CHAPTER 4

INTERNATIONAL LITIGATION ISSUES

This chapter focuses on the pre-trial procedural issues present in all transnational litigation, not just antitrust. We look specifically at service of process, personal jurisdiction, and discovery, and conclude with a look at an Act of the United Kingdom to block discovery materials requested by foreign plaintiffs. It should be noted that the United Kingdom is not alone, as many other countries have passed blocking statutes in response to antitrust suits brought in U.S. courts against foreign companies.

SERVICE OF PROCESS AND VENUE

Federal Rules of Civil Procedure

Rule 4. Summons

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(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed

by the court.

Section 12 of the Clayton Act (15 U.S.C. § 22) District in Which to Sue Corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Notes

1. A lively debate has developed over the interpretation of Section 12 of the Clayton Act as to whether a plaintiff can mix and match the world-wide service of process provisions of Section 12 with the general personal jurisdiction and venue provisions available or must instead satisfy service of process, venue, and personal jurisdiction in accordance with Section 12. See SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD §5 (3d ed. 1997 & annual supp.).

2. The defendants in the following case relied on the Hague Convention on Service of Process in arguing that service was not proper. The Hague Convention is the international version of Rule 4 of the Federal Rules of Civil Procedure. It is the agreed upon method of service in transnational litigation, which purpose is to bridge the differences between different judicial cultures. Selected text of the Convention follows the case. As you will see, the potential parties to a case may use several different means of effecting service which include departments of State, judicial and diplomatic intermediaries.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988)

After his parents were killed in an automobile accident, respondent filed a wrongful death action in an Illinois court, alleging that defects in the automobile designed and sold by Volkswagen of America, Inc. (VWoA), in which the parents were driving, caused or contributed to their deaths. When VWoA's answer denied that it had designed or assembled the vehicle, respondent amended his complaint to add as a defendant petitioner here (VWAG), a German corporation which is the sole owner of VWoA. Respondent attempted to serve the amended complaint on VWAG by serving VWoA as VWAG's agent. Filing a special and limited appearance, VWAG moved to quash the service on the grounds that it could be served only in accordance with the Hague Service Convention, and that respondent had not complied with the

Convention's requirements. The court denied the motion, reasoning that VWoA and VWAG are so closely related that VWoA is VWAG's agent for service of process as a matter of law, notwithstanding VWAG's failure or refusal to appoint VWoA formally as an agent. The court concluded that, because service was accomplished in this country, the Convention did not apply. The Appellate Court of Illinois affirmed, ruling that the Illinois long-arm statute authorized substituted service on VWoA, and that such service did not violate the Convention.

The Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service.

The service of process in this case is notcovered by Article 1 of the Convention, which provides that the Convention "shall apply . . . where there is occasion to transmit a judicial . . . document for service abroad." "Service" means a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. Since the Convention does not itself prescribe a standard for determining the legal sufficiency of the delivery, the internal law of the forum state controls. Thus, where, as here, the forum state's law does not define the applicable method of serving process as requiring the transmittal of documents abroad, the Convention does not apply. This interpretation is consistent with the negotiating history and the general purposes of the Convention. One purpose of the Convention is to provide means to facilitate service of process abroad. The Convention implements this purpose by requiring each state to establish a central authority to assist in the service of process, and nothing in the present decision interferes with that requirement. Another purpose of the Convention is to assure foreign defendants adequate notice. The present decision does not necessarily advance this purpose, because it makes application of the Convention depend on the forum's internal law; however, it is unlikely that any country will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad. Furthermore, this decision does not prevent voluntary compliance with the Convention even when the forum's internal law does not so require, and such compliance can be advantageous.

VWAG's contention that service upon it was not complete until VWoA transmitted the complaint to it in Germany, and that this transmission "for service abroad" rendered the Convention applicable to the case under Article 1, is without merit. Where, as here, service on a domestic agent is valid and complete under both state law and the Due Process Clause without an official transmission of documents abroad, the inquiry ends and the Convention has no further implications.

Notes

1. The text of the Hague Service Convention that the Supreme Court interpreted in *Schlunk* follows below. Is the Supreme Court correct that its provisions would not apply under the facts in *Schlunk*?

2. If another signatory to the Hague Service Convention believed that the U.S. courts have misinterpreted the Convention, what are their options and remedies?

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention on Service of Process)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

Chapter I - Judicial Documents

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either --

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with --

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

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Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

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Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that --

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled --

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

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Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

PERSONAL JURISDICTION

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987).

JUSTICE O'CONNOR announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS join,

and an opinion with respect to Parts II-A and III, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA join.

This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"

I

On September 23, 1978, on Interstate Highway 80 in Solano County, California, Gary Zurcher lost control of his Honda motorcycle and collided with a tractor. Zurcher was severely injured, and his passenger and wife, Ruth Ann Moreno, was killed. In September 1979, Zurcher filed a product liability action in the Superior Court of the State of California in and for the County of Solano. Zurcher alleged that the 1978 accident was caused by a sudden loss of air and an explosion in the rear tire of the motorcycle, and alleged that the motorcycle tire, tube, and sealant were defective. Zurcher's complaint named, inter alia, Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. Cheng Shin in turn filed a cross-complaint seeking indemnification from its codefendants and from petitioner, Asahi Metal Industry Co., Ltd. (Asahi), the manufacturer of the tube's valve assembly. Zurcher's claims against Cheng Shin and the other defendants were eventually settled and dismissed, leaving only Cheng Shin's indemnity action against Asahi.

California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Asahi moved to quash Cheng Shin's service of summons, arguing the State could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment.

In relation to the motion, the following information was submitted by Asahi and Cheng Shin. Asahi is a Japanese corporation. It manufactures tire valve assemblies in Japan and sells the assemblies to Cheng Shin, and to several other tire manufacturers, for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.

In 1983 an attorney for Cheng Shin conducted an informal examination of the valve stems of the tire tubes sold in one cycle store in Solano County. The attorney declared that of the approximately 115 tire tubes in the store, 97 were purportedly manufactured in Japan or Taiwan, and of those 97, 21 valve stems were marked with the circled letter "A", apparently Asahi's

trademark. Of the 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes. The store contained 41 other Cheng Shin tubes that incorporated the valve assemblies of other manufacturers. An affidavit of a manager of Cheng Shin whose duties included the purchasing of component parts stated: "'In discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.'" An affidavit of the president of Asahi, on the other hand, declared that Asahi "'has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.'" The record does not include any contract between Cheng Shin and Asahi.

Primarily on the basis of the above information, the Superior Court denied the motion to quash summons, stating: "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale."

The Court of Appeal of the State of California issued a peremptory writ of mandate commanding the Superior Court to quash service of summons. The Supreme Court of the State of California reversed and discharged the writ issued by the Court of Appeal. The court observed: "Asahi has no offices, property or agents in California. It solicits no business in California and has made no direct sales [in California]." Moreover, "Asahi did not design or control the system of distribution that carried its valve assemblies into California." Nevertheless, the court found the exercise of jurisdiction over Asahi to be consistent with the Due Process Clause. It concluded that Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components. The court considered Asahi's intentional act of placing its components into the stream of commerce -- that is, by delivering the components to Cheng Shin in Taiwan -- coupled with Asahi's awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause.

We granted certiorari and now reverse.

II

A

Assuming, arguendo, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. On the basis of

these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.

B

The strictures of the Due Process Clause forbid a state court from exercising personal jurisdiction over Asahi under circumstances that would offend "'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S., at 316, quoting Milliken v. Meyer, 311 U.S., at 463.

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." World-Wide Volkswagen, 444 U.S. at 292.

A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.

Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Tawainese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.

Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. The Supreme Court of California argued that the State had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." The State Supreme Court's definition of California's interest,

however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan. The possibility of being haled into a California court as a result of an accident involving Asahi's components undoubtedly creates an additional deterrent to the manufacture of unsafe components; however, similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.

World-Wide Volkswagen also admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.

III

Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I do not agree with the interpretation in Part II-A of the stream-of-commerce theory, nor with the conclusion that Asahi did not "purposely avail itself of the California market." I do agree, however, with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with "fair play and substantial justice." This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has

purposefully engaged in forum activities." I therefore join Parts I and II-B of the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

The judgment of the Supreme Court of California should be reversed for the reasons stated in Part II-B of the Court's opinion. While I join Parts I and II-B, I do not join Part II-A for two reasons. First, it is not necessary to the Court's decision. An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional. Part II-B establishes, after considering the factors set forth in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980), that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair." This finding alone requires reversal; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." Accordingly, I see no reason in this case for the plurality to articulate "purposeful direction" or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Second, even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case. The plurality seems to assume that an unwavering line can be drawn between "mere awareness" that a component will find its way into the forum State and "purposeful availment" of the forum's market. Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[the] placement of a product into the stream of commerce, without more. . . ." Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

Notes

1. What are the bases given by the different opinions for rejecting personal jurisdiction over Asahi?

2. How would the result or reasoning have been different if the remaining plaintiff was a U.S. party?

3. In attendance to the minimum contacts and fundamental fairness issues raised in Asahi, a

different personal jurisdiction is raised in a case based on a federal statute such as the Sherman Act. The question is whether the non-U.S. defendants must have minimum contacts with the United States as a whole or with the state in which the court is located where they have been sued? Most, but not all, of the lower courts which have considered the question have decided that minimum national contacts will suffice. The Supreme Court has not ruled on this issue. All courts agree that a foreign defendant sued in state court or a federal court on a state law claim must have constitutionally sufficient contacts with the state in which they have been sued. See generally Spencer Weber Waller, Antitrust and American Business Abroad § 5.

DISCOVERY AND SANCTIONS

Once process is served and the court determines that it has jurisdiction then the real problems start. What information is discoverable and how the parties may access it may be determined not only by the laws of the forum country but also by the laws of countries wherein the information is located. Please review Federal Rules of Civil Procedure 26-45 before tackling the next two cases which analyze how these rules apply in the international context.

Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. Rogers
357 U.S. 197 (1958)

The question before us is whether, in the circumstances of this case, the District Court erred in dismissing, with prejudice, a complaint in a civil action as to a plaintiff that had failed to comply fully with a pretrial production order.

This issue comes to us in the context of an intricate litigation. Section 5 (b) of the Trading with the Enemy Act sets forth the conditions under which the United States during a period of war or national emergency may seize " . . . any property or interest of any foreign country or national . . . ." Acting under this section, the Alien Property Custodian during World War II assumed control of assets which were found by the Custodian to be "owned by or held for the benefit of" I. G. Farbenindustrie, a German firm and a then enemy national. These assets, valued at more than $ 100,000,000, consisted of cash in American banks and approximately 90% of the capital stock of General Aniline & Film Corporation, a Delaware corporation. In 1948 petitioner, a Swiss holding company also known as I. G. Chemie or Interhandel, brought suit under the Trading with the Enemy Act against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States, to recover these assets. This section authorizes recovery of seized assets by "any person not an enemy or ally of enemy" to the extent of such person's interest in the assets. Petitioner claimed that it had owned the General Aniline stock and cash at the time of vesting and hence, as the national of a neutral power, was entitled to recovery.

The Government both challenged petitioner's claim of ownership and asserted that in any

event petitioner was an "enemy" within the meaning of the Act since it was intimately connected with I. G. Farben and hence was affected with "enemy taint" despite its "neutral" incorporation. More particularly, the Government alleged that from the time of its incorporation in 1928, petitioner had conspired with I. G. Farben, H. Sturzenegger & Cie, a Swiss banking firm, and others "to conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

At an early stage of the litigation the Government moved under Rule 34 of the Federal Rules of Civil Procedure for an order requiring petitioner to make available for inspection and copying a large number of the banking records of Sturzenegger & Cie. Rule 34, in conjunction with Rule 26 (b), provides that upon a motion "showing good cause therefore," a court may order a party to produce for inspection nonprivileged documents relevant to the subject matter of pending litigation ". . . which are in his possession, custody, or control . . . ." In support of its motion the Government alleged that the records sought were relevant to showing the true ownership of the General Aniline stock and that they were within petitioner's control because petitioner and Sturzenegger were substantially identical. Petitioner did not dispute the general relevancy of the Sturzenegger documents but denied that it controlled them. The District Court granted the Government's motion, holding, among other things, that petitioner's "control" over the records had been prima facie established.

Thereafter followed a number of motions by petitioner to be relieved of production on the ground that disclosure of the required bank records would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure. The Government in turn moved under Rule 37 (b)(2) of the Federal Rules of Civil Procedure to dismiss the complaint because of petitioner's noncompliance with the production order. During this period the Swiss Federal Attorney, deeming that disclosure of these records in accordance with the production order would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records, "confiscated" the Sturzenegger records. This "confiscation" left possession of the records in Sturzenegger and amounted to an interdiction on Sturzenegger's transmission of the records to third persons. The upshot of all this was that the District Court, before finally ruling on petitioner's motion for relief from the production order and on the Government's motion to dismiss the complaint, referred the matter to a Special Master for findings as to the nature of the Swiss laws claimed by petitioner to block production and as to petitioner's good faith in seeking to achieve compliance with the court's order.

The Report of the Master bears importantly on our disposition of this case. It concluded that the Swiss Government had acted in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the Sturzenegger records, and found that there was ". . . no proof, or any evidence at all of collusion between plaintiff and the Swiss Government in the seizure of the papers herein." Noting that the burden was on petitioner to

show good faith in its efforts to comply with the production order, and taking as the test of good faith whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order, the Master found that ". . . the plaintiff has sustained the burden of proof placed upon it and has shown good faith in its efforts [to comply with the production order] in accordance with the foregoing test."

These findings of the Master were confirmed by the District Court. Nevertheless the court, in February 1953, granted the Government's motion to dismiss the complaint and filed an opinion wherein it concluded that: (1) apart from considerations of Swiss law petitioner had control over the Sturzenegger records; (2) such records might prove to be crucial in the outcome of this litigation; (3) Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order, since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum; and (4) that the court in these circumstances had power under Rule 37 (b)(2), as well as inherent power, to dismiss the complaint. However, in view of statements by the Swiss Government, following petitioner's intercession, that certain records not deemed to violate the Swiss laws would be released, and in view of efforts by petitioner to secure waivers from those persons banking with the Sturzenegger firm who were protected by the Swiss secrecy laws, and hence whose waivers might lead the Swiss Government to permit production, the court suspended the effective date of its dismissal order for a limited period in order to permit petitioner to continue efforts to obtain waivers and Swiss consent for production.

By October 1953, some 63,000 documents had been released by this process and tendered the Government for inspection. None of the books of account of Sturzenegger were submitted, though petitioner was prepared to offer plans to the Swiss Government which here too might have permitted at least partial compliance. However, since full production appeared impossible, the District Court in November 1953 entered a final dismissal order. This order was affirmed by the Court of Appeals, which accepted the findings of the District Court as to the relevancy of the documents, control of them by petitioner, and petitioner's good-faith efforts to comply with the production order. The court found it unnecessary to decide whether Rule 37 authorized dismissal under these circumstances since it ruled that the District Court was empowered to dismiss both by Rule 41 (b) of the Federal Rules of Civil Procedure, and under its own "inherent power." It did, however, modify the dismissal order to allow petitioner an additional six months in which to continue its efforts. We denied certiorari.

During this further period of grace, additional documents, with the consent of the Swiss Government and through waivers, were released and tendered for inspection, so that by July of 1956, over 190,000 documents had been procured. Record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A "neutral" expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court, and Swiss authorities. After inspection of the Sturzenegger files, this investigator would submit a

report to the parties identifying documents, without violating secrecy regulations, which he deemed to be relevant to the litigation. Petitioner could then seek to obtain further waivers or secure such documents by letters rogatory or arbitration proceedings in Swiss courts.

The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. It directed final dismissal of the action. The Court of Appeals affirmed, but at the same time observed: "That [petitioner] and its counsel patiently and diligently sought to achieve compliance . . . is not to be doubted." Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari.

II.

We turn to the remaining question, whether the District Court properly exercised its powers under Rule 37 (b) by dismissing this complaint despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, and Hammond Packing Co. v. Arkansas, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. In Hovey v. Elliott, it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by Hammond Packing Co. v. Arkansas, where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The Hovey case was distinguished on grounds that the defendant there was denied his right to defend "as a mere punishment"; due process was found preserved in Hammond on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence ". . . was but an admission of the want of merit in the asserted defense." But the Court took care to emphasize that the defendant had not been penalized ". . . for a failure to do that which it may not have been in its power to do." All the State had required "was a bona fide effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . ." of the order.

These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond case might well falter under such circumstances. Certainly substantial constitutional

questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a defendant, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure.

The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated. Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts. It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its inability to comply because of foreign law.

In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

This is not to say that petitioner will profit through its inability to tender the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an "enemy" within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious

handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

Societe Nationale Industrielle Aerospatiale et. al. v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987).

The United States, the Republic of France, and 15 other Nations have acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This Convention -- sometimes referred to as the "Hague Convention" or the "Evidence Convention" -- prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state. The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.

The two petitioners are corporations owned by the Republic of France. They are engaged in the business of designing, manufacturing, and marketing aircraft. One of their planes, the "Rallye," was allegedly advertised in American aviation publications as "the World's safest and most economical STOL plane." On August 19, 1980, a Rallye crashed in Iowa, injuring the pilot and a passenger. Dennis Jones, John George, and Rosa George brought separate suits based upon this accident in the United States District Court for the Southern District of Iowa, alleging that petitioners had manufactured and sold a defective plane and that they were guilty of negligence and breach of warranty. Petitioners answered the complaints, apparently without questioning the jurisdiction of the District Court. With the parties' consent, the cases were consolidated and referred to a Magistrate.

Initial discovery was conducted by both sides pursuant to the Federal Rules of Civil Procedure without objection. When plaintiffs served a second request for the production of documents pursuant to Rule 34, a set of interrogatories pursuant to Rule 33, and requests for admission pursuant to Rule 36, however, petitioners filed a motion for a protective order. The motion alleged that because petitioners are "French corporations, and the discovery sought can only be found in a foreign state, namely France," the Hague Convention dictated the exclusive procedures that must be followed for pretrial discovery. In addition, the motion stated that under

French penal law, the petitioners could not respond to discovery requests that did not comply with the Convention.[6]

The Magistrate denied the motion insofar as it related to answering interrogatories, producing documents, and making admissions.[7] After reviewing the relevant cases, the Magistrate explained:

"To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products."

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[6] Article 1A of the French "blocking statute," French Penal Code Law No. 80-538, provides:

"Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

Article 2 provides:

"The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures.

[7] The Magistrate stated, however, that if oral depositions were to be taken in France, he would require compliance with the Hague Evidence Convention.

The Magistrate made two responses to petitioners' argument that they could not comply with the discovery requests without violating French penal law. Noting that the law was originally "'inspired to impede enforcement of United States antitrust laws,'" and that it did not appear to have been strictly enforced in France, he first questioned whether it would be construed to apply to the pretrial discovery requests at issue. Second, he balanced the interests in the "protection of United States citizens from harmful foreign products and compensation for injuries caused by such products" against France's interest in protecting its citizens "from intrusive foreign discovery procedures." The Magistrate concluded that the former interests were stronger, particularly because compliance with the requested discovery will "not have to take place in France" and will not be greatly intrusive or abusive.

Petitioners sought a writ of mandamus from the Court of Appeals for the Eighth Circuit. Although immediate appellate review of an interlocutory discovery order is not ordinarily available, the Court of Appeals considered that the novelty and the importance of the question presented, and the likelihood of its recurrence, made consideration of the merits of the petition appropriate. It then held that "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." The Court of Appeals disagreed with petitioners' argument that this construction would render the entire Hague Convention "meaningless," noting that it would still serve the purpose of providing an improved procedure for obtaining evidence from nonparties. The court also rejected petitioners' contention that considerations of international

comity required plaintiffs to resort to Hague Convention procedures as an initial matter ("first use"), and correspondingly to invoke the federal discovery rules only if the treaty procedures turned out to be futile. The Court of Appeals believed that the potential overruling of foreign tribunals' denial of discovery would do more to defeat than to promote international comity. Finally, the Court of Appeals concluded that objections based on the French penal statute should be considered in two stages: first whether the discovery order was proper even though compliance may require petitioners to violate French law; and second, what sanctions, if any, should be imposed if petitioners are unable to comply. The Court of Appeals held that the Magistrate properly answered the first question and that it was premature to address the second. The court therefore denied the petition for mandamus. We granted certiorari.

II

In the District Court and the Court of Appeals, petitioners contended that the Hague Evidence Convention "provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory." .We are satisfied that the Court of Appeals correctly rejected this extreme position. We believe it is foreclosed by the plain language of the Convention. Before discussing the text of the Convention, however, we briefly review its history.

The Hague Conference on Private International Law, an association of sovereign states, has been conducting periodic sessions since 1893. The United States participated in those sessions as an observer in 1956 and 1960, and as a member beginning in 1964 pursuant to congressional authorization. In that year Congress amended the Judicial Code to grant foreign litigants, without any requirement of reciprocity, special assistance in obtaining evidence in the United States. In 1965 the Hague Conference adopted a Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention), to which the Senate gave its advice and consent in 1967. The favorable response to the Service Convention, coupled with the longstanding interest of American lawyers in improving procedures for obtaining evidence abroad, motivated the United States to take the initiative in proposing that an evidence convention be adopted. The Conference organized a special commission to prepare the draft convention, and the draft was approved without a dissenting vote on October 26, 1968. It was signed on behalf of the United States in 1970 and ratified by a unanimous vote of the Senate in 1972. The Convention's purpose was to establish a system for obtaining evidence located abroad that would be "tolerable" to the state executing the request and would produce evidence "utilizable" in the requesting state.

What the convention does is to provide a set of minimum standards with which contracting states agree to comply. Further, through articles 27, 28 and 32, it provides a flexible framework within which any future liberalizing changes in policy and tradition in any country with respect to international judicial cooperation may be translated into effective change in international procedures. At the same time it recognizes and preserves procedures of every country which now or hereafter may provide international cooperation in the taking of evidence on more liberal and less restrictive bases, whether this is effected by supplementary agreements or by municipal

law and practice."

III

In arguing their entitlement to a protective order, petitioners correctly assert that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. This observation, however, does not dispose of the question before us; we must analyze the interaction between these two bodies of federal law. Initially, we note that at least four different interpretations of the relationship between the federal discovery rules and the Hague Convention are possible. Two of these interpretations assume that the Hague Convention by its terms dictates the extent to which it supplants normal discovery rules. First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures. Two other interpretations assume that international comity, rather than the obligations created by the treaty, should guide judicial resort to the Hague Convention. Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.

In interpreting an international treaty, we are mindful that it is "in the nature of a contract between nations," to which "general rules of construction apply." We therefore begin "with the text of the treaty and the context in which the written words are used." The treaty's history, "'the negotiations, and the practical construction adopted by the parties'" may also be relevant.

We reject the first two of the possible interpretations as inconsistent with the language and negotiating history of the Hague Convention. The preamble of the Convention specifies its purpose "to facilitate the transmission and execution of Letters of Request" and to "improve mutual judicial cooperation in civil or commercial matters." The preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices.[15] The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.

The Convention contains three chapters. Chapter I, entitled "Letters of Requests," and chapter II, entitled "Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners," both use permissive rather than mandatory language. Thus, Article 1 provides that a judicial authority in one contracting state "may" forward a letter of request to the competent authority in another contracting state for the purpose of obtaining evidence. Similarly, Articles 15, 16, and 17 provide that diplomatic officers, consular agents, and

commissioners "may . . . without compulsion," take evidence under certain conditions. The absence of any command that a contracting state must use Convention procedures when they are not needed is conspicuous.

Two of the Articles in chapter III, entitled "General Clauses," buttress our conclusion that the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad. Article 23 expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country. Surely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised

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[15] The Hague Conference on Private International Law's omission of mandatory language in the preamble is particularly significant in light of the same body's use of mandatory language in the preamble to the Hague Service Convention, 20 U. S. T. 361, T. I. A. S. No. 6638. Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Id., at 362, T. I. A. S. No. 6638. As noted, supra, the Service Convention was drafted before the Evidence Convention, and its language provided a model exclusivity provision that the drafters of the Evidence Convention could easily have followed had they been so inclined. Given this background, the drafters' election to use permissive language instead is strong evidence of their intent.

over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23, which enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery. In the absence of explicit textual support, we are unable to accept the hypothesis that the common-law contracting states abjured recourse to all pre-existing discovery procedures at the same time that they accepted the possibility that a contracting party could unilaterally abrogate even the Convention's procedures. Moreover, Article 27 plainly states that the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention. Thus, the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad.

An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities.

IV

While the Hague Convention does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure, the optional character of the Convention procedures sheds light on one aspect of the Court of Appeals' opinion that we consider

erroneous. That court concluded that the Convention simply "does not apply" to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court. Plaintiffs argue that this conclusion is supported by two considerations. First, the Federal Rules of Civil Procedure provide ample means for obtaining discovery from parties who are subject to the court's jurisdiction, while before the Convention was ratified it was often extremely difficult, if not impossible, to obtain evidence from nonparty witnesses abroad. Plaintiffs contend that it is appropriate to construe the Convention as applying only in the area in which improvement was badly needed. Second, when a litigant is subject to the jurisdiction of the district court, arguably the evidence it is required to produce is not "abroad" within the meaning of the Convention, even though it is in fact located in a foreign country at the time of the discovery request and even though it will have to be gathered or otherwise prepared abroad.

Nevertheless, the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is "abroad" and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus, it appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does "apply" to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ.

V

Petitioners contend that even if the Hague Convention's procedures are not mandatory, this Court should adopt a rule requiring that American litigants first resort to those procedures before initiating any discovery pursuant to the normal methods of the Federal Rules of Civil Procedure. The Court of Appeals rejected this argument because it was convinced that an American court's order ultimately requiring discovery that a foreign court had refused under Convention procedures would constitute "the greatest insult" to the sovereignty of that tribunal. We disagree with the Court of Appeals' view. It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts. We therefore do not believe that an American court should refuse to make use of Convention procedures because of a concern that it may ultimately find it necessary to order the production of evidence that a foreign tribunal permitted a party to withhold.

Nevertheless, we cannot accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant. Assuming, without deciding, that we have the lawmaking power to do so, we are convinced that such a general rule would be unwise. In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the "just, speedy,

and inexpensive determination" of litigation in our courts.

Petitioners argue that a rule of first resort is necessary to accord respect to the sovereignty of states in which evidence is located. It is true that the process of obtaining evidence in a civil-law jurisdiction is normally conducted by a judicial officer rather than by private attorneys. Petitioners contend that if performed on French soil, for example, by an unauthorized person, such evidence-gathering might violate the "judicial sovereignty" of the host nation. Because it is only through the Convention that civil-law nations have given their consent to evidence-gathering activities within their borders, petitioners argue, we have a duty to employ those procedures whenever they are available. We find that argument unpersuasive. If such a duty were to be inferred from the adoption of the Convention itself, we believe it would have been described in the text of that document. Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate. We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.[29]

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[29] The French "blocking statute," n. 6, supra, does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration.

In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

Some might well regard the Court's decision in this case as an affront to the nations that have joined the United States in ratifying the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Court ignores the importance of the Convention by relegating it to an "optional" status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents. Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately

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the act of production may violate that statute. See Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197, 204-206 (1958). Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts. It is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge. It would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation. Extraterritorial assertions of jurisdiction are not one-sided. While the District Court's discovery orders arguably have some impact in France, the French blocking statute asserts similar authority over acts to take place in this country. The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a raw exercise of their jurisdictional power to the detriment of the United States' national and international interests. The Court's view of this country's international obligations is particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial.

I do agree with the Court's repudiation of the positions at both extremes of the spectrum with regard to the use of the Convention. Its rejection of the view that the Convention is not "applicable" at all to this case is surely correct: the Convention clearly applies to litigants as well as to third parties, and to requests for evidence located abroad, no matter where that evidence is actually "produced." The Court also correctly rejects the far opposite position that the Convention provides the exclusive means for discovery involving signatory countries. I dissent, however, because I cannot endorse the Court's case-by-case inquiry for determining whether to use Convention procedures and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry. In my view, the Convention provides effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence gathering. I therefore would apply a general presumption that, in most cases, courts should resort first to the Convention procedures. An individualized analysis of the circumstances of a particular case is appropriate only when it appears that it would be futile to employ the Convention or when its procedures prove to be unhelpful.

I

Even though the Convention does not expressly require discovery of materials in foreign countries to proceed exclusively according to its procedures, it cannot be viewed as merely advisory. The Convention was drafted at the request and with the enthusiastic participation of the United States, which sought to broaden the techniques available for the taking of evidence abroad. The differences between discovery practices in the United States and those in other countries are significant, and "no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Of particular import is the fact that discovery conducted by the parties, as is common in the United States, is alien to the legal systems of civil-law nations, which typically regard evidence gathering as a judicial function.

The Convention furthers important United States interests by providing channels for discovery abroad that would not be available otherwise. In general, it establishes "methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence." It serves the interests of both requesting and receiving countries by advancing the following goals:

"The techniques for the taking of evidence must be 'utilizable' in the eyes of the State where the lawsuit is pending and must also be 'tolerable' in the eyes of the State where the evidence is to be taken."

The Convention also serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems.

It is not at all satisfactory to view the Convention as nothing more than an optional supplement to the Federal Rules of Civil Procedure, useful as a means to "facilitate discovery" when a court "deems that course of action appropriate." Unless they had expected the Convention to provide the normal channels for discovery, other parties to the Convention would have had no incentive to agree to its terms. The civil-law nations committed themselves to employ more effective procedures for gathering evidence within their borders, even to the extent of requiring some common-law practices alien to their systems. At the time of the Convention's enactment, the liberal American policy, which allowed foreigners to collect evidence with ease in the United States was in place and, because it was not conditioned on reciprocity, there was little likelihood that the policy would change as a result of treaty negotiations. As a result, the primary benefit the other signatory nations would have expected in return for their concessions was that the United States would respect their territorial sovereignty by using the Convention procedures.

II

By viewing the Convention as merely optional and leaving the decision whether to apply it to the court in each individual case, the majority ignores the policies established by the political branches when they negotiated and ratified the treaty. The result will be a duplicative analysis for which courts are not well designed. The discovery process usually concerns discrete interests that a court is well equipped to accommodate -- the interests of the parties before the court coupled with the interest of the judicial system in resolving the conflict on the basis of the best available information. When a lawsuit requires discovery of materials located in a foreign nation, however, foreign legal systems and foreign interests are implicated as well. The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.

It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own. Unlike the courts, "diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association." The Convention embodies the result of the best efforts of the Executive Branch, in negotiating the treaty, and the Legislative Branch, in ratifying it, to balance competing national interests. As such, the Convention represents a political determination -- one that, consistent with the principle of separation of powers, courts should not attempt to second-guess.

Not only is the question of foreign discovery more appropriately considered by the Executive and Congress, but in addition, courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood. As this Court recently stated, it has "little competence in determining precisely when foreign nations will be offended by particular acts." A pro-forum bias is likely to creep into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules. In addition, it simply is not reasonable to expect the Federal Government or the foreign state in which the discovery will take place to participate in every individual case in order to articulate the broader international and foreign interests that are relevant to the decision whether to use the Convention. Indeed, the opportunities for such participation are limited. Exacerbating these shortcomings is the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions.

III

The principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority. The Court asserts that the concept of comity requires an individualized analysis of the interests present in each particular case before a court decides whether to apply the Convention.

There is, however, nothing inherent in the comity principle that requires case-by-case analysis. The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, maritime law, and sovereign immunity, and the Court offers no reasons for abandoning that approach here.

Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill. As in the choice-of-law analysis, which from the very beginning has been linked to international comity, the threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

In most cases in which a discovery request concerns a nation that has ratified the Convention there is no need to resort to comity principles; the conflicts they are designed to resolve already have been eliminated by the agreements expressed in the treaty. The analysis set forth in the Restatement (Revised) of Foreign Relations Law of the United States is perfectly appropriate for courts to use when no treaty has been negotiated to accommodate the different legal systems. It would also be appropriate if the Convention failed to resolve the conflict in a particular case. The Court, however, adds an additional layer of so-called comity analysis by holding that courts should determine on a case-by-case basis whether resort to the Convention is desirable. Although this analysis is unnecessary in the absence of any conflicts, it should lead courts to the use of the Convention if they recognize that the Convention already has largely accommodated all three categories of interests relevant to a comity analysis -- foreign interests, domestic interests, and the interest in a well-functioning international order.

A

I am encouraged by the extent to which the Court emphasizes the importance of foreign interests and by its admonition to lower courts to take special care to respect those interests. Nonetheless, the Court's view of the Convention rests on an incomplete analysis of the sovereign interests of foreign states. The Court acknowledges that evidence is normally obtained in civil-law countries by a judicial officer, but it fails to recognize the significance of that practice. Under the classic view of territorial sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent. As explained in the Report of United States Delegation to Eleventh Session of the Hague Conference on Private International Law, the taking of evidence in a civil-law country may constitute the performance of a public judicial act by an unauthorized foreign person: " In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate

position of assisting the judicial authorities.

"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 public judicial act by an unauthorized foreign person. It may violate the 'judicial sovereignty' of the host country, unless its authorities participate or give their consent." 8 Int'l Legal Materials 785, 806 (1969).

Some countries also believe that the need to protect certain underlying substantive rights requires judicial control of the taking of evidence. In the Federal Republic of Germany, for example, there is a constitutional principle of proportionality, pursuant to which a judge must protect personal privacy, commercial property, and business secrets. Interference with these rights is proper only if necessary to protect other persons' rights in the course of civil litigation.

The United States recently recognized the importance of these sovereignty principles by taking the broad position that the Convention "must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it." Now, however, it appears to take a narrower view of what constitutes an "evidence taking procedure," merely stating that "oral depositions on foreign soil . . . are improper without the consent of the foreign nation." I am at a loss to understand why gathering documents or information in a foreign country, even if for ultimate production in the United States, is any less an imposition on sovereignty than the taking of a deposition when gathering documents also is regarded as a judicial function in a civil-law nation.

Use of the Convention advances the sovereign interests of foreign nations because they have given consent to Convention procedures by ratifying them. This consent encompasses discovery techniques that would otherwise impinge on the sovereign interests of many civil-law nations. In the absence of the Convention, the informal techniques provided by Articles 15-22 of the Convention -- taking evidence by a diplomatic or consular officer of the requesting state and the use of commissioners nominated by the court of the state where the action is pending -- would raise sovereignty issues similar to those implicated by a direct discovery order from a foreign court. "Judicial" activities are occurring on the soil of the sovereign by agents of a foreign state. These voluntary discovery procedures are a great boon to United States litigants and are used far more frequently in practice than is compulsory discovery pursuant to letters of request.

Civil-law contracting parties have also agreed to use, and even to compel, procedures for gathering evidence that are diametrically opposed to civil-law practices. The civil-law system is inquisitional rather than adversarial and the judge normally questions the witness and prepares a written summary of the evidence. Even in common-law countries no system of evidence-gathering resembles that of the United States. Under Article 9 of the Convention, however, a foreign court must grant a request to use a "special method or procedure," which includes requests to compel attendance of witnesses abroad, to administer oaths, to produce verbatim

transcripts, or to permit examination of witnesses by counsel for both parties. These methods for obtaining evidence, which largely eliminate conflicts between the discovery procedures of the United States and the laws of foreign systems, have the consent of the ratifying nations. The use of these methods thus furthers foreign interests because discovery can proceed without violating the sovereignty of foreign nations.

B

The primary interest of the United States in this context is in providing effective procedures to enable litigants to obtain evidence abroad. This was the very purpose of the United States' participation in the treaty negotiations and, for the most part, the Convention provides those procedures.

The Court asserts that the letters of request procedure authorized by the Convention in many situations will be "unduly time-consuming and expensive." The Court offers no support for this statement and until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation. Conspicuously absent from the Court's assessment is any consideration of resort to the Convention's less formal and less time-consuming alternatives -- discovery conducted by consular officials or an appointed commissioner. Moreover, unless the costs become prohibitive, saving time and money is not such a high priority in discovery that some additional burden cannot be tolerated in the interest of international goodwill. Certainly discovery controlled by litigants under the Federal Rules of Civil Procedure is not known for placing a high premium on either speed or cost-effectiveness.

There is also apprehension that the Convention procedures will not prove fruitful. Experience with the Convention suggests otherwise -- contracting parties have honored their obligation to execute letters of request expeditiously and to use compulsion if necessary. By and large, the concessions made by parties to the Convention not only provide United States litigants with a means for obtaining evidence, but also ensure that the evidence will be in a form admissible in court.

There are, however, some situations in which there is legitimate concern that certain documents cannot be made available under Convention procedures. Thirteen nations have made official declarations pursuant to Article 23 of the Convention, which permits a contracting state to limit its obligation to produce documents in response to a letter of request. These reservations may pose problems that would require a comity analysis in an individual case, but they are not so all-encompassing as the majority implies -- they certainly do not mean that a "contracting party could unilaterally abrogate . . . the Convention's procedures." First, the reservations can apply only to letters of request for documents. Thus, an Article 23 reservation affects neither the most commonly used informal Convention procedures for taking of evidence by a consul or a commissioner nor formal requests for depositions or interrogatories. Second, although Article 23 refers broadly to "pre-trial discovery," the intended meaning of the term appears to have been much narrower than the normal United States usage. The contracting parties for the most part have modified the declarations made pursuant to Article 23 to limit their reach. Indeed, the

emerging view of this exception to discovery is that it applies only to "requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court." Thus, in practice, a reservation is not the significant obstacle to discovery under the Convention that the broad wording of Article 23 would suggest.

In this particular case, the "French 'blocking statute,'" poses an additional potential barrier to obtaining discovery from France. But any conflict posed by this legislation is easily resolved by resort to the Convention's procedures. The French statute's prohibitions are expressly "subject to" international agreements and applicable laws and it does not affect the taking of evidence under the Convention.

The second major United States interest is in fair and equal treatment of litigants. The Court cites several fairness concerns in support of its conclusion that the Convention is not exclusive and apparently fears that a broad endorsement of the use of the Convention would lead to the same "unacceptable asymmetries." Courts can protect against the first two concerns noted by the majority -- that a foreign party to a lawsuit would have a discovery advantage over a domestic litigant because it could obtain the advantages of the Federal Rules of Civil Procedure, and that a foreign company would have an economic competitive advantage because it would be subject to less extensive discovery -- by exercising their discretionary powers to control discovery in order to ensure fairness to both parties. A court may "make any order which justice requires" to limit discovery, including an order permitting discovery only on specified terms and conditions, by a particular discovery method, or with limitation in scope to certain matters. If, for instance, resort to the Convention procedures would put one party at a disadvantage, any possible unfairness could be prevented by postponing that party's obligation to respond to discovery requests until completion of the foreign discovery. Moreover, the Court's arguments focus on the nationality of the parties, while it is actually the locus of the evidence that is relevant to use of the Convention: a foreign litigant trying to secure evidence from a foreign branch of an American litigant might also be required to resort to the Convention.

The Court's third fairness concern is illusory. It fears that a domestic litigant suing a national of a state that is not a party to the Convention would have an advantage over a litigant suing a national of a contracting state. This statement completely ignores the very purpose of the Convention. The negotiations were proposed by the United States in order to facilitate discovery, not to hamper litigants. Dissimilar treatment of litigants similarly situated does occur, but in the manner opposite to that perceived by the Court. Those who sue nationals of noncontracting states are disadvantaged by the unavailability of the Convention procedures. This is an unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified.

In most instances, use of the Convention will serve to advance United States interests, particularly when those interests are viewed in a context larger than the immediate interest of the litigants' discovery. The approach I propose is not a rigid per se rule that would require first use of the Convention without regard to strong indications that no evidence would be forthcoming. All too often, however, courts have simply assumed that resort to the Convention would be

unproductive and have embarked on speculation about foreign procedures and interpretations. When resort to the Convention would be futile, a court has no choice but to resort to a traditional comity analysis. But even then, an attempt to use the Convention will often be the best way to discover if it will be successful, particularly in the present state of general inexperience with the implementation of its procedures by the various contracting states. An attempt to use the Convention will open a dialogue with the authorities in the foreign state and in that way a United States court can obtain an authoritative answer as to the limits on what it can achieve with a discovery request in a particular contracting state.

C

The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and "stability through satisfaction of mutual expectations." These interests are common to all nations, including the United States.

Use of the Convention would help develop methods for transnational litigation by placing officials in a position to communicate directly about conflicts that arise during discovery, thus enabling them to promote a reduction in those conflicts. In a broader framework, courts that use the Convention will avoid foreign perceptions of unfairness that result when United States courts show insensitivity to the interests safeguarded by foreign legal regimes. Because of the position of the United States, economically, politically, and militarily, many countries may be reluctant to oppose discovery orders of United States courts. Foreign acquiescence to orders that ignore the Convention, however, is likely to carry a price tag of accumulating resentment, with the predictable long-term political cost that cooperation will be withheld in other matters. Use of the Convention is a simple step to take toward avoiding that unnecessary and undesirable consequence.

IV

I can only hope that courts faced with discovery requests for materials in foreign countries will avoid the parochial views that too often have characterized the decisions to date. Many of the considerations that lead me to the conclusion that there should be a general presumption favoring use of the Convention should also carry force when courts analyze particular cases. The majority fails to offer guidance in this endeavor, and thus it has missed its opportunity to provide predictable and effective procedures for international litigants in United States courts. It now falls to the lower courts to recognize the needs of the international commercial system and the accommodation of those needs already endorsed by the political branches and embodied in the Convention. To the extent indicated, I respectfully dissent.

Notes

1. It is important to remember that the issue in *Aerospatiale* was the choice of discovery rules for a foreign party. For non-parties, the only way to compel the production of relevant testimony and evidence for use at trial will be through the Hague Convention or any other treaty between the United States and the nation in which the party with the evidence is located.

2. Do you see a pattern developing in the Supreme Court's interpretation and treatment of treaties governing transnational litigation? Many countries have grown extremely frustrated with such decisions as Schlunk and Aerospatiale even when they are in substantial agreement with the United States on the substance of the law at issue. Such frustration undoubtedly has played in the refusal of any other nation to enter into a binding treaty with the United States regarding the enforcement of judgments.

3. For a sense of the importance of the choice of proceeding under the Federal Rules or the Hague Convention see the excerpt below describing the costs and delays in using the Hague Convention. Also pay close attention to the type and form of the evidence that can be obtained through the two contrasting methods.

Spencer Weber Waller, International Trade and U.S. Antitrust Law (1st ed. 2005). Reprinted with permission of Thomson/West. For more information about this publication please visit www.west.thomson.com.

§ 708 Proceeding Under the Hague Convention

A party will be limited to the procedures of the Hague Convention if the foreign party has met its burden under *Aerospatiale* or if the party seeks discovery from a non-party witness. If the litigant seeks to compel the taking of evidence abroad, the Hague Convention poses numerous road blocks for an American attorney familiar with the broad pretrial discovery permitted under the Federal Rules of Civil Procedure.

[1] Delay

Obtaining the right to take a deposition or seek documents under the Hague Convention is very different from the traditional document request or notice of deposition issued by the parties, or subpoena that is prepared by the parties and issued as a ministerial matter by the clerk's office of the United States district court. In order to obtain a letter rogatory or letter of request from the United States district court, a party must proceed via motion under Rule 28(b) of the Federal Rules of Civil Procedure and any local rules governing the briefing and hearing of motions. The other parties to the litigation may oppose the motion, propose modifications, or seek additional areas of discovery.

Once the letter rogatory or letter of request has been issued by the United States court, it must be transmitted to the Central Authority of the receiving country for review to determine whether the letter comports with the Hague Convention, any reservations adopted by the receiving jurisdiction, and local procedures. The letter will not be executed by the receiving Central Authority if it seeks a type of discovery not permitted under the Convention or local procedure. If acceptable, the Central Authority will transmit the request to the appropriate court, who will serve the letter rogatory or letter of request on the witness.

Further delays will occur in civil law jurisdictions. Pretrial proceedings, if any, in such jurisdiction are an inherently judicial function. Any questioning of witnesses or production of documents will normally be conducted by a judicial officer, which may impose further delay.

[2] Cost

The costs of proceeding under the Hague Convention may be productive in terms of obtaining peripheral evidence from third parties or in cases with limited monetary value. Each party will normally bear its own expenses in connection with the travel costs of the foreign proceeding. Most parties will also need the assistance of local counsel to cope with language and logistical difficulties, contacts with the court conducting the examination, and advice regarding local law and procedure.

While English and French are the official languages of the Convention, the Convention also permits reservations by signatories requiring the translation of documents into the national language or languages. Such reservations are customary. The witness also has the right to have the examination conducted in his or her native language, and to receive certain witness fees and transportation expenses. Unless counsel happens to be fluent in the local languages, there will be additional translation expenses for the examination itself and for the translation of the final protocol of the examination into English. There will be further costs if the parties receive permission to separately tape or transcribe the proceeding.

[3] Foreign Refusals to Implement Letters Rogatory or Letters of Request

A foreign court may refuse to execute a letter rogatory or letter of request on substantive as well as procedural grounds. The Hague Evidence Convention permits a signatory to refuse to enforce a request for pretrial discovery, or where the request constitutes a violation of the sovereignty or security of the signatory.

The reservation against implementing requests for pretrial discovery is a major constraint on the use of letters of request by American litigants in comparison to the use of the Federal Rules of Civil Procedure. Most civil law jurisdictions that have executed the Convention have adopted reservations under Article 23 of the Convention prohibiting letters of requests seeking discovery of the existence and location of documents within the foreign jurisdiction.

The risks of refusal to execute a letter of request or surprise at the procedures selected for the

examination can be minimized but not eliminated through a carefully drafted letter of request. The request should be focused on obtaining evidence for use at trial. Any request for production of documents should specify carefully identified documents needed for use a trial. General requests for broad categories of documents that might lead to the discovery of admissible evidence will normally not be executed by any receiving country which has executed a reservation pursuant to Article 23 of the Convention.

A letter of request may also be refused on the grounds that the enforcement of the request would constitute a violation of the public policy of the receiving state. At least two foreign courts have specifically refused to enforce letters rogatory in the context of private treble damage antitrust litigation in the uranium industry. In *Rio Tinto Zinc*, the British Law Lords refused to enforce a letter rogatory requested by Westinghouse to obtain discovery to support its defense in contract litigation that sudden dramatic price increase were the result of the unlawful activities of an international uranium cartel. In another aspect of the uranium litigation, the Canadian Supreme Court refused to enforce a letter rogatory in *Gulf Oil Corp. v. Gulf Canada, Ltd.*, on the grounds that the extraterritorial assertion of United States antitrust law violated Canadian public policy and Canadian sovereignty.

[4] Nature of the Examination

The examination itself will be conducted under local procedural rules. The witness may not necessarily be sworn prior to testimony. In most civil law jurisdictions, the examination will be conducted by a judicial officer based upon written questions submitted by the parties. The witness may refuse to answer any questions under a valid privilege of *either* the United States or the jurisdiction of the examination. Most civil law jurisdictions also require the examining officer to prepare a protocol summarizing the questions and answers rather than creating a verbatim transcript of the proceedings.

Even the simplest aspects of the examination should not be taken for granted. The letter of request should request that the examination be conducted under oath. The request should ask permission to have a translator present and to make a verbatim recording or transcript of the examination. If a recording is made, the court should be asked to authenticate the recording. The request should also ask for the right of counsel to ask additional follow-up questions. Such requests are discretionary, but may not necessarily be granted unless formally and specifically requested.

[5] Use of Evidence Obtained Under the Convention

The Final protocol of the examination may be in a form very different from an American deposition transcript. Instead of a verbatim transcript reflecting the questions, answers, objections, and arguments of counsel, the judicial officer will prepare a summary of the proceedings. The judicial officer's perception of the important aspects of the examination may be skewed by the lack of familiarity with the legal issues or the evidence in the case. Without guidance from the parties, the protocol may or may not include the material deemed most

relevant by the parties. It is incumbent upon the litigants to request explicitly that the judicial officer include particular questions, answers, or exhibits which are critical to the litigation.

The admissibility of the protocol in the United States proceeding will depend on the degree of reliability of the procedures used in the examination. Evidence obtained in response to a letter rogatory or letter of request will not be excluded merely because it differs in form from discovery taken under the Federal Rules of Civil Procedure. The Federal Rules specifically state that the lack of an oath by the witness, the lack of a verbatim transcript, or similar departures from United States procedure will not automatically bar the admission of a foreign examination. The advisory notes to the Federal Rules further state that the nature of the foreign examination will normally affect only the weight of evidence at trial but caution that "[t]he testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether."

The latitude of United States practice in this area is best illustrated in *United States v. Salim*. In a criminal drug prosecution the government sought to take the deposition of a witness being held in custody in France. The defendant was in custody in the United States and could not be present for the deposition. The French court refused to allow the defendant to listen to the deposition or consult with his attorney by telephone. The court also refused to permit an audio or video taping of the deposition.

The court required the parties to submit both direct and cross-examination questions in writing to both the court and the witness. The court further refused to let the defendant's attorney be present during the examination. The court also ruled that the examination could not be under oath because French law prevented an accused from taking an oath.

During the examination, certain questions were answered under French law by the attorney for the witness. The attorney instructed the witness not to answer other questions in accordance with French privilege law. The French magistrate conducting the examination supplemented the written questions with certain questions of her own. Finally, certain statements were never translated into English, were never transcribed, or only summarized by the court reporter.

Despite these significant differences from United States civil *and* criminal procedure, the Court held that the procedures had sufficient indicia of reliability to be admitted at the defendant's trial. The court rejected all objections to the use of the deposition and affirmed the conviction.

Note

One common foreign reaction to frustration with either the substance of United States antitrust law, the use of extraterritoriality, or the general nature of the U.S. litigation system has been the passage of blocking statutes designed to frustrate litigation in U.S. courts and provide the defendants in such actions with a right to sue in their home jurisdictions for the receovery of any judgments recovered against them in the United States.

Blocking and Secrecy Statutes

Protection of Trading Interests Act 1980 (c 11) (United Kingdom), 20 March 1980

SECTION: 1 Overseas measures affecting United Kingdom trading interests

(1) If it appears to the Secretary of State--

(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and

(b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Direction under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

SECTION: 2 Documents and information required by overseas courts and authorities

(1) If it appears to the Secretary of State--

(a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or

(b) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1)(a) or (b) above is inadmissible--

(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or

(b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1)(a) above is also inadmissible--

(a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or

(b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same

effect could be or could have been imposed; and

(a) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or

(b) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement,

shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

SECTION: 3 Offences under §§ 1 and 2

(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2(1) above shall be guilty of an offence and liable--

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

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(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

SECTION: 4 Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975

A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

SECTION: 5 Restriction on enforcement of certain overseas judgments

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being--

(a) a judgment for multiple damages within the meaning of subsection (3) below;

(b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b) above.

(3) In subsection (2)(a) above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2)(b) above make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2)(a) above applies to a judgement given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection (1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

SECTION: 6 Recovery of awards of multiple damages

(1) This section applies where a court of an overseas country has given a judgment for multiple damages with the meaning of section 5(3) above against--

(a) a citizen of the United Kingdom and Colonies; or

(b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom

are responsible; or

(c) a person carrying on business in the United Kingdom,

(in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or to a party entitled to contribution include references to any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

(7) This section shall, with the necessary modifications, apply also in relation to any order which is made by a tribunal or authority of an overseas country and would, if that tribunal or authority were a court, be a judgment for multiple damages within the meaning of section 5(3) above.

SECTION: 7 Enforcement of overseas judgment under provision corresponding to § 6

(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for

the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of [judgments of any description specified in the Order which are given under any provision of the law of that country relating to the recovery of sums paid or obtained pursuant to a judgment for multiple damages within the meaning of section 5(3) above, whether or not that provision corresponds to section 6 above].

[(1A) Such an Order in Council may, as respects judgments to which it relates--

(a) make different provisions for different descriptions of judgment; and

(b) impose conditions or restrictions on the enforcement of judgments of any description.]

NOTES

1. The PTIA was the U.K.'s specific response to U.S. extraterritorial application of antitrust law via the uranium antitrust litigation, infra chapter 5. Australia also passed blocking legislation in 1976 in response to the uranium litigation in an attempt to prevent evidence from within Australia from being used in foreign legal proceedings to which Australia objected. Canada passed similar blocking legislation in 1985, after originally administrative regulations in 1976 in response to the uranium litigation. The blocking laws of these countries allow their Attorneys General to prevent the production of evidence as well as the enforcement, in whole or in part, of foreign antitrust judgments. The laws also include provisions for the defendants to foreign antitrust suits to seek recovery from the plaintiff in certain situations. *See* Spencer Weber Waller, Antitrust and American Business Abroad, §§ 4:16, 17 (3d ed. 1997 & annual supp.).

2. Blocking legislation goes back as far as 1947 in Canada, in response to American proceedings seeking discovery from the Canadian newsprint industry. Other countries, such as the U.K., Germany, France and New Zealand passed blocking legislation in response to the 1960 U.S. antitrust shipping litigation.

3. The most recent blocking statutes have been much more modest in scope. Both Japan and the European Union enacted non-recognition and clawback statutes in response to the judicial enforcement of the United States Antidumping Act of 1916. Following the WTO decision holding that the 1916 Act was inconsistent with WTO antidumping provisions, the United States Congress repealed the Act, but did so on a *prospective* basis. Shortly thereafter, Japan enacted The Special Measure Law concerning the Obligation to Return Profits Obtained pursuant to the Antidumping Act of 1916 of the United States. The Special Measure allowed Japanese nationals to sue any parent or subsidiary of the prevailing party for the recovery of any judgment entered against them under the 1916 Act. The EU enacted a similar measure.

Following the return of one and only U.S. jury verdict against a Japanese firm under the 1916 Act, that defendant announced its intention to institute suit for recovery of the full amount of the US judgment, attorneys fees, and costs. In response, the United States sought and obtained an anti-suit injunction from the U.S. court enjoining the Japanese defendant from pursuing any such counter-suit in Japan. This injunction was dissolved on appeal. As of the end of June 2007, the Japanese countersuit had not been commenced.

PROBLEM 4

You represent a United States firm contemplating suing a series of defendant for overcharges as a result of a long running international cartel affecting imports into the United States. None of the prospective defendants have any facilities, employees, or assets in the United States. How would you approach questions and strategies for subject matter jurisdiction, personal jurisdiction, service of process, and discovery in order to maximize the chance that the appropriate foreign jurisdiction will recognize and enforce any resulting U.S. court judgment?

PROBLEM 5

In addition to the issues set forth in Problem 5, one or more the defendants are based in foreign countries which have blocking statutes similar to the United Kingdom Protection of Trading Interest Act. How does this affect your incentives to bring suit and litigation strategies if you choose to proceed?