International Lawyer

Volume 47 | Number 2 Article 8

2013

No Fifth; No Problem: The Availability of a Stay of Discovery for Foreign Non-Party Witnesses

Owen R. Wolfe

No Fifth? No Problem: The Availability of a Stay of Discovery for Foreign Non-Party Witnesses

OWEN R. WOLFE*

Abstract

In today's global economy, more civil cases may be decided on the basis of critical testimony from foreign witnesses. Often, these witnesses—such as employees or former employees of a corporation that is being sued—may not be parties to the civil litigation. Most courts have not yet addressed the issue of whether the unavailability of these critical witnesses due to a criminal proceeding in their home country might be grounds for a stay of civil litigation in the United States. Looking to the Hague Convention on the Taking of Evidence Abroad, this article argues that these foreign, non-party witnesses should be treated just as a domestic witness would be if he or she was unavailable due to the assertion of the Fifth Amendment. In cases where the foreign witness is critical to the case, a stay should be issued pending the resolution of the foreign criminal proceeding.

I. Introduction

In today's global economy, more civil cases may be decided on the basis of critical testimony from foreign witnesses. Often, these witnesses—such as employees or former employees of a corporation that is being sued—may not be parties to the civil litigation. There is a wealth of case law on the availability of a stay of discovery when these kinds of non-party witnesses are unavailable due to a pending criminal proceeding in the United States. Incredibly, however, there is next to no case law on what happens when the witness is unavailable due to a criminal proceeding in a foreign country, despite the fact that foreign corporations are repeatedly sued in the United States.

The difference is critical because all of these cases involving witnesses who are subject to a U.S. criminal proceeding are based on the witness' assertion of the Fifth Amendment. But as the U.S. Supreme Court has held, the Fifth Amendment cannot be invoked in a U.S. proceeding for fear of self-incrimination in a *foreign* criminal proceeding.[1] Thus, we

* 2012 Graduate of The Ohio State University Moritz College of Law and an attorney at an international law firm based in New York City. The author previously worked as a research assistant for Professors Edward Foley, Dale Oesterle, and Daniel Tokaji at The Ohio State University Moritz College of Law and as a summer associate at Vorys, Sater, Seymour, and Pease LLP in Columbus, Ohio. The views expressed herein are my own.

1. United States v. Balsys, 524 U.S. 666, 669 (1998).

are left with the question of whether U.S. courts should recognize the unavailability of foreign witnesses who are unable to invoke the Fifth Amendment and grant stays of discovery as to those witnesses. Though it appears that no court in the United States has yet addressed this issue, the answer should be yes.

First, I discuss the basic framework under federal law for assessing when the unavailability of a non-party witness might warrant a stay of discovery. Second, I examine the *Balsys* decision, which held that the Fifth Amendment was inapplicable to fears of criminal prosecution in a foreign country. Third, I examine why foreign criminal proceedings might still render non-party witnesses unavailable if their deposition testimony is subject to the Hague Convention. Finally, I briefly examine when the Hague Convention applies to non-parties in civil litigation in the United States.

A. The Federal Standard for a Stay of Discovery Pending Related Criminal Proceedings

Federal courts typically identify six factors in determining whether a stay of discovery should be issued due to pending criminal proceedings against a witness:

> 1) the extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; 4) the private interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest.[2]

Some courts have identified additional factors as well, such as the good faith of the litigants or whether and when the privilege against self-incrimination was asserted.[3]

With regard to non-party witnesses, the analysis is a bit more complicated. Generally, however, federal courts recognize that the unavailability of a non-party witness is a ground for a stay of discovery.[4] In *Douglas v. United States*, the plaintiffs sued the United States government to obtain a tax refund, while the government argued that the plaintiffs were not entitled to a refund because their tax returns had been fraudulent.[5] There was a related criminal proceeding in which plaintiffs were not involved, focusing on whether the financial transaction listed in the tax return was indeed fraudulent.[6] The court granted a stay, holding that the non-parties involved in the criminal proceeding would be witnesses in the civil suit and the unavailability of those non-parties "would directly impact the Government's ability to prove their counterclaim and defend themselves against the [plaintiffs'] suit."[7]

In a similar case, plaintiffs—two LLCs—sued the Internal Revenue Service (IRS) in a civil proceeding "seeking redetermination of adjustments that the [IRS] made to the part-

2. *See, e.g., In re* WorldCom, Inc. Sec. & ERISA Litig., Nos. 02 Civ. 3288 (DLC), 02 Civ. 4816 (DLC), 2002 U.S. Dist. LEXIS 23172, at *12 (S.D.N.Y. Dec. 5, 2002).

3. *See, e.g., In re* Enron Corp. Secs. Litig., MDL-1446, 2006 U.S. Dist. LEXIS 90529, at *6-7 (S.D. Tex. Dec. 12, 2006).

4. *See generally* Douglas v. United States, Nos. C 03-04518 JW, C 04-05357 JW, 2006 U.S. Dist. LEXIS 52754 (N.D. Cal. July 17, 2006).

5. *Id.* at *5-6.

6. *Id.* at *7-9.

7. *Id.* at *15-16.

nership income tax returns" filed by plaintiffs.[8] There was a related criminal proceeding involving an accountant and a lawyer who were not parties to the civil suit, the result of which would help determine whether fraud had occurred in the tax filings of the civil plaintiff LLCs.[9] One of the indicted non-parties "would be an important witness in this [civil] case," while the indicted attorney was "[a]nother likely witness."[10] The court concluded that "[c]ivil discovery should not impinge upon the *Fifth Amendment* rights of this key witness or force him to prematurely disclose any part of the defense he intends to raise at the [criminal] trial."[11]

Federal courts do not grant these stays in all situations, however.[12] In *WorldCom*, the court denied a request from a group of underwriter defendants seeking a stay due to a pending criminal case against the former CFO and Controller of WorldCom.[13] Part of the court's rationale was that all documents the underwriters needed to make an effective defense were in the underwriters' possession, belying the argument that the CFO and Controller were critical to the underwriters' ability to defend themselves.[14]

One court—an apparent outlier—has stated that "a stay is almost never appropriate where the criminal defendant is not a party to the civil action."[15] There was no argument made that the non-party was a critical witness, however, as his criminal proceeding was about tax fraud and the main issue in the civil case was whether the criminal defendant's estranged wife owned property, pursuant to a separation agreement, that was seized by the IRS.[16] Furthermore, the non-party criminal defendant had not been indicted and, in fact, had "only received a 'target letter' informing him that he [was] the subject of a criminal investigation."[17]

This last point is incredibly important because federal courts almost uniformly refuse to grant stays unless an indictment has been issued.[18] In addition to *Beauchamp*, the South-

8. AWS Mgmt., LLC v. United States, Nos. 05-1056 CW, 05-1058 CW, 2006 U.S. Dist. LEXIS 24894, at *2 (N.D. Cal. Mar. 29, 2006).

9. *Id.* at *3.

10. *Id.* at *4.

11. *Id.* at *9 (italics in original); *see also* Cutting v. United States, 204 F. Supp. 2d 216, 221 (D. Mass. 2002) (noting that the court had earlier stayed a tort action against the United States until the criminal trial of the non-party employee of the United States who committed the underlying tort had been completed); La Reunion Francaise Soc. Anon. D'Assurances es des Reassurances v. J.E. Brenneman Co., No. 01-5612, 2007 U.S. Dist. LEXIS 47312, at *22-24 (D.N.J. June 28, 2007) (noting that the court had earlier stayed the proceedings due to the pending criminal proceeding against two key individuals who were non-parties in the case); SEC v. Treadway, No. 04 Civ. 3464 (VW)(JCF), 2005 U.S. Dist. LEXIS 4951, at *8-9 (S.D.N.Y. Mar. 30, 2005) (granting stay of discovery pending criminal proceedings of non-parties).

12. *See generally In re WorldCom*, 2002 U.S. Dist. LEXIS 23172.

13. *In re WorldCom*, 2002 U.S. Dist. LEXIS 23172, at *28.

14. *Id.* at *29.

15. Beauchamp v. United States, No. 97-CV-6372T, 1998 U.S. Dist. LEXIS 1458, at *7 (W.D.N.Y. Jan. 16, 1998). The court cited only one case to support the claim that criminal proceedings against non-parties usually do not support a stay, United States v. One 1967 Ford Galaxie, 49 F.R.D. 295, 297 (S.D.N.Y. 1970). *Ford Galaxie* cited no authority for the idea that the unavailability of non-parties generally does not warrant a stay and based its decision on the fact that there were no cases granting a stay to a non-party (rather than any cases holding that such a stay was unavailable).

16. *Beauchamp*, 1998 U.S. Dist. LEXIS 1458, at *1-3.

17. *Id.* at *5, 8.

18. *See e.g.*, *Beauchamp*, 1998 U.S. Dist. LEXIS 1458; *see generally* SEC v. First Jersey Sec., Inc., No. 85 Civ. 8585 (RO), 1987 U.S. Dist. LEXIS 10157 (S.D.N.Y. Mar. 26, 1987).

ern District of New York, in *SEC v. First Jersey Securities, Inc.*, held that a stay was not appropriate because the non-party witnesses were only targets of a grand jury investigation and had not yet been indicted.[19] Other courts have noted the importance of indictments in the availability of a stay.[20]

First Jersey has some troubling language for corporate defendants whose employees, while not technically parties to the suit, are potential witnesses in the dispute. The court suggested that where a corporation is unindicted, a non-party employee's assertion of the Fifth Amendment could *never* justify a stay in civil litigation against the corporation, because that "would be tantamount to permitting the employee to invoke the privilege on behalf of the corporation."[21] Subsequent courts, however, have viewed this case as being limited to situations where the non-party witnesses are unindicted.[22] Therefore, *First Jersey*'s statements are not as problematic for corporate defendants as they might seem at first glance.

In order to be unavailable, however, the non-parties need to be able to invoke the privilege against self-incrimination. While other factors in the stay analysis could still weigh in favor of a stay, the fact that the witness would not truly be unavailable would be hard to overcome in convincing a court to issue a stay of discovery. This is a problem where the non-party witness resides in a foreign country and is subject to criminal prosecution there, because that kind of witness cannot invoke the Fifth Amendment in U.S. civil proceedings.

B. The Fifth Amendment and Foreign Criminal Proceedings

Aloyzas Balsys was a resident alien living in New York when he came under investigation from the U.S. Department of Justice's Office of Special Investigations, which suspected that Balsys "participated in Nazi persecution during World War II."[23] At a deportation hearing, Balsys attempted to rely on the Fifth Amendment and refused to answer any questions about his past, citing the potential for "criminal prosecution [in] Lithuania, Israel, and Germany."[24] The district court found that the Fifth Amendment could not be invoked in order to avoid self-incrimination in a foreign criminal proceeding.[25]

The Second Circuit reversed this decision, finding that as long as "a witness [has] a real and substantial fear of prosecution by a foreign country, [he] may assert the *Fifth Amendment* privilege to avoid giving testimony in a domestic proceeding, even if the witness has

19. *Id.* at *15.

20. *See* SEC v. Treadway, No. 04 Civ. 3464 (VW)(JCF), 2005 U.S. Dist. LEXIS 4951, at *8-9 (S.D.N.Y. Mar. 30, 2005) (granting stay of discovery, pending criminal proceedings of non-parties who had been indicted in criminal case); SEC v. Google, No. 3:95cv00420 (AVC), 1997 U.S. Dist. LEXIS 20878, at *8-9 (D. Conn. Apr. 30, 1997) ("The defendant is now under indictment . . . accordingly, the court grants the defendant's motion to stay"); United States v. Certain Real Property & Premises, 751 F. Supp. 1060, 1063-64 (E.D.N.Y June 8, 1989) (granting a stay to the civil defendants where one civil defendant had been indicted).

21. *See First Jersey*, 1987 U.S. Dist. LEXIS 10157, at *16.

22. *See Treadway*, 2005 U.S. Dist. LEXIS 4951; *see also Google*, 1997 U.S. Dist. LEXIS 20878; *see also Certain Real Property*, 751 F. Supp. 1060.

23. United States v. Balsys, 524 U.S. 666, 669-70 (1998).

24. *Id.* at 670.

25. United States v. Balsys, 918 F. Supp. 588, 600 (E.D.N.Y. 1996).

no valid fear of criminal prosecution in this country."[26] The Second Circuit's holding was directly at odds with a number of other circuit courts.[27] The U.S. Supreme Court disagreed with the Second Circuit and held that the Fifth Amendment did not apply to the risk of criminal prosecution in a foreign country.[28] The reasoning was essentially that the Fifth Amendment only applies to a sovereign that is also bound by the Fifth Amendment.[29]

C. The Hague Convention Allows Invocation of a Foreign Privilege Against Self-Incrimination

Nonetheless, foreign litigants subject to the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention) may be able to invoke a foreign privilege against self-incrimination in order to avoid testifying in U.S. civil litigation. The Hague Convention permits parties in a signatory nation to obtain discovery from individuals or entities located in another signatory nation.[30] Article 11 of the Hague Convention allows parties from whom evidence is sought to assert any "privilege or duty to refuse to give the evidence . . . under the law of the State of execution."[31]

The case law on this topic is limited, but a number of federal courts have recognized the applicability of Article 11 to a foreign party's refusal to testify in U.S. civil discovery when discovery is sought through the Hague Convention. For example, the court in *In re Urethane Antitrust Litigation*[32] noted that,

> Article 11 of the Hague Convention permits a person being questioned "to refuse to give evidence insofar as he has a privilege or a duty to refuse to give the evidence" under the law of either the state of origin (i.e., the United States) [or] the state of execution (i.e., Germany).[33]

Similarly, the court in *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*[34] addressed whether the litigants were required to inform deponents that they had a right to invoke a foreign privilege against self-incrimination under the Hague Convention.[35] The court concluded that Hague Convention requests need not inform the foreign targets of

26. *Balsys*, 524 U.S. at 670-71 (italics in original) (citing United States v. Balsys, 119 F.3d 122 (2d Cir. 1997)).

27. *Id.* at 671 n.2 (citing United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997) (en banc)); *See* United States v. (Under Seal), 794 F.2d 920, 926 (4th Cir. 1986); *see also In re* Parker, 411 F.2d 1067, 1070 (10th Cir. 1969).

28. *Balsys*, 524 U.S. at 671.

29. *See id.* at 675, 689-90.

30. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241.

31. *Id.* art. 11.

32. *See generally In re* Urethane Antitrust Litig., 267 F.R.D. 361 (D. Kan. 2010).

33. *Id.* at 367 n.12; *see also* Nursing Home Pension Fund v. Oracle Corp., No. C01-00988 MJJ, 2007 U.S. Dist. LEXIS 49851, at *53 (N.D. Cal. June 29, 2007) (denying motion to compel testimony of a non-party witness because witness had a privilege against self-incrimination under English law in deposition conducted pursuant to Hague Convention).

34. *See generally* Pronova BioPharma Norge AS v. Teva Pharm. USA, Inc., 708 F. Supp. 2d 450 (D. Del. 2010).

35. *Id.* at 454.

discovery that they have rights under Article 11, but that "these individuals may avail themselves of the privilege provided in this country and in the executing country."[36]

Thus, as long as the non-party witness resides in a country with a privilege against self-incrimination, any depositions sought from that witness via the Hague Convention would be subject to that privilege. Assertion of that privilege, in turn, could render the witness "unavailable" and, depending on how critical that witness is to the case, could justify a stay of discovery. The problem is that the Hague Convention does not always apply when seeking depositions from a foreign witness.

D. When Does the Hague Convention Apply?

In *Societe Nationale Industrielle Aerospatiale v. United States District Court*,[37] the U.S. Supreme Court held that the Hague Convention was not the exclusive means by which a party could obtain evidence from someone in a foreign country.[38] In other words, the Hague Convention is just another option that is "available whenever [it] will facilitate the gathering of evidence."[39] All of this is true "even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention."[40] The Court went on to note that attempting to go through the Hague Convention would only be required as an initial matter if an analysis showed that "comity requires resort to [the] Hague Evidence Convention . . . [because] sovereign interests, and [the] likelihood that resort to those procedures will prove effective" indicate that the Hague Convention is the proper method for obtaining evidence.[41]

Aerospatiale involved the taking of evidence from a foreign party to litigation.[42] Nonetheless, courts have applied its reasoning to foreign non-parties as well. Some state courts have set a de facto rule that under a comity analysis, "[w]hen discovery is sought from a nonparty in a foreign jurisdiction, application of the Hague Convention . . . is virtually compulsory."[43] Federal courts, on the other hand, have generally been more nuanced in their application of the comity analysis to evidence sought from non-parties.

A particularly instructive case with a thorough analysis is *Tiffany (NJ) LLC v. Qi Andrew*.[44] In that case, the plaintiffs sought discovery from three non-parties—Bank of China, Industrial and Commercial Bank of China, and China Merchants Bank—with branches in New York.[45] The court noted that if a non-party has the ability to obtain the requested information, it has to do so under the Federal Rules of Civil Procedure.[46] The court rejected the arguments of the Chinese banks that the branch offices had no control

36. *Id.*

37. *See generally* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

38. *Id.* at 536.

39. *Id.* at 541.

40. *Id.* at 528.

41. *See id.* at 544.

42. *See generally Aerospatiale*, 482 U.S. 522.

43. Orlich v. Helm Bros., 560 N.Y.S.2d 10, 14 (App. Div. 1990); *see also* Francesca v. Agusta-Vacca-Graffagni *ex rel.*, 567 N.Y.S.2d 664, 665 (App. Div. 1991).

44. *See generally* Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011).

45. *Id.* at 144-46.

46. *Id.* at 147.

over these documents, noting that the plaintiffs served the entire corporation rather than just the branch offices.[47]

Because Chinese law would prohibit the banks from complying, however, the court performed a comity analysis to see if the plaintiffs would first be required to utilize the Hague Convention before resorting to the discovery procedures in the Federal Rules of Civil Procedure.[48] The comity factors cited by the court were,

> (1) the importance of the documents or information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of retrieving the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located. In addition, courts . . . may also consider the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery.[49]

In weighing those factors, the court in this case found that the first two factors favored the plaintiffs, but the other factors all weighed in favor of the Chinese banks.[50]

Specifically, the court found that the information was in China, that the Hague Convention was available as an alternative, and that because the banks were non-parties, the United States' interests in this case were lessened, while China's interest in the privacy of its banking system was quite important.[51] Finally, the burden on the foreign party was severe, because of the potentially harsh sanctions that could come from violating Chinese law, and there was no evidence that the Chinese banks were acting in bad faith.[52] Therefore, the court held that the plaintiffs must first attempt to get the evidence they were seeking through the Hague Convention.[53] Even so, the court left open the possibility that the plaintiffs could utilize the Federal Rules of Civil Procedure if their attempt to obtain the evidence through the Hague Convention was unsuccessful.[54]

Other courts have disagreed with this outcome.[55] A prime example is *First American Corp. v. Price Waterhouse LLP*. In that case, as in *Tiffany*, the court went through a rigorous comity analysis.[56] Yet unlike *Tiffany*, the court refused to require use of the Hague Convention as a first resort.[57] In applying the comity analysis, the court argued that the United States' interest in adjudicating disputes outweighed the United Kingdom's interest

47. *Id.* at 149-50.
48. *Id.* at 151.
49. *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted).
50. *Id.* at 160.
51. *Id.* at 152-58.
52. *Id.* at 159-60.
53. *Id.* at 160.
54. *Id.* at 160-61.
55. *See generally* First Am. Corp. v. Price Waterhouse LLP, 988 F. Supp. 353 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 16 (2d Cir. 1998); *see also* Dietrich v. Bauer, No. 95 Civ. 7051 (RWS), 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. Aug. 9, 2000). In the *Dietrich* case, however, this appeared to be partly the fault of the non-party, who did not address at all why the comity factors should require resort to the Hague Convention, relying instead on a bare statement that the Hague Convention was "appropriate." *Dietrich*, 2000 U.S. Dist. LEXIS 11729, at *14-15.
56. *Id.* at 364.
57. *Id.*

in its confidentiality laws, which were qualified and not absolute; the scope of the request was limited, meaning that there was less of a burden on the non-party to comply and there were no allegations of bad faith.[58]

Notably, the *First American Corp.* court did not go through all of the factors in its comity analysis that the *Tiffany* court went through.[59] Also of note, however, is that the *Tiffany* court made little or no effort to distinguish *First American Corp.* or explain why the cases came out differently.[60] The Second Circuit affirmed the district court decision in *First American Corp.*, while noting that "non-party status is a consideration in the comity analysis."[61]

Interestingly, some other federal courts have agreed with New York state courts and will almost always require resort to the Hague Convention when evidence is sought from a non-party. This was the case in the District of Delaware, where the court relied on New York state court cases in holding that "[r]esort to the [Hague Convention] in this instance is appropriate since both [witnesses] are not parties to the lawsuit, have not voluntarily subjected themselves to discovery, are citizens of the Netherlands, and are not otherwise subject to the jurisdiction of the Court."[62] Other courts have at least agreed that a witness's non-party status should make application of the Hague Convention more likely, stating, for instance, that "[r]esort to using the procedures of the Hague Convention is particularly appropriate when, as here, a litigant seeks to depose a foreign non-party who is not subject to the court's jurisdiction."[63]

II. Conclusion

Generally speaking, stays of discovery are available for critical non-party witnesses who have been indicted in a pending criminal proceeding and are "unavailable" because of their invocation of the Fifth Amendment. This becomes more problematic in the context of foreign non-party witnesses, who are not able to assert the Fifth Amendment to protect themselves against prosecution in their home countries. Therefore, they are not "unavailable" in the same way that a witness who is able to invoke the Fifth Amendment would be. Nonetheless, when evidence is sought from non-party witnesses through the Hague Convention, they become just as "unavailable" because they can invoke their home countries' privilege against self-incrimination. To the extent they have not done so, American courts should give these types of witnesses the same weight they would give to domestic non-party witnesses who rely on the Fifth Amendment in determining whether or not to grant a stay.

---

58. *Id.* at 364-66.

59. *See id.*

60. *See generally Tiffany*, 276 F.R.D. 143.

61. *First Am. Corp.*, 154 F.3d at 21.

62. Tulip Computers Int'l B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003).

63. *In re* Urethane Antitrust Litig., 267 F.R.D. at 364; *see also* Abbott Labs. v. Teva Pharm. USA, Inc., No. 02-1512-KAJ, 2004 U.S. Dist. LEXIS 13480, at *7 (D. Del. 2004) ("As a threshold matter, I agree with the parties that application of the Hague Convention is appropriate here, as the witnesses are not parties to the lawsuit, have not voluntarily subjected themselves to discovery, are citizens of France, and are not otherwise subject to the jurisdiction of this court.").