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Taking Evidence Abroad for Use in Civil Cases in the United States - A Practical Guide

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The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Cases (Convention) was initially adopted in October, 1968 to provide a uniform system for the transmission, execution and processing of judicial requests for the taking of evidence in foreign jurisdictions.[1] Under the Convention, requests are to be handled expeditiously, and are to be honored unless inconsistent with the internal law or public policies of the country asked to execute the request.[2] The Convention is now in force in most of the major nations of the Western world.[3] It provides the principal means for obtaining evidence abroad for use in civil proceedings in the United States.

The Convention has been the subject of much litigation[4] and commentary[5] aimed at delineating its scope and application. Nevertheless, more than a decade after its adoption, the operation of the Convention remains uncertain and inconsistent in actual practice.

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*The author practices law in New York City. The author wishes to thank Denis McInerney, Esq., who reviewed this article and had primary responsibility for taking the evidence in England and West Germany discussed herein.

[1]23 U.S.T. 2555, T.I.A.S. No. 7444. The Convention was opened for signature on March 18, 1970.

[2]Convention, article 9.

[3]The Convention is presently in force in Barbados, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, Israel, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom and the United States. VIII MARTINDALE-HUBBELL LAW DIRECTORY 4631 (1982).

[4]*E.g.*, Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [1978] A.C. 547 [House of Lords, United Kingdom].

[5]*See* Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5 (Winter 1979); Borel and Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35 (Winter 1979).

The author has had occasion over the last four years to take evidence under the Convention in the United Kingdom and the Federal Republic of Germany (West Germany) in connection with a major patent infringement/antitrust action then pending in a U.S. district court.[6] Since these countries provide excellent examples of both common law and civil law jurisprudence, the experience gained in them is of even more general application.

The English adventure was the first reported effort to take such evidence following the decision of the House of Lords in the *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* case (*Rio Tinto Zinc*).[7] The German endeavor was the first attempt to take evidence in that country under the Convention, which became effective in West Germany in June 1979. The purpose of this article is to relate the practicalities of seeking and taking testimony and other evidence under the Convention in these two countries as a guide to American attorneys in any future quest for foreign evidence.

I. Preliminary Steps—U.S. Proceedings

As a preliminary matter American counsel must make an initial determination as to whether the evidence is really needed, whether there is any other way to get it and whether it is the right stage of the proceedings to seek to take evidence abroad. These threshold determinations are important because, as will be seen below, the taking of evidence abroad in the face of determined opposition can be a long, expensive and difficult process, and both counsel and his client should carefully weigh the benefits and alternatives before proceeding. If, for example, the desired witness is a party or would be subject to subpoena in the United States, or would appear voluntarily anywhere, it would, in most instances, be preferable to proceed with discovery in the normal course under the Federal Rules of Civil Procedure before invoking the Convention. It is in any event generally advisable to have proceeded far enough with domestic discovery to be in a position to determine whether foreign evidence is needed and also to have accumulated as much factual information as possible as a basis for making specific requests for the required information. Having considered these factors, there certainly will be instances, particularly in the case of non-party witnesses, where compelling evidence abroad is necessary and economically justifiable, and the Convention provides the only means to do it.

Once the decision has been made to proceed under the Convention, the first step is the application to the U.S. district court for the issuance of a letter of request.[8] This should be done by motion on notice to opposing

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[6]Corning Glass Works v. International Telephone and Telegraph Corp., Civil Action No. 76-0144 (W.D. Va.).

[7]*See* note 4.

[8]Under article 1 of the Convention any "judicial authority" may issue a letter of request. Thus although requests are to be sent to a central authority in the recipient country (*see infra*

counsel in accordance with the local court rules. The motion should be accompanied by an affidavit setting forth in detail the reasons for the issuance of a letter of request and a form of proposed letter of request in compliance with the terms of the Convention. This very first step is critical because it will set the stage for the execution of the letter of request and the litigation both here and abroad that may surround the execution. Several key factors discussed below should accordingly be kept in mind.

The information required to be set forth in the letter of request as listed in article 3 of the Convention is rather straightforward. It includes the identification of the authority requesting the information and the authority requested to obtain it, the names and addresses of the parties to the proceedings and their representatives, the names and addresses of the persons to be examined, etc. (article 3a, b, e). The key provisions are the description of the nature of the action (article 3c) and a list of the questions to be put to the witness *or* a statement of the subject matter of the examination (article 3f) and a specification of documents sought (article 3g).

The description of the action should be neutral, brief and to the point and should emphasize: (1) the commercial nature of the proceeding; and (2) that an actual litigation is involved and the evidence sought is needed for trial.

The Convention only applies to actual judicial proceedings involving commercial matters (article 1). In both England and Germany, we were met with objections that the proceedings were not commercial because there can be criminal penalties in an antitrust case (even though the proceeding at issue was clearly a civil matter) and that a judicial proceeding was not involved because we were in the pre-trial discovery stage. These objections were eventually overruled, but we learned to never use the word "discovery" in connection with these requests, since it implies pre-trial investigation rather than usage at trial.

A listing of questions to be asked is generally not advisable except in the unusual situation that answers to, in effect, written interrogatories would suffice. If an actual deposition is desired instead, this should be so stated and a brief but informative general description of the examination should be provided to allow as much flexibility as possible. (This can be supplemented later, if requested, which is what we experienced in Germany.) On the other hand, document requests should as a general rule be quite specific since, although document production is permitted under the Convention, virtually all countries except the United States have elected under article 23 not to allow "pre-trial discovery of documents as known in Common Law countries."[9] Specific requests are clearly required under the *Rio Tinto Zinc* rule in England.[10] On the other hand, as discussed below, the specific doc-

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at pp. 579, 582), the district judge is the only U.S. government official who need be involved in the issuance of the request.

[9]*See* VIII MARTINDALE-HUBBELL LAW DIRECTORY 4631.

[10]*See* [1978] A.C. at 610.

ument request turned out to be somewhat counterproductive in Germany.

The form of the letter of request should be in accordance with the practices of the foreign jurisdiction. Since you will eventually probably need and want to have foreign counsel involved, it is recommended that foreign counsel be retained to review the form of letter of request in the first instance (before it is submitted to the American court), rather than waiting to bring foreign counsel in at a later stage, when the die may have already been cast. The fact that foreign counsel has reviewed the letter of request will aid the American court in determining whether or not to issue the request and will undoubtedly increase the likelihood of the request being honored once it passes to the foreign jurisdiction. Foreign counsel should also be available to submit an affidavit in support of the letter of request in the U.S. proceeding if it is challenged. Whether that affidavit should be submitted with the initial motion or reversed if needed for reply may depend on whether such an affidavit is needed to put to rest at the outset any doubts the court might have as to the suitability of the request under foreign law; if not, it may complicate an otherwise straightforward motion. We found with respect to the German request that using a detailed foreign expert's affidavit in reply was an effective means of diffusing cursory objections that were initially raised with respect to German law.

Surprisingly, it may be helpful to have a challenge to the issuance of the letter of request raised before the U.S. district court by the opponents in the American proceeding. We did not have such a challenge with respect to the English request, and the court issued the request in the form requested. The result was that once in England we were met with the charge that the request was not really that of the court but of an interested party, and was accordingly not due the deference and comity that a request of the court would otherwise be accorded. Thus it may be helpful to have the application fully aired before the U.S. court, with oral argument and the opportunity for the adversary to state his opposing position, if he has one.

Once the letter of request has been issued, in accordance with the terms of the Convention, it must be sent by the American court to the official authority in the foreign jurisdiction.[11] Even at this initial stage, the procedures vary greatly from country to country, so at this point it is in order to separately catalog our experiences in England and West Germany. However, before doing so, the importance of involvement of foreign counsel at all stages of the proceedings cannot be overemphasized. His responsibilities may range from overseeing the initial processing of the request, to setting up the mechanics for the taking of testimony and guiding the American counsel through the vagaries of the local procedure, to arguing the basis for the request to the foreign court in the event of a challenge. It is most helpful if foreign counsel is conversant with American procedures as well as his own, and it goes without saying that counsel must be able to bridge any

[11]Convention, article 2.

language barriers.[12] With this introduction we then turn to the practices and procedures in England and then in West Germany.

II. England

Letters of Request in England are handled by the court administrators and the judiciary[13] (as opposed to Germany where they are reviewed in the first instance by the Ministry of Justice, *see infra*). The request can, of course, be submitted by mail directly from the U.S. court. However, if time is a factor, and more importantly, if shepherding the request through a bureaucracy is desired, it is recommended that the request be submitted directly through foreign counsel along with an application for prompt execution of the request. Although, as noted below, this procedure was questioned in Germany, it was not challenged in England, and resulted in considerable time saving and advantage at the outset.

The English procedure is, in the first instance, quite efficient and expeditious. The request is taken to the court administrator, who in turn assigns it to a master who is roughly equivalent to a U.S. magistrate. The master then will issue a summons to the witness to appear along with the requested documents at a stated time and place. All of this is done on an ex parte basis.

The master will, however, make an independent assessment of whether the request is in accord with the Convention and with the English Evidence (Proceedings in Other Jurisdictions) Act of 1975, which was promulgated in order to implement the Convention. In our experience, the deposition request which contained only a general description of the subject matter of the examination, was approved in the first instance without question, but the document request was closely scrutinized. As noted, England, as well as virtually every other signatory of the Convention except for the United States, has elected not to permit "common law pre-trial discovery of documents"—which seems to translate as "documentary discovery as used in the U.S." This is not to say that document production may not be required, but rather that the documents requested must be identified with specificity, and "fishing" expeditions will not be allowed.

In our case, after initially reviewing the document request, the master indicated that it appeared too broad. In an effort to avoid difficulties in this regard we took it upon ourselves to propose a modified narrower document

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[12]The author wishes to acknowledge with thanks the efforts of David Eady, Esq. of the English Bar, David Brown and Lawrence Cohen of the London firm of Bristows, Cooke & Carpmael and Dr. Dirk-Reiner Martens of the firm of Kreuz, Neibler & Mittl, Munich, Germany, for their able assistance in presenting the requests in England and West Germany.

[13]Requests should be addressed to:

Central Authority for England
Senior Master of the Supreme Court
Royal Courts of Justice
Strand
London WC2, England

request to the U.S. judge who in turn issued a revised request. This was ultimately approved by the master.

In *Rio Tinto Zinc* (and in subsequent appeals in this action), the English courts have indicated that if the master finds the request for documents to be too broad he may go through a "blue pencilling" exercise and narrow the request to proper bounds without referring it back to the U.S. court.[14] Obviously, an effort should be made to narrow the request in the first instance to avoid this procedure.

Once the request has been approved by the master and the summons issued, the possibility for a challenge by the witnesses arises. We encountered such a challenge in England, which resulted in hearings and appeals at various levels and a delay of more than a year.

The initial challenge comes in a form of the equivalent of a motion to quash the summons. The objections that were made in our case were, we believe, fairly typical. It was asserted, inter alia, that the document request was an improper attempt to obtain pre-trial discovery of documents. Furthermore, it was asserted that the production of documents and the testimony requested might subject the company which had the documents and the employee witnesses to criminal penalties under both articles 85 and 86 of the Treaty of Rome and the U.S. antitrust laws, and, accordingly, there was a privilege against producing documents or testifying under both English and U.S. law, which could be invoked under the Convention.[15]

The motion to quash first went before a master. After extended written and oral submissions he ruled that the company could at the outset properly invoke a privilege against producing the documents which might subject it to a penalty, but that the witnesses could not invoke the privilege against self-incrimination before the questions were asked and therefore they had to appear at the deposition.[16]

The decision of the master was appealed to the Queen's Bench, the lower level trial court, which, following further written submissions and oral argument, affirmed the master's decision. Further appeal to the Court of Appeal and the House of Lords was possible, but these appeals were not taken in our case.[17] Thus, slightly more than a year after the letter of

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[14]*See* [1978] A.C. at 610.

[15]Article 11 of the Convention permits the invocation of privilege under the law of either the requesting country or the country to which the request is issued. In this instance, an effort was made to invoke the English privilege with respect to penalties that might be incurred under the Treaty of Rome and the United States Fifth Amendment privilege. It is noted further that the privilege raised with regard to document production was viewed as that of the company whereas the privilege against self-incrimination from testifying was viewed as that of the witnesses.

[16]The English principle is similar to the American principle which also requires that the question be asked before the privilege can be invoked. *See* Hoffman v. United States, 341 U.S. 479 (1951); United States v. Malnick, 489 F.2d 682, 685 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974).

[17]It is noted that under English procedure the loser pays costs *and* attorneys' fees.

request first was issued, the stage was set to proceed with discovery, albeit limited to depositions without document production.

The depositions took place at the American Embassy in London in July, 1979. The American judge to whom this case was assigned went to London to supervise the depositions. (One of our arguments with regard to not allowing the witnesses to claim American privileges or otherwise in advance was that the American judge would be present at the depositions to rule on any objections at the time they were made.) The presence of the American judge was exceedingly helpful for several reasons. In the first place, the fact that the American judge was planning to come was helpful in dispelling the suggestion that privilege objections might be made in advance. More importantly, as a practical matter, the presence of the American judge presiding at the depositions enabled them to move forward smoothly, which would have been highly unlikely had attorneys from different backgrounds been sitting across the table from each other with no one to keep order. In the presence of the American judge the proceedings went very smoothly.[18] As it turned out, despite the contention put forth during more than a year of appeals that the witnesses would take the Fifth Amendment, they chose not to. Questions with regard to American procedure and relevance were ruled on promptly. In the end only a few questions of English procedure were raised, principally with regard to inquiry about material that may have been contained in documents which had not been produced. These questions were referred to an English master on an emergency basis. He heard argument (with the American judge) and sustained the objections.

The net result of our English experience was that while no documents were obtained, detailed depositions in the American style were taken. A year was lost in procedural maneuvering. In retrospect, in light of the difficulty of obtaining documents, a number of the procedural obstacles and much delay might have been avoided if documents are not requested. However, the results of the depositions more than justified the entire exercise.

III. West Germany

After catching our breaths upon returning from England we started all over again in Germany. The timing was rather opportune because the Convention did not enter into force in the Federal Republic of Germany until June, 1979, so we were ready to proceed as soon as we finished in England in August. In September, 1979 we filed a motion with the U.S. district court for the issuance of a letter of request to the West German authorities. This

[18]The Judicial Conference of the United States has issued a policy statement disapproving the practice of federal judges travelling abroad to take testimony or depositions in cases pending before them. (Report of Judicial Conference, March 1978.) We understand that the policy is currently under review. While there may be sound reasons for the policy in some instances, the blanket disapproval is, we submit an unfortunate development in so far as it will undoubtedly make depositions under the Convention all the more difficult.

time our adversaries in the United States vigorously challenged the motion. They did so, inter alia, on the grounds that it would delay the U.S. proceeding, which was scheduled to go to trial, and that the evidence sought (documents and deposition testimony) was not permissible under German law. We countered with legal argument and affidavits as to the relevance of the evidence sought to the U.S. proceedings, and the right to broad "discovery" prior to trial,[19] particularly where the depositions sought were to be used in lieu of trial testimony. We also submitted an affidavit of our German counsel as to the appropriateness of the requests under German law. Relying on our English experience, we had drafted the document request very narrowly. The entire request as drafted was approved by the American court in February, 1980.

We then started down the long road of processing the request in West Germany. In many respects this proved more difficult than in England. In the first place there was a language barrier and all materials had to be translated into German. Second, West Germany is a civil law system and the entire concept of pre-trial discovery is even more remote to the German system than it is to the English. Third, there was no internal law specifically designed to implement the Convention as was the case in England nor had there been any litigation such as the *Rio Tinto Zinc* case to smooth the way.

We started off, as in England, with our German counsel transmitting the request to the official authorities, which was in this case the Ministry of Justice for the state where the witnesses resided.[20] Unlike England, where the request is handled entirely by the court system, in Germany it is a two-stage process with the request initially being reviewed by the Ministry of Justice and thereafter by the courts. In retrospect, it did not save time in Germany to have counsel transmit the request. During the course of appeals that followed, this method of transmission was criticized, and although it was ultimately sustained, it caused needless challenges. On the other hand, it is strongly recommended to have local counsel monitor the progress of the request once it is transmitted through official channels.

After the request was filed with the ministry, a review which lasted for several months ensued. The delay we experienced was undoubtedly partially attributable to the fact that this was the first such request to be processed. During the course of the ministry's review there were informal contacts between the ministry and the lawyers for the requesting party and for the witnesses, and briefs were submitted in which the parties presented their views on the appropriateness of the request. Ultimately the ministry

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[19] *See* United States v. International Business Machines, 66 F.R.D. 186, 189 (S.D.N.Y. 1974).

[20] In West Germany requests are handled on a regional basis by the several German states that make up the Federal Republic of Germany. In this case we dealt with the Bavarian Ministry of Justice (Bayerisches Justizministerium) which had jurisdiction over Munich. *See* VIII MARTINDALE-HUBBELL LAW DIRECTORY at 4633, for a listing of the other competent authorities in West Germany.

had an informal hearing to which U.S. counsel was invited, and a decision was issued two weeks after the hearing. The ministry ruled that deposition would be permitted, but that no document production would be required since, even though document production is permitted under the Convention (subject to the reservations of article 23), there is no mechanism for document production under German law. The decision indicated that a procedure for limited document production was being studied.

Both sides appealed from this decision to the Court of Appeal.[21] Briefing and argument ensued and four months later the Court of Appeals issued its decision affirming the ministry's directive. The proceedings then reverted to the lower court[22] which was charged with the taking of testimony.

In West Germany there is an internal procedure for a judge in one German state to request that a judge in another German state take testimony for use by the requesting state. It was this procedure with some modification which was used as the basis for executing the request. Following this procedure initially resulted in a number of mechanical and procedural problems in implementing the depositions.

Under the existing German procedure a part-time lower court judge is assigned to execute requests for testimony from one German state to another. Such a judge was assigned to our case. Unlike the English procedure, under which an English judge is not present at the depositions, in Germany the German judge must be present and plays an active role as the questioner and ordinarily the one who summarizes the testimony. As a result, for a while it appeared that the depositions of a number of witnesses which were scheduled to last several weeks would have to be conducted on a part-time basis, subject to the judge's availability, thus multiplying the amount of time needed. Fortunately, due to the significance of this case, the presiding judge arranged for a full-time judge to be appointed.

A more substantive preliminary concern was that the German judge required detailed information as to the nature of the examination in advance, because it is the German procedure for the judge himself to do the questioning, with the attorneys only asking a follow-up question as necessary. Under the normal German internal procedures written questions are given to the judge by the parties in advance. For a time it appeared that the depositions would, therefore, as a practical matter, become more like interrogatories, which for a number of reasons are unsatisfactory in most cases. At the risk of not having the request executed, we nevertheless did not proffer specific questions, but rather provided the German court with a very detailed summary of the American case and a listing of the areas of inquiry that we were concerned with, so as to leave room for a more traditional deposition testimony. This resulted in a host of further objections by both the German witnesses and our American adversaries who argued that such

[21] Oberlandesgericht Munchen (Higher Regional Court of Munich).
[22] Amtsgericht Munchen (Local Court of Munich).

a general summary was not permitted and that we were trying to argue our case and prejudice the court in advance. Nevertheless, ultimately the information we provided was accepted as sufficient by the German court.

One additional major hurdle prior to the depositions resulted from the language of the Court of Appeal's decision, which (apparently in an effort to make the examination more specific) appeared to indicate that the depositions could be taken only with respect to the material listed in the document request, even though the document request had been denied. As noted, we had drawn the document request very narrowly in light of the English experience. This threatened to curtail our examination because our adversaries argued that the Court of Appeal's dicta should be read literally and enforced so that the depositions would be limited to the material listed in the document request (which we never obtained) rather than the broader depositions that had been intended by the overall request. As it turned out, after much briefing and argument on this issue, the lower court did not interpret the decision so narrowly.

To the credit of the presiding German judge, once the initial procedural hurdles were overcome the depositions, which did not commence until June, 1981, were conducted in a remarkably orderly and efficient fashion. The judge agreed that the depositions could be held in a suitable simultaneous translation facility rather than in the local court as ordinarily required. We were fortunate in being able to use the facilities of the European Patent Office in Munich which has perhaps the best facilities in Europe for simultaneous translations. We sent in advance several volumes of documents which we planned to use in the course of examination and had these translated. (This was a bit cumbersome since in some instances we were forced to translate into German letters written in English by the German witnesses.)

The German judge undertook to study the documents and our summaries in advance. He then proceeded to conduct an extensive examination of each witness in the first instance, after which he allowed us to examine the witness at length. Wide latitude was allowed in this follow up examination. We were not limited to filling in the details of the judge's interrogation, but we were permitted to question on relevant areas not covered in the judge's initial examination. Six witnesses were examined on complex antitrust issues over the course of four weeks.

Several novel procedures were employed to facilitate the depositions. A verbatim transcript was taken, rather than the judge's minutes as in the usual practice. The English questions were translated into German for the witnesses to answer. A transcript was recorded in German and then translated into English. A tape recorder was utilized, perhaps for the first time in a German court.

During the course of examination we were met with one major obstacle, which was the German business secret privilege. Even though the witnesses had voluntarily testified on the same general subject, when we attempted to

cross-examine as to the details of certain business meetings, the business secret privilege was invoked. The judge recessed the court while the parties briefed the issue and a day later the judge sustained the objection and provided a record for an appeal. An emergency appeal was taken the next day to the district court which promptly sustained the objections the same day. The depositions then continued with this one rather crucial area of testimony being removed at first, but the witnesses ultimately testified fully once assured that they could stop whenever they wished.

All things considered, the German depositions in the end worked out rather well. The German experience was a more difficult one than the English, and we note that the procedures may well vary from German state to state.

Postscript

After five years of discovery and pre-trial proceedings the case described herein was scheduled to go to trial two months after our return from Germany. One month after our return, the case settled. We believe that for all the difficulties encountered the English and German depositions were a significant factor in the resolution of the action and were well worth the effort.