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The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence

I. Introduction

In recent years, along with a great expansion in foreign trade, there has been a concomitant boom in U.S. litigation involving foreign parties. Increasingly, U.S. courts have been faced with foreign defendants who are properly subject to the jurisdiction of U.S. courts and maintain potentially discoverable materials in a foreign country.[1] The courts and lawyers involved in transnational litigation have consequently been faced with the procedural question of how to obtain discovery from a foreign party, in light of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which sets forth procedures for the use, by the U.S. courts, of the judicial assistance of a foreign court, and a foreign legal system, which views American-style discovery hostilely.

One recent illustration is *Falzon v. Volkswagenwerk Aktiengesellschaft.*[2] In 1974, the plaintiffs were travelling in their Volkswagen microbus when it suddenly swerved sharply and crashed into a bridge abutment leaving the

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1. This article concerns itself solely with countries which are signatories (Contracting States) to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (*entered into force* between the U.S. and the Federal Republic of Germany, June 26, 1979) [hereinafter cited as Evidence Convention]. The article stresses the gathering of evidence for use in U.S. judicial proceedings from countries with a civil law tradition. For an article describing U.S. procedures when a foreign court is seeking evidence in the U.S. *see* Weiner, *In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice,* 58 NOTRE DAME LAW. 60 (1982).

2. No. 77-722-371 NP (Mich. Cir. Ct. Wayne County).

parents paraplegic and seriously injuring their three children. Suit was brought in 1977 against Volkswagenwerk A.G. (VWAG) and other defendants on theories of negligence, breach of warranties, and strict liability.[3]

In the course of discovery, the plaintiffs issued notices for the depositions of thirteen employees of VWAG to take place at the VWAG plant in Wolfsburg, Federal Republic of Germany. VWAG moved to quash the depositions on grounds of violations of federal law and of the Evidence Convention. On September 5, 1980, the Wayne County Circuit Court[4] ordered the depositions to go forward with contingency plans to take the testimony at the U.S. Consulate in Hamburg if the parties did not agree to take the depositions in Wolfsburg.

VWAG sought relief from the orders from the Michigan courts. Due to the failure of the Michigan courts to act, VWAG applied to the U.S. Supreme Court for a stay of discovery pending disposition of the appeal in the Michigan courts. On August 23, 1982, the stay was granted.[5]

The Supreme Court of Michigan then denied VWAG's application for leave to appeal.[6] Plaintiffs again filed notices of depositions to take place in Wolfsburg, and VWAG applied to Michigan courts and the U.S. Supreme Court for stays of the discovery orders. Again, the U.S. Supreme Court granted a stay pending action by the Michigan courts;[7] stating "that there was a substantial chance that the applicant would prevail, and that the injury resulting from a denial of the stay would be irreparable."[8] The Michigan court again denied the application for leave to appeal, and for a third time, VWAG appealed to the U.S. Supreme Court. Finally on February 2, 1984, following an official statement by the U.S. government that, regardless of the outcome of the court of appeals, the depositions would not be taken by consular officials,[9] the Supreme Court dismissed the appeal by VWAG.[10]

Using *Falzon* as a starting place and general example, this article will explore the use and misuse of the Evidence Convention in the U.S. courts. The article will examine problems which the U.S. courts have dealt with in applying the Evidence Convention in light of U.S.-style discovery and the mistakes the courts have made in analyzing these disputes. The article will also offer "peaceful" solutions to the problems caused by the conflict of procedures. Inherent in both sides are the arguments best used to block the

3. *Id.* at Complaint.
4. Farmer, J., Wayne County Circuit Court.
5. Volkswagenwerk A.G. v. Falzon, No. A-191 (Burger, J., Circuit Justice).
6. 417 Mich. 889 (1983).
7. 461 U.S. 1303 (1983) (O'Connor, J., Circuit Justice).
8. 461 U.S., at 1304.
9. Brief for the United States as Amicus Curiae, *reprinted in* 23 INT'L LEGAL MATERIALS 412, 413 (1984) [hereinafter cited as U.S. Brief].
10. 104 S. Ct. 1260, *reh'g denied*, 52 U.S.L.W. 3757 (1984).

application of either the Federal Rules or the Evidence Convention. Finally, problems with the proposed solutions and responses to those problems will be discussed. The position is taken that in transnational litigation, where the parties are nationals of Contracting States to the Evidence Convention, the Convention must, as a matter of comity, be the avenue of first resort in the gathering of evidence abroad. Specifically, in the case of depositions, the Evidence Convention is the exclusive means, except in a limited number of situations.

II. Problems with Application of the Evidence Convention by U.S. Courts

The issue presented in *Falzon* has been addressed on only a handful of occasions by other U.S. courts. Unfortunately for international judicial cooperation, the majority of the courts have reached a result similar to that of the Michigan trial court. Equally unfortunately, the majority of these decisions have been based upon errors in interpretation of the Evidence Convention and its application, or upon jingoistic applications of U.S. discovery rules.

A. Restrictions of Personal Jurisdiction over Parties

One of the concerns raised in these cases is that the application of the Convention will restrict personal jurisdiction and all that flows from it. This point was strongly emphasized by the Fifth Circuit in *In re Anschuetz & Co., GmbH,*[11] the first U.S. Court of Appeals decision addressing problems similar to those raised in *Falzon*. In *Anschuetz*, a German third-party defendant, over whom the U.S. District Court had proper jurisdiction, was ordered to produce eleven employees for depositions in the Federal Republic of Germany. The court rejected the claims of Anschuetz and the U.S. Department of Justice that ordering depositions in Germany without proceeding under the Evidence Convention constituted a violation of German judicial sovereignty and international law.[12] In rejecting the solutions of

11. Anschuetz & Co., GmbH v. Mississippi River Auth., No. 85–98, 754 F.2d 602 (5th Cir. 1985); *see also* Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the District of Iowa, No. 85–1695, 782 F.2d 120 (8th Cir. 1986), *cert. granted* June 9, 1986 [hereinafter cited as S.N.I.A.]; and Messerschmitt Bolkow Blohm, GmbH v. Virginia Walker, No. 85–99, 757 F.2d 729 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (April 21, 1986), *cert. vacated* (June 9, 1986).

12. The position of the U.S. government changed subsequent to the brief in *Falzon*. In his brief as Amicus Curiae in Club Mediterranee, S.A. v. Dorin, *reprinted in* 23 Int'l Legal Materials 1332 (1985), *appeal dismissed*, 105 S. Ct. 286 (1984), the Solicitor General asserted that the U.S. courts had every right to order discovery to proceed in a foreign country given the

other jurisdictions,[13] the court stated that "none of the cases . . . indicate . . . that the purpose of the Convention was to restrict the exercise of *in personam* jurisdiction by United States courts over foreign nationals properly before it."[14]

The court's contention is valid in an absolute sense, *i.e.*, the Evidence Convention does not purport to limit the jurisdiction of any nation. This has been clearly recognized in all cases addressing the applicability of the Convention. In a few cases, such as *Philadelphia Gear Corp. v. American Pfauter Corp., Schroeder v. Lufthansa German Airlines* and *Volkswagenwerk Aktiengesellschaft v. Superior Court (VWAG II),*[15] the courts have held, however, as a matter of judicial self-restraint and international comity, that the U.S. party should first attempt to seek discovery using the procedures of the Evidence Convention.[16] This latter approach, discussed in more detail *infra,* seems to be the more compelling approach for the U.S. courts to take.

B. Mutuality of the Convention's Procedures

Another concern expressed by the Fifth Circuit in *Anschuetz* was that U.S. parties would be put at an extreme disadvantage if forced to use the Evidence Convention while foreign litigants were free to use the more liberal discovery provisions of the Federal Rules. Following the court's view—the extraterritorial application of the Federal Rules—in this matter,

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consent of the host state. It distinguished *Falzon* by pointing out that the Federal Republic of Germany limited its consent to discovery to means circumscribed by the Evidence Convention. Thus, only discovery orders which conformed to the Evidence Convention could be allowed in *Falzon. Club Med* at 1338, n. 10.

13. See Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981) [hereinafter cited as *VWAG II*]; *see also* Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983).

14. *Anschuetz, supra* note 11 at 606.

15. *See supra* note 13.

16. General Electric v. North Star International, 39 Fed. R. Serv. 2d 207, 209 (N.D. Ill. 1984); *Philadelphia Gear, supra* note 13 at 61; *Schroeder, supra* note 13 at 17,223; *VWAG II, supra* note 13 at 857. *See also* Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); Th. Goldschmidt AG v. Smith, 676 S.W.2d 443 (Tex. App. 1 Dist. 1984); Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher, 328 S.E.2d 492 (W. Va. 1985).

In Work v. Bier, 106 F.R.D. 45 (D.D.C. 1985) (Burnett, U.S. Magistrate), the court, while generally supporting the analysis of the *Anschuetz* court as to the applicability of the Evidence Convention where the evidence to be discovered is located in the U.S., stated that "the Hague Evidence Convention is not rendered inapplicable by a Federal district court having *in personam* jurisdiction over a . . . defendant, where the endeavor is to take the . . . deposition of the German national within the geographic boundaries of the Federal Republic of Germany." *Id.* at 48.

however, could lead to even more disastrous results for U.S. litigants.[17] This is due to the intrusion upon the judicial sovereignty caused by such an application of the U.S. rules of procedure and the legal system they reflect.

In contrast, requiring U.S. parties to proceed under the Evidence convention may lead to greater foreign compliance with U.S. discovery requests. By expressing sensitivity to the concerns of foreign judicial officials and a desire to cooperate, U.S. parties and judicial authorities will enhance the foreign court's willingness to provide the requested information. This is due in part to the fact that "the locus of the evidence, not the nationality of the parties, is the critical territorial factor."[18] To equalize access to discoverable materials, the court may require that the foreign litigant be restricted in the use of U.S. discovery procedures.[19]

Earlier attempts to force U.S. discovery requests on foreign parties led to the passage of "blocking" statutes.[20] By taking an antagonistic and nationalistic approach to the problem, U.S. courts have essentially shot themselves, and U.S. litigants, present and future, in the foot.

C. Waiver of "Conventional" Procedures by the Foreign Party

The U.S. courts have further decided that by failing to raise the Hague Convention at the beginning of discovery, or following the first discovery request, the foreign party waives the right to assert the exclusivity of the Convention's procedures at a later time.[21] Although this analysis is unpersuasive in theory, it has been adopted by some courts.[22] There is no power of

17. *Anschuetz, supra* note 11 at 606.

18. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 783 (1983) [hereinafter cited as Oxman]. *See also* International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984).

19. Oxman, *supra* note 18 at 783. Oxman points out "[i]t must be recalled that the reason for using cooperative methods for securing evidence is to accommodate the interests of a foreign state in a rational and ordered system of territorial sovereignties, not to promote the convenience of litigants. *Id.* at 784, n. 137. In Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16 (S.D.N.Y. 1984), the court, although sensitive to the possible intrusions on French judicial sovereignty, ordered discovery under the Federal Rules because the foreign plaintiff would be put at an unfair advantage otherwise. *Id.* at 32.

20. *See generally,* Great Britain: Protection of Trading Interests Act, 1980 c. 11 s. 1–4; France: Law No. 80-538 of July 16, 1980 Relating to Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, [1980] J.O. 1799, English version with commentary, 75 Am. J. Int'l L. 382 (1981).

21. *Anschuetz, supra* note 11 at 607; *see also* Cooper Industries v. British Aerospace, 102 F.R.D. 918 (S.D.N.Y. 1984); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360 (D. Vt. 1984).

22. *Supra* note 21.

waiver granted the foreign party under the Convention. "The failure of one litigant to demand compliance with the convention cannot divest the foreign nation of its sovereign judicial rights under the convention. The convention may be waived only by the nation whose judicial sovereignty would thereby be infringed upon."[23] The right to waive the procedures of the Evidence Convention in *Anschuetz* and *Falzon* belonged to the Federal Republic of Germany, not to the individual foreign litigants. Thus, in the absence of such waiver by the host state, the foreign party may, at his or her discretion, object or not object to "un-Conventional" procedures.

Of course where both parties to the litigation and the foreign witness all agree to direct discovery, no issue of the use of the Evidence Convention is raised and such discovery will not be barred.[24] This is not because there is no intrusion on the judicial sovereignty of the host country, but rather because no issue will be presented to the court.[25] If any of the parties, witnesses, or governments concerned oppose direct discovery, it is incumbent upon the U.S. court to require compliance with the Evidence Convention as an avenue of first resort.[26]

D. The Use of the Convention to Shield Foreign Information

The court in *Anschuetz* was also concerned that requiring resort to the Evidence Convention would result in the shielding of pertinent information and documents from the U.S. courts. At the root of this argument lies the court's reasoning that the procedures of the Evidence Convention are merely permissive.[27] This, in turn, is based upon the language of the Evidence Convention which states that "it shall not prevent a Contracting State from . . . permitting by internal law or practices, methods of taking evidence other than those provided for in this Convention."[28]

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23. *Pierburg, supra* note 16 at 244–245.
24. Oxman, *supra* note 18 at 781.
25. *Id.*
26. *Id.* It can, and should be argued that the Convention be used as a matter of judicial self-restraint and comity regardless of the attitudes of the parties and witnesses. This is discussed further in § III.A. *infra*.
27. *Anschuetz, supra* note 11 at 608; *see also* Graco v. Kremlin, Inc., 101 F.R.D. 503, 520 (N.D. Ill. 1984); Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983). *Contra* 1 B. Ristau, International Judicial Assistance 254–255 (1984) [hereinafter cited as Ristau]. Ristau argues that analyzing a problem with reference to the "permissive," "optional," or "mandatory" character of the Convention leads to misinterpretations of international obligations of the Contracting States. It is important, rather, to look to the obligations between the United States and each of the individual Contracting States as a separate treaty and to base analysis of the validity of the discovery request in issue on that ground. *Id.* at 254.
28. Evidence Convention, *supra* note 1, Art. 27(c).

This section of the Evidence Convention, however, refers to the "internal laws or practices" of the host state. This becomes patently clear when read in connection with another section of the same article allowing the use of less restrictive methods for the taking of evidence under internal law or practice.[29] Reading these sections as modifying the internal laws of the *requesting* state makes the whole Convention moot. "To allow the forum court to supplement the Convention with its own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories . . . ",[30] the two goals of the Convention.[31] The Convention created a set of minimum standards of judicial assistance which the individual host countries may liberalize at will.[32] It has, therefore, created a mandatory set of procedures which may be expanded upon.[33]

E. Effect of an Article 23 Declaration

Many U.S. courts, as in *Anschuetz*, have resisted applying the Evidence Convention procedures where the host country has reserved the right, under Article 23 of the Convention, to refuse to "execute Letters of Request issued for the purpose of obtaining pretrial discovery . . . as known in Common Law countries."[34] This reservation has been made by all signatories to the Convention except the United States.[35] The original purpose of the provision, which was requested by the United Kingdom, was to prevent discovery of "documents in the possession of [an] adversary, to aid . . . in the preparation of . . . pleadings. . . ."[36]

In practice, however, the reservation has generally been used to prevent a "fishing expedition" carried on under the authority of the U.S. courts.[37] While a number of instances of abuse of discovery have occurred, the problem underlying Article 23 lies with mistaken European notions of the purpose, role, and conduct of discovery within the U.S.[38] Many European

29. *Id.* at Art. 27(b).

30. *Philadelphia Gear, supra* note 13 at 60.

31. Evidence Convention, *supra* note 1, Preamble.

32. *Pierburg, supra* note 16 at 244; *VWAG II, supra* note 13 at 859.

33. Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. S. Exec. A., 92d Cong., 2d Sess. (February 1, 1972), *reprinted in* 12 Int'l Legal Materials 327, 328, 331–332 (1973) [hereinafter cited as Explanatory Report].

34. Evidence Convention, *supra* note 1, Art. 23.

35. Report of the Special Commission on the Operation of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, June 12–15, 1978, *reprinted in* 17 Int'l Legal Materials 1425, 1427 (1978) [hereinafter cited as Special Commission Report].

36. Explanatory Report, *supra* note 33 at 329.

37. *See generally,* In re Westinghouse Electric Corp. Uranium Litigation [1978] 2 W.L.R. 81.

38. Report of the U.S. Delegation to the Special Commission on the Operation of the

delegates to the Convention were of the opinion that pretrial discovery in the U.S. implies some sort of proceeding prior to institution of a lawsuit to determine whether a suit can be supported by evidence.[39] In response to such concerns, the U.S. delegates agreed to stress the requirement of specificity in a Letter of Request in exchange for an agreement to reconsider reservations under Article 23.[40]

The concerns of the *Anschuetz* court over possible rejection of a Letter of Request, due to an Article 23 reservation by the Federal Republic of Germany, are unfounded.[41] First, the language of the Convention is clearly permissive on this point. The potential host state will reject a Letter of Request *only* if the Letter of Request seeks unspecified evidence. Second, further protection against wrongful rejection is built into the Evidence Convention. The Letter may only be rejected if it does not comply with the requirements of the Convention,[42] if execution is not within the functions of the host state's judiciary,[43] or if execution would prejudice the sovereignty or security of the host state.[44] Thus, the potential for success or failure of a Letter of Request lies mainly with the party and court issuing the Letter. Finally, it should be noted that in practice, Article 23 reservations have led to infrequent refusals to execute Letters of Request in the first ten years of operation of the Evidence Convention.[45]

F. The Party/Non-party Distinction in Applying the Procedures of the Convention

The court in *Anschuetz*, although generally rejecting the use of the Evidence Convention for discovery from foreign parties before a U.S. court, sees it as serving an important role in taking evidence from non-party witnesses located outside the United States. The court bases this on two

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Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 12–15 June, 1978, *reprinted in* 17 Int'l Legal Materials 1417, 1422 (1978).

39. *Id.* at 1421.

40. *Id.* at 1424.

41. The Federal Republic of Germany's reservation under Article 23 states: "The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." 28 U.S.C.A. § 1781 note (West 1984 Supp.). Thus, it appears that any hesitation by a court to use the Evidence Convention for the taking of depositions, due to West Germany's Article 23 reservation, would be unfounded since it is limited to the "discovery of documents."

42. Evidence Convention, *supra* note 1, Art. 5.

43. *Id.* at Art. 12(a).

44. *Id.* at Art. 12(b).

45. *Special Commission Report, supra* note 35 at 1431.

purposes it regards as being served by the Convention. First, for the witness who is willing to be deposed at home but cannot travel to the U.S., the Evidence Convention provides a procedure by which the information may be gathered with the least affront caused to the host state.[46] Second, in the case of a non-voluntary witness, the Convention provides for the host state to use its internal laws of compulsion.[47]

The party/non-party distinction, however, is unknown under the Evidence Convention, and is irrelevant to resolving the problems of either *Anschuetz* or *Falzon*. Nowhere in the Convention is the line drawn between those witnesses with a direct stake in the outcome of the litigation, and those without such an interest. Furthermore, no commentator and no group considering the operation of the Convention have drawn this line. Instead, the major concern of the drafters of the Evidence Convention, and others, has been the protection of the judicial sovereignty of the host state.[48]

Because such sovereignty belongs to the host state, the question of whether one type of witness or another must comply with the Convention is a question properly left to the internal law of the host state.[49] Ironically, in the Federal Republic of Germany, parties to the litigation are not competent witnesses, for it is believed that they cannot be impartial in their own case.[50] While the party/non-party distinction may be applicable in U.S. domestic litigation, it often falls apart in transnational context. Therefore, the *Anschuetz* court, and others making this distinction,[51] improperly avoid the use of the Convention.

G. Avoiding the Application of the Convention by Ordering Discovery to Take Place in the United States

In *Anschuetz*, when faced with witnesses which it believed were not subject to the Evidence Convention, the court sidestepped the issue of judicial sovereignty altogether.[52] "If [the witnesses] are subject to the court's jurisdiction, . . . then the court may order that they be produced for

46. *Anschuetz, supra* note 11 at 611 (quoting *Graco, supra* note 27 at 519).
47. *Id.*
48. Report of the U.S. Delegation to the 11th Session of the Hague Conference on Private International Law, *reprinted in* 8 Int'l Legal Materials 785 (1969) [hereinafter cited as Report of U.S. Delegation].
49. Evidence Convention, *supra* note 1, Art. 9.
50. Heck, *Federal Republic of Germany and the E.E.C., Transnational Litigation Part II: Perspectives from the U.S. and Abroad,* 18 Int'l Law. 793, 795 (1984).
51. *See* S.N.I.A., *supra* note 11; *Graco, supra* note 27 at 520–521.
52. *Anschuetz, supra* note 11 at 611.

deposition; violation of the other country's sovereignty is avoided by ordering that the deposition take place outside the country."[53] (footnote omitted)

This "answer" does not solve the problem of intrusion on judicial sovereignty in this case. As stated in *Pierburg:*

> The foundation of the Hague Convention is to honor West Germany's civil law jurisdiction over civil discovery concerning its nationals conducted within the territory of West Germany. Accordingly, plaintiffs cannot avoid the clear applicability of the Convention by arguing that the Pierburg officers responsible for providing answers to the discovery could leave West Germany to perform the physical act of giving answers.[54]

Judicial sovereignty, like the Evidence Convention, can only be waived or ignored by the holder of the right to do so, *i.e.*, the host state. Thus, the U.S. courts again balanced chauvinistic jurisprudence in a single case over the larger international policy considerations.[55]

In the final paragraphs of its opinion in *Anschuetz*, the Fifth Circuit did hold that the Evidence Convention was applicable and necessary for taking depositions of *involuntary* parties located in a foreign state.[56] The court, however, "stuck by its guns" by ordering discovery of the identity of witnesses in Germany. It did state, however, that, should the discovery prove too intrusive, the parties would then be ordered to proceed under the Evidence Convention.[57] Unfortunately for the U.S. party in that case, and all future U.S. parties in transnational litigation, by that time, the damage would already be done.

III. Proposed Solutions to the Problems Addressed by the United States Courts

The problems expressed by the court in *Anschuetz, Falzon* and other cases concerned with the application of the Hague Evidence Convention, may be resolved in a number of ways. One manner of resolution is to treat the procedures of the Convention as mandatory for all U.S. litigants seeking evidence abroad.[58] While this "solution" has its own problems, it resolves some of the conflicts expressed in many of the cases discussed in this article.

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53. *Graco, supra* note 27 at 521; *see also* S.N.I.A., *supra* note 11; Slauenwhite v. Bekum Maschinenfabrik, GmbH, 104 F.R.D. 616 (D. Mass. 1985); Adidas (Canada) Ltd. v. S/S Seatrain Bennington, 80 Civ. 1911 (S.D.N.Y. May 30, 1984) (available on LEXIS, Genfed library, Dist file).

54. *Pierburg, supra* note 16 at 245.

55. *VWAG II, supra* note 13 at 857. *See also* Oxman, *supra* note 18 at 783.

56. *Anschuetz, supra* note 11 at 615.

57. *Id.*

58. 1 RISTAU, *supra* note 27 at 256.1.

This section discusses a few of these solutions to the conflicts between the procedures of the Convention and the Federal Rules of Civil Procedure or similar state rules.

A. THE *VWAG II* Approach

The notion of international comity runs strongly through nearly all cases such as *Falzon* and *Anschuetz*. Comity is "[t]he concept that the courts of one sovereign state should not, as a matter of sound international relations, require acts . . . within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified."[59] This "procedure" was used by the California Court of Appeals in *VWAG II*.[60] On facts nearly identical to *Falzon*, the court overturned an order for depositions to take place in Wolfsburg, Federal Republic of Germany. The court recognized that under notions of internationl comity, a U.S. court cannot, and, should not, order judicial acts which are inconsistent with the laws of a foreign state to be performed in that state.[61]

In accordance with this concept, the court recommended an approach which is "a significant departure,"[62] and is, in this author's opinion, the answer to the major problem posed in *Falzon*. The court stated:

> If the initial discovery order is to be validated, and if consideration of conflicts of sovereignty is to be postponed until after the responding party has failed to give the ordered discovery, then at least *the initial discovery order must appear to take into account the ascertainable requirements of the foreign state and adopt those procedures which are least likely to offend that state's sovereignty.*[63] (emphasis added)

The court reinforced this conclusion by stating that failure to use the least intrusive available method would lead to the setting aside of the discovery order.[64]

The key, according to the California court is for all parties to minimize

59. *VWAG II, supra* note 13 at 857.

60. *VWAG II, supra* note 13. The court noted and adopted a balancing of interests test in such a situation. This requires weighing principles of due process and comity, on the one hand with the interests of the law of the forum on the other. In adopting this approach, the court stated that where a party uses a method of discovery where another method "more apt to elicit the cooperation of the forum government is plainly available but is not used . . ." the discovery order should be set aside for failure to take full account of the comity interests. *Id.* at 857–858.

61. *Id.* at 857.

62. von Mehren, *Discovery of Documentary and Other Evidence in a Foreign Country*, 77 AM. J. INT'L LAW 896, 898 (1983); von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U. J. INT'L L & POL. 985, 993 (1984).

63. *VWAG II, supra* note 13 at 858.

64. *Id.*

intrusions on sovereignty as early in the discovery process as possible. If the *VWAG II* standard had been applied in *Falzon*, the Michigan trial judge would have been required, on his own initiative, to limit the scope of the ordered discovery. In the alternative, he may have required the use of the Evidence Convention, and required the responding party to "take all possible steps to secure the permission and cooperation of the foreign government."[65]

B. The Restatement (Revised) Approach

Another source of innovation in the area of extraterritorial discovery is the American Law Institute's (ALI) Restatement (Revised) of Foreign Relations Law.[66] The Restatement (Revised) strikes an effective balance between the U.S. system and its strong need for discovery on the one hand, and the civil law countries and their non-recognition of pretrial discovery by parties on the other. Section 420 of the Restatement (Revised) recognizes the right of a court to order discovery outside the United States where authorized by treaty or by rule of court. The section, however, limits the scope of that discovery to "documents or other information directly relevant, necessary and material to an action. . . ."[67] More importantly, the Restatement (Revised) lays out factors to be considered by the court before issuing an order for discovery abroad.

> [A] court . . . must take into account the importance to the . . . litigation of the . . . information requested; the degree of specificity of the request; in which of the states involved the . . . information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.[68]

This section of the Restatement (Revised) marks a significant departure from prior practice in the United States. It also signals a changing attitude toward, and a desire to cooperate with, the rest of the world. Under the Federal Rules, generally, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved. . . ."[69] Under the Restatement (Revised), a party seeking discovery abroad must "meet a more stringent test of direct relevance, necessity and materiality than is required for comparable requests for . . . information located in

65. *Id.*
66. Restatement (Revised) of Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, March 15, 1982) [hereinafter cited as Restatement (Revised)].
67. *Id.*, § 420(1)(a).
68. *Id.*, § 420(1)(c).
69. Fed. R. Civ. P. 26(b)(1).

the United States."[70] This requirement is reasonable in light of the civil law procedures and the desired goals of foreign compliance with discovery requests and admissibility of the evidence.[71]

Thus, in *Anschuetz, Falzon* and all similar cases, it is necessary to balance the competing interests of the U.S. and the foreign state. In so doing, however, it is necessary to recognize the international and comparative law realities of the situation. Thus, in a case involving a civil law country it is improper to claim, as the Fifth Circuit did in *In re Messerschmitt Bolkow Blohm GmbH* that "[d]iscovery, under the Federal Rules, of documents located in Germany need not directly involve German judicial officers. . . ."[72]

IV. Problems with the Proposed Solutions

A. Status of the Evidence Convention in U.S. Law

While a great number of the problems seen in *Anschuetz* could have been avoided by employing either the *VWAG II* or the Restatement (Revised) approaches, these solutions are not without their faults or problems. Federal courts ruling on cases involving the Evidence Convention[73] have debated the question of priority between the Convention and the Federal Rules of Civil Procedure.

It is generally accepted that the Federal Rules have the force of a federal statute.[74] When a statute, or in this case, the Federal Rules, comes into conflict with a treaty or other international agreement, the last-in-time rule applies.[75] Under this rule, the treaty or statute which is most recent prevails.[76] Even where the statute has supplanted the treaty or agreement in domestic law, the international obligations under the treaty or agreement do not end.[77] Finally, it has been argued that the last-in-time rule should not apply where there is a conflict between a statute and a multilateral agreement,[78] *e.g.*, the Hague Service Convention.[79]

70. Restatement (Revised), *supra* note 66, § 420, Comment 1.
71. *See id.*
72. *Supra* note 11 at 732; *see* also S.N.I.A., *supra* note 11.
73. *See generally, Murphy, supra* note 21 at 361, n.2; *Lasky, supra* note 27 at 1228.
74. United States for Use of Tanos v. St. Paul Mercury Insurance Co., 361 F.2d 838 (5th Cir. 1966), *cert. denied,* 385 U.S. 971 (1966); Association of Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 495 (D.N.D. 1982); *Murphy, supra* note 21 at 363, n. 3.
75. Vorhgrees v. Fischer & Kleche, 697 F.2d 574 (4th Cir. 1983).
76. Restatement (Revised), *supra* note 66 § 135 (Tent. Draft No. 1, April 1, 1980).
77. *Id.* § 135(c).
78. Domangue v. Eastern Airlines, 722 F.2d 256 (5th Cir. 1984); *see also* Restatement (Revised), *supra* note 66 § 135, R.n. 3.
79. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in

The Evidence Convention was proposed by the United States following the success of the Service Convention,[80] and is viewed by many to be fashioned after the Service Convention.[81] The Service Convention comprehensively regulates the service of process among signatory states and is recognized by the U.S. courts as supplanting the laws of service of process in signatory states.[82] In cases concerning a conflict between the Federal Rules and the Service Convention, the courts have consistently followed the idea that "[t]he Hague [Service] Convention *applies to all cases* where service is to be made in a foreign country and the countries involved are signatories. . . ."[83] (emphasis added).

Like the Service Convention, the Evidence Convention was designed to comprehensively cover the taking of evidence abroad by all signatories.[84] This was performed by creating a minimum standard with which all signatory states must comply, with the option of allowing more liberal internal procedures for the execution of requests originating abroad.[85] While not designed to supplant *all* internal discovery laws, the Evidence Convention supplanted only those more restrictive procedural laws. By implication, therefore, the Evidence Convention will, or should, take priority over the Federal Rules.

Additionally, it is incumbent upon U.S. courts to construe a statute so as to avoid conflicts with, and violation of international law and international agreements.[86] Thus, when a court finds conflict between the Federal Rules and the Evidence Convention, every effort should be made to avoid violating the international obligations created by the ratification of the Convention by the U.S. Such efforts ought to include the exercise of judicial self-restraint evidenced by requiring the use of the Evidence Convention, as a matter of comity.

Civil and Commercial Matters, November 15, 1965, *entered into force for the U.S.*, February 10, 1969, 20 U.S.T. 361, T.I.A.S. No. 6638.

80. REPORT OF U.S. DELEGATION, *supra* note 48 at 804–805; Letter of Submittal from Secretary of State William P. Rogers to the President Regarding the Evidence Convention, S. Exec. A., 92d Cong., 2d Sess. (February 1, 1972), *reprinted in* 12 INT'L LEGAL MATERIALS 324 (1973) [hereinafter cited as Letter of Submittal].

81. U.S. Brief, *supra* note 9 at 414.

82. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 287–289 (3d Cir. 1981).

83. Harris v. Browning-Ferris Industries Chem. Serv., 100 F.R.D. 775, 777 (M.D. La. 1984); *see also* Richardson v. Volkswagenwerk A.G., 552 F. Supp. 73, 78–79 (W.D. Mo. 1982).

84. *But see Club Med, supra* note 12.

85. Letter of Submittal, *supra* note 80 at 324; REPORT OF U.S. DELEGATION, *supra* note 48 at 808; U.S. Brief, *supra* note 9 at 414.

86. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Restatement (Revised), *supra* note 66 § 134 (Tent. Draft No. 1).

B. The Supremacy Clause Argument

It can be argued that *VWAG II* and the other cases arising out of state courts[87] can be explained on constitutional grounds. If one assumes that there is a direct conflict between the Convention and the procedural rules of the state, under the Supremacy Clause,[88] the Convention, as federal law, is supreme. The Evidence Convention was, however, designed to complement existing procedures in the Contracting States.[89] Thus, differences in discovery from state to state may alter the effect of the Supremacy Clause argument.

The court in *VWAG II* went out of its way to base its holding on non-constitutional grounds. The court stated that:

> We could . . . read the Hague [Evidence] Convention, broadly, as a preemptive and exclusive rule of international evidence-gathering, binding . . . as the supreme law of the land under clause 2 of article VI of the federal Constitution. But we . . . believe that the Hague [Evidence] Convention establishes not a fixed rule but rather a minimum measure of international cooperation. . . .[90]

The court in *VWAG II*, therefore, in the face of a perfectly acceptable means of deciding the case, opted in favor of the greater policy aims effected by recognizing international comity—complete and fair adjudication of all claims among them.

C. Fitting the *VWAG II* Approach into the Federal Rules Framework

Further problems arise in the federal court system when the *VWAG II* approach is used. The most innovative aspect of that approach is the requirement that the initial discovery order take all sovereignty and comity considerations into account.[91] The problems arise under the Federal Rules where the taking of depositions on notice, without judicial interference, is the "order" of the day.[92] Thus, the insult or damage may occur prior to the time any court would balance the considerations of comity.

In answer to this problem, the best solution is offered by the Federal Rules themselves, and the Restatement (Revised). Under the 1983 amendments to the Federal Rules, the judge may direct the parties to appear for a

87. Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686 (1984); Th. Goldschmidt, supra note 16; *Starcher, supra* note 16. *Contra* Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d 575 (A.D. 2 Dept. 1985).

88. U.S. Const. art. 6, cl. 2.

89. Explanatory Report, *supra* note 33.

90. *VWAG II*, *supra* note 13 at 859.

91. *Id.* at 858.

92. *See* Fed. R. Civ. P. 30.

pretrial conference.[93] The conference was designed to be used for "establishing early and continuing control. . . ; [and] discouraging wasteful pretrial activities."[94]

The pretrial conference would, therefore, also be an ideal time to prepare an order to obtain discovery abroad pursuant to the Restatement (Revised).[95] The court could balance the interests of the parties and issue both the discovery order and a Letter of Request, assuming the balance weighed in favor of obtaining the evidence from overseas. Thus, in the best possible case, less adversarial relationships between the parties and between the U.S. and foreign judicial systems are established at the earliest stages of litigation, and there is a greater possibility of cooperation in later stages.

D. Non-compliance with Discovery Requests

Finally, one of the most difficult problems raised by the solution of *VWAG II*[96] is how to handle foreign non-compliance with a proper request to take evidence abroad. The courts applying the Evidence Convention seem to believe that discovery should proceed under the Convention until such avenue is closed by the host state.[97] Only at this point should the U.S. court impose sanctions to compel compliance.

It is argued that this "second guessing" of the actions of foreign courts may constitute a greater intrusion into the sovereignty of the host state than the original requests.[98] This argument, however, ignores a few major points. First, the judicial sovereignty concerns of a civil law nation are aroused mainly by the usurping of their judicial functions by a foreign—in this case, U.S.—court. By issuing a Letter of Request for the taking of depositions abroad in compliance wth the Evidence Convention, the U.S. court is requesting the judicial assistance of the foreign court. Once the executed Letter is returned to the U.S. court, the Convention has been fulfilled. There is no recognized right of appeal for the requesting state nor a recognized duty to prosecute or defend an appeal by the host state.[99]

The burden falls on the U.S. courts to ensure compliance by the foreign party with the good faith requirements of the Evidence Convention, ensure its own good faith, and ensure that the trial is "less a game of blind man's

93. Fed. R. Civ. P. 16(a).
94. *Id.*
95. *See* text accompanying notes 68–71 (§ III.B.).
96. *Supra* note 13.
97. *Philadelphia Gear, supra* note 13 at 61; *Schroeder, supra* note 13 at 17,224; *Th. Goldschmidt, supra* note 16 at 445.
98. *Anschuetz, supra* note 11 at 613; S.N.I.A., *supra* note 11 (citing Anschuetz).
99. Special Commission Report, *supra* note 35 at 1431.

bluff and more a fair contest with the basic issues and facts disclosed. . . ."[100] The U.S. court may, therefore, impose sanctions or request further discovery in order to ensure the fairness of the case. As previously mentioned, however, this sort of situation rarely arises in practice.[101]

Secondly, the ruling on the imposition of such sanctions is a long-standing practice of U.S. courts. Although predominantly concerned with the failure to disclose under threat of criminal sanctions, *i.e.*, "blocking" statutes, these cases can be analogized to the present situation. First of all, it must be determined whether the problem arose with the foreign party or with the host state. If with the host state, the foreign party will be required to petition the Central Authority of the host state to request relaxation of the rules for execution of foreign discovery requests, the foreign party being in the best position to so plead.[102] The Supreme Court has held that given a good faith effort by the foreign party to comply with the request, if compliance is prevented by foreign law, then the case will not be dismissed; however, the foreign party will not be allowed to profit by this inability to disclose.[103]

A similar approach was taken by the ALI in the Restatement (Revised).[104] Under the Restatement (Revised), a foreign party prevented from disclosing information due to a law or regulation of the host state "may be required . . . to make a good faith effort to secure permission from the foreign authorities to make the information available."[105] The section limits the sanctions available to the courts and reserves to the courts the right to make findings of fact adverse to the foreign party despite the good faith effort to comply.[106] Thus, the ALI has attempted to ensure that sanctions are imposed only after the balancing of interests swings toward the individual U.S. litigant. Further, the sanctions are limited so as to avoid prejudice to either litigant.

If the failure to comply with the Letter of Request is, in whole or in part, due to the actions of the foreign party, however, the remedies are different. Under the Evidence Convention, compulsion is mandatory and follows the internal laws and procedures of the host state.[107] Thus, if compulsion is required in a domestic proceeding in the host state, it will be applied when executing a Letter of Request. If compulsion is discretionary in a domestic context, then it will also be discretionary in a transnational context.[108]

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100. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).
101. *Supra* notes 37 and 45 and accompanying text.
102. Societe Internationale pour Participation Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205 (1957).
103. *Id.* at 212.
104. Restatement (Revised), *supra* note 66 § 420(2).
105. *Id.*, § 420(2)(a).
106. *Id.*, § 420(2)(b), (c).
107. Evidence Convention, *supra* note 1, Art. 10.
108. EXPLANATORY REPORT, *supra* note 33 at 334.

V. Conclusion

The conflict continues in the U.S. courts between the discovery provisions of the Federal Rules and the Evidence Convention. As the number of decisions automatically resolving the conflict in favor of the Federal Rules grows, it will become increasingly difficult for the judiciary to perform the careful and delicate balancing of interests that comity analysis requires. The result of such decisions is bound to be a breakdown in the underlying principles and policies of comity, notably, the effective and complete adjudication of claims, and fairness.

A few U.S. courts, however, have realized that comity is a key component in attempting to redress wrongs done to U.S. plaintiffs in transnational disputes. The California Court of Appeals has led the way in this area. This court, and a few federal courts, have exercised great self-restraint and have consistently opted, *as a matter of comity*, to require the use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters over the local discovery rules, or those of the Federal Rules of Civil Procedure. Furthermore, they have required early control over extraterritorial discovery in order to avoid aggravating foreign courts and governments. It would behoove the rest of the judiciary and legal community to follow the lead of these courts.

Change cannot, however, be a one way street. The Evidence Convention provides ample opportunity for civil law states to liberalize their discovery practices. Such liberalization need only affect the operation of the system in its execution of foreign discovery requests. Absent such liberalization, however, provisions will have to be made, by the U.S., to require foreign corporations doing business in the U.S. to allow greater access to information as a cost of doing business here.

Extraterritorial discovery cannot be viewed by the parties on either side as an all-or-nothing prospect. In order to ensure cooperation and foster good feelings among nations, both sides must be willing to give a little. Great progress in international judicial assistance has been made; however, continuing awareness of foreign sensitivities is necessary for this progress to continue.