OBTAINING INTERNATIONAL JUDICIAL ASSISTANCE UNDER THE FEDERAL RULES AND THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS: AN EXPOSITION OF THE PROCEDURES AND A PRACTICAL EXAMPLE: IN RE WESTINGHOUSE URANIUM CONTRACT LITIGATION

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I. INTRODUCTION

The nations of the world have become increasingly interdependent; trade agreements, private business ventures, and a host of other arrangements indicate the continuous and complex interaction of governments and individuals across national boundaries. Although a great deal of attention often is placed upon the initial agreements, far less consideration is given to the problem of what happens when differences occur and agreements are broken. More specifically, there has been insufficient critical attention directed toward the type of evidence which will be available to a litigant when questions arise concerning international transactions. As an illustration, suppose a businessman from the United States agreed to have a French company supply him with needed equipment. If the French firm breaches the agreement and the American brings a civil suit in the United States, it is crucial to know what evidence or testimony can be obtained from the French company and its officials who are nationals of France. This article examines the practical considerations involved and the legal framework to be utilized in obtaining evidence abroad.

The purpose of this paper is twofold. First, an in-depth review is presented of the law applicable to litigants who bring a civil case in the United States and seek to obtain foreign source evidence. The relevant procedure under the Federal Rules of Civil Procedure, as well as the guidelines provided by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, is examined. Second, In Re Westinghouse Uranium Contract Litigation is examined; a case in which the defendant,
Westinghouse Electric Corporation, attempted to utilize the provisions of the Evidence Convention to obtain evidence from several British subjects. Several elements of the case are discussed, including: the procedures utilized by Westinghouse, the reaction of the British subjects to the request for evidence, the role of the U.S. government and the decisions of the British courts regarding the issue of providing judicial assistance to the American court. In this discussion, some of the important implications of the Convention are assessed.

The Hague Evidence Convention is the culmination of extensive efforts to simplify and expedite the process of international judicial assistance. The results of this effort reflect the current

Role in the Hague Evidence Convention

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IT is important for the practitioner to distinguish the Hague Convention on the Service Abroad of Judicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, reprinted in 28 U.S.C.A. FED. R. CIV. P., 6 MARTINDALE-HUBBELL LAW DIRECTORY 4285 (1976), from the Hague Evidence Convention, which is the topic of this paper. The Service Convention provides for the service of judicial documents in civil or commercial matters among the eighteen countries that have ratified that agreement. PRACTICE MANUAL at 6.

The Service Convention was the first accomplishment of the Hague Conference on Private International Law, which studied and sought to resolve the problems of international judicial assistance. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 836 (2d ed. 1976) [hereinafter cited as STEINER & VAGTS]. Following the success of the Service Convention as an aid in resolving private international litigation, the United States proposed that the Hague Conference on Private International Law consider the revision and modernization of procedures for taking evidence in foreign countries. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 INT'L LEGAL MAT'LS 804-05 (1969). [hereinafter cited as U.S. Report on the Hague Conference]. Thus, the Service Convention was a prelude to the more difficult problem of establishing an international procedure for the obtaining of evidence abroad. The Service Convention is currently in effect in 18 countries: Barbados, Belgium, Botswana, Denmark, Egypt, Fiji, Finland, France, Israel, Japan, Luxembourg, Malawi, Norway, Portugal, Sweden, Turkey, the United Kingdom and the United States. PRACTICE MANUAL at 7.

Under the terms of the Service Convention, an American attorney who seeks to serve a person in one of the countries that has ratified the Convention can send the necessary documents to the central authority in that country. The central authority is the governmental unit authorized to process the service of the documents. A list of the appropriate central
level of international cooperation through which the courts of one country can obtain needed evidence from another country in order to pursue their own adjudicative process. Although the Convention has limitations, it is presently the best international mechanism for American litigants to obtain evidence in those countries which have ratified the agreement.¹ The Westinghouse authorities, as well as a list of the reservations and declarations made by each country to the Service Convention, is printed in the annotation to FED. R. CIV. P. 4(i). The names and addresses of the central authorities can be found in Appendix D to Department of Justice Memo No. 386, Revision 1, July 1, 1973, on file in the U.S. Attorney’s and U.S. Marshall’s offices. PRACTICE MANUAL, supra note 3. See also Carl, Service of Judicial Documents in Latin America, 53 DEN. L. J. 455 (1976). Additional consideration of the procedure for serving documents abroad is beyond the scope of this article. Such procedure is, however, an important adjunct to the taking of evidence procedure, and the above mentioned sources should provide an indication of when and how service abroad can be accomplished by counsel for U.S. litigants. Furthermore, the number of countries which have ratified the Service Convention may be an indication of eventual further ratification of the Evidence Convention, which has thus far been ratified by seven countries.

¹ Proceeding under the Evidence Convention is more satisfactory than other methods of obtaining evidence abroad because it is a standardized procedure which removes much uncertainty from the effort. The Evidence Convention is not the most liberal procedure in effect for obtaining evidence within a country. For example, the judicial assistance statute of the United States, 28 U.S.C. § 1782 (1976), is much more liberal. Of course, the U.S. law applies whenever litigants from foreign countries seek to obtain evidence within the U.S. While detailed analysis of the United States procedures for allowing foreign litigants to obtain evidence here is beyond the scope of this paper, several important details should at least be mentioned to provide a basis for comparing the reverse process of American litigants seeking evidence abroad.

Foreign courts can obtain evidence in the U.S. “with greater facility than can our courts in the converse situation.” In fact, our courts have the power to extend international judicial assistance to foreign courts despite the lack of any reciprocity. PRACTICE MANUAL, supra note 2, at 53. See In re Request for Judicial Assistance from the Second District Criminal Court, Seoul, Korea, 428 F. Supp. 109 (N.D. Cal. 1977), aff’d, 555 F.2d 720 (9th Cir. 1977). In addition, 28 U.S.C. § 1782 applies to criminal as well as civil matters for which evidence is sought. By comparison, the Evidence Convention only applies to obtaining evidence in civil or commercial matters. This is a key difference which precludes American courts obtaining substantial international judicial assistance in criminal matters. For cases which involve the use of 28 U.S.C. § 1782 to obtain evidence for a criminal proceeding in another country see In re Letters Rogatory from the Justice Court, Dist. of Montreal, Canada, 383 F. Supp. 857 (D.C. Mich. 1974), aff’d, 523 F.2d 562 (6th Cir. 1975). Accord, In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 569 F.2d 1216 (9th Cir. 1977). See also 13 HOUSES. R. R. 423 (1976); 18 HARV. INT’L L. J. 460 (1977); 12 TEXAS INT’L L. J. 105 (1977).

An additional indication of section 1782’s more liberalized view of international judicial assistance is that federal courts will recognize requests for assistance not only from foreign courts, but also from “tribunals.” The term “tribunals” has been broadly interpreted to include a public prosecutor, see In re Letters Rogatory from the Tokyo District, Tokyo, Japan, supra, but not a Canadian Commission of Inquiry, In re Letters of Request to Examine Witnesses from the Court of Queen’s Bench for Manitoba, Canada, 59 F.R.D. 625 (N.D. Cal. 1973). However, the purpose of using the word “tribunal” in Section 1782 was to broaden the applicability of the provision to proceedings not only before conventional courts, but also before “investigating magistrates” in foreign countries. REPORT OF THE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 1052, 86th Cong., 1st Sess. 9 (1963). As long as the re-
case is a good example of some of the problems which arise in obtaining foreign source evidence. It is the author's contention that the problems which arose in that case possibly are due in part to the complexities surrounding international notions of comity and questing body serves a judicial or quasi-judicial function, American judicial assistance should be forthcoming if it is requested under section 1782. In re Letters Rogatory from the Tokyo District, supra at 1218. The Evidence Convention similarly uses the term judicial authority. See note 135, infra. See also 9 Texas Int'l L. J. 108 (1974).

Finally, section 1782 provides for the assertion of a privilege by any person from whom testimony is sought. Obviously, a legally applicable privilege in the U.S. would be the self-incrimination privilege of the fifth amendment. For example, In re Letters Rogatory from the Tokyo District, supra, involved a claim of fifth amendment privilege by three former Lockheed officials whose testimony was taken under a letter of request from the Japanese prosecutor. The U.S. district court judge recognized the privilege and refused to release any depositions until a grant of immunity from criminal prosecution was issued by the Japanese government. Once such immunity was granted, the testimony was released. 18 Harv. Int'l L. J. 460 (1977). The privileges which a witness can invoke in the face of a foreign court's request for judicial assistance is critically important. In fact, in the Westinghouse case the assertion of two privileges (one based upon English law; the other based on the fifth amendment) had the effect of precluding the acquisition of testimony from the British subjects. See text at notes 46-64 infra. See also the Evidence Convention's provisions regarding privilege, text at note 161, infra.


"Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy or good will, upon the other." Hilton v. Guyot, 159 U.S. 113, 163-4 (1894). See generally J. Story, Commentaries on the Conflict of Laws (2nd ed. 1841); R. Cramton, D. Currie & H. Kay, Conflicts of Laws, 1-8 (2d ed. 1975).

The U.S. government honors letters of request received by the Department of State under 28 U.S.C. § 1783(a)(1) (1976) in its discretion "...on the basis of international courtesy and comity." However, requests "under the Hague Evidence Convention ... must be executed as a result of a treaty obligation assumed by the United States." Practice Manual, supra note 3, at 56-57 (Emphasis added). This distinction between the obligations of a country based upon comity or upon a treaty obligation can be crucial in determining the action to be provided upon receipt of a letter of request. See text at note 157, infra.
in part to the limits on the reach of American courts, rather than to the limits of the Convention itself. These limits may be especially important in cases involving U.S. antitrust law or the regulations of the Federal Maritime Commission. Generally speaking, the limitations on the effective use of the Convention, such as those imposed by the British courts, are not likely to arise in the more common cases where government policy issues do not stand as impediments. In such cases, the Convention will no doubt be a very useful tool for obtaining evidence. It is hoped that the review of the Westinghouse case, though it is perhaps an extraordinary one, will serve to identify some elements of the interaction between foreign and domestic laws when the Evidence Convention is utilized. In addition, the case

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* See note 236, infra. The existence of antitrust law elements in the Westinghouse case makes it more complex than what might ordinarily arise between two private litigants. In the easier case, usually it is two non-governmental parties which are trying to resolve their differences. However, in the Westinghouse litigation the evidence which was being sought by Westinghouse would also be useful, if not essential, to an investigation being conducted by the Justice Department into antitrust violations by the uranium cartel and a federal grand jury proceeding with the same purpose. The action of the Department of Justice in regard to the Westinghouse case, discussed infra at notes 242-276, adds an important dimension to the case which adversely affected the willingness of the British courts to grant Westinghouse's request for evidence from the British subjects. It will be seen, however, that the Justice Department had little choice but to become even further involved in the matter when the British subjects claimed the fifth amendment privilege against self-incrimination, and a grant of immunity was required to obtain any testimony from them. See note 248, infra.

7 The Evidence Convention establishes specific procedures for obtaining evidence from another country. It allows litigants "to obtain evidence abroad for use in judicial proceedings, commenced or contemplated without the need to proceed through the time consuming and uncertain diplomatic channel." *Practice Manual*, supra note 3, at 25.

8 For example, the Evidence Convention provides that a court within the country which is requested to execute a letter of request (i.e., the executing country) "shall apply its own law as to the methods and procedure to be followed. However, [the executing country can comply with] a request for the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the state of execution..." Evidence Convention, *supra* note 1, Article 9. In Article 10, the Convention provides that the state of execution "shall apply the appropriate measure of compulsion...[to require testimony and to the same extent as] provided by its internal law for the execution of requests made by parties in internal proceedings." Because of these provisions and Article 11 which allows a witness to assert any privilege to refuse to provide evidence under the law of either the state of execution or the requesting state, substantial conflicts may easily arise between the foreign law of the requesting state and the domestic law of the state of execution. The ultimate resolution of such conflicts in a particular case will have a conclusive effect on the availability or non-availability of the evidence being sought. For a detailed discussion of this problem see the text at notes 142-158, infra.

A complete evaluation of all applicable foreign internal law relating to honoring requests of other countries desiring to obtain evidence in a particular country is beyond the scope of this paper. In regard to the Westinghouse case, however, there will be an analysis of the internal law of Great Britain and its application to an attempt to secure evidence in that coun-
places the Evidence Convention in perspective; the Convention accomplishes a great deal but cannot unravel some of the complex issues of sovereignty and comity\textsuperscript{9} which may arise in any litigation having international aspects.

With these general thoughts in mind, the elements which make up the mosaic of international judicial assistance available to United States litigants can be reviewed.

II. OBTAINING EVIDENCE ABROAD WHEN THERE IS NO TREATY BETWEEN THE UNITED STATES AND THE FOREIGN COUNTRY

Before looking at the Evidence Convention, it is important to review briefly some other methods which may be used to obtain evidence abroad.\textsuperscript{10} These methods will be used in the absence of any specific agreement\textsuperscript{11} such as the Evidence Convention or other applicable treaty or international agreement.\textsuperscript{12}

As with requests under the Hague Service Convention,\textsuperscript{13} several factors will influence the method to be used in obtaining evidence from within another country. Key considerations\textsuperscript{14} are:

\textsuperscript{9} See note 5 supra.

\textsuperscript{10} There are some important limitations to utilization of the Evidence Convention:
(a) it applies only to civil or commercial matters and not to criminal matters (Article 1); and
(b) it is operative only among the states which have ratified it. See note 1 supra.

\textsuperscript{11} Many of the Justice Department's "requirements for foreign source evidence arise in connection with criminal cases involving countries with which no mutual assistance agreements are in force." Practice Manual, supra note 3, at 33. Apparently, the only agreement negotiated by the U.S. in this area as of 1973 was the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters. This treaty entered into force in January 1977. Reprinted in Sen. Exec. F., 94th Cong., 2d Sess. (1976) and 12 Int'l Legal Mat'ls 916 (1973).

\textsuperscript{12} For example, the Inter-American Convention on Letters Rogatory applies to serving documents and to taking evidence abroad. This agreement was adopted by the Organization of American States and is open to adherence by member states as well as by nations who are not O.A.S. members. O.A.S. Doc. OEA/Ser. A/21 (SEDF). Carl, Service of Judicial Documents in Latin America, 53 Den. L. J. 455, 457-58 (1976).

\textsuperscript{13} See note 3 supra.

\textsuperscript{14} Practice Manual, supra note 3, at 33-34. These considerations may be applicable to situations where there is or is not a treaty in existence. The Westinghouse case is a par-
(1) whether the request will relate to a criminal or civil case;\textsuperscript{15}

(2) whether the necessary information may be obtained without the formal cooperation of the foreign authorities;

(3) whether the prospective witnesses will cooperate voluntarily;

(4) whether the evidence is designed for civil discovery or grand jury purposes, or whether it is to be used at trial in this country;\textsuperscript{16}

(5) the legal system of the foreign country from which the evidence is being sought; and

(6) whether any particular restrictions or prohibitions are imposed by the foreign country with respect to the giving of testimony or the production of documents, business records, or other items for use in judicial proceedings in this country.\textsuperscript{17}

Any one of these considerations may be critical in determining the success or failure of the effort to obtain evidence. In addition to these considerations, the utilization of any of the methods discussed below to obtain evidence may be further complicated by the confusion and uncertainty surrounding the role of the Department of State and United States diplomatic and consular missions abroad.\textsuperscript{18}

\textsuperscript{15} This distinction became important in the Westinghouse case once the possibility arose that the evidence could be used in a criminal proceeding, although the initial request was for evidence to be used in a civil case. See text at notes 248-251.

\textsuperscript{16} Use of the evidence at trial is another consideration which received extensive review by the British courts in the Westinghouse case. The British discovery process differs substantially from the American discovery process under the Federal Rules of Civil Procedure. British courts are reluctant to allow evidence to be obtained which is in the nature of a "fishing expedition" and not for use at trial. See note 130 infra. On the other hand, \textsc{Fed. R. Civ. P. 26(b)} does not allow a witness to refuse to answer a question during the discovery stage on the ground that the testimony will be inadmissible at trial.

\textsuperscript{17} This consideration also played an important part in the Westinghouse case. The governments of South Africa, Canada, France and Australia had all taken action to completely prohibit the disclosure of any information about the uranium cartel's activities in those countries or about possible government involvement. See notes 193, 196, and 284 infra. Thus, Westinghouse was foreclosed from seeking evidence about the cartel from any of these countries. When Westinghouse sought to obtain evidence from the English subjects involved, there was no direct government prohibition regarding disclosure. However, ultimately the British Foreign Office and Attorney General became involved in the case. See the text at notes 249 and 274-76.

\textsuperscript{18} One must also add to this concern the question of the appropriate role of the Department of Justice. The Department's request for immunity for the witnesses in the Westinghouse case, after the British subjects invoked their fifth amendment privilege against self-incrimination led to an unfavorable response from the British government and, ultimately, to an adverse decision from the House of Lords. Whether such a result was justified is reviewed in the text beginning at note 208 infra.
A. Obtaining Evidence Abroad without the Aid of Foreign Authorities

To obtain evidence from "foreign source testimony without the aid of foreign authorities," it is necessary that the witness be willing to testify voluntarily and that no foreign laws prohibit such testimony. However, several countries "view the taking of even voluntary testimony (by persons other than their own officials) as an infringement of their territorial sovereignty." If no such prohibition exists and the witness is cooperative, the witness's testimony may be obtained by stipulation, on notice, or by commission.

Aside from reviewing the citations to the following material, an attorney who seeks to obtain evidence abroad should supplement his knowledge of the applicable procedures either by securing the assistance of foreign counsel or by contacting the Office of Special Consular Services, Department of State, Washington, D.C. 20520, or the American Embassy or Consulate in the country concerned. PRACTICE MANUAL, supra note 3, at 39 and 49, n.23. Id. at 34-35.

The PRACTICE MANUAL suggests two possible ways to avoid this problem: (1) ask the witness to testify in a third country (see, e.g., The Signe, 37 F. Supp. 819 (E.D. La. 1941)); or (2) determine the possibility of having a local attorney obtain the testimony informally.

Countries which object to the taking of evidence by either the notice or commission procedure, and which tend to object when the witness volunteers testimony, are primarily civil law countries. The objection may be more readily understood upon consideration of the differences between the common law and civil law systems. The civil law system relies primarily on the judge or other official for performing procedural acts. Furthermore, the civil law system vies the trial as comprising all the elements of the litigation process. Thus, the deposition and other pre-trial procedures are considered part of the judicial function. In contrast, the common law system "makes the parties themselves responsible for the protection of their own interests" rather than the judge. By following rules of procedure, binding each party to their statement of the issues, requiring each party to obtain evidence and allowing notice to each side of the other's actions, the common law system places great emphasis upon the parties. This is in direct contrast to the civil law notion of having the judge carry out the procedural steps. PRACTICE MANUAL, supra note 3, at 22-23. Note, Taking Evidence Outside the United States, 55 B.U.L. REV. 368, 374 (1975) [hereinafter cited as Taking Evidence Abroad].

Many of the references to particular countries which allow or prohibit various methods of obtaining evidence abroad are dated. The citations are provided as a starting point only. The procedures in any particular country may have changed drastically since these lists were compiled. Therefore, they are not definitive. See note 69 infra for assistance in determining a country's current procedures. These countries may prohibit the taking of depositions by stipulation or on notice of foreign nationals within their territory: Bolivia, Bulgaria, the Dominican Republic, Haiti, Honduras, Hungary, Japan, Latvia, Liberia, Poland, Switzerland, Turkey and Yugoslavia. Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 YALE L. J. 515, 524 n.21 (1953).

Further discussion of the commission procedures begins at note 49 infra. The following countries do not allow testimony of U.S. Nationals or their own nationals to be taken by commission: Afghanistan, Denmark,* the Dominican Republic, Guatemala, Iran, Japan, Jordan, Luxembourg, the People's Republic of China, Russia, Switzerland and Venezuela.

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1. Deposition by Stipulation of the Parties: Federal Rule 29

Federal Rule 29 permits the parties to provide by written stipulation "that depositions may be taken before any person, at any time, upon any notice, and in any manner..." unless the court orders otherwise.\(^4\) The stipulation procedure is the "most expeditious method of taking testimony abroad."\(^2\) It does not require a foreign government's participation and the parties themselves can be sure that they obtain testimony that will be admissible in the American court.\(^2\) But even if there is no prohibition of the taking of testimony by the foreign government,\(^7\) the stipulation method is only feasible "if the parties are in agreement and the witness is willing to testify."\(^2\) The parties have no power to compel the testimony or even the attendance of a "recalcitrant witness."\(^2\) A further disadvantage to this procedure is that Rule 29 does not authorize the person taking the deposition to administer oaths.\(^2\) Therefore, under the stipulation procedure, if the deposition is taken before a person who is not authorized by U.S. law to administer oaths, any "perjury by the deponent may not be punishable."\(^1\) Thus, in effect, there is no incentive to insure the truthfulness of the testimony.

Countries which permit the voluntary testimony of U.S. nationals to be taken by commissioin include: Bolivia, Bulgaria, Egypt, Finland, Haiti, Honduras, Hungary, Kuwait, Liberia, Poland, Saudi Arabia, Turkey, South Africa and Yugoslavia. Countries which permit the voluntary testimony of their own nationals as well as U.S. nationals to be taken by commissioin include: Argentina, Austria, Bulgaria, Brazil, Cambodia, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, El Salvador, Ecuador, France,\(^*\) Germany, Greece, Hong Kong, Iceland, India, Indonesia, Iraq, Israel, Italy, Korea, Laos, Lebanon, Liechtenstein, the Netherleands, Mexico, Nicaragua, Norway,\(^*\) Pakistan, Panama, Paraguay, Peru, the Philippines, Portugal,\(^*\) Romania, Spain, Sweden,\(^*\) Thailand, the United Kingdom\(^*\) and Uruguay. Note, Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony, 62 Mich. L. Rev. 1375, 1388 n.56 (1964).

\(^*\)These countries are now parties to the Evidence Convention and have assumed a treaty obligation for providing evidence to one another under the terms of the Convention.

\(^1\) Fed. R. Civ. P. 29.

\(^2\) Practice Manual, supra note 3, at 37.

\(^3\) Id.

\(^4\) Some countries prohibit the taking of evidence by private individuals. Brazil, Bulgaria, Taiwan, Columbia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iceland, Indonesia, Korea, Kuwait, Morocco, Monaco, Panama, Paraguay, Peru, Thailand, Tunisia and the U.S.S.R. Taking Evidence Abroad, supra note 21 at 377 n.43.

\(^5\) Taking Evidence Abroad, supra note 21, at 377-38.

\(^6\) Practice Manual, supra note 3, at 37.

\(^7\) Cf. The commission procedure infra at not 49 which does authorize the appointed commissioner to administer oaths. See Fed. R. Civ. P. 28(b)(2).

\(^8\) In 1964, the applicable perjury statute was amended to make explicit the fact that perjury committed before any person competent to administer oaths as authorized by the U.S. (e.g., under the commission procedure; see text at note 49 infra) would be punishable,
2. Deposition by Notice: Federal Rule 28(b)(1)

Federal Rule 28(b)(1) authorizes the taking of depositions "on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or the law of the United States." The notice method does not require either United States or foreign court intervention, and offers another "simple and expeditious means of obtaining foreign source testimony for use in an American court." It is the responsibility of the moving party to "make the necessary arrangements for the presence at the deposition of the witness, an appropriate foreign official (usually a 'notary'), a reporter, and where needed, whether the perjury was committed within or without the U.S. 18 U.S.C. § 1621 (1970) (amending Act of June 25, 1948, Ch. 645, 62 Stat. 773). There may be some question as to the extraterritorial application of this perjury statute. See Taking Evidence Abroad, supra note 21, at 371 n.21. In U.S. v. Pizzarusso, 338 F.2d 8 (2d Cir. 1965), cert. denied, 392 U.S. 936, Mrs. Pizzarusso, a Canadian citizen, made false statements under oath when applying for a visa to enter the United States. The application for the visa was made in Montreal, Canada. The applicant was arrested in New York after using the fraudulently obtained visa to enter the U.S. The court held that there was no lack of jurisdiction to prevent convicting the defendant of a crime. Mrs. Pizzarusso received a one year suspended sentence and two years probation. The statute involved was 18 U.S.C. § 1546 which made it a crime to make false statements under oath in applying for a visa. The question of extraterritorial application concerns the principles of the protective theory vis-à-vis the territorial principle. Asserting U.S. jurisdiction here would be based upon the protective principle. See N. Leech, C. Oliver, & J. Sweeney, THE INTERNATIONAL LEGAL SYSTEM 133-36 (1973). In U.S. v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956), a perjury conviction was upheld against an alien who perjured himself before the United States Vice Consul in Cuba. The court also applied the protective principle in U.S. v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960), aff'd sub nom, Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), cert. denied 366 U.S. 948 (1961).

The note on the 1963 amendment to Fed. R. Civ. P. 28 states that this amended rule (b)(1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a Secretary of Embassy or Legation, Counsul General, Consul, Vice Consul or Consular Agent of the U.S. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to take notice deposition before officers of the country in which the examination is taken. Notes of Advisory Committee on 1963 Amendment to Rules, 28 U.S.C. Appendix C. Rules of Civil Procedure, Rule 28, at 7784 (1970); 31 F.R.D. 640-41 (1963).

Note that some countries prohibit use of the notice method unless the deposition is to be made by an United States national who is in the foreign country. See note 23 supra.

Information regarding the identity and mailing addresses of foreign officials authorized to administer oaths and to conduct such proceedings is available from several sources: correspondent counsel abroad, the MARTINDALE-HUBBELL LAW DIRECTORY, and the Ministry of Justice in the foreign country. Also, American consulates and embassies are authorized to furnish lists of foreign attorneys and notaries located within their district. 22 C.F.R. 92 82(b) 1974. PRACTICE MANUAL, supra note 3, at 39.
an interpreter." The moving party also must be certain that the presiding foreign official is informed of "such matters as the procedure to be followed and the scope of his responsibilities." In order to avoid the added expense and difficulty involved in using a foreign official for the notice procedure, it would be preferable to have a United States official take the deposition. Even if a United States official is used, "the Department of State expects that attorneys for the moving party will communicate with prospective witnesses, arrange for their presence, and employ translators and reporters." Finally, upon compliance with the above-mentioned prerequisites, a deposition upon oral examination or upon written questions can be obtained.

It should be noted that under the notice or commission procedure (described below) a party may apply for the issuance of a subpoena under 22 U.S.C. § 1783. This procedure is expressly

37 Id. at 38. It may be easier to engage foreign counsel to make the necessary arrangements. A listing of local attorneys can be obtained from United States foreign service posts. Taking Evidence Abroad, supra note 21, at 370 n.12. If documents are involved, translations may be required.

38 Practice Manual, supra note 3, at 38.

39 Id. at 39. See 22 U.S.C. § 1203 (1976) and 22 C.F.R. 92.4(a) which provides that: Every secretary of embassy or legation is authorized . . . within the limits of his embassy or legation, and every consular officer of the United States is required whenever application is made to him . . . within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition . . . .

See also 22 C.F.R. § 92.55(a) (1977). "Any United States consular officer may be requested to take a deposition on notice."

40 Practice Manual, supra note 3, at 40. But see 22 C.F.R. § 92.56 (1977) which states that in lieu of special instructions the consular officer should proceed as follows in taking depositions: "(a) request the witnesses . . . to appear before him . . .; (b) when necessary, act as interpreter or translator, or see that arrangements are made for some qualified person to act in this capacity; (c) . . . administer oaths . . .; (d) have the witness examined in accordance with the procedure described in §§ 92.57 to 92.60; (e) either record, or have recorded in his presence and under his direction, the testimony of the witnesses; (f) take the testimony, or have it taken, stenographically . . .; (g) be actually present throughout the examination of witnesses . . .; (h) mark . . . all documents identified by a witness or counsel and submitted for the record."


43 As to official fees, see C.F.R. §§ 22.1, 92.88 and 92.70.

44 The subpoena will be issued by the court provided that it finds that the particular testimony or the production of the document . . . is necessary in the interest of justice and that it is not possible to obtain his testimony in admissible form without his personal appearance. . . . 28 U.S.C. § 1783 (1976). See Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1035-39 (1965) for details of amended § 1783, and [1964] U.S. Code Cong. & Ad. News 3782. See generally International Litigation, note 98 infra, at 240-42.
authorized by Rule 45(e)(2). The subpoena can be served only on a national or resident of the United States who is located in a foreign country. Failure to comply with the subpoena may result in a finding of contempt under 28 U.S.C. § 1784. Thus, utilization of § 1783, coupled with the contempt provisions of § 1784, "provides virtually the same scope of discovery as would be available from similar witnesses present in the United States."

3. Deposition by Commission: Federal Rule 28(b)(2)

Rule 28(b)(2) provides that depositions may be taken in a foreign country "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." When a party requests that the court appoint a person as commissioner, the district court will appoint such an individual to take the evidence. This appointment is the court's written order giving the commissioner the "power to take the testimony of a witness who cannot appear personally to be examined in court. . . ." The procedure is quite similar to the notice procedure except that "it requires the court to appoint the person before whom the testimony is to be taken." The court may, for example, appoint a foreign official or a private person in a foreign country to take testimony.

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5 The power of Congress to provide legislation for service of subpoenas on U.S. citizens outside the U.S. derives from the fact that the U.S. possesses power inherent in its sovereignty to require the return to this country of a citizen, who is resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. U.S. v. Lansky, 496 F.2d 1063 (5th Cir. 1974), rehearing denied, 502 F.2d 1168 (5th Cir. 1974). The basis for American jurisdiction is the residency or nationality of the witness and not his presence. Taking Evidence Abroad, supra note 21, at 375 n. 47. This power has been upheld in several cases. See, e.g., Blackmer v. United States, 284 U.S. 421 (1942). See also Restatement (Second) of Foreign Relations Law §§ 10(b) (1965). "No case has been reported involving a subpoena directed to an alien resident." Taking Evidence Abroad, supra note 21, at 375. But cf. In re Grand Jury Proceedings, 532 F.2d 404 (5th Cir. 1976), rehearing denied 535 F.2d 660, cert. denied, 429 U.S. 940, where the court held it had power to subpoena a non-resident alien present in the United States.
6 23 U.S.C. § 1784 permits the court to levy upon or seize an individual's property within the U.S. and to impose a fine of up to $100,000. Sale of the property may be ordered to satisfy such a fine. Blackmer v. United States, 284 U.S. 421 (1932).
7 Taking Evidence Abroad, supra note 21, at 377. Note that the § 1784 sanctions also apply to the use of the commission procedure discussed in the next section of the text. When evidence is sought from a foreign national, a situation which falls outside the scope of § 1783, the use of a letter rogatory (letter of request) is required to compel testimony.
10 See the text at notes 32-48 supra.
11 Practice Manual, supra note 3, at 41.
under this procedure. Nevertheless, "this method is rarely used; commissions are generally issued to United States consular officers." As with the notice procedure, evidence obtained under the commission procedure must conform to the procedural requirements of the district court because the process is carried out under the federal rules.

Generally, the notice or commission procedures are the preferred methods for obtaining evidence abroad. They require little judicial action and the evidence obtained will conform with the procedural requirements of the district court. There also may be a further advantage to the commission procedure in some countries. If the country provides for compulsory process when the commissioner petitions the foreign tribunal for assistance, a witness could be compelled to testify even though the witness may be a foreign national. However, the same considerations which apply to the compulsion that foreign courts will apply under the letters rogatory process would seem to be applicable for the commission procedure as well.

B. Obtaining Evidence Abroad with the Aid of Foreign Authorities

In a situation where the witness does not voluntarily agree to testify, where foreign law prohibits the use of the notice or commission procedures, or for some other reason, the above described

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53 One advantage of such an appointment would be that evidence could be obtained even in those countries which would not permit a U.S. consular official to take evidence under the notice procedure. See notes 22, 23, and 28 supra. If, however, the country considers the taking of testimony as a sovereign function, the commission procedure will not be available. 54 22 C.F.R. § 92.66 (1977). The reason for this is that use of a consular officer is easier and less expensive than going through a foreign official. If the U.S. consular officer is used, it is more convenient to follow the notice procedure. Therefore, the notice procedure would be used more often and nearly always when a U.S. consular official is involved. See Taking Evidence Abroad, supra note 21, at 371-72.

55 PRACTICE MANUAL, supra note 3, at 41.

56 Cf. the letters rogatory procedure discussed below. Under this procedure the evidence is obtained through the assistance of the foreign court. And such evidence may not be in conformity with the district court's requirements for admissability. See note 21 supra. For additional information about the commission procedure, see 22 C.F.R. §§ 92.51 et seq.

57 PRACTICE MANUAL, supra note 3, at 41. As an example of an act providing for compulsion of such a witness, see The Evidence (Proceedings in Other Jurisdictions) Act 1975, note 219 infra.

58 See the discussion of foreign courts compelling their own nationals to testify under the letters rogatory procedure in STEINER & VAGHTS, supra note 3, at 838. A foreign court, under a letter of request, may compel testimony of its own national who is a non-party witness. See text at notes 64, 148 and 163 infra.

59 See note 21 supra. Some countries prohibit the use of the notice or commission procedure except when taking evidence from an American national. Other countries will pro-
procedures are not available to take evidence abroad without the aid of foreign authorities, it would be necessary to seek the assistance of the appropriate foreign authorities in order to obtain evidence. "The customary method of obtaining the assistance of foreign authorities is by means of a letter of request or letter rogatory." The letter of request "denotes a formal request from a court, in which an action is pending, to a foreign court to perform some judicial act." It is also true that, in the absence of a treaty obligation or an international agreement, a foreign court may refuse to honor the request, based upon its view of comity between the countries. If, however, the foreign court does

hbit any private individuals from taking evidence, because such act is considered an infringement upon their sovereignty. See note 28 supra; Taking Evidence Abroad, supra note 21, at 374-75. For information about the appropriate procedure in a country see note 72 infra. See also 22 C.F.R. § 92.66 (1977).

In some foreign countries, American consular officers are not allowed to take testimony. 22 C.F.R. § 92.55(c) (1977) states that the right to take depositions only exists if the laws or authorities of the national government will permit a deposition to be taken; unless there is a treaty which establishes such a right. If a consular officer receives a notice or commission to take testimony in such a country, he should return it and indicate what other methods may be available, for example letters of request, to obtain the testimony. Section 92.66 states that "where depositions must be taken before a foreign authority, letters rogatory are usually issued to a foreign court." 22 C.F.R. § 92.66 (1977).

Practice Manual, supra note 3, at 42. Examples are requests for the taking of evidence, the issuing of a summons, subpoena, or other legal notice or the execution of a civil judgment. In United States usage, letters rogatory have been utilized only for the purpose of obtaining evidence. Requests rest upon the comity of courts toward each other and embody a promise of reciprocity. 22 C.F.R. § 92.54 (1977). See 28 U.S.C. § 1781 (1976) and the Evidence Convention which utilizes the letter of request as the primary means to obtain judicial assistance; see notes 121 and 136 infra. "The usual form of requesting judicial aid between states is the venerable commission-rogatoire, or what we call in English the letter rogatory." 6 M. White, Digest of International Law § 12 at 204 (1968).

A "letter rogatory" is under the control of the foreign court for compliance, while the notice or commission procedure would be controlled by the issuing court. Volkswagenwerk Aktien Gesellschaft v. Superior Court In and For Sacramento County, 109 Cal. Rptr. 219, 33 Cal.App.3d 503 (1973). See also Black's Law Dictionary 1050 (4th ed. 1968).

E.g., the Evidence Convention discussed infra at note 165 et seq. Article 12 of the Convention "permits refusal to execute a letter only to the extent that (a) the execution is not within the function of the judiciary or (b) the state of execution considers that its sovereignty or security would be prejudiced thereby." President's Message to Congress Transmitting the Convention on the Taking of Evidence Abroad, Sen. Exec. A, 92d Cong., 2d Sess. (1972) [hereinafter cited as Message of the President]. Thus, it appears that unless the request for evidence will prejudice the sovereignty of a signatory, the request must be complied with under the Evidence Convention. See note 157 infra.

See note 5 supra. The Federal Republic of Germany and the Netherlands will not compel a witness' testimony on the basis of a letter rogatory if there is no treaty agreement in effect. Therefore, if the witness is a national of these countries, his testimony cannot be obtained. Taking Evidence Abroad, supra note 21, at 373 n. 35. The Federal Republic of Germany became a signatory of the Evidence Convention on October 21, 1971. As of 1977, however, the country had not ratified the convention.
recognize the validity of the request, it will have the witnesses appear for examination, provided that the other aspects of the procedure have been complied with.

Federal Rule 28(b)(3) prescribes the basic procedure to be followed. Upon application by a party

a letter rogatory shall be issued ... on terms that are just and appropriate. It is not requisite to the issuance of ... a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. ... A letter rogatory may be addressed 'to the appropriate authority in [here name the country].'

Under 28 U.S.C. § 1781(a)(2), "the Department of State has power ... to receive a letter rogatory issued ... by a tribunal in the United States, to transmit it to the foreign or international tribunal, ... and to receive and return it after execution." In addition, under 28 U.S.C. § 1781(b)(2), a letter rogatory may be transmitted directly from a United States court to the foreign or international tribunal.

In civil law countries the court itself will examine the witness. However, in a common law country a special examiner is appointed "before whom the evidence will be taken by the attorneys in the usual manner." Taking Evidence Abroad, supra note 21, at 373 n. 34.

The term "tribunal" indicates that letters of request may be issued not only between courts, but also other semijudicial agencies; for example, a public prosecutor. See note 4 supra. Note that most courts will not honor requests from a purely administrative tribunal or from executive departments or agencies because the letter of request has not been issued by a judicial authority. Practice Manual, supra note 3, at 43-44. It is also true that most countries will not honor requests issued in connection with a court martial. However, "foreign courts frequently honor requests from Federal courts in connection with grand jury investigations." United States v. Reagan, 453 F.2d 165 (6th Cir. 1971). Practice Manual, supra note 3, at 44. Cf. the result of the Westinghouse case and the House of Lords' objection that evidence could not be obtained under the Evidence Convention for a criminal investigation, note 288 infra.

Federal courts have held that the issuing of letters of request is among their inherent powers. De Villeneuve v. Morning Journal Ass'n., 206 F. 70 (S.D.N.Y. 1913); Gross v. Palmer, 105 F. 833 (N.D. Ill. 1900). Such requests will be issued in civil cases, Zassenhaus v. Evening Star Newspaper Co., 404 F.2d 1361 (D.C. Cir. 1968), and in criminal cases, Reagan v. United States, 433 F.2d 165 (6th Cir. 1971), where it is impossible to secure evidence from abroad through some other procedure. Cf. Practice Manual, supra note 3, at 43. See also Taking Evidence Abroad, supra note 21, at 372 n. 26. Recall that Federal Rule 28 states that it is not required for issuance of a letter of request that the evidence is not obtainable in some other manner, or even that such other manner is inconvenient.

See 22 C.F.R. §92.66 (1977) regarding the direct transmittal of letters rogatory from court to court. Some foreign governments require that the request be made through diplomatic channels. Inquiries concerning customary procedural requirements in given countries may be addressed to the American embassy or legation in foreign capitals, or to the Department of State, Washington D.C. 20520. Practice Manual, supra note 3, at 44. See note 89 infra.
Although the requirements mentioned in § 1781 are rather succinct, there are additional requirements which should be followed in the preparation of the letter of request. It should indicate the caption of the case along with the phrase "Request for International Judicial Assistance." The letter should be addressed to the foreign court which will execute the request and should describe the parties and the nature of the suit. The letter of request should be written in clear language, avoiding the use of complex sentences and "cumbersome grammar," since "American legalisms are unintelligible to foreign courts." The letter should specifically state the needs of the requesting party. An appropriate request would state: "it is requested that you cause Mr. X to appear before you and to answer, under oath, the written questions and cross questions which are attached." If oral testimony is sought, it is best to specify the procedure to be followed. "Foreign courts apply their own procedures if a specific method is not designated." If it is desired that the foreign court propound certain questions to the witness, the request should include the specific questions to be asked. The letter of request

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70 Id.
71 Id. If the foreign court is unknown, the letter should be addressed to "The Appropriate Judicial Authority in (here name the country)." See FED. R. CIV. P. 28(b)(3).
72 Usually, statements that "the evidence is being sought for use in a judicial proceeding which is presently pending before this court," and that "the evidence is necessary to insure that justice is done," or that "the evidence is required in the interest of justice" will be included. Id. at 45. Cf. note 129 infra.
73 Id. An example of language used can be found in the appendix to the FED. R. CIV. P. 28. Conformance to this rule will facilitate the procurement of an accurate and concise translation, particularly in situations in which the translator has no legal training.
74 Id.
75 Note, though, that it may be within the discretion of the foreign court whether to follow the requested procedure.
76 Because of the differences between civil and common law procedures, the letter of request must be very specific in this regard. Civil law countries concentrate on letters of request, while common law countries usually take testimony on notice, by stipulation or through commissions to consuls. The civil law technique results in a resume of the evidence which is prepared by the executing judge and signed by the witness. The common law procedure, in contrast, results in a verbatim transcript of the witness' testimony certified by the reporter. Message of the President, supra note 63, at VI. In addition, civil law countries are not accustomed to taking testimony under oath without a specific request to do so. "One may always request the foreign court to provide a verbatim transcript ... to [give] advance notice of the proceedings ... so that a representative of the requesting authority may attend the hearing ... [and to] permit a designated representative of the requesting court either to conduct the examination himself or to participate by way of asking supplementary questions after the judge has conducted the examinations in chief." PRACTICE MANUAL, supra note 3, at 46-47. See generally 22 C.F.R., §92.57 (1977). Some foreign courts will not permit private individuals to conduct an examination. See note 27 supra. Concerning the admissibility of evidence, see note 89 infra and accompanying text.
and its accompanying documents should be translated into the language of the state where the letters are to be executed (state of execution) and submitted in duplicate. The letter should also contain a provision "to reimburse the foreign court for all costs which it may incur in executing the request." Finally, a letter of request generally includes an offer to provide reciprocal assistance in a similar case. The letter of request in United States v. Reagan is a modern illustration of one used successfully in a criminal case.

After the letter of request is drafted and signed by the judge, it is ready for transmittal. Transmittal can be accomplished either through the State Department or by the court directly to the executing authority abroad. Provided the foreign government does not object, direct transmittal is usually the faster of the two methods. It also may be advisable to retain local counsel to present the letter of request to the executing court. Regardless of the method used, however, it is impossible to predict accurately

77 Practice Manual, supra note 3, at 47.
78 Id.
79 Id. at 48. Charges for letters of request submitted through American officials are prescribed by the Tariff or Fees Schedule, Foreign Service of the United States. 22 C.F.R. §22.1 (1977).
80 Practice Manual, supra note 3, at 48.
81 453 F.2d 165, 168 (6th Cir. 1971).
82 Practice Manual, supra note 3, at 48. See also excerpts from the Westinghouse letter of request at notes 202 and 203 infra. The Practice Manual cautions against the use of published samples of letters of request because "they often employ archaic or unduly technical language which may well be unintelligible to a civil law court." Examples of these forms (together with supporting motions and explanatory notes) can be found at: 2A BENDER, FEDERAL PRACTICE FORMS 148-61; 8 AM. JUR., PLEADING AND PRACTICE FORMS (Rev.), Depositions and Discovery, Forms 171 et seq.; 3 MOORE, FEDERAL PRACTICE, Form Nos. 15:21, 15:22; 4 MOORE, FEDERAL PRACTICE 1921-66 (paras. 28.03-28.09(3), Deposition Abroad). See also 3 MOORE, FEDERAL PRACTICE FORMS, Form Nos. 15:24.1 and 15:25.
83 Practice Manual, supra note 3, at 48.
84 See note 69 supra. See 22 C.F.R. §92.66 (1977) for a description of the role of the State Department in transmitting requests abroad. Note, too, that "the diplomatic channel is cumbersome in operation" and may take more time than the parties desire. "However, in a case of particular urgency or importance (the Justice Dep't.) is prepared to urge the Department of State to expedite the diplomatic transmission process to the extent possible in countries whose courts insist on the use of diplomatic channels." Practice Manual, supra note 3, at 14, 49.
86 This may be especially appropriate in certain common law jurisdictions. For civil law practice see INTERNATIONAL COOPERATION IN LITIGATION: EUROPE (Smit ed. 1965). Current information as to the required procedures can be obtained from the Office of Special Consular Services, Department of State, Washington, D.C. 20520. Practice Manual, supra note 3, at 49.
the length of time required for a letter of request to be executed.\(^7\) Usually letters of request "travel slowly" and a "prompt response is the exception rather than the rule."\(^8\) Thus, it is best to seek foreign source evidence at the earliest opportunity.

After the letter of request has been executed, one is left with the difficult task of determining the legal sufficiency of the testimony and documents obtained. Such a determination is made by the American court in which the proceedings are being held.\(^9\) Furthermore, under Rule 28(b), evidence obtained in response to a letter rogatory need not be excluded merely because it is not a verbatim transcript,\(^90\) because the testimony was not taken under oath, or for any similar departures from the United States rules for depositions.\(^91\)

In summary, the letters rogatory process may be utilized to obtain evidence in a foreign country, but it is a complicated\(^92\) and time consuming\(^93\) process. Even if all of the procedural requirements are met, the evidence obtained may not be useful at trial in the United States.\(^94\) And, while the American procedures

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\(^{87}\) Practice Manual, supra note 3, at 50. The time involved depends on such factors as the legal system in the state of execution, the nature and complexity of the request and the attitude of officials in the state of execution.

\(^{88}\) Id. Authorities have noted that letters of request normally require at least three months for execution. Taking Evidence Abroad, supra note 21, at 374 n. 38. In one instance it took in excess of a year for the requests to be executed. Practice Manual, supra note 3, at 50. In the Westinghouse case, for example, the letter of request never was executed. The lower court proceedings and the final decision in the case took more than 14 months from the time the letter of request was received in England.

\(^{89}\) See 22 C.F.R. §92.54 (1977).

\(^{90}\) For the usual practice in civil law countries not resulting in a verbatim transcript see note 76 supra.

\(^{91}\) Fed. R. Civ. P. 28(b). It may be advisable to make particular requests in the letter rogatory in order to obtain evidence which may be used at trial in the U.S. See note 76 supra. Note, too, the converse problem: the discovery limits under the Federal Rules are very broad, while in many foreign countries the discovery of evidence which may lead to evidence admissible at trial is not allowed. "Many countries, including common law countries, will not honor requests which have been issued for the purpose of obtaining pre-trial discovery." Practice Manual, supra note 3, at 43. See, e.g., Re Radio Corp. of America v. Rauland Corp., [1956] 5 D.L.R.2d 424; Radio Corp. of America v. Rauland Corp., 2 W.L.R. 281, aff'd 1 Q.B. 618 (1956); Penn-Texas Corp. v. Anstalt, [1963] 1 All E.R. 258 (C.A.). See note 16 supra in which it is indicated that letters of request are not to be used for "fishing expeditions."

\(^{92}\) "International litigation is beset with difficulties not encountered in even the most complex domestic litigation, difficulties arising by reason of different legal systems and jurisprudential concepts." Sklaver, Obtaining Evidence in International Litigation, 7 Cum-Sam. L. Rev. 233 (1976) [hereinafter cited as International Litigation].

\(^{93}\) See note 87 supra and accompanying text. "Currently counsel who need to take evidence abroad may be required to expend a disproportionate amount of time, effort, and money. . . ." Taking Evidence Abroad, supra, note 21, at 379.

\(^{94}\) See note 89 and accompanying text.
for permitting foreign countries to take evidence in the United States are very liberal, the reverse is not often true. Moreover, any of the several procedures followed by American counsel under the Federal Rules is fraught with complex procedural intricacies in addition to the inherent difficulties involved in international communication. Given the diverse internal practices of each foreign country and the tremendous uncertainty over the appropriate current practice in a particular country, it is not surprising that several countries, including the United States, have sought to remedy these problems. The existence of such disparities could have an adverse impact on the growth of international trade, since businessmen may be unwilling to enter contracts or to rely on foreign commitments if there is no recourse to a satisfactory judicial resolution of any problems which might arise. In order to simplify the process of international judicial assistance, the Hague Conference on Private International Law was encouraged to draft a convention on the taking of evidence abroad.

III. OBTAINING EVIDENCE ABROAD UNDER THE HAGUE EVIDENCE CONVENTION ON CIVIL OR COMMERCIAL MATTERS

A. History and Purpose

Following the success in drafting and ratifying the Convention on the Service Abroad of Judicial Documents, the Department

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9 For a brief overview of the liberal American procedure see note 4 supra. See also International Litigation, supra note 92, at 235-42.
95 See notes 22 and 27 supra.
96 "... It is often difficult to determine the practice prevalent in a country without extensive inquiries. In some jurisdictions, practices have not been reduced to written form. Moreover, even when a written statement of a particular country's policy is available, there may be a disparity between the actual practice and the written statement." Taking Evidence Abroad, supra note 21, at 374 n. 41.
97 See International Litigation, supra note 92, at 233.
98 The Hague Conference on Private International Law was established upon the initiative of the government of the Netherlands and has been active in the field of the unification of private international law since 1893. The U.S. participated as an observer at the 1956 and 1960 sessions of the Conference. In 1964, the U.S. became a member of the Conference pursuant to Public Law 88-244, 77 Stat. 775 (1963). See Message of the President, supra note 63, at V.
99 The Evidence Convention will be discussed in general, with a special emphasis upon the letters of request procedure. The author's purpose is to provide an adequate framework for utilizing the Convention in obtaining evidence abroad as well as to provide a more thorough understanding of the Westinghouse case.
100 The Service Convention was ratified by the U.S. in April, 1967. See note 3 supra for a brief discussion of this Convention.
of State recommended that a revision be made in the 1954 Hague Convention dealing with letters rogatory and the taking of evidence in foreign countries. At the Hague, a special commission prepared a proposed draft treaty, and the Conference on Private International Law unanimously adopted a final text in 1968. On June 1, 1970, the Evidence Convention was opened for signature at the Hague. It was signed by the United States on July 27, 1970, and two years later advice and consent of the Senate was given, without dissent. At the present time seven countries have ratified the Convention.

The Senate Committee on Foreign Relations suggested, in its report on the Evidence Convention, that the willingness of the Hague Conference to proceed promptly with its work on the Convention was perhaps attributable "to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems." One of the primary purposes of the Evidence Convention drafters was to "bridge the gap between common law practice . . . (in which parties have the duty of securing evidence and presenting it at trial) and the civil law concept of judicial sovereignty . . . (in which evidence is obtained primarily by the courts with the parties serving only to assist the judicial authorities)." The Convention endeavored to provide a standardized framework in which evidence for use in a requesting country may be obtained from another country without concern for all of the procedural particularities existing in

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103 Id. at 104.

104 Currently the United States, the United Kingdom, Sweden, Portugal, Norway, France, and Denmark have ratified the Evidence Convention. See note 1 supra.


106 International Litigation, supra note 92, at 242. See note 76 supra. "The act of taking evidence in a common law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil law country may be a public matter, and may constitute the performance of a judicial act by an unauthorized person. It may violate the judicial sovereignty of the host country, unless its authorities participate or give their consent." U.S. Report on the Hague Convention, supra note 2, at 806-7. The perspective of the civil law country involved has a direct bearing upon the choice of a method for obtaining evidence: letter of request, taking evidence by a consular officer or the use of a commissioner. The latter two methods raise serious questions of intrusion upon the sovereignty of the country where the evidence is to be taken. However, with the letter of request there is no such risk because the courts of one state request the courts of another state to obtain the evidence. Id.
the state of execution. To attain this simplification, the Convention sought to have the ratifying countries agree "to follow as closely as possible the practice and procedure of the requesting state, in order that the evidence might be taken in a manner which most closely approached the technique of the forum where the action was pending (i.e., the requesting state)." The value of such an agreement would be the elimination of unnecessary expenditures of time, effort or money in the procurement of evidence and greater likelihood of its admissibility at trial in the requesting state. Additionally, the problem of deciphering the procedural practices in the executing state would be avoided. Finally, and perhaps more importantly, an international treaty would provide a firm legal basis for securing evidence in a foreign country without concern for ultimate legal justification and dependence on "the vague and uncertain duties imposed by international comity." Evidence could be obtained pursuant to treaty terms, thus eliminating the problem of another country's refusal to honor a letter of request.

In short, the Evidence Convention provided a standardized procedure for obtaining evidence in a foreign country; it eliminated problems which occur because of the jurisprudential differences of common law and civil law countries; and it established a foundation of international treaty law, rather than comity, for supporting requests to obtain evidence in another country. Finally, the Evidence Convention, once ratified by a country, replaced all previous methods for obtaining evidence between the ratifying

107 Id. at 806.
108 Id. Perhaps the most succinct expression of the Convention's underlying philosophy was that "any system of obtaining evidence or securing the performance of other judicial acts internationally must be tolerable in the state of execution and must also be utilizable in the forum of the state of origin where the action is pending." Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in Message of the President, supra note 63 at 11-42.

109 Taking Evidence Abroad, supra note 21, at 379-80. See note 5 supra regarding comity. "Countries ratifying the Convention assume a treaty obligation to honor foreign evidence requests in instances covered by the Convention, and they may not decline to honor evidence requests from other ratifying countries except under the limited conditions specified in Article 12 of the Convention." Practice Manual, supra note 3, at 25-26. Article 12 permits refusal to honor a letter of request if execution does not fall within the judicial function or if the executing country's sovereignty would be prejudiced.

countries. As a result, the convention eliminated any need to proceed through time consuming diplomatic channels in order to obtain evidence.


In order to serve the purposes discussed in the section above, the Evidence Convention: (1) makes letters of request the principal means of obtaining evidence abroad; (2) attempts to improve methods for obtaining evidence by increasing the power of consuls and by introducing in civil law countries the use of commissioners to take evidence; (3) provides the appropriate procedure to obtain evidence in the form needed by the requesting court; and (4) preserves any more liberal practices currently accepted by signatories. The forty-two articles of the Convention are divided into three chapters: Chapter I, Letters of Request, (articles 1-14); Chapter II, Taking Evidence by Diplomatic Officers, Consular Agents and Commissioners, (articles 15-22); and Chapter III, General Clauses, (articles 23-42).

Letters of request are the principle vehicles for obtaining evidence in this country. See note 4 supra. Ratification required little change in the present U.S. procedure. Message of the President, supra note 63, at XI. Note that the Convention expressly preserves "for each signatory party all provisions of its internal law [which] are more favorable to, and grant more generous assistance to foreign courts and litigants than the methods prescribed in the Convention." U.S. Ratification, supra note 102, at 107. Thus, the more liberal U.S. Code procedures are in effect for foreign litigants who desire to obtain evidence in this country.

Use of the letters of request procedure becomes even more important because all of the foreign countries which have ratified the Convention "have interposed major reservations [as permitted by Article 33] with respect to the operation of Chapter II, Taking Evidence by Diplomatic Officers, Consular Agents and Commissioners." See note 3 supra, at 30. Article 33 states in pertinent part: "A state may at the time of signature, ratification, or accession exclude, in whole or in part, the application of the provisions of . . . Chapter II. No other reservation shall be permitted." States which have made such reservations are Denmark and Norway. See 28 U.S.C.A. §1781 for a listing of declarations and reservations. For subsequent declarations and reservations of countries which ratify the Convention, consult with the Department of Justice (Civil Division, Foreign Litigation Unit) or the Assistant Legal Adviser for Treaty Affairs, Department of State, Washington, D.C. 20520. See note 3 supra, at 30.

See the reservations with respect to Chapter II which have been made by civil law countries. See note 113 supra.

See note 106 supra.
evidence under the Convention. Letters of request are covered exclusively in articles 1-14 and are also governed by some of the general clauses, such as articles 23-28, 33, 35 and 36. The Chapter I articles regulate the form of the letter, its scope and content, methods of transmission, language to be used, methods and technique of execution, compulsion which may be exercised against a witness, permissable grounds for refusal to execute the letter, privileges and immunities of witnesses and questions of costs and expenses. The Convention also increases the power of consuls, by permitting them to take evidence informally without the use of judicial authorities and provides for the commission procedure to take evidence.

Chapter II regulates the situations in which a consul or Commissioner may act (such as the use of compulsion against a witness), provides for the regulation of their activity by the state of execution, defines the limits of a commissioner’s power, and identifies other channels for obtaining evidence should the commission method fail. Chapter II also sets out the extent to which the executing state’s approval and consent may be required. For example, Chapter II provides that a consular officer may, without compulsion, take evidence from his own nationals for use in his own country’s courts. But the consul may take evidence from non-nationals only with the consent of the state where the evidence is to be taken.

Finally, Chapter III, which contains the general clauses, covers such matters as the relationship between the present Convention and the 1905 and 1954 conventions, the reservation power of signatories, the states which may be signatories or which may accede to the Convention, the use of diplomatic channels to resolve disputes and the time limits for when the Convention will enter into and remain in effect. Chapter III also provides limitations on the scope of letters of request, indicates details respecting the operation of the Central Authority and contains provisions by which states may derogate from the Convention or make certain reservations upon ratification. This Chapter also includes the “all-important provisions that if any state, by internal law or practice,
permits any act on a more liberal... basis... such internal law or practice... will continue to govern (despite the provisions of the Convention)."\(^{124}\)

C. **Procedural Requirements for Utilizing the Hague Evidence Convention**\(^{125}\)

1. **Chapter One of the Convention**

American attorneys who desire to utilize the Evidence Convention should be aware of the following provisions which apply to the letters of request procedure. Article One states that in civil or commercial matters\(^{126}\) a judicial authority\(^{127}\) of a contracting state may, in accordance with the laws of that state, request the competent authority of another contracting state, by means of a letter of request, to obtain evidence or to perform some other judicial act.\(^{128}\) This article also indicates that letters of request "shall not

\(^{124}\) *Id.* at 2. See also Message of the President, *supra* note 63, at 12-13. The concept of the Central Authority was devised for use originally in the Service Convention, *supra* note 3. The central authority is designated by each state. Letters of request will be transmitted through this central authority (See Article 2 of the Evidence Convention at note 133), which receives letters of request from another country and transmits them to the competent authority in its own country, which then executes the letters. The central authority designated by the U.S. is the Department of Justice. But 28 U.S.C. §1781(a) still authorizes the State Department to receive letters. If it does, they are sent on to the Department of Justice. Exec. Order No. 11,698, reprinted in [1973] 2 U.S. CODE CONG. & AD. NEWS 3477. See *International Litigation, supra* note 92, at 247, and *Taking Evidence Abroad, supra* note 21, at 381.

\(^{125}\) Two previous articles present a general discussion of the Evidence Convention: *Taking Evidence Abroad, supra* note 21, at 379-386 and *International Litigation, supra* note 92, at 242-254. In addition, both the Message of the President, *supra* note 63, containing the official explanatory report of the Hague rapporteur at 11-42, and the *U.S. Report on the Hague Conference, supra* note 3, at 808-820, provide additional material which would be quite helpful in analyzing specific provisions of the Convention. The emphasis of this paper will be procedural, particularly with regard Chapter I of the Convention. However, relevant background information will be indicated in the footnotes.

\(^{126}\) The Evidence Convention is limited to taking evidence in "civil or commercial" matters. However, this term is not defined in the Convention. Other treaties of the Hague Civil Procedure Conference use the term, and it also appears in bilateral agreements between the United Kingdom and Continental countries. For more than "sixty years... there has never been a recorded disagreement between any two members of the Hague Conference... over the meaning of this term or over its applicability to a particular request for assistance in securing evidence. The delegates at the conference agreed unanimously that no definition was needed." *U.S. Report on the Hague Conference, supra* note 3, at 808. Cf. the problems concerning such definitional matters in the Westinghouse case, *infra*.

\(^{127}\) This term is not defined. The *U.S. Report on the Hague Conference, supra* note 3, at 808, indicates that this was deliberate in order to provide flexibility. See *Taking Evidence Abroad, supra* note 21, at 382. There are many judicial and quasi-judicial bodies in common and civil law countries. Thus, a precise definition would be problematic.

\(^{128}\) The term "other judicial act" does not include the service of documents (see the Service Convention *supra* note 3), enforcement of judgments, or provisional or protective
be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated." This is interpreted to preclude the use of letters of request to seek evidence such as pre-trial discovery, or evidence which is not itself to be used at trial, but which will be used to discover other possibly admissible evidence. Thus, attorneys should draft requests which are "as specific as possible" and which state that the evidence being sought will be "for use in a judicial proceeding." Counsel should assiduously avoid reference to the term "pre-trial discovery."

Once a letter of request is prepared, it is transmitted directly from the court in the requesting country to the designated central authority in the state of execution, in accordance with Article Two of the Convention. The benefit of this requirement is that it dispenses with the need for intermediaries, thus saving a significant amount of time.

Article Three prescribes the necessary contents of a letter of request:

1. the name and address of the authority requesting its execution and of the authority requested to execute it;
2. the names and addresses of the parties to the proceedings and their representatives, if any;
3. the nature of the proceedings for which the evidence is required, and pertinent information with respect to the particulars thereof;
4. the specific evidence to be obtained, or the other judicial act to be performed;

measures such as injunctions, restraining orders, forced sales, receiverships or mandamus. The act requested must be recognized as a judicial act under the domestic law and practice of the state of execution. Message of the President, supra note 63, at VII.

However, letters of request may be used to perpetuate testimony of an aged, dying or departing witness. Id. at VII and 13. See also Taking Evidence Abroad, supra note 21, at 383. Cf. note 72 supra.

See Article 23 of the Convention which provides that a state may declare that it will not honor letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. This provision was adopted pursuant to a request of the United Kingdom delegation, and refers to the procedure wherein a party may obtain access, before trial, to documents in the possession of his adversary. The purpose, of course, would be to aid the party in preparation of the pleadings. Note that the procedure varies among countries and some may be willing to allow letters of request for this purpose, while other will not. Message of the President, supra note 63, at 15. See also Taking Evidence Abroad, supra note 21, at 383, especially note 91. See notes 208, 219, and 221 infra which indicate this problem in the Westinghouse case.


See note 124 supra regarding the central authority concept.

See Message of the President, supra note 63, at 15 for additional considerations of this article.
(5) the names and addresses of the persons to be examined;
(6) the questions to be put to the persons to be examined, or
alternatively, a statement of the underlying facts in sufficient
detail to enable the foreign authority to formulate its own ques-
tions;
(7) a complete description of the documents or other property,
real or personal, to be inspected, if applicable;
(8) any requirement that the testimony be given on oath or affir-
mation, and if so, any special form to be used; and
(9) any special method or procedure to be used under Article 9.
Mention may also be made of privileges to refuse to give infor-
mation (Article 11).135

No formal authentication of the letter of request is required.136

Article Four provides rules on the correct language to be used
in drafting the letter. It employs the conventional rule that every
letter of request must be written in the language of the state of
execution or accompanied by a translation into that language.137
Any such translation must be certified as correct by either a
diplomatic officer, consular officer or agent; or by a sworn trans-
lator or by an authorized person.138

Article Five permits the executing state to refuse to execute
the letter if it does not comply with the formal requirements of
the Convention. The central authority is to advise promptly the
requesting state of any defect. Such notice should help insure
prompt correction of any technical or formal errors in the letter.
Another very practical provision is Article Six, which allows
misdirected letters of request to be forwarded to the appropriate
authority in the state of execution.139

Articles Seven and Eight regulate the notice to be given of the
actual execution of the letter and the persons who may be pre-
sent. Under Article Seven, the requesting authority has the right

135 This article is modelled on the United Kingdom bilateral conventions. If the authority
to whom the letter should be directed is unknown, it is sufficient to direct the letter to the
"appropriate authority of the State of ________." U.S. Report on the Hague Conference,
supra note 3, at 809.
136 Practical Manual, supra note 3, at 27-28. See Article 9 which provides that the re-
questing authority can specify a particular procedure which must be followed unless incompat-
ible with the domestic laws of the state of execution or impossible of performance due to
practical difficulties.
137 "Every contracting state does agree to accept a letter in either English or French, or
translated into one of those languages, unless the state makes a reservation . . . to such ac-
ceptance." Message of the President, supra note 63, at VII. Special provisions are made for
bilingual states.
139 Message of the President, supra note 63, at VII.
to be informed of both the time and place at which the letter will be executed. The parties or their representatives may be present at the execution proceedings.\textsuperscript{140} Also allowed to attend are the judges of the court which issued the letter,\textsuperscript{141} pursuant to the conditions laid down in Article Eight.

The ninth Article is a most important provision. It provides that the "judicial authority which executes a letter of request shall apply its own law as to the methods and procedures to be followed."\textsuperscript{142} However, while it is easier for the executing court to apply its own procedures, it will comply with a request of the issuing court that a special method or procedure be followed in order to ensure maximum utilization of the evidence.\textsuperscript{143} An executing court is not required to comply with a special procedural request if the requested procedure is incompatible with the executing state's internal law, or is impossible due to internal practice or procedure or because of practical difficulties.\textsuperscript{144} The legislative history of the Convention makes it clear that such incompatibility\textsuperscript{145} could exist only when the law of the state of execution imposed a barrier to the special procedure and that "impossible" does not mean inconvenient.\textsuperscript{146} Thus, although the standards are somewhat imprecise, the state of execution can refuse to comply with a special procedural request only when there is conflict with internal substantive law (e.g., the constitution or legislation of the state of execution), or when the internal practice or procedure makes compliance "truly impossible."\textsuperscript{147}

If followed by the executing state, Article Ten can be a quite useful provision. Under this article, a recalcitrant witness who

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\textsuperscript{140} \textit{Practice Manual}, supra note 3, at 28.


\textsuperscript{142} \textit{Evidence Convention, supra} note 1.

\textsuperscript{143} \textit{U.S. Report on the Hague Conference, supra} note 3, at 810. Examples of special procedures include: that the responses be furnished in writing under oath; that a verbatim transcript be made; that the witness be placed under oath; and that a representative of the requesting authority be permitted to be present and to participate actively in the proceedings. \textit{Practice Manual, supra} note 3, at 29.

\textsuperscript{144} \textit{Message of the President, supra} note 63, at VII and 23.

\textsuperscript{145} Incompatibility means a conflict with a constitutional or legislative provision. \textit{U.S. Report on the Hague Conference, supra} note 3, at 810.

\textsuperscript{146} \textit{Id.} at VIII. There was considerable debate on the semantics of this article in an effort to accurately state the intention of the Convention. There was no desire to create an "escape clause" through the use of too broad phraseology. There is a clear difference between "impracticable" and "impossible of performance." The latter phrase is a more difficult standard to meet in order to avoid complying with the letters of request. This was intentional because the basic intent was to maximize international cooperation and to minimize the possibilities of refusal to cooperate. \textit{Id.} at 23.

refuses to appear, or who appears but refuses to furnish the
evidence requested, can be compelled either to appear or to
testify.\textsuperscript{148} Such an "application of compulsion is not discretionary
with the executing authority," according to the treaty.\textsuperscript{149} The only
limitations are that compulsion be appropriate and that it corre-
spond to the same compulsion which would be enforced in a
similar domestic proceeding in the state of execution.\textsuperscript{150} If compul-
sion would have been granted in the state of execution under the
same circumstances, then compulsion will be applied in executing
the letter of request. However, no greater level of compulsion
would ever be used in the executing state than that prescribed by
its domestic laws.\textsuperscript{151} It is also possible that the Article Twelve
"sovereignty and security" exception to execution, discussed
below, could limit the applicability of compulsion under Article
Ten.\textsuperscript{152}

Article Eleven of the Convention allows a witness to invoke any
testimonial privilege available to him under either the law of the
requesting state or the state of execution.\textsuperscript{153} If privileges of the
state of execution are recognized, the execution of the letter of re-
quest would, as a result, conform to the requirements of a
domestic proceeding in the executing state. However, in recogniz-
ing privileges which exist in the requesting state two possibilities
can occur. First, the requesting state may indicate the applicable
privilege within the letter of request itself. Second, if this is not
done, the witness may, during the proceedings in the executing
state, make a claim of "foreign privilege" under the law of the re-
questing state.\textsuperscript{154} The responsibility of raising a claim of privilege
in the latter situation is upon the witness. If he does claim the
privilege of the requesting state's law, the executing authority
will ask the requesting state for a specification of the privilege in
order to certify that the privilege is valid and one which the state
of execution should honor.\textsuperscript{155}

\textsuperscript{148} Id. at 811. See Message of the President, \textit{supra} note 63, at VIII and 25.
\textsuperscript{149} This article uses the mandatory word "shall." Compulsion is appropriate to require
the witness to answer a particular question or to produce certain documents or to permit
entry upon real property for inspection. \textit{See} Message of the President, \textit{supra} note 63, at 25.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{153} \textit{Practice Manual, supra} note 3, at 29. \textit{See} text at notes 242-248 \textit{infra} for the use of
the fifth amendment privilege by the English witnesses in the Westinghouse case.
\textsuperscript{154} Message of the President, \textit{supra} note 63, at 26.
\textsuperscript{155} Id. at 26. The Commission recognized that the allowance of "foreign law" privilege
might frustrate execution of the letters of request, since it would be possible for a witness
Article Twelve permits the executing state to refuse a letter of request only to the extent that its execution is not within the function of the judiciary or on the ground that the executing state considers that its sovereignty or security would be prejudiced by the letter's execution. The executing state, however, may not refuse execution solely on the ground that it claims exclusive jurisdiction over the subject matter of the letter of request or because the law of the executing state would not recognize a right of action on the subject.

In Article Thirteen, the Convention provides for the return of the executed letter through the same channel as it was originally transmitted by the requesting authority. Finally, Article Fourteen, along with Articles Twenty-six and Twenty-eight, regulate the question of costs and fees for the execution of the letter. Ex-
execution generally does not give rise to reimbursement of any costs. The basic idea is that the services are to be furnished free of charge by the state of execution. Nevertheless, any unusual costs for employing interpreters, experts or other special procedures under Article Nine may result in assessment of a fee by the executing state.\textsuperscript{160}

2. Chapter Two of the Convention

As indicated previously,\textsuperscript{161} the second chapter of the Convention, dealing with the taking of evidence by consular officers and commissioners, has found more limited application than Chapter One due to the reservations made by signatories to the Convention. "Unfortunately, all foreign countries who have ratified the Convention to date have interposed major reservations with respect to this Chapter."\textsuperscript{162} Nevertheless, a brief overview of the chapter is warranted, if only for comparison with the similar process of taking testimony under the commission process of Federal Rule 28, discussed above in Part II.

Article Fifteen allows a diplomatic or consular officer to take testimony from his own national for use in his country's courts. No compulsion, however, is permitted.\textsuperscript{163} Under the second part of Article Fifteen, a state may file a declaration requiring the officer in every case to apply to an authority of that state for permission to take evidence.\textsuperscript{164} Article Sixteen provides that, in most cases, a diplomatic or consular officer may take evidence from persons who are not nationals of the officer's country only with the consent of the state of execution.\textsuperscript{165} Article Seventeen permits a commissioner to take testimony if the state of execution has granted either general permission or permission in the specific case. It also allows for the appointment of foreign judges as commissioners of a requesting state's courts, which enables the judges to directly examine witnesses in their own language and under the state of execution's procedure.\textsuperscript{166}


\textsuperscript{161} See note 113 supra.

\textsuperscript{162} \textit{Practice Manual}, supra note 3, at 30. For reservations, which signatories have made to the Convention see note 113 supra.

\textsuperscript{163} Cf. the letters of request procedure and the use of compulsion in the text at note 148 supra. To the extent that these provisions have been adopted, American litigants may utilize the notice and commission methods to take evidence. \textit{See Taking Evidence Abroad}, supra note 21, at 384.

\textsuperscript{164} \textit{Practice Manual}, supra note 3, at 31.

\textsuperscript{165} Id.

\textsuperscript{166} Id.
Article Eighteen gives the state of execution discretion in applying compulsion to assist a foreign officer in obtaining evidence from a recalcitrant witness. Article Nineteen authorizes the state of execution to fix the time and place of the taking of evidence before a consul or commissioner. The unconditional right of the persons concerned to be represented by counsel is granted by Article Twenty. Article Twenty-one delineates the administrative rules that apply to a foreign officer taking evidence under the Convention. Paragraph (d) of this Article is particularly important; it permits the taking of evidence under the procedure of the forum where the action is pending, unless it is forbidden by the law of the state of execution. Under Article Twenty-two, if the process of taking evidence through a commissioner or consul fails, the requesting party may then utilize the letter of request procedure.

3. Matters Not Included in the Convention

Several items were not included in the Convention due to policy differences. No provision is made for free legal aid to the witnesses. The question of the immunity of a witness from arrest or service of process while attending a hearing in execution of a letter of request was left as a matter to be resolved under the law of the state of execution. Also excluded was the matter of a witness refusing to appear and testify before a consul or commissioner. This, too, was felt to be a matter best left for regulation by the state of execution.

Questions still remain concerning which nation's consuls may take the testimony of a witness having a dual nationality. Under Article Sixteen, the state of execution is given the right to decide who are its nationals. There is also the problem of precisely defining the term "judicial authority" as it is used in Article One. It is questionable whether "administrative tribunals" are to be excluded from the provisions of the Convention. Since no exact definition has yet been promulgated, each case must be reviewed on its facts. Finally, there are problems of criminal law which may arise from attempts to take testimony abroad. For instance, the failure of a witness to obey an order of the executing state and the giving of false testimony by a witness raise questions of internal law

167 Id. at 32.
168 Id.
169 Id.
170 Message of the President, supra note 63, at 41-42.
regarding criminal sanctions and jurisdiction. The Hague Commission was of the opinion that these matters were not appropriate for regulation by the Evidence Convention.\textsuperscript{171}

D. Summary of the Evidence Convention

The Convention establishes minimum standards for international judicial assistance and serves to improve the practice of international litigation by simplifying, or at least unifying, the various procedures which may be utilized in obtaining evidence abroad. The Convention is not as liberal as the current United States law, but it is a move in the direction toward greater liberality and increased international cooperation. It is unfortunate that, thus far, only seven of the eighteen signatory states have ratified the Convention. Apart from the Convention, the only methods available for obtaining foreign source evidence are those previously discussed: notice, commission and letters of request procedures, which are fraught with complex difficulties and inherent delays.

The remaining portion of this paper will present an analysis of the Westinghouse case. Certainly, the discussion does not exhaust the background facts of the case. Information concerning the precise methods used to obtain testimony, the evaluation made of the letter of request by the English government, the communication between counsel for Westinghouse and the American government (if any), and many other important matters which would enable one to focus more clearly on the process used and counsel's reasons for their choices, is not available. Nevertheless, one can ascertain the reaction of the British courts to the letter of request from the American court. This reaction, as well as the entire judicial process involved in execution of the letter of request, illustrates the difficulties which arise when an effort is made to take testimony abroad.

IV. THE WESTINGHOUSE URANIUM CASE LITIGATION AND THE USE OF THE EVIDENCE CONVENTION'S LETTER OF REQUEST PROCEDURE

There are many interesting aspects to the Westinghouse Uranium Litigation. However, aside from providing some background material concerning how the case initially arose, this article will concentrate on one particular aspect of the litigation—the

\textsuperscript{171} Id.
attempt by Westinghouse to secure documentary evidence and oral testimony from a British corporation and several individual British witnesses through the use of the Evidence Convention's letter of request procedure. Despite the fact that this involves only a minor aspect of the entire case, it is interesting to consider that if the evidence had been obtainable, the Westinghouse Corporation might have been able to avoid potential liability of $2 billion and actual liability of approximately $650 million. Furthermore, the issue of obtaining evidence in England is not an insignificant one. Overall there were five judicial opinions rendered by the English courts, and the time both parties spent seeking either to enforce or to avoid the execution of the letters of request was more than a year. Of course, a substantial sum of money was spent by the parties. The American and British governments also became involved in the case. If the issue was considered insignificant, it was not apparent from the importance attached to the case by everyone involved.

In this section, the facts giving rise to the Westinghouse case and the need which arose for letters of request will be examined first. Then a review of the appeals through the lower British courts will be presented. Finally, the decision of the House of Lords resolving the matter will be evaluated. This review will highlight some of the practical difficulties in seeking judicial assistance under the rules of the Evidence Convention.

A. Factual Background: Why the Letters of Request Were Used

1. The Uranium Contracts

In 1966, Westinghouse Electric Corporation began contracting with various electric utility companies for the sale of nuclear reactor power plants. As part of these contractual agreements with the utility companies, Westinghouse offered "as a sweetener" to supply uranium fuel for use in the reactors. Westinghouse sought to make its contracts with the utilities a complete system package, wherein Westinghouse would supply not only the reactors but also all of the necessary uranium fuel to run them. Such contractual arrangements were acceptable to many utility companies and, at the time, conditions in the uranium market seemed

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172 See note 182 and text infra.
173 Dep't of Justice Memorandum (July 6, 1977), at 2.
174 BUS. WEEK, December 26, 1977, at 33.
to indicate that Westinghouse would be able to meet easily its contractual commitments.\textsuperscript{176} In fact, Westinghouse did keep its uranium fuel commitments in line with its actual supplies until 1971.\textsuperscript{176} Thereafter, however, Westinghouse began contracting to sell uranium short (i.e., to sell supplies it did not yet own).\textsuperscript{177} These supplies were to be delivered to the utility companies at prices "stated in the contracts, which could be varied only with changes in the general cost of living, and not with changes in the market price of uranium."\textsuperscript{178} Even though the contract price for yellow cake uranium was a low $6.00 to $8.00 per pound, Westinghouse "felt secure" in agreeing to these prices as late as 1974.\textsuperscript{179} The uranium supply situation had only begun to undergo change in late 1972 when Australia ceased production, and in 1973, when the Arab oil embargo focused attention on U.S. uranium supplies.\textsuperscript{180} It was also during 1973 that some countries began to emphasize nuclear power as a means to supply their future electrical needs, while other countries completely banned the exportation of uranium fuel. Perhaps as a result of these factors, the price of uranium doubled to $16.00 per pound.

By 1974 Westinghouse had agreed to supply various electric utilities with 80 million pounds of uranium at an average price of $10.00 per pound.\textsuperscript{181} The current world market price of uranium by that time had reach $42.00 per pound. The company had only 15 million of the 80 million pounds of uranium needed to fulfill its contracts. The cost of obtaining the remaining 65 million pounds was at least two billion dollars, nearly twice the company's assets of record at the time.\textsuperscript{182} Faced with such an awesome liability, Westinghouse announced to the utility companies in September,

\textsuperscript{176} Atlanta Constitution, Feb. 6, 1978, § D, at 9, col. 1.

\textsuperscript{177} Id.


\textsuperscript{179} Id.

\textsuperscript{180} Atlanta Constitution, Feb. 6, 1978, § D, at 9, col. 3.

\textsuperscript{181} "The primary effect of the oil embargo was to increase the attractiveness of the nuclear option (for electricity) relative to oil and gas." Id.

\textsuperscript{182} TIME, Nov. 21, 1977, at 96.


"If the company had to buy the 65 million pounds it needs—uranium that it had agreed to supply the utilities at about $11.00 a pound—it would have to shell out (with today's price escalators taken into account) at least $2 billion and perhaps much more. A company accountant recently testified in Richmond that Westinghouse could lose as much as $3.1 billion by honoring the contracts." Id.
1975, that it could not deliver the contracted-for uranium, and offered instead to allocate the 15 million pounds it currently owned among all of the utility companies. The companies refused the offer. Instead, they sued Westinghouse for its failure to deliver the actual contracted-for amount of uranium.

In lawsuits by the utility companies, Westinghouse claimed as its defense that under U.C.C. § 2-615, it was excused from performing its contract obligations because of unforeseen circumstances which made such performance "commercially impracticable." Westinghouse was sued in several courts, but only the federal court suits filed by thirteen utility companies which were consolidated in the United States District Court for the Eastern District of Virginia, Richmond Division, under Judge R. Merhige, Jr., as In Re Westinghouse Electric Corporation Uranium Contract Litigation are the subject of this review. The results of this proceeding may have a critical impact upon future litigation against Westinghouse as well as any other litigation which might benefit from the production of the evidence sought in the Richmond case.

U.C.C. § 2-615 (1952 version) provides in pertinent part that:

[Except so far as a seller may have assumed a greater obligation (a) delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .

The comment to this section says that a seller is excused from delivering goods "where his performance has become commercially impracticable because of unforeseen circumstances not within the contemplation of the parties at the time of contracting." This section codifies the doctrine of commercial impracticability.


See also notes 194 and 200 infra, regarding the plaintiff's charges that Westinghouse knew of the cartel and, therefore, could not plead impracticability as a defense.

Second Appeal, supra note 177, at 3. Westinghouse notified the utilities of its inability to supply the uranium in a letter dated September 8, 1975.

405 F. Supp. 316 (1975) [hereinafter cited as the Richmond Litigation].

Aside from the Richmond action, the following litigation was pending in which Westinghouse was a party:

(1) A suit by three Pennsylvania corporations against Westinghouse, also a Pennsylvania corporation, in state court. This court issued letters rogatory, similar to the Richmond case, but the state court action continued with an eventual settlement of about $6 million. See Parisi, supra note 182, at 39.

(2) A suit by Westinghouse against thirty foreign or domestic corporations which produce uranium was filed in the District Court for the Northern District of Illinois on October 15, 1976. In this action, Westinghouse alleged a
2. The Richmond Litigation

At trial, Westinghouse relied upon an affirmative defense based on the legal doctrine of commercial impracticability under the U.C.C. Section 2-615. This portion of its defense was based primarily upon the changed circumstances in the world uranium market. In addition, Westinghouse alleged that a uranium cartel existed "whose actions drastically restricted the available supply of certain fuels, including uranium, and dramatically increased prices..." Apparently, Westinghouse first obtained hard world-wide conspiracy and the formation of a cartel in violation of United States antitrust laws. See Westinghouse Elec. Corp. v. Rio Algom Ltd., [1976] ANTITRUST & TRADE REG. REP. (BNA) at A-3.

Other actions which include similar allegations as those made by Westinghouse in item 2 above, have been initiated by other plaintiffs. For example, the Tennessee Valley Authority (TVA) filed antitrust suits on November 18, 1977, against ten foreign and three U.S. producers of uranium. The suits were filed in federal district courts in Chattanooga, Denver and New York. (TVA is also a party to the suit against Westinghouse filed in Richmond, Virginia. TVA's suit is against Rio Tinto Zinc Corporation of Great Britain; its U.S. unit Rio Algom Corporation; Gulf Oil Corporation of Pittsburgh; and eleven other foreign and domestic corporations). FACTS ON FILE, Nov. 26, 1977, at 895.

In addition United Nuclear Corp. filed suit against General Atomic Co., a 50%-owned subsidiary of Gulf Oil Corporation alleging, inter alia, a violation of U.S. antitrust laws. TIME, Nov. 21, 1977, at 96. United Nuclear found itself in a situation quite similar to Westinghouse, when the price of uranium rose dramatically from 1972 to 1975. United Nuclear had agreed to deliver 27 million pounds of uranium at prices ranging from $9.00 to $14.00 per pound, with the current price at $42.00 per pound on the world market. Id. In this suit, United Nuclear claimed that "Gulf entered into the relatively low-priced contracts in 1973 and 1974 when it had inside information, gained from its Canadian subsidiary's participation in the cartel, that uranium prices would rise steadily in future years." FACTS ON FILE, Nov. 26, 1977, at 895. Finally, aside from the court proceedings mentioned above, an investigation was being conducted by the U.S. Department of Justice. This investigation began in March of 1976 when a Grand Jury was impanelled in the District of Columbia to aid in the Justice Department's investigation of potential violators of U.S. antitrust laws. In Re Westinghouse Electric Corp. Uranium Contract Litigation, [1977] Queen's Bench Divison, Transcript of the Proceedings Before Master Jacob, at 6 [hereinafter cited as First Appeal].

Westinghouse alleged the changed circumstances and the existence of a uranium cartel which manipulated prices in paragraphs four and six of its pleadings, which stated:

Paragraph 4: In the fall of 1973, the Arab oil embargo precipitated a world wide energy crisis, that radically changed all pre-existing assumptions upon which the aforementioned contracts or negotiations were based. The availability and price of certain fuels, including uranium, were thereafter manipulated by the anti-competitive actions of certain foreign governments, producers and cartels, whose actions drastically restricted the availability supply of certain fuels, including uranium, and dramatically increased prices to artificially set levels, many times the price levels which would have prevailed in a free competitive market.

Paragraph 6: On information and belief, defendant avers that certain uranium producers, individually and collectively, withdrew from the uranium market and refused to sell quantities of uranium for the purpose of securing higher prices. These actions have had a serious impact upon the uranium market, causing a lack of supply and artificially high prices.
evidence of a cartel's existence from documents which were released in California in August 1976, and which were obtained from the files of an Australian uranium producer.\(^{188}\) The cartel included uranium producers from France, England, Canada, Australia, and South Africa. Rio-Tinto-Zinc (RTZ) Corporation was one of these producers, as well as its associated company, RTZ Services Limited.\(^{189}\) Both of these firms are located in Great Britain, but also include a U.S. unit, Rio Algom Corporation.\(^{190}\) The documents were put before the Richmond court by Westinghouse as evidence of the cartel's existence. They included minutes of the cartel's meetings and other documents dealing with the cartel's activities.\(^{191}\)

Unfortunately for Westinghouse, however, these documents were by no means complete. The documents had been obtained "surreptitiously" in Australia,\(^{192}\) and they were only indicative of the cartel's wide-ranging activities.\(^{193}\) Because of the need for addi-
tional and more conclusive evidence in the Richmond litigation which would improve Westinghouse's affirmative defense, Westinghouse wanted to obtain other information regarding the cartel's manipulation of uranium supplies; however, its attempts to obtain additional evidence in Australia, Canada, France and South Africa were not successful. These countries had enacted regulations which forbade the disclosure of any documents concerning the cartel. At this point, Westinghouse sought additional evidence of cartel activity from the English Corporation, Rio Tinto Zinc, and some of its officers.

B. Procedural Background: Difficulties in Obtaining Compliance with the Letters Rogatory

1. The Letters Rogatory

In order to obtain evidence for use in its defense, Westinghouse proceeded under the Federal Rules of Civil Procedure, Rule 28, which provides for the taking of a deposition in a foreign country "pursuant to a letter rogatory." Westinghouse applied to the
district court for letters rogatory to take testimony and to obtain documentary evidence. Their purpose in

... serving such testimony and documents was designed to confirm recently released documents and attendant publicity suggesting the existence and operation of an international conspiracy and cartel among uranium producers to raise uranium prices, to establish uniform terms of sale, to allocate markets, and to refuse to deal with Westinghouse and other resellers of uranium. The testimony and documents sought through their application will allow Westinghouse to prove not only that its freedom to purchase uranium at reasonable prices for resale to its customers was infringed by the cartel, but also that the cartel's impact spread to the United States and infected the price and terms of sale offered by U.S. uranium producers. Such evidence bears an important legal issue in this litigation. . . .'198

In its application to Judge Merhige, Westinghouse went on to clarify the precise reasons for which it sought the depositions and information from the English Corporation, Rio Tinto Zinc. Westinghouse said that, although the evidence and information to date amply demonstrated the existence and operation of the cartel, the documents did not constitute a complete set of the minutes of the many meetings held during a five-year period throughout the free world nor a complete record of the cartel's activities to accomplish its objectives. Therefore, its application sought to obtain complete testimonial and documentary proof regarding the "operation of the international cartel as well as the activities of its constituent 'participating groups' of uranium producers in order to provide conclusive proof of the effect of the cartel, both outside and inside the United States, on the price of uranium sales and on the supply of uranium."199 The electric utilities objected to the issuance of the letters rogatory,200 but Judge Merhige issued them, nevertheless, in October, 1976.201

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198 Application of Westinghouse Electric Corporation for issuance of letters rogatory, reprinted in Second Appeal, supra note 177, at 10-11.
199 Id.
200 See note 194 supra. The utility companies objected to issuing the letters rogatory because they felt "it was not a basic assumption of the contracts (with Westinghouse) that there was no cartel." Therefore, it was said, the information sought by the oral testimony and the documents was "irrelevant." The plaintiffs also protested the issuance of the letters because the Evidence Act of 1975 specifically prohibits pre-trial discovery of documents and England does not generally permit the utilization of pre-trial discovery procedures as used in the U.S." Second Appeal, supra note 177, at 12. This particular issue of whether the documents were for use at trial, or were merely pre-trial discovery was an issue on review by the English court. See notes 72 and 129 supra.
201 Judge Merhige specifically supplemented the letters rogatory on May 20, 1977, to
The letters rogatory were then sent to Great Britain, where orders were issued to have several named individuals examined and to have the RTZ Company produce certain documents for the civil proceedings in the Richmond litigation. The letters rogatory stated that in order to achieve justice between the parties in the Richmond litigation, the testimony and documents relating to the cartel activities of Rio Tinto Zinc Corporation were needed. They went on to request the English court to "cause by your proper and usual process (five named individuals associated with RTZ) to appear before any consul . . . of the United States . . . to be examined orally as a witness in the above entitled actions pending (in the Richmond Court)."

make it clear that they were concerned, not with pre-trial discovery, but "for evidence and documents for actual use at trial." Third Appeal, supra note 192, at 436.

First Appeal, supra note 186 at 2.

The text of the letters rogatory is in part:

The people of the United States of America to the High Court of Justice in England. Greeting: Whereas certain actions are pending in our District Court for the Eastern District of Virginia, Richmond Division in which the corporations [the electric utility companies] are plaintiffs and Westinghouse Corporation is defendant, and it has been suggested to us that justice cannot be done among the parties without testimony, which is intended to be given in evidence at the trial of the actions, of the following persons residing in your jurisdiction, being directors and/or employees and/or former directors and/or former employees of the Rio Tinto Zinc Corporation Limited of 6 St. James' Square, London or such other director or other person who has knowledge of the facts as to which evidence is desired as hereinafter stated, nor without the production of certain documents in the possession of the Rio Tinto Zinc Corporation Limited such testimony and such documents being related to the existence and terms of various agreements, arrangements or concerted practice between Rio Tinto Zinc Corporation Limited and the following entities as well as others whose identities are presently unknown: . . . RTZ Services, Rio Tinto Zinc Corporation (U.S.), Rio Algom Limited (Can.) . . . . (Other Australian and South African companies are also named). . . . (A)nd whereas the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court. We, therefore, request that in the interests of justice, you cause by your proper and usual process [five named individuals] or other person having knowledge of the facts to appear before any consul or vice consul or other consular officer to the United States of America at London, at a time and place to be determined, then and there to be examined orally as a witness in the above entitled actions pending in this court, under oath (or solemn affirmation) upon such oral questions as shall be propounded by . . . attorneys for the defendants, and upon such cross questions as shall be propounded by any . . . (attorney) representing the plaintiffs relating to the existence and terms of the above mentioned agreements or concerted practices. We further request that you cause the said Rio Tinto Corporation Limited by its proper officer to appear at the time and place determined for the above oral examination, then and there to produce documents . . . which appear to be in the possession, custody or power of the Rio Tinto Zinc Corporation Limited.

First Appeal, supra note 186, at 8.
The letters rogatory were given effect in England on October 28, 1976, in an *ex parte* action by Master Creightmore "ordering that the individuals named do attend and submit to be examined, and that the companies named do produce certain documents required for certain civil proceedings in America." The English subjects sought to have the letters rogatory orders set aside or, in the alternative, to have the court, in its discretion, refuse to comply with the American court's request or to assist Westinghouse in its efforts. The first appeal by RTZ was before Master Jacob, who held that the RTZ objections to complying with the letters rogatory were insufficient and, therefore, the orders of Master Creightmore were to be complied with by the Rio Tinto Zinc Company and its officials.

2. *The English Court of Appeals Decisions*

A discussion of the English Court opinions which were handed down after the letters were transmitted to England can be more easily understood by reference to the chronological table set out in the footnote. At the First Appeal, RTZ sought to have the

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205 Id. at 2.
206 Id. at 1.
207 Chronology of events:

October 21, 1976
Letters Rogatory were issued by Judge Merhige in Richmond

October 28, 1976
In England, Master Creightmore's *ex parte* order gave effect to the letters.

February 22, 1977
First Appeal by RTZ to set aside the order was dismissed.

May 10, 1977
Second Appeal resulted in affirmance of the decision in the First Appeal.

May 20, 1977
Judge Merhige supplemented the letters rogatory to make it clear that they were concerned with evidence to be used at trial.

May 26, 1977
Third Appeal affirmed the lower court decisions which gave effect to the letters rogatory, but allowed for claims of privilege. Some modification of the list of documents which could be discovered was made.

June 8, 1977
At the execution of the letters, the witnesses claimed the fifth amendment privilege against self-incrimination.

June 13, 1977
Judge Merhige traveled to London and ruled that the fifth amendment privilege was properly invoked. To obtain testimony immunity would have to be granted.

June 15, 1977
The Department of Justice sent a memorandum to Judge Merhige stating the need for the testimony of the RTZ witnesses.

June 27, 1977
The British government delivered an Aide Memoire protesting the "intervention" of the
order upholding the letters rogatory set aside because the request was an attempt to obtain pre-trial discovery which is prohibited under English law. After discussing several arguments, the court held:

(1) oral testimony from the RTZ officials should be given under the terms of the letters rogatory.

U.S. government in private civil litigation.

July 6, 1977

U.S. Department of Justice refuted the British contention that it was “intervening” in private litigation.

July 7, 1977

An appeal by Westinghouse to disallow the privilege claim by RTZ was denied by the English court, which upheld the Third Appeal decision.

July 12, 1977

Attorney General Bell’s letter supported the granting of immunity in order to obtain the testimony of the witnesses.

July 18, 1977

Immunity was granted by Judge Merhige under U.S.C. §6002.

July 21, 1977

RTZ’s counsel wrote to the Crown indicating the matters which may be stated in evidence, if the witnesses were re-examined after the immunity grant.

July 25, 1977

RTZ applied for a stay of the orders in the Third Appeal which would require oral testimony of the individual witnesses. The stay was refused by the court.

July 25, 1977

The RTZ executives again refused to testify and an appeal was taken to the House of Lords.

December 1, 1977

The House of Lords issued its opinion.

See note 130 supra concerning Article 23 of the Evidence Convention and the English desire to avoid honoring letters of request which seek pre-trial discovery. No doubt the situation is problematic, unless the requesting courts procedures are used as a deciding factor. Otherwise, no adequate definition of pre-trial discovery can serve every case. Thus, as in the Westinghouse litigation, it is largely a matter of court discretion to determine if the evidence sought is to be used at trial or whether it is only serving pre-trial discovery purposes. In the First Appeal, the judge was satisfied that Westinghouse wanted the oral testimony of the RTZ officials and the company's documentary evidence “for adducing evidence at trial and not for merely discovering facts which may not be used at trial.” First Appeal, supra note 186, at 15. Cf. the more liberal allowance for obtaining evidence under the Federal Rules at note 91 supra. See also the older English cases, prior to the Evidence Convention, which forbade allowing pre-trial discovery or “fishing expeditions” under the 1856 Foreign Tribunals Evidence Act: Radio Corp. of America v. Rauland Corp. 2 W.L.R. 281, aff'd 1 Q.B. 618 (1956) and American Express Warehousing v. Doe, 1 Lloyd's List L.R. 222 (C.A. 1967). The 1856 Act was superceded by the Evidence (Proceedings in Other Jurisdictions) Act of 1975 which gave effect to the Evidence Convention in the United Kingdom. See notes 219 and 221 infra.

The judge stated: “in a matter involving such world-wide importance as the establishment of a club or cartel to control the supply and prices of uranium, it is inconceivable that the managing director, chairman, or deputy chairman should not be aware of what [was] happening.” These people should have “material evidence which they can give in relation to the issue of relating to the existence and activities of the cartel.” First Appeal, supra note 186, at 18.
(2) documentary evidence relating to the cartel's meetings was not pre-trial discovery and would be used at trial and, therefore, it was obtainable under the letters;\textsuperscript{210}

(3) the RTZ claim of a privilege because of the penalty provisions of Article 85 of the Treaty of Rome was not sufficiently imminent to allow this privilege to defeat the letters\textsuperscript{211} and "the claim to privilege on the ground of self-incrimination [did] not apply" to the corporation;\textsuperscript{212} and,

(4) the fifth amendment claim of privilege by the individual witnesses was a "question to question" claim and could not be invoked prior to the asking of the questions pursuant to the letters rogatory.\textsuperscript{213} In short, the letters were to be complied with according to the privilege guidelines indicated.

The First Appeal framed the three major issues of the case in this manner: whether the letters were to be given effect under English law; whether the RTZ company could invoke a privilege against turning over any documents because it would be subject to a penalty under the Treaty of Rome and whether the individual witnesses (officers of the RTZ company) could invoke the fifth amendment privilege of the United States Constitution against self-incrimination.\textsuperscript{214}

The decision in the Second Appeal, concerning the initial order giving effect to the letters rogatory, was handed down on May 10, 1977.\textsuperscript{215} The Second Appeal affirmed the decision of the court in the First Appeal.\textsuperscript{216} Afterwards, RTZ filed yet another appeal to

\textsuperscript{210} Id. at 16.
\textsuperscript{211} See notes 227-234 infra.
\textsuperscript{212} First Appeal, supra note 186, at 24.
\textsuperscript{213} Id. at 25. The testimony could in effect be taken but the U.S. court would have to rule on the validity of any fifth amendment privilege. Claims of privilege had to be decided on a question by question basis. Of course, if upheld, no evidence by way of oral testimony could be obtained. See note 155 supra which indicates that the Evidence Convention provides for the recognition of such privileges. See also note 219 infra for the English Evidence Act provisions which control this procedure.
\textsuperscript{214} First Appeal, supra note 186.
\textsuperscript{215} See note 177 supra.
\textsuperscript{216} As it was, Justice MacKenna in the Second Appeal ruled for Westinghouse on every point raised by the Rio Tinto counsel. But the judge's ruling affirming the decisions below and requiring compliance with the letters rogatory was diminished by his statement that he would have reversed judgment if he had more time, and that he had dealt inadequately with the obligations of Rio Tinto's counsel. Part of the time constraint which existed was due to the August deadline which Judge Merhige had set for the Richmond litigation to reconvene after the taking of depositions under the letters rogatory.

The points on which Justice MacKenna in the Second Appeal had ruled in favor of Westinghouse were:

(1) that Westinghouse had established its reasons for obtaining the letters rogatory be-
avoid testifying or producing documents for use in the Richmond litigation.

The Third Appeal was decided May 26, 1977.\(^{217}\) The court primarily considered the question of allowing Westinghouse the opportunity to obtain evidence which might be for pre-trial discovery or in the nature of a "fishing expedition."\(^{218}\) The court was faced with a case of first impression, because the controlling legislation, the Evidence (Proceedings in Other Jurisdictions) Act of 1975,\(^{219}\) had not been interpreted by a higher court, at least as

fore the Richmond court, and that those persons named in the letters would have "evidence to give about the restrictive activities of the cartel;"

(2) that although there might be some question about the use of the testimony under the letters rogatory, "Westinghouse did not ask Judge Merhige to request an examination for the obtaining of indirectly relevant evidence." The letters sought to obtain "directly relevant" evidence which was to be used at trial and Westinghouse could not and would not use the examinations for obtaining indirect evidence,

(3) that based on item 2, the English courts will not be assisting the Richmond court in pre-trial discovery,

(4) a witness who was compelled to answer in the letters rogatory examination would not be incriminating himself because his testimony could not be used to his jeopardy in England. "The witness's involvement in the cartel would not expose him to any liability in our courts, civil or criminal." Furthermore, no new privilege should be invented to protect the Corporation, which in either England or the U.S. had no privilege against self-incrimination,

(5) that a privilege against self-incrimination does not apply to statements by employees who incriminate the corporation, and

(6) that the companies should produce the documents pursuant to the letters rogatory and, therefore, the company's present or former directors will be required also to answer questions in relation to such documents.

\(^{217}\) See note 192 supra. This case is briefly reviewed in 13 Texas Int'l L.J. 370 (1978).

\(^{218}\) See note 208 supra regarding pre-trial discovery.

\(^{219}\) Evidence (Proceedings in Other Jurisdictions) Act 1975, the Public General Acts and Synod Measures, Vol. 2, C. 34, 23 & 24 Elizabeth 2, 1975. The Act provides that in Civil Proceedings (1b) evidence may be obtained through the English courts, and that an order under this law ". . . shall not require a person . . . to produce any documents other than particular documents specified in the order. . . ." (2,4,b). The Act also provides, in pertinent part, that:

§3(1). A person shall not be compelled . . . to give any evidence which he could not be compelled to give—
(a) in civil proceedings . . . in the United Kingdom;
(b) Subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercise jurisdiction.

§3(2). 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 . . . or,
(b) conceded by the applicant for the order;
and where such a claim made by any person is not supported or conceded . . . he may . . . 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 upholds the claim.

\(^{219}\) See note 213 supra and note 236 infra. See also the House of Lords opinion, note 245 infra, at 3, which gave effect to the letters of request, but which continued to object to the pre-trial discovery element of the situation.
far as the provisions relevant to this case. At the outset, the judges stated "there are no regulations in England forbidding access to (the Rio Tinto) documents" and that "disclosure of them depends on our ordinary rules of law." The first principle enunciated by the Court of Appeals was that English law did not require them to "accede to anything in the nature of a roving enquiry in which a party sought to 'fish-out' something." It was thought that pre-trial discovery was of this nature. But the court held that "so long as the evidence is required for use in civil proceedings" the request of the Richmond court would be granted, "provided that the evidence is relevant to the issues in dispute in the foreign court." The Court of Appeals relied upon Judge Merhige's statement that the evidence would be used in the American trial, and upheld the order giving effect to the letters of request with modifications.

Third Appeal, supra note 192, at 436. Also note that Judge Merhige had by this time supplemented the request for the letters rogatory by stating that the information (evidence and documents) obtained would be "not merely for pre-trial procedure" but for "actual use at the trial." Id. at 436.

Id. at 436. See Radio Corporation, note 208 supra. In the First Appeal Master Jacob had already ruled that the Westinghouse request did not violate English law, and the evidence was, in fact, to be used at trial. "In the present case there are a whole series of factors which, taken together or even separately, demonstrate that the oral evidence which is required by Westinghouse from the witnesses who are named is intended to be adduced as evidence at the trial for trial purposes. This was made clear on the application for the letters rogatory themselves. . . . This was made clear in unmistakable and in the clearest possible terms by Mr. Bingham (counsel for Westinghouse) before me when he said that as far as necessary he would undertake to adduce the totality of the evidence taken from the witnesses in England at the trial before the American courts. . . . What more can the applicants for the order do? [T]hey have demonstrated in some detail how it is they propose to use this evidence, in the sense of adducing it at the trial." First Appeal, supra note 186, at 16.

According to English law "evidence" means evidence to be adduced at trial and not for discovery by way of a pre-trial process. Evidence (Proceedings in Other Jurisdictions) Act 1975 Section 1. Thus, the broad pre-trial discovery procedure of FED. R. CIV. P. 30 and 32, and its use at trial in whole or in part, conflict to some extent with the English requirement of use at trial. Id. See notes 208 and 219 supra.

Third Appeal, supra note 192 at 437. The Court of Appeal referred to American Express Warehousing Ltd. v. Doe, 1 Lloyd's List L.R. 222 (1967) as valid precedent for complying with the letters rogatory. In American Express the English court upheld the request of an American court for evidence to be taken from some English brokers. The English decision relied upon the statement by the American judge that such evidence would, at least, be considered at trial and a final ruling given on its admissibility at that time.

See notes 220 and 221 supra.

The court did modify the letter of request compliance order so as to allow discovery of only those documents which were specified with such distinctiveness as would be sufficient for a subpoena duces tecum. However, the documents discovered did not have to be ancillary to oral testimony. "The description (of the documents) should be sufficiently specific to enable the person to put his hand on the documents or the file without himself having to
The Court of Appeal next turned to the problem of self-incrimination and the existence of any privilege with regard to the evidence requested in the letters rogatory. English law, as a matter of precedent, did not require a person to answer if such reply will make him liable for "punishment, penalty, or forfeiture." The English Civil Evidence Act of 1968 abolished the privilege in regard to a forfeiture. But the 1968 Act expressly retained the privilege in regard to a penalty. "The right of a person in any legal proceeding (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 offence or for the recovery of a penalty . . . shall apply only as regards criminal offenses under the law of any part of the United Kingdom and penalties provided for by such law." In order to establish the benefit of this privilege and to avoid complying with the letters rogatory, the RTZ Company relied on the penalty provisions of the Treaty of Rome. Under English law prior to this Treaty, none of the RTZ witnesses "would be liable to a penalty." But since the Treaty of Rome was adopted by Great Britain in 1972, all of its provisions are part of the British law. Article 85 of the Treaty, according to the Court of Appeal, "is wide enough to prohibit any cartel or association of producers by which they agree to keep up prices or to limit competition in a way which affects the Common Market." Thus, if

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225 Id. "It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered would tend to subject him to any punishment, penalty or forfeiture . . . 'no one is bound to incriminate himself.'" Lord Justice Bowen (1891) quoted in Comet Products v. Hawkex Plastics, 2 Q.B. 773 (1971).


228 Third Appeal, supra note 192, at 439-40.


230 The Treaty states that:

all agreements between undertakings . . . and concerted practices which affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical developments, or investments . . . are prohibited. Article 85, §1, Treaty of Rome, supra note 227.
Westinghouse was correct in its allegations.\textsuperscript{231} Rio Tinto Zinc Corporation would be liable for a breach of Article 85 of the Treaty of Rome.\textsuperscript{232} For such a breach the European Commission\textsuperscript{233} could impose fines on undertakings (not individuals) which intentionally violated Article 85. Such fines have a maximum limit of 10 percent of the preceding business year's turnover.\textsuperscript{234} Therefore, it was clear that RTZ "[might] be exposed to a very large fine by the European Commission," and such fine was, indeed, a penalty.\textsuperscript{235} The court held that, because of this potential penalty, the RTZ company would be entitled to a claim of privilege during the examination. "If the company does claim privilege, the examiner must give affect to it."\textsuperscript{236} RTZ would have an absolute privilege, in this regard,

\textsuperscript{231} The allegations could include, at a minimum, that a world-wide cartel did exist which violated some aspects of Article 85 within the Common Market. See note 234, infra. See generally R. Folsom, Corporate Competition Law in the European Communities (1978); W. Alexander, The EEC Rules of Competition (1973); C. Oberdorfer, Common Market Cartel Law (2nd Ed. 1971); and A. Campbell, Restrictive Trading Agreements in the Common Market (1964), especially the forward by Lord Diplock, one of the law-lords who decided the Westinghouse case. Lord Diplock states: "it is no exaggeration to say that no one, whether inside or outside the common market, can prudently enter into business relations with a competitor . . . without informing himself about the provisions of this new Code." For additional consideration of Art. 85 and 86 of the European Economic Community Treaty, see Steiner & Vagts, supra note 3, at 1342-48. The same text discusses the ambivalence of the Common Market when it comes to allowing some agreements among competing firms at pp. 1414-19. See also Korah, Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market, 53 Notre Dame Law. 768 (1978).

\textsuperscript{232} Third Appeal, supra note 192 at 440.

\textsuperscript{233} The European Commission is the executive branch of the European Economic Community (EEC). It is composed of 13 members who are appointed on the basis of their competence and independence by mutual agreement of the governments of the Member States. The four largest Member States—France, Germany, Italy, and the United Kingdom—have two commissioners each, and the other Member States have one each. A. Parry & S. Hardy, EEC Law (1973).

\textsuperscript{234} Third Appeal, supra note 192, at 440. The primary basis for breach of Article 85 by RTZ was its alleged agreements with a French company to restrict competition and fix selling prices. This activity "would affect the trade between member states." Id.

\textsuperscript{235} Id.

\textsuperscript{236} Id. Section 3 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 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." See note 219 supra. It has been suggested that foreign courts are reluctant to allow the discovery of evidence beyond that material to be used for trial, because of U.S. efforts to apply its antitrust laws and Maritime Commission regulations extraterritorially. This problem of extension of U.S. jurisdiction could be settled by use of the comity principle, but according to a recent article, U.S. courts have been deficient in showing "respect for the reserved domain of other states. . . ." Maechling, Uncle Sam's Long Arm, 63 A.B.A.J. 372, 373 (1977). See note 294, infra. For the historical background to the English reluctance to countenance "fishing expeditions", see the English cases arising prior to the 1975 Evidence Act and the
unless the European Commission stipulated that it would not take any action. In such case the privilege would be lost.\textsuperscript{237}

Next, the individual RTZ officials relied upon the fifth amendment privilege against self-incrimination provided in the United States Constitution in order to avoid complying with the letters rogatory.\textsuperscript{238} The English Evidence Act of 1975 states that “a person shall not be compelled to give evidence which he could not be compelled to give in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.”\textsuperscript{239} Since the RTZ witnesses would be entitled to the privilege against self-incrimination in the United States, they could not be compelled to testify under the letters rogatory.\textsuperscript{240} Thus, the court gave effect to the recent English law which had been enacted in order to adopt the Evidence Convention in England. The court said that any refusal to testify, based upon either the threat of a penalty from the European Commission or the fifth amendment, could be judicially reviewed by a court. In the former case, the English court would review such refusal. In the latter, “the examiner will ... take down the evidence, seal it up and send it across to the United States; and then the United States court will rule whether the claim is good or not.”\textsuperscript{241}

In summary, the Court of Appeals held that both the RTZ Company and its officials were required to provide the evidence requested by the letters rogatory. This requirement was subject to the defense of privilege, however. The RTZ Company successfully claimed that it was privileged under the British Civil Evidence Act of 1968 because of possible subjection to penalty under the Treaty of Rome. The individual officials were held privileged under the English Evidence (Proceedings in Other Jurisdictions)


\textsuperscript{237} Third Appeal, supra note 192, at 441.

\textsuperscript{238} U.S. Const. amend. V. “No person ... shall be compelled in any criminal case to be a witness against himself. ...”

\textsuperscript{239} Third Appeal, supra note 192, at 441. See note 219 supra.

\textsuperscript{240} Id.

\textsuperscript{241} Id. But see note 219 supra, which says the evidence would not be transmitted to the requesting court, until it ruled on the privilege issues.
Act of 1975 because they would have been accorded the fifth amendment privilege in United States courts. This decision comports with the requirements of the Evidence Convention, which permits the exercise of privileges under the law of the state of execution and the law of the requesting state.

3. Procedural Matters and Government Differences

After the Court of Appeals decision in the Third Appeal was handed down, an attempt was made to take the testimony of the witnesses in London on June 8 and 10, 1977. However, the witnesses claimed privilege and refused to answer or to supply any documents (except six) under both the fifth amendment of the United States Constitution and the English Civil Evidence Act. On June 13, Judge Merhige went to London to review the question of fifth amendment privilege. He heard the RTZ witnesses and all of them claimed the fifth amendment privilege. On June 14, Judge Merhige ruled that “the privilege was well taken and that the witnesses need answer no questions except to give their names and addresses.”

On June 15, 1977, a “Memorandum in Support of Request to Require Testimony” was sent to Judge Merhige by the Antitrust Division of the United States Department of Justice. This memorandum expressed the necessity of obtaining, in the public interest, the testimony of those named in the letters rogatory for purposes of aiding a Federal Grand Jury investigation. The Department of Justice was prepared to grant immunity to the RTZ witnesses and, in fact, by July 18, 1977, it made application to Judge Merhige to issue a grant of immunity in order to compel the testimony of the RTZ witnesses. Prior to Judge Merhige's

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242 The proceedings were held at the U.S. Embassy in London.
243 See text at notes 241-42 supra.
246 Department of Justice Memorandum, W.B. Cummings, U.S. Attorney for the Eastern District of Virginia and several attorneys from the Antitrust Division, June 15, 1977, Memorandum in Support of Request to Require Testimony [Hereinafter cited as Dep't of Justice Memorandum].
247 Id. at 2. See note 186 supra. The Dep't of Justice was investigating possible violations of U.S. antitrust law, and a grand jury had been impanelled in March, 1976. See note 67 supra.
248 House of Lords, supra note 245, at 6. A grant of immunity by the U.S. in response to the English witnesses invocation of the fifth amendment is appropriate under Article 11 of the Evidence Convention. See notes and text at notes 153-55 supra. The actual basis for a
order granting immunity on July 18, 1977, there was a flurry of diplomatic activity between the British government and the State Department.\textsuperscript{249} Then, on July 12, 1977, the Attorney General

grant of immunity and the appropriate procedure is determined by 18 U.S.C. §§6002-6003 (1976). These sections provide in pertinent part:

\textbf{§ 6002} Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to (1) A court... of the United States... and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order... may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

\textbf{§ 6003} Court and Grand Jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States.... the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States Attorney General for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such an order to become effective as provided in section 6002 of this part.

(b) A United States Attorney may, with the approval of the Attorney General.... request an order under subsection (a) of this section when in his judgment (1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

"Although immunity grants pursuant to 18 U.S.C. Sections 6002-6003 have typically been issued to obtain Grand Jury or trial testimony which the Government seeks directly, there is no prohibition against obtaining such orders in a civil case, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), nor is there any requirement that the Government be a party to the proceeding." Dep't of Justice Memorandum, supra note 246, at 3. Many federal court decisions have also supported the notion that the Government has an inherent right and power to grant immunity regardless of statute. See e.g., United States v. Carter, 454 F.2d 426, (4th Cir. 1972); United States v. Librack, 536 F.2d 1228 (8th Cir. 1976); United States v. De Sena, 490 F.2d 692 (2nd Cir. 1973); United States v. Levy, 153 F.2d 995 (3d Cir. 1946); and In re Kelly, 350 F. Supp. 1198 (E.D. Ark. 1972).

\textsuperscript{249} On June 27, 1977, the British Government delivered an Aide Memoire to the State Department protesting the alleged "intervention" of the Department of Justice in the letters rogatory proceedings of the Richmond litigation. The Aide Memoire is a classified document and was unavailable for study. On July 6, 1977, the Department of Justice responded to the Aide Memoire. In part, the reply memorandum denied the British contention that the Department's grant of immunity undermined the Hague Convention on the Taking of Evidence Abroad because immunity was granted to obtain evidence, not in a civil matter as required by the convention, but to improve the prospects of the grand jury investigation (a criminal proceeding). The Department of Justice's reply also states that the
of the United States wrote to the United States Attorney for the Eastern District of Virginia concurring in the orders to compel testimony. The Attorney General felt that the exceptional circumstances of the case required the Department of Justice to support the compulsion of testimony by granting immunity. It was said that the case was one of public interest, the deponents were outside the personal jurisdiction of the United States, they were unlikely to enter the United States and there is no other arrangement for obtaining their testimony which "may well be indispensable to the work of the grand jury." Finally, on July 18, Judge Merhige granted immunity to the witnesses pursuant to the Department of Justice’s request under 18 U.S.C. Section 6002. At the hearing for the grant of immunity, counsel for the RTZ witnesses reiterated that there was still "an outstanding right of appeal to the House of Lords in relation to the whole basis of the letters rogatory." Judge Merhige was uncertain of the response of the RTZ witnesses, but felt that if they continued to refuse to testify "application would have to be made to the British Court seeking sanctions to compel testimony." Immediately after Judge Merhige’s grant of immunity, the RTZ witnesses wrote to the British Foreign Office suggesting that "the matters of primary concern are the affect of relations with foreign governments, because there are no less than four foreign governments involved." At this point, the RTZ attorneys were seeking

letters rogatory were upheld in all three appeals before the English courts. See text at notes 219-240, supra. The reply said, "a full review of the issues was made at each level of appeal, and at each level these summonses ordering the RTZ deponents to appear pursuant to the letters rogatory were upheld." The memorandum also clarifies the Department of Justice’s role in granting immunity: which was not intervention but compliance with applicable U.S. law. Furthermore, the three British courts recognized the role to be played by the Justice Department should the fifth amendment be invoked. Nor was it a violation of the Hague Convention which expressly reserves to the authorities of the requesting state the resolution of privilege claims based on the law of the representing state. See note 88 supra. Finally, the Dep’t of Justice Memorandum stated that the existence of grand jury proceedings had no bearing upon the letters rogatory proceedings. "The English law is that if evidence is obtained in one action, there is no reason why it should not be used in another." First Appeal, supra note 186, at 26. See note 268 infra.

251 Id. The grand jury had been impanelled by the Justice Dep’t, note 247 supra.
253 Id. at 92. Compulsion is provided for in the Evidence Convention, see text at notes 148-51 supra.
254 RTZ, Application for Stay of Execution of Orders, Court of Appeal, July 25, 1977, at 14. [Hereinafter cited as Application for Stay]. The quoted passage was testimony by Mr. Gibson who appeared before the Court of Appeal on behalf of the Attorney General of the United Kingdom.
a stay in the execution of the orders requiring testimony, which had been upheld in the Third Appeal on May 26, 1977. In arguments before the same judges who had previously upheld the orders, Mr. Neill, counsel for the individual RTZ witnesses, stressed that there was no longer a privilege available under the fifth amendment because of the immunity grant and that the taking of the depositions was to proceed subject to the application currently before the Court. Raising four arguments, Mr. Neill asked the judge "to look at the matter afresh," because a "new situation had arisen." First, Mr. Neill sought to appeal to the House of Lords on the matter of the Court's order in the Third Appeal requiring compliance with the letters rogatory. Second, he sought to raise a new situation; namely, what he called the intervention of the United States Department of Justice. He said that based on the Attorney General's letter, the letters rogatory procedure was being used for a different purpose than what was argued before the court in the Third Appeal on May 26, 1977. However, Mr. Neill had a difficult time expressing any substantial change in circumstances between the situation in May and the situation in July following the grant of immunity. His third argument for a stay was that the House of Lords should rule on these matters

255 See text at notes 220-241 supra.
256 Application for Stay, supra note 254, at 4.
257 Id. at 5.
258 Id.
259 Id. To this remark that Mr. Neill sought to challenge the basic notion of the carrying out of the letters rogatory, which had been upheld in three appeals, including one before the current justices, Lord Justice Roskill replied: "You want to say that everybody was wrong, the Master, Mr. Justice MacKenna, and we?" Mr. Neill replied, "Yes." Id. at 5. Mr. Neill then went on to express his arguments for attacking the letters rogatory themselves, because the RTZ witnesses had not anticipated, or at least felt it unlikely, that the grant of immunity would be issued thus effectively destroying what had heretofore been the privilege against self-incrimination.
260 Id. at 7. Mr. Neill read Attorney General Bell's letter to the judges. See text at note 254 for the main items upon which Mr. Bell felt that granting immunity was justified in this case.
261 At the earlier hearing on May 26, 1977, the Court of Appeals upheld the order requiring testimony under the letters rogatory because such testimony was to be used at the trial in Richmond.
262 Lord Justice Roskill said:
Is it accurate, with respect, to talk of the letters rogatory being used for different purposes. All that has happened is that one source of objection to giving evidence has been withdrawn. The purpose of the letters rogatory was to inform Judge Merhige's Court in Virginia. The fact that the Department of Justice may be moved to grant immunity, because of what one might call wider public policy and consideration to the United States, cannot affect the purpose of the letters rogatory, surely?

Application for Stay, supra note 254, at 8.
before the examination of the witnesses took place, otherwise any privilege which the witnesses might have had would be "rendered nugatory." Finally, Mr. Neill brought up the question of the British Government's position in the matter. He referred to the Aide Memoire which stressed the so-called intervention of the Department of Justice in the case when it granted immunity under 18 U.S.C. Section 6002. Mr. Neill then sought, on the basis of these arguments, to obtain a short stay in the examination of the RTZ witnesses until the House of Lords could hear the case in October, 1977. At the hearing Mr. Gibson appeared on behalf of the Attorney General of the United Kingdom. He argued in favor of the grant of a stay based on the United States Government's use of the evidence for the purposes of Grand Jury proceedings. He attempted to make the point that the United States had violated the Evidence Convention (or that there was some question, at any rate, concerning its compliance with the Convention). Therefore, he concluded, the whole matter should be pursued via diplomatic channels to its ultimate resolution. He said that the British

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263 Id. at 9. The RTZ counsel apparently feared that the evidence once obtained would be sent to the United States with the U.S. Court ruling on its use at trial. See note 241 supra.
264 See note 249 supra.
265 See note 248 supra.
266 Application for Stay, supra note 254, at 10.
267 Id. at 11. But see notes 249 and 262 supra.
268 The main problem concerning the Hague Convention involves the use of obtained evidence in a criminal proceeding. The British Attorney General argued that evidence obtained can only be used in civil or commercial matters. And that it would undermine the purpose of the convention to allow the United States to use the evidence at the Grand Jury hearings. See note 249 supra. The Department of Justice's response to this argument was:

The nature of the British protest indicates that the Foreign Office is reading a 'specialty' clause into the Hague Convention, necessarily limiting the use of evidence only to the specific purpose for which it was obtained. But unlike certain other treaties between the United States and Her Majesty's Government, the Hague Convention contains no such clause. Such a provision was intentionally omitted because few countries have the means or the willingness to guarantee that evidence of public record obtained through standardized procedures would never be used in another proceeding. Because the Convention envisions requests from judicial authorities at all levels, the task of controlling the later dissemination of evidence obtained on the public record in one proceeding would simply be unmanageable.

Dep't of Justice Memorandum, supra note 181, at 13. The memorandum also noted that the "procedural character of the matter" was not altered by the immunity grant to advance the civil case. Id. at 14. Furthermore, the Convention's purpose was to improve procedures for taking evidence in foreign jurisdictions, seeking to accommodate, as Lord Roskill noted in the Court of Appeal, "the different methods which (the Parties) use for this purpose."

269 Application for Stay, supra note 254 at 12. Diplomatic resolution of difficulties is provided for in the Evidence Convention.
Government wanted to consult with the American Government "with a view to trying to persuade the American Government that its action in applying for (the letters rogatory order) was, in fact, wrong; that they should not have applied for the order at all and that an application should be made to withdraw the order." This was the highest level upon which the English Attorney General's representative could put the argument to the Court. The overall preference of the British Government was to have the House of Lords hear the matter and render a decision based on these new arguments.

The judges were still unconvinced that these recent arguments actually affected the underlying validity of the letters rogatory in this case. To clarify the situation, Mr. Gibson brought to their attention the letter from RTZ counsel, Mr. Neill, to the Crown, which indicated that certain matters were likely to be given as oral evidence if the RTZ witnesses were re-examined. Commenting on this letter, Mr. Gibson said, "There is a possibility, I put it no higher, that questions of public interest privilege will arise on that evidence." The judge then inquired whether it was, indeed, contrary to the public interest for the evidence to be given. Mr. Gibson responded that there could arise a privilege in that regard. The judges concluded that "[e]ven though it is between other parties, the Crown could claim a privilege with regard to documents." It must be emphasized here that the public interest privilege referred to by the judges was that of the United Kingdom, not the parties to the litigation. As Mr. Gibson pointed out, the "matters of primary concern were the effect of relations with foreign governments, because there are no less than four foreign governments involved. Thus, Mr. Gibson was
successful in convincing the judges that, on grounds of possible public interest privilege, there might be just cause for hearing the case anew.

Counsel for Westinghouse reiterated that all of the English courts knew that the Department of Justice antitrust investigation was being pursued and that all three lower courts had upheld the letters rogatory. All of the arguments heard in the previous decision were reviewed by the Westinghouse counsel. It was further pointed out that the Evidence (Proceedings in other Jurisdictions) Act 1975 provided a means by which the public interest and concerns about foreign governments could be reviewed.\(^{277}\) Paragraph 4147 of the 1975 Evidence Act states that "a person shall not be compelled . . . 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 (British) to the effect that it would be so prejudicial for that person to do so, shall be conclusive evidence of that fact."\(^{278}\) Because this procedure exists, there should be no reason to compel an answer, provided the Secretary of State (British) agrees that the witnesses' testimony will adversely affect the security of the United Kingdom. Thus, there is no need to further delay the depositions from the RTZ witnesses because of any "nebulous grounds" which are being raised at this late time.\(^{279}\) Furthermore, these "new reasons" for denying the effect of the letters rogatory because, in the words of the Aide Memoire, "of the Department of Justice's intervention" are groundless. First of all, "it is not new, because the courts have known about the Grand Jury all along," and second, "it is not a reason for requiring the evidence, it is the reason which has led the United States authorities to grant the immunity."\(^{280}\)

After considering these arguments, the Court of Appeal refused to grant a stay and said "the examination must proceed this afternoon" (July 25, 1977). The judges felt that "if an appeal was to be taken to the House of Lords it ought to have been taken long

French company allegedly involved in the cartel is a quasi-governmental body. "South Africa already had stringent laws which strictly limit what can be divulged about the country's uranium operations." \(\)\(^{277}\) Id.

Application for Stay, supra note 244, at 20. Mr. Bingham, counsel for Westinghouse, also referred to the intervention of the British Attorney General as unnecessary and uncalled for on the basis of the 1975 Act.

\(^{278}\) Id. Cf. the Evidence Convention provision of a similar nature discussed in the text at notes 157-58, supra.

\(^{279}\) Id. at 21.

\(^{280}\) Id. at 22. See notes 238, 239 supra, for further elaboration of these points.
ago." Later that afternoon, the Rio Rinto Zinc executives refused to testify and applied to the House of Lords for a stay, pending the full hearing of their appeal. There remained no more barriers to requiring the oral testimony other than an adverse decision by the House of Lords. This, however, was no longer a simple letters rogatory procedure; the stature of the case had changed. The United Kingdom's Attorney General had intervened in the case; matters of public interest and relations with four foreign governments had become issues. Furthermore, the RTZ Corporation was the last element available to Westinghouse, at least in this action, for uncovering the details and arrangements of the cartel's activities against them, since it was the one major company which had been alleged to belong to the cartel but which had not been protected by a government decree.

C. The House of Lords Decision

The House of Lords rendered its decision on December 1, 1977. Lord Wilberforce wrote the lead opinion for the five justices, all of whom agreed in the result. The House of Lords agreed with the opinion of the Court of Appeal that the RTZ Corporation could claim a privilege under the Civil Evidence Act of 1968 because of the penalty which might be imposed under the Treaty of Rome. The Lords also upheld the Court of Appeal ruling that the individual witnesses could claim a privilege against self-incrimination under the fifth amendment. These holdings

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virtually mirrored the Court of Appeal decision. Also upheld was the original order of Master Creightmore of October 28, 1976, which, in fact, had given effect to the letters rogatory. 288

Despite the foregoing holdings, however, the House of Lords went on to hold that the letters rogatory should not be given effect regarding the witnesses. The House of Lords first reviewed several issues, such as: the process by which the RTZ witnesses were first ordered to testify; how they next claimed the self-incrimination privilege of the fifth amendment; Judge Merhige's upholding of their claim; the letters concerning immunity from the Justice Department's application to Judge Merhige to grant immunity; and, finally, Judge Merhige's order compelling the English subjects to testify. Following their review, the House of Lords reversed the rulings of the Courts of Appeal, relying on two arguments: (1) that Judge Merhige's ruling recognizing the fifth amendment privilege was a "considered ruling in law" which should be reviewed very carefully when "action is said to negative that ruling"; and (2) that the testimony being sought was really to be used, not in the Richmond litigation, which was a civil proceeding, but in the Justice Department's Grand Jury investigation, which "may lead to criminal proceedings." 289

These two arguments do not lead inevitably to the Lords' holding. Considering the first argument, Lord Wilberforce stated that Judge Merhige's ruling on the fifth amendment privilege "was given by the competent judicial authority that the evidence sought was evidence which the witnesses could not be compelled to give in civil proceedings in the country in which the requesting court exercises jurisdiction." 290 It was said of the ruling that it was "necessary to look very carefully at action which is said to negative that ruling." 291 Thus far, the House of Lords opinion appeared consistent with the Evidence Convention regarding assistance on letters rogatory.

The "action which is said to negative" Judge Merhige's fifth amendment ruling was the subject of Lord Wilberforce's second argument. It should be recalled that what prompted Judge Merhige's order to compel testimony, despite his recognition of the fifth amendment privilege, was the grant of immunity he

288 House of Lords, supra note 245 at 5.
289 Id. See text at notes 246-252 detailing the immunity grant pursuant to 18 U.S.C. §§ 6002, 6003 (1976).
290 House of Lords, supra note 245, at 8 (Emphasis added).
291 Id. at 5.
made at the request of the Justice Department. Apparently the
House of Lords believed that the Justice Department involvement
on the immunity issue so changed the "character and purpose" of
the Judge's order to compel testimony that the letter of request
could not fall within the provisions of the Evidence Convention.
The Lords believed that the United States Government's letters
of June 15 (the memorandum from the Antitrust Division) and of
July 12 (the Attorney General's letter) made it clear that "[t]he
evidence to obtain which the order was made and the immunity
granted was on the face of these documents evidence required for
the Grand Jury investigation set up by the United States Depart-
ment of Justice, Antitrust Division." The position of the House
of Lords, that the Justice Department's involvement in the case
created a "new situation" changing the nature of the letters of re-
quest, had been rejected earlier by the Court of Appeals.

Since the Grand Jury investigation could lead to criminal pro-
cceedings, it was held, the letters rogatory should not be given ef-
fect, because the Evidence (Proceedings in Other Jurisdictions)
Act of 1975 (which implemented the Evidence Convention) limited
such procedures to civil cases. Furthermore, the House of Lords
held, even if this case fell within the provisions allowing restricted
use of letters rogatory in criminal matters, the letters must be
pursuant to proceedings which had been instituted. None had
been instituted at that time. Thus, the opinion of the House of
Lords posed a seemingly inescapable dilemma for Westinghouse:
either the letters rogatory were issued to obtain evidence for a
criminal proceeding, in which case they would not have effect
because they were not for a civil proceeding, or, if they fell within

297 See note 247 supra.
298 See text at notes 250-51 supra.
299 House of Lords, supra note 235, at 8.
300 See text at notes 259-280 supra and the contrasting arguments of Mr. Neill, the RTZ
counsel, and Mr. Gibson, the Westinghouse counsel.
301 House of Lords, supra note 235, at 8. The pertinent provisions of the Evidence (Pro-
ceeding in Other Jurisdictions) Act of 1975, supra note 219, are as follows:

§ 1(b) that the evidence to which the application relates is to be obtained for the
purposes of civil proceedings which either have been instituted before
the requesting court or whose institution before that court is contem-
plated . . .

§ 5(1) The provisions of sections 1 to 3 above shall have effect in relation to the
obtaining of evidence for the purposes of criminal proceedings as they
have effect in relation to the obtaining of evidence for the purposes of civil
proceedings except that—
(b) paragraph (b) of that section shall apply only to proceedings which
have been instituted . . .
the limited provision for criminal cases, no such proceeding had begun.

The important point here, aside from the curious reasoning of the House of Lords, is that the Lords *assumed* that the Justice Department involvement in the case transformed it from a civil to a criminal case, thereby precluding effective use of the letters. Interestingly, Lord Wilberforce did not review the Court of Appeal's previous refusal to grant a stay in the proceedings; that court had expressly rejected the very arguments concerning United States government involvement which the House of Lords ultimately accepted.297

The motive behind the House of Lord's first two arguments becomes clearer upon a review of their concluding argument. Lord Wilberforce discussed the "infringement of United Kingdom sovereignty" which occurred because of the efforts of the United States "to extend the Grand Jury investigation extra-territorially into the activities of the RTZ Companies."298 The opinion stated

> [t]hat the Grand Jury [had] issued a subpoena to Westinghouse requiring that company to produce to the Grand Jury documents and testimony obtained in discovery in the Virginia Proceedings. Therefore evidence given in pursuance of the letters rogatory will be available to the United States Government for use against a United Kingdom company and the United Kingdom nationals in relation to activities occurring outside United States territory in antitrust proceedings of a penal character.299

Although the evidence taken from the RTZ Companies and from the witnesses could ultimately be used in a criminal proceeding, it does not necessarily follow that the United States government

297 See text at notes 259-280 supra.

298 House of Lords, *supra* note 245, at 8. The British papers editorialized: "the expansionary ambitions of U.S. agencies have been checked. It is to be hoped that this approach will be more effective than others in securing that "comity" between the interests of different governments which has been endangered by the U.S. approach. . . . The findings of the House of Lords may have a more direct and general effect on the attitude of the U.S. courts to matters of sovereignty: Those who work in a tradition of common law tend to respect one another's decisions." Financial Times, Dec. 2, 1977, at 22.

The editorial also expressed repugnance at the idea that the U.S. courts and Federal regulatory agencies tried to "enforce their authority on foreign nationals transacting business outside the U.S., if their business is thought likely to have economic effects inside the U.S." One other area of a notable clash between the U.S. and other governments is in the operations of the Federal Maritime Commission in relation to foreign shipping conferences. Id. See note 236 supra.

would, in fact, bring a civil or a criminal antitrust action. The principal reason for the House of Lords holding seems to be a disdain for the extra-territorial application of United States antitrust laws. In a display of candor Lord Wilberforce declared: "[i]t is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack." Thus, due to the perceived involvement of the United States Government in the Westinghouse case, the House of Lords refused to give effect to the letters rogatory.

D. Conclusion

The opinion of Lord Wilberforce failed to review the basis for the intervention of the British Government. The Lords did not consider that the interest shown in the case could have been the result of the requests of the governments of other countries who might have been implicated in the cartel's activities. Nor did the Lord's opinion attempt to clarify the fact that through the three appeals in the lower courts, plus the refusal by the Court of Appeals to grant a stay, each decision upheld the validity of the letters rogatory, even though the courts were aware of additional proceedings then occurring in the United States. Furthermore, these courts were also aware of the Department of Justice's Grand Jury investigation when they made their decisions. The Court of Appeal was aware of the letters from the Department of Justice and the Attorney General when it refused to grant a stay in the letters rogatory proceedings. Perhaps it would be requiring too much, in the face of extreme political pressure, to ask the House of Lords to assess more carefully the logic of the preceding opinions.

Also noteworthy is the fact that the House of Lords took no interest in the possible losses to British citizens which may have resulted from the manipulation of uranium supplies and prices. The lower courts felt that the RTZ Company might be subject to rather severe penalties under the Treaty of Rome provisions. Thus, whereas the lower courts perceived the alleged manipulative practices of RTZ as detrimental, to some extent, to England and the European Economic Community, the House of Lords chose to disregard this impact.

The final effects of the House of Lords ruling are not precisely quantifiable. It is likely that Westinghouse's hope of obtaining ad-
ditional information from RTZ delayed its efforts to settle with the United States utility companies.\textsuperscript{301} Westinghouse has settled a few suits out of court, and it hoped to offer its services, equipment and cash in suitable amounts to settle the remaining suits. However, many of the utilities in the Richmond litigation involved large claims and would be difficult to settle. In any event, Judge Merhige urged the officials of the utilities and Westinghouse "to renew their stymied efforts to compromise before he had to render what might be an all-or-nothing decision."\textsuperscript{302}

Another interesting question, which also remains unresolved, is what foreign source evidence will be available, if any, in the other suits now pending in the United States.\textsuperscript{303} Will the government or other plaintiffs have any opportunity to obtain evidence abroad which would help to establish participation by American firms in the cartel? If not, the adverse effect which the lack of such evidence would cause must be seen as, at least, a partial failure of the Hague Evidence Convention. Yet these are extraordinary cases, in that they involve not only private litigants, but also the actions of governments. In such cases, the procedural requirements of the Evidence Convention may become secondary to governmental interests. Perhaps in cases where the policy interests of governments are less at stake, the procedures of the Evidence Convention can be utilized successfully to serve the cause of justice in the courts of a particular country by providing a clear and effective process of international judicial assistance.

V. SUMMARY AND CONCLUSION

After reviewing both the specific legal procedures for obtaining evidence abroad and their attempted utilization by Westinghouse, one becomes well aware of the complexities which may accompany efforts to obtain foreign source evidence for use in the United States. The review of the various methods for obtaining evidence abroad encompassed non-treaty means, such as deposition by stipulation, by notice, and by commission; and the recent treaty on this subject, the Hague Evidence Convention on Civil or Commercial Matters, with emphasis on the letters rogatory procedures.

\textsuperscript{301} Wall St. J., June 2, 1978, at 36 col. 1.
\textsuperscript{302} Id.
\textsuperscript{303} See note 186 supra. The suit by Westinghouse against the thirty foreign and domestic uranium producers has been delayed until Sept. 1981. Judge Marshall ordered the continuance because a number of the defendants could not be ready for trial as originally planned. Atlanta Constitution, Sept. 3, 1979, § D, at 13, col. 1.
The Evidence Convention presents standardized procedures for obtaining foreign source evidence, thereby eliminating many of the problems found with non-treaty methods. In addition, since the Convention imposes a treaty obligation upon the signatory states, evidence gathering pursuant to it should be less subject to the vicissitudes of traditional international law notions such as comity.

The extensive Westinghouse litigation undertaken to obtain evidence from British subjects demonstrates one limit to the Convention's usefulness: when a state raises governmental policy issues in what should be fairly straightforward procedural matters. The British courts provided some early interpretations of several key provisions of the Convention relating to letters rogatory. They upheld the validity of the letters rogatory procedures and applied rules regarding the recognition of privilege claims. In the end, however, the House of Lords, under heavy political pressure, refused to give effect to the letters on the grounds of United States Government involvement in the case. The Westinghouse case shows, then, that letters of request procedures, even when undertaken pursuant to the Evidence Convention, may become unreliable when there is governmental involvement in litigation. This can occur even when, as in the Westinghouse case, governments get involved tangentially.

The important question which remains for the practitioner, then, is whether the Evidence Convention can be utilized effectively in a case where such important national policy issues do not arise. This article has suggested that it can be so used. If used successfully, there is no doubt that the Evidence Convention will foster increased international judicial cooperation and result in more effective enforcement of international business agreements.
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