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## Effective Evidence-Taking under the Hague Convention

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# ARTICLES

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## Effective Evidence-Taking Under the Hague Convention

We are at a critical point in the life of the Hague Evidence Convention<sup>1</sup> The United States Supreme Court has held that use of the Convention to obtain evidence from foreign litigants is not mandatory and that in deciding whether to use Convention procedures, the lower courts are to engage in a detailed comity analysis based upon the facts of each individual case.<sup>2</sup>

As a result, private litigants in U.S. courts will need to become better informed about how to make a complete record before the lower courts on all of the comity factors that the Supreme Court has now required the courts to consider. In particular, if the Convention is to be an effective means for gathering evidence, private litigants will need to alert the courts to: (a) the interests of the United States Government in maintaining co-operative and productive international relations with major trading part-

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1. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Convention]. The Convention is in force among the United States, France, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, West Germany, Israel, Italy, Luxembourg, Monaco, The Netherlands, Norway, Portugal, Singapore, Sweden and the United Kingdom. The Convention entered into force for the United States on October 7, 1972. The Convention is reprinted in 8 MARTINDALE-HUBBELL LAW DICTIONARY pt. VII, at 13 (1988) and at 28 U.S.C.A. § 1781 (Supp. 1988), along with the declarations and reservations by various signatories.

2. *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542 (1987) [hereinafter *Aerospatiale*].

ners; (b) the interests of foreign sovereigns that a U.S. request for evidence may affect; and (c) the effectiveness of procedures under the Convention and the extent to which the courts of foreign nations will enforce requests made pursuant to the Convention.

To facilitate practice under the Convention, this article sets forth the procedures that the Convention makes available for obtaining evidence abroad and explains how to use those procedures. The current state of practice under the Convention is then summarized with respect to four of the United States' major European trading partners, France, the United Kingdom, West Germany, and Italy.

## **I. The *Aerospatiale* Decision and Its Potential**

The United States Supreme Court, by a vote of five to four, held in *Aerospatiale* that the Convention constitutes one means, but not the exclusive or mandatory means, for seeking documents, interrogatory answers, deposition testimony, or requests for admissions from foreign parties over which a U.S. court has jurisdiction.<sup>3</sup> The decision directed the lower courts to engage in a detailed comity analysis in determining whether to order use of Convention procedures or to conduct discovery under the Federal Rules of Civil Procedure. The comity analysis should examine: (a) the competing interests of the governments involved (for example, the U.S. interest in full discovery versus foreign principles of judicial sovereignty, and the interest of all signators in maintaining a smoothly functioning international legal system); (b) the likelihood that Convention procedures would be effective; (c) the intrusiveness of the discovery requests (e.g., whether the requests seek trade secrets or matters affecting the national defense of a foreign sovereign); (d) the origin of the information being sought; (e) the costs of transporting the witnesses, documents, or other evidence to the United States; (f) the skill with which the requests are drafted (i.e., are they clear, specific, and limited to obtaining relevant information?); (g) the importance to the litigation of the documents or information sought; and (h) the availability of alternative means of securing the information.<sup>4</sup>

The Supreme Court stated that: "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court,

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3. Because treaties such as the Convention are part of the supreme law of the land, U.S. CONST. art. VI, cl. 2, the state courts should be bound to use the Convention at least to the extent that would be required by *Aerospatiale*. See Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion*, 16 INT'L L. & POL'Y 1031, 1033-34 nn. 7-8 (1984).

4. See *Aerospatiale*, 107 S. Ct. at 2555-56; see also RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986).

based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.”<sup>5</sup> The decision did not, however, provide specific guidance to the lower courts for making the comity analysis: “We do not articulate specific rules to guide this delicate task of adjudication.”<sup>6</sup> While the court’s case-by-case approach initially might seem to have done little to clarify the uncertain state of the law that existed prior to the decision,<sup>7</sup> the opinion, outright or by implication, actually does contain guidelines that will aid the lower courts’ analyses.

Lacking definitive rules in this area, the lower courts will need assistance in order to conduct a fully informed comity analysis of the type required by *Aerospatiale*. It is unlikely, however, that the U.S. State Department or the governments of other parties to the Convention will submit amicus briefs whenever a discovery issue arises that may be treated under the Convention. Indeed, it is highly unlikely that the State Department or foreign governments will even receive notice of most such discovery disputes. Thus, the burden will fall on private litigants, many of whom may not have full knowledge of the foreign sovereign interests involved and may not have the incentive to make a full record of those interests before the court. Consequently, in many cases information concerning foreign sovereign interests, foreign laws, the impact on international relations, and the efficacy or inefficacy of Convention procedures in foreign countries probably will not be made fully known to the court.<sup>8</sup>

Because discovery rulings are generally viewed as interlocutory and not appealable until a final judgment is obtained, a discovery ruling can place great burdens on a foreign litigant, and might even place it at odds with the government of its home country for an extended period of time before review on appeal could be had.<sup>9</sup> Even then, the discovery ruling

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5. *Aerospatiale*, 107 S. Ct. at 2556.

6. *Id.* at 2557.

7. See, e.g., 1 U.S. DEP’T JUSTICE, CIVIL DIVISION PRACTICE MANUAL, INTERNATIONAL JUDICIAL ASSISTANCE 22–24 (1976) [hereinafter CIVIL PRACTICE MANUAL]; Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT’L L. 231, 233 (1986); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1465 n.14 (1984).

8. Even before *Aerospatiale* the Special Commission on the Operation of the Hague Convention recognized that the Convention was not sufficiently used. *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (July 1985), 24 I.L.M. 1668, 1670 (1985) [hereinafter 1985 Special Commission Report].

9. Such a result would create needless friction among nations whose relations are otherwise cooperative and productive. See, e.g., Brief for the Italy-America Chamber of Commerce, Inc. as Amicus Curiae in Support of Petitioners at 16, *Aerospatiale* (Supreme Court of the United States) (No. 85-1695); Brief of Amicus Curiae for the Republic of France in

may be viewed as not affecting the outcome of the case and therefore may be viewed as nonreversible.

The Convention resulted from arduous negotiation among the contracting nations and was intended to bridge the gap between the common law and civil law systems.<sup>10</sup> Its very purpose was to replace vague concepts of comity and judicial discretion with a system of Convention obligations, thus creating a modicum of order and certainty in the field of international evidence-gathering.<sup>11</sup> Several contracting nations have even altered their international codes of procedure to accommodate Convention requests.<sup>12</sup>

If the *Aerospatiale* decision were read as delegating virtually unfettered discretion to the U.S. district courts and to the state courts, that might return litigants to an unpredictable system of international comity which the Convention was designed to replace. But that would be reading *Aerospatiale* too narrowly.<sup>13</sup> The Supreme Court held that the Convention clearly does apply to evidence in the possession of a non-U.S. litigant.<sup>14</sup> The court also stated that:

[T]he degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and

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Support of Petitioners at 1-2, *Aerospatiale* (Supreme Court of the United States) (No. 85-1695) [hereinafter Brief of the Republic of France as Amicus Curiae]; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 4, *Aerospatiale* (Supreme Court of the United States) (No. 85-1695); Brief for the Federal Republic of Germany as Amicus Curiae at 15, *Aerospatiale* (Supreme Court of the United States) (No. 85-1695) [hereinafter Brief of West Germany as Amicus Curiae].

10. Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 (1973); Heck, *supra* note 7, at 235.

11. See Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651 (1969); see also Letter of Submittal from the Secretary of State to the President, dated Nov. 9, 1971, S. EXEC. DOC. NO. A1, 92d Cong., 2d Sess. (1972), reprinted in 12 I.L.M. 324 (1973); Comment, *supra* note 7, at 1465.

12. France has amended its Code of Civil Procedure to provide that counsel for the parties (even if counsel are foreigners) may ask questions of a witness (article 740) and that a verbatim transcript shall be taken if requested (article 739). The United States has also permitted foreign judges to conduct interrogations in the United States in accordance with civil law procedures. 1985 *Special Commission Report*, *supra* note 8, at 1675. See generally NOUVEAU CODE DE PROCÉDURE CIVILE [C. PR. CIV.] arts. 733-748 (Fr.); Evidence (Proceedings in Other Jurisdictions) Act 1975 (U.K.); Act to Implement the Hague Evidence Convention, BUNDESGESETZBLATT, Teil I [BGBL I] 3106 (W. Ger.).

13. At least one post-*Aerospatiale* decision has nonetheless incorrectly granted such unfettered trial court discretion in determining whether Convention procedures should be followed. See *Sandsend Fin. Consultants v. Wood*, 743 S.W.2d 364 (Tex. App.—Houston [1st Dist.] 1988, no writ). Moreover, it should not be enough for a court to say, as did the Texas court, that use of the Convention can be rejected because discovery needs to proceed expeditiously. *Id.* at 366. In view of the Supreme Court's approval of the Convention as a workable means of obtaining evidence, more than such a generality should be required. If speed in discovery is a genuine and pressing consideration, lower courts should be required to make a finding as to whether, by stipulation or otherwise, Convention discovery could be accomplished with reasonable expedition.

14. 107 S. Ct. at 2554.

international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction.<sup>15</sup>

The Court required "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures [under the Convention] will prove effective"<sup>16</sup> and emphasized the importance of careful supervision of discovery of foreign litigants:

*American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation.*<sup>17</sup>

Because the lower courts may not have all relevant considerations placed in the record before them—including such matters as the foreign government interests involved and the interest of the United States in maintaining cordial relations with its trading partners—we submit that the Convention should be given prima facie effect. The burden should be upon the litigant wishing to use American discovery procedures for evidence located abroad in the territory of a party to the Convention to show that use of the Convention's procedures would be substantially ineffective under the circumstances.<sup>18</sup> Allocating the burden of persuasion in this

15. *Id.* at 2556 n.29 (quoting § 437 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES).

16. 107 S. Ct. at 2556.

17. *Id.* at 2557 (emphasis supplied). The Letter of Submittal from the Secretary of State to the President, *supra* note 11, stated that letters of request were intended to be a principal means of obtaining evidence from abroad. *Id.* at 324. It was suggested before the *Aerospatiale* decision that the Convention was never intended to apply to discovery between parties to litigation and that it only applies to evidence-gathering for trial, not pretrial discovery. See Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 INT'L COMP. L.Q. 765 (1986). Those arguments did not survive the decision, however, at least insofar as litigation in the United States is concerned.

18. The Convention should be asserted at the outset of the discovery process so as to avoid undue delay. Since the Convention embodies the interests of sovereign nations not before the court, however, it is at least questionable whether Convention procedures which protect those interests can be waived by a private party to litigation. See, e.g., *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876, 881 (2d Dist. 1982).

manner would be consistent with the *Aerospatiale* decision. It also would aid in ensuring that the lower courts do not through inadvertence automatically assume that the Convention is ineffective or override the interests of foreign sovereigns and interests of cordial international relations—interest that the Supreme Court has stated must be considered, but that are not likely otherwise to be as fully placed before the court or as fully considered as the interests of the parties.<sup>19</sup>

Undue delay can be prevented in most cases by placing a time limit on the use of Convention procedures<sup>20</sup> or by preventing the foreign party

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19. In one post-*Aerospatiale* decision, *Hudson v. Herman Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987), the court held that "the burden should be placed on the party opposing the use of Convention procedures to demonstrate that those procedures would frustrate these interests" (referring to the interests of U.S. litigants in obtaining evidence and the U.S. courts in obtaining a just resolution of disputes). Several other post-*Aerospatiale* decisions should also be mentioned. In *John Jenco v. Martech Int'l, Inc.*, Civ. No. 86-4229 (E.D. La. May 20, 1988) (LEXIS, Genfed library, Dist. file), a U.S. district judge, overruling a magistrate, upheld the contention of a Norwegian defendant that depositions of its representatives on the issue of whether it was subject to personal jurisdiction should be held pursuant to the Convention rather than the Federal Rules. The court ruled that when personal jurisdiction is in issue, discovery should proceed under the Convention. *In re Anschuetz & Co. GmbH*, 838 F. 2d 1362 (5th Cir. 1988), is the opinion of the U.S. Court of Appeals for the Fifth Circuit upon the Supreme Court's remand of the case to it after the *Aerospatiale* decision. The Fifth Circuit, in turn remanding the case to the district court, declined to lay down specific guidelines for the lower courts, but emphasized its expectation that lower courts "will be sensitive to interests expressed in the Hague Convention." *Id.* at 1364. It also cautioned "that many foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures." *Id.*

The need for such reminders is shown by *In re Benton Graphics v. Uddenholm Corp.*, 118 F.R.D. 386 (D.N.J. 1987), and *Haynes v. Kleinwebers*, 119 F.R.D. 335 (E.D.N.Y. 1988), decisions by U.S. magistrates rejecting contentions by Swedish and German corporations, respectively, that the Convention should be applied to discovery against them. In *Rich v. Kis California, Inc.*, Civ. No. 87-801 (M.D.N.C. June 22, 1988) (WESTLAW, Allfed database), in contrast to *John Jenco v. Martech Int'l, Inc.*, discovery against a French defendant on the issue of personal jurisdiction was permitted under the Federal Rules rather than the Convention. The decision in *Benton Graphics* stated that an affidavit of an Assistant Undersecretary of the Swedish Ministry for Foreign Affairs setting forth Swedish interests did not sufficiently support resort to the Convention. 118 F.R.D. at 391. The *Benton Graphics*, *Haynes*, and *Rich* decisions should have required as a first step that parties opposing use of the Convention establish why the Convention would not be an adequate means of evidence gathering in the particular circumstances of those cases. See also *Sandsend Fin. Consultants v. Wood*, 743 S.W.2d 364 (Tex. App.—Houston [1st Dist.] 1988, no writ). The *Rich v. Kis California, Inc.* opinion also erred in mis-citing *Aerospatiale* as support for the proposition that the proponent of the Convention had "the burden of demonstrating the necessity for using those procedures."

20. As to the substantive scope of the evidence sought—an issue which is distinct from the procedures to be used in seeking evidence—the party opposing the discovery would still bear the burden of challenging the scope of the requests before the U.S. court prior to issuance of a letter of request. This would be done by motion for a protective order, FED. R. Civ. P. 26(c). There are, however, significant differences as to how such protective applications must be handled under *Aerospatiale*, as opposed to garden variety protective

from obtaining discovery until it has itself provided discovery under the Convention. When Convention procedures prove to be either futile or ineffective in a particular case, then the court would retain full jurisdiction to order, in the alternative, that discovery be had in accordance with the Federal Rules.<sup>21</sup> If the discovery order then is not complied with, the court would retain full jurisdiction to order appropriate sanctions, taking into account the good faith efforts that have been made by the foreign litigant to obtain the requested discovery in accordance with *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*.<sup>22</sup> Such sanctions imposed under *Rogers* may include exclusion of the evidence, dismissal of the action, permitting the finder of fact to draw adverse inferences from a foreign party's refusal to produce evidence, or other appropriate sanctions.<sup>23</sup>

Using the Convention procedures will encourage lawyers in the countries that have signed the Convention to engage in the dialogue necessary

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order motions. In the first place, the Supreme Court has left no doubt that the lower courts bear an unusual and important responsibility in the kinds of cases under consideration here. Due to the nature of the interests at stake, "special vigilance" must be exercised by the lower courts to assure that the discovery requests are not being used for purposes of harassment or undue burden. 107 S. Ct. at 2557. At a minimum, that should mean that requests for oral hearings should not be denied, and that a full opportunity for briefing the issues must be allowed. The average time required to execute a letter of request is between one and six months. The revised model form of letter of request includes a provision for specifying the date by which the requesting authority requires receipt of the response and some Central Authorities will give expedited treatment of urgent requests. See Item 4 of the revised model form, Appendix hereto; 1985 *Special Commission Report*, *supra* note 8, at 1673-74.

21. The majority opinion in *Aerospatiale* clearly states that the Convention does not deprive the United States courts of jurisdiction to order a foreign party to produce evidence. 107 S. Ct. at 2553. Nor is there any general requirement that the Convention always be used first before resorting to procedures under the Federal Rules of Civil Procedure. *Id.* at 2555. Any other approach would merely invite both United States and foreign companies to place documents abroad in foreign parent companies or subsidiaries and to thereby shelter themselves from U.S. litigation risks.

22. 357 U.S. 197 (1958). For an excellent example of the application of *Rogers*, see *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977). Several important foreign statutes regulating or limiting access to information are discussed in Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 INT'L LAW. 61 (1983). See also Note, *The Hague Evidence Convention: Determining Its Applicability Through Comity Analysis*, 38 SYRACUSE L. REV. 717, 722 n.30 (1987).

23. The Convention (under Article VI of the U.S. Constitution) and the Federal Rules of Civil Procedure both have the force of federal law. See *United States v. St. Paul Mercury Ins. Co.*, 361 F.2d 838 (5th Cir. 1966); *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 495, 498 (D.N.D. 1982), *modified*, 713 F.2d 1384 (8th Cir. 1983); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 363 n.3 (D. Vt. 1984). The Convention and the Rules need not be treated as mutually incompatible. As set forth herein, a court can maintain all aspects of its jurisdiction and still honor both the Convention and the Rules by giving the Convention a *prima facie* opportunity to work where it can do so effectively.



to improve the Convention's functioning. To assist in this process, the available Convention procedures are set forth below, along with the revised form of a letter of request included as the Appendix to this article.<sup>24</sup> In addition, summaries of the current state of practice under the Convention in each of the major contracting nations are provided.

## II. Convention Procedures

### A. GENERAL CONSIDERATIONS

The threshold question whether the potential value of the desired evidence is worth the time and expense required to gather it becomes especially important when the evidence is located abroad. Language barriers, travel and communication complications, and uncertainty about foreign law, all combine to make foreign discovery more difficult than domestic discovery. For these reasons, it is usually more efficient first to pursue domestic discovery to narrow issues and avoid wasted effort before seeking evidence abroad, assuming that time and other considerations permit.<sup>25</sup> Pursuing domestic discovery in the first instance can be of great assistance in learning the precise nature of relevant evidence located abroad; it can enable one to target more precisely the evidence to be sought through Convention procedures; and it can enable one to determine whether the foreign evidence is necessary or purely cumulative. Moreover, domestic discovery may directly aid in using Convention procedures, whose availability can depend on the ability to specify the documents sought and to show that the evidence sought is directly relevant to matters that will be in issue at trial.

The Convention, of course, does not apply to evidence located in the United States. Witnesses or documents found in the U.S. office of a foreign company (or its division or subsidiary) are subject to discovery under the normal American rules.

The Convention is limited by its terms to evidence in "civil or commercial matters."<sup>26</sup> The interpretation placed upon the term "civil or commercial matters" varies among the contracting states. The United States defines as a civil or commercial matter any matter that is not

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24. A general reference is also available entitled *PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS* (1984) [hereinafter *PRACTICAL HANDBOOK*].

25. *MANUAL FOR COMPLEX LITIGATION* (SECOND) § 21.485 (1985).

26. Convention, *supra* note 1, arts. 1, 15, 16, 17.

27. *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial*

criminal.<sup>27</sup> Civil law<sup>28</sup> jurisdictions interpret the scope of the Convention more narrowly. Generally speaking, these states tend to exclude from the scope of the Convention not only criminal matters, but also government fiscal and administrative matters, as well as other cases in which the government is the plaintiff.<sup>29</sup> Thus, officials responsible for administering Convention procedures in civil law jurisdictions have stated that they would be unlikely to honor a request from a U.S. court on the behalf of the Internal Revenue Service, because that would be tantamount to enforcing a foreign public revenue law; but they might well honor a request from a taxpayer seeking to protect property interests from the tax collector.<sup>30</sup>

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*Matters*, 17 I.L.M. 1417, 1418 (1978) [hereinafter 1978 U.S. *Delegation Report*]. The meaning of "civil and commercial matter," as used in the statute that implemented the Convention in the United Kingdom (Evidence (Proceedings in other Jurisdictions) Act, 1975, ch. 34, § 9(1)) was discussed at length in the various opinions of the English Court of Appeal (Civil Division) in *In re State of Norway's Application* (No. 2), the Times (London), Jan. 8, 1988 (LEXIS, Dec. 18, 1987, ENGGEN library, Cases file). The Court pointed out that possible constructions of that phrase could look to the following: (1) a generally accepted international interpretation; (2) classification under the law of the requesting state; (3) classification under the law of the requested state; or (4) a combination of (2) and (3). After extensive consideration, it found that the subject proceeding, arising from a tax dispute concerning an estate, was not a "civil or commercial matter." *Id.*

28. See generally J. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985).

29. See 1978 U.S. *Delegation Report*, *supra* note 27, at 1417-19; *Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* [hereinafter 1978 *Special Commission Report*], 17 I.L.M. 1425, 1426-27 (1978); 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, 754-56 n.60 (1983); Radvan, *supra* note 3, at 1031, 1040-42.

The Special Commission on the Operation of the Hague Convention has recently considered whether bankruptcy proceedings are "civil or commercial matters" within the scope of the convention. Those present at the meeting agreed that regular bankruptcy proceedings generally would be considered to fall within the scope of the Convention's coverage, although a criminal prosecution of the bankrupt or its officers for fraud would not be within the Convention's coverage. See 1985 *Special Commission Report*, *supra* note 8, at 1671. The Convention probably does not apply to arbitrations unless a court is rendering assistance in the production of evidence abroad in the context of arbitral proceedings. *Id.* at 1679. Article 1 of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments, to which the United States is not a party, expressly excludes arbitration from its definition of "civil or commercial matters." European Communities Convention on Jurisdiction and enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 27, 1968, 8 I.L.M. 229, 232 (1969). Some contracting states may view U.S. antitrust proceedings as administrative or penal (due to the provision for treble damages) and therefore outside the scope of the Convention. *Id.* at 1681; Radvan, *supra* note 3, at 1041.

30. 1978 U.S. *Delegation Report*, *supra* note 27, at 1419. This may explain the cases cited in the amicus brief of the U.S. Government in which the government encountered delays in seeking evidence abroad. See also Brief for the United States and the Securities and Exchange Commission as Amicus Curiae at 16 nn. 15-17, *Aerospatiale* (U.S. Supreme Court) (No. 85-1695).

In addition, the Convention only applies to requests to obtain evidence or to perform some other judicial act.<sup>31</sup> Letters of request are available only "for use in judicial proceedings, commenced or contemplated."<sup>32</sup> The Convention expressly does not cover "the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures."<sup>33</sup> Thus, injunctions, restraining orders, forced sales, receiverships, or mandamus cannot be had under the Convention.<sup>34</sup> The act requested pursuant to the Convention must also be viewed as a judicial act within the state of execution.<sup>35</sup> Requests merely to obtain copies of public documents such as birth certificates or marriage certificates, or to advertise the existence of legal proceedings, probably would not be viewed as judicial acts, and a request for such acts would not be honored under the Convention.<sup>36</sup>

In an effort to bridge the gap between common law and civil law methods of international assistance,<sup>37</sup> the Convention provides two basic means for gathering evidence. The first is the letter of request procedure set forth in Chapter I (articles 1–14), which is the method of international judicial assistance most commonly utilized by civil law systems.<sup>38</sup> The second is the taking of evidence by diplomatic officers or commissioners set forth in Chapter II (articles 15–22). This procedure is roughly analogous to the common law practice of taking evidence abroad by notice, stipulation, or through court appointed commissioners.<sup>39</sup>

31. Convention, *supra* note 1, art. 1.

32. *Id.* art. 1, para. 2; Amram, *supra* note 11, at 653.

33. Convention, *supra* note 1, art. 1. Service abroad of judicial documents is within the scope of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 1969, 20 U.S.T. 361, T.I.A.S. No. 6638, which was recently construed by the U.S. Supreme Court in *Volkswagenwerk AG v. Schlunk*, 56 U.S.L.W. 4595 (No. 86-1052, June 15, 1988).

34. Amram, *supra* note 11, at 652–53.

35. *Id.* at 653.

36. *Id.*

37. See 1978 *Special Commission Report*, *supra* note 29, at 1426; *U.S. Ratification*, *supra* note 10, at 105.

38. Amram, *supra* note 11, at 652.

39. *Id.* The Convention does not prevent signatory states from agreeing that letters of request may be transmitted by means other than those provided in the Convention, nor from permitting requests to be honored upon terms which are more liberal than those provided for in the Convention. Article 27 preserves for the foreign court or litigant any procedures provided for by the law of requested state which may be more favorable to the foreign litigant than the provisions of the Convention. See Amram, *supra* note 10, at 107. There are also treaties between the U.S. and individual nations regarding the gathering of evidence. See Agreement on Judicial Assistance: Taking of Evidence, Feb. 11, 1955, U.S.-W. Germany, 32 U.S.T. 4181, T.I.A.S. No. 9938 (entered into force Oct. 8, 1956, additional notes Oct. 17, 1979, Feb. 1, 1980); Agreement Between the United States and the Federal

To deal with requests for evidence made under the Convention, the contracting nations are required to designate Central Authorities.<sup>40</sup> In addition, several countries have modified their internal codes of procedure and issued enabling regulations to provide for Convention requests.<sup>41</sup> It seems highly unlikely that those nations would have taken the extraordinary steps of entering into the Convention, making their powers of compulsion available to assist foreign judicial proceedings, and modifying their internal codes of procedure, if they thought that the Convention would be used only in those rare instances when a U.S. court does not have long-arm jurisdiction over a foreign entity in possession of relevant evidence.

United States procedures for honoring requests received from abroad were liberalized in 1964, *before* the Convention was even negotiated.<sup>42</sup> Thus, liberal access to evidence located in the United States was not an inducement for other nations to enter into the Convention, for they already had that advantage.<sup>43</sup> Rather, the non-U.S. signatory nations believed that by entering into the Convention, in exchange for agreeing to compel their citizens to provide evidence, they were obtaining control over evidence-gathering within their sovereign territories.<sup>44</sup> A strong impetus for their agreement to the Convention was their desire for less U.S. intrusion into their internal documents and economic activities.<sup>45</sup> As stated by one of the U.S. negotiators of the Convention, the Convention was designed to create a system of internal evidence-gathering that "must be 'tolerable'

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Republic of Germany Regarding Restrictive Business Practices, June 23, 1976, U.S.-W. Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291. Such treaties are specifically preserved by Article 32 of the Convention. These 'bilateral treaties are often more liberal than is the Convention itself. See 1978 *Special Commission Report*, *supra* note 29, at 1433.

40. Convention, *supra* note 1, art. 1.

41. See *supra* note 12.

42. Pub. Law. No. 88-619, 78 Stat. 995 (current version at 28 U.S.C. §§ 1781, 1782 (1982)) see also FED. R. CIV. P. 28(b); Amram, *supra* note 11, at 652 n.8. The amendments designated the State Department as the authority to receive letters of request from foreign litigants or courts and authorized the use in the federal courts of evidence obtained in other countries even if the form of the evidence did not precisely comply with the requirements of U.S. evidence law.

43. See I B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 14-52 (1984); *Aerospatiale*, 107 S. Ct. at 2559 (Blackmun, J., concurring in part and dissenting in part).

44. As stated by the U.S. negotiators of the Convention, "Their [the civil law countries'] concepts of 'judicial sovereignty' are fully respected." Amram, *supra* note 11, at 655.

45. See *Compagnie Française D'Assurance Pour Le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y. 1984). In many cases, a foreign government should be recognized to have a legitimate interest in the disclosure of documents and information from within its borders. Who could dispute, for example, that matters affecting the disclosure of national defense plans, secret product formulas, or high technology items can legitimately be regulated by foreign governments? For an excellent discussion of the protection of such materials, see *id.* at 24-26.

in the state of execution and 'utilizable' in the forum of the state of origin where the action is pending."<sup>46</sup>

## B. LETTERS OF REQUEST

### 1. *Procedures*

Letters of request consist of written requests for evidence (generally document requests or requests to interrogate witnesses) from the U.S. judge to the foreign sovereign asking that evidence be provided under the Convention. They are generally sought in the U.S. court on motion and notice under Federal Rule of Civil Procedure 28(b).<sup>47</sup>

Article 3 of the Convention specifies the information to be set forth in the letter of request.<sup>48</sup> This includes a description of the action (article 3(c)), the identify of the person to be examined (article 3(e)), a list of questions to be put to the witness or a statement of the subject matter of the examination (article 3(f)), a specification of documents requested (article 3(g)), and a request for execution utilizing "special procedures" (articles 3(i), 9). The Special Commission on the Operation of the Convention has promulgated a revised model form for letters of request and a copy of that form is included as Appendix A to this article.<sup>49</sup> Use of the model form has been recommended by the Special Commission on the Operation of the Convention.<sup>50</sup> The letter should be accompanied by a certified translation into the language of the receiving state.<sup>51</sup>

46. Amram, *supra* note 11, at 652; Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law*, 63 AM. J. INT'L L. 521, 526 (1969) [hereinafter *Report on Eleventh Session*]; Oxman, *supra* note 29, at 762-65.

47. See generally, Devine & Olsen, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368, 369-73 (1975).

48. Convention, *supra* note 1, art. 3.

Article 3 states:

A Letter of Request shall specify—

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia:

- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- (g) the documents or other property, real or personal, to be inspected;
- (h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- (i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11?

No legalization or other like formality may be required.

49. 1985 *Special Commission Report*, *supra* note 8.

50. 1978 *Special Commission Report*, *supra* note 29, at 1435.

51. Convention, *supra* note 1, art. 4. English or French may be used unless the requested state has made a reservation requiring otherwise. *Id.*

After the letter of request is issued by the U.S. court, it is sent (generally by the lawyer for the requesting party) to the Central Authority of the nation in which execution is to take place.<sup>52</sup> The addresses of the Central Authorities are provided in each signator nation's declarations made in connection with its ratification of the Convention. It is important to have counsel in the receiving state review the letter of request before it is propounded and assist with enforcing it in the receiving state. Indeed, item 6 of the revised model form of letter of request provides for identification of the representative of the requesting party in the receiving state.<sup>53</sup>

A letter of request submitted in conformance with the Convention's procedures must be honored unless the acts requested do not fall within the functions of the judiciary or the state addressed considers that its sovereignty or security would be prejudiced thereby.<sup>54</sup> The requested states may also declare at the time of signature, ratification, or accession that they will not execute letters of request seeking pretrial discovery of documents.<sup>55</sup> Execution may not be refused on the ground that the executing state asserts exclusive jurisdiction over the subject matter of the action or does not recognize the right of action being pursued in the U.S. court.<sup>56</sup>

If so requested, the foreign Central Authority is required to give the requesting party notice of the time and place where the proceedings are to be held.<sup>57</sup> Article 9 requires that requests shall be executed "expeditiously." Article 10 provides, in mandatory terms, that appropriate compulsion shall be exercised to compel a recalcitrant witness to give evidence in response to a letter of request to the same extent that compulsion would be exercised by the requested court in a similar proceeding under the domestic law of the requested court.<sup>58</sup> The availability of powers of compulsion in foreign states greatly enlarged the assistance given to U.S. litigants in the foreign nations that are parties to the Convention.<sup>59</sup> Under

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52. Convention, *supra* note 1, art. 2. In most countries other than the United States, letters of request are forwarded by the Central Authority of the requesting state to the Central Authority of the requested state. 1978 *Special Commission Report*, *supra* note 29, at 1429.

53. See revised model form, attached hereto as Appendix.

54. Convention, *supra* note 1, art. 12.

55. *Id.* art. 23. The effect of a reservation under article 23 is discussed *infra* at the text accompanying notes 72-76.

56. Convention, *supra* note 1, art. 12.

57. *Id.* art. 7.

58. *Id.* art. 10; Amram, *supra* note 10, at 106-07. If compliance with the request would not be compelled under the internal law of the executing state, however, then to that extent powers of compulsion which may be available in U.S. courts may not be available under the Convention.

59. *Report on Eleventh Session*, *supra* note 46, at 526.

prior practice, absent a binding treaty obligation, U.S. litigants could rely only upon the good will and comity of the foreign for the execution of a letter of request. The Convention thus makes available to U.S. litigants the powers of compulsion of the foreign sovereign with respect to evidence located abroad to the same extent as provided by the internal law of the executing state.<sup>60</sup>

## 2. *Special Requests*

From the U.S. lawyer's perspective, one of the most significant features in letter of request procedures is the provision for requesting special methods of execution. Under article 9 of the Convention, the foreign sovereign is to follow its own law in executing a letter of request unless a special method or procedure is requested. A special request or procedure, however, must be allowed unless it is incompatible with the internal law of the state of execution<sup>61</sup> or impossible of performance under internal practice and procedure or due to practical difficulties.<sup>62</sup>

Civil law systems generally consider evidence-gathering to be a judicial function performed as an aspect of the state's sovereign power.<sup>63</sup> The examination of witnesses is conducted by the judge and usually results in a written summary prepared by the examining judge rather than a verbatim transcript of the witness's testimony.<sup>64</sup> Civil law systems do not divide litigation into a "pretrial" and a "trial" phase; rather, the fact-finding process takes place in a series of hearings conducted by a judge, who decides what evidence is required in order to render a decision. In

60. The contracting states have not agreed as to whether a Central Authority has an obligation to pursue a letter of request through the appeals process if execution is denied by a lower court of the requested state. 1978 *Special Commission Report*, *supra* note 29, at 1431.

61. Convention, *supra* note 1, art. 9. "Incompatibility" means conflict with a constitutional or legislative provision, not mere inconsistency. *Report of the United States Delegation to Eleventh Session of the Hague Conference on Private International Law*, 8 I.L.M. 785, 810 (1969) [hereinafter 1969 U.S. Report]; see also Amram, *supra* note 10, at 106 n.13.

62. Convention, *supra* note 1, art. 9. "Impossibility" requires more than that the requested procedure is merely "inconvenient" or "difficult." 1969 U.S. Report, *supra* note 61, at 810. Use of the term "impossible" was intended to maximize cooperation and minimize the possibilities for refusing to honor special requests. See Amram, *supra* note 10, at 106 n.14.

63. J. MERRYMAN, *supra* note 28, at 111-18; Amram, *supra* note 11, at 652; Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 35-37 (1979); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 466-69 (1983).

64. J. MERRYMAN, *supra* note 28, at 111-16; Borel & Boyd, *supra* note 63, at 36; Shemanski, *supra* note 63, at 468; see generally *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 59-60 (E.D. Pa. 1983).

the ordinary case, witnesses are not examined under oath.<sup>65</sup> Thus, unlike the common law systems, litigation in the civil law system is much more a function of the court than of private counsel.

In drafting the Convention, the European doctrine of judicial sovereignty was very much on the minds of the U.S. negotiators.<sup>66</sup> As stated by one of the U.S. delegates to the Convention: "[F]undamental principles of 'judicial sovereignty' in the state of execution must be respected, as well as the diametrically different approaches in the common-law and civil-law countries to the 'public' or 'private' quality of the taking of evidence."<sup>67</sup> By taking evidence through the judicial process of the requested state, the negotiators hoped to eliminate the sovereignty problem in most cases through the consent of the requested state to make its judicial process available for compliance with letters of request.<sup>68</sup> Once the evidence has been obtained, it is returned by the executing authority either directly to the requesting authority or via the Central Authority of the requested state.<sup>69</sup>

United States litigants who are concerned that information obtained through these methods might be subject to evidentiary objections in a U.S. court<sup>70</sup> can invoke article 9 and request that a witness be placed under oath, that a verbatim transcript be prepared, and that counsel be permitted to examine or cross-examine the witness. The executing state will be obligated to comply with these requests to the extent that they do not conflict with internal law. Special methods cannot be denied merely because they are difficult or inconvenient; under the Convention, they can be denied only if they are impossible.<sup>71</sup> Thus, in article 9 the civil

65. Borel & Boyd, *supra* note 63, at 35-37; Shemanski, *supra* note 63, at 466-69.

66. 1969 U.S. Report, *supra* note 61, at 806-07.

67. Report on Eleventh Session, *supra* note 46, at 526. Amram was also rapporteur of the Special Commission which actually drafted the Convention.

68. *Id.* Some states even permit judicial authorities of the requesting state to be present at the taking of testimony pursuant to a letter of request. Convention, *supra* note 1, art. 8.

69. Convention, *supra* note 1, art. 13. The 1978 Special Commission Report urged direct return of the documents by the executing authority to the requesting authority. 1978 Special Commission Report, *supra* note 29, at 1431.

70. Although rule 28(b) of the Federal Rules of Civil Procedure provides that evidence is not inadmissible because it was taken by such procedures, *cf.* Uebersee Finanz-Korporation, A.G. v. Brownell, 121 F. Supp. 420 (D.D.C. 1954), the Advisory Committee notes to rule 28(b), suggest that such evidence may be entitled to less weight.

71. Article 9 is thus one of the most important ways in which the Convention seeks to create a system of evidence-gathering procedures which will be "tolerable" in the state of execution but which will result in evidence that is "utilizable" in the courts of the requesting state. Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in *United States: Message from the President Transmitting to the Senate the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 12 I.L.M. 323 (1973) (reproduced from S. Exec. Doc. A, 92d Cong., 2d Sess. (Feb. 1, 1972)).



law countries made significant concessions to the American way of gathering evidence.

### 3. *Pretrial Discovery of Documents*

A much-criticized but perhaps misunderstood feature of letter of request procedures under the Convention is article 23, which provides: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law Countries." All but five of the Convention's signatory states have made a declaration under article 23.<sup>72</sup> Contrary to the misconceptions surrounding the purpose of article 23, however, carefully drafted, specific document requests will, in the case of many contracting states, stand a good chance of execution, particularly where the letter of request makes it clear that the documents requested are relevant to matters that will be in issue at trial.<sup>73</sup> There is, indeed, a trend in that direction, as several of the largest nations have taken steps to clarify their positions on this issue.<sup>74</sup>

72. All parties to the Convention except Barbados, Cyprus, Czechoslovakia, Israel and the United States have made a declaration under article 23. Article 23 was originally proposed by the United Kingdom to counter American document requests which it considered to be lacking in specificity. 1978 *Special Commission Report*, *supra* note 29, at 1428.

73. Some commentators have viewed article 23 as an extension of articles 1 and 3(g) which require that letters of request will issue only with respect to "judicial proceedings commenced or contemplated" and that the documents sought must be "specified" in the request. A distinction has been drawn between specific requests for documents which will be used in judicial proceedings, and broad fishing expeditions designed to unearth evidence to support a claim that a party does not presently know to exist. See Gouguenheim, *Convention sur l'Obtention des Preuves a l'Etranger en Matière Civile et Commercial*, 96 JOURNAL DU DROIT INTERNATIONAL 315, 319 (1969); Oxman, *supra* note 29, at 772, n.110.

74. For example, the United Kingdom declaration under article 23 states that:

In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand 'Letters of Request issued for the purpose of obtaining pretrial discovery of documents' for purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

This reservation seems essentially to prohibit broad requests for "all documents relevant to \_\_\_\_\_" and requests which are not for specific and identified documents. The scope of the article 23 declarations was the subject of extended discussions at the meeting of the signator nations in 1978 at which American experts urged that article 23 reservations should be exercised only to the extent that the requests for documents were overly broad and lacked specificity. 1978 *Special Commission Report*, *supra* note 29, at 1427-28. Following the 1978 meeting, Singapore, The Netherlands, Sweden, Finland, Norway and Denmark have modified their article 23 declarations along the lines of the U.K. declaration. See Oxman, *supra*, note 29, at 775-76; Radvan, *supra* note 3, at 1046 n.69. France has recently stated that it will honor document requests which are "enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation." Letter from the French Minister of Justice to the Minister of Foreign Affairs (Aug. 19, 1986), annexed as VOL. 22, NO. 4

Article 23 only applies to letters of request seeking documents. Thus, requests for deposition discovery by letters of request are not restricted by article 23. Moreover, pretrial discovery of documents may be sought through consular or commissioner channels from voluntary witnesses where the compulsory power of the foreign state is not needed. Most civil law countries exercised their article 23 right by excluding all common law document requests for purposes of pretrial discovery, apparently due to a widespread misunderstanding that viewed American pretrial discovery as a procedure by which lawyers might seek, prior to the filing of a case, to determine whether evidence exists that could support the filing of an action.<sup>75</sup> After the civil law countries became aware that American discovery typically occurs only in a pending action and that discovery abroad often is gathered with a view to its future use at trial,<sup>76</sup> several of them modified their prior declarations along the lines of the United Kingdom's declaration so as to limit their article 23 objections only to those document requests that lack specificity.<sup>77</sup>

United States delegates have repeatedly emphasized at meetings of the Special Commission on the operation of the Convention that, except in rare circumstances,<sup>78</sup> pretrial discovery can only be conducted after a civil proceeding has been commenced and that the Federal Rules of Civil Procedure have themselves been amended in order to curb abusive discovery requests.<sup>79</sup> United States experts have further pointed out that objections can be made by the receiving party; that U.S. counsel may negotiate limits on the scope of the requests; and that U.S. courts themselves will grant protective orders placing reasonable limits on the scope of the requests.<sup>80</sup>

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Appendix to French Amicus Brief, *supra* note 9 [hereinafter Letter]. West Germany and Italy have ratified the Convention while making broad reservations under article 23, but West Germany is currently considering regulations which would limit the scope of its article 23 reservation. Heck, *supra* note 7, at 237 n.33.

75. 1978 *Special Commission Report*, *supra* note 29, at 1428; 1978 *U.S. Delegation Report*, *supra* note 27, at 1421.

76. Item 8 of the revised model form of letter of request (Appendix hereto) permits a requesting party to explain why the evidence requested is needed for trial.

77. For an excellent discussion of the confusion regarding American pretrial discovery and the changes in article 23 declarations which resulted from the clarification of this issue, see Oxman, *supra* note 29, at 771-79.

78. See 1985 *Special Commission Report*, *supra* note 8, at 1676; FED. R. CIV. P. 27.

79. Every request for discovery or response thereto must be signed by the attorney to certify that it is consistent with the Federal Rules, is not interposed to harass or cause unnecessary delay or expense, and is not unreasonable given the needs of the case, the discovery already had, the amount in controversy and the importance of the issues at stake. Sanctions are available against an attorney who signs a request in violation of the rule. FED. R. CIV. P. 26(g). See also 1985 *Special Commission Report*, *supra* note 8, at 1676-77.

80. 1985 *Special Commission Report*, *supra* note 8, at 1676-77. Several of these points were also made by the U.S. delegation at the 1978 Special Commission on the Operation of the Hague Convention. 1978 *U.S. Delegation Report*, *supra* note 27, at 1423-24.

Clearly, any evidence-gathering done abroad in connection with U.S. litigation must be done before the trial is commenced and therefore would qualify as "pretrial discovery." Reasonable pretrial discovery must be permitted, by the signatory nations, since once the trial is commenced, there is rarely enough time to pursue Convention procedures before the trial is concluded. If the Convention is to have utility for U.S. litigants, reasonable pretrial discovery must be permitted, for without it there is no practical way to gather needed evidence under the Convention.<sup>81</sup>

A concern that foreign Central Authorities will refuse to honor discovery requests has been one of the main factors causing U.S. courts to refuse to require use of the Convention.<sup>82</sup> Thus, honoring reasonable discovery requests propounded by U.S. litigants would be in the interest of the foreign signatory states because it would tend to encourage use of the Convention by the U.S. courts.<sup>83</sup> The signatory nations have begun to recognize this fundamental aspect of U.S. litigation, and the trend is toward permitting reasonable and specific pretrial requests for documents.<sup>84</sup> The current status of the approach to discovery requests under the Convention in France, the United Kingdom, West Germany, and Italy is set forth in Part III of this article.

To overcome objections that U.S. discovery serves as a roving commission to seek evidence that may serve as the basis for instituting new actions, it is helpful to specify the particular documents sought and emphasize that the documents sought are relevant to matters in issue and are likely to be used at trial.<sup>85</sup> It is also useful to emphasize in the letter of request that the proceeding in which the evidence is sought has already been commenced, that the evidence is directly relevant to matters already in issue before the court, and that the requests have been reviewed and approved by the requesting court.<sup>86</sup>

81. See 1978 U.S. Delegation Report, *supra* note 27, at 1424.

82. See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 449-50 (S.D.N.Y. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 509-12 (N.D. Ill. 1984).

83. The 1985 *Special Commission Report* concluded that "the adoption of an unqualified reservation as permitted by article 23 would seem to be excessive and detrimental to the proper operation of the Convention." 1985 *Special Commission Report*, *supra* note 8, at 1678; see also 1978 U.S. Delegation Report, *supra* note 27, at 1421; Radvan, *supra* note 3, at 1044.

84. 1985 *Special Commission Report*, *supra* note 8, at 1678.

85. Radvan, *supra* note 3, at 1044-45. In West Germany document requests probably will not be honored regardless of their specificity. Regulations concerning document requests, however, are currently under consideration by the West German government. See *infra* text accompanying notes 236-40.

86. Thus, if the requests have been the subject of a motion to compel under rule 37 of the Federal Rules of Civil Procedure, that fact should be pointed out in the letter of request.

#### 4. *Important Matters of Form*

Before seeking a letter of request from a U.S. court, counsel should also focus on important matters of form.<sup>87</sup> The language of the letter should be clear and concise; legal jargon should be avoided.<sup>88</sup> Because the letter of request will probably need to be translated, complex grammatical construction also should be avoided.<sup>89</sup> The assistance of foreign counsel should be considered when drafting the letter of request. Their input can be helpful in convincing the U.S. court that the letter of request is proper under the law where it is to be executed and in ensuring that it is in the form most likely to result in swift execution.<sup>90</sup>

The description of the action should be concise and neutral and should emphasize the commercial and civil nature of the action.<sup>91</sup> In order to avoid the negative "fishing expedition" connotations associated with U.S. discovery, counsel should emphasize that the evidence is sought for use at trial in litigation that has been commenced.<sup>92</sup> It may also be useful to recite that the U.S. judge has considered the requests in light of the comity analysis mandated by the Supreme Court in *Aerospatiale* and has determined that use of the Convention is appropriate and that the requests are proper. To the extent that the U.S. judge has approved the requests, they may be found less offensive to a foreign sovereign that views evidence taking as a judicial function. If depositions of witnesses are desired, the proposed questions should not be listed, but the subject matter of examination should be described briefly and, if appropriate, the relevance of those subject matters to matters in issue should be provided, again to avoid charges of "fishing expedition."

A letter of request should indicate with the greatest possible specificity any documents being sought. If possible (especially when the documents

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In addition, Federal Rule of Civil Procedure 26(b) permits involvement by the U.S. judge in framing discovery requests. Moreover, recent amendments to the Federal discovery rules reflect concerns quite similar to those voiced by the European signator states. See FED. R. CIV. P. 26(g). Thus, article 23 can be seen as an extension of the debate on the scope of discovery which is ongoing in U.S. domestic practice.

87. Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW, 575, 576-77 (1982).

88. See 1978 *Special Commission Report*, *supra* note 29, at 1435.

89. Delegates to the 1985 meeting of the Special Commission on the Convention stated that poor translation is one of the main reasons for delays in the execution of letters of request. 1985 *Special Commission Report*, *supra* note 29, at 1673.

90. Platto, *supra* note 87, at 578. Foreign counsel can be located from many sources; *Martindale-Hubbell* contains a partial list of foreign counsel. The U.S. State Department Office of Citizens Consular Services and the U.S. Embassy or Consulate in the State where evidence is to be taken can also provide the name of local counsel.

91. Platto, *supra* note 87, at 577.

92. *Id.*

are known to exist) they should be described by author, recipient, subject matter, and approximate date. A vague and general request for "any and all documents relating to \_\_\_\_\_" probably will not be honored in most foreign signatory states.<sup>93</sup> The request should emphasize that the documents are sought for use at the trial of an action that is currently pending, and should state that the requests have been issued by the court where the action is pending. Presumably, the court will have reviewed the requests and found them relevant and perhaps even necessary for trial. If so, it would be helpful to recite this in the letter of request.<sup>94</sup> In any event, the words *pretrial discovery* should be avoided.<sup>95</sup>

Under article 4 of the Convention a contracting state is obligated to accept letters of request in either English or French unless it has exercised its right under article 33 to make a reservation to the contrary.<sup>96</sup> In that event the letter of request must be in the language of the authority requested to execute it or be accompanied by a translation into that language.<sup>97</sup> Generally, however, it is wise to provide an official translation into the language of the receiving state.

After the letter of request has been issued by the U.S. court, it must be transmitted to the appropriate foreign authority for execution. Under article 2, each contracting state is required to establish a Central Authority to receive letters of request and forward them to the appropriate authority for execution.<sup>98</sup> If the Central Authority considers that the request does not comply with the Convention, it must return it to the requesting authority, specifying its objections.<sup>99</sup> If the authority to which a letter of request has been transmitted for execution by the Central Authority is not competent to execute it, that is not a basis for returning the letter of request; instead the Central Authority must send the letter of request to the proper authority.<sup>100</sup>

After a letter of request has been executed, it must be returned through the same channels. In every instance where a letter of request is not executed in whole or in part, the requesting authority must be notified and informed of the reasons.<sup>101</sup> Thus, the Convention provides uniform

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93. 1978 U.S. Delegation Report, *supra* note 27, at 1424.

94. See Platto, *supra* note 87, at 578.

95. CIVIL PRACTICE MANUAL, *supra* note 7, at 43; Platto, *supra* note 87, at 577.

96. Convention, *supra* note 1, art. 4.

97. *Id.*

98. *Id.* art. 2. The Central Authorities and their addresses are listed in each signatory country's declarations to the Convention. See, e.g., Declaration of the Federal Republic of Germany at B(1). Contracting parties may designate additional authorities and federal states may designate more than one central authority. Convention, *supra* note 1, art. 24.

99. Convention, *supra* note 1, art. 5.

100. *Id.* art. 6.

101. *Id.* art. 13.

and definite procedures for transmission of and communications regarding letters of request, which serve to eliminate confusion and delay encountered in prior practice as a result of the varying procedures for judicial assistance in different countries.<sup>102</sup>

The Convention also regulates testimonial privileges. A person from whom evidence is sought has an unqualified right to assert privileges available under the law of the state of execution.<sup>103</sup> Privileges of the requesting state are available to the extent that they are specified in the letter of request or are confirmed to the executing authority by the requesting authority.<sup>104</sup> A person from whom evidence is sought is entitled to be represented by counsel.<sup>105</sup>

The execution of a letter of request does not give rise to reimbursement of costs or taxes of any kind except fees paid to experts and interpreters and costs occasioned by the use of a special procedure requested pursuant to article 9.<sup>106</sup> When required to do so by the law of the executing state, an executing state may, however, request reimbursement by the requesting state of fees and costs for service of process, witness fees, and the cost of any transcript.<sup>107</sup>

### C. TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS OR COMMISSIONERS

The taking of evidence by diplomatic officers or commissioners, while familiar to the common law world, represents a significant departure from civil law systems, where evidence-gathering for civil litigation is a judicial function.<sup>108</sup> The taking of evidence by private persons (i.e., counsel for the parties or a commissioner) or U.S. government officials (i.e., diplo-

102. See Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101, 118-20 (1980).

103. Convention, *supra* note 1, art. 11. For example, Germany has a privilege against the disclosure of "trade secrets." See *infra* text accompanying notes 239-42. See generally Oxman, *supra* note 29, at 767-69; Radvan, *supra* note 3, at 1047-49.

104. Convention, *supra* note 1, art. 11. However, the difficulty of proving testimonial privileges of the requesting state may lead to confusion and delay when authorities of the requested state, attempting to execute letters of request, encounter privileges not provided for under this local law. See 1985 *Special Commission Report*, *supra* note 8, at 1675.

105. Convention, *supra* note 1, art. 20. This right applies whether evidence is taken by letter of request, diplomatic officer or commissioner. *Id.*

106. *Id.* art. 14. Yet, when the law of an executing authority requires the parties to gather evidence, i.e., common law countries, the requesting authority is responsible for costs only if it so consents. *Id.*

107. Convention, *supra* note 1, art. 14.

108. J. MERRYMAN, *supra* note 28, at 111-18; Borel & Boyd, *supra* note 63, at 35-37; Shemanski, *supra* note 63, at 466-69.

matic or consular officers) is considered an infringement on an area of exclusive judicial sovereignty, in some cases even where taken from a willing witness.<sup>109</sup> For this reason, the Convention gives contracting states the right at the time of ratification to exclude in whole or in part the taking of evidence by diplomatic officers or commissioners.<sup>110</sup> The taking of evidence by these methods is subject to supervision by the states where the evidence is to be taken, and the degree of supervision depends on whether the evidence is to be taken from a national of the requesting or executing state or of a third state. In this way, the Convention allows contracting states to exercise a degree of supervision over procedures they may consider alien and intrusive. Compulsion of witnesses is not available under these methods of evidence-gathering, unless the executing state has made a declaration that it will make such compulsion available.<sup>111</sup> Thus, the taking of evidence by commissioners or consuls will likely be useful only where the witness will appear voluntarily.<sup>112</sup>

Under article 15 of the Convention, a U.S. diplomatic officer or consul may without compulsion take evidence within his host country<sup>113</sup> from American nationals in aid of a proceeding commenced in the U.S. courts.<sup>114</sup> The host nation may declare, however, that prior permission must be sought from a designated authority before he can take such evidence.<sup>115</sup> Under article 16, a diplomatic officer or consular officer may also take evidence without compulsion from nationals of his host state or of third states. In this case, however, permission must be obtained from the state in which the evidence is to be taken. Conditions may be attached to the granting of such permission, although a state may declare that no such prior permission is required.<sup>116</sup>

Article 17 allows a person duly appointed as a commissioner to take evidence in one contracting state in aid of a proceeding commenced in the courts of another contracting state. In all such cases prior permission is required from a designated authority of the state in which evidence is

109. 1985 *Special Commission Report*, *supra* note 8 at 1677; Oxman, *supra* note 29, at 761-65.

110. Convention, *supra* note 1, art. 33; Amram, *supra* note 11, 654-55; Radvan, *supra* note 3, at 1049-50. Only Singapore has excluded these methods in their entirety.

111. Convention, *supra* note 1, art. 18.

112. Radvan, *supra* note 3, at 1051-52.

113. Diplomatic officers and commissioners may take evidence but may not perform "other judicial acts" which may be sought to be performed by use of a letter of request. *Report on the Eleventh Session*, *supra* note 46, at 527.

114. Evidence may be taken by diplomatic officers and commissioners only in aid of proceedings which have been "commenced," Convention, *supra* note 1, arts. 15-17; while letters of request may be used to gather evidence for actions "commended or contemplated." *Id.* art. 1.

115. *Id.* art. 15.

116. *Id.* art. 16.

to be taken, and conditions may be attached to the granting of such permission.<sup>117</sup> Again, however, a state may declare that prior permission is not required.<sup>118</sup>

A diplomatic officer or commissioner may take evidence in the manner provided for by the law applicable to the court where the action is pending, unless that manner is forbidden by the law of the state where the evidence is taken.<sup>119</sup> He or she may also take any sort of evidence that is not inconsistent with the law of the state where the evidence is to be taken or contrary to any conditions that may be imposed by the host nation.<sup>120</sup> Oaths or affirmations may be administered within the same limits.<sup>121</sup> A request to a person to appear before a diplomatic officer or commissioner must, unless the recipient is a national of a state in which the action is pending, be drawn up in the language of the place where the evidence is to be taken or accompanied by a translation into that language.<sup>122</sup> The request must inform the person to be examined that he may be represented by counsel, and unless the evidence is to be taken in a state that has agreed to compel attendance, the request must inform the person that he may not be compelled to appear or give evidence.<sup>123</sup> A person requested to give evidence may invoke privileges to the same extent as under letter of request procedures.<sup>124</sup> Article 22 provides that letter of request procedures will be available in the event that attempts to take evidence by diplomatic officers or commissioners fail because a witness refuses to give evidence.

Despite the limitations in the system of evidence-taking by diplomatic officers or commissioners, it is potentially less time-consuming and costly than letter of request procedures. It can be done without the use of government or court officials of the receiving state,<sup>125</sup> and American discovery procedures may also be used without the necessity of a special request to the extent not inconsistent with the law of the requested country. The

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117. *Id.* art. 17. Article 19 sets forth some of the conditions which may be imposed on the taking of evidence by diplomatic officers and commissioners under articles 16 and 17, including conditions on the time and place of examination, and requirements that the designated authority be given advance notice of the examination and that a representative of the designated authority be entitled to be present at the taking of evidence. *See also* Radvan, *supra* note 3, at 1050.

118. Convention, *supra* note 1, art. 17.

119. *Id.* art. 21(d); Amram, *supra* note 11, at 655.

120. Convention, *supra* note 1, art. 21(a).

121. *Id.*

122. *Id.* art. 21(b).

123. *Id.* art. 21(c).

124. *Id.* art. 21(e); *see supra* text accompanying notes 103–05 (privileges available under the letter of request procedures).

125. Where permission must be sought, local government officials will be involved to that extent.



commissioner can be someone familiar with U.S. procedures who resides in the country addressed, thereby eliminating travel costs.<sup>126</sup> These procedures may even be carried out by counsel themselves, either under the supervision of a diplomatic officer or as commissioners duly appointed by the court where the action is pending. The use of diplomatic officers or commissioners can also eliminate requirements as to translation of the examination, which may be imposed under local law for letter of request procedures.<sup>127</sup> There are, however, limitations on the use of these procedures. If evidence must be taken from an unwilling witness, recourse must be had to letter of request procedures unless the state where evidence is to be taken has declared under article 18 that it will make available compulsion for the taking of evidence by diplomatic officers or commissioners.<sup>128</sup>

Apart from requiring contracting states to designate the competent authority from whom any necessary permission must be sought, the Convention provides no formal mechanism for taking of evidence by diplomatic officers or commissioners. Parties wishing to use these methods should proceed under rule 28(b) of the Federal Rules of Civil Procedure. If diplomatic officers are to be used, either the notice provision of rule 28(b)(1) or the provision for the appointment of a commissioner under rule 28(b)(2) may be used.<sup>129</sup> The request should be phrased so that any qualified diplomatic officer may preside over the deposition.<sup>130</sup>

According to the U.S. State Department, the following information should be provided to the American Services Section of the Consular Section of the appropriate American embassy, together with the notice of deposition or the commission of the consular officer:

126. 1978 *Special Commission Report*, *supra* note 29, at 1433.

127. Under article 21(b), the notice to the witness must, however, be in the language of the place where the evidence is to be taken or accompanied by a translation into that language.

128. When taking evidence from an unwilling witness even where the state in which evidence is to be taken has made a declaration under article 18, it may be best to proceed first by letter of request procedures. States which have made a declaration under article 18 are obliged only to apply such compulsion at their discretion. Amram, *supra* note 11, at 655. In addition, conditions may be attached to the granting of compulsion. For this reason, seeking compulsion under article 18 could require as much (or more) time and effort as letter of request procedures.

129. Under United States law:

Every secretary of embassy or legation and consular office is authorized, whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his embassy, legation, or consulate, to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States.

22 U.S.C. § 4221 (1982); *see also* 22 C.F.R. § 92.1-7 (1987).

130. Delay may result if a particular officer is designated by name, since only that officer may take the evidence. *See* 22 C.F.R. § 92.55(a) (1987).

- requesting counsel's full name, address, and telephone number;
- a brief description of the nature of the case and the purpose of the deposition;
- the full name and address of the persons to be deposed as well as their citizenship and a statement that the witness's appearance is voluntary;
- suggested dates for taking the deposition or a period within which the depositions should be taken;
- whether the deposition will be upon oral questions or written interrogatories;
- whether a qualified court reporter and/or translator will be necessary; and, if so, whether the requesting party will make the arrangements for them or wishes the consular officer to do so;<sup>131</sup>
- who will attend the deposition (i.e., requesting counsel, opposing counsel);
- whether the consular official will be required to preside at the entire proceeding or may administer the appropriate oath(s) and withdraw.<sup>132</sup>

The communications to the American embassy should include authorization for a return collect communication to confirm arrangements.<sup>133</sup> A check for \$250 must also be included as a deposit to cover fees and expenses.<sup>134</sup> Consular facilities are provided free of charge.<sup>135</sup> The requesting party is responsible for arranging the appearance of the witness and the payment of any applicable travel or witness fees.<sup>136</sup>

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131. There seems to be some uncertainty as to whether consular officials will arrange for translators and stenographers. 22 C.F.R. § 92.56 (1987). In the absence of special instructions, the consular officer should "... (b) when necessary, act as an interpreter or translator, or see that arrangements are made for some qualified person to act in this capacity; ... [and] (e) either record or have recorded ... the testimony of the witness." 22 C.F.R. § 92.56(b), (e) (1987). Yet the CIVIL PRACTICE MANUAL, *supra* note 7, at 40, and an information sheet prepared by the U.S. Embassy in Paris for U.S. citizens seeking judicial assistance in France, states that consular officials will not arrange for these services. See AMERICAN EMBASSY, PARIS, FRANCE, JUDICIAL ASSISTANCE—FRANCE 4 (1986) [hereinafter U.S. EMBASSY INFORMATION SHEET]. Counsel planning to rely on consular officials to arrange for translators or stenographers should be certain that the particular embassy or consulate is willing and able to do so. The requesting party will be responsible for the cost of any such services.

132. U.S. DEP'T OF STATE, OFFICE OF CITIZENS CONSULAR SERV., OBTAINING EVIDENCE ABROAD 2-3 (1986) [hereinafter OBTAINING EVIDENCE ABROAD].

133. *Id.* at 3.

134. A certified check should be payable to "The American Embassy at (City)." Additional fees will be billed to counsel. Current consular fees are \$90 per hour (or a fraction thereof) for the presence of a consular officer. 22 C.F.R. § 22.1 (1987).

135. See U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 4.

136. OBTAINING EVIDENCE ABROAD, *supra* note 132, at 3; CIVIL PRACTICE MANUAL, *supra* note 7, at 40.

When the requesting party wishes to have the consular official administer the oath and then withdraw to allow the depositions to be conducted by counsel, the notice or commission should so state and incorporate a stipulation of the parties to that effect.<sup>137</sup>

When evidence is to be taken by a commissioner, the procedure under rule 28(b)(2) is fairly straightforward. The requesting party must first apply to the court in which the action is pending for the issuance of the commission. The district court may then issue the commission. Any person may be appointed as a commissioner and the appointment carries with it the authority to administer an oath and take testimony.<sup>138</sup>

The ability to appoint any person a commissioner has the advantage of allowing testimony to be taken by foreign counsel conversant with American procedures or U.S. counsel practicing abroad, thus avoiding the expense of travel. When testimony is taken by commissioner, requesting counsel is required to arrange for the notice to the witness required by the Convention, translation and stenographic services, and any necessary permission of the state where the evidence is to be taken and the fulfillment of any conditions attached to the grant of any such permission. Local counsel can assist in making these arrangements and obtaining any necessary permission.

### III. Convention Procedures Abroad

#### A. FRANCE

##### 1. *Letters of Request*

The Central Authority appointed by France for the receipt of letters of request is:

Civil Division of International Judicial Assistance<sup>139</sup>  
Ministry of Justice,  
13, Place Vendôme,  
Paris 75001.

France views litigation as a process supervised by public officials and thus views international judicial assistance as assistance rendered by one court for the benefit of another court.<sup>140</sup> It is preferable, therefore, to

137. OBTAINING EVIDENCE ABROAD, *supra* note 132, at 3. Although the procedure could be stipulated to at the time of deposition, scheduling will be facilitated by including the stipulation in the notice of commission. Consular officers are quite busy and are more likely to be able to schedule quickly the short block of time which would be required under such a procedure.

138. FED. R. CIV. P. 28(b)(2).

139. Service Civil de l'Entraide Judiciaire Internationale.

140. See sources cited *supra* note 64.

transmit a letter of request directly from the U.S. court to the French Central Authority, rather than submit it by U.S. or local counsel. The letter of request must be in French or accompanied by a translation into French.<sup>141</sup> The French Central Authority will send the letter of request to the *ministère publique* (district attorney) of the jurisdiction in which it is to be executed.<sup>142</sup> The *ministère publique* then directs the letter to the competent court, which in turn assigns it to a magistrate for execution.<sup>143</sup>

The French Civil Code (*Nouveau Code de Procédure Civile*) was specifically amended in 1975 to accommodate letters of request received pursuant to the Convention.<sup>144</sup> The letter of request will be executed in accordance with French law unless the foreign court has requested a special procedure.<sup>145</sup> A verbatim transcript (not just a summary) is taken if the issuing court has so requested.<sup>146</sup> Upon authorization by the French judge, foreign counsel and their clients may be present and ask questions, which (along with the answers) must be translated into French.<sup>147</sup> The U.S. judge may also attend.<sup>148</sup> Echoing article 12 of the Convention, the Civil Code provides that enforcement of letters of request cannot be denied solely on the ground that France claims exclusive jurisdiction of the subject matter or does not recognize the substantive cause of action that is the subject of the litigation.<sup>149</sup> The French court does not assess costs or taxes for execution of letters of request, although fees will likely be due to witnesses, experts, interpreters, and a reporter who takes a verbatim transcript.<sup>150</sup> In permitting questioning by counsel and the taking

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141. Convention, *supra* note 1, Declarations of the Republic of France, at 143. C. Pr. Civ. art. 736; *see also* Borel & Boyd, *supra* note 63, at 39.

142. C. Pr. Civ. art. 736, *see also* Borel & Boyd, *supra* note 63, at 39.

143. C. Pr. Civ. arts. 736-38; *see also* Borel & Boyd, *supra* note 63, at 39-40.

144. The Code is available in English translation in H. DEVRIES, N. GALSTON & R. LOENING, *FRENCH LAW—CONSTITUTION AND SELECTIVE LEGISLATION* (1987). One purpose of the amendments was to deny French courts the ability to refuse requests for special procedures under the Convention. Brief of the Republic of France as Amicus Curiae, *supra* note 9, at 7 n.7.

145. C. Pr. Civ. art. 739. As noted above, under the Convention France has an obligation to follow requested special procedures unless they are "incompatible" with French Law or "impossible of performance." Convention, *supra* note 1, art. 9.

146. C. Pr. Civ. art. 739

147. *Id.* at art. 740. This may include both direct and cross-examination. Borel & Boyd, *supra* note 63, at 39. Although questioning the witness is subject to the consent of the judge, principles of comity and judicial courtesy, in addition to the clearly expressed intention of the statute to allow such procedures, suggest that such consent will freely be given. *Id.* The extent to which such a procedure departs from a standard French practice is illustrated by article 214 of the French Code of Civil Procedure, which provides: "The parties must not interrupt, interrogate, or seek to influence witnesses who give evidence, nor address them directly, under penalty of law being excluded from the court."

148. C. Pr. Civ. art. 741.

149. *Id.* art. 742.

150. *Id.* art. 748.

of a verbatim transcript, and in making powers of compulsion available in pursuance of causes of action that may not even be recognized in France, articles 739–748 represent a major concession by France to the common law style of taking evidence.

A French court, either “*sua sponte* or upon demand of any interested person” may refuse to execute a letter of request if it considers that its execution is beyond its jurisdiction or is likely to threaten the sovereignty or security of France.<sup>151</sup> The judge has discretionary power in making this determination.<sup>152</sup> Any adverse decision may be appealed by any of the parties or by the *ministère publique* to the Court of Appeals, which ultimately decides whether to perform the requested acts.<sup>153</sup>

The French court may employ various methods of compulsion in executing the letter of request. A party or nonparty may be ordered to disclose any and all written documents in his possession and a daily fine for noncompliance may be imposed.<sup>154</sup> Witnesses must give evidence under oath unless they have a legitimate excuse for not doing so or are a relative of a party.<sup>155</sup> A fine of from 100 to 10,000 francs may be imposed against a witness who refuses to appear or to give evidence or to take an oath.<sup>156</sup> Parties may be ordered to appear; if they fail to do so, adverse inferences may be drawn against them with respect to issues about which they would be expected to provide evidence.<sup>157</sup> Witnesses who give false evidence may be fined from 500 to 7,500 francs and may be imprisoned for two to five years.<sup>158</sup>

Although France initially declared under article 23 that it would not execute letters of request issued for the purpose of obtaining pretrial discovery of documents,<sup>159</sup> an August 19, 1986, letter from the French Minister of Justice to the Minister of Foreign Affairs states that France will not object to the execution of letters of request seeking the production of documents, provided that the requested documents are enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation.<sup>160</sup> In its amicus brief, filed August 22, 1986, in

151. *Id.* art. 743. In this respect, French law incorporates and parallels articles 12(a) and (b) of the Convention, *supra* note. 1.

152. Borel & Boyd, *supra* note 63, at 40.

153. *Id.*

154. Borel & Boyd, *supra* note 63, at 40.

155. *Id.*; C. Pr. Civ. arts. 206, 211.

156. C. Pr. Civ. art. 207.

157. *Id.* arts. 184–86, 198.

158. *Id.* art. 211; Borel & Boyd, *supra* note 63, at 40.

159. See text accompanying notes 72–86 *supra*.

160. *Supra* note 74. The letter states that:

the Central Authority designated pursuant to article 2 of the Convention . . . does not object to transmission to the competent French court of a letter of request whose purpose is “pretrial discovery of

the *Aerospatiale* case before the U.S. Supreme Court, the Republic of France stated that it "will use its compulsory powers to require production [of documents] if the demand is formulated pursuant to the Convention, and meets minimum standards of relevance and specificity."<sup>161</sup>

## 2. *Diplomatic Officers and Commissioners*

Evidence may be taken by diplomatic officers or commissioners in France only pursuant to a commission issued under rule 28(b)(2) by the court in which the action is pending.<sup>162</sup> Attendance before a consul or commissioner will not be compelled in France.<sup>163</sup>

American diplomatic officers in France may take evidence from American nationals without the prior approval of French authorities, since France did not exercise its right under article 15 of the convention to require such permission.<sup>164</sup> Prior French Central Authority authorization is required, however, when evidence is to be taken by diplomatic officers from French or third-state nationals.<sup>165</sup> While the American Embassy in Paris will seek such authorization free of charge,<sup>166</sup> the French Central Authority will also process requests made by an interested party or its counsel.<sup>167</sup>

Although special conditions may be imposed in particular cases, France has declared pursuant to article 16 that permission will be granted for consuls to take evidence from nationals of France or of third states on the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates;
2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;
3. Evidence shall be taken in premises accessible to the public;

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documents" so long as such letter of request presents the following assurances: the requested documents must be enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. It goes without saying that the conditions generally provided in the Convention regarding the nature of the requesting authority and respect for the requested State's public policy must have been observed. *Id.*

161. Letter, *supra* note 74, at A3. For this reason, as stated *supra* at text accompanying notes 85-86, it is best to emphasize in any letter of request that the documents are sought for use as evidence at trial and are directly relevant to matters in issue. It may also be helpful if the document requests have been the subject of a motion to compel or protective order or if the requests are otherwise given the court's approval or imprimatur in the course of the proceeding by which the letter of request was issued from the U.S. court.

162. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 4.

163. Convention, *supra* note 1, Declarations of the Republic of France.

164. *Id.*

165. *Id.*

166. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 3-4.

167. Brief of the Republic of France as Amicus Curiae, *supra* note 9, at 25.

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument shall mention:
  - a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;
  - b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the state of origin;
  - c. That the parties to the trial are consenting or, if not, the grounds of their objections;
  - d. That in the taking of evidence the person concerned may be legally represented.
  - e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.
5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.<sup>168</sup>

When its assistance in seeking authorizations is desired, the American Embassy in Paris requires that it receive the necessary documents<sup>169</sup> at least forty-five days prior to the date of the deposition to allow sufficient time to obtain authorization from the Ministry of Justice and to provide the required notice to the witness.<sup>170</sup>

France's prior permission is required whenever evidence is to be taken by commissioners.<sup>171</sup> Permission is granted on the same terms as for the taking of evidence by diplomatic officers from French or third-state nationals<sup>172</sup> with the additional requirement that the request for authorization include an explanation of: "1. The motives that led to choosing

168. Convention, *supra* note 1, Declarations of the Republic of France.

169. A discussion of the general requirements for taking evidence by American diplomatic officers is found *supra* at text accompanying notes 108-16.

170. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 4-5. General State Department guidelines state that the requesting party is responsible for arranging the presence of the witness. See OBTAINING EVIDENCE ABROAD, *supra* note 132, at 3. The U.S. EMBASSY INFORMATION SHEET, however, states that the American Embassy in Paris will notify all parties planning to attend the hearing as soon as authorization has been received. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 5. In situations of urgency, authorization has been granted within one or two days. Borel & Boyd, *supra* note 63, at 42. No depositions may be scheduled for the Paris Embassy during June, July or August. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 5.

171. Convention, *supra* note 1, Declarations of the Republic of France.

172. This imposes the requirement that the hearing be held at the Embassy premises.

this method of taking evidence in preference to that of a Letter of Request, considering the judiciary costs incurred; 2. The criteria for appointing commissioners when the person appointed does not reside in France.”<sup>173</sup> The American Embassy in Paris will seek the required authorization free of charge but must receive the required documents<sup>174</sup> forty-five days before the deposition is to take place.<sup>175</sup>

### 3. The French “Blocking Statute”

France’s concern for the integrity of its territorial and judicial sovereignty is manifested in French penal statutes that prohibit persons from requesting or producing evidence for use in foreign judicial proceedings other than through the procedures provided by the Convention, other applicable international treaties, or specific provision of French law.<sup>176</sup> The French statute, enacted in 1980, imposes significant fines and, in the case of individuals, up to six months’ imprisonment, or both.

While an extensive discussion of the 1980 statute is beyond the scope of this article,<sup>177</sup> several significant aspects of the 1980 law are pertinent. First, it is not, as it has often been characterized, a “blocking” statute, insofar as it merely relegates U.S. litigants to Convention procedures. The 1980 law was passed after France ratified the Convention and made the above outlined changes in the internal French civil code to accommodate Convention requests. The 1980 law was passed specifically in response to many U.S. litigants’ disregard of Convention procedures.<sup>178</sup> Thus, the law does not seek to impede access to evidence but rather to channel requests for evidence through procedures that have been established by means of a negotiated international agreement—an agreement that, significantly, has been implemented in France through changes in French law that represent unprecedented concessions to the United States’

173. Convention, *supra* note 1, Declarations of the Republic of France.

174. When seeking authorization for the taking of evidence by the commissioner, the Embassy will require the information noted *supra* at text accompanying notes 131-32, which it would need if the evidence were to be taken by a diplomatic officer. The required information must be accompanied by a translation into French for submission to the Ministry of Justice.

175. U.S. EMBASSY INFORMATION SHEET, *supra* note 131, at 4-5.

176. Law No. 80-538, 1980 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] 1799, 1980 DALLOZ-SIREY, LEGISLATION [D.S.L.] 285. Article 1-bis of the 1980 law provides:

*Subject to treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.*

Translation reprinted in *Aerospatiale* 107 S. Ct. at 2546 n.6 (emphasis added).

177. For a detailed discussion of the 1980 law, its legislative history and enforcement, see Toms, *supra* note 176.

178. *Id.* at 596-97.



desire to facilitate U.S.-style discovery abroad. Second, contrary to the views expressed by some American courts and litigants,<sup>179</sup> the 1980 law does not allow the French Government to waive the penal prohibitions against discovery outside of the Convention. No such waiver has ever been granted.<sup>180</sup> Third, its prohibitions apply to those who request as well as those who produce evidence and nothing would prevent the French Government from using it to halt broad and unfocused "legal tourism" that offends its concepts of sovereignty.<sup>181</sup> If France proves its newly stated willingness to honor requests for pretrial production of documents, the 1980 law may yet achieve its goal of encouraging use of the Convention.

#### B. THE UNITED KINGDOM<sup>182</sup>

The Convention is implemented in the United Kingdom through the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the Evidence Act). The U.K. Central Authority for the receipt of letters of request is:

Foreign and Commonwealth Office,  
King Charles Street,  
London SW1, England.

Requests for compulsion for the taking of evidence by diplomatic officers or commissioners pursuant to article 18 should be addressed to:

Senior Master of the Supreme Court,  
Royal Courts of Justice,  
Strand, London WC2, England.<sup>183</sup>

It is important to stress in the letter of request that evidence is sought for use at trial. It is best if the issuing court can so certify either as the result of a motion to compel, a motion for a protective order, or pursuant to a request that it do so when it issues the letter of request.

179. See, e.g., *Graco, Inc. v. Kremlin, Inc.*, 103 F.R.D. 503 (N.D. Ill. 1984); *Wilson v. Stillman & Hoag, Inc.*, 121 Misc. 2d 374, 467 N.Y.S.2d 764 (N.Y. Sup. Ct. 1983).

180. Brief of the Republic of France as Amicus Curiae, *supra* note 9, at 17 n. 24.

181. Other nations have not been so demure in enforcing their notions of judicial sovereignty. For an account of the arrest by Swiss authorities of two Dutch lawyers for conducting the deposition of a Dutch national in Switzerland for a case in The Netherlands, see Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 (1953). For an account of a similar encounter, see Brodegaard, *Victory Abroad: A Guide to Foreign Discovery*, 14 LITIG., Winter 1988, at 27.

182. Portions of this section of the article are derived from papers submitted by David Vaughn, Q.C. and Charles Hollander, Esq. of Temple, London, and by Sa'id Mosteshar, Jeremy Sandelson, and Jan Woloniecki of Clifford Chance, London. For a description of one attorney's efforts to take evidence in the United Kingdom under the Letter of Request procedure provided by the Convention, see Platto, *supra* note 87, at 579-81.

183. Convention, *supra* note 1 Declaration of the United Kingdom; see also Platto, *supra* note 87, at 579 n.13.

Upon receipt, the request will be assigned by the court administrator to a master of the Queen's Bench Division of the High Court, who will determine whether the request is in accord with the Convention and the Evidence Act.<sup>184</sup> Application is made by *ex parte* affidavit, attaching a copy of the letter of request.<sup>185</sup> If the request is found to be proper, the master will issue a summons to the witness to appear, along with the requested documents, at a stated time and place.<sup>186</sup> In the absence of a request under article 9 for the use of a special procedure, the examination will take place before an examiner of the court. American litigants have successfully requested that depositions be taken utilizing American procedures.<sup>187</sup>

Witnesses may challenge the issuance of an order at the trial court level and appeals may be taken to the Court of Appeals and then to the House of Lords.<sup>188</sup> In evaluating a request, the master and the courts may either reject or "blue pencil" requests they find to be too broad without referring them back to the requesting court.<sup>189</sup>

The United Kingdom has modified its procedural laws to accommodate Convention requests. Under the Evidence Act the High Court has the broad power, in response to a letter of request received pursuant to the Convention, to make such order as will give effect to the letter of request.<sup>190</sup> For example, such an order may provide for: examination of witnesses either orally or in writing; the production of documents; the inspection of property; the taking of samples or the carrying out of experiments on or with any property; the medical examination of any person; or the taking of blood samples.<sup>191</sup> In general, the court may order such evidence-taking as may be ordered by the U.K. courts in purely domestic cases.<sup>192</sup>

Testimonial privileges of both the requesting and executing states are preserved.<sup>193</sup> However, privileges recognized by the requesting court

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184. RULES OF THE SUPREME COURT [R.S.C.] Order 70 § 1(2); Platto, *supra* note 87, at 579.

185. R.S.C. Order 70, § 2.

186. *Id.* § 4.

187. Platto, *supra* note 87, at 579-81.

188. *Id.* at 580.

189. *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] Appeal Cases [A.C.] 547, 610 (United Kingdom). The English courts have, however, simply rejected letters of request which they found overly broad and vague. *See, e.g., In re Norway's Application* (No. 1), [1986] 1 Lloyd's Rep. 496 (request for evidence for use in Norwegian Estate Tax case rejected on "fishing grounds").

190. Evidence Act, 1975, ch. 34, § 2(1).

191. *Id.* § 2(2).

192. *Id.* § 2(3).

193. *Id.* § 3(1).

must be set forth in the letter of request or conceded by the applicant if they are to be upheld when the request is executed.<sup>194</sup>

The U.K. court may decline to execute a request if providing the evidence would be prejudicial to the security of the United Kingdom.<sup>195</sup> Powers of compulsion, as are used in internal procedures, are incorporated into the Evidence Act and may be used to enforce compliance with letters of request.<sup>196</sup> Compulsion will also be made available for the taking of evidence by diplomatic officers and commissioners, but only as to requests issuing from states that make such compulsion reciprocally available.<sup>197</sup> The United Kingdom has declared pursuant to article 8 of the Convention that judicial personnel of the requesting state may be present for the execution of the letter of request. American litigants have taken advantage of this opportunity to allow the American judge to be present to rule on questions of privilege.<sup>198</sup> Such a procedure could result in significant time savings when questions of privilege under American law may have to be confronted before testimony can be taken. In the United Kingdom no prior permission is required for the taking of evidence by diplomatic officers or commissioners unless the diplomatic officer or commissioner wishes to obtain evidence by compulsion. Under the Evidence Act the procedure for securing such compulsion is the same as the procedure for executing a letter of request.<sup>199</sup>

The principles adopted by the English courts in dealing with letters of request pursuant to the Act are set out in *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*<sup>200</sup> The English courts have adopted a more liberal approach in dealing with requests for the taking of oral evidence than in dealing with requests for documentary evidence. Requests for oral testimony will generally be granted where the letter of request states that a person is a necessary witness. The U.K. court usually will not involve itself in assessing the details of whether a witness might or might not have knowledge that is specifically relevant to the issues in the proceeding where the request originated.

Requests for production of documents, however, will be closely scrutinized. The U.K. approach to letters of request has been recently exemplified by the decision of the House of Lords in *Re Asbestos Insurance Coverage Cases*.<sup>201</sup> There the letters of request sought documents and

194. *Id.* § 3(2).

195. *Id.* § 3(3); see also Protection of Trading Interests Act, 1980, ch. 11, § 4.

196. Evidence Act, 1975, ch. 34, § 4.

197. Convention, *supra* note 1, Declarations of the U.K.

198. Platto, *supra* note 87, at 581.

199. The Evidence Act addresses "order[s] for evidence to be taken . . . made in pursuance of a request issued by or on behalf of a court." This would appear to include request for compulsion made by diplomatic officers or commissioners.

200. [1978] A.C. 547.

201. [1985] 1 All England Law Reports [All E.R.] 716.

testimony from insurance brokers located in the United Kingdom for proceedings pending in California. The House of Lords upheld the requests for oral evidence because the appellants admitted that they were in a position to give relevant evidence. Lord Fraser cited the speech of Lord Keith in the *Westinghouse* case<sup>202</sup> to the effect that the court should not examine the issues and circumstances of the case with excessive particularity for the purpose of determining in advance whether the oral testimony of that person would be relevant and admissible.

The situation relating to requests for documentary evidence is different, however. The Evidence Act provides in section 2(4):

An order under this Section shall not require a person (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.<sup>203</sup>

The same language appears as the United Kingdom's declaration under article 23 of the Convention. The purpose of section 2(4)(b) was to avoid mere "fishing" expeditions. "Particular documents" was held by the House of Lords in *Westinghouse* to mean "individual documents separately described."<sup>204</sup> In *Asbestos* Lord Fraser stated:

I do not think that by the words "separately described" Lord Diplock intended to rule out a compendious description of several documents provided that the exact document in each case is clearly indicated. . . . [A]n order for production of the respondent's "monthly bank statements for the year 1984 relating to his current account" with a named bank would satisfy the requirements of the paragraph, provided that the evidence showed the regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for "all the respondent's bank statements in 1984" would in my view refer to a class of documents and would not be admissible.<sup>205</sup>

Lord Fraser went on to say that the second test of particular documents was that they must be actual documents about which there was evidence that satisfied the judge that they were in existence, and that they were likely to be in the respondent's possession. Actual documents were to be contrasted with conjectural documents that might or might not exist. Thus a request that in effect called for production of "written instructions if any" would not be enforced, although it was permissible to call for replies to letters "where replies must have been sent."<sup>206</sup>

202. [1978] A.C. 547, 654.

203. This reflects the U.K. reservation made pursuant to article 23 of the Convention.

204. See [1978] A.C. 547, 635 (Lord Diplock).

205. [1985] 1 All E.R. 721.

206. *Id.* at 721-22.

Of course, in the majority of cases the draftsman has a difficult task if he is to overcome the limitations of the *Asbestos* decision. The requirements of *Asbestos* and the Evidence Act militate in favor of conducting prior document discovery in the United States and prior depositions in the United States and United Kingdom in order to establish, to the extent possible, the specific documents likely to be in the possession of a U.K. respondent.

In *J. Barber & Sons v. Lloyd's Underwriters*<sup>207</sup> Justice Evans granted an application that evidence by depositions be taken before an examiner of the High Court and that the examination be videotaped, even though such evidence is not admissible in English courts. A number of previous orders had been made by the English courts for videotaping of evidence by deposition (largely at the request of the American courts), but the point had never before been fully argued.

Another recent case, *In re State of Norway's Application (No. 1)*,<sup>208</sup> affecting Convention procedures related to the complex estate of a Norwegian shipowner who died in 1982. The estate had brought an action in the Sandefjord City Court in Norway to have a tax assessment set aside. The estate appealed to the Norwegian National Tax Committee, which jointly with the estate obtained an order in England for evidence from English witnesses respecting the decedent's assets. The witness sought to set aside the order. A request for production of documents was rejected by the lower court as overly broad, and that decision was not appealed. The matter came before the Court of Appeal on appeal by the witnesses against the order for their oral examination.

The Court of Appeal allowed the appeals of the witnesses on two grounds, however. First, the request as drafted was too broad and went beyond the elicitation of evidence and contained a great deal of "fishing." Lord Justice Kerr defined *fishing* as follows:<sup>209</sup>

It arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is a search for material in the hope of being able to raise allegations of fact, which have been raised bona fide with adequate particularization. . . .

According to the Court of Appeal, this request went even beyond the limits permitted by *Westinghouse* and the *Asbestos* case. The Court of Appeal declined to "blue pencil" offending requests and permit the rest, and instead rejected the entire request.

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207. [1986] 2 All E.R. 845.

208. [1986] 1 Lloyd's Rep. 496.

209. *Id.* at 515.

Closely allied to the "fishing" ground was an argument based on confidentiality, since witnesses were to be asked about activities in breach of their duty of confidentiality as banker and financial adviser. Confidentiality would not necessarily in itself be a ground for refusal to issue the order, but it was a relevant factor for the court to weight in balancing the interests of assisting foreign courts with the interest of confidentiality. What concerned the Court of Appeal in *Norway (No. 1)* was the breadth of the request (which Lord Justice Kerr described as a "roving investigation")<sup>210</sup> and the extent to which the witnesses would be compelled to disclose banking confidences.

Following the decision of the Court of Appeal, Norway redrafted a further request to the English court. This request has itself become the subject of further argument before the English courts.

### C. FEDERAL REPUBLIC OF GERMANY<sup>211</sup>

#### 1. *Letters of Request*<sup>212</sup>

The Federal Republic of Germany (West Germany) has designated eleven central authorities for the receipt of letters of request, one for each of the ten federal states (Bundeslander) and one for West Berlin.<sup>213</sup> A letter of request must be sent to the Central Authority of the state in which it is

210. *Id.* at 518.

211. Other agreements to which the United States and Germany are parties are listed in 2 B. RISTAU, *supra* note 43, at CI-77-84.

212. For a practical description of the potential problems involved in an attempt to obtain evidence in West Germany, see Martens, *German Civil Procedure and the Implementation of the Hague Evidence Convention*, 1 INT'L LITIG. Q. 115 (Sept. 1985). A recent extensive treatment of the encounter between the West German and U.S. systems in this area is set forth in German in Junker, *Verlag Recht und Wirtschaft* (1987), reviewed in Stuermer, *infra* note 238.

213. The Central Authorities are Baden-Wuerttemberg: das Justizministerium, Baden-Wuerttemberg (The Ministry of Justice of Baden-Wuerttemberg), D 7000 Stuttgart; Bavaria: das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 Muenchen; Berlin: der Senator fuer Justiz (The Senator of Justice), D 1000 Berlin; Bremen: der Praesident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen; Hamburg: der Praesident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg; Hesse: der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden; Lower Saxony: der Niedersaechsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover; Northrhine-Westphalia: der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine-Westphalia), D 4000 Duesselford; Rhineland-Palatinate: das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz; Saarland: der Minister fuer Rechtspflege (The Minister of Justice), D 6600 Saarbruecken; Schleswig-Holstein: der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land of Schleswig-Holstein), D 2300 Kiel. Convention, *supra* note 1, Declarations of the Federal Republic of Germany.

to be executed.<sup>214</sup> The letter of request must be in German or accompanied by a German translation,<sup>215</sup> and should be transmitted from the issuing court to the appropriate Central Authority. Transmission directly to the Central Authority by local counsel in Germany has been criticized by West German courts as contrary to Convention procedures, although the courts have not refused execution on this basis.<sup>216</sup>

The letter of request will initially be reviewed by the Central Authority, which is the Ministry of Justice for the particular federal state (or West Berlin) in which the request will be handled.<sup>217</sup> The Ministry's review may include informal contacts between the Ministry and counsel for interested parties and may also involve the submission of written briefs and an informal hearing.<sup>218</sup> After approving the letter of request, the Ministry will send it to the local district court (*Amtsgericht*) for execution in conformance with its ruling.<sup>219</sup> At this point, either the requesting party or the witness may appeal the Ministry's ruling to the Court of Appeal (*Oberlandesgericht*).<sup>220</sup>

A letter of request normally will be executed in West Germany using West German procedures, but in practice some depositions have been taken American style pursuant to a request under article 9 of the Convention for the use of a "special procedure."<sup>221</sup> A German judge will preside over the taking of the evidence.<sup>222</sup> West Germany has declared under article 8 of the Convention that "members of the requesting court" may be present at the taking of the deposition when prior authorization has been granted.<sup>223</sup> This is understood to include counsel for the parties, since they are officers of the court. Counsel for the parties will be permitted to participate in the questioning of the witness.<sup>224</sup> Counsel for the parties may also cross-examine, since this form of questioning is not

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214. To enable American practitioners to determine where to send their requests, the German Federal Ministry of Justice has provided the U.S. Justice Department's Office of International Judicial Assistance, which is the U.S. Central Authority, with a directory of West German postal codes which indicates which codes are within which states. Shemanski, *supra* note 63, at 471.

215. Platto, *supra* note 87, at 582.

216. *Id.*

217. *Id.*

218. *Id.*

219. Shemanski, *supra* note 63, at 471.

220. Platto, *supra* note 87, at 583.

221. *Id.* at 584-85.

222. *Id.*

223. Convention, *supra* note 1, Declarations of the Federal Republic of Germany, at B2.

224. Shemanski, *supra* note 63, at 472. Under usual West German civil procedure, counsel for the parties and the parties themselves may question a witness when authorized by the judge. *Id.* at 467-68.

unknown under West German law.<sup>225</sup> The examination must, however, be conducted in German.<sup>226</sup> The West German court can also administer required oaths and cause a verbatim transcript to be prepared.<sup>227</sup>

In one case involving the execution of a letter of request in West Germany under Convention procedures for use in American litigation, counsel for the parties were permitted to conduct extensive examination of the witness.<sup>228</sup> Counsel were given wide latitude by the West German judge and were allowed to question the witness on relevant areas not covered in the judge's initial examination.<sup>229</sup>

Two decisions of the West German Court of Appeal in that action<sup>230</sup> provide insight into the extent to which particular types of requests will be executed. A letter of request was issued to gather evidence in support of a patent abuse counterclaim in *Corning Glass Works v. International Telephone & Telegraph*,<sup>231</sup> a U.S. antitrust action. The Ministry of Justice ruled that the witnesses were required to give testimony but were not required to produce the requested documents. Appeals were taken by both the requesting party and the witnesses.

The witnesses contended that the request did not sufficiently specify the subject matter about which they were to be examined, as required by article 3 of the Convention. The court agreed that the requirements of article 3 were not met, but found that these defects were not substantial enough to cause the Ministry of Justice to reject the request. The court based its decision on West Germany's desire to place judicial assistance with the United States on a solid treaty basis. The court also noted West Germany's treaty obligation under article 9 to comply with requests for special procedures.

The court upheld the Ministry of Justice's refusal to allow the production of documents,<sup>232</sup> but held that the witnesses could be examined about the contents of those documents. The refusal to execute the document requests was based upon West Germany's reservation under article 23 of the Convention.<sup>233</sup> The court rejected the argument that the documents

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225. *Id.* at 468, 473. It is the position of West Germany that it is obligated under article 9 of the Convention to allow the use of a requested procedure unless it is "genuinely impossible." *Id.* at 472.

226. *Id.* at 473.

227. *Id.*

228. Platto, *supra* note 87, at 584.

229. *Id.*

230. Judgment of Nov. 27, 1980, Judgment of Oct. 31, 1980, Oberlandesgericht [OLG], 1981 JZ 538. A translation of the Court's opinion in the Nov. 27, 1980 is also included as Appendix C to the Brief of the Federal Republic of Germany as Amicus Curiae, *supra* note 9.

231. No. 76-0144 (D. Va. 1976).

232. Shemanski, *supra* note 63, at 482.

233. *Id.* at 481.



were not sought for discovery, but were, in fact, needed for the trial of the action.<sup>234</sup> The court noted that because the U.S. trial had not yet started, the U.S. judge had not yet determined the relevance of the requested documents.<sup>235</sup>

It may be possible in the future to obtain documents pursuant to letters of request in West Germany. West German law specifically provides for the execution of letter of request for production of documents.<sup>236</sup> Such production, however, may only be made pursuant to regulations<sup>237</sup> that the Federal Ministry of Justice has yet to promulgate.<sup>238</sup> In its amicus brief submitted in *Aerospatiale* West Germany stated that:

The Federal Republic of Germany has recently accelerated the procedure for the issuance of regulations which will permit the pretrial production of documents when they are clearly identified, relevant and do not necessarily divulge business secrets. The government of the Federal Republic of Germany is endeavoring to issue the regulations before the end of 1986, after the necessary consent of the *Bundesrat* (Upper House of Parliament) has been obtained. This corresponds with suggestions made by the Government of the United States on the diplomatic level.<sup>239</sup>

The regulations have not yet been issued, however, and accordingly documentary evidence is still not obtainable from West Germany under the Convention.<sup>240</sup>

When testimony is to be taken in West Germany, the existence of privileges under West German law must also be considered. The most unusual of these to an American practitioner and the most likely to come into play is the privilege for "trade secrets."<sup>241</sup> This privilege extends beyond the concept of "trade secret" as it is understood in the U.S. to include a privilege against disclosing business deliberations, strategies, and plans.<sup>242</sup>

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234. *Id.*

235. *Id.* at 481-82.

236. Law of December 22, 1977, 1977 BUNDESGESETZBLATT [BGBl.] I 3105.

237. *Id.*

238. Shemanski, *supra* note 63, at 483; Stuermer, Book Review, *Discovery in German-American Litigation*, 21 INT'L LAW. 1224 (1987). At the time of writing, the most recent draft issued by the Ministry of Justice is dated March 31, 1988.

239. Brief of the Federal Republic of Germany as Amicus Curiae, *supra* note 9, at 9-10.

240. One of the authors, Mr. Alley, is a member of the ABA's Joint Committee on the Hague Evidence Convention (which includes members from the Section of International Law and Practice and the Section on Litigation). The Committee has participated in meetings in Munich and Hamburg of the Joint U.S./German working group on the Convention with respect to defining and narrowing the issues raised by Germany's position on document production and by various proposed German regulations designed to modify that position.

241. Shemanski, *supra* note 63, at 486; Platto, *supra* note 87, at 584-85.

242. Platto, *supra* note 87, at 584-85.

## 2. *Diplomatic Officers or Commissioners*

Because West Germany has not made the permitted declaration under article 15 of the Convention, U.S. diplomatic officers may take the testimony of U.S. nationals in West Germany without prior permission or supervision of the West German Government or court officials.<sup>243</sup> West Germany has declared that such permission is required when testimony is to be taken by diplomatic officers from third state nationals.<sup>244</sup> Such permission must be sought from the Central Authority of the state where the evidence is to be taken.<sup>245</sup> Conditions may be imposed on the granting of such permission,<sup>246</sup> but West Germany has given no indication of what those conditions might be. No compulsion may be used when taking evidence by these methods. Evidence taking by commissioners is disfavored and may be done only with the prior permission of the West German Central Authority. Such permission may be subject to conditions, and the local court is entitled to control the preparation and actual taking of the evidence.<sup>247</sup>

West Germany has declared pursuant to article 33 of the Convention that evidence may not be taken by diplomatic officers where West German nationals are involved.<sup>248</sup> A series of letter agreements between the United States and West Germany, however, allow American litigants to utilize this method for taking the testimony of Germany nationals when certain conditions are met.<sup>249</sup> These agreements were originally implemented through an exchange of notes between the United States and West German Governments in 1955 and 1956. The notes were never officially published.<sup>250</sup> When West Germany in 1979 ratified the Convention with legislation that precluded bilateral agreement at variance with the Convention, the United States and West German Governments agreed to exchange further notes to confirm that the previous agreement was still in effect. This exchange was conducted with notes dated October 17, 1979, and February 1, 1980.<sup>251</sup>

243. Convention, *supra* note 1, Declarations of the Federal Republic of Germany.

244. *Id.* Declaration at B(3).

245. *Id.*

246. Convention, *supra* note 1, art. 16.

247. Convention, *supra* note 1, Declarations of the Federal Republic of Germany at B(4).

248. *Id.* Declaration at A.

249. Under article 28 of the Convention, such agreements are not superseded by the Convention. *See also* Amram, *supra* note 11, at 653.

250. The 1955 and 1956 notes are reprinted in the original English and in the original German with translations into English in *Practical Handbook*, *supra* note 24, at 64-67.

251. Judicial Assistance, Taking of Evidence, Feb. 11, 1955, United States-Germany, Fed. Republic Of, 32 U.S.T. 4181, T.I.A.S. No. 9938. The 1979 and 1980 notes are also reprinted in the original English and in the original German with English translations. *PRACTICAL HANDBOOK*, *supra* note 24, at 67-69.

The first condition under these agreements is reciprocity, which was formally granted by the United States in exchange of notes. No compulsion may be used in the taking of the testimony.<sup>252</sup> The request to give information must not be called a "summons," and the questioning must not be called "interrogatories." No pressure or compulsion of any kind may be imposed upon a person giving evidence to make him sign protocols or other records of the testimony provided.<sup>253</sup> The examination of the witness must take place within the offices of the American Consulate unless the witness agrees otherwise or requests that the evidence be taken at his home or office.<sup>254</sup> The witness must also have the right to be represented by counsel if he wishes.<sup>255</sup>

#### D. ITALY<sup>256</sup>

Italy ratified the Convention by Act No. 745/1980, and the Convention took effect in Italy on August 21, 1982. Italy has made the following declarations and reservations thereto:

1. under article 2, the Ministry of Foreign Affairs is designated as the Central Authority;
2. the Court of Appeal within whose jurisdiction the proceedings are to take place is the competent authority for authorizing foreign judicial personnel to be present at the execution of a Letter of Request (article 8), for authorizing foreign diplomatic officers, consular agents, or commissioners to take evidence (articles 16 and 17), and for granting the judicial assistance provided for by article 18; and
3. Italy will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries.

The Ministry of Foreign Affairs will transmit the letter of request to the competent Court of Appeal. The proof-taking proceedings are deemed open after the Court of Appeal has ruled on the compatibility with Italian law of the requested evidence and authorized by decree the taking of the requested evidence. The Court of Appeal usually delegates the actual taking of the evidence to a lower judge (*pretore*) who, if necessary, has the authority to exercise subpoena powers. (For example, he may issue an order for attendance of witnesses or apply an appropriate fine.)

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252. Judicial Assistance, Taking of Evidence, Feb. 11, 1955, United States-Germany, Fed. Republic of, 32 U.S.T. 4181, T.I.A.S. 9938.

253. *Id.*

254. *Id.*

255. *Id.*

256. This section is taken from a report to the ABA's European Law Committee by Roberto Casati, Esq. and Roberto Donnini, Esq. of Magrone, Pasinetti, Brosio & Casati of Milan, Rome and Turin.

Since the Ministry of Foreign Affairs merely performs a check on the formal requirements with which a letter of request must comply,<sup>257</sup> any substantive problems deriving from the application of the Convention arise only in connection with the decision by the Court of Appeal.

Only in rare instances has a Court of Appeal refused to execute a letter of request or has a controversy arisen concerning the interpretation of the Convention. In fact, the Convention allows such a refusal only in cases where the execution of the request could jeopardize the state's sovereignty or security, require of the judge the use of powers not vested in the judiciary, or, finally, require special proceedings incompatible with Italian law.

Although a complete review of court decisions on the matter would be extremely arduous because of the lack of published reports, based on available decisions it is possible to state that refusals have occurred only in cases of requests for evidence held incompatible with Italian law. This is confirmed by a survey of recent decisions by the Courts of Appeal of Rome and Milan. The survey has shown that both courts have been construing the Convention provisions broadly and liberally. In fact, for example, such courts have always allowed the execution of letters of request even if such action entailed the adoption of proof-taking proceedings different from those provided for under Italian law. There have been several cases of examinations taken under oath pursuant to specific requests to that effect.

Furthermore, the Courts of Appeal have also executed requests granting the Italian judge broad discretionary power to gather such evidence as he deemed appropriate in connection with the controversy in question. Moreover, such requests have been granted in order to allow the so-called "free examination" of an Italian plaintiff who had come back to Italy after initiating proceedings abroad and the "free examination" of an Italian defendant who had failed to appear in foreign proceedings. After a request for examination of an Italian defendant who had failed to appear in foreign proceedings had been granted, however, the court refused to compel attendance in light of the fact that, under Italian law, no party can be forced either to appear in court or to be examined.

Decrees issued by the Courts of Appeal under the Convention, whether denying or granting the execution of a request, are not subject to appeal or attacks in any way.

To date, Italy has not limited or modified its article 23 reservation with respect to pre-trial discovery of documents.

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257. See *supra* note 48.

#### **IV. Conclusion**

Although it obviously differs from normal American discovery practice, the Convention makes available a number of meaningful opportunities for obtaining evidence abroad. Using the Convention would in many instances enable the gathering of such evidence with a minimum of friction among the United States and other signatory nations. Only if counsel assist in familiarizing the courts with Convention procedures, however, will the *Aerospatiale* comity analysis lead to decisions that give the Convention the full weight it deserves.

## Appendix

### Model for Letters of Request Recommended for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Model for letters of request recommended for use in applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Request for International Judicial Assistance pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of English, French or another language.

In order to avoid confusion, please spell out the name of the month in each date.

Please fill out an original and one copy of this form (use additional space if required).

1. Sender (identity and address)  


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2. Central Authority of the Requested State  
(identity and address)  


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3. Person to whom the executed request is to be returned

(identity and address)

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4. Specification of the date by which the requesting authority requires receipt of the response to the letter of request

Date

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Reason for urgency\*

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IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOR TO SUBMIT THE FOLLOWING REQUEST:

5. a. Requesting judicial authority (article 3,a)

(identity and address)

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b. To the competent authority of (article 3,a)

(identity and address)

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c. Name of the case and any identifying number

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6. Names and addresses of the parties and their representatives (including representatives in the requested state\*) (article 3,b)

a. Plaintiff

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Representatives \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

b. Defendant \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Representatives \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

c. Other parties \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Representatives \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

7. a. Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (article 3,c)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

b. Summary of complaint

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

c. Summary of defence and counterclaim\*

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_



d. Other necessary information or documents\*

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8. a. Evidence to be obtained or other judicial act to be performed  
(article 3,d)

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b. Purpose of the evidence or judicial act sought

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9. Identity and address of any person to be examined (article  
3,e)\*

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10. Questions to be put to the persons to be examined or statement  
of the subject-matter about which they are to be examined (ar-  
ticle 3,f)\*

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11. Documents or other property to be inspected (article 3,g)\*

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12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3,h)\* (In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence)

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13. Special methods or procedure to be followed (e.g., oral or in writing, verbatim, transcript or summary, cross-examination, etc.) (articles 3,i, and 9)\* (In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law)

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14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)\*

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15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (article 8)\*

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16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11,b)\* (attach copies of relevant laws or regulations)

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17. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by\*

(identity and address)

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DATE OF REQUEST \_\_\_\_\_

SIGNATURE AND SEAL OF THE REQUESTING AUTHORITY

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\*OMIT IF NOT APPLICABLE