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THE PRACTICAL ASPECTS OF LITIGATING AGAINST FOREIGN CORPORATIONS

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LITIGATION WITH foreign corporations has become commonplace as more foreign corporations invest their assets and import their products into the United States. Wary of the extensive discovery United States courts allow domestic parties, these foreign corporations often attempt to limit access to their information. In addition, some create subsidiaries to insulate themselves from the jurisdiction and verdicts of United States courts. This article offers practical information regarding suits against foreign corporations, including guidance on determination of parties, jurisdictional concerns, service of process, and gathering evidence. This article also provides, in part, a guide to the procedural steps that may be encountered.

I. Deciding Whom to Sue

Every litigator faces the question of whom to join as parties to a lawsuit. When a foreign corporation is involved, that question becomes even more complicated. A litigator must consider both the propriety and costs of joining private foreign parties, foreign officials, or even a

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foreign government. If a foreign government must be sued, the litigator should refer to the Foreign Sovereign Immunity Act,\(^1\) which provides immunity for foreign states. Certain exceptions to the Act exist, however. For example, a foreign state may not be immune from the jurisdiction of United States courts if it has waived its immunity, or if the action is based on commercial activity carried on in the United States by the foreign state or commercial activity carried on abroad but having an impact in the United States.\(^2\) The Foreign Sovereign Immunity Act also provides conditional exceptions with regard to personal injury or death actions and property interests.\(^3\)

Questions that should be asked when considering whether to join a foreign party include:

1. Is the corporation doing business in the jurisdiction where the action will be brought?
2. Is there a subsidiary through which the foreign corporation operates in the United States?
3. Will distributors, importers, and other middle men have to be joined?
4. Where are the assets of the corporation?
5. Are there substantial assets in the United States?

Most states require foreign corporations to register with the Secretary of State to do business in that state. Most also publicize a certified list of domestic and foreign corporations each year. Additionally, Chambers of Commerce may provide listings of foreign corporations and useful information on the extent of their activities.

II. Service of Process Domestically

If a foreign corporation is not operating within the forum state, initial proceedings may be limited to the dis-

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\(^3\) Id. §§ 1602-1611.
tributors, importers, etc., who are amenable to jurisdiction. Early discovery through interrogatories and depositions can then help determine whether or not joining a foreign corporation is possible. United States courts are becoming more inclined to uphold service of process where the service was made on an agent of a foreign corporation within the United States. In S & S Industries, Inc. v. Nakamura-Tome Precision Industries Co., the district court held that service on a wholly-owned subsidiary was sufficient service of process on the subsidiary's Japanese parent corporation. Nakamura-Tome Precision Industries Co., Ltd., the parent corporation, argued that counsel for Nakamura-Tome American Corporation, the American subsidiary, was not the registered agent for service upon the parent. The fundamental issue in deciding sufficiency of service in such circumstances, the court noted, was whether service on the subsidiary provided the parent with adequate notice. The court found that such notice had been provided based on the strong parent/subsidiary relationship.

Control by a parent corporation, for service purposes, involves an examination of the following factors:

1. Whether the subsidiary exists predominantly to promote the sale and distribution of the parent corporation's products;

2. Whether there are strict or exclusive distributing agreements between the two corporations; and

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5 93 F.R.D. at 568.
6 Id. at 565.
7 Id. at 568.
8 Id.
9 Id.
3. Whether there are interlocking directorates through which the parent corporation dominates the subsidiary.10

The bottom line in determining whether service on a subsidiary is sufficient to cover the parent corporation is whether the parent corporation was fully apprised of the action's pendency by service on the subsidiary.11 As discussed further in this article, the Supreme Court recently held that a West German corporation was validly served by service only on its U.S. subsidiary, after the court recognized there was a controlling parent/subsidiary relationship.12

Courts may vacate defaults by the foreign corporation where it is unclear whether the foreign party had adequate notice. In Lasky v. Continental Corp., the plaintiffs served Nissan Motor Company, a wholly-owned subsidiary of Nissan-Japan, in the United States.13 The court held, however, that there was no showing that the American subsidiary was so dominated or controlled by the Japanese parent that service on the subsidiary constituted proper notice to the parent.14

Even where United States courts are willing to consider the possibility of a controlling parent/subsidiary relationship in service of process or jurisdictional settings, it is clear that the party attempting to show such a relationship

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14 Id. at 716-17; see also Kramer Motors v. British Leyland, Ltd., 628 F.2d 1175 (9th Cir.), cert. denied, 449 U.S. 1062 (1980). The Kramer court concluded that the fact that some directors of the British defendant's corporation sat on the board of the U.S. subsidiary did not make the latter an alter ego or agent for jurisdictional purposes, absent a showing of "continuous and systematic activity." Kramer, 628 F.2d at 1177-78.
must meet a high standard of proof. In *Geick v. American Honda Motor Co.*, where the plaintiff served Honda Motor Co., Ltd., the parent corporation, through its subsidiary, American Honda Motor Co., Inc., the court focused on whether the corporation was "doing business" within the state to determine *in personam* jurisdiction.  

The court evaluated the parent/subsidiary relationship to determine the extent of the foreign corporation's activities in Illinois and found that service was insufficient because the plaintiff failed to show evidence of extensive control.

Likewise, in *Stoehr v. American Honda Co.*, an action was brought against a Japanese motorcycle manufacturer as well as its wholly-owned United States subsidiary, which was the exclusive importer and distributor of the Japanese corporation's products. The court found personal jurisdiction over the Japanese corporation through Nebraska's long-arm statute. However, the court refused to find service on the registered agent of the American subsidiary sufficient to constitute service on the parent even though the plaintiff demonstrated an exclusive importer/distributor agreement, interlocking directorates, and consolidated financial reporting. The court stated that the plaintiff had not shown that the parent corporation so dominated the subsidiary as to treat it as a division of the parent corporation. The *Stoehr* court did not allow the plaintiff to re-serve the defendant because the statute of limitations had run on the plaintiff's claim. Accordingly, the complaint against the Japanese corpora-

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15 See *Geick*, 117 F.R.D. at 125-127.
16 Id.
17 Id. at 127.
19 Id. at 764-65. The court's finding was based on precedent subjecting non-resident manufacturers to its long-arm jurisdiction where the manufacturer had "placed its products in the stream of commerce with the knowledge and expectation that those products will reach the ultimate consumers throughout the country, including this state ...." Id. at 765.
20 Id. at 764-766. The interlocking directorate only amounted to a minority of directors on either side. Id. at 766.
21 Id.
22 Id. at 767. In Nebraska, the failure to properly serve the defendant before
tion was dismissed.\textsuperscript{23}

Contribution and indemnity are also reasons for joining foreign manufacturers.\textsuperscript{24} In \textit{Montalbano v. Easco Hand Tools, Inc.}, the American distributor of forgings for sledgehammers manufactured by a Japanese corporation joined the foreign corporation in a third-party complaint.\textsuperscript{25} The service was found to be improper, however, because the distributor attempted to serve the Japanese corporation by merely mailing a complaint and summons to its purported American agent.\textsuperscript{26} The court of appeals therefore upheld the district court's dismissal of the claim against the Japanese corporation due to the distributor's failure to serve within the 120-day time limit of Federal Rule of Civil Procedure 4(j).\textsuperscript{27} While there is a foreign country exception to Rule 4(j), the court noted that the distributor never even attempted to serve process in a foreign country, and the court therefore applied the 120-day limit.\textsuperscript{28}

\section*{III. SERVICE OF PROCESS ABROAD}

After deciding whom to sue, counsel must decide where to sue. This will depend on where counsel would prefer enforcement of the judgment to take place, and where jurisdiction can be obtained. Most foreign and United States courts determine whether they will enforce judgment on the basis of whether the person against whom judgment is sought has been given adequate notice of process. Thus, it is essential that counsel choose a method of service that the country who will be enforcing the judgment considers valid.\textsuperscript{29} Counsel should review the running of the statute of limitations precluded an action against the unserved defendant even if the lawsuit was timely filed. \textit{Id.}

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} See \textit{Montalbano v. Easco Hand Tools, Inc.}, 766 F.2d 737 (2d Cir. 1985).
\textsuperscript{25} \textit{Id.} at 738.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 739.
\textsuperscript{28} \textit{Id.}
the 1965 Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents ("Service Convention"). In reviewing the Service Convention, counsel should determine whether the country where service is desired is a party to the Service Convention and, if so, whether that country has made any reservations or modifications concerning the provisions. The advantage of working under the Service Convention is that any foreign country which is a member assumes many of the responsibilities dealing with service. While the Supreme Court's recent interpretation of the Convention may influence counsel not to proceed under the Service Convention, counsel should still take note of the procedures.

The Service Convention was inspired by a desire to create a means by which documents could be served abroad with sufficient and timely notice. Although the treaty sets forth an orderly procedure, there are pitfalls that might be encountered. Commentator David Siegal admonishes the practitioner to take care that nothing done offends the foreign sovereign "lest the return consist of a large envelope containing only the process server!"

The Service Convention applies only to parties to the Convention and only where the address of the person to be served is known. It is applicable in all cases involving "civil or commercial matters." The crux of the Service

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31 Service Convention, supra note 30. A partial list of the parties to the Service Convention includes: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, France, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, the United Kingdom and the United States. Id.

32 See infra note 68 and accompanying text.

33 See Preface to the Service Convention, supra note 30.

34 David D. Siegal is the writer of the Practice Commentary on the Amendment of Federal Rule of Civil Procedure 4, which provides insight on using Rule 4 methods abroad. Fed. R. Civ. P. 4 (Practice Commentary by David D. Siegal).

35 Id.

36 Service Convention, supra note 30, at Art. 1.
Convention is the designation by each contracting State of a Central Authority. The Central Authority of the State, usually the country’s Ministry of Justice or corresponding official department, will then receive requests for service and proceed to serve the documents. Counsel must complete a request for service which conforms to the model annexed to the Service Convention. The appropriate judicial officer then forwards the request to the Central Authority of the State where service is desired. The Central Authority will serve the document or provide otherwise for its service. The request requires counsel to list their identities and addresses, as well as the identity and address of the person to be served. Counsel must also specify the documents to be served and the method of service to be used. In addition, Article 5 requires that counsel include a summary of the documents to be served.

Counsel should check with the country’s Central Authority to determine if a translation is required. Germany, Japan, the United Kingdom, Sweden and Luxembourg all require a translation in their official language. In Shoei Kako Co. v. Superior Court, San Francisco, however, service of process was proper where documents transmitted by mail were not translated into Japanese. The court upheld the service, noting that the Japanese

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57 Id. at Art. 2.
58 Id.
59 Id. at Art. 3; see also id. at Annex.
60 Id. at Art. 3. In the United States, applicants should direct their requests to the United States Department of State. Id. The United States has designated the United States Department of State, the United States Department of Justice, and the United States Marshall for the judicial district in which service is made as appropriate authorities to complete a request for service. Id.
61 Id. at Art. 5.
62 Id. at Annex.
63 Id.
64 Id. at Arts. 5, 7.
company was accustomed to receiving communications in English, had authorized brochures printed in English to be sold in the United States, and had executed the postal receipt, which was written in English and French. The court also reasoned that the special appearance of the defendant indicated that the "purport of the documents was understood." 

Likewise, in Lemme v. Wine of Japan Import, Inc., the district court held that process was sufficient where plaintiff served a Japanese corporation by mail, but translated only the summons into Japanese. The court held that the translation requirement under the Service Convention Articles was only triggered when the Central Authority was used. Because the summons was translated, the court held that the foreign corporation had "notice of the existence of the proceedings against it." Counsel should note that the foreign corporation in Lemme brought a motion to dismiss plaintiff’s complaint for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. Any time service of process to a signatory varies from the procedures of the Service Convention, counsel should be aware of the possibility of such motions. Although there are limited exceptions to the Service Convention procedures, counsel should comply as closely as possible with the conditions required by a foreign country to avoid potential problems in the enforcement of any judgment in that country.

On the reverse of the request for service, counsel should include a certificate. Under Article 6, the Central Authority must designate on the certificate whether a document has been served, the place and date of service, and

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46 Shoei, 33 Cal. App. 3d at 824, 109 Cal. Rptr. at 413.
47 Id.
49 Id. at 464.
50 Id.
51 Id. at 457.
52 Service Convention, supra note 30, at Art. 6. The Service Convention also provides a Model Certificate. See id. at Annex.
to whom the document was delivered.\textsuperscript{53} If service was not possible, the Central Authority is required to explain the reasons why service was prevented and send the certificate back to the applicant.\textsuperscript{54} Under Article 5, counsel can effect service by the methods prescribed by the internal law of the country where service is desired or by requesting a particular alternate method.\textsuperscript{55} The alternate method must be compatible with that State's law. Article 5 states that "the document may always be served by delivery to an addressee who accepts it voluntarily."\textsuperscript{56}

The State that receives a request for service can refuse to comply with the request only if it deems that compliance would infringe on its sovereignty or security.\textsuperscript{57} A State cannot refuse to comply solely on the claim that the State has exclusive jurisdiction over the subject matter of the action or that its internal law does not permit the claim.\textsuperscript{58} Under Article 13, where a State has refused to comply, the Central Authority must promptly inform the applicant and state the reasons for refusal.\textsuperscript{59}

Articles 8 through 11 provide for alternate service whereby the litigant can avoid going through the Central Authority. Counsel can elect to directly or indirectly effect service through United States diplomatic or consular channels.\textsuperscript{60} However, counsel should check the declarations made by the country where service is desired for opposition to this method.

Article 10(a) allows applicants to send judicial documents by mail directly to persons abroad, but clearly states that such a method is allowed only if the country where service is desired does not object. There is a continuing conflict over whether 10(a) permits service of pro-

\textsuperscript{53} Id. at Art. 6.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at Art. 5.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at Art. 13.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at Art. 8.
cess by mail. Those who refuse to construe 10(a) as permitting service by mail contend that the Service Convention repeatedly refers to “service of documents” (such as interrogatories) and if the drafters had meant for 10(a) to provide an additional manner of service of process, they would have used the word “service.” Parties who claim 10(a) permits service by mail contend that the reference to “the freedom to send judicial documents by postal channels, directly to persons abroad” would be superfluous unless it related to sending such documents for the purpose of service. Supporters also argue that the reference to 10(a) appears in the context of other alternatives to the use of the Central Authority. Courts will not uphold service that is contrary to the express objections of the contracting State, however. Additionally, if the State where service is sought does not object, judicial officers, officials, or other competent persons from the applicant’s State have the freedom to effect service of judicial documents directly through the same qualified persons in the country where service is desired.

Article 12 provides that the applicant shall pay the costs associated with the employment of a judicial officer or other competent person in the State where service was desired, as well as the costs for a particular method of service. Article 15 establishes that where service was made under the Service Convention and defendant has not ap-

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62 See Mommsen, 108 F.R.D. at 446.
63 Shoei, 33 Cal. App. 3d at 808, 109 Cal. Rptr. at 411.
64 Id.
65 Harris v. Browning-Ferris Indus. Chem. Serv., 100 F.R.D. 775, 777-78 (M.D. La. 1984), aff’d, 806 F.2d 259 (5th Cir. 1986). However, plaintiff was given an additional 30 days to get proper service. Id. at 778.
66 Service Convention, supra note 30, at Art. 10(b)-(c).
peared, no judgment shall be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the state where service was desired; or
(b) the document was actually delivered to the defendant by another method under the Service Convention.

In addition, Article 15 requires evidence that service be given in sufficient time to allow the defendant to defend himself. Under Article 15, a State can give permission to its own judges to enter judgment even if no certificate has been received, provided:

(a) the document was served by a provision under the Service Convention;
(b) at least six months have elapsed since the date of service; and
(c) no certificate has been received — even though every reasonable effort was made to obtain the certificate.

Article 16 permits a judge to allow a defendant to appeal for relief from a judgment where the defendant does not appear within a reasonable time after having knowledge of the judgment. Under Article 16, the judge has the power to relieve the defendant from the effects of the expiration of the time for appeal if:

(a) the defendant, without fault, had no knowledge of the document in sufficient time to defend on appeal; and
(b) the defendant has shown a *prima facie* defense to the action on the merits.

Article 19 allows states to use methods of transmission other than those provided under the Service Convention. Therefore, the Service Convention does not automatically preempt all methods that may be used for service abroad. On June 15, 1988, the Supreme Court held in *Volkswagenwerk Aktiengesellschaft v. Schlunk* that the Service Convention was not applicable to "service of pro-

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67 Article 11 and Article 24 also permit agreements between parties as to provisions not provided for by the Service Convention.

cess on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation’s involuntary agent for service of process.”

In Schlunk, the plaintiff filed a wrongful death action on behalf of his parents, who were killed in an automobile accident in 1985, against Volkswagen of American, Inc. (“VWOA”). Schlunk alleged that VWOA had designed and sold the automobile that his parents were driving and that defects in the automobile caused or contributed to their deaths. Schlunk successfully served VWOA, and when VWOA denied that it had designed or assembled the automobile in question, Schlunk added Volkswagen Aktiengesellschaft (“VWAG”) as a defendant. Schlunk attempted to serve his amended complaint on VWAG, a corporation established under the Federal Republic of Germany, by serving VWOA as VWAG’s agent. VWAG, in moving to quash service, stated that it could only be served under the Service Convention, and that Schlunk had not complied with the Convention’s requirements. The Circuit Court of Cook County, Illinois, denied VWAG’s motion, reasoning that VWOA and VWAG were so closely related that VWOA was VWAG’s agent for service of process as a matter of law, even though VWOA was not formally appointed as VWAG’s agent. The court noted that VWOA was a wholly-owned subsidiary of VWAG, that a majority of members of VWOA’s board of directors were members of VWAG’s board of directors, and that VWOA was VWAG’s exclusive importer and distributor of VWAG products in the United States. Since service was accomplished in the United States, the court held that the Service Convention did not apply.

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69 Id. at 2105.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id. at 2106-2107.
75 Id.
76 Id.
Court of Appeals, for similar reasons, agreed. The Supreme Court granted certiorari to decide the issue.

The Court noted from the onset that the language of Article 1, which defines the scope of the Service Convention, was mandatory. Article 1, as previously noted, states that "the present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." The Court noted that the Convention "did not specify" the circumstances in which there is "occasion to transmit" a complaint "for service abroad." Service of process, it noted, refers to "a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." The Court then held that since the Service Convention did not prescribe a standard for the legal sufficiency of a formal delivery of documents, the Court must refer to the internal law of the forum state.

After looking at the negotiating history of Article I, the Court determined that the history indicated that whether there must be service abroad must be determined by looking at the law of the forum state. VWAG argued that interpreting the Convention as only applying when the internal law requires service abroad was inconsistent with the purpose of the Convention, which was to assure adequate notice. While the Court acknowledged that its interpretation of the Convention did "not necessarily" advance this particular objective, the Court dismissed as unlikely the idea that the United States or any other country "could draft its internal laws deliberately so as to cir-

77 Id. at 2107.
79 Schlunk, 108 S. Ct. at 2108.
80 Service Convention, supra note 30, at Art. 1.
81 Schlunk, 108 S. Ct. at 2108.
82 Id.
83 Id.
84 Id.
85 Id. at 2109-2110.
cumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad." The Court stated that voluntary compliance with the Convention could still be had where advantageous.

Finally, the Court rejected VWAG's argument that service was not complete until VWOA transmitted the complaint to VWAG in Germany, and that this transmission constituted service abroad under the Service Convention. The Court held that where service on a domestic agent is valid under both state law and the Due Process Clause, all inquiry ends.

Justice Brennan, joined by Justice Marshall and Justice Blackmun, concurred. Brennan, while concurring in the outcome, criticized the Court's construction of the Service Convention. Brennan instead argued that the words "service abroad," read in light of the negotiating history, embody a substantive standard that limits a forum's latitude to deem service complete domestically, and the Court's solution "leaves contracting nations free to ignore its terms entirely, converting its command into exhortation."

The real effect of this interpretation, as Brennan points out, may be felt by American citizens who are involved in litigation abroad in countries which may be less concerned with an adequate standard of due process than the United States. Had the United States been content with foreign notions of fair play and substantial justice, Brennan criticizes, participation in the Convention would not have been necessary in the first place.
IV. Service of Process Under Rule 4

In Schlunk, Justice Brennan noted that United States service of process procedures and principles are consistent with Service Convention expectations as far as due process is concerned. Hence, methods under Federal Rule 4 or similar state methods may be used by counsel in lieu of Convention procedures if the methods actually insure that adequate notice will be given.

Before deciding to use the Service Convention and/or Rule 4, counsel should compare the method of service in the foreign country and the methods under Rule 4 or similar state rules. This will involve checking with local foreign counsel as to what their country considers sufficient process to enforce a judgment. If enforcement is sought in that country, counsel should choose a method of service that is compatible with or similar to the foreign process. Due to the numerous procedures available, the standard Rule 4 service methods and similar state methods will not be discussed in this article. Counsel should be knowledgeable, however, about Rule 4(i)'s Alternate Provisions for Service in a Foreign Country. Rule 4(i) exists as a supplement to the other provisions of Rule 4, in recognition of the probability that a judgment rendered will need to be enforced in the foreign country. That country may refuse to enforce a judgment unless their own criteria for service have been met. Rule 4(i)(1)(A) therefore allows service to be made in the methods of the foreign country. Methods of process not used in the United States can be implemented, as long as those methods meet United States due process principles. Using an alternative method may aid enforcement, especially in a country unfamiliar with United States service methods.

Rule 4(i)(1)(B) allows service as directed by the foreign authority in response to a letter rogatory. A letter roga-
tory is a letter from a court in the United States to a court in a foreign country requesting international judicial assistance. Service by letters rogatory is administered by 28 U.S.C. section 1781 (1982), and 22 C.F.R. section 92.54 (1987). Serving by letter rogatory, however, is time consuming and counsel should avoid using this method unless it is the only one allowed by the country where service is desired. More information on letters rogatory is provided in the section on obtaining evidence.

Rule 4(i)(1)(C) provides for service on an individual or on a general agent, officer, or manager of a corporation. This method is efficient because it assures that actual notice will be given. However, counsel should check the foreign country's law to determine whether such service is permitted. Rule 4(i)(1)(D) provides for mailing of service and requires a signed receipt. Counsel should check carefully whether the foreign country will recognize such service. Switzerland and the Federal Republic of Germany consider service by mail offensive.

Finally, Rule 4(i)(1)(E) allows the court to provide a method of service to suit the needs of the particular parties, if the alternatives do not appear to be satisfactory. For example, in New England Merchants National Bank v. Iran Power Generation and Transmission Co., Iranian authorities refused to return receipts of process, so the court authorized service by Telex. The Court also authorized cable delivery of the requisite documents, but only where there was evidence of actual delivery. The Court held that use of these methods "assured that the defendants would receive actual notice of the suits and the claims of the plaintiff."

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98 For a sample letter rogatory, see 4 J. Moore, J. Lucas and G. Gr 99 Horlick, supra note 20, at 642. 100 Id. at 643.
101 Id.
103 Id. at 52.
104 Id.
Rule 4(i)(2) provides that proof of service may be made as prescribed by Rule 4, by the law of the foreign country, or by the court.105 Again, this grants the parties some leeway when facing a situation where the foreign country does not recognize or is unfamiliar with the method of proof. In Fox v. Regie Nationale Des Usines Renault,106 foreign defendants moved to dismiss a product liability complaint for insufficiency of process on the grounds that the failure to return a full completed certificate constituted insufficient service.107 The court rejected that argument by recognizing that because the Service Convention is complimentary to Rule 4, proof of service includes any evidence of delivery satisfactory to the court.108 The court also held that Rule 4 stresses actual notice and not strict formalism,109 and that under Rule 4(g) the failure to make proof of service did not affect the validity of service.110 Because it was clear that the defendant had sufficient notice by reason of its answer, the fact that the return was not completely filled out did not render the process insufficient.111

Rule 4(j) provides a time limit of 120 days for obtaining service.112 The section also provides, however, that the time limit shall not apply to service in a foreign country pursuant to 4(i).113 Where service of process has been quashed because of plaintiff's failure to follow the Service Convention, some courts have allowed plaintiffs time to effect proper service under the Convention.114

105 FED. R. CIV. P. 4(i)(2).
107 Id. at 454-55.
108 Id.
109 Id.
110 Id.
111 Id.
112 FED. R. CIV. P. 4(j).
113 See Montalbana, 766 F.2d at 740.
V. Discovery

The system of serving process on a foreign corporation is highly simplified in comparison with the possible roadblocks that may be encountered in attempting to obtain evidence abroad. Many procedural mechanisms are now in place to ease the difficulty lawyers have experienced in the past in trying to obtain evidence abroad. This section provides a brief overview of the different procedures involved. Specifically, it covers the procedures outlined under the Federal Rules and how those procedures correspond with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Evidence Convention").

This section also illustrates how United States courts are interpreting the role of the Evidence Convention in particular discovery matters, and provides insight into procedures involving countries which are not members of the Evidence Convention.

In light of the lengthy and costly nature of taking evidence abroad, the following questions should be considered before discovery is initiated:

1. Is the evidence sought from abroad actually needed?
2. Are there other expeditious ways to obtain that information in the United States?
3. Does the case have strict time requirements or can it withstand lengthy litigation?

The last question is particularly important because there may be numerous delays in the attempt to obtain evidence abroad, including objections from foreign counsel about procedures, delays in setting and executing

\[115\] Taking of Evidence Abroad, Sept. 15, 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Evidence Convention included within); see also VIII MARTINDALE-HUBBELL LAW DICTIONARY Part VII at 13 (1988) for the Evidence Convention. The Evidence Convention is in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States.


\[117\] See In re Anschuetz, 754 F.2d 602 (5th Cir. 1985), vacated, 107 S. Ct. 3223
depositions, and delays in receiving responses to interrogatories and requests to produce. Once it has been determined that documents or depositions from witnesses in the foreign country are needed, counsel must choose the most advantageous route to take. This involves initial considerations such as whether the evidence will be given voluntarily, whether the country where evidence is desired is a member of the Evidence Convention, whether the country from which evidence is desired recognizes and allows United States discovery procedures, and the extent of that allowance.\footnote{As a general rule, evidence obtained abroad must be obtained in accordance with the laws of the foreign jurisdiction in order to avoid violating the judicial sovereignty of that country. \textit{See, e.g., infra} note 121 and accompanying text for examples.}

A. Methods of Discovery

Litigants seeking discovery from foreign parties have often used the Federal Rules of Civil Procedure and similar state rules to obtain evidence. Due to variations in state procedures, only the Federal Rules are discussed in this article.

Whether the Evidence Convention or the Federal Rules should be used depends on whether the court has jurisdiction over the foreign party, whether the discovery request actually involves a party or a non-party, and whether witnesses are willing or unwilling.

1. Where to Find Specific Information

Annexed to the problem of obtaining evidence in a foreign country is discovering \textit{information} about how to take evidence in that country. Every country has different procedures and regulations regarding the taking of evidence abroad, which may change from one case to the next. The first thing counsel should do is enlist the aid of responsible and knowledgeable local counsel in the foreign coun-

\footnote{In that case, all proceedings were delayed for two years while the jurisdictional fight with one of the foreign defendants occurred.}
try. Hopefully, the foreign counsel can then give the most informed advice about how to proceed in his country. A good source for finding foreign counsel is the president of the bar in the capital of the particular country.

The United States Department of State maintains the Office of Citizens Consular Services (CCS), which provides information regarding foreign laws and procedures pertaining to international judicial assistance. CCS provides information relating to the legal requirements of specific foreign countries generally from past experience and suggests that foreign counsel be contacted for specific information. CCS also provides a listing of foreign attorneys and various circulars that give a broad overview on the taking of evidence in Japan, Taiwan, France, Korea, and other countries. Procedures on depositions and letters rogatory are set forth in 22 C.F.R. section 92.49-71. Further information will be provided here as each procedure is delineated.

2. Depositions

Before embarking on any deposition-taking, counsel should consult with local counsel to insure that the foreign country does not consider the taking of depositions by attorneys to be a violation or affront to their sovereignty. Rule 28(b) of the Federal Rules of Civil Procedure provides that depositions may be taken in foreign countries on notice, by commission, or under letters rogatory. Specific information on these procedures is located at 22 C.F.R. section 92.49-71 (1987). In addition, counsel should check to see if the country where a deposi-

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119 For general information on the laws of a particular country regarding evidence procedures, contact the Office of Citizen Consular Services (“CCS”), Room 4817, Department of State, 2201 C Street N.W., Washington, D.C. 20520.
120 22 C.F.R. § 92.49-71 (1987); see also FED. R. CIV. P. 28(b).
121 For example, taking a deposition in Switzerland is considered a criminal violation complete with a jail sentence! For more information on the difficulty and difference of evidence procedures between nations, see O’Kane, Obtaining Evidence Abroad, 17 VANDERBILT J. OF TRANSNATIONAL L. 69 (1984).
tion is being considered is a member of the Evidence Convention, and if so, whether that country delineates any procedures, declarations, or reservations about the three procedures cited above. After consideration of these factors, it may seem more opportune to transport the witness to the United States, where the deposition can be taken under more familiar discovery procedures. That, of course, will depend upon whether the witness considers such an option to be feasible.

If the deposition is to be taken abroad, the first method under the Federal Rules is to take the deposition on notice. A deposition on notice is taken before a competent official, most likely a diplomatic or consular officer, after reasonable written notice has been given to the opposing parties and attorneys. A "commission to take depositions" on the other hand, is a written authority issued by a court of justice, a quasi-judicial body, or a body acting in such capacity. This written authority gives power to those judicial bodies to take the testimony of witnesses who cannot appear personally to be examined in court or before the particular body issuing the commission. Commissions are only issued when necessary or convenient, when applied for, and where required notice is given. The notice or commission should be addressed to "Any Consul or Vice-Consul of the United States of America at (Locality)." The consular officer may act on the request if the testimony is voluntary and foreign law does not preclude such action. In undertaking to have a consular officer preside at the taking of a voluntary deposition at an American embassy or consulate, the following information should be furnished to the American Services Section of the Consular Section of the American embassy or consulate:

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These procedures were provided in a circular published by CCS on April 1,
1988] LITIGATION: FOREIGN CORPORATIONS 145

1. The requesting counsel's full name, address, and telephone number.

2. A brief description of the nature of the case and purpose of the deposition.

3. The full name and address of the persons to be deposed, their citizenship, and statement that they are appearing voluntarily.

4. The suggested dates for taking the deposition or a period within which the deposition should be taken.

5. Whether the deposition will be oral or by written interrogatories.

Counsel should also inform the embassy or consulate whether a court reporter and/or translator will be needed. The embassy should have a list of interpreters that can be used. Very few, if any, embassies will have a court reporting service, so separate arrangements must be made to insure that a reporter will be present. In dealing with court reporters and interpreters, disputes may arise over testimony interpretations. It may also become very expensive to employ both. The best situation is to find a person who can record and transcribe at the same time.129 Counsel should also provide the embassy with the names of those who will attend the deposition and request to participate in the deposition. Whether participation will be allowed depends on the requirements or restrictions placed on the roles of attorneys of the particular country. CCS suggests that $250 be attached as a deposit to cover necessary fees and expenses. Current consular fees are $90 per hour.

Other items CCS suggests be furnished to the embassy are a list of interrogatories, any special instructions counsel would like the officer to follow, the original commission or notice of the taking of the deposition, and a return collect cable so the officer can confirm the arrangements. It is the responsibility of the attorney requesting the dep-

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1986. Contact CCS, supra note 119, for copies of circulars and any recent additions or changes.

129 See O'Kane, supra note 121, at 71.
osition to make all the arrangements with the witnesses to insure that they will appear. This involves transportation costs, witness costs, and any other arrangements necessary to insure that the deposition will go as planned.

Before planning a video-deposition abroad, counsel should check to see whether the foreign country permits video-depositions or requires special customs clearance for the equipment. If clearance is not obtained, the country may confiscate the equipment. A special voltage adapter may also be needed.

Several countries prohibit consular depositions altogether. Some countries permit the taking of voluntary depositions, but only if they are of United States citizens or third country nationals.

3. Letters Rogatory

If the foreign country from which evidence is desired prohibits depositions by attorneys, consular officials, or diplomatic officers, and is not a member of the Evidence Convention, the evidence will probably have to be obtained by a letter rogatory. A letter rogatory may also be necessary to compel the attendance of a non-party or unwilling witness. Letters rogatory can embody a request for the serving of a summons, the taking of evidence, the serving of a subpoena, or other legal notice. Requests for letters rogatory generally appeal to the comity of the courts and usually involve a promise of reciprocity.

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130 Countries which prohibit voluntary depositions before consular officers of United States citizens, host country nationals, and third country nationals include Austria, Angola, Bulgaria, Cuba, Denmark, Iran, Libya, Liechtenstein, Malawi, Mali, Sierra Leone, Swaziland, Switzerland and Venezuela. CCS Circular, Apr., 1986. Call CCS for any recent additions.

131 Bolivia, Central African Republic, Colombia, Greece, Honduras, Hungary, and Turkey permit only voluntary depositions of United States citizens, while Romania and the U.S.S.R. also allow depositions of third country nationals and United States citizens. Brazil permits a deposition only if it is never intended for use in a United States court and not taken at a United States court's request. See CCS Circular, Apr. 1, 1986.


133 Id.
example, letters rogatory to a court in Taiwan should contain an offer of reciprocal assistance as well as a statement of the United States court's willingness to reimburse the Taiwan court for costs incurred in executing the letters rogatory. Under 28 U.S.C. sections 1781(1) and (2), the Department of State has the power to forward as well as receive letters rogatory. A court can transmit a letter rogatory, however, without using the State Department. Letters rogatory are only issued when "necessary" or "convenient" on application and notice.

Letters rogatory typically take six months to a year to be executed and, usually, the requesting attorney is not allowed to participate in the execution. Hence, most attorneys look upon the letter rogatory as a time consuming process. However, in some countries, letters rogatory are the only way to obtain the evidence needed.

The key to getting the information desired is in preparing a letter rogatory very carefully. Letters rogatory must be issued under the seal of the court and the signature of the judge, and must be addressed "To the appropriate Judicial Authority in (name of the country)."

Usually, the letter rogatory, the desired interrogatories, and any other papers must be accompanied by a complete translation into the language of the country where the letter rogatory will be executed. Before the documents are sent, the translator should execute, before a notary, an affidavit as to the translation's validity. The documents should be submitted in duplicate to CCS. CCS will

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134 This information is provided by CCS in a United States Department of State Circular, Rev. Dec. 13, 1985.
135 Id.
136 Many countries allow only procedures through letters rogatory to compel the taking of evidence. See CCS Circular, Apr. 1, 1986.
139 Id. § 92.66(b).
140 The procedures listed were provided by CCS in a United States Department of State Circular on letters rogatory dated Apr. 1, 1986.
then transmit them to the American embassy in the foreign country, who will then transmit them to the Ministry of Foreign Affairs.\textsuperscript{141}

CCS suggests including the following documents: (1) the original letter rogatory, under seal, or a certified copy; (2) the translation; and (3) photocopies of both. The copies will be returned to the United States court as proof of execution.\textsuperscript{142} Counsel should also include a letter setting forth the name of the case, the docket number, the mailing address of the clerk of the court to whom the executed request should be returned, and a statement of responsibility for additional costs incurred.\textsuperscript{143} CCS suggests that a refundable deposit of $100 be submitted from which the $16 letter rogatory and corresponding fee can be provided for each person to be served or deposed.

Once the letter rogatory has been received by the foreign court, American attorneys again face the issue as to whether they will be allowed to participate in the proceedings. Taiwan, for example, will not permit examination of witnesses by attorneys.\textsuperscript{144} Likewise, the Federal Republic of Germany requires that the judge determine which evidence will be produced and heard.\textsuperscript{145} Also, in Germany no verbatim transcript of the testimony is given, since the judge usually dictates the testimony in summarized form to the clerk of the court.\textsuperscript{146} Japan has a similar procedure, since the taking of depositions is considered to be a judicial function.\textsuperscript{147}

Attorneys should always request participation in the proceeding. Even if the judge retains his power to question, counsel may be allowed to pose additional questions

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} This information was provided by CCS in a United States Department of State Circular on Taiwan, Dec. 13, 1985.
\textsuperscript{146} Id. at 468.
\textsuperscript{147} Fox, \textit{Discovery from Japanese Companies}, \textsc{Trial}, Aug. 1986, at 20.
to the judge, or in rare circumstances, to the witness. In any event, the interrogatories should be framed as specifically as possible. This will probably be the only chance to question the deponent before trial, so the questions should include any queries that will establish the authenticity of documents that the witness might provide during the proceedings, as well as questions that will establish the witness' expertise or qualifications. A specific request for a written transcript of the testimony should also be made. Because participation will probably be limited, the opportunity for cross-examination is also limited. This may create problems of admissibility. Questions to the judge should be phrased to avert such problems.

VI. The Evidence Convention

The Evidence Convention provides a codified procedure for taking evidence on notice and by commission, and also for compulsion of evidence. The Evidence Convention's purpose was to set up a system for obtaining evidence located abroad that would be "tolerable" to the State executing the request and would produce evidence "utilizable" in the requesting State. The Convention is divided into three chapters: (1) the procedure through Letters of Request; (2) the taking of evidence by diplomatic officers, consular agents, and commissioners; and (3) general provisions.

Chapter I of the Convention on Evidence provides that in civil or commercial matters, a judicial authority of one signatory may request the authority of another signatory by Letter of Request to obtain evidence or perform some other judicial act. Chapter I expressly states that a letter shall not be used to obtain evidence for use other than in judicial proceedings, and that the phrase "other judicial act" does not cover service, process, or orders. Like the Convention on Service, the signatories have designated a

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Central Authority to receive Letters of Request and transfer them to the competent authority. A Letter of Request should include:

(a) the name of the authority requesting its execution, and the authority requested to execute it, if known;
(b) the names and addresses of parties/representatives to the proceedings;
(c) the nature of the proceedings for which evidence is required; and
(d) the evidence to be obtained or act to be performed.

If appropriate, the letter should specify:

(a) the names and addresses of persons to be examined;
(b) the questions to be put to them, or a statement of the subject matter about which they are to be examined;
(c) documents and other property to be inspected;
(d) any requirements that oaths, affirmations, or special forms be used; and
(e) any special method or procedure to be followed under Article 9.

With regard to (e), counsel should keep in mind that the foreign country's procedures are probably very different from United States procedures. Article 9 provides that while the executing country shall apply its own law to the methods and procedures followed, the executing country will follow a request for a special method or procedure unless that procedure is incompatible or impossible, or conflicts with the foreign country's internal law and practice. For example, the common-law procedure of cross-examination is not employed in most civil law countries. Therefore, it may not be practicable for some of those countries to comply with a request for cross examination.

Article 4 provides that a Letter of Request should be in

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149 Evidence Convention, supra note 115, at Art. 2.
150 Id. at Art. 3.
152 Id.
the language of the executing State or accompanied by a
translation. However, paragraph 2 of Article 4 provides
that the executing State must accept a Letter of Request
in either English or French unless it has made a reserva-
tion under Article 33. Denmark, Finland, and the United
Kingdom have all made reservations that they will not ac-
cept Letters of Request in French, while France has re-
served to accept only Letters in French. Germany
requires Letters of Request to be in German.153

Counsel should also indicate the desire to be informed
of the time and place where the proceeding will be and
request to be allowed to attend (if so desired).154 Under
Article 8, States may declare that "members of the judicial
personnel of the requesting authority may be present." For
every, Finland, France, and the United Kingdom allow judicial personnel to be present without prior au-
thorization, while the Federal Republic of Germany, Italy,
and the United States require prior authorization. Under
Article 10, the executing country shall apply the appropri-
ate measures of compulsion as provided by its internal
law. The witness concerned also has the right to refuse to
give evidence in light of privilege and duty.155 Article 14
provides for reimbursement, stating that the executing
State has the right to require the originating State to re-
imburse fees paid to experts, interpreters, and other costs
incurred because of a special procedure under Article 9.

Chapter II outlines the procedure to be used by diplo-
matic officers, consular agents, and commissioners for
taking evidence. These officers have the right to take evi-
dence, irrespective of the nationality of the witnesses.156
However, when the officer takes evidence from nationals
of States other than the requesting State, the executing
State may impose requirements of permission, as well as

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153 Article 4 also states that a country may specify by declaration the language
or languages in which a Letter of Request may be sent to its Central Authority.
154 Evidence Convention, supra note 115, at Arts. 7, 8.
155 Evidence Convention, supra note 115, at Art. 11.
156 Edwards, supra note 151, at 650.
certain conditions. Germany has declared, for example, that the taking of evidence by diplomatic or consular agents is not permissible within its territory if German nationals are involved.

Article 18 allows an officer to apply to the executing State (if the executing State so declares) for assistance to obtain evidence by compulsion. The United Kingdom and Italy, for example, have made such declarations. If the taking of evidence by such officers is contemplated, the CCS process previously noted corresponds well with the Convention. Counsel should use the declarations of specific countries in the Evidence Convention as a guide.

Chapter III contains general provisions, some of which allow States to make reservations or modifications to the provisions. Article 23 is particularly significant, as it provides that a country can declare that it will not execute Letters of Request issued for purposes of obtaining pre-trial discovery of documents as known in common law countries. Countries which have made such declarations include Denmark, Finland, France, Germany, Italy, and the United Kingdom. This provision originated out of the concern that countries should have the right to refuse a request for pre-trial discovery of a "fishing" nature or to refuse production of documents which are not directly needed by the requesting court. In addition, many countries will refuse to honor discovery requests where the request requires a person to provide a list of documents relevant to the proceedings in his possession or to produce any documents other than those specified in Letters of Request. France has declared that Article 3 does

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157 Evidence Convention, supra note 115, at Arts. 15, 16, and 17. France, for example, requires notification of the date and time of the proceeding to be served upon the person to be deposed. Other requirements include: (1) that evidence requested conform with the Evidence Convention; (2) that the witness' appearance be voluntary and consensual (or that reason be given as to why it is not consensual); and (3) that the deponent be allowed legal representation and be permitted to invoke a privilege or duty to refuse to give evidence. See France declarations, Evidence Convention, supra note 115, at 17.

158 Edwards, supra note 151, at 650-651.
not apply "when the requested documents are enumerated limitively in the Letters of Request and have a direct and precise link with the object of the procedure."\textsuperscript{159}

A. United States Courts and the Evidence Convention

The Evidence Convention has met with much conflict in United States courts. Foreign defendants and their American opponents have raised issues of whether the Evidence Convention was meant to be exclusive,\textsuperscript{160} whether discovery is considered to take place in a State's borders because the documents are located there,\textsuperscript{161} and whether American plaintiffs can order depositions of foreign parties to be taken in the United States.\textsuperscript{162} The recent Supreme Court decision in Societe Nationale Industrielle Aerospatiale v. United States District Court,\textsuperscript{163} exemplifies the current thinking that United States courts do not adhere to the view that the Evidence Convention must be the exclusive means used to gain "utilizable" evidence. In Societe Nationale, the Supreme Court held that the Evidence Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory territory.\textsuperscript{164}

In Societe Nationale, plaintiffs\textsuperscript{165} instituted suit against the designers/manufacturers of a "Rallye" airplane which crashed in Iowa.\textsuperscript{166} The defendants were corporations owned by the Republic of France.\textsuperscript{167} Plaintiffs alleged that

\textsuperscript{159} See France declarations, supra note 157.
\textsuperscript{163} 107 S. Ct. 2542 (1987).
\textsuperscript{164} Id. at 2554.
\textsuperscript{165} The district court was the nominal respondent in the Supreme Court proceeding, but the plaintiffs were the real parties in interest. Id. at 2546 n.5.
\textsuperscript{166} Id. at 2546.
\textsuperscript{167} Id. Societe Nationale Industrielle Aerospatiale is wholly owned by the Government of France, while Societe de Construction d'Avions de Tourism is a
defendants had manufactured and sold a defective plane, had been negligent, and had breached their warranty.¹⁶⁸ The jurisdiction of the district court was not challenged and the cases were consolidated and referred to a magistrate.¹⁶⁹ Both parties conducted initial discovery pursuant to the Federal Rules of Civil Procedure.¹⁷⁰

Plaintiffs then served a second request for documents, interrogatories, and admissions under the Federal Rules.¹⁷¹ At that point, defendants filed a motion for a protective order, alleging that because defendants were French corporations and the discovery sought could only be found in a foreign State (France), the Hague Convention "dictated the exclusive procedures that must be followed for pretrial discovery."¹⁷² Defendants stated that under French penal law, they could not respond to discovery requests that did not comply with the Convention.¹⁷³ The magistrate denied the motion.¹⁷⁴ The court of appeals held that "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's posses-

wholly-owned subsidiary of Societe Nationale Industrielle Aerospatiale. Id. at 2546 n.2.
¹⁶⁸ Id. at 2546.
¹⁶⁹ Id.
¹⁷⁰ Id. Plaintiffs requested production of documents under Rule 34(b) and admissions under Rule 36. Id. at 2546 n.4. Defendants also deposed witnesses and parties, and served interrogatories and requests to produce under the Federal Rules. Id.
¹⁷¹ Id. at 2546.
¹⁷² Id.
¹⁷³ Id. Defendants based their motion on Article 1A of the French "blocking statute," French Penal Code Law No. 80-538, which provides:
Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party 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.

Id. n.6. Article 2 provides: "The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures." Id.
¹⁷⁴ Id. at 2547. The magistrate stated that if plaintiffs had requested oral depositions to be taken in France, he would require plaintiffs to comply with the Evidence Convention. Id. at 2547 n.7.
sion, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention."  

The Supreme Court, in deciding the issue, noted four different interpretations of the relationship between federal discovery rules and the Evidence Convention. The Court rejected the interpretation that the Evidence Convention was exclusive by reasoning that the Preamble of the Convention did not speak in mandatory terms which would "purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices." The Court also recognized that the procedures under the Evidence Convention use "permissive rather than mandatory language." The Court con-

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175 In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir. 1986). The court of appeals also rejected defendant's contentions that international comity considerations required plaintiffs to use Evidence Convention procedures as a first resort. Id. at 125-126. The court of appeals stated that its interpretation would not render the Evidence Convention meaningless, as it would still provide a procedure for obtaining evidence from non-parties. Id. at 125. The court of appeals also held proper the magistrate's ruling that the discovery order was proper, despite the fact that compliance would require defendants to violate the French blocking statute. Id. at 126.

176 Societe Nationale, 107 S. Ct. at 2550. The four interpretations noted were:
1. The Evidence Convention requires its use to the exclusion of any other discovery procedures whenever evidence located abroad is requested for use in a United States court;
2. The Evidence Convention requires first but not exclusive use of its procedures;
3. The Evidence Convention establishes a supplemental set of discovery procedures which are optional, but nonetheless require first resort by United States courts; and
4. The Evidence Convention should be resorted to when a United States court deems appropriate after considering the situations of the parties as well as the interests of the foreign state.

"Id.

177 Id. at 2551. Specifically, the Court pointed toward the use of the word "may" in Articles 1, 15, 16, and 17. Id. Also, the Court rejected the hypothesis that an "exclusive" procedural interpretation would present, in that common law countries would have given up their recourse to pretrial discovery procedures at the same time they agreed to Article 23's possibility that a signatory could unilaterally abrogate the Convention procedures. Id. at 2552. Finally, the Court recognized that Article 27 did not prevent signatories from using more liberal methods other than those under the Convention. Id.
cluded that "the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures." The Court further noted that interpreting the Evidence Convention as being the exclusive means for obtaining evidence abroad would subject "every American court hearing a case involving a national of a contracting State to the internal laws of that State, even to the most routine pre-trial proceedings." Accordingly, the Court concluded that the Evidence Convention did not prevent the district court from ordering "a foreign national party before it [under proper jurisdiction] to produce evidence physically located within a signatory nation."

In addition, the Court held that the appellate court's opinion that the Convention "does not apply" to discovery sought from a foreign litigant who is subject to an American court's jurisdiction was erroneous. Further, the Court rejected the rule of "first resort" to the Evidence Convention. It recognized that such a rule would be time consuming, expensive, and, therefore, inconsistent with the "just, speedy and inexpensive determination" of litigation in United States courts. Moreover, the Court also did not agree that comity considerations required first resort to the Evidence Convention. Instead, the Court left the decision of whether a discovery request was reasonable or unreasonable for the trial court to decide based on its knowledge of the case, the claims

\[\text{Id. at 2553.}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Id. at 2554. The Court held that while the procedures are not mandatory, the Evidence Convention "does apply to the production of evidence . . . in the sense that it is one method of seeking evidence that a court may elect to employ." Id.}\]

\[\text{Id. at 2555.}\]

\[\text{Id.}\]

\[\text{Id. at 2555-2556. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Id. at 2555 n.27.}\]
and interests of the parties, and the governments involved. The Court advised American courts to exercise respect for any problems encountered by foreign litigants, but did not supply specific guidelines to the courts.

Justice Blackmun, concurring and dissenting in part, supported the view that there should be a general presumption that courts first resort to Convention procedures. He advocated a three-part analysis which considered "foreign interests, domestic interests, and the mutual interests of all nations in a smoothly functioning international legal regime." A case-by-case analysis, according to Justice Blackmun, should lead courts to require use of the Convention if it accommodates all three interests.

In *Hudson v. Herman Pfauter GmbH & Co.*, the district court applied Justice Blackmun's analysis and concluded that such analysis required adherence to the Evidence Convention. *Hudson* involved an action for injuries incurred by the plaintiff's operation of a machine manufactured by the West German defendant Pfauter. Pfauter objected to plaintiff's request for 92 interrogatories with subparts, moved for a protective order, and requested that plaintiff be required to conduct discovery in accordance with the Evidence Convention.

Applying Justice Blackmun's rationale, the court found that the foreign interests in the case weighed in favor of

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185 *Id.* at 2556.
186 *Id.* at 2556-2557. The Court also recognized that the French "blocking statute" did not alter its decision. *Id.* at 2556 n.29. The Court stated that "it is well-settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Id.* at 2556 n.29. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-06 (1958).
187 *Id.* at 2558.
188 *Id.* at 2562.
189 *Id.*
191 *Id.* at 39.
192 *Id.* at 34.
193 *Id.*
using the Evidence Convention procedures first. The court reasoned that federal discovery practices were likely to be more offensive to West Germany’s sovereign interests as a civil law country than to a common law country. The court reasoned that West Germany’s consent to the Evidence Convention’s procedures reduced the danger of offending West Germany’s sovereign interests.

In considering Justice Blackmun’s second prong, the court noted that the United States interests were two-fold: insuring that there were effective discovery procedures and insuring that foreign parties doing business in the United States were held responsible for their conduct in the United States. However, the court held that plaintiffs had not met the burden of showing frustration of those interests.

Finally, the court acknowledged that under Justice Blackmun’s final prong, using the Evidence Convention in lieu of the Federal Rules in a case where discovery is sought in a civil law country like West Germany “would promote the developments of an ordered international system.” The court also reserved the power to compel discovery under the Federal Rules if the Convention procedures brought inadequate results.

Clearly, any future conflicts over whether to resort to the Evidence Convention will undoubtedly involve the Societe Nationale requirements of analysis of the particular facts, sovereign interests, and likelihood that such resort would prove effective, as well as Justice Blackmun’s concurrence. Consideration of other cases involving unique issues, however, may also prove helpful to counsel.

195 Id. at 37.
196 Id.
197 Id.
198 Id.
199 Id. at 40.
200 Id.
201 Id. at 39.
in developing that analysis.\footnote{203}

For example, in \textit{McLaughlin v. Fellows Gear Shaper Co.},\footnote{204} the Evidence Convention was held inapplicable to plaintiff's interrogatories, which requested the identity and qualification of defendant's expert witnesses.\footnote{205} The court first recognized the argument that the Evidence Convention has no applicability to discovery under Federal Rules instituted pursuant to the court's jurisdiction.\footnote{206} Further, the court held that the request essentially called for "information" which did not amount to the obtaining of evidence.\footnote{207} Finally, the court also held that the Evidence Convention did not govern the conduct of a trial, and, therefore, the defendant could be barred from presenting at trial any evidence not adequately disclosed before trial and any witness that opposing counsel has not had a reasonable opportunity to depose.\footnote{208} Hence, the first argument is affected by \textit{Societe Nationale}, but a future dispute may end in the same result based on the other two arguments.

\section*{VII. Conclusion}

This article's goal is to provide a guide for the litigant in seeking and joining foreign defendants and serving process domestically or abroad. This article also strives to guide the litigant through the many methods of obtaining evidence. Hopefully, it will help those attorneys litigating against foreign entities to gain some insight about the necessary procedures and their variations.

\footnote{203} The Supreme Court recently granted certiorari to two Fifth Circuit cases, vacated the judgments, and remanded those cases for further consideration in light of \textit{Societe Nationale}. See \textit{Anshuetz}, 754 F.2d at 602; \textit{In re Messerchmitt Bolkow Blohn Binbl}, 757 F.2d 729 (5th Cir. 1985), \textit{cert. granted}, 106 S. Ct. 1633 (1986), \textit{vacated}, 107 S. Ct. 3223 (1987).
\footnote{204} \textit{Id.}
\footnote{205} \textit{Id.}
\footnote{206} \textit{Id.}
\footnote{207} \textit{Id.}
\footnote{208} \textit{Id.}