HAGUE EVIDENCE CONVENTION: A PRACTICAL GUIDE TO THE CONVENTION, UNITED STATES CASE LAW, CONVENTION—SPONSORED REVIEW COMMISSIONS (1978 AND 1985), AND RESPONSES OF OTHER SIGNATORY NATIONS: WITH DIGEST OF CASES AND BIBLIOGRAPHY

I. Introduction

Regardless of the scope of an attorney’s practice, at some point, evidence located abroad will be needed to settle a dispute. This is true whether the attorney is involved in a civil or commercial practice, is a solo practitioner, or is a partner in a larger firm. For example, a client may be injured as a result of a defective engine which was manufactured in West Germany. Or, the client may become involved in an antitrust action involving foreign-based corporations.1

The response a court should make to a discovery request involving nationals of a foreign country or evidence located within a foreign country are issues addressed by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.2 This Note

1 Recently, The Washington Post National Weekly Edition reported:
The increasing globalization of consumer and industrial markets, the desire to buy a stake in the relatively robust U.S. economy, and, more recently, the decline of the dollar have ignited a new interest among some of the largest foreign multinational corporations in making acquisitions in the United States.

2 The Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, reprinted in 28 U.S.C.A. § 1781 note at 88 (West Supp. 1985) [hereinafter cited as Convention]. The United States ratified the treaty in 1972. The treaty is currently in force among Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States. 28 U.S.C.A. § 1781 at 94 (Barbados, Cyprus, and Singapore were not represented at the original signing of the Convention; therefore, it is only in force between those nations which have specifically accepted the accession according to article 39, paragraph 4). For a complete list of each country’s reservations and declarations, see 28 U.S.C.A. § 1781 at 94-106.
Additionally, the following countries have expressed some degree of interest in the Hague Convention and have sent observers to meetings in which progress of the
reviews the terms of the Convention itself, the application of this treaty by United States courts, the responses to that action made by several Hague Convention signatory nations, as well as the findings of the Special Commission which reviewed the use and non-use of the treaty in May 1985.

In addition to providing the practicing attorney with a practical jurisdiction-by-jurisdiction digest of United States case law involving discovery requests which implicate the Convention (Appendix A) and a bibliography of materials on the Convention (Appendix B), this Note proposes a balancing/comity analysis for use by courts confronted with discovery requests involving foreign nationals.

II. BACKGROUND

A. Basic Differences Between Civil Law and Common Law Evidence-Taking Procedures

Because discovery procedures vary greatly between nations, the choice of evidence-taking procedures afforded by various nations may affect enormously the amount and the type of evidence obtained. The greatest differences exist between the procedures of common law and civil law nations. The following illustration uses the United States as an example of the common law approach and the Federal Republic Convention is monitored and discussed: Arab Republic of Egypt, Argentina, Australia, Austria, Belgium, Canada, Chile, Ireland, Japan, People's Republic of China, Spain, Switzerland and Uruguay. It is unknown whether any of these countries will sign the treaty in the near future. Countries expressing interest are Australia, Austria, Belgium, Egypt, Canada, Ireland, Japan, Spain, and Switzerland. See Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 24 I.L.M. 1668 (1985) [hereinafter cited as Second Report] O'Kane, Obtaining Evidence Abroad, 17 VAND. J. TRANSNAT'L L. 69, 69-71 (1984); Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 I.L.M. 785 (1969) [hereinafter cited as Delegation Report].


4 Id.; see also infra notes 43-49 and accompanying text.

5 See infra notes 7-11. It should be noted that not all common law countries afford their litigants the broad discovery available to United States litigants under the Federal Rules of Civil Procedure. England, for example, has criticized United States discovery requests for over thirty years as being "overly intrusive and unsupervised." Note, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters — A Comparison with Federal Rules Procedures, 7 BROOKLYN J. INT'L L. 365, 406 (1981). In fact, it was the United Kingdom which proposed that the Hague Convention include a provision (later adopted as article
of Germany as an example of the civil law approach⁶ to obtaining evidence.

United States litigants enjoy broad powers of discovery under the Federal Rules of Civil Procedure.⁷ Any information may be discovered provided it is reasonably calculated to lead to the discovery of admissible evidence.⁸ Discovery may be conducted by stipulation of the parties with little interference by the court.⁹ Additionally, the Federal Rules contain provisions for compelling participation in the discovery process.¹⁰ Deponents are required to testify under oath while a court

23) to allow nations to declare that they would not execute Letters of Request under the Convention which sought pre-trial discovery as known in United States courts. Id. at 406-07. For an in-depth description of English procedures, see Myrick and Love, Obtaining Evidence Abroad For Use in United States Litigation, 35 Sw. L.J. 585, 597-609 (1981).

⁶ See infra notes 12-19. Another civil law country with which United States courts frequently have contact is France. For an in-depth description of French procedures, see Borel and Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States, 13 Int'l L. 35 (1979). In addition to having problems with the basic differences between the two types of systems, some nations have enacted blocking statutes to further frustrate discovery attempts under the liberal United States discovery provisions. See infra notes 47-49, 56-58 and accompanying text.


⁸ Fed. R. Civ. P. 26. "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." Hickman v. Taylor, 329 U.S. 495, 507 (1947); see also Wright, supra note 7, § 81 at 543-44.

The fear of a fishing expedition prompted the United Kingdom to propose that the article 23 provision be included within the Convention. See supra note 5. Unfortunately, the actions of United States courts have not served to allay other signatory nations' fears, as evidenced by the fact that the meaning of "pre-trial discovery" was one of the main topics of discussion at a meeting during the summer of 1985 of the special commission on the operation of the Hague Convention. See Second Report, supra note 2; Report of the United States Delegation to the Hague Conference on Private International Law (HCOPIL) Special Commission Meeting, May 28-31, 1985 (telegram report to the United States Secretary of State) (available from George Taft, Attorney Advisor, Office of the Legal Adviser, Department of State, Washington, D.C. 20520) [hereinafter cited as Second Delegation Telegram]. See also infra notes 43-46, 50-55 and accompanying text.


¹⁰ Fed. R. Civ. P. 37. In addition to compelling discovery, the courts can impose sanctions for failure to comply with such orders. Fed. R. Civ. P. 37(b). See generally Wright, supra note 7, § 90 at 596-601 (discussion of Rule 37(b) procedures).
reporter records their testimony verbatim. Finally, deposition transcripts are available to all parties upon request.11

Because there is no jury in civil cases in civil law countries such as West Germany, the evidentiary procedures are quite different.12 First, "pretrial discovery"13 as known in the United States does not exist in West Germany. Instead, the judge controls the taking of evidence.14 The court, rather than the parties, chooses the documents15 and witnesses16 it will examine based upon the allegations of the

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11 Fed. R. Civ. P. 30(c). The witness has a right to read the transcript and make a note of any changes and the reason for such changes. Fed. R. Civ. P. 30(e). Wright, supra note 7, § 84 at 572 n.45 and text. These changes will be sent to the other parties and a copy will be placed with the original transcript.


13 See supra notes 7-11 and accompanying text.

14 Because "[t]he main function of the German court is to find the truth, not merely to determine whether the burden-of-proof-bearing party actually produced sufficient evidence to carry his burden," Martens, German Civil Procedure and the Implementation of the Hague Evidence Convention, 1 Int'l Lit. Q. 115, 118 (1985), "the judge maintains complete control of the entire litigation from the day the action is filed until the day he puts his hand to the final judgment." Id. (this publication of the International Litigation Committee of the ABA Section of Litigation is available from David Brent, Liaison, American Bar Association Section of Litigation, 750 North Lake Shore Drive, Chicago, IL 60611). Further, a party before a German court must be able to prove the allegations contained in the pleading, and must offer the sources of such proof within the pleading itself. Id. "Such a proffer of evidence may include, for example, the names and addresses of witnesses and a description of documents relating to specific issues." Id.

There are five methods for proving a party's allegations: personal inspection by the court, examination of non-party witnesses, examination of experts, submission of documents, and examination of the parties. Id. at 119.

15 In proving allegations by the use of documents, a party can only use documents which it already has in its possession. Heck, supra note 12, at 793-94 (quoting a German Supreme Court case which held that "a party is not required to help its opponent to victory by making available material that [the opponent] does not have at its disposal already"). This is because there is no general rule in German procedural law by which a party or witness could be compelled to produce documents that are in its possession. Martens, supra note 14, at 122. Thus, document production as known in the United States is "unknown in German law." Id.

16 Witnesses in a civil law country are not witnesses of a party, but witnesses of the court. Further, parties to a suit cannot give testimony as witnesses in civil law countries because of the notion that "parties cannot be expected to be impartial to their own case." Heck, supra note 12, at 795.

For purposes of this rule, certain persons are treated as being identical to a party and are, therefore, disqualified as witnesses. Examples are the members of the board of directors (Vorstand) of a stock corporation (Aktiengesellschaft AG); the managing director(s) (Geschaftsfuhrer) of a company with limited liability (Gesellschaftmit beschrankter Haftung, GmbH), the general partner(s) (Komplementare) of a limited partnership (Kommanditgesellschaft, KG), and all partners in a partnership, be it a commercial
complaint. Second, the court, rather than the parties, questions witnesses with little input from the parties and their attorneys.

Parties may be allowed to testify in one of three situations. The judge might allow the parties to give an informal explanation of their positions. Id. The judge may, sua sponte, order that one or both parties testify. This rule is rarely invoked. Id. at 122. Finally, a party may testify when an issue cannot be resolved otherwise. In this situation, “a party may move that its opponent testify as a secondary form of evidence.” Id. at 121. Because a party-witness may not be forced to testify, id., this method is of questionable effectiveness, “although the court may, under § 446 ZPO, draw conclusions from a refusal to testify.” Id. at 122.

An early draft of the Convention contained an additional provision which excluded mandatory compulsion of the parties to the action. This was included to take care of the practice in some civil law states, notably in France, under which a party to an action cannot compel testimony from its adversary. This provision was ultimately deleted from Article 10 as redundant. Since compulsion is, by definition, limited to the practice of the state of execution, compulsion in civil law countries will necessarily be limited by the domestic law of those countries; if that law excludes compulsion against a party in domestic actions, it will automatically exclude compulsion against parties in the execution of a Letter of Request (footnotes omitted).


See supra note 14. Based upon the allegations in the pleadings, the court decides the issues it considers to be relevant. It then issues a formal evidence order (“Beweisbeschluss”) rephrasing the parties’ contentions deemed relevant by the court and determining whether evidence proffered by the parties is to be taken for proof. Martens, supra note 14, at 118-19.

After the court has summoned the witness to appear in an evidence-taking session, the court first asks the witness to give his or her testimony. This testimony is restricted to the “subject matter as stated in the evidence order and in the witness summons.” Id. at 120. Once the court is satisfied that the witness is sufficiently knowledgeable about the subject matter, it then poses specific questions it deems necessary to fulfill its duty to ascertain the truth. Heck, supra note 12, at 795. The attorneys, and occasionally the parties, are then given an opportunity to put additional questions to the witness. Those questions may refer only to the subject matter of the examination as stated in the evidence order. Attorneys are sometimes reluctant to ask too many questions because the court may consider this a criticism of its own examination of the witness (the judge’s examination was supposed to have touched upon all relevant questions). Thus, German civil procedure is unfamiliar with witness cross examination as allowed under the Federal Rules of Civil Procedure. Martens, supra note 14, at 120.

German courts, however, have loosened the restrictions placed on witness examinations under the Hague Convention:

In complex cases, such as American antitrust litigation, the judge will not be in a position fully to identify the relevant legal issues and to ask the “right question,” no matter how well briefed he or she is. Realistically,
Additionally, rather than a verbatim transcript of a witness' testimony, the judge dictates only a summary of the testimony at the conclusion of the examination.\textsuperscript{19}

\textbf{B. The Hague Evidence Convention}\textsuperscript{20}

The Hague Evidence Convention\textsuperscript{21} was designed to bridge some of the differences in evidence-taking procedures between civil law and common law nations.\textsuperscript{22} Although the Convention superseded the evi-
dence-taking provisions of earlier conventions, it did not affect


The commentary on the Convention suggests that its purpose was to resolve disputes between civil law and common law countries over the gathering of evidence within the territory of one country in a form so as to be admissible in the courts of the other. The Convention was designed to accommodate concerns for judicial sovereignty with the needs of the litigants to collect evidence within the borders of those countries. (footnote omitted).

Id.

A commission of experts from the signatory nations which met in 1978 reported: "[t]he meeting opened with a round-table discussion which revealed that the Convention dealt with real needs and that it constituted a useful and efficient bridge between the civil law systems and those of common law." Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 17 I.L.M. 1425, 1426 (1978), reprinted in HANDBOOK, supra note 21, at 36 [hereinafter cited as Commission Report].

In 1985, the commission met again and reported that although "the Convention had not given rise to major problems and that its application was satisfactory . . . [i]t was . . . probably not sufficiently used." Second Report, supra note 2 at 1670. The Commission felt that this situation "was to be deplored, because its use would help to reduce court costs substantially." Id.

Cf. McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984) (the Convention procedures were "designed to facilitate the process of obtaining evidence in foreign countries without doing violence to the rights of foreign nationals in their own countries, or to each country's notions of its own sovereignty.") See also Edwards, Taking of Evidence Abroad in Civil or Commercial Matters, 18 INT'L & COMP. L.Q. 646, 647 (1969).


Earlier conventions such as the Hague Convention of 1905 and the Hague Convention on Civil Procedure of 1954, were exclusively between civil law nations. They dealt with commissions rogatories (letters rogatory or letters of request) and other techniques for obtaining evidence abroad under civil law practice. Amram, The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A.J. 651, 651 (1969) [hereinafter cited as Amram, Proposed Evidence Convention].

The first convention between common law and civil law nations was the Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters. See Amram, The Proposed International Convention on the Service of Documents Abroad, 51 A.B.A.J. 650 (1965) for a discussion of this Convention.

In 1964, the United States sought to aid foreign litigants by amending 28 U.S.C. §§ 1781 - 1782, as well as the Federal Rules of Civil Procedure. The amendments sought to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States. The amendments authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal rules of evidence.

Amram, Proposed Evidence Convention, supra, at 651.
bilateral agreements between nations.24

Under the Hague Convention, a litigant may employ one of two methods for obtaining evidence.25 First, the appropriate authority26 may execute a Letter of Request.27 A litigant may also use a diplomatic

24 Convention, supra note 2, arts. 28 & 32, reprinted in 28 U.S.C.A. § 1781 note at 92 (West Supp. 1985). A British article described the importance of this provision as follows:

The United Kingdom has already concluded a large number of bilateral Civil Procedure Conventions with civil law countries which include provisions on the taking of evidence. These bilateral Conventions (which are not affected by the provisions of the multilateral Convention — Article 32) contain more liberal provisions for the collection of evidence than does the latter Convention which is, nevertheless, of interest to the United Kingdom because the taking of evidence in those countries which are members of the Conference but with which the United Kingdom has no bilateral Civil Procedure Convention (for example, Japan, the United Arab Republic and Switzerland) will be considerably facilitated in the event that they are able to ratify it.

Edwards, supra note 22, at 646.

25 "Although the use of diplomatic or consular representatives and the use of commissioners are lumped together in Chapter II of the Convention, the report of the United States delegation appropriately treats them as separate methods because of the variations in the procedures applicable to each." Int'l Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 550 n.7 (S.D.N.Y. 1984); see also infra notes 28-29 and accompanying text.

26 Article 2 of the Convention requires each signatory nation to:

designate 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. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Convention, supra note 2, art. 2, reprinted in 28 U.S.C.A. § 1781 note at 89 (West Supp. 1985). The designated Central Authority for each signatory nation can be found at 28 U.S.C.A. § 1781 note at 94-106. The United States designated the Department of Justice Office of International Judicial Assistance as its Central Authority. However, 28 U.S.C. § 1781(a)(1) provides that the Department of State has the "power, directly, or through suitable channels" to receive or transmit letters rogatory or Letters of Request. Additionally, § 1781 specifically states that it does not preclude

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.


27 Convention, supra note 2, art. 1, reprinted in 28 U.S.C.A. § 1781 note at 88 (West Supp. 1985). For an in-depth description of procedures, see arts. 1-14 at 28
officer, consular agent, or commissioner to obtain evidence.

The procedures listed in the Convention are not absolute. Participating nations were permitted to make declarations and reserva-


For selected problems in the execution of a Letter of Request, see Martens, supra note 14, at 132-135 (includes the language of the proceedings, questioning by the judge and the parties, privileges of the witnesses, and transcript problems).

Convention, supra note 2, arts. 15 and 16, reprinted in 28 U.S.C.A. § 1781 note at 90-91 (West Supp. 1985). The Convention sought "to eliminate restrictions on use of diplomatic and consular officers which required provision for the separate problems relating to witnesses who are nationals of the requesting State, or of the requested State, or of third States." Delegation Report, supra note 2, at 807. See infra note 33 for Germany's declaration and policy concerning the use of diplomatic and consular officers.


A commission, of course, authorizes a designated individual to take the deposition of a named witness. A letter rogatory is a judicial request addressed to a foreign court that a witness be examined within the latter's territorial jurisdiction by written interrogatories or, if the foreign court permits, by oral interrogatories. An important distinction is that the commission is entirely under control of the court issuing it; as to the letter rogatory, the procedure is under the control of the foreign tribunal whose assistance is sought in the administration of justice. The federal statute mentioned earlier (28 U.S.C. § 1781) authorizes the State Department to act as a transmission channel for Letters Rogatory between American and foreign courts. (citations omitted)

A commissioner nominated by the court of the state where the litigation is pending acts as the "extended arm of the state". Delegation Report, supra note 2, at 806. Federal Rule of Civil Procedure 28(b) describes the procedures used in United States federal courts. For a discussion of the judicial sovereignty problems potentially created by the use of commissioners in civil law nations, see infra note 100. See also supra note 27 (discussion of the letter of request).

Convention, supra note 2, art. 9(2), reprinted in 28 U.S.C.A. § 1781 note at 89 (West Supp. 1985) ("In civil or commercial matters a judicial authority of a contracting state may, . . . request . . . ").

Although recent commentators have argued that the Hague Convention constitutes the exclusive method of obtaining evidence abroad, courts have held otherwise. Compare In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985) and Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360 (D. Ver. 1984) (Hague Convention does not supersede Federal Rules of Civil Procedure) with Bishop, Significant Issues in the Construction of the Hague Evidence Convention, 1 INT'L LIT. Q. 2 (1985) (this publication of the International Litigation Committee of the ABA Section of Litigation is available from David Brent, Liaison, American Bar Association
tions altering Convention provisions at the time of ratification.\textsuperscript{31} Whereas under the Convention the United States was generally liberal in the discovery powers granted to foreign litigants,\textsuperscript{32} West Germany, like other civil law nations, strictly limited its evidence-taking procedures.\textsuperscript{33}


Another important Convention provision is article 11, which allows a testifying witness to 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.

A Contracting State may declare that, in addition, it will represent privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

\textit{Convention, supra} note 2, art. 11, \textit{reprinted in} 28 U.S.C.A. § 1781 note at 90 (West Supp. 1985). The importance of this declaration becomes apparent when one considers the fact that other nations, such as France and the United Kingdom, grant their citizens more extensive privileges against testifying than is granted United States citizens under the fifth amendment right against self-incrimination. See, \textit{e.g.}, \textit{Note, supra} note 5, at 394-95. For a listing of the declarations and reservations made by the United States and the Federal Republic of Germany, see \textit{infra} notes 32-33.


The United States, in fact, provided several aids to a foreign litigant seeking discovery in the United States. For example, foreign diplomatic officers, consular agents, and commissioners may gather evidence without prior permission of the United States Government. Foreign agents may also enlist United States aid to compel discovery. 28 U.S.C.A. § 1781 note at 105-06 (West Supp. 1985). See \textit{also} 28 U.S.C. § 1781 (1966) (transmittal of letter rogatory or request); 28 U.S.C. § 1782 (1966) (assistance to foreign and international tribunals and to litigants before such tribunals); \textit{FED. R. Civ. P.} 4(i) (alternative provisions for service of process in a foreign country); \textit{FED. R. Civ. P.} 26(a) (general discovery methods allowed); \textit{FED. R. Civ. P.} 28(b) (depositions in foreign countries).

\textsuperscript{33} \textit{Convention, supra} note 2, \textit{reprinted in} 28 U.S.C.A. § 1781 note at 97 (West
Foreign litigants, therefore, have utilized the liberal United States discovery procedures while simultaneously attempting to shield them-

Supp. 1985). West Germany made several declarations and reservations which limit evidence-taking procedures. These include:

(1) All Letters of Request must be in the German language. The Convention, however, permits either French or English translations, unless otherwise specified. Convention, supra note 2, art. 4, reprinted in 28 U.S.C.A. § 1781 note at 89, 97.

(2) Prior authorization is required if “members of the requesting court of another Contracting State” wish to be present at the execution of the Letter of Request. According to the Hague Convention, if no such declaration is made, the requesting nation may have someone present. Id. art. 8, reprinted in 28 U.S.C.A. § 1781 note at 89, 97.

(3) Certain restrictions may be imposed on the use of diplomatic agents. Id. art. 16, reprinted in 28 U.S.C.A. § 1781 note at 91, 97. Interestingly, Germany specifically stated that no prior permission is required if the person to be examined is a dual citizen of the requesting state. The Conference considered, but deliberately omitted, any discussion of the issue of dual citizenship. See Amram, Proposed Evidence Convention, supra note 23, at 655.

(4) The local German court may control the preparation and actual taking of the evidence. Convention, supra note 2, art. 17, reprinted in 28 U.S.C.A. § 1781 note at 91, 97.

(5) Refused to declare that West Germany will aid a nation by using compulsion under article 18. The request to the person from whom evidence is sought must specifically note that the person cannot be compelled to appear. Id. art. 21, reprinted in 28 U.S.C.A. § 1781 note at 91, 97.

(6) Germany may specify conditions as to the time and location of taking evidence by diplomatic officers, consular agents, and commissioners. Additionally, West Germany retained the right to have German authorities present at such an event. Id. art. 17, reprinted in 28 U.S.C.A. § 1781 note at 91, 97; id. art. 19, reprinted in 28 U.S.C.A. § 1781 note at 91, 97.

(7) West German courts will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery. Id. art. 23, reprinted in 28 U.S.C.A. § 1781 note at 92, 97.

All the West German declarations were not restrictive. For example, West Germany did not exercise its right to require prior permission before a diplomatic officer, consular agent, or commissioner takes evidence of the officer's own national without compulsion. Id. art. 18, reprinted in 28 U.S.C.A. § 1781 note at 91, 97. Additionally, “[c]onsistent with authority contained in the Convention West Germany specified in connection with its ratification that ‘the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.’” Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 853, 176 Cal. Rptr. 874, 882 (1981).

However, a series of Notes Verbales exchanged between the United States and West German governments between October 17, 1979, and February 1, 1980, confirmed that earlier notes regarding questioning by consular officers remained in effect notwithstanding ratification of the Hague Convention. This earlier exchange of Notes Verbales, concluded on October 8, 1956, had created an understanding that “American consular officers could question West German and other non-American nationals,
selves under the Hague Convention. Courts interpreting such attempts to avoid the liberal discovery allowed under the Federal Rules have reached differing interpretations of the function of the Hague Convention.

III. NON-JUDICIAL RESPONSES

A. Hague Evidence Convention Special Commission Meetings

To further the use of the Hague Convention, a Special Commission composed of experts on international judicial assistance and representatives of the Central Authorities of signatory nations was appointed to meet periodically “to consider ways in which the existing Convention machinery could be made to work more effectively.” This commission first met in 1978.

During the 1978 meeting, it became apparent that “a serious misunderstanding held sway in regard to the concept of ‘pretrial discovery of documents.’” Many civil law nations had not realized that document discovery in common law nations was conducted as a part of the preparation for trial rather than conducted prior to the instigation of litigation. Because several of the nations originally making article 23 reservations prohibiting Letters of Request issued for the purpose of obtaining pretrial discovery of documents had not intended “to refuse all requests for evidence submitted by the American judicial authorities before the trial on the merits commenced before the jury,” the Commission determined that it desired

without compulsion of any kind, with an opportunity for the person questioned to be accompanied by counsel, at the consular premises or [upon the express request or express consent of the person to be questioned].” Id. at 854, 176 Cal. Rptr. at 882. For the complete text of these Notes Verbales, see HANDBOOK, supra note 21, at 64-69.

35 See infra notes 59-112 and accompanying text.
36 See also supra note 23.
38 Commission Report, supra note 22, at 1424; HANDBOOK, supra note 21, at 36. Note that many of the participating nations had only recently become signatories to the Convention and, therefore, had not dealt extensively with the Convention’s provisions. Convention Report, supra note 22, at 1424.
39 Id. at 1428, HANDBOOK, supra note 21, at 37.
40 Convention Report, supra note 22, at 1428.
41 Id.
that the State Parties to the Convention and those which were to become Parties withdraw or never make this reservation, or at least that they restrict by declaration the application of the reservation to Letters of Request which are not sufficiently specific, taking as their example the declaration made by the United Kingdom.42

In May 1985, the Special Commission met for the second time. Pretrial discovery of documents and article 23 reservations constituted the "core issues" of the meeting.43 Again it was determined that the Convention had been "poorly drafted as shown by the misunderstanding resulting from the expression employed—'pre-trial discovery.'"44 The experts concluded, however, that some form of restriction was necessary as a protection from "unreasonable or overly burdensome" discovery requests.45 The limited reservation made by the United Kingdom was again generally approved.46

The Commission also discussed problems generated by the existence of blocking statutes47 designed to prevent the disclosure of evidence for use in foreign tribunals.48 The Commission recognized that serious problems had arisen as a result of the co-existence of blocking statutes and the article 23 reservation. Indeed, the combined effect of a blocking statute and a general, unrestricted reservation under article 23, may paralyse [sic] the Convention and has caused the courts in the United States not to use the Convention.49

B. Variant Article 23 Reservations

As noted by the Special Commission, the Hague Convention provision which has generated the most controversy is article 23, which

42 Id.
44 Second Report, supra note 2, at 1675.
45 Id. at 22, 24. See also supra note 42 and accompanying text; infra note 59.
46 Statutes which prohibit the production of evidence abroad, commonly known as 'blocking statutes', many of which have been adopted since the 1978 meeting of the Special Commission, are in part a response to what are perceived in some countries as exorbitant assertions of jurisdiction by the courts of other countries. Such statutes however constitute a complicating factor and emphasize the need for long-term solutions through international understanding.
47 Second Report, supra note 2, at 1678-79.
49 Id. at 22, 24. See also supra note 42 and accompanying text; infra note 59.
allows a signatory nation to 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." This provision, directed at perceived abuses in the United States discovery procedures, was included just prior to the signing of the Convention and generated very little discussion. While five signatory nations have made the unlimited reservation cited above, seven other nations have implemented a modified reservation designed to include Letters requiring 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 requesting court to be, or likely to be, in his possession, custody or power.

51 Martens, supra note 14, at 122-23. This lack of discussion and/or negotiation may account for the continued criticism of the "poorly drafted" article. See supra notes 36-39 and accompanying text.
52 France, Germany, Italy, Luxembourg and Portugal. During the Second meeting of the Special Commission on the Operation of the Hague Convention in May 1985, both France and Germany "gave some indication of modifying full article 23 reservation to limited one." Second Delegation Telegram, supra note 8, at 1. This is a direct result of the following conclusions reached by experts, see infra note 72 and accompanying text, attending the meeting:

1. The discussions have clearly shown the necessity for a substantial number of States of a reservation in order to avoid abuses which can arise in connection with pre-trial discovery of documents. However, the adoption of an unqualified reservation as permitted by article 23 would seem to be excessive and detrimental to the proper operation of the Convention.

2. The tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame - or, to the extent that they have not yet done so, to limit - their reservations along the lines of the reservation formulated by the United Kingdom or the reservation contained in the Protocol drawn up under the auspices of the Organization of American States.

Second Report, supra note 2, at 1678.

53 Denmark, Finland, the Netherlands, Norway, Singapore, Sweden and the United Kingdom. Note that Denmark, Finland and Sweden are civil law countries, yet they will participate in at least some common law pretrial discovery.

In addition to the United States, four nations have chosen not to make an article 23 reservation.\footnote{Barbados, Cyprus, Czechoslovakia, and Israel.}

\section*{C. Blocking Statutes}

Several Hague Convention nations have enacted blocking statutes specifically designed to prevent their nationals from disclosing evidence for use in foreign tribunals.\footnote{See supra notes 47-49 and accompanying text.} These nations believe that their judicial sovereignty is usurped when their nationals are required by a foreign tribunal to disclose information which is privileged under that nation's law.\footnote{See Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 YALE L.J. 612 (1979) [hereinafter cited as Foreign Nondisclosure Laws].} A prime example is the French blocking statute which specifically states that its nationals are prohibited from disclosing "documents or information of an economic, commercial, industrial, financial or technical nature" requested "[o]utside of international treaties or conventions."\footnote{Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686, 688 (1984). For a discussion of the blocking statutes of the United Kingdom, Canada, Australia, South Africa, the Netherlands, Italy and Belgium on antitrust litigation, see Pettit and Styles, The International Response to the Extraterritorial Application of United States Antitrust Laws, 37 BUS. LAW. 697 (1982); see also Foreign Nondisclosure Laws, supra note 57.}

\section*{IV. Judicial Responses}

\subsection*{A. United States}

Whereas early state court decisions followed Hague Convention procedures because of a lack of knowledge as to how foreign courts would treat a Letter of Request (particularly if that nation had made an article 23\footnote{See supra notes 50-55 for a discussion of the various reservations made by Hague Convention signatories pursuant to article 23 of the Convention.} reservation),\footnote{E.g., Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 175 Cal. Rptr. 874 (1981). At the time of the decision, no precedent existed for requiring a foreign litigant properly before the court to produce evidence in violation of its own nation's law and procedures. \textit{Id.} The court recognized that it had the power to require foreign litigants to "elect between the demands of the California court and the sensitivities of the West German government, and to risk the sanctions authorized by California law should it elect not to give the required discovery." \textit{Id.} at 857, 176 Cal. Rptr. at 884. However, the court held that the Hague Convention should be pursued at that time. \textit{Id.} at 859, 176 Cal. Rptr. at 886. The court stated that it believed that West Germany's declaration of its intent} federal courts, in contrast, required
litigants to follow the Federal Rules of Civil Procedure.\textsuperscript{61} For example, the California Court of Appeals, in \textit{Pierburg \& Co. v. Superior Court},\textsuperscript{62} required litigants to follow Hague Convention guidelines as a matter of judicial self-restraint rather than as a matter of international law.\textsuperscript{63} The court noted that its decision was influenced by a lack of information as to how German courts would treat a Letter of Request for written interrogatories.\textsuperscript{64}

In contrast, the District Court for the Eastern District of Pennsylvania, in \textit{Laksy v. Continental Products Corp.},\textsuperscript{65} held that since it was unclear whether the discovery requests constituted violations of German law or infringements upon Germany’s judicial sovereignty,\textsuperscript{66} it was inappropriate to limit the parties’ discovery solely to Hague Convention procedures.\textsuperscript{67} The court stated that its conclusion was supported by West Germany’s article 23 declaration that it would not execute Letters of Request to obtain pretrial discovery.\textsuperscript{68} Because “Letters of Request are the only method of compelling” discovery under the Hague Convention, the court determined that such a re-

\textsuperscript{61} E.g., \textit{In re Anschuetz \& Co.}, 754 F. 2d 602 (5th Cir. 1985). For a discussion of the differences between the procedures under the Hague Convention and the Federal Rules of Civil Procedure, see \textit{supra} notes 5-19 and accompanying text.

\textsuperscript{62} 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

\textsuperscript{63} Id. at 244, 186 Cal. Rptr. at 880.

\textsuperscript{64} Id. at 247, 186 Cal. Rptr. at 882.

\textsuperscript{65} The \textit{Pierburg} and \textit{Volkswagenwerk} courts relied extensively upon an earlier decision, \textit{Volkswagenwerk A.G. v. Superior Court}, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973), which discussed whether the Hague Convention was controlling.

The first \textit{Volkswagenwerk} case, decided in 1973, referred to the Convention, but it was a pre-Convention case, since West Germany did not ratify the convention until 1979. The \textit{Pierburg} court mistakenly read the first \textit{Volkswagenwerk} case as construing the United States’ obligations under the Convention.


\textsuperscript{67} See \textit{supra} note 100.

\textsuperscript{68} \textit{Lasky}, 569 F. Supp. at 1229.
striction "would severely restrict the plaintiffs' scope of discovery." 69

While some federal courts have held the Hague Convention applicable whenever foreign nationals are parties to suits, 70 others have found that the controlling issue is not the citizenship of the party, but the location of the evidence to be produced. 71 There has even been some uncertainty within courts as to the proper approach. For instance, in Schroeder v. Lufthansa German Airlines, 72 the District Court for the Northern District of Illinois held that United States litigants are obligated to request assistance from a foreign government pursuant to Hague Convention procedures whenever the litigant wishes to obtain evidence from a national of that country. 73

The same Illinois court, however, rejected this argument one year later in Graco, Inc. v. Kremlin, Inc., 74 holding that the controlling issue is not the citizenship of the party, but where the evidence-taking proceeding is to be conducted. 75 Thus, if the documents are to be produced in the United States, the Federal Rules of Civil Procedure, not the Hague Convention, should be followed, even if the information to be produced is located abroad. 76 In Renfield Corp. v. E. Remy Martin & Co., S.A., 77 however, the Delaware District Court took a more moderate approach, holding that the Hague Convention governs the discovery of any documents located abroad, but has no applicability to documents located within the United States. 78

Many courts, such as the District Court for the Eastern District of Pennsylvania in Philadelphia Gear Corp. v. American Pfauter Corp., 79 have traditionally held that, in the interest of international relations and comity, 80 initial efforts to obtain evidence abroad should

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69 Id.
70 E.g., Schroeder v. Lufthansa German Airlines, 39 Fed. R. Serv. 2d (Callaghan) 211 (N.D. Ill. 1983).
72 39 Fed. R. Serv. 2d (Callaghan) at 211.
73 Id. at 214.
75 Id. at 521.
76 Id.
77 98 F.R.D. 442 (D. Del. 1982).
78 Id. at 444.
80 Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than
follow Hague Convention procedures. The rationale is that ignoring the Hague Convention would “permit one sovereign to foist its legal procedures upon another whose internal rules are dissimilar.” Such action, in the courts’ view, “would run afoul of the interests of sound international relations and comity.” However, these courts generally reserve the right to resort to the Federal Rules of Civil Procedure in the event that such initial efforts prove futile.

Interestingly, recent federal courts have rejected this procedure, using the identical rationale. For example, the Graco court stated that in its view, “the greatest insult to the civil law countries’ sovereignty would be for American courts to invoke their judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure.”

Recent decisions indicate that both state and federal courts are completely rejecting the use of the Hague Convention. This position

merely comity does not achieve the force of an imperative or obligation. Rather, it is a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the nation called upon to give it effect.


82 Philadelphia Gear Corp., 100 F.R.D. at 60.
83 Id.
84 Id. at 61.
85 In re Anschuetz & Co., 754 F.2d 602, 613 (5th Cir. 1985), appeal filed.
87 Id. at 523. For a discussion of the principle of judicial sovereignty, see supra note 100. See also McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Pa. 1984), which stated that: “Arguably at least, the Evidence Convention has no application at all to the production, in this country, by a party within the jurisdiction of this court, of evidence pursuant to the Federal Rules of Civil Procedure.” Id. at 958. The McLaughlin court required the foreign national to produce the names and qualifications of all trial witnesses or face their preclusion. Id.

This position was recently extended by a District of Columbia court which asserted that a United States court could force foreign nationals to submit to a deposition in the United States or in a nearby non-Hague Convention nation. Work v. Bier, 106 F.R.D. 45, 52 n.10 (D.D.C. 1985).

88 See Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d 575 (A.D. 1985)
was taken by the Fifth Circuit\textsuperscript{89} in \textit{In re Anschuetz & Co.}\textsuperscript{90} and \textit{In re Messerschmitt Bolkow Blohm GmbH}\textsuperscript{91}. In these decisions, the court held that Hague Convention procedures were to be used when taking the involuntary deposition of a party within a foreign country and when seeking the production of documents or other evidence in a foreign country from one not subject to the personal jurisdiction of the court.\textsuperscript{92} However, the court held that the Hague Convention has no application to (1) the production of documents within the United States by a party subject to the court’s \textit{in personam} jurisdiction,\textsuperscript{93} or (2) involuntary depositions conducted on United States soil.\textsuperscript{94}

In reaching these conclusions, the Fifth Circuit rejected the argument that the Hague Convention procedures constitute the exclusive means for obtaining evidence abroad. First, the court found that the Convention does not purport to be the exclusive means to obtain evidence abroad.\textsuperscript{95} Further, the court noted that the purpose of the Convention was to improve rather than thwart the taking

\textsuperscript{89} The Fifth Circuit is the first circuit to review the issue. \textit{Anschuetz}, 754 F.2d at 605.

\textsuperscript{90} \textit{Id.} at 604.

\textsuperscript{91} 757 F.2d 729, 731 (5th Cir. 1985), \textit{appeal filed}. The court followed the earlier \textit{Anschuetz} decision, but went a step further to perform a comity analysis rather than leaving that to the district court on remand, as the \textit{Anschuetz} court had done. \textit{Id.}

\textsuperscript{92} \textit{Anschuetz}, 754 F.2d at 615. The court also noted that resort to the Hague Convention might also be necessitated if the discovery sought in Germany becomes “particularly intrusive.” \textit{Id.}

\textsuperscript{93} \textit{Anschuetz}, 754 F.2d at 615; \textit{Messerschmitt}, 757 F.2d at 731.

\textsuperscript{94} \textit{Messerschmitt}, 757 F.2d at 733. The depositions involved in the \textit{Messerschmitt} case were those of defendant German corporation’s trial experts. The court distinguished between depositions to take place on foreign soil and those to take place in the United States pursuant to the Federal Rules of Civil Procedures. The court’s opinion dealt only with those depositions to take place within the United States. Because the court-ordered depositions involved trial experts of a party subject to the court’s \textit{in personam} jurisdiction, the Fifth Circuit held that in the event of noncooperation the district court could invoke any of the sanctions authorized by the Federal Rules, such as preclusion of the experts’ testimony at trial. \textit{Id.}

\textsuperscript{95} The court reasoned that since the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters contained a specific provision of exclusiveness (“The present Convention shall apply in all cases in civil or commercial matters where there is an occasion to transmit a judicial or extrajudicial document for service abroad”), the 1970 Evidence Convention would have also contained such a provision if that had been the intent of the signatory nations. \textit{Anschuetz}, 754 F.2d at 615.
of evidence abroad. Finally, the court concluded that restricting United States litigants to Hague Convention procedures would impact discovery negatively. Foreign litigants, for example, could take advantage of liberal discovery under the Federal Rules of Civil Procedure while simultaneously shielding their own documents from discovery through the Hague Convention. The court expressed concern that restricting discovery to Hague Convention procedures would thus encourage concealment of sensitive or incriminating information.

The Anschuetz opinion also rejected the argument that principles of judicial sovereignty and international
comity would require litigants to use Hague Convention procedures when seeking evidence located abroad. Other courts had stated that a litigant initially should proceed under Hague Convention procedures. Resort to the Federal Rules was then permitted if initial efforts proved unsuccessful. The Fifth Circuit rejected the judicial sovereignty argument because to overrule or to ignore a foreign nation's refusal to execute a Letter of Request would constitute a more serious affront to the nation's judicial sovereignty than would completely avoiding a conflict all together. There is currently an appeal of the Fifth Circuit's decisions in Anschuetz and Messerschmitt pending before the United States Supreme Court.

Whereas the Anschuetz court left analysis of comity considerations to the district court on remand, the Messerschmitt court chose to assisting judicial authorities. A Letter of Request, therefore, does not interfere with a requested state's legal procedures because the evidence is gathered by the foreign government's judicial authorities. A commissioner, however, might interfere with the nation's judicial sovereignty because the commissioner acts as an extended arm of the other nation. The examination is conducted under the procedures of the state granting the commission. Thus, the method of the examination could easily conflict with the procedures of the authorized by the foreign government. Edwards, supra note 22, at 649.

For a discussion of the principle of international comity, see supra note 80. Anschuetz, 754 F.2d at 613.


Anschuetz, 754 F.2d at 613.

Id.

The Anschuetz appeal was filed July 17, 1985. The parties' briefs were distributed to the Court for its September 30, 1985 conference. On October 7, 1985, the Court invited the Solicitor General to file a brief expressing the views of the United States. As of November 9, 1985, the Solicitor General had made no such filing.


Messerschmitt, 757 F.2d at 731. It is not apparent from the language of the Anschuetz opinion that this was the court's holding. In fact, it appears that the Anschuetz court rejected the comity argument by determining that comity was not implicated when a discovery request was not overly intrusive. Anschuetz, 754 F.2d
expedite the litigation by weighing competing national interests and by deciding the legal issues of comity.\textsuperscript{108} Recognizing the West German concern that its nationals might be forced to produce documents under foreign procedures,\textsuperscript{109} as well as United States litigants' need to obtain promptly the documents and deposition testimony necessary to prepare for complex litigation in an United States court, the court held that an order for production of documents within the United States appeared to appropriately balance the considerations involved and was, therefore, not a violation of the principles of international comity.\textsuperscript{110}

\textbf{B. Other Nations}

The United States is not the only Hague Convention signatory to rule on the Hague Convention-Federal Rules controversy. Courts in the United Kingdom and West Germany have also considered discovery requests made by United States litigants. These courts generally consider the Hague Convention to be the exclusive means of obtaining

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at 615. Further, the court found that gathering evidence in West Germany for production in the United States did not constitute "the taking of evidence abroad" contemplated by the Hague Convention, but constituted "acts preparatory" to the production of evidence within the United States. \textit{Id.} at 611. The court based this construction on the decision of an earlier court which stated:

What is required of [defendant French corporation] on French soil is certain acts preparatory to the giving of evidence. It must select appropriate employees to give depositions in the forum state: likewise it must select the relevant documents which it will reveal to its adversaries in the forum state. These acts do not call for French judicial participation. If [defendant] were preparing to bring litigation against United States adversaries in the United States courts, it would perform the same acts of selecting employee witnesses and evidentiary documents from its files without participation by an [sic] French judicial authority. In no way do those acts affront or intrude on French sovereignty.

Adidas (Canada) Ltd. v. SS Seatrain Bennington, No. 80 Civ. 1911 (S.D.N.Y. May 30, 1984), \textit{quoted in Anschuetz}, 754 F.2d at 611.

\textsuperscript{104} \textit{Messerschmitt}, 757 F.2d at 731. The court noted that although the suit was filed more than two years ago, it remained at the pretrial stage at the time of its decision. \textit{Id.} at 731 n.9.

\textsuperscript{105} \textit{Id.} at 732. The court recognized that United States discovery procedures are unfamiliar to the German civil law system. \textit{Id.} For a discussion of the differences between the United States and German procedures for taking evidence, see \textit{supra} notes 5-19 and accompanying text.

\textsuperscript{110} \textit{Messerschmitt}, 757 F.2d at 732. The court noted that "[t]he district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States." \textit{Id.}
evidence from their nationals. Further, they consider the relevant question to be the nationality of the party, rather than the place of production as United States courts do.

V. ANALYSIS AND CONCLUSION

Solutions to complicated problems often generate unexpected results. Occasionally the solution itself raises more problems than it solves. Though the recent decisions in Anschuetz and Messerschmitt present a solution to United States litigants' problems of obtaining discovery abroad, the method employed by the court to reach its decision may create international policy problems. In making decisions with international ramifications, courts should consider various competing interests such as the impact on present litigation, the impact on foreign relations, and the impact of subsequent interpretations of the decision.

In Anschuetz and Messerschmitt, the Fifth Circuit considered the impact of its decision based solely on the case before the court. The primary focus of the court's inquiry was whether the requested information could be obtained if Hague Convention procedures were followed. Unfortunately, the court failed to consider ramifications of its decision on foreign relations and the economic environment of the United States.


**113** Anschuetz, 754 F.2d at 607.

**114** Because of the political, military, and economic importance of the United States, many countries will be reluctant to oppose discovery orders of United States courts. These countries are faced with a choice between acquiescing in what they perceive to be a violation of their sovereignty and complicating their relations with the major Western power. Predictably, many countries friendly to the United States frequently acquiesce, with or without verbal protest. Resentment accumulates, however, and those countries may retaliate by withholding cooperation in other matters. Thus, the decision to rely on the inherent political, military, and economic power of the United States to induce acquiescence is not without potential long-term political cost and embarrassment. American courts must be circumspect in deciding to rely on that power to obtain discovery. Demonstrations of national strength are quintessentially political and federal, not judicial or local.

The recent United States court decisions have not fully appreciated the fact that foreign displeasure with United States discovery procedure was an impetus behind the Hague Convention. The United States joined nations drafting the Hague Convention in an effort to promote judicial cooperation. For example, the provision allowing nations to refuse to execute Letters of Request seeking pretrial discovery was included to allay concerns regarding liberal United States discovery procedures. United States ratification of the Convention implied an agreement to respect the concerns of nations objecting to United States discovery procedures. The recent Fifth Circuit decisions have failed to address these concerns. Rather than examining West Germany’s motive for the reservation, the court focused exclusively on its own interest in maintaining control over parties subject to the court’s jurisdiction. For example, the court did not consider whether the decision would adversely affect West Germany’s willingness to enter into future treaty negotiations with the United States.

In holding that foreign nationals doing business within the United States are subject to the jurisdiction and procedures of United States courts, the Fifth Circuit failed to consider how such a finding might affect a foreign corporation’s decision to expand into the United States market. State, local, and national leaders are making vigorous efforts to entice foreign corporations to open offices and plants in the United States. An increase in international business correspondingly brings about an increased number of lawsuits. Thus, foreign

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115 See Anschuetz, 754 F.2d at 611; see also supra notes 10, 39-46, 49-55 and accompanying text.  
117 Augustine, supra note 116, at 103-04. See also supra notes 8, 39-46, 50-55 and accompanying text.  
118 Cf. Martens, supra note 14, at 124 (“It is fair to say that the reservation did not achieve what Germany hoped to accomplish with it: a device to avoid the perceived abuses of United States pre-trial discovery.”)  
119 The court failed to consider how this decision would be viewed by the other signatory nations, for example, whether the decision would be viewed as a “necessary evil” in order to do justice to the parties or simply a blatant disregard for other nation’s interest in protecting its nationals from unnecessary discovery. See also supra note 114.  
120 Ellinis, Rolling Out a Red Carpet, NATION’S BUS., Aug. 1985, at 53.  
121 See Augustine, supra note 116, at 102.
corporations concerned about United States judicial procedure may choose not to do business within the United States.\footnote{122}

The Fifth Circuit also failed to consider subsequent interpretations of its decision. The \textit{Anschuetz} opinion stated that depositions under the Federal Rules of Civil Procedure might be taken outside a foreign party's nation to avoid violating the nation's judicial sovereignty.\footnote{123} The recent District of Columbia decision in \textit{Work v. Bier}\footnote{124} interpreted this position as follows: "an American federal court [can] order a deposition of a foreign national to take place in a nearby non-Hague Convention State or in the United States" (emphasis added).\footnote{125} The exclusion of other Hague Convention nations reveals that the district court was aware that signatory nations would consider the deposition a violation to the law of the United States.\footnote{126}

Courts faced with discovery requests involving foreign nationals should balance the competing interests discussed above. This proposition is not new and has been advocated by recent commentators.\footnote{127}

\begin{footnotes}
\item[123] \textit{Anschuetz}, 754 F.2d at 611, n.25.
\item[124] 106 F.R.D. 45 (D.D.C. 1985) (mem.).
\item[125] \textit{Id.} at 52 n.10.
\item[126] The court's actions may also be considered a violation of international law. "An international agreement is binding in accordance with its terms and each party has a duty to give them effect . . . ." \textit{Restatement (Second) of Foreign Relations Law of the United States} § 138 (1965) [hereinafter cited as \textit{Restatement (Second)}]
\item[127] For example, \textit{Restatement (Second)} § 40 provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct on the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

\begin{enumerate}
\item vital national interests of each of the states,
\item the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
\item the extent to which the required conduct is to take place in the territory of the other state,
\item the nationality of the person, and
\item the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
\end{enumerate}

\textit{Id.}

\end{footnotes}
Requiring courts to balance competing interests does not imply that all discovery requests should conform to Hague Convention procedures. Rather, it requires courts to view each discovery request in terms of the potential impact it might have outside the scope of the litigation. A balancing test would better serve both the immediate interests of the litigants and the long-term interests of the United States.

Denise L. Dunham

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128 But see Bishop, supra note 29, at 67 (arguing that "the Convention's legislative history [and] the rules of interpretation" point to "the conclusion that the Convention provides the exclusive procedures for obtaining evidence located in a Convention country. Moreover, it is clear that the Convention applies to parties and encompasses the typical and routine methods of American discovery.")
APPENDIX A: JURISDICTION-BY-JURISDICTION DIGEST OF CASES

FEDERAL CASES

UNITED STATES SUPREME COURT

*Club Mediterrane, S.A. v. Dorin*, 105 S.Ct. 286 (1984) (mem.). Dismissed appeal of New York trial court order directing a French national to answer interrogatories pursuant to state law in violation of a French blocking statute. The Solicitor General's Brief for the United States filed as Amicus Curiae took the position that the Hague Convention is not exclusive nor does it supersede traditional discovery methods under federal and state rules of civil procedure. However, principles of comity require United States courts to utilize the procedures established in the Hague Convention to avoid international friction arising from the enforcement of extraterritorial discovery orders. Under this approach, the court would nevertheless retain the authority to impose sanctions on a litigant who was not complying with the requests. The brief urged that each case should perform a comity analysis, balancing competing interests. Because the lower court did not appear to have made such a review, the Solicitor General recommended that the Court deny review of the orders at that time.

*Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984) (mem.), reh. den. 104 S.Ct. 1932 (1984) (mem.). Dismissed, for lack of jurisdiction, appeal of Michigan trial court's order permitting Plaintiff to depose German corporate defendant's employees in the Federal Republic of Germany. In his amicus curiae brief filed at the Court's request on behalf of the United States, the Solicitor General stated that the Department of State planned to instruct United States consular officials to refuse to comply with the lower court's order. Since this would preclude the taking of the depositions ordered by the Michigan court, the Solicitor General advised the Court to dismiss the appeal. The Solicitor General maintained that the trial court's orders conflicted with the obligations of the United States under the Hague Convention, were not authorized by an earlier exchange of notes between the United States and the Federal Republic of Germany, and were therefore invalid under the Supremacy Clause of the United States Constitution.

*D.C. CIRCUIT*


*FIRST CIRCUIT*

*Boreri v. Fiat S.p.A.*, 763 F.2d 17 (1st Cir. 1985). Declined to balance the competing interests necessary to decide the force and effect of the Hague
Convention because the order appealed from was not final. However, the court noted that the courts seemed sharply divided on the issue, stating that a balance must eventually be struck throughout the federal court system.

**FIFTH CIRCUIT**

*In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), appeal filed. Hague Convention procedures are to be used when taking the involuntary deposition of a party within a foreign country and when seeking the production of documents or other evidence in a foreign country from one not subject to the personal jurisdiction of the court. However, the court held that the Hague Convention has no application to (1) the production of documents in the United States by a party subject to the court's *in personam* jurisdiction or (2) involuntary depositions conducted on United States soil.

*In re Messerschmidt Bolkow Blohm*, 757 F.2d 729 (5th Cir. 1985), appeal filed. Followed the earlier *Anschuetz* decision, but performed a comity analysis to determine that an order for production of documents within the United States appeared to appropriately balance the considerations involved and was therefore not a violation of the principles of international comity.

**DELWARE**

*Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982). Controlling issue is not the citizenship of the party, but the location of the evidence to be produced. Thus, the Hague Convention governs the discovery of any documents located abroad, but has no applicability to documents located within the United States. Interestingly, the parties did not argue that the Hague Convention controlled evidence located in France; therefore, the court applied choice of law principles to find that the United States had the most significant relationship with the communications in question.

**DISTRICT OF COLUMBIA**

*Laker Airways v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984). Although Hague Convention procedures do not constitute the exclusive means for the taking of evidence, the court deferred ordering the West German defendant to comply with discovery requests for thirty days to allow the German authorities and the parties time to attempt to come to an agreement regarding reasonable parameters for discovery in West Germany.

*Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985)(Mag.). Asserted that a United States court could force a foreign national to submit to a deposition in the United States (pursuant to the Federal Rules of Civil Procedure) or in a nearby non-Hague Convention nation to avoid infringing on Germany's judicial sovereignty. Allowed the parties to stipulate that the depositions would take place in Germany, but stated that the court would force them to take place in the United States if the parties were unable to reach an
agreement. This comprehensive, in-depth opinion is particularly noteworthy since the court allowed a non-party (one of Defendants' United States general counsel) to file an amicus curiae brief.

**ILLINOIS—NORTHERN DISTRICT**


*Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984). Rejected earlier Schroeder rationale, holding that the controlling issue is not the citizenship of the party, but where the evidence-taking procedure is to be conducted. Thus, if the documents are to be produced in the United States, the Federal Rules of Civil Procedure — not the Hague Convention — should be followed, even if the information to be produced is located abroad. Also rejected initial use of Hague Convention, stating that "the greatest insult to the civil law countries' sovereignty would be for American courts to invoke their judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." *Id.*, 101 F.R.D. at 509.


**MASSACHUSETTS**

*Slauenwhite v. Bekum Maschinenfabriken*, 104 F.R.D. 616 (D. Mass. 1985). Hague Convention does not prohibit the taking of discovery in the United States from a West German corporation subject to the court's *in personam* jurisdiction. Further, West German defendant may have waived any right to object to discovery pursuant to the Federal Rules of Civil Procedure vis-a-vis itself (but not the West German government) when it voluntarily produced a West German witness in the United States to testify on jurisdictional issues.

**NEW YORK—SOUTHERN DISTRICT**

*Adidas (Canada) Ltd. v. SS Seatrein Bennington*, No. 80 Civ. 1911 (S.D.N.Y. May 30, 1984) (available Jan. 22, 1986 on LEXIS, Genfed library, Dist file). No threat to France's judicial sovereignty when the documents located in France are to be produced on United States soil because the gathering of the documents involves no participation of the French judiciary; therefore, the Federal Rules of Civil Procedure are controlling.

*Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984). Although the Hague Convention procedures are not the exclusive means of taking evidence abroad, its procedures should be the
first avenue of discovery. Should those efforts fail, the court reserved the right to compel the requested discovery.

Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918 (S.D.N.Y. 1984). Ordered British corporate defendant to comply with discovery pursuant to the Federal Rules of Civil Procedure, finding that Defendant had waived the protection of the Hague Convention by first telling the United States plaintiff to go through defendant’s United States agent, rather than its British offices. Further, Great Britain’s sovereignty is not implicated with the production of documents, only depositions. Finally, the court noted that a corporation cannot be allowed to shield documents simply by storing them abroad (Defendant’s United States employees should have had access to the documents in question on a daily basis).

International Society for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984) (Mag.). Hague Convention does not apply to the discovery of evidence available in the United States and its application to evidence located abroad is discretionary. Because West Germany has indicated that it will not execute Letters of Request issued to obtain pre-trial discovery of documents and the Hague Convention machinery “is quite slow and costly even when the foreign government agrees to cooperate,” the court refused to require litigants to follow Convention procedures, noting that “the First Amendment issues at stake here should not be further delayed except for the most compelling of reasons and no such reasons have been suggested.”

PENNSYLVANIA—EASTERN DISTRICT

Lasky v. Continental Products Corp., 569 F.Supp. 1227 (E.D. Pa. 1983). Because it was unclear whether discovery requests were violations of German law or infringements upon Germany’s judicial sovereignty, the court held it inappropriate to limit the parties’ discovery solely to Hague Convention procedures (noting that Germany had stated that it would not execute Letters of Request to obtain pretrial discovery). Since Letters of Request are the only method of compelling discovery under the Hague Convention, such a restriction would severely restrict the plaintiff’s scope of discovery.

McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Pa. 1984). Required foreign party to produce the names and qualifications of all trial witnesses or face their preclusion, stating that “[a]rguably at least, the Evidence Convention has no application at all to the production, in this country, by a party within the jurisdiction of this court, of evidence pursuant to the Federal Rules of Civil Procedure.” The court further noted that the Hague Convention does not control a United States trial.

formulation of its terms, the Convention had never entered into force regarding Japan.

Philadelphia Gear Corporation v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983). Respect for the judicial sovereignty of a foreign nation requires the initial use of Hague Convention procedures. However, the court reserved the right to resort to the Federal Rules of Civil Procedure in the event that such initial efforts prove futile. The controlling issue is not the citizenship of the party, but the location of the evidence to be produced (ignoring the Hague Convention would allow one sovereign to force its legal procedures upon another whose internal laws are different, which would run afoul of the interests of sound international relations and comity).

TENNESSEE—WESTERN DISTRICT

Lowrance v. Weinig, 107 F.R.D. 386 (W.D. Tenn. 1985). Followed the Anschuetz and Messerschmidt opinions in holding that the Hague Convention does not apply to discovery efforts in this country directed to a foreign national over whom the court has in personam jurisdiction. Discovery requests served on a party within the United States are deemed to occur in the United States regardless of the location of information sought. Specifically refused to force discovery within Germany, but provided for full Federal Rules of Civil Procedure sanctions on failure to comply with the discovery requests.

VERMONT

Murphy v. Reifenhauser KG Maschinenfrabrick, 101 F.R.D. 360 (D. Ver. 1984). Principles of comity do not require a United States plaintiff to use Hague Convention procedures where the foreign defendant has already answered two sets of interrogatories, further delay would impede litigation and Hague Convention requests would likely be futile. The procedures authorized be the Hague Convention are not required, but permissive.

STATE CASES

CALIFORNIA


Pierburg GmbH & Co. v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). Required litigants to follow Hague Convention guidelines as a matter of judicial self-restraint rather than as a matter of international law; decision influenced by a lack of information as to how German courts would treat a Letter of Request for written interrogatories.


**DELAWARE**

_Morton-Norwich Products, Inc. v. Rhone-Poulac, S.A.,_ No. 6525 (Del. Ch. November 24, 1981) (available Jan. 22, 1986, on LEXIS, States library, Del file). Refused to order parties to follow Hague Convention procedures where French corporation was being sued under a stock purchase agreement in which it agreed to be bound by Delaware law. The court noted that France had declared that it would not execute Letters of Request which sought pre-trial discovery; therefore, requiring the parties to follow Hague Convention procedures would effectively preclude the United States plaintiff from pre-trial discovery.

**NEW JERSEY**

_Vincent v. Ateliers de la Motobecane, S.A.,_ 193 N.J. Super. 716, 475 A.2d 686 (1984). When Defendant sought protection from discovery orders based on French blocking statute, the court ordered discovery to be initially conducted pursuant to Hague Convention procedures. Decision was influenced by the court's receipt of a letter from French officials stating that they would comply with requests made pursuant to the Hague Convention. Nevertheless, the court informed the parties that they could return to court if the initial efforts under the Hague Convention proved futile.

**NEW YORK**


**TEXAS**

_Th. Goldschmidt A.G. v. Smith_, 676 S.W.2d 443 (Tex. App. 1984). Ordered parties to proceed under the Hague Convention as a matter of comity and judicial restraint until a weighing of interests makes it clear that an order authorizing actions outside the Convention are necessary to prevent an impasse. This decision was made in spite of a letter from the West Germany Embassy opposing the depositions, stating that Hague Convention procedures are exclusive.
WEST VIRGINIA

_Gbr. Eickhoff Maschinenfabrik Und Eisengieberei v. Starcher_, 328 S.E.2d 492 (W. Va. 1985). Although the Hague Convention does not constitute the exclusive means of obtaining evidence abroad, international comity dictates that first resort to those procedures be made until it appears that these efforts have proven fruitless and further action is necessary to prevent an impasse.
APPENDIX B: BIBLIOGRAPHY*

* This listing of articles and other resources on the Hague Evidence Convention contains sources not cited in text.


Dellapenna, Suing Foreign Governments and Their Corporations: Choice of Law, 86 COMM. L.J. 210 (1981) (First in eight part series; the remaining parts can be found at 86 COMM. L.J. 346, 86 COMM. L.J. 438, 86 COMM. L.J. 486, 87 COMM. L.J. 8, 87 COMM. L.J. 92, 87 COMM. L.J. 244, and 87 COMM. L.J. 303).


Low, Taking Evidence Abroad For Use in Litigation in Colorado, 14 COLO. LAW. 523 (1985).


