and Recommendations Nos 42 to 44 of the 2003 Special Commission and notes that the use of video-links and similar technologies to assist the taking of evidence abroad is consistent with the current framework of the Convention. In particular, the SC notes that:

a. The Convention permits parties and their representatives to be present (Art. 7), and does not preclude judicial personnel of the requesting authority from being present (Art. 8), by video-link at the execution of the Letter of Request by the Requested State, to the same extent as these persons could be physically present.
b. The Convention permits a video-link to be used to assist in the execution of a Letter of Request where the law of the Requested State permits such use (Art. 9(1)).
c. A video-link may be used to assist in the execution of a Letter of Request in accordance with Article 9(2).
d. The Convention permits a video-link to be used to assist in the taking of evidence by a diplomatic official, consular agent or commissioner, provided that the practice is not forbidden by the State in which the evidence is to be taken, and provided that the relevant permission has been granted (Arts 15, 16, 17 and 21).

2014 Meeting

C&R No 9

The SC notes that the practical operation of the Evidence Convention would be further improved by more timely execution of Letters of Request, and better communication with Central Authorities, including by e-mail, at all stages of the execution of a Letter of Request.

C&R No 10

The SC welcomes the practice reported by Contracting States whereby Central Authorities:

a. promptly acknowledge the receipt of Letters of Request to the requesting authority and / or interested parties;
b. promptly respond to enquiries from requesting authorities and / or interested parties about the status of execution;
c. communicate to the requesting authority and / or interested parties an indication of steps to be taken for execution.

C&R No 20

The SC recalls that the use of video-links to assist the taking of evidence abroad is consistent with the framework of the Evidence Convention (cf. C&R No 55 of the 2009 SC). The SC acknowledges that Article 17 does not preclude a member of judicial personnel of the court of origin (or other duly appointed person), who is located in one Contracting State, from examining a person located in another Contracting State by video-link.

C&R No 21

Further to a proposal by the delegation of Australia to consider an optional protocol to facilitate the taking of evidence, without compulsion, by video-link under the Evidence Convention, and with a view to promoting the further use of modern technologies, the SC recommends that the Council establish an Experts' Group at its next meeting to investigate the issues that may arise with the use of video-link and other modern technologies in the taking of evidence abroad. The SC further recommends that the Experts' Group study existing instruments and current practice, and explore potential ways to address these issues, including the desirability and feasibility of an optional protocol or any other instrument.

C&R No 39

The SC encourages the transmission and receipt of requests by electronic means in order to facilitate expeditious execution. Contracting States should consider security matters when evaluating methods of electronic transmission.

Index of Cited Case Law

Figures refer to page numbers.

Australia

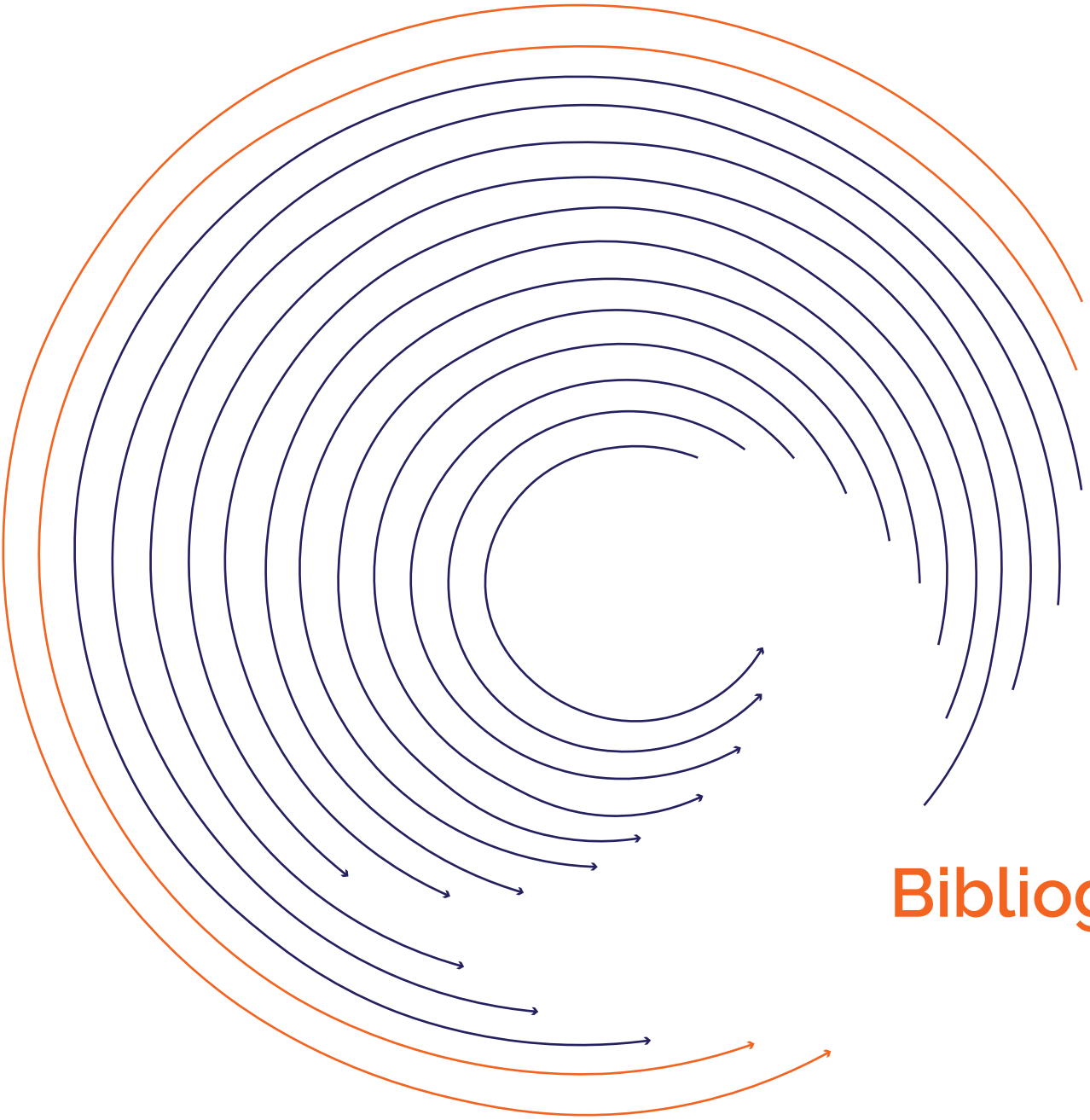
Canada

India

People's Republic of China (Hong Kong SAR)

United Kingdom

United States



Bibliography

Conférence de La Haye de droit international privé / Hague Conference on Private International Law :

- Responses to the Country Profile Questionnaire, available on the Evidence Section of the HCCH website under "Taking of evidence by video-link".

- Synopsis of Responses to the Country Profile Questionnaire on the Taking of Evidence by Video-link under the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention), available on the Evidence Section of the HCCH website under "Taking of evidence by video-link".

- Conclusions & Recommendations adopted by the 2003, 2009 and 2014 meetings of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions, available on the Evidence Section of the HCCH website under "Special Commissions".

- Conclusions & Recommendations adopted by 2015 and 2016 meetings of the Council on General Affairs and Policy, available on the HCCH website under "Governance" then "Council on General Affairs and Policy".

- Evidence Handbook: Practical Handbook on the Operation of the Evidence Convention, 3rd ed., The Hague, 2016.

- Explanatory Report on the 1970 Evidence Convention, by P. W. AMRAM, in *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves à l'étranger*, The Hague, SDU, 1970.

- *Report of the Experts' Group on the Use of Video-link and Other Modern Technologies in the Taking of Evidence Abroad*, Prel. Doc. No 8 of December 2015 for the attention of the 2016 meeting of the Council on General Affairs and Policy, available on the Evidence Section of the HCCH website.

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COUNCIL OF THE EUROPEAN UNION – *Guide on videoconferencing in cross-border proceedings*; Luxembourg, Publications Office of the European Union, 2013, available at the following address: < http://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/ >.

COUNCIL OF THE EUROPEAN UNION – Council of the European Union, *Multi-aspect initiative to improve cross-border videoconferencing ("Handshake" Project);* 2017, available at the following address: < https://beta.e-justice.europa.eu/69/EN/general_information >.

DAVIES, M. – Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation; (2007) *American Journal of Comparative Law* 55(2), p. 206.

DUNN, M. & NORWICK, R. – *Report of a Survey of Videoconferencing in the Courts of Appeals*; Federal Judicial Center, 2006, available at the following address: < https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf >.

EPSTEIN, D., SNYDER, J. & BALDWIN IV, C.S. – *International Litigation: A Guide to Jurisdiction, Practice, and Strategy*; 4th ed., Leiden/Boston, Martinus Nijhoff Publishers, 2010.

ELECTRONIC COMMUNICATIONS COMMITTEE (ECC) OF THE EUROPEAN CONFERENCE OF POSTAL AND TELECOMMUNICATIONS ADMINISTRATIONS (CEPT) – *ECC Report 265: Migration from PSTN/ISDN to IP-based networks and regulatory aspects;* 2017, available at the following address: < https://www.ecodocdb.dk/download/754b9fdf-e4c5/ECCRep265.pdf >.

EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS – *Using videoconferencing to obtain evidence in civil and commercial matters under Council Regulation (EC) No 1206/2001 of 28 May 2001: A practical guide*; Brussels, European Union Commission, 2009, available at the following address: < https://e-justice.europa.eu/content_ejn_s_publications-287-en.do?clang=en >.

FEDERAL COURT OF AUSTRALIA – *Guide on Videoconferencing*; 2016, available at the following address: < http://www.fedcourt.gov.au/services/videoconferencing-guide >.

FEDERAL OFFICE OF JUSTICE OF SWITZERLAND – Guidelines on International Judicial Assistance in Civil Matters; 3rd ed., Bern, January 2013, p. 20, available at the following address: < http://www.rhf.admin.ch >.

GRUEN, M. E. & WILLIAMS, C. R. – *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings*; Administrative Conference of the United States, 2015, available at the following address: < https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings >.

INTERNATIONAL TELECOMMUNICATION UNION – *Standardization*; available at the following address: < https://www.itu.int/ITU-T/recommendations/index.aspx? >.

INTERNATIONAL TELECOMMUNICATION UNION – *Y.1001: IP framework – A framework for convergence of telecommunications network and IP network technologies*; 2000, available at the following address: < https://www.itu.int/rec/T-REC-Y.1001-200011-I >.

OFFICE OF INTERNATIONAL JUDICIAL ASSISTANCE OF THE U.S. DEPARTMENT OF JUSTICE, OIJA Evidence and Service Guidance (11 June 2018); available at the following address: < https://www.justice.gov/civil/evidence-requests >.

POLYCOM – *An Introduction to the Basics of Video Conferencing*; White Paper, 2013, available at the following address: < http://www.polycom.com/content/dam/polycom/common/documents/whitepapers/intro-video-conferencing-wp-engb.pdf >.

REID, M. – Multimedia conferencing over ISDN and IP Networks using ITU-T H-series recommendations: architecture, control and coordination; (1999) 31 *Computer Networks*, p. 234.

RIJAVEC, V., *et al* (eds) – *Dimensions of Evidence in European Civil Procedure*; The Netherlands, Kluwer Law International, 2016.

RISTAU, B. – *International Judicial Assistance (Civil and Commercial)*; Washington, D.C., International Law Institute, Georgetown University Law Center, vol. I, part V, 2000 revision.

ROWDEN, E., *et al* – *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings*; Sydney, University of Western Sydney, 2013.

TORRES, M. – Cross-Border Litigation: "Video-taking" of evidence within EU Member States, (2018) 12 *Dispute Resolution International* 1, p. 76.

UNITED KINGDOM MINSTRY OF JUSTICE – *Practice Direction 32 – Evidence*; available at the following address: < https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32 >.

UNITED STATES NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST) – Announcing the Advanced Encryption Standard (AES); (2001) 197 *Federal Information Processing Standards Publication*.

VAN RHEE, C.H. & UZELAC, A. (eds) – *Evidence in Contemporary Civil Procedure*; Cambridge, Intersentia, 2015.

VILELA FERREIRA, N., *et al. – Council Regulation (EC) no 1206/2001: Article 17º and the video conferencing as a way of obtaining direct evidence in civil and commercial matters*; Centre for Judicial Studies (*Centro de Estudos Judiciários*), Lisbon, 2010.

WILLIAMS, R. A. – Videoconferencing: Not a foreign language to international courts; (2011) *Oklahoma Journal of Law and Technology* 7(54).

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