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OBTAINING EVIDENCE ABROAD FOR USE IN UNITED STATES LITIGATION†

by

Ronald E. Myrick* and G. Roland Love**

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AMERICAN litigators in complex federal cases often seem to have an insatiable desire for discovery. Through the discovery process, litigators typically seek access to everything that may be helpful to their clients, as well as to everything harmful that may be known by their opponents. The Federal Rules of Civil Procedure promote broad discovery from the parties to the litigation as well as from third parties. Liberal discovery from third parties to U.S. litigation is common, provided that the third parties are within the jurisdiction of the U.S. When discovery is sought of unwilling third parties in foreign countries, however, or when a foreign party to the litigation ignores or objects to the jurisdiction of U.S. courts, the breadth of discovery may be curtailed sharply due to foreign law and practice.¹

The methods for taking evidence abroad initially depend upon the ap-

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 applicable U.S. laws and rules of procedure. Due consideration also must be
given to any treaties that may exist between the U.S. and the country
where the evidence is to be taken. While such a treaty may provide a
vehicle for obtaining the evidence required, it also may proscribe, directly
or in spirit, informal avenues of discovery, even when all concerned are
agreeable. Additionally, the litigator engaged in a complex case should
explore thoroughly the statutes and practice of the country in which evi-
dence is to be taken. Discovery practice in the U.S. is somewhat atypical,
and the litigator trained in the U.S. must not make the mistake of assum-
ing that procedures available at home are equally available elsewhere; rou-
tine practices in the U.S. may be prohibited under foreign law, even if the
witness does not object. Moreover, the scope of discovery available in the
U.S., particularly from a third party to the U.S. litigation, may be vastly
broader than that available in the foreign country where the evidence is to
be taken.

The U.S. litigator should consider the applicable U.S. laws and rules,
the pertinent treaties, and the foreign law and practice as early in the liti-
gation as possible, preferably with the advice and assistance of qualified
foreign counsel and the appropriate geographical division of the U.S.
Department of State. A substantial portion of the discovery effort in the U.S.
may need to be directed toward developing information sufficient to make
an evidence-gathering program abroad practicable. The purpose of this
Article is to provide a discussion of the fundamental considerations and
procedures for obtaining discovery abroad, under U.S. law and practice,
under the Hague Convention on the Taking of Evidence Abroad in Civil
or Commercial Matters (hereinafter referred to as the Hague Evidence
Convention or the Convention),\(^2\) and under foreign law and practice, par-
ticularly in the illustrative contexts of the United Kingdom (principally
England and Wales) and Canada.

One of the most fundamental considerations in obtaining discovery
abroad is definitional. The term “discovery” itself is a term of art, having
various meanings throughout the world. Even within the English-speaking
world, the meaning of “discovery” varies widely.\(^3\) In the U.S. the term
“discovery” is used generically to describe the entire process of collecting
information that is either admissible evidence itself or may lead to admis-
sible evidence. The collection process may include taking depositions of
various persons, whether party to the litigation or otherwise, preparing and
answering interrogatories, and inspecting documents and things. In En-
gland, however, the term “discovery” is much more limited in scope and
generally refers to document production only between the parties to the
litigation. If the term “discovery” is to be used at all in connection with
efforts to obtain evidence abroad, it should be only with an awareness of

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(West Supp. 1980) and 8 MARTINDALE-HUBBELL LAW DIRECTORY 4556 (1981) [hereinafter
cited as Hague Convention].

3. Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United
its full meaning in the country in which evidence is to be sought.4

I. U.S. LAW AND PRACTICE

A number of U.S. statutes and rules of procedure pertain to obtaining evidence abroad. Several of these are discussed below in order to establish the background and context for the discussion of the Hague Evidence Convention and exemplary foreign practice that follows. While this discussion of U.S. practice is not intended to be exhaustive, it provides an overview of the framework of most foreign discovery procedures.

A. Subpoena of U.S. Nationals or Residents in a Foreign Country

Under international law as interpreted by U.S. courts, a sovereign has the power to require the return of one of its citizens, residing elsewhere, to give testimony.5 Congress has provided legislation, the Walsh Act,6 to enable the exercise of this power. Under the Walsh Act a U.S. court may order the issuance of a subpoena requiring a U.S. national or resident who is in a foreign country to appear and give testimony or produce documents and things.7 The court must make certain findings of fact to support its order, and the subpoena must be properly served.8

4. For the remainder of this Article, the term "discovery" will be used in its American sense unless the circumstances indicate otherwise.
7. The Act states:
   (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.
   (b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

8. FED. R. CIV. P. 28(b) previously have been employed unsuccessfully.
Because the proscriptions, customs, and practices under foreign law may complicate service, foreign law should be considered carefully before service is attempted. The country in which the subpoena is to be served may abhor the compulsion of testimony unless its procedures are satisfied, even if that testimony is to be extracted from foreign nationals within its jurisdiction. Dislike of compelled testimony may be apparent particularly when evidence is to be taken informally or before a person who is not a judicial official of the country in question. The U.S. judge should consider these factors before exercising his discretion with regard to issuing a subpoena.

B. Foreign Depositions Under the Federal Rules of Civil Procedure

I. Federal Rule of Civil Procedure 29. Rule 29 enables the litigator to minimize cost and expedite discovery in the foreign context by permitting the parties to vary substantially by written stipulation the procedures applicable to deposition taking. The use of the rule, however, even pursuant to an agreement of the parties, cannot obviate compliance with the local law of the country where the discovery is to be taken. The local law may be intended to protect the witness and may be unconcerned with any agreement the litigants may have reached with respect to that witness.

10. See Note, The 1980 French Law on Documents and Information, 75 Am. J. Int’l Law 382 (1981). See also Swiss Penal Code §§ 271-274 (possible criminal sanctions) and the discussions thereof in Dep’t of State Airgram No. A-275 Bern (June 25, 1973) and in the U.S. Dep’t of Justice, Civil Division Practice Manual § 3-12.9 (1976). Additionally, some countries have made proper declarations under the Hague Evidence Convention that seem to conflict with the compulsory taking of evidence from U.S. nationals within the jurisdiction of those countries solely at the instance of a U.S. court. A conflict, therefore, may exist between the procedure authorized by the Walsh Act and the Hague Evidence Convention, a ratified treaty of the United States. An argument, therefore, may be made that for countries having made such declarations, the U.S. court should not and possibly cannot order such compulsion of testimony in such countries. Cf. Kadota v. Hosogai, 125 Ariz. 131, 608 P.2d 68 (1980) (no personal jurisdiction under state rules if rules violate terms of international treaty).
13. Fed. R. Civ. P. 29 reads as follows:
   Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.
Particularly in civil law countries, a witness's agreement to a deposition procedure may be immaterial if that procedure treads upon the private preserves of the judiciary of the country. In such countries the taking of evidence is considered to be a judicial function and may not be usurped by foreign interlopers except with specific, prior permission.15

2. Federal Rule of Civil Procedure 28(b). For purposes of obtaining depositions from persons in foreign jurisdictions, the more significant rule is rule 28(b).16 The rule provides three avenues for taking depositions in foreign countries. Depositions may be made:

(1) on notice before a person authorized to administer oaths under either U.S. or local foreign law;
(2) before a person commissioned by the U.S. court; or
(3) pursuant to a letter rogatory.

The notice procedure under rule 28(b) is similar to that conventionally used for depositions within the U.S.17 Under rule 28(b), however, depositions may be taken before a person authorized to administer oaths under local foreign law. This provision was added by a 1963 amendment that substantially expanded the class of persons before whom depositions could be taken beyond the previous limitation to U.S. consular and diplomatic officials.18

Under the commission procedure provided by rule 28(b), depositions may be taken before a person specially empowered by the U.S. court for that purpose.19 The person conducting the deposition may be either a U.S. resident who is to travel abroad for the deposition or a foreign resident.

16. FED. R. CIV. P. 28(b) provides:
   In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed “To The Appropriate Authority in [here name the country].” Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

19. Unless provision for a commission is made by treaty, the commission procedure may run afoul of the concepts of judicial sovereignty applicable in civil law countries because the commission is effectively an extension of the appointing court. Accordingly, the commission procedure should be used only after consultation with qualified foreign counsel and the U.S. Department of State.
possibly a judicial officer. Under both the notice and the commission procedures, the designation of persons before whom the deposition is to be taken may be made by name or descriptive title, which facilitates the designation of a local official. U.S. diplomatic and consular officials, however, will not serve as commissioners in countries where such service is prohibited.

Use of the letter rogatory procedure requires the cooperation of both U.S. and foreign courts. The U.S. court requests that the courts in the country where evidence is to be taken make the orders necessary to obtain the testimony or documents within the foreign jurisdiction. In the absence of a treaty such as the Hague Evidence Convention, the requesting court must rely upon the principles of comity in seeking the acquiescence and assistance of the requested court.

Ordinarily the procedures used when taking a deposition in a foreign country pursuant to a letter rogatory are those normally employed for taking testimony in that country. The last sentence of rule 28(b) was added in 1963 to minimize problems with regard to the admissibility of evidence elicited using foreign procedural rules. The amended rule provides that procedural departures from normal U.S. practice, such as the absence of a verbatim transcript or an oath at the time testimony was taken under the letter, are not sufficient to require exclusion of the affected evidence. Such procedural irregularities, however, may affect the weight to be given to the evidence. The 1963 amendment also deleted language that had permitted a commission or letter rogatory to be issued “only when necessary or convenient.”

The changes in rule 28(b) have made the letter rogatory method a more desirable avenue for taking depositions abroad, placing it on a more equal footing with the notice and commission procedures. Some argue that the amended rule limits the U.S. court’s discretion to refuse to issue a commission or letter rogatory. The rule should not be read so restrictively, how-

20. The restrictions of Fed. R. Civ. P. 28(c) still must be observed: “No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.”


22. 4 J. Moore, Federal Practice ¶ 28.04 (2d ed. 1979). For exemplary forms relative to commission procedures, see 2A. Bender’s Federal Practice Forms 132 (1980) [hereinafter cited as Bender’s Forms]; 3A West’s Federal Forms ¶ 3304 (1977) [hereinafter cited as West’s Forms].

23. 4 J. Moore, supra note 22, ¶ 28.05. See also exemplary forms relative to letter rogatory procedures in Bender’s Forms, supra note 22, at 148; West’s Forms, supra note 22, § 3312.


28. See 4 J. Moore, supra note 22, ¶ 28.05; 8 C. Wright & A. Miller, supra note 14, § 2083.

29. See 4 J. Moore, supra note 17, ¶ 28.06[3]. Fed. R. Civ. P. 28(b) provides that “a
ever, particularly in view of Federal Rule of Civil Procedure 26(c), which allows the court to limit discovery under certain circumstances.30

The U.S. court has an apparent need for discretion to deny certain discovery requests in the interest of protecting against undue burden and expense. In efforts to obtain discovery abroad, however, such discretion may serve an additional salutary purpose by encouraging compliance by the foreign court. A foreign court may be more inclined to honor a request for international assistance if it is convinced that the request is a genuine effort by the U.S. court to obtain evidence for trial rather than a perfunctory performance of a nondiscretionary, ministerial act initiated by counsel for a party.

II. THE HAGUE EVIDENCE CONVENTION

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters became effective in the United States in 1972.31 Other nations that adhere to the Convention are Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, Israel, Luxembourg, Norway, Portugal, Singapore, Sweden, and the United Kingdom. The Convention provides two principal avenues for the taking of evidence abroad: by letters of request and by diplomatic officers, consular agents, and commissioners. The letter of request corresponds to the U.S. letter rogatory procedure, while the diplomatic official method is similar to the U.S. notice and commission procedure.

A. Letters of Request

Under article 1 of the Convention a “Letter of Request” is a request from “a judicial authority of a Contracting State” to the “competent authority of another Contracting State . . . to obtain evidence, or to perform some other judicial act.”32 Under article 2 of the Convention, each contracting state has designated a “Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.” Execution of letters of request through the respective central authorities may obviate the use of local counsel in the executing state for simple or routine matters; however, for important or complex cases, consultation with local counsel in the preparation and execution of the letters of request remains advisable.

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32. Article 1 of the Convention also provides that “the expression ‘other judicial act’ does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.” Hague Convention, supra note 2, art. 1.
Letters of request under the Convention differ from letters rogatory in that they do not rely solely upon comity for execution. A contracting state has an obligation to execute a proper letter of request and may refuse only on certain specified grounds. Article 12 provides that execution cannot be refused “solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject matter of the action or that its internal law would not admit a right of action on it.” The Convention is, thus, a major departure from preexisting practice.

A letter of request must comply with certain formal and substantive requirements that are recited in article 3 of the Convention. Tailoring the letter to the particular requirements of the state of execution may be advantageous and in some cases essential. A letter of request generally specifies:

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

When appropriate, the letter may specify:

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

Virtually all of the convention states have declared, as is their right
under article 23 of the Convention, that they will not execute letters of request for the purpose of obtaining pretrial discovery of documents. A letter of request, therefore, should indicate clearly on its face that it is directed to evidence for trial purposes, particularly with regard to document requests. The declaration in this regard by the United Kingdom is instructive because it reflects disenchantment with the expansive discovery sanctioned under U.S. practice; article 23 allows each state to prevent liberal discovery within its territory. Dislike for the U.S. style of pretrial discovery also may extend beyond document requests to depositions. The Convention provides avenues for taking "evidence" abroad, and that term is likely to be narrowly construed by foreign courts.

The Convention requires the state of execution to apply measures of compulsion that normally are applied for execution of internal orders. Testimonial privileges afforded or duties imposed by either the state of execution or the requesting state, however, will be honored by the executing state. The fifth amendment privilege against self-incrimination, for example, may be important in a U.S. antitrust suit because testimony may be required by the law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Hague Convention, supra note 2, art. 9 (emphasis added).

37. Article 23 provides as follows: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries."

Id. art. 23.

38. Id. The declaration of the U.K. in regard to article 23 reads as follows:

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

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.


39. Article 10 of the Convention provides:

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Hague Convention, supra note 2, art. 10.

40. Article 11 of the Convention provides:

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.
expose the witness to criminal sanctions. The courts of the executing state defer to U.S. courts in determining the applicability of the fifth amendment privilege in such situations.

B. Taking of Evidence by Diplomatic Officers, Consular Agents, and Commissioners

The Convention allows diplomatic officers, consular agents, and commissioners to take evidence subject to declarations made by the respective convention states. Under article 15 of the Convention, a U.S. diplomatic officer or consular agent may take evidence from U.S. nationals within the territorial area of his responsibility. Contracting states may require an officer or agent to seek prior permission before taking such evidence. Four states (Denmark, Norway, Portugal, and Sweden) have availed themselves of this right, declaring that evidence may be taken by foreign diplomatic officers and consular agents from their own nationals only if prior permission from the appropriate local authority has been obtained.

The Convention provides that evidence may be taken by diplomatic officials only without compulsion. Under article 21(c) of the Convention a request to appear and give evidence must inform the potential witness that he has a right to counsel and that he is not compelled to appear and give
evidence. This requirement may diminish the statutory authority of U.S. courts under the Walsh Act to issue subpoenas compelling testimony from U.S. nationals and residents abroad in Convention countries. A state also may allow by declaration that a diplomatic officer or consular agent may apply for assistance in obtaining evidence by compulsion.

Article 16 of the Convention permits a U.S. diplomatic officer or consular agent to take evidence without compulsion within the territorial area of his responsibility from nationals of the host state or of a third state. The host state must grant prior permission, either generally or specially, before a diplomatic officer may depose foreign nationals. A state may make a general declaration of such permission, as some states have done. Similarly, a person duly appointed as a commissioner by a U.S. court may take evidence without compulsion within the territory of another state, so long as that state has given either general or special prior permission.

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Hague Convention, supra note 2, art. 21. See also note 10 supra.


49. Article 18 of the Convention provides:

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Hague Convention, supra note 2, art. 18.

50. Article 16 of the Convention provides:

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Id. art. 16 (emphasis added).

51. Id.


53. Article 17 of the Convention provides:

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a
may give such permission by general declaration. The notice provisions of article 21(c), however, apply to all of the diplomatic officer, consular agent, and commissioner procedures.

III. Taking Evidence in England for Use in Foreign Proceedings

If complex civil proceedings outside England require evidence from a person residing in England who does not agree to testify voluntarily, the English court, under certain circumstances, may compel his testimony. A reluctant witness also may be ordered to produce documents in his possession, custody, or power in appropriate situations. The word “evidence” must be distinguished from the term “discovery”; the English court may only grant orders seeking evidence for use at trial. This portion of the Article considers the practicalities of obtaining such evidence in England from an unwilling witness for use in an important or complex case. Since depositions may be taken and documents procured voluntarily in England without recourse to the courts or other official channels, it is only when such evidence cannot be obtained by agreement that recourse to an English court is necessary.

Evidence gathering in England is governed by the Evidence (Proceedings in Other Jurisdictions) Act, 1975 (the 1975 Act), by Orders 39 and 70 of the Rules of the Supreme Court (R.S.C.), and by case precedent. Although the United Kingdom is a party to the Hague Evidence Convention, that Convention is not itself part of English law. The governing law and procedural rules are those stated in the 1975 Act and the pertinent rules of the Supreme Court.

The U.K. has issued a specific declaration pursuant to article 23 of the Convention stating that it will not recognize a request for pretrial discovery of documents. In addition, the U.K. has declared generally that prior permission to take evidence under articles 16 and 17 of the Convention

Contracting State in aid of proceedings commenced in the courts of another Contracting State if—
(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
(b) he complies with the conditions which the competent authority has specified in the permission.
A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Hague Convention, supra note 2, art. 17.

54. Id.

55. Id. art. 21(c). Article 27 should not be overlooked, because it authorizes contracting states to employ practices less restrictive than those otherwise required by the Convention. Id. art. 27. Counsel thus should look to local law and other pertinent treaties, in addition to the Convention. The Convention did not preempt other preexisting treaties.

56. The following discussion of practice in England was contributed by solicitors Laurence Cohen and David Brown, of the firm of Bristows, Cooke and Carpmael, London, England.

57. The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34.


59. For the text of the declaration, see note 38 supra.
will not be required in respect of diplomatic officers, consular agents, or commissioners of a convention state that also does not require such permission. The U.S. has declared that it does not require prior permission for taking evidence under articles 16 and 17.

A. Outline of Typical Procedure

The attorney in need of evidence to be obtained in England initially should apply to the appropriate U.S. district court for a request for international judicial assistance from the English court. The application and request should be prepared in consultation with English solicitors familiar with the peculiarities of the applicable English practice. The request issued by the U.S. court, along with evidence to support the request, then may be transmitted by the party who obtained the request directly to its English solicitors, who apply to the English court for an order pursuant to the request.

Supporting evidence should be supplied to the English court in the form of affidavits. The English court may fulfill the request in whole or in part through an order requiring the appropriate witness to present the evidence and documents requested. The order is served by the solicitors on the person whose evidence is required; that individual then may apply to set aside the order within fourteen days of service. Once an order is finally made pursuant to the request, the hearing of the evidence takes place before an examiner. In the absence of agreement between the parties, the examiner will be appointed by the English court. Unless agreed otherwise between the parties, evidence is taken in the English mode: examination in chief, followed by cross examination and then re-examination. In English legal proceedings, the person carrying out the examination in chief is not allowed to ask leading questions unless a witness is declared to be hostile. Whether this rule applies to evidence taken for proceedings outside the United Kingdom has not been tested. Objections can be taken to questions, for example, on the ground of privilege, and such objections are determined by the English court or referred to the U.S. court, depending upon whether the objection taken is one under English law or United States law.

B. The English Procedure in Detail

1. The Meaning of Discovery in English Practice. In English legal proceedings "discovery" ordinarily refers to the discovery of documents rather than to discovery by deposition. In practice, discovery is not permitted against a stranger to an English suit.

60. Id.
62. For Convention states other than England the request may need to be transmitted more formally, directly to the designated central authority for the executing state. Transmittal from the U.S. court directly to the appropriate central authority in the U.K. is an option that rarely is used.
OBTAINING EVIDENCE ABROAD

Poena and documents produced under a subpoena duces tecum may be presented only at the actual trial. The English court may issue a subpoena requiring a witness to give evidence at a trial. A third party also may be compelled by subpoena duces tecum to bring specific, particularized documents to the trial. Unlike the usual American practice, these documents may not be inspected prior to trial. While exceptions to both of these rules exist, they are applicable only in very limited circumstances.64

An English court making an order pursuant to a request for international judicial assistance applies stringent tests. The English court specifically is forbidden to give effect to a request for international judicial assistance if that request requires steps that cannot be taken in English civil proceedings.65

2. The Request. The careful litigator should present to the U.S. court detailed justification for the necessity of seeking evidence abroad. Although the English courts are not supposed to look behind the U.S. court's request, in practice they often do so, particularly to discover if the request is in fact for evidence or is for more liberal discovery that may lead to the securing of evidence.66 A recital by the U.S. court that it has been "satisfied that this request is required to produce necessary evidence for trial"67 may help establish the validity of the request in the eyes of the English court.

The request must list the witnesses whose evidence is required and the nature of the evidence each witness is expected to give. Under the 1975 Act the English court has discretion whether to give effect to a request for evidence for use in foreign proceedings.68 If the request is contested, it will be scrutinized to ensure that it seeks only evidence for trial. For this reason it is important to show the English court that the requesting court has understood and appreciated the nature of the evidence each witness will be expected to give.

Requests may seek production of documents from individuals and from corporations as well as oral evidence from individuals.69 Section 2(4)(a) of the 1975 Act, however, prohibits the English court from requiring "discov-

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64. See Norwich Pharmacal Co. v. Commissioners of Customs & Excise, [1974] A.C. 1933 (limited discovery allowed against nonparty to enable patentee to determine who was importing a drug alleged to infringe a U.K. patent).
65. Section 2(3) of the 1975 Act provides:
   An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.
66. The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 2(1).
68. See id. at 621 (Dilhorne, J.); id. at 642 (Fraser, J.).
69. Section 2(2) of the 1975 Act states:
Allowing "discovery" essentially imposes an impermissible duty upon the person from whom evidence is sought to determine whether the documents in his possession, custody, or power are relevant to the issues in the action. A request for international judicial assistance to an English court must not seek to impose this task upon the potential witness. A request may seek production only of documents that are sufficiently particularized that the party against whom the order is made is able to identify the actual documents requested without consideration of the issues within the litigation. Any part of a schedule of documents attached to a request that does not list the documents with reasonable particularity is likely to be stricken by the English court as "discovery" or "fishing." If the request is challenged, the requesting party must show that each document is or is likely to be in the possession, custody, or power of the person against whom the order is sought.

The timing of any request to the English court is important because an English court can honor only a request for evidence. This limitation often places U.S. litigants in a dilemma because a contested request may not become final for as long as eighteen months. If the request is made too early, the requesting party may be accused of seeking evidence from England for use other than at trial. If the request is made too late, the American trial may be completed before the English evidence is obtained.

3. The Application to the English Court. Once the request is made, it is transmitted by the party seeking the evidence to his English solicitor or to the appropriately designated central authority. The English solicitor then drafts an affidavit, setting out the circumstances in which the request was made, providing some details about the litigation, and exhibiting the re-

Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—
(a) for the examination of witnesses, either orally or in writing;
(b) for the production of documents;
(c) for the inspection, photographing, preservation, custody, or detention of any property;
(d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
(e) for the medical examination of any person;
(f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

Id. § 2(2).

70. Section 2(4) of the 1975 Act provides:
An order under this Section shall not require a person—
(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

Id. § 2(4).

72. See note 70 supra.
OBTAINING EVIDENCE ABROAD

quest itself. The affidavit preferably should set out the type of evidence that each of the witnesses can be expected to give, and the reasons why the documents requested are, or are likely to be, in the possession, custody, or power of the person against whom the order is sought.

The solicitor then applies ex parte to a Master of the Queen's Bench Division of the High Court for an order pursuant to the request. The English court deems itself to have wide discretion whether to honor a request for international judicial assistance, but it will exercise its discretion in favor of the requesting court if it reasonably can do so.

The solicitor also will provide a draft form of an order, which must state where and before whom the evidence will be taken. When taking evidence for U.S. proceedings, the United States Embassy ordinarily is nominated as the venue, and the United States Consul normally is named as examiner. Often, however, the parties by subsequent agreement name an alternative examiner and a suitable venue, such as a central London hotel.

4. Application to Set Aside an Order. Once the order is issued and served on the parties requested to give evidence or produce documents, the requested witnesses may apply to set it aside in whole or in part. An application to set aside an order initially is made before a Master of the Queen's Bench Division of the High Court. Both sides give evidence by affidavit, after which the master will make an appropriate order. The court is not obliged to give effect to a request for international judicial assistance, and the requesting party must convince the court to exercise discretion in its favor.

The parties have the right to appeal to a judge the result of an application to set aside an order, and during this appeal some supplementing of evidence is possible. From the determination by the judge, appeal is to the Court of Appeal by leave of the judge, and in a contested case such leave is unlikely to be refused. The Court of Appeal will admit no further evidence except in relation to matters that may have occurred subsequent to the hearing before the judge. In the complete rehearing before the judge,

73. R.S.C.O. 70, r.2(1) provides: "Subject to rule 3 an application for an order under the Act of 1975 must be made ex parte and must be supported by affidavit."

74. Section 2(1) of the 1975 Act provides:
Subject to the provisions of this section, the High Court [England and Wales], the Court of Session [Scotland], and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.


75. Some of the Hague Evidence Convention states prefer that evidence be taken within the confines of an embassy or consulate. See, e.g., Declarations of France, reprinted in 8 MARTINDALE-HUBBELL LAW DIRECTORY 4556, 4559 (1981). In other circumstances, the evidence may have to be taken by a judicial officer in a court.
he need not consider any discretion exercised by the master. At the higher appellate stages the discretion of the judge may be a factor; where evidence was given orally before the judge, appellate courts are reluctant to upset judicial discretion unless it has been exercised unreasonably.

The court may set aside an order to present evidence on the grounds that the order is oppressive, that the witness has no relevant evidence to give, that the evidence is protected by privilege, or that the request is not a proper request. Opponents commonly argue that the request was made for the purposes of pretrial "discovery." An order for production of documents, whether by individuals or by corporations, may be opposed on the grounds that the order is in effect an impermissible order for "discovery," that the documents are not sufficiently particularized, or that the requesting party has not shown that the documents are or are likely to be in the possession, custody, or power of the witness. Blocking legislation, such as the Protection of Trading Interests Act of 1980, may apply to prevent document production in certain circumstances.

a. Privilege. Potential witnesses often argue that the evidence or the documents sought to be obtained as evidence are privileged from production. The 1975 Act protects privileged evidence under both English law and relevant foreign law. Under the Civil Evidence Act of 1968 a person may decline to answer a question or decline to produce a document if answering or producing may expose that person to proceedings for an offense or for the recovery of a penalty. The law of the United Kingdom determines the scope of the terms "offense" and "penalty." Thus, offenses or penalties under U.S. antitrust or copyright law are not under U.K. law "offenses" or "penalties" sufficient to uphold a claim to English privilege.

The risk of a penalty in a claim to privilege must be real, and the English court examines the measure of risk. The court will give the benefit of

76. The Protection of Trading Interest Act, 1980, c. 11.
77. Section 3(1) of the 1975 Act provides:
   A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—
   (a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or
   (b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1). Privileges afforded by third states are not to be considered.
78. The Civil Evidence Act, 1968, c. 64.
79. Section 14 of The Civil Evidence Act provides:
   (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offense or for the recovery of a penalty—(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law . . . .

Id. § 14.
80. See Rank Film Distribs. Ltd. v. Video Information Centre, [1981] 2 All E.R. 76. In this case, objections to the production by the respondents of certain information and the disclosure and production of documents were upheld by the House of Lords on the ground
any doubt to the person claiming the privilege. The presumption of privilege is of particular significance in antitrust litigation. If any Common Market element exists in a case in which an English company is asked to produce documents, that company may be able to claim privilege successfully on the ground that production of the documents might lead to antitrust claims by the European Commission under articles 85 and 86 of the Treaty of Rome.81 The European Commission has the right to levy fines that are considered penalties under U.K. law.82

Questions of privilege under foreign law are handled in one of two ways. The party applying for judicial assistance may admit that the party claiming the privilege is entitled to that claim; if not, the foreign court conclusively determines the claim to privilege.83 Thus an individual may claim the fifth amendment privilege against self-incrimination,84 but that claim for privilege will not prevent the English court from granting an order pursuant to a request for international judicial assistance, because the claiming of privilege under foreign law is a matter for determination by the foreign court.

A second ground of privilege may be raised when a corporate legal adviser or patent agent is requested to give evidence. The legal adviser may

that the supply of the information and the production of the documents sought would tend to expose the respondents to a charge of conspiracy to defraud. A police prosecution on this ground already was already in being against at least one of the respondents. The House of Lords indicated, without finally deciding the point, that possible liability for a petty offence might be disregarded as totally insubstantial where a claim for privilege against self-incrimination is made.

In Rank, the petty offence alleged also to give rise to privilege was under section 21 of the Copyright Act of 1956, which creates summary offences under a number of headings, some of which would have had potential applicability to respondents. For a first offence, the maximum fine is 50 pounds sterling, no matter how many infringing articles are involved; however, the House of Lords held, albeit reluctantly, that the supply of the information and the production of the documents sought would tend to expose the respondent to the serious charge of conspiracy to defraud the copyright owner of the benefit of his copyright by the illicit video taping of films. Id. at 80. The House of Lords called for Parliament to pass appropriate legislation to remove the privilege that the Lords held attached to the respondents in this case while at the same time preventing the material's use in criminal proceedings as statements that otherwise would be privileged. Id. at 86.

81. March 25, 1957, 298 U.S.T. 3. Articles 85 and 86 apply to undertakings that effectively divide a market to the detriment of consumers and abuse a dominant market position.
83. See section 3(2) of the 1975 Act which provides:
    Subsection (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—
    (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
    (b) conceded by the applicant for the order; and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(2). See also id. § 3(1)(b); R.S.C. 0.70, r.6.
84. U.S. Const. amend. V.
claim the attorney-client privilege if he is acting in his capacity as legal adviser or patent agent, but such claim to privilege will not be upheld if he is acting purely as a business representative. Each such claim will be considered by the court on its merits, in respect of each question, or class of questions, raised.  

b. **Insufficiently Particularized Documents.** In a request for documents a foreign court, the list of documents must be particularized in such a way that the party against whom the order is made will have no difficulty locating them. Furthermore, the party must not be forced to state either directly or indirectly which relevant documents are in his possession, custody, or power. Thus, a request that asks for documents relating to "meetings between X and Y" is an improper request. A request must describe the documents in explicit terms: "Memorandum by X summarizing the meeting between Y and Z on [date]."

The requirement that documents be explicitly described places a difficult burden on the party applying for production of documents. In order to frame his request properly, he must know in at least some detail what documents the third party actually has or is likely to have. A proper request for documents to an English court usually can be made only when evidence learned earlier in U.S. discovery pinpoints the existence of relevant documents in England.

c. **Possession of Documents.** Another possible objection to the production of documents is that the documents have not been shown to be or likely to be in the possession, custody, or power of the person against whom the order is made. The attorney should not overlook this technical question of evidence when drafting affidavits in support of the request for judicial assistance. Also the English courts are reluctant to lift the veil of a company's incorporation. When requesting documents, therefore, the prudent attorney will direct the request to the parent company as well as to its subsidiaries. The parent should be included in the request because it arguably has the requested documents in its power or control, even if the subsidiary retains actual physical possession or custody. By contrast, a subsidiary may not be able to obtain documents from an unwilling parent company, and an employee may not be permitted to produce his employer's documents even if he has access to them.

d. **Improper Request for International Judicial Assistance.** The objection that a particular request is improper includes the important objection

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85. A patent agent's dealings with his clients concerning an application for a patent or in relation to actual or contemplated proceedings relating to a patent are privileged. The Patents Act, 1977, c. 37, § 104. Whether the benefit of this privilege attaches to foreign patent agents is not clear.

86. The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 2(4); see note 70 supra.


that the requested evidence actually is for the purpose of pretrial discovery. An opponent almost inevitably will allege that the request is made to see what evidence might be available and to establish a train of inquiry. The requesting party must insist, however, that the request is being made for evidence for use at the trial. Although the request often is made considerably before the end of pretrial discovery, the timing can be justified by the lapse of time that may occur between a contested application and the eventual taking of the evidence.

If the presentation of any evidence or production of any document pursuant to a request would be prejudicial to the security of the U.K., the U.K. Secretary of State may conclusively certify as much. The English court then will not give effect to the request of the foreign court.

e. Protection of Trading Interests Act, 1980. A recent change in U.K. law will affect significantly the taking of evidence in England pursuant to a foreign request for international judicial assistance. The Protection of Trading Interests Act, 1980 (the 1980 Act) provides another major basis for objections to requests for international judicial assistance. It also will affect the administrative and legal measures that courts, governments, or others outside the U.K. may use against companies or individuals doing business there, particularly in cases involving antitrust elements or awards of multiple damages.

Section 1 of the 1980 Act enables the U.K. Secretary of State to counteract certain "measures" that may damage the trading interests of the U.K. The term "measures" includes administrative actions, judicial actions, and various other governmental actions taken or proposed to be taken under the law of another country for the purpose of regulating or controlling international trade. The U.K. Secretary of State may make orders against such measures only insofar as they apply to actions taken outside the territorial jurisdiction of the U.K. by persons carrying on business there. The Secretary may demand notice of any requirements or prohibitions imposed or threatened to be imposed by the measures, and he may prohibit compliance with the measures. This section is designed to prohibit persons

89. Sections 3(3) and 3(4) of the 1975 Act provide:

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(4) In this section references to giving evidence include references to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.

The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, §§ 3(3), (4).

90. The Queen gave the Royal Assent to the Act on March 20, 1980. No practice under the Act has been reported. The Secretary of State for Trade and Industry has made only one order pursuant to this statute as of May 26, 1981, an order under section 2. For a discussion of the Act, see Lowe, Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980, 75 AM. J. INT'L LAW 257 (1981).
Section 2 of the 1980 Act gives the U.K. Secretary of State the additional power to prohibit an individual in the U.K. from complying with various requirements to produce evidence. The Secretary may forbid compliance with any requirement to: (1) produce a commercial document not within the territorial jurisdiction of the court, tribunal, or authority requiring such production, (2) furnish any commercial information to such court, tribunal, or authority, or (3) publish any such document or information. The Secretary is empowered to prohibit compliance, however, only if the requirement infringes upon the jurisdiction of the U.K., is otherwise prejudicial to the sovereignty of the U.K., or would prejudice the security or the international relations of the U.K. The U.K. Secretary of State also may prohibit compliance if the request is wholly or mainly for the purpose of obtaining discovery of documents or for some reason other than use in pending civil or criminal proceedings.

The Act clearly gives the U.K. Secretary of State the power to prohibit a person in the U.K. from producing any commercial document not located in the U.S. to a U.S. court under a discovery order issued by that court. The Secretary also may prevent any witness present in the U.K. from furnishing commercial information to a requesting U.S. court. The Secretary's power to prohibit the taking of evidence in this manner may have a substantial effect on companies and individuals who periodically visit or do business in the U.K. They may be prohibited from complying with ordinary orders for discovery by U.S. courts by virtue of presence or business activity in the U.K. That the U.K. Secretary of State will prohibit the taking of evidence in the absence of a request from an affected party is unlikely, however, and this practical limitation may reduce the scope of the wide power he possesses.

Section 3 of the 1980 Act provides penalties for failure to obey an order of the U.K. Secretary of State. Section 4 restricts the scope of the 1975 Act by prohibiting judicial orders pursuant to a request if that request infringes upon the jurisdiction of the U.K. Under section 5, judgments for multiple damages awarded in civil proceedings by courts in overseas countries are declared enforceable in the U.K. This section gives the U.K. Secretary of State power to proscribe provisions or rules of law of overseas countries that regulate competition, thereby enabling the Secretary to render unenforceable any judgment based on those provisions or rules of law, including judgments awarded in U.S. antitrust suits.

Section 6 of the Act enables certain persons to recover in the U.K. that portion of an award of damages against them in foreign proceedings that exceeds compensation for the loss or damage suffered by the injured party. Persons entitled to such a recovery include citizens of the U.K., corporate
entities incorporated in the U.K., and persons carrying on a business in the U.K. Two important exceptions limit this right of recovery. First, a corporate entity with its principal place of business outside the U.K. at the time of the award of multiple damages is not permitted to recover excess damages. Secondly, if the activities that gave rise to the judgment for multiple damages were carried on exclusively in another country, the Act permits no recovery of excess damages awards in the U.K. Section 6(5) enables an English court to entertain recovery proceedings in respect of a judgment for multiple damages even if the party against whom the proceedings are brought is not within the U.K. Because the 1980 Act has been in effect for only a short time, no practice is yet associated with its operation or determinative of its interpretation.

5. Execution of the Order. An order issued pursuant to a request for evidence directs the witnesses to attend the taking of depositions and to produce documents at a specified time and place before an appropriate person. The order includes a notice of penalties for failure to comply. In a recent case involving a U.S. antitrust claim, a United States federal judge conducted deposition proceedings in London pursuant to a request for international judicial assistance. When dealing with questions of U.S. privilege and procedure, he was acting in his capacity as a U.S. district judge. For purposes of conducting the depositions and directing British questions to American participants, he was acting in the role of an examiner.

The English court will allow a witness to be represented by both English and American lawyers. Ordinarily the examination proceeds until a witness refuses to answer a question. An objection to answering a question may be taken only on the ground of privilege but not on the ground of confidentiality or prejudice. A witness may be advised by counsel not to answer a question because the answer might destroy a privilege that his employer can claim. Whether the court will uphold an objection on such ground of privilege is unclear. The two forms of privilege most commonly asserted are the privilege against self-incrimination and the attorney-client privilege. Both technically belong to the witness.

If a witness objects to answering a question on the grounds of English privilege, the English court may be asked to determine the validity of the claim. Where U.S. privilege is asserted, the witness should answer the question if the examiner so requests, and the transcript should note the nature of the witness's objection. The transcript of the answer is withheld from the requesting court until the validity of the claim to privilege has been determined.

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92. See R.S.C.O. 70, r.6. Considerable criticism of this rule exists, as the answer will be known by the party who asked the question, and even knowledge of the answer may lead to a line of inquiry that may have the effect of circumventing a claim to privilege that later is upheld. Some propose that the rule be changed to allow the issue of privilege to be determined before the question is answered. The disadvantage of this approach is that if the claim for privilege fails and the answer still is important, reconstituting the examination may be difficult and expensive.
been ascertained. As far as the English court is concerned, the determination of a question of U.S. privilege by a U.S. court is conclusive.93

Technically the transcript of the deposition should be sent through the English court to the requesting U.S. court, but in practice the English court leaves the appropriate arrangements to the parties themselves. That portion of the transcript in which an assertion of privilege has been taken and upheld need not be transmitted to the American court.

6. Open Questions. Three important questions in relation to the taking of evidence pursuant to a request for international judicial assistance remain wholly or partially undetermined. As yet undecided is whether a corporation can intervene to prevent its employee from giving evidence in a case in which English privilege protects the company from the production of its documents. This situation could arise, for example, if oral evidence of an employee would destroy the privilege created in an antitrust case by articles 85 and 86 of the Treaty of Rome.94

Another unanswered question with regard to evidence gathering abroad is whether an individual with access to the documents of his employer within the scope of his employment can be compelled to produce those documents, even if the employer has not or cannot be compelled to produce them. In Morgan v. Morgan95 the court ruled that the individual did not have possession, custody, or power over his employer's documents for purposes of obtaining evidence. Production, therefore, could not be compelled.96 The courts may compel production of documents so closely and intimately connected with the employee's work that they ordinarily would be found in his desk or otherwise close at hand.

A final area of dispute concerns whether an employee can be forced to answer a deposition question with regard to the existence and location of certain documents. Although the question appears proper on its face, the argument has been made that such an inquiry is tantamount to discovery. The point is particularly difficult to resolve when the English court already has ruled that the employer is entitled to claim privilege against production of his documents.97 If the employee-witness is forced to answer the deposition question under such circumstances, the employer's privilege could be destroyed.

7. Request from an Administrative Agency. The 1975 Act authorizes judicial assistance by English courts for requests issued "by or on behalf of a court or tribunal."98 Possibly the U.K. would honor an otherwise proper request emanating from an administrative proceeding for determining pri-

93. See note 85 supra.
94. This issue was left unanswered by the House of Lords in Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 617 (Wilberforce, J.).
96. Id. at 126.
98. The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 1(a).
vate rights on the theory that the administrative agency constitutes a "tribunal" for purposes of the 1975 Act.99 Even if a request issued by an administrative agency were not effective, the U.K. would honor a request by the U.S. district court in a related court action filed subsequently. Subsequent court action might provide a vehicle for obtaining evidence that otherwise might not be available.

IV. Taking Evidence in Canada for Use in Foreign Proceedings100

Unlike the United Kingdom and the United States, Canada has not ratified the Hague Evidence Convention. Nevertheless, a foreign litigant is not faced with insurmountable obstacles in seeking to obtain evidence in Canada, and recognized procedures for evidence gathering do exist. Moreover, with the exception of certain blocking statutes, no prohibitive rules are in force in Canada with respect to the taking of voluntary evidence. Accordingly, evidence that can be obtained voluntarily generally can be had without resort to a Canadian court, by employing the notice and commission procedures available under Federal Rule of Civil Procedure 28(b).101

A. Obtaining Evidence for Trial from Involuntary Witnesses

Section 92(14) of the British North America Act102 provides that the administration of justice in the Canadian provinces, including the organization of provincial courts and the imposition of fines and penalties to enforce valid provincial laws, falls within the jurisdiction of the provinces. Each province accordingly has legislated rules of court, including rules of trial procedure and evidence. The federal government has exclusive authority to enact criminal legislation and to enforce rights arising under federal statutes.

The Evidence Act of Ontario103 provides in section 2 that the Act is to apply to all actions and other matters "respecting which the Legislature has jurisdiction."104 In a similar fashion, section 2 of the Canada Evidence Act,105 enacted by the Canadian federal government, provides that it shall apply to all criminal proceedings and to all civil proceedings and other matters "respecting which the Parliament of Canada has jurisdiction."106

Section 37 of the Canada Evidence Act further provides that even in pro-

100. The following discussion of practice in Canada was contributed by James Kokonis, Q.C., and John Bochnovic of the firm of Smart and Biggar, Ottawa, Canada.
101. FED. R. CIV. P. 28(b); see notes 16-30 supra and accompanying text.
102. The British North America Act, 1867, 30 & 31 Vict., c. 3, § 92(14) (Can.).
104. Id. § 2.
106. Id.
ceedings in which the Parliament of Canada has legislative authority, the
laws of evidence in force in the province in which the action is taken will
be held to apply.\textsuperscript{107} The practical effect of this position is that the Canada
Evidence Act and the relevant provincial evidence legislation are equally
applicable in many situations. The taking of evidence in aid of foreign
courts is a situation in which both provincial and federal jurisdiction ex-
ists. An application to a court to obtain an order for examining a witness,
therefore, can be based upon both the federal statute and the relevant pro-
vincial statute.\textsuperscript{108}

1. \textit{Statutory Basis}. When a witness must be compelled to give evidence
or produce documents, a Canadian lawyer must be engaged to obtain the
appropriate order from a Canadian court. The application must be sup-
ported by requesting documents; letters rogatory or letters of request are
acceptable forms. The application for an order to take evidence in Canada
may be made under section 43 of the Canada Evidence Act.\textsuperscript{109} An applic-
ation for an order also may invoke the appropriate statute in the province
in which the witness is located. The Province of Ontario seems to have
had the majority of judicial activity in this area; for this reason, the Onta-
rio situation is addressed in more detail.\textsuperscript{110}

2. \textit{The Role of the Department of External Affairs}. The Department of
External Affairs of the Government of Canada in Ottawa, the counterpart
of the U.S. State Department, will advise and assist U.S. litigants. Depart-
ment personnel are familiar with the procedure for taking evidence in the
various Canadian jurisdictions and are prepared to answer inquiries from
U.S. litigants as to how they should proceed.\textsuperscript{111} The more expeditious pro-
cedure, however, may be for U.S. litigants to contact a firm of qualified
Canadian lawyers in the appropriate province for assistance in obtaining
the required order.\textsuperscript{112}

\textsuperscript{107} \textit{Id.} \S\ 37.

\textsuperscript{108} A recent oral decision in the High Court of Ontario, Medical Ancillary Servs. v.
Sperry Rand Corp., 23 Ont. 2d 406 (1979), now may cast some doubt on the concurrency
of the jurisdiction. Mr. Justice Steele observed, “While the present application is brought
under both Acts, I am of the opinion that only the Ontario Act has any application to a civil
action of this nature.” \textit{Id.} at 407.


\textsuperscript{110} See \textit{Ont. Rev. Stat.} ch. 151, \S\ 60 (1970).

\textsuperscript{111} Inquiries may be directed to: Head, Private International Law Section
Legal Advisory Division
Department of External Affairs
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Canada K1A 0G2

\textit{See also} Dep't of External Affairs of Canada, International Judicial Co-opera-
tion in Civil, Commercial, Administrative and Criminal Matters (1980).

\textsuperscript{112} Canada has treaties with nineteen countries (not including the United Kingdom or
the United States) that define an exact procedure for the taking of evidence by foreign liti-
gants. The procedure requires letters of request, which may be transmitted directly from the
foreign embassy to the attorney general’s department of the particular province involved. In
the case of a nontreaty country, such as the United States, the use of the Department of
3. **Pretrial Discovery Unavailable.** The order requested from the Canadian court must be necessary for the taking of evidence for use at trial in the U.S. court. "Discovery" of witnesses and documents is not available. This restriction of the scope of evidence-gathering is articulated in similar decisions in both the United Kingdom and the Province of Ontario\(^1\) and has been reemphasized in two more recent decisions in the Ontario courts.\(^1\) In *Re Raychem Corp. v. Canusa Coating Systems, Inc.*\(^1\), a patent case heard in a provincial court, the court stated:

> [T]he court will order an examination of a witness only if it is clear that what is intended is the taking of that evidence for the purpose of trial. No such order will be made if the principal purpose is to use such proceedings to search out evidence and information in the same way as on examination for discovery.\(^1\)

The position of the federal courts of Canada appears to be identical. In *Xerox v. IBM*\(^1\) the federal court refused to grant letters of request to a Canadian litigant for discovery of several foreign inventors/assignors of Canadian patents. The court was not convinced of a "reasonable probability" that the order would be effective under the laws of the five different state jurisdictions in the United States (New York, Connecticut, two districts in California, and Hawaii).\(^1\) The federal court apparently was influenced by affidavits indicating that the United States courts might not honor the letters of request because of the inability of the federal court of Canada to reciprocate.\(^1\) The court's rationale apparently recognizes the inability or refusal of the federal court to act upon letters rogatory issued by foreign courts for discovery purposes.

4. **Extent of Privilege Available to Witness.** No witness required to produce evidence in Canada will be obliged to undergo a broader form of inquiry than he would if the litigation were being conducted in Ontario.\(^2\) Not clear, however, is whether a witness will be granted the privileges of the foreign jurisdiction and thus be entitled to the narrower form of inquiry that might result from those privileges. Accordingly, the U.S. fifth amendment privilege against self-incrimination may not be available to a

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\(^1\) See *RCA v. Rauland Corp.*, [1956] 1 All E.R. 549; *Re Radio Corp. of America v. Rauland Corp.*, [1956] Ont. 630.

witness in Canada, at least in Ontario, where section 5 of the Canada Evidence Act\textsuperscript{121} and section 9 of the Evidence Act of Ontario\textsuperscript{122} would be applicable. Those sections oblige a witness to answer questions that may tend to incriminate him, although the potentially incriminating answer cannot be used against him in another proceeding.

5. **Evidence Must Be for Judicial Rather than Administrative Tribunals.**
The evidence sought to be obtained in Canada must be intended for use in a foreign court or tribunal of competent jurisdiction before which an action, suit, or proceeding is pending. The foreign court or tribunal must be a court of law or equity; administrative tribunals, such as the United States Securities and Exchange Commission are not included\textsuperscript{123}

6. **Evidence Must Be Within Bounds of Justice and Stated Public Policy.**
In determining whether to grant a request for evidence, an Ontario court apparently will consider the necessity of obtaining the evidence for the purposes of justice. The court is prepared to look behind the actual request in order to examine precisely what the U.S. court is seeking to do. The court then will give effect to the request only if it is convinced that the requirements of Ontario law are satisfied.\textsuperscript{124} Moreover, one court has declared that a court "should take judicial cognizance of the stated public policy in exercising its discretionary power."\textsuperscript{125} In that case, a minister of the Crown had regarded the matter as an issue of sovereignty that should not be disclosed. This statement of public policy influenced the court's decision not to compel the taking of evidence.\textsuperscript{126}

7. **Concurrent Litigation in Canada and Foreign Jurisdictions.**
Litigation often runs concurrently in the United States and Canada. In the Raychem case\textsuperscript{127} the Ontario Court of Appeals held that the mere fact that two patent infringement actions were running a parallel course in Canada and the United States was not an appropriate ground upon which to refuse an application for an examination order.\textsuperscript{128}

8. **Appointment of Commissioner to Take the Evidence.**
Section 60 of the Ontario Evidence Act\textsuperscript{129} apparently does not give the Ontario court express authority to appoint an official to conduct the examination. The provision presumably contemplates the appointment of such an official by the

\textsuperscript{121} CAN. REV. STAT. ch. E-10, § 5 (1970).
\textsuperscript{122} ONT. REV. STAT. ch. 151, § 9 (1970).
\textsuperscript{124} See note 116 supra and accompanying text. The Supreme Court of Canada, in a presently unreported decision in Gulf Oil Corp. v. Gulf Canada Ltd., expressly considered public policy as part of the basis upon which it refused to enforce certain letters rogatory.
\textsuperscript{126} Id.
\textsuperscript{128} Id. at 688.
\textsuperscript{129} ONT. REV. STAT. ch. 151, § 60 (1970).
obtain evidence abroad. In Re Paramount Film Distributing Corp. v. Ram\textsuperscript{130} the Ontario court endorsed the view that the Evidence Act of Ontario anticipates the appointment of a commissioner by the foreign court.\textsuperscript{131} Section 60 of the Ontario Act empowers a judge to assist the commissioner by granting him the authority to compel attendance of witnesses and production of documents.\textsuperscript{132} The Canada Evidence Act, however, clearly grants to Canadian courts the power to appoint an examiner.\textsuperscript{133} A number of cases, including Ram, have recognized that the Canada Act has concurrent effect in Ontario with the Evidence Act of Ontario. Thus, an application to take evidence in Ontario should be based on the federal and provincial provisions together.

9. Blocking Statutes. The taking of some otherwise available evidence, even when produced voluntarily, may be prohibited if it falls within the purview of certain blocking statutes in effect in Canada and the provinces. Canada has promulgated regulations under the Atomic Energy Control Act that prohibit production of certain documents.\textsuperscript{134} The Provinces of Ontario\textsuperscript{135} and Quebec\textsuperscript{136} have enacted Business Records Protection Acts\textsuperscript{137} that similarly limit the production of business documents. Under these statutes limited production may be possible, but only within the respective province.\textsuperscript{138} Furthermore, the documents obtained may not be removed from the jurisdiction of the province.

B. The Hague Evidence Convention and Canada

1. Future Ratification of the Hague Evidence Convention. Canada is not yet a signatory to the Hague Evidence Convention. The implementation of the Convention there is likely to be more complicated than in the United Kingdom because the subject matter falls at least partially within the jurisdiction of the provinces. Thus, it is unclear whether acceptance in Canada is likely in the near future. Studies by the provincial and federal

\textsuperscript{130} Ont. W.N. 753 (1954).
\textsuperscript{131} Id. at 754.
jurisdictions are necessary to illuminate potential conflicts with existing legislation and rules of court, as well as to determine the extent to which further legislation or the amendment of the rules of court may be required.

One practical stumbling block to Canadian ratification of the Convention is the absence of a federal state clause in the Convention. A federal state clause would enable specified provincial jurisdictions to ratify the Convention. Without such a clause, substantial compliance by all of the Canadian provinces would be required before Canada could ratify. A protocol to the Convention possibly could be obtained in order to introduce a federal state clause if sufficient advance notice of the proposal is given.

2. Changes Anticipated from Ratification of the Convention. Implementation of the Hague Evidence Convention in Canada undoubtedly would result in a number of changes. Ratification of the Convention would streamline procedure and provide greater certainty for the foreign litigant seeking to obtain evidence. Some of the more important changes that would result from implementation include the following:

(a) While Canadian courts presently have discretion as to whether to grant an order seeking evidence, the Convention would make this a mandatory obligation, avoidable only within the terms of article 12 of the Convention.\(^\text{139}\)

(b) The Convention does not appear to require an applicant to establish that the evidence sought to be obtained is absolutely necessary for the purposes of justice. Under the Convention, the court apparently would not be permitted to address this requirement once the evidence has been established to be for use at trial in the foreign jurisdiction.

(c) Under article 12(b) of the Convention, the public policy ground for refusing to execute letters of request would be limited to the protection of the sovereignty of the state to which the application is made.\(^\text{140}\)

(d) The present requirement that the evidence be intended for use at trial might be altered if the ratifying jurisdiction accepts article 23 of the Convention.\(^\text{141}\) Pretrial discovery procedures conceivably would be permitted between Canada and the United States if Canada and its provincial jurisdictions were to ratify without reservation under article 23.

(e) Section 60(3) of the Evidence Act of Ontario\(^\text{142}\) and section 47 of the Canada Evidence Act\(^\text{143}\) currently limit the scope of inquiry in evidence gathering to that required by Ontario practice. Article 11 of the Convention additionally would incorporate all privileges available in the jurisdiction of origin,\(^\text{144}\) enabling United States litigants to invoke the fifth amendment privilege against self-incrimination.

\(^\text{139}\) Hague Convention, \textit{supra} note 2, art. 12.
\(^\text{140}\) \textit{Id.} art. 12(b).
\(^\text{141}\) \textit{Id.} art. 23.
\(^\text{142}\) \textit{ONT. REV. STAT.} ch. 151, § 60(3) (1970).
\(^\text{144}\) Hague Convention, \textit{supra} note 2, art. 11.
(f) A question exists as to whether the Evidence Act of Ontario provides the court with the requisite authority to appoint an examiner.\textsuperscript{145} This right certainly is available in Ontario by virtue of the Canada Evidence Act, if it is not available under the Ontario Act. By virtue of article 2 of the Hague Convention, the execution of the letters of request would include appointment of an official before whom the examination could be made.\textsuperscript{146} Implementation of the Convention, accordingly, would create in Ontario an independent procedure for the execution of letters of request and the appointment of officials to conduct the examination.

(g) The Convention distinguishes between duly appointed commissioners and diplomatic or consular officials having a right to take evidence in a foreign jurisdiction.\textsuperscript{147}

(h) Some of the provisions of article 21 of the Convention may change the procedure for summoning witnesses to the examination.\textsuperscript{148}

V. Conclusion

Avenues for “discovery” abroad are available and may be effective, provided that planning and consultation with both the U.S. Department of State and knowledgeable local counsel accompany their use. In particular, the Hague Evidence Convention has received wide acceptance, as a number of nations have adopted its procedures for the taking of evidence abroad. The Convention is not, however, a vehicle for unbridled discovery of the type to which U.S. litigators may be accustomed. Used as part of a carefully organized discovery plan, the Convention may be a valuable tool for the experienced litigator. Even where the convention is unavailable, established avenues for taking evidence, arising out of comity or other treaties, may exist. These possibilities should be explored well before the need for the evidence is pressing.

\textsuperscript{145} See notes 129-33 supra and accompanying text.
\textsuperscript{146} Hague Convention, supra note 2, art. 2.
\textsuperscript{147} Id. arts. 15-17.
\textsuperscript{148} Id. art. 21.