

ANSWERS OF THE MACAO SPECIAL ADMINISTRATIVE REGION (MSAR) OF THE PEOPLE'S REPUBLIC OF CHINA (PRC) TO THE QUESTIONNAIRE ON THE OPERATION OF THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

Introduction

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Convention) was extended to Macao with effect from 14/12/1999.

After the Reunification, some of the previous treaties in force in Macao have continued to apply to the MSAR. On 16 December 1999, the PRC notified the Netherlands' Ministry of Foreign Affairs that it would assume the responsibility for the international rights and obligations arising from the application of the Convention to the MSAR.

Considering some of the questions raised in the questionnaire, it is relevant to mention that the MSAR legal system is a civil law system

The Questionnaire

1. Do you have at your disposal recent precedents delivered pursuant to the 1970 Convention and which would be relevant for the Special Commission? If so, can you provide them to us? Insofar as the text of the ruling is drafted in a language other than English or French, a summary in the English or French language of the facts and grounds for the ruling would be very helpful.

Considering that the Convention has been applying to the MSAR only since 14 December 1999, no significant rulings have yet been delivered pursuant to the Convention.

2. Do you have at your disposal statistics relating to the number of requests to obtain evidence addressed to your State from different States Party to the Convention?

There are no available statistics. Until now, very few requests have been received and forwarded to obtain evidence under the Convention. It is roughly estimated that 16 requests have been forwarded and received to obtain evidence.

3. *Have you encountered practical difficulties connected with application of the Convention?*

No significant practical difficulties have been encountered with application of the Convention.

4. *In light of the terminology used in the Practical Handbook for the Service Convention (see provisional version of the new Practical Handbook, Prel. Doc. No 1, (I-5.-B)), do you have at your disposal precedents determining whether the Convention is considered as “mandatory” by your State? Do you have at your disposal case-law determining whether the Convention is considered as “exclusive” by your State?*

The MSAR legal system is a civil law system. Therefore, there is no system of precedent. Each judge makes his own interpretation of the applicable legislation and is not bound to follow a decision previously rendered by another court for similar cases.

Until now, there were no decisions on this subject.

5. *If your State has stated a reservation under Article 23 of the Convention, has that reservation been asserted to deny performance of requests to obtain evidence from abroad?*

In accordance with Article 23 of the Convention, the PRC has declared, by letter of notification of 16 December 1999, that the MSAR will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents known in common law countries.

This reservation has been done due to the fact that pre-trial is not allowed by the MSAR legal system.

6. *At the Special Commission of 1989, it was recommended that priority be granted to the procedures provided for under the Convention for their requests to obtain evidence located abroad, and that States having made or proposing to make reservation under Article 23 should limit its scope. Do you consider this recommendation to have been helpful? Has it been applied in practice?*

In the MSAR, the procedures provided for under the Convention are expeditious and generally do not result in delays.

Recommendations that may expedite the procedures are considered useful in the sense that they help to render effectiveness and optimise the implementation of the Convention.

7. The Permanent Bureau has been faced on several occasions with the issue whether the Convention applies to arbitration proceedings. This issue was discussed at the Special Commission in May 1985, but the Commission had considered at the time that there was no need to adopt a Protocol in this respect. For its part, the 1989 Special Commission stated that the law of certain countries provided for legal assistance to obtain evidence in arbitration matters, in which case the Convention might be used in order to seek evidence abroad.

The position advised by the Permanent Bureau is that the benefit of the Convention may extend to arbitration proceedings insofar as the arbitration panel sends its request to obtain evidence abroad to a judicial authority of its State, which will then assume forwarding to the State addressed of the request to obtain evidence: as the arbitration panel cannot be treated as a judicial authority for the purposes of the Convention, it cannot itself forward the request to obtain evidence directly to the State addressed.

Have you had occasion to deal with such requests to obtain evidence in the course of arbitration proceedings?

Do you share the view of the Permanent Bureau?

The MSAR shares the view of the Permanent Bureau in what concerns the requests to obtain evidence in the course of arbitration proceedings.

In fact, the MSAR legal framework on arbitration allows the arbitration panel to request the court's assistance in order to obtain evidence. According to the MSAR Civil Procedure Code, in order to obtain evidence abroad, a letter of request must be forwarded by the MSAR court to the foreign competent authorities.

Until now, the MSAR competent authorities have not had any occasion to deal with requests to obtain evidence in the course of arbitration proceedings.

8. What is the average time elapsing between receipt of the request to obtain evidence and its performance?

The average time elapsing between receipt of the request to obtain evidence and its performance is around 1 month but, in certain cases, it can go up to 4 months.

9. Do you allow the representatives of a requesting Court to take part in the execution pursuant to Article 8 of the Convention?

The representatives of a requesting court are not allowed to take part in the execution, as no positive declaration has been made regarding the MSAR, under the terms of Article 8, allowing the representatives to do so.

10. Do your Central Authorities accept to receive requests by electronic means to obtain evidence from abroad?

According to the MSAR Civil Procedure Code, requests to obtain evidence can be transmitted by any means, including fax and e-mail, under the terms foreseen in specific legislation.

In what concerns the use of fax, the existing law requires the original request and documents attached to be presented to the court afterwards. In what concerns e-mail, no law has been enacted yet.

11. Have your authorities received or forwarded requests to obtain evidence requiring the use of new information technology? If so, were these requests fulfilled?

Until now, the MSAR authorities did not receive or forward requests to obtain evidence requiring the use of new information technology.

12. Would you consider it useful to have a recommendation adopted for the promotion of the use of modern communication technologies? Do you consider that development of a new instrument ought to be considered in order to deal more specifically with these issues?

The impact of new technologies and their potential use in the context of the Convention are considered important issues that should be addressed.

As modern communication technologies are being introduced to the MSAR courts, the adoption of a recommendation for the promotion of the use of such technologies is envisaged favourably as it could contribute to accelerate the domestic procedure for adoption of legislation on the use of electronic means.