

MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE TAKING OF EVIDENCE BOTH IN CIVIL AND CRIMINAL MATTERS

Introduction

The topic concerning mutual assistance for the service of process, taking of evidence or obtaining of information both in civil and criminal matters had been undertaken by the Committee's Secretariat with a view to preparation of the Draft for a regional or sub-regional Convention on the model of the Inter-American Convention on Letters Rogatory (1975) in pursuance of the Committee's decision taken at its Seventeenth Session held in Kuala Lumpur in June 1976.

This was in the context of the need felt to promote judicial cooperation as between the countries of the region in view of their wider involvement in trade, commerce and industrial development in recent years. Extensive investments had been made in the developing countries of the region in projects of national importance by countries both within and outside the region which have led to employment of technicians and other personnel from the investing countries in addition to vast movement of labour to the Middle East from overpopulated areas. These increasing contacts made it incumbent that proper judicial process should be available to facilitate protection of rights and enforcement of obligations of the parties involved which could not be achieved without adequate cooperation between the countries concerned. It was felt that a beginning in this direction could be made with the assistance being rendered in the service of process and taking of evidence abroad as these were considered to be areas where it might be relatively easy to achieve concrete results within a reasonable time frame.

The Committee's Secretariat had accordingly prepared the draft for a proposed multilateral Convention and this was placed before the Twentieth Session of the AALCC held in Seoul in February 1979. The Draft of the Convention dealing with civil and criminal matters was further considered at the Committee's Jakarta (1980) and Colombo (1981) Sessions. At the Colombo Session views were expressed by a

number of delegations that it would be preferable to have separate drafts, one to deal with civil or commercial matters and the other relating to assistance in criminal proceedings. The Committee also decided that the two drafts when prepared, should be considered by an Expert Group during the inter-sessional period.

The Expert Group which met at the Committee's Secretariat in New Delhi in August 1982 expressed the view that it would be preferable initially to contemplate bilateral arrangements for mutual assistance in judicial matters in order to promote contacts between the States of the region which could eventually provide a solid basis for a multilateral Convention on the pattern which had found acceptance in other regions. The Expert Group accordingly prepared the drafts of two model arrangements for judicial assistance on bilateral basis-one related to civil or commercial matters and the other on letters rogatory relatable to criminal proceedings. The draft models were placed before the Tokyo Session of the AALCC in May 1983 where the matter was extensively discussed.

The Plenary endorsed the approach of the Expert Group that it would be more productive at this stage to contemplate judicial assistance on bilateral basis and comments were accordingly invited from member governments on the two draft model arrangements. The modality of bilateral arrangements appeared to be generally acceptable to member governments and the comments received from governments on the drafts were either of a drafting nature or related to technical details.

At the Kathmandu Session, it was decided that the draft model for bilateral arrangements on mutual assistance for the service of process and the taking of evidence abroad in civil or commercial matters should be finalised by an Expert Group in the light of the comments received and that thereafter it be submitted to governments as the final recommendations of the Committee on the subject. There however, appeared to be some difference in views about the scope of the model arrangements on letters rogatory relatable to criminal proceedings.

A Working Group with the participation of the Hague Conference on Private International Law, the Commonwealth Secretariat, the League of Arab States together with the representatives of ten governments met at the Hague from the 24th to 26th June 1985 and finalised the draft of the model bilateral arrangements for mutual assistance relatable to civil and commercial matters.

The model text was thereafter examined and approved with some changes at the Arusha Session. The model text as finally approved has

been sent to member governments. It is felt that the member governments might find the model useful in assisting them to negotiate bilateral arrangements with interested governments. It may be mentioned that a country which is a party to a multilateral or regional convention is not precluded in any manner from entering into bilateral arrangements with countries which are not parties to such convention. Indeed there is nothing in the AALCC draft model bilateral arrangement which is inconsistent with the Hague Conventions or the Regional Conventions in force.

MODEL FOR BILATERAL ARRANGEMENTS ON MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS AND THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

Preamble

The States Parties to the present Arrangements, desirous of bringing about closer co-operation in the matter of mutual assistance for service of process, taking of evidence and other related functions in aid of judicial proceedings relating to civil or commercial matters,

Have agreed as follows:

CHAPTER I General Provisions

Article 1

Use of terms

For the purposes of these Arrangements:

- (a) *Process*: means any notice, writ, summons or any other type of document, which is required to be served on a party or witness in judicial proceedings relating to civil or commercial matters;
- (b) *Requesting State*: means the State which requests the service of process in the territory of another State or the State from which a request to take evidence, obtain information or perform some other judicial act emanates;
- (c) *Requested State*: means the State in which the service to be effected or the State in which the request is to be executed for taking of evidence, or performing some other judicial act or obtaining information;

(d) *Central Agency*: means the authority which is empowered:

- (i) to transmit to a Central Agency of the other Contracting State requests or letters of request for the purpose of service of process or for taking of evidence, or performing some other judicial act, or obtaining of information, emanating from a competent authority of its own State; and
- (ii) to receive and to take action on requests or letters of request transmitted by a Central Agency of the other Contracting State.

Article 2

Scope of the Arrangements

1. The Contracting States undertake to afford each other, in accordance with and subject to the provisions of these Arrangements, mutual assistance with regard to service of process, taking of evidence or performing some other judicial act, or obtaining of information, by means of requests or letters of request issued for the purpose, addressed by a competent authority in one State Party to a competent authority of the other State in civil or commercial proceedings.
2. Letters of request shall not be used for taking of evidence which is not intended for use in judicial proceedings.
3. The expression 'other judicial act' does not cover the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 3

Execution of request or letter of request non-commitment to recognition of the judgment

Execution of the request or the letter of request shall not imply ultimate recognition of the jurisdiction of the authority issuing it or a commitment to recognize the validity of the judgment it may render or to enforce it.

Article 4

Central Agency

1. Each Contracting State shall designate or establish a Central Agency through which requests or letters of request to the other Contracting State shall be transmitted. Requests or letters of request from the other Contracting State shall be received by the

Central Agency which shall forward them to the competent authorities in its own State for taking action.

Note: Federal States shall be free to designate or establish more than one Central Agency and this paragraph would need to be adapted accordingly.

2. Each Contracting State shall inform the other Contracting State the name and address of the Central Agency (or Agencies) designated or established in accordance with the provisions of this Article.

Article 5

Legalisation

The request or the letter of request shall be presumed to be duly legalised in the requesting State when the same is signed and bears the seal or stamp of a Central Agency.

Article 6

Language

1. The request or the letter of request and the appended documentation shall be drawn up in the _____ language(s) or be accompanied by a translation into that language/those languages.
2. The reply shall be prepared and transmitted in the language(s) specified in paragraph 1 or be accompanied by a translation.
3. Any translation accompanying a request or a letter of request shall be certified as correct, by a person qualified for this purpose under the law of either State.

Article 7

Time-limits

The competent authority issuing the request may indicate a time-limit for the service of process or taking of evidence, obtaining of information or performing some other judicial act in the requested State. The competent authority shall briefly state the reasons for establishing such time-limit. The Central Agency of the requested state shall communicate with the Central Agency of the requesting State if any

difficulty is experienced in adhering to the time-limit. The competent authority of the requesting State shall have the option to indicate a further period of time for taking action on the request.

Article 8

Compliance with the Arrangements

If the Central Agency of the requested State considers that the request or the letter of request does not comply with the provisions of the present Arrangements it shall promptly inform the requesting Central Agency and specify its objections.

Article 9

Grounds for non-compliance with the request or the letter of request

1. The execution of a request or of a letter of request may be refused if the requested State considers that its sovereignty, security, public policy or other essential interests (ordre public) would be prejudiced thereby.
2. The execution of a letter of request may also be refused if:
 - (a) the execution of the letter of request does not fall within the functions of the judiciary or any other competent organ of the requested State; or
 - (b) the requested State considers that the execution of the letter of request might prejudice the fundamental rights of any person; or that the letter of request concerns information held in confidence the disclosure of which is prohibited by law;
 - (c) [the letter of request seeks to obtain
 - (i) a statement from any person of the documents relevant to the proceedings to which the request relates which are or have been in his possession, custody or power; or
 - (ii) the production of any documents other than particular documents specified in the request as being documents appearing to the competent authority in the requesting State initiating the request to be, or to be likely to be, in his possession, custody or power.] * or
 - (d) [the letter of request relates to taking of evidence prior to judicial proceedings or in "pre-trial discovery of documents" as known in the common law system.] *

* In negotiating these Arrangements Governments may choose to include either sub-paragraph (c) or (d). These sub-paragraphs cover the same ground i.e. they allow the refusal of letters of request, issued in the context of pre-trial discovery of documents, which seek to obtain testimony on, or production of, unspecified documents ("fishing expeditions").

3. [Execution of a request or of a letter of request may not be refused solely on the ground that under its internal law the requested State claims exclusive jurisdiction over the subject-matter of the proceedings or that its internal law would not permit the bringing of the proceedings to which the request or letter of request relates.]
4. In any case in which the execution of a request or a letter of request is refused, the Central Agency of the requested State shall promptly inform the requesting Central Agency and state the grounds for such refusal.

CHAPTER II

Service of Process

Article 10

Form of Request

1. The authority competent under the law of the requesting State shall forward a request for the service of process to its own Central Agency for transmission to the requested State.
2. The request for the service of process shall be drawn up in accordance with form 'A' appended to the present Arrangements and the document to be served or a copy thereof shall be annexed to it. The request and the document shall both be provided in duplicate.

Article 11

Execution of request for service

1. The authorities of the requested State shall effect service of the process on the person to be served by any method prescribed or permitted by its internal law.
2. Where the competent authority of the requesting State has indicated any particular method of service, an endeavour shall be made to comply with such request provided that the same is not inconsistent with the laws of the requested State.

3. A summary of the document to be served, drawn up in accordance with form 'C' appended to the present Arrangements, shall be served together with the document.

Article 12

Certificate of the executing authority for service of process

The Central Agency of the requested State or any authority which it may have designated for that purpose, shall complete a certificate in form 'B' appended to the present Arrangements.

Article 13

Costs

The requested State shall be entitled to be reimbursed by the requesting State:

- (a) the fees or charges paid for effecting service as authorised under the law of the requested State; and
- (b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.

Article 14

Service of process by diplomatic or consular officers

A diplomatic or consular officer of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, effect service of judicial documents upon his own nationals provided no measures of compulsion be applied.

Article 15

Service of process by post and other modes*

Subject to any objection on the part of a Contracting State:

- (a) each Contracting State may send judicial documents by postal channels, directly to persons in the other Contracting State;
- (b) the judicial personnel, officials or other competent persons in a

* The Contracting Parties whilst negotiating may consider which of these modes, if any, are to be included in the bilateral Arrangements.

Contracting State may effect service of judicial documents directly through the judicial personnel, officials or other competent persons in the other Contracting State; and

- (c) any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial personnel, officials [legal practitioners] or other competent persons in the other Contracting State.

CHAPTER III

Taking of Evidence

Article 16

FORM OF REQUEST

1. The authority or Judicial officer competent under the law of the requesting State shall forward to its own Central Agency a letter of request for taking of evidence or performing some other judicial act of an analogous nature with the request to transmit it to the Central Agency of the requested State. The letter of request shall be drawn up in form 'D' appended to the present Arrangements.
2. The relevant authorities in the requesting State shall ensure that its formalities and procedures prescribed by its laws for the admissibility of validity of the requests made in the letter of request are fully complied with before taking any action under this article.

Article 17

Execution of letters of request

1. The authority responsible for the execution of letters of request shall apply its internal law as to the methods and procedures to be followed.
2. However, it shall follow any special method or procedure specified in the letter of request unless that procedure conflicts with the internal law of the requested State or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

3. [If the requesting State desires witnesses or experts to give evidence on oath, it shall expressly so state, and the requested State shall comply with the request if its internal law does not prohibit the same.]
4. In the execution of the letter of request, the authorities of the requested State shall not require any person to give evidence in respect of any matter where he has a privilege or duty to refuse to give such evidence under the law of the requested State or of the requesting State.
5. The requested State may transmit original or certified copies of records or documents requested.

Article 18

Notice to the requesting authority regarding time and place of the execution of the request

1. On the express request of the requesting authority the requested State shall inform that authority of the time when, and the place where, the proceedings will take place. The requested State shall endeavour to send such information directly to the parties when the authority of the requesting State so desires.
2. The officials designated by the requesting State and parties concerned may be present or be represented at the proceedings, if the same is not inconsistent with the internal law.

Article 19

Application of the measures of compulsion by the authority

[In the execution of the letter of request, the requested authority shall apply appropriate measures of compulsion in the instances and to the same extent as are provided for by its internal law.]

Article 20

Costs

1. The requested State shall be entitled to be reimbursed by the requesting State:
 - (a) the fees or charges paid to experts, witnesses, interpreters or any

other person as authorised under the law of the requested State; and

- (b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.
2. [The requested State whose law obliges the parties themselves to secure evidence may, after having obtained the consent of the requesting Central Agency, appoint a suitable person to execute the letter of request. When seeking such consent the requested Central Agency shall indicate the approximate costs which would result from following of this procedure. If the requesting Central Agency gives its consent the requesting State shall reimburse the costs incurred; without such consent the requesting State shall not be liable for the costs.]

Article 21

Taking of evidence by diplomatic or consular officers

1. A diplomatic or consular officer of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, take the evidence of nationals of his home State in aid of proceedings commenced in the courts of that State, without application of any compulsion.
2. If an attempt to obtain evidence in the manner provided for in paragraph 1 of this Article fails, it shall not prevent a letter of request being subsequently sent to the Central Agency of the requested State in accordance with Article 16 of these Arrangements.

Article 22

Taking of evidence by commissioner

The Commissioner appointed by a judicial authority in a Contracting State to record the evidence of a witness or expert, for the purposes of proceedings pending before it, may take such evidence in the other Contracting State, provided a competent authority of that State has given its endorsement or authorisation on the warrant of commission and subject to such terms and conditions as may be specified in the endorsement or authorisation.

CHAPTER IV

Request for Information and Documents

Article 23

Request for information on laws and regulations

The Contracting States agree to furnish each other with information on their laws and regulations relating to civil or commercial matters, both substantive and procedural, whenever a request is made by a Contracting State.

Article 24

Requests for judicial records

1. Upon the request made by a judicial authority of the requesting State transmitted through the Central Agency, extracts from and information relating to judicial records shall be made available to the same extent and in like manner as these are available as between the judicial authorities in the requested State.
2. The requesting authority shall specify the purpose for which the extract or information referred to in paragraph 1 is required and may not use such extract or information for any other purpose.
3. If compliance with any request made under this Article involves expense for the requested State, it may obtain reimbursement of such expense from the requesting State.

CHAPTER V

Final Provisions

Article 25

Entry into force of the Arrangements

1. [The present Arrangements shall be subject to ratification]
2. [The Arrangements shall enter into effect _____ days]

after the date of exchange of instruments of ratification and shall remain in force for a period of _____ years]

Article 26

Other international agreements, practices or arrangements

Except as may be specified herein, nothing in these Arrangements shall affect existing or future bilateral or multilateral agreements, practices or other arrangements between the Contracting States which relate to matters dealt with in these Arrangements.

Note: If certain existing bilateral or multilateral agreements, practices or arrangements are to be replaced or superseded, in whole or in part, and those agreements or arrangements so permit, this should be specified in a second paragraph to this Article.

Article 27

Difficulties arising in operation of the Arrangements to be settled through negotiation

Any difficulties which may arise between Contracting States in regard to the interpretation or application of these Arrangements shall be settled through negotiation.

Article 28

Revision of the Arrangements

At the request of any Contracting State, the State Parties shall enter into negotiations with a view to examine the provisions of these Arrangements and to consider the advisability of a revision or of an enlargement of the scope of these Arrangements.

Article 29

Denunciation of the Arrangements

Either Contracting State may denounce these Arrangements by means of a notification communicated to the other State Party. Denunciation shall take effect six months after the date of receipt of such instrument of denunciation.

Note: The Committee decided that the provisions in regard to which

some differences of view had been expressed should be placed within square brackets [] so that the governments may give special consideration to those articles whilst negotiating agreements.

APPENDIX

The delegate of Pakistan suggested that the following articles be included in the draft:

Provisions relating to equality of treatment in judicial matters

Article X

The nationals of a Contracting Party shall, in the territory of the other Party, be entitled to legal protection for their persons and property and to bring actions or defend themselves under the same conditions, including charges and costs, and shall enjoy the same rights as the nationals of the other Contracting Party.

Article Y

The nationals of a Contracting Party resident in the territory of the other Party shall not be constrained to effect any payment as security for court costs which the nationals of the other Party are not obliged to deposit or pay.

Article Z

The nationals of a Contracting Party shall, in the territory of the other Party, enjoy free legal aid on the same basis as the nationals of the latter.

**ANNEX TO THE DRAFT OF MODEL BILATERAL
ARRANGEMENTS ON MUTUAL ASSISTANCE FOR THE
SERVICE OF PROCESS AND THE TAKING OF EVIDENCE
ABROAD IN CIVIL OR COMMERCIAL MATTERS**

FORMS

- i. Request for Service - Form 'A'
- ii. Certificate - Form 'B'
- iii. Summary of the Document to be served - Form 'C'
- iv. Request for Taking of Evidence - Form 'D'

**ANNEX TO THE ARRANGEMENTS*
REQUEST FOR SERVICE****

FORM 'A'

1. REQUESTING CENTRAL AGENCY:
ADDRESS
2. RECEIVING CENTRAL AGENCY:
ADDRESS
3. REFERENCE: Of the requesting authority
4. SUBJECT OF THE REQUEST: Service abroad of documents
(documents listed below** enclosed in duplicate)***
5. ADDRESSEE OF THE DOCUMENT:
(A) NAME (In Capitals):

(B) Where applicable, further details
for identification of the address:

(C) ADDRESS:

(D) COUNTRY:

* As referred to in Article 10 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.

** This form must be drawn up in duplicate, one being the original, the other the copy.

*** In the event of service of summons on an action instituted, a copy of the complaint or statement of claim shall be provided.

6. METHOD OF SERVICE REQUESTED:

- (a) in accordance with the method prescribed by internal law of the requested State:-
- (b) in accordance with the following method:-

7. IDENTITY AND ADDRESS OF THE ADDRESSEE:

If the requested authority requires additional information for effecting service, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished:_____. The document sent with the this request should however be retained with the requested authority pending supply of the additional information by the requesting authority.

8. TIME-LIMITS:

The document should be served before _____ (Date). The reasons for fixation of the time-limit are the following:_____. If it is not possible to effect service by the dates specified, the document should be returned unserved/it should be served whenever possible.*

The authority is requested to return or arrange to have returned to the requesting authority a copy of the documents - and of the annexes - with a CERTIFICATE as provided in Form 'B'.

List of documents _____ Done
at _____ the

Signature and/Seal _____

*Delete whichever is inapplicable.