Federal Judicial Center
International Litigation Guide

Discovery in International Civil Litigation: A Guide for Judges

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Discovery in International Civil Litigation: A Guide for Judges

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I. Introduction

At an increasing rate, U.S. courts are hearing cases in which parties seek evidence located abroad or parties to a foreign or international proceeding seek evidence located in the United States. International discovery issues pose difficult and complex challenges, at both the procedural and substantive levels. This guide seeks to address these issues by providing a practical overview of cross-border discovery questions that commonly arise in civil cases before federal courts.

In considering these matters, it is important to emphasize that the U.S. approach to the taking of evidence differs significantly from that seen elsewhere in the world. The liberal, party-driven approach to discovery in the United States is unique. Other countries allow only very targeted discovery (typically referred to as "disclosure") and, in certain cases, with strict oversight by the judiciary. To place U.S. evidentiary procedures in context, Appendix A summarizes the relevant domestic discovery and disclosure rules in several jurisdictions frequently involved in U.S. litigation and explains how those jurisdictions are likely to address requests for assistance with discovery.

In the United States, there are a limited number of treaties and laws that address the taking of evidence in international disputes. The most significant are the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a multilateral treaty detailing procedures for the taking of evidence among signatory countries, and 28 U.S.C. §§ 1781–1783. In *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*,[1] the Supreme Court considered whether the Hague Convention was the mandatory or exclusive means by which a party to a U.S. proceeding may obtain documents or information from a foreign signatory. The Court determined that it is not. This decision, the Hague Convention, and relevant statutes are discussed in detail in this guide.

U.S. courts and litigants need to be aware that matters relating to the taking of evidence are not always considered "merely" procedural in the cross-border context. In some countries, courts retain control over the taking of evidence. Party-initiated efforts (such as those used

1. 482 U.S. 522 (1987).

in the United States) within a foreign court's territorial jurisdiction are often viewed as infringing on the foreign court's jurisdiction and the sovereignty of the foreign state. These sorts of conceptual differences are important for U.S. courts to consider when undertaking a comity analysis to determine whether an application seeking discovery abroad will be granted.

The taking of evidence across national borders is a lengthy and often complicated matter that can involve questions of U.S., foreign, and international law. The process can take more than a year in some circumstances and is not always guaranteed to be successful. Although the U.S. Department of State does not provide assistance in individual cases, its website includes some useful background information on the process and may provide insight with respect to a particular foreign state.[2]

2. U.S. Department of State, *International Judicial Assistance—Country Information*, http://travel.state.gov/content/travel/english/legal-considerations/judicial/country.html [hereinafter U.S. Department of State, *Country Information*].

II. Discovery in a Foreign Jurisdiction to Assist Proceedings in the United States

Transnational litigation often involves parties in a U.S. court who are seeking evidence that is located abroad.[3] The approach to this type of discovery may vary depending on whether the evidence sought is in the possession of a party or a non-party.

Foreign states are often unfamiliar with and wary of U.S. discovery practices. Their concern, in part, arises from the intrinsic differences between discovery procedures available in the United States and those available in the rest of the world, particularly civil law countries. Many states view U.S.-style discovery as overbroad and, in some cases, as antithetical to deeply held conceptions of fairness. Furthermore, many states view the taking of evidence within their borders as implicating their own state sovereignty, particularly in circumstances in which the evidence sought is taken from a national or an entity incorporated under the state's laws.

A. Planning for International Discovery in a U.S. Proceeding

International discovery takes careful planning. Judges should encourage the parties to identify as early as possible whether international discovery might be necessary and to resolve consensually any cross-border discovery issues that arise during a Rule 26(f) (meet and confer) conference under the Federal Rules of Civil Procedure. Rule 16(a) scheduling conferences can also be used to help the parties work together to develop a cooperative protocol for collecting evidence and avoid needless motion practice when a case has strong cross-border characteristics.

When assessing the range of cross-border issues that might arise in a particular case, judges and parties should address

- the nature of the evidence at issue (e.g., documentary, testimonial);

3. The reasons a party may seek discovery abroad are numerous. For example, apart from the involvement of parties who have connections to foreign states, a party may seek discovery abroad if it becomes necessary for a judge to determine issues of foreign law under Federal Rule of Civil Procedure 44.1.

- the subjects to which the evidence pertains;
- the geographical location of the evidence;
- the owner or custodian of the evidence (e.g., a party, an affiliate or employee of a party, a non-party, a government);
- how the parties intend to request production of evidence;
- whether another party intends to consent to or oppose the request;
- applicable treaties, conventions, and foreign laws or practices, including mutual legal assistance treaties (MLATs), blocking or data protection laws, privilege issues, and sovereignty or comity interests;
- whether the Federal Rules of Civil Procedure will govern the procedure of any deposition to be taken in a foreign country, and whether the U.S. court will resolve disputes arising during such deposition;
- practical obstacles or delays inherent to discovery in the target jurisdiction; and
- electronic discovery issues.

Parties should be urged to identify and address cross-border discovery issues in the Rule 26(f) discovery plan and to set a schedule that accounts for foreseeable delays or other problems in order to prevent future disputes.

Given the complex issues raised by requests for international discovery, disputes in this area often require the involvement of a judge. The remainder of this chapter addresses some of the issues that may arise.

B. Discovery from a Party to a U.S. Federal Litigation

Generally, when one party to a U.S. federal litigation seeks evidence from another party, the Federal Rules of Civil Procedure govern, even when the evidence is located in a foreign jurisdiction.[4] However, to

4. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522 (1987) (permitting litigants seeking evidence located abroad to proceed under the Federal Rules); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 445 (S.D.N.Y. 1984) ("[T]he federal courts have repeatedly acknowledged their own authority to compel a party to provide relevant discovery pursuant to the normal procedures outlined in the federal rules, both civil and criminal, regardless of where the information is actually located.").

avoid an argument that the Federal Rules do not apply when evidence is located abroad, requesting parties often seek discovery by alternative means. Several of these alternatives, including Hague Convention letters of request and letters rogatory, are discussed below in the context of non-party discovery (section II.C), although these procedures can also be used by and against parties to a proceeding.[5]

1. Deposition of a Party or a Party's Employees Located Outside the United States

Cross-border discovery issues often require special attention. For example, the question of which corporate employees may be compelled to give testimony on notice takes on greater significance in the cross-border context because the requesting party may not be able to use a subpoena as a means of obtaining the requested testimony.[6] Instead, the requesting party may be required to submit its requests by letters rogatory or the Hague Convention—less familiar devices that can result in delay. When considering what approach to take, the party seeking discovery must determine whether the employee is an officer, director or managing agent of the corporate party whose deposition can be compelled pursuant to a notice of deposition or whether the witness is a lower-level employee whose deposition must be obtained by other means.[7] If the sought-after witness is not an officer or director but may be a managing agent, resolution of the issue may require submissions from the parties and a hearing to weigh competing positions.[8]

Determining where a deposition of a foreign party or corporate employee should take place can also trigger disputes among parties.

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5. *See* T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges (Federal Judicial Center 2014), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/mlat-lr-guide-funk-fjc-2014.pdf/$file/mlat-lr-guide-funk-fjc-2014.pdf.

6. If the witness abroad is a U.S. national, a subpoena may be issued under 28 U.S.C. § 1783. *See supra* section II.C.3.

7. *See* Dubai Islamic Bank v. Citibank N.A., No. 99 CIV. 1930 (RMB) (THK), 2002 WL 1159699, at *2–3 (S.D.N.Y. May 31, 2002) (discussing five-factor, fact-specific analysis to determine whether an employee is a "managing agent" of a corporate party whose deposition may be compelled pursuant to a notice of deposition).

8. *See id.* at *2 (noting numerous conferences and "voluminous submissions" required to decide the issue).

Although a requesting party may designate the location of a deposition under the Federal Rules of Civil Procedure, there is a general presumption that the deposition of a defendant (or an employee of the defendant) should take place at the deponent's residence or place of business, even if that location is overseas.[9] This presumption may be overcome, however, when practical considerations weigh in favor of holding the deposition in the United States. For example, if the law of the foreign state prohibits U.S.-style depositions or otherwise makes them impractical and other considerations of cost, burden, litigation efficiency, or the defendant's contacts with the United States weigh in favor of a deposition here, a court may order the deposition to take place in the United States.[10] Plaintiffs, on the other hand, are typically required to be deposed in the forum in which they chose to file suit, unless there was no choice of jurisdiction or there is other good cause to depart from the general rule.[11]

2. Documents Outside the United States

If a party asserts that documents must be obtained from the responding party's foreign affiliate, courts consider whether the documents are within the responding party's "possession, custody, or control" under Federal Rule of Civil Procedure 34.[12] Neither strict legal ownership nor physical possession is required for a foreign party to have "control" over documents. Rather, the requesting party need only show that the responding party has the practical ability to obtain the documents from its foreign affiliate.[13]

When a foreign statute prohibits disclosure of evidence sought by a party, courts have sometimes required the responding party to make

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9. *See* Fed. R. Civ. P. 30(b)(1); United States v. Halliburton Co., 270 F.R.D. 26, 29 (D.D.C. 2010).

10. *See* Fausto v. Credigy Servs. Corp., 251 F.R.D. 427 (N.D. Cal. 2008) (ordering depositions in the United States because Brazilian law prohibited U.S. lawyers from taking depositions there and defendants often hosted Brazilian employees in the United States); Chris-Craft Indus. Prods., Inc. v. Kuraray Co., 184 F.R.D. 605 (N.D. Ill. 1999).

11. *See* Aerocrine AB v. Apieron Inc., 267 F.R.D. 105, 108 (D. Del. 2010).

12. Fed. R. Civ. P. 34(a)(1); Shcherbakovskiy v. Seitz, No. 03 CV 1220 (RPP), 2010 WL 3155169, at *3 n.7 (S.D.N.Y. July 30, 2010).

13. *See* The Bank of N.Y. v. Meridien Biao Bank Tanzania Ltd., 171 F.R.D. 135, 146–47 (S.D.N.Y. 1997).

a good faith effort to secure permission to disclose from the foreign government.[14] Failing such a good faith effort (and, notably, sometimes even in cases in which a good faith effort has proven unsuccessful), an adverse inference against the non-disclosing party may be an appropriate measure for mitigating prejudice to the requesting party's case.[15]

C. Discovery from a Foreign Non-party

Discovery from a foreign non-party presents many of the same issues discussed above, as well as additional unique challenges. When voluntary cooperation is not an option (whether by law or lack of consent), U.S. litigants may seek discovery from foreign non-parties through the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention") or letters rogatory, although both procedures may involve complicated considerations of foreign law, sovereignty, and international comity.[16] If the responding

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14. Restatement (Third) of Foreign Relations Law of the United States § 442(2)(a) (1990) ("[A] court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available."). *See* Linde v. Arab Bank, PLC, 706 F.3d 92, 97–101 (2d Cir. 2013) (describing Arab Bank's efforts to seek permission from authorities in relevant foreign states to produce responsive material subject to foreign bank secrecy laws); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008) (denying French bank's request for a protective order covering materials subject to French bank secrecy law after multifactor analysis).

15. *See* Linde v. Arab Bank, PLC, 269 F.R.D. 186 (E.D.N.Y. 2010) (considering Arab Bank's compliance with discovery obligations in light of foreign bank secrecy laws which Arab Bank argued prohibit the production of certain documents, and concluding that an adverse inference instruction can be a proper sanction under Fed. R. Civ. P. 37(b) even when the non-producing party has not been found to have engaged in bad faith or willful conduct); *see also Linde*, 706 F.3d at 116.

16. At least one court has held that when a party seeks discovery simultaneously under the Federal Rules and by letters rogatory, resort to letters rogatory does not prejudice the party's right to seek discovery under the Federal Rules. *See* Dubai Islamic Bank v. Citibank N.A., No. 99 CIV. 1930 (RMB) (THK), 2002 WL 1159699, at *2–3 (S.D.N.Y. May 31, 2002). As the Hague Convention expressly states that it does not preclude any other method of obtaining disclosure pursuant to local law, the same reasoning presumably would apply to parallel requests involving the Convention. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, Mar. 18, 1970, 23 U.S.T. 2555, art. 27 [hereinafter Hague Convention]; Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522 (1987) (hold-

party is a U.S. citizen or resident located abroad, a court also may issue a subpoena for the requested testimony or documents under the Walsh Act, 28 U.S.C. § 1783.[17]

1. The Hague Convention

The Hague Convention is a multilateral treaty designed to facilitate the taking of evidence abroad (see Appendix B).[18] The Hague Conference on Private International Law (the Hague Conference) negotiated the terms of the Hague Convention on March 18, 1970, with the intent to create a treaty to improve judicial cooperation between common law and civil law countries on issues of foreign discovery.[19] These efforts were promoted by the United States, which had been frustrated with the practical difficulties of seeking evidence abroad.[20] As of the date of this publication, the Hague Convention is in effect in more than 50 countries ("contracting states").[21]

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ing that the Hague Convention, where applicable, is not the exclusive means by which to compel discovery from a party to a litigation located abroad).

17. *See infra* notes 90–91 and accompanying text.

18. During the drafting of this guide, the Hague Conference on Private International Law (the "Hague Conference") released the *Draft Practical Handbook on the Operation of the Evidence Convention*. Judges should refer to the Hague Conference's website to ensure that they have access to the latest draft of this useful resource in interpreting and applying the rules of the Hague Convention when a party seeks discovery abroad. *Draft Practical Handbook on the Operation of the Evidence Convention*, Hague Conference on Private International Law (2014), http://www.hcch.net/upload/wop/2014/2014sc_pd01en.pdf (last visited Mar. 5, 2015) [hereinafter Draft Handbook].

19. *See* Hague Convention, *supra* note 16; Draft Handbook, *supra* note 18 ¶¶ 5–11. For further insight with respect to the terms of the Hague Convention, see Philip W. Amram, *Explanatory Report on the 1970 Hague Evidence Convention*, Hague Conference on Private International Law (1970), http://www.hcch.net/index_en.php?act=publications.details&pid=2968&dtid=3 (last visited Mar. 5, 2015).

20. In *Aérospatiale*, the Supreme Court describes the interest of U.S. lawyers in particular in improving procedures for obtaining evidence abroad, which motivated the United States to take the initiative in proposing that an evidence convention be adopted. *See Aérospatiale*, 482 U.S. at 530–31 (citing Department of State, Convention on Taking of Evidence Abroad, S. Exec. Rep. No. 92-25, at 3 (1972) (statement of Carl F. Salans, Deputy Legal Adviser)).

21. Signatories to the Hague Convention include the United States, members of the European Union, China, Turkey, Singapore, and the Russian Federation. A complete list of signatories, declarations, and reservations is available on the Hague Conference website. *See Status Table: Convention of 18 March 1970 on the Taking of Evi-*

II. Discovery in a Foreign Jurisdiction to Assist Proceedings in the United States

The Hague Convention streamlines procedures for seeking evidence abroad by allowing U.S. courts to request evidence directly from the designated central authority of a foreign state and bypass diplomatic channels. However, despite these enumerated procedures, the success of obtaining discovery through the Hague Convention, like that of other methods, remains highly variable as well as potentially slow and expensive.[22] It may take six months or more to receive a response pursuant to a letter of request submitted pursuant to the Hague Convention procedures.[23]

The success of Hague Convention procedures for parties to a U.S. litigation rests in large part on the local discovery rules of the state in which discovery is sought ("requested state") and its willingness to permit U.S.-style discovery procedures. Appendix A provides a broad overview of local discovery practices in selected jurisdictions, including, where applicable, each contracting state's approach to discovery under the Hague Convention.[24]

In the United States, the Hague Convention has become the preferred means of obtaining discovery from foreign non-parties to a U.S. litigation, largely because the mechanisms provided incorporate the

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dence Abroad in Civil or Commercial Matters, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Mar. 5, 2015).

22. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 542 (1987).

23. *See Report on the Work of the Special Commission of May 1985 on the Operation of the Convention*, Hague Conference on Private International Law, § 3(A) (1986) http://www.hcch.net/upload/scrpt85e_20.pdf (last visited Mar. 5, 2015) [hereinafter Hague Convention Report of 1986] (noting that the average delay in executing letters of request at the time of the May 1985 Special Commission meeting was one to six months); Draft Handbook, *supra* note 18, ¶¶ 248–52.

24. For additional information on a contracting state's application of the Hague Convention, the Hague Conference has also made available online responses to a November 2013 questionnaire completed by a number of contracting states. *See Publications: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Questionnaires & Responses*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=publications.details&pid=6043&dtid=33 (last visited Mar. 5, 2015). The Hague Conference also maintains a bibliography of materials on the Hague Convention. *See Bibliography: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=1&cid=82 (last visited Mar. 5, 2015).

express terms of the responding jurisdiction. Parties to a U.S. litigation will often employ the Hague Convention in parallel with other means of procuring evidence so as to cover all possible avenues. Encouraging parties to do so can save time and effort in the discovery process. Additionally, as discussed in section II.D, discovery pursuant to the Hague Convention typically may proceed notwithstanding blocking statutes enacted by the requested state.[25]

a. Scope

The applicability of the Hague Convention is limited by several variables, some of which have engendered disagreement among contracting states. Most significantly, the treaty applies only to "civil or commercial matters" and for the pursuit of evidence to be used "in judicial proceedings, commenced or contemplated."[26] As neither variable is defined, contracting states have disagreed as to whether the Hague Convention applies in the context of certain proceedings.[27] However, reports from the Hague Conference suggest that such disagreements have not hindered the successful use of the Hague Convention between contracting states.[28]

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25. *See infra* section II.D.1.b for further information on blocking statutes.

26. *See* Draft Handbook, *supra* note 18, ¶¶ 47–57. The Hague Convention does not apply to criminal matters or arbitrations, or to matters in which the plaintiff is a state or agency thereof.

27. *See Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,* Hague Conference on Private International Law, § 1 (1978), http://www.hcch.net/upload/scrpt78e_20.pdf (last visited Mar. 5, 2015) [hereinafter Hague Convention Report of 1978]; Hague Convention Report of 1986, § 1(A), *supra* note 23; *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Hague Conference on Private International Law, Annex ¶ (a) (1989), http://www.hcch.net/upload/scrpt89e_20.pdf (last visited Mar. 5, 2015) [hereinafter Hague Convention Report of 1989]. The Hague Convention should be interpreted similarly across jurisdictions, given that it is to be interpreted in accordance with generally accepted principles of treaty interpretation. *See* Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331.

28. *See* Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, and Taking of Evidence and Access to Justice Conventions ¶ 13 (Feb. 2–12, 2009), http://www.hcch.net/upload/wop/

Contracting states further disagree as to the exclusivity of the Hague Convention procedures when one contracting state seeks evidence from another.[29] The Supreme Court clarified the United States' position in the seminal case *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, wherein the Supreme Court held that the Hague Convention is neither the exclusive nor the mandatory procedure for obtaining documents and information in a foreign signatory's territory.[30] The Court observed that both the text and history of the Hague Convention "unambiguously support[] the conclusion that it was intended to establish *optional* procedures that would facilitate the taking of evidence abroad."[31] It is significant that many contracting states operate on the assumption that the Hague Convention is the only means for securing discovery within the United States or other contracting states.[32]

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jac_concl_e.pdf (last visited Mar. 5, 2015) [hereinafter Special Commission Conclusions and Recommendations of 2009]. The Hague Conference provides responses to questionnaires completed by contracting states describing, to a limited extent, each state's application of the Hague Convention procedures. Included among the questions is how each state interprets the phrase "civil or commercial matters." By way of example, the United States responded to this question by noting that "[t]he Central Authority will consider any request for evidence in a non-criminal proceeding that emanates from a tribunal or other authority that has judicial or adjudicatory powers." United States Response to Questionnaire of May 2008 relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (Evidence Convention), Hague Conference on Private International Law, http://www.hcch.net/upload/wop/2008usa20.pdf (last visited Mar. 5, 2015). More recently, the United States has indicated that it encountered problems with the interpretation of the phrase "civil or commercial." United States Response to Questionnaire of November 2013 relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (Evidence Convention), Hague Conference on Private International Law, http://www.hcch.net/upload/wop/2014/2014sc_20us.pdf (last visited Mar. 5, 2015).

29. *See* Draft Handbook, *supra* note 18, ¶¶ 19–28.

30. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 533–47 (1987).

31. *Id.* at 538, 541 (emphasis added).

32. For more information on the approach of different contracting states to the Hague Convention, see *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, *Questionnaires & Responses*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=82 (last visited Mar. 5, 2015).

Thus, if foreign discovery is sought in a U.S. proceeding, a requesting party may simultaneously seek evidence under the Hague Convention and under an alternative discovery mechanism. The responding party may then move for a protective order requiring the requesting party to comply with the Hague Convention. In assessing such cases, U.S. courts employ a comity analysis that weighs "the particular facts, sovereign interests, and likelihood that resort to [Hague Convention] procedures will prove effective."[33] When a party seeks discovery from a foreign non-party over whom the court lacks jurisdiction, courts have viewed resort to the Hague Convention procedures as "virtually compulsory" as compared with other means.[34]

As in civil discovery in the United States, the party resisting discovery bears the burden of showing that the discovery requested is irrelevant to the issues in the case or is overly broad, unduly burdensome, unreasonable, or oppressive.[35]

b. Procedure

The Hague Convention creates two basic mechanisms by which a party to a proceeding in a contracting state may seek evidence abroad. First, it permits a judicial authority of a contracting state to submit a "letter of request" to the competent authority of the requested state for the purpose of obtaining evidence.[36] Second, the Hague Convention permits the taking of evidence by a diplomatic officer, consular agent, or commissioner of a contracting state in the territory of another con-

33. *Aérospatiale,* 482 U.S. at 544–46; *see also* Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 246 (S.D.N.Y. 2010) (following comity analysis of the Restatement of Foreign Relations Law, together with additional factors articulated by courts within the Second Circuit); Rich v. KIS Cal., Inc., 121 F.R.D. 254, 257 (M.D.N.C. 1988) (observing that Hague proponent "bears the burden of demonstrating the necessity for using those procedures") (citing *Aérospatiale,* 482 U.S. at 546–47).

34. Orlich v. Helm Bros., Inc., 160 A.D.2d 135, 143–44 (N.Y. Sup. Ct. 1990); *see also* Gap, Inc. v. Stone Int'l Trading, Inc., No. 93 Civ. 0638 (SWK), 1994 WL 38651, at *1 (S.D.N.Y. Feb. 4, 1994) ("As a practical matter, in many cases the Hague Convention provides the only means to request documents or testimony from foreign non-parties over whom the court has no personal jurisdiction and who are beyond the subpoena power of the court.").

35. Upper Deck Int'l B.V. v. Upper Deck Co., No. 11CV1741-LAB KSC, 2013 WL 3746086, at *2 (S.D. Cal. July 12, 2013).

36. *See* Hague Convention, *supra* note 16, ch. 1.

tracting state under certain, limited circumstances.[37] Each procedure is discussed below in turn.

i. Letters of Request

The Hague Convention permits a U.S. court to submit a letter of request to a designated "central authority" of the contracting state in which the evidence is sought.[38] Once the central authority receives the letter of request, it transmits the letter of request to the competent judicial authority for execution.[39] A list of central authorities designated for each state that is party to the Hague Convention is available on the Hague Conference website.[40]

Letters of request must specify basic information, including the parties, the nature of the proceedings, a description of the evidence sought, and, as appropriate, the specific documents or information requested to be disclosed.[41] When a judicial authority executes a letter of request, it applies its local laws to the methods and procedures to be followed unless a requesting state specifies a "special method or procedure" in the letter of request.[42] In practice, this provision permits parties to request specific U.S. procedures that may not be available in the foreign jurisdiction in which the evidence is sought, "largely eliminat[ing] conflicts between the discovery procedures of the United States and the laws of foreign systems . . . without violating the sover-

37. *See* Hague Convention, *supra* note 16, ch. 2. Article 33 of the Hague Convention permits a contracting state to exclude, in whole or in part, the application of Chapter 2. *Id.* art. 33.

38. *See id.* arts. 2, 27(a). Contracting states are required to designate one or more central authorities to receive letters of request. *See id.* arts. 2, 24.

39. *See id.* art. 2; *see also* Draft Handbook, *supra* note 18, ¶¶ 166–78.

40. *See Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: Central Authorities*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.authorities&cid=82 (last visited Mar. 5, 2015).

41. *See* Hague Convention, *supra* note 16, arts. 3, 4; *see also* Draft Handbook, *supra* note 18, ¶¶ 102–40 (describing the content of a letter of request under the Hague Convention).

42. Hague Convention, *supra* note 16, art. 9; Draft Handbook, *supra* note 18, ¶¶ 137–38. Furthermore, the use of video links and similar technologies to assist in the taking of evidence abroad has been determined to be consistent with the framework of the Hague Convention. *See* Special Commission Conclusions and Recommendations of 2009, *supra* note 28, ¶¶ 55–57.

eignty of foreign nations."[43] This special method or procedure should be followed by the judicial authority unless (a) it is deemed "incompatible" with the law of the executing state or (b) performance is impossible as a result of internal practice and procedure or practical difficulties.[44] The Hague Conference provides a model that may provide useful guidance as to the typical form and content of a letter of request.[45] In addition, it may be helpful to attach appropriate affidavits or declarations by the parties to a proceeding or by relevant experts, explaining the need and appropriateness of the requested foreign discovery.

If a witness refuses to provide evidence in response to a letter of request, the Hague Convention provides that the requested state shall use "appropriate" coercive procedures provided under domestic law to obtain the evidence.[46] Once the central authority of the requested state receives documents from the local court establishing the execution of the letter of request, these documents are sent to the requesting state by the same channels through which the letter of request was received.[47]

ii. Diplomatic Officer, Consular Agent, or Commissioner

Pursuant to the Hague Convention, a diplomatic officer, consular agent, or commissioner of a contracting state may take evidence, without compulsion, from a person to aid a civil or commercial proceeding, although the permission of the state in which the evidence is being taken may be required.[48]

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43. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 560–61 (1987) (Blackmun, J., concurring in part and dissenting in part).

44. Hague Convention, *supra* note 16, art. 9; *see also* Draft Handbook, *supra* note 18, ¶¶ 215–29.

45. *See Model for Letters of Request Recommended for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,* Hague Conference on Private International Law (1985), http://www.hcch.net/index_en.php?act=publications.details&pid=3309&dtid=2 (last visited Mar. 5, 2015).

46. Hague Convention, *supra* note 16, art. 10.

47. *See id.* art. 13.

48. Hague Convention, *supra* note 16, arts. 15 (describing the authority of a U.S. diplomatic officer or consular agent taking evidence from a U.S. national), 16 (describing the authority of a U.S. diplomatic officer or consular agent taking evidence from a national of a third state), and 17 (describing the authority of a commissioner to

However, the availability of this mechanism varies by contracting state. The Hague Convention permits a contracting state to exclude, in whole or in part, the application of provisions related to the taking of evidence by diplomatic officers, consular agents, or commissioners.[49] Furthermore, the Hague Convention expressly permits contracting states to make certain declarations and impose additional obligations to employ this mechanism. For example, a contracting state may make a declaration that permits a diplomatic officer, consular agent, or commissioner to apply to a competent authority to obtain the evidence by compulsion.[50] The United States and Italy, for example, have filed unconditional declarations permitting foreign states to take these actions.

Article 21 of the Hague Convention places certain limitations on the type of evidence a diplomatic officer, consular agent, or commissioner may take, as well as the method used to do so. Namely, the evidence (a) should not be of a kind that is incompatible with the law of the state in which the evidence is taken or contrary to any permission granted by the state; and (b) should not be taken in a manner forbidden by the law of the state in which the evidence is taken.[51]

When an attempt to take evidence using a diplomatic officer, consular agent, or commissioner has failed because the person has refused to give evidence, the letter of request mechanism may be employed.[52]

In the United States, foreign discovery by this second Hague Convention procedure could be considered redundant to the deposition authority provided under the Federal Rules of Civil Procedure. As the Supreme Court observed in *Aérospatiale*, at the time the Hague Convention was adopted, in the United States "Federal Rule of Civil Procedure 28(b) clearly authorized the taking of evidence on notice either in accordance with the laws of the foreign country or in pursuance of

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take evidence from a person located abroad). *See also* Draft Handbook, *supra* note 18, ¶¶ 363–406.

49. *See* Hague Convention, *supra* note 16, art. 33.

50. *See id.* art. 18; *see also id.* art. 19 (permitting a competent authority to lay down conditions as to the time and place of the taking of evidence, as well as to require reasonable advance notice).

51. *See id.* art. 21(a), (d).

52. *See id.* art. 22.

the law of the United States."[53] Thus, in practice, parties may seek to employ this Hague Convention mechanism to take depositions in a foreign country by using the notice provision of Rule 28(b)(1) or the procedure to appoint a commissioner under Rule 28(b)(2).[54]

c. The Hague Convention in Practice

A requested state may refuse to consider or execute a letter of request made pursuant to the Hague Convention when it concludes that

- the assistance sought is not covered by the Hague Convention (e.g., the matter for which evidence is requested is not "civil or commercial" in nature and/or does not relate to "judicial proceedings");[55]
- the letter of request does not comply with the provisions of the Hague Convention, in which case the requested state is required to inform the central authority of the requesting state of its specific objections;[56]
- execution of the letter of request does not fall within the functions of the judiciary of the requested state;[57] or
- the sovereignty or security of the requested state would be prejudiced.[58]

Furthermore, many of the Hague Convention's contracting states, including the United States, have issued limiting declarations and reservations. Perhaps most relevant to U.S. litigants are the various reservations made under Article 23 of the Hague Convention. Article 23 allows a contracting state to declare that it will not execute a letter of request "for the purpose of obtaining pretrial discovery of documents as known in Common Law countries."[59] Numerous countries have made this Article 23 declaration, including Argentina, Australia, Ger-

53. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 534 n.16 (1987).

54. *See* Laura W. Smalley, 71 Am. Jur. Trials 1 (Originally published in 1999).

55. Hague Convention, *supra* note 16, art. 1.

56. *Id.* art. 5.

57. *Id.* art. 12(a).

58. *Id.* art. 12(b). Refusals to execute are infrequent in practice. *See* Hague Convention Report of 1978, *supra* note 27, § 5(F).

59. *See* Hague Convention, *supra* note 16, art. 23; Draft Handbook, *supra* note 18, ¶¶ 316–35.

many, Italy, and South Africa.[60] The United Kingdom, China, and France, among other states, have submitted qualified Article 23 reservations, limiting the broad language permitted by Article 23 and focusing instead on avoiding overly broad "fishing expeditions."[61] Only a small fraction of contracting states, including the United States, Israel, and Russia, have not submitted any reservation under Article 23.[62]

Questions regarding the admissibility of evidence gathered in response to a letter of request may arise once a party applies for a letter of request or after such evidence is received and a party seeks admission of that evidence at trial. U.S. courts have declined to reject applications for letters of request on the basis that the evidence requested would be inadmissible. U.S. courts have observed that the Federal Rules of Civil Procedure allow the discovery of information which, though not itself admissible, may disclose or lead to admissible evidence.[63]

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60. *See Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the Hague Evidence Convention*, Hague Conference on Private International Law, May 2014, http://www.hcch.net/upload/appl-table20e.pdf (last visited Mar. 5, 2015) [hereinafter Hague Convention Applicability Table].

61. *See In re* Asbestos Ins. [1985] 1 W.L.R. 331 (House of Lords). The United Kingdom allows such reservations to be overcome if a letter of request provides sufficient specificity when identifying the documents to be produced or examined. *See* Hague Convention Report of 1978, *supra* note 27, § 2; Hague Convention Report of 1986, *supra* note 23, § 4 (noting that the primary concern with respect to pretrial discovery is to preclude "fishing expeditions"); Hague Convention Report of 1989, *supra* note 27, Annex ¶ (d) (in which the Special Commission urges contracting states to limit the scope of their reservations under Article 23 to facilitate the use of the Hague Convention); *see also Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, Hague Conference on Private International Law ¶ 23 (2003), http://www.hcch.net/upload/wop/lse_concl_e.pdf; Draft Handbook, *supra* note 18, ¶ 63.

62. *See* Hague Convention Applicability Table, s*upra* note 60.

63. *In re* Urethane Antitrust Litig., 267 F.R.D. 361, 365–66 (D. Kan. 2010) (rejecting defendant's assertion that a list of questions to be put to persons in Germany (and enclosed with a Hague Convention letter of request) should be modified on the grounds that the questions seek evidence that would not be admitted at trial based on hearsay or other grounds); *see also* Upper Deck Int'l B.V. v. Upper Deck Co., No. 11CV1741-LAB KSC, 2013 WL 3746086, at *2 (S.D. Cal. July 12, 2013); Fed. R. Civ. P. 26.

When a foreign court executes a letter of request for a deposition using its own procedures, Federal Rule of Civil Procedure 28(b)(4) specifically provides that "[e]vidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States."[64]

While the Hague Convention is the primary treaty used to seek evidence abroad, parties may rely on other international agreements. For example, the United States is a party to a number of bilateral treaties that address the taking of evidence.[65]

2. Letters Rogatory

In addition to the Hague Convention, there are other avenues open to a U.S. party seeking evidence located abroad. Perhaps the best known of these mechanisms involves letters rogatory, which are used by both U.S. and foreign courts.[66] Appendix C is a sample letter rogatory.

A letter rogatory is a formal request from a court in which an action is pending to a foreign court, asking for assistance in performing a

64. Fed. R. Civ. P. 28(b)(4).

65. *See, e.g.*, Agreement Relating to the Taking of Evidence with the Federal Republic of Germany (1956); Agreement Relating to the Taking of Evidence with the Federal Republic of Germany (1980); The Agreement to Facilitate the Conduct of Litigation with International Aspects in Either Country with Sierra Leone (1966); The Agreement between the United States and the U.S.S.R. relating to the Procedure To Be Followed in the Execution of Letters Rogatory (in force between the United States and Ukraine) (1935); Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance (1987); Agreement Exempting from Authentication Signatures Attached to Letters Rogatory Exchanged Between Puerto Rico, the Philippine Islands, and Spain, with Declaration (1901). The United States has not yet signed the Inter-American Convention on the Taking of Evidence and Additional Protocol. *See* Inter-American Convention on the Taking of Evidence, Organization of American States, http://www.oas.org/juridico/english/sigs/b-37.html (last visited Mar. 5, 2015); Signatories and Ratifications: Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, Organization of American States, http://www.oas.org/juridico/english/sigs/b-51.html (last visited Mar. 5, 2015).

66. *See* Funk, *supra* note 5.

judicial act.[67] In the absence of an applicable treaty like the Hague Convention, letters rogatory may be the only means by which a party can compel evidence from a foreign non-party who is not subject to the personal jurisdiction of the U.S. court. However, the letters rogatory procedure is both slow and costly.

a. Scope

A party seeking to compel discovery abroad may apply for a letter rogatory from a U.S. judge. U.S. courts have consistently held that they have the power to issue letters rogatory pursuant to 28 U.S.C. § 1781 (see Appendix D) and Federal Rule of Civil Procedure 28(b), some finding the ability to issue letters rogatory to be within the "inherent" authority of the court.[68] Rule 28(b) specifically provides that a deposition may be taken in a foreign country by letter rogatory,[69] although

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67. Title 22 (Foreign Relations) of the Code of Federal Regulations defines "letters rogatory" as follows:

> In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act. Examples are requests for the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment. In United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining evidence. Requests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity.

22 C.F.R. § 92.54. Notably, while the United States has signed the Inter-American Convention on Letters Rogatory, it has entered a reservation stating that the convention does not apply to the taking of evidence (although the convention does apply to letters rogatory for the performance of procedural acts, such as service of process, summonses, or subpoenas). *See* Inter-American Convention on Letters Rogatory: Signatories and Ratifications, Organization of American States, http://www.oas.org/juridico/english/sigs/B-36.html (last visited Mar. 5, 2015).

68. *See, e.g.*, United States v. Staples, 256 F.2d 290, 292 (9th Cir. 1958); Barnes & Noble, Inc. v. LSI Corp., No. C 11-02709 EMC LB, 2012 WL 1808849, at *2 (N.D. Cal. May 17, 2012); *see also* 28 U.S.C. § 1781; Fed. R. Civ. P. 28(b).

69. *See* Fed. R. Civ. P. 28(b); *see also* Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 776 (S.D.N.Y. 2012) (stating that courts apply the discovery principles of the Federal Rules of Civil Procedure in deciding whether to issue letters rogatory); Asis Internet Servs. v. Optin Global, Inc., No. C-05-05124 JCS, 2007 WL 1880369, at *3 (N.D. Cal. June 29, 2007) ("Ultimately, a court's decision whether to issue a letter rogatory requires an application of Rule 28(b) in light of the scope of discovery provided for by the Federal Rules of Civil Procedure.").

foreign courts have found U.S.-style depositions to be problematic and a potential infringement on the sovereignty of the foreign state.[70]

In determining whether a letter rogatory should be granted, U.S. courts have held that there must be some level of justification for denying the request. Certain courts have held that denial of a letter rogatory under Rule 28(b) requires "good reason."[71] A court may also place limitations on the scope of discovery when the discovery abroad may be unduly burdensome or expensive.[72] The comity analysis described with respect to the Hague Convention has also been applied by courts in determining whether to grant an application for a letter rogatory.[73]

b. Procedure

The U.S. Department of State advises that letters rogatory concerning requests for evidence should be as specific as possible and describe the

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70. *See, e.g.*, Orlich v. Helm Bros., Inc., 160 A.D.2d 135, 144, 560 N.Y.S.2d 10, 15 (N.Y. App. Div. 1990) ("Since fact gathering is a judicially controlled process in civil law nations such as West Germany, the non-judicial taking of evidence located within their territory is regarded as an affront to their sovereignty.").

71. *In re* Bankers Trust Co. v. Bethlehem Steel Corp., 752 F.2d 874, 890 (3d Cir. 1984); Evanston Ins. Co. v. OEA, Inc., No. Civ. S-02-1505 (DFL) (PAN), 2006 WL 1652315, at *1–2 (E.D. Cal. June 13, 2006); Brake Parts, Inc. v. Lewis, No. 09-132 (KSF), 2009 WL 1939039, at *2 (E.D. Ky. July 6, 2009); B & L Drilling Electronics v. Totco, 87 F.R.D. 543, 545 (W.D. Okla. 1978); United States v. Badger, No. 2:10-CV-00935, 2013 WL 1309165, at *7 (D. Utah Mar. 31, 2013). "Good reason" for denying a request for letters rogatory has been found in cases in which a party has not explained efforts to obtain requested discovery, and cases in which discovery can be obtained from another source that is more convenient, less burdensome, or less expensive. *In re* Letters Rogatory from Canada, No. 08-MC-50465-DT, 2008 WL 2760963, at *2 (E.D. Mich. July 15, 2008).

72. *See* Philan Ins. Ltd. v. Frank B. Hall & Co., 138 F.R.D. 45, 46 (S.D.N.Y. 1991) (granting letters rogatory but instructing the requesting party to bear some of the expense); DBMS Consultants Ltd. v. Computer Assocs. Int'l, Inc., 131 F.R.D. 367, 370 (D. Mass. 1990) (limiting the examination of a witness located abroad to written questions in the first instance, rather than the oral examination requested, to limit expense and burden).

73. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 792–96 (S.D.N.Y. 2012) (applying the comity analysis in Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522 (1987), and Restatement (Third) of Foreign Relations Law of the United States § 442 when considering a request to issue amended letters rogatory directed to Canada (a non-party to the Hague Convention)).

particular procedures to be followed, including whether a verbatim transcript is required, whether a witness should be placed under oath, and other similar elements.[74] The Department of State website includes an example of a letter rogatory for guidance,[75] although it is important to note that individual countries may have specific requirements regarding the form and content of letters rogatory.[76]

The letters rogatory mechanism relies primarily on the use of diplomatic channels.[77] After counsel prepares a letter rogatory, the letter must be signed by a U.S. judge and, if required by the foreign state from which assistance is sought, authenticated.[78] Letters rogatory are typically conveyed through the Department of State to the U.S. Embassy, to the Ministry of Foreign Affairs in the target jurisdiction, and to the Ministry of Justice in the target jurisdiction before arriving in a foreign court that can execute the letter.[79]

U.S. courts also have the authority to transmit letters rogatory to the proper foreign authority or directly to the court if the rules of the foreign court permit this practice.[80] Once the letter rogatory is executed, the foreign court transmits it back through the aforementioned diplomatic channels, and the executed letter rogatory is sent to the requesting court or, on some occasions, directly to requesting counsel.[81]

c. Letters Rogatory in Practice

Although letters rogatory are a key means of obtaining international discovery, the mechanism faces several difficulties. First and foremost, letters rogatory are a means by which a court may *request* assistance

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74. *See* U.S. Dep't of State, *Preparation of Letters Rogatory*, http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html (last visited Mar. 5, 2015) [hereinafter U.S. Department of State, *Letters Rogatory*].

75. *See id.*

76. For additional information, parties may be directed to the U.S. Department of State's overview on country-specific evidence-gathering considerations. *See* U.S. Department of State, *Country Information*, *supra* note 2.

77. *See* 22 C.F.R. § 92.66 (1995).

78. *See* U.S. Department of State, *Letters Rogatory*, *supra* note 74.

79. *Id.*

80. *See* 28 U.S.C. § 1781.

81. *See* U.S. Department of State, *Letters Rogatory*, *supra* note 74.

from a foreign judicial authority; in the absence of a treaty or an agreement requiring cooperation, the foreign state has no obligation to provide the assistance sought.[82] Consequently, there have been a number of instances in which foreign courts have rejected entirely, or failed to act on, a letter rogatory submitted by a U.S. court. Foreign courts have rejected assistance when provision of the evidence would violate foreign blocking or secrecy laws or be duplicative of evidence available in the United States.[83] Foreign courts have also rejected letters rogatory or have been unwilling to execute the full extent of the assistance sought when the discovery procedures requested have conflicted with the procedures available pursuant to the rules of that court, including requests that seek pretrial discovery. Some courts have refused to execute requests on the grounds that a particular request for pretrial discovery constitutes an impermissible "fishing expedition."[84]

Not only is the letters rogatory procedure unpredictable, it is also notoriously slow and cumbersome. The Department of State currently estimates that execution of letters rogatory can take a year or more.[85]

Nevertheless, letters rogatory can be a useful means of seeking discovery abroad, in particular because it is a voluntary mechanism and thus would not infringe on the sovereignty of the responding jurisdiction.[86] Furthermore, letters rogatory usually result in some form of assistance, even if the scope and type of assistance may be limited or revised as compared with the original request, since foreign courts want to provide whatever assistance is possible for reasons of international comity. One common way that a foreign court may limit the request is to only allow production of evidence that is permitted by its own domestic procedures.[87] In such instances, U.S. courts may diminish the weight of, or deem inadmissible, evidence provided pursuant

82. Restatement (Third) of Foreign Relations Law of the United States § 473 (1987).

83. *See, e.g.*, Gary Born & Peter Rutledge, International Civil Litigation in United States Courts 972–73 (5th ed. 2011).

84. *See, e.g.*, *In re* Asbestos Ins. Coverage Cases [1985] 1 All E.R. 716; Rio Zinc Corp. v. Westing House Electric Corp. [1978] AC 547; Panayaiotou v. Sony Music Entertainment (UK) Ltd. [1994] ch. 142.

85. *See* U.S. Department of State, *Letters Rogatory*, *supra* note 74.

86. *See id.*

87. *See* Hague Convention, *supra* note 16, art. 9.

to a letter rogatory.[88] However, as described above in section II.C.1.c with respect to letters of request under the Hague Convention, courts need not reject an application for a letter of request or letters rogatory on the basis that the requested evidence would not be admissible; rather, courts apply the discovery principles contained in Federal Rule of Civil Procedure 26.[89]

3. Subpoena to a U.S. Citizen or Resident Abroad Under the Walsh Act, 28 U.S.C. § 1783

Evidence found in a foreign country may also be sought pursuant to federal statutory law. Under the Walsh Act, 28 U.S.C. § 1783, and Federal Rule of Civil Procedure 45(b)(3), a federal court may issue a subpoena for testimony or documents from a national or resident of the United States who is in a foreign country if the evidence is "necessary in the interest of justice" and is "not possible to obtain . . . in any other manner."[90] The Walsh Act originally pertained solely to criminal actions, and it has seldom been used in the context of civil actions.[91]

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88. *See* Wynberg v. Nat'l Enquirer, Inc., 564 F. Supp. 924, 930 (C.D. Cal. 1982) (rejecting statements collected in response to letters rogatory transmitted from Sweden, as the request was not executed in accordance with the terms of the court order, and the witnesses were not sworn, no cross-examination was permitted, and no verbatim transcript was made). For example, Title 22 (Foreign Relations) of the Code of Federal Regulations, when defining "letters rogatory" provides as follows:

> The legal sufficiency of documents executed in foreign countries for use in judicial proceedings in the United States, and the validity of the execution, are matters for determination by the competent judicial authorities of the American jurisdiction where the proceedings are held, subject to the applicable laws of that jurisdiction.

22 C.F.R. § 92.54 (1995).

89. *See, e.g.*, Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 776 (S.D.N.Y. 2012); Brey Corp. v. LQ Mgmt., L.L.C., No. AW-11-CV-00718-AW, 2012 WL 3127023, at *4 (D. Md. July 26, 2012).

90. 28 U.S.C. § 1783(a); Fed. R. Civ. P. 45(b)(3).

91. *But see, e.g.*, Estate of Yaron Ungar v. Palestinian Auth., 412 F. Supp. 2d 328 (S.D.N.Y. 2006) (Court found that it was in the interest of justice to issue the subpoena due to the Palestinian Authority's intent to evade judgment and the inability of plaintiffs to secure judgment without the information requested under the subpoena.); Kleisch & Co. v. Liberty Media Corp., 217 F.R.D. 517 (D. Colo. 2003) (Court granted a subpoena pursuant to the Walsh Act requiring a non-party U.S. citizen residing in Germany to appear and be deposed by the defendant. Court found that it was in the interest of justice to grant the subpoena because the deposition could recover

4. The Legal Procedures of the Foreign State

Parties to a U.S. litigation may also pursue discovery using the legal procedures of the foreign state from which discovery is sought.[92] If a party collects evidence using the foreign state's procedures, questions regarding the admissibility of such evidence may arise. However, Federal Rule of Civil Procedure 28(b) explicitly permits the U.S. court to accept such deposition evidence despite certain procedural defects.[93] Appendix A provides an overview of local discovery procedures in sample foreign jurisdictions.

D. Obstacles to U.S.-Style Discovery

Parties in a U.S. court may object to the taking of evidence based on standard concerns about relevance, scope, and similar issues.[94] Discovery across borders also can involve a number of objections that are unique to the cross-border context, including matters relating to data protection laws and blocking statutes, competing sovereignty interests, and foreign privileges or immunities.

1. Data Protection Laws and Blocking Statutes

Many governments have taken an active role in regulating the flow of information across borders. Two forms of legislation that frequently arise in international litigation are data protection laws and blocking statutes. Data protection laws prohibit, with narrow exceptions, the transmission of data that are identifiable to a person (e.g., a name, address, or identification number) outside of participating jurisdictions.

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relevant information, and the plaintiff had not provided support for his assertion that the subpoena constituted harassment of the witness.).

92. *See* Graig J. Alvarez, *Conducting Discovery in Foreign Countries*, *in* International Litigation—Defending and Suing Foreign Parties in U.S. Federal Courts 279 (David J. Levy ed., 2003).

93. "Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States." Fed. R. Civ. P. 28(b). *See, e.g.*, Westernbank Puerto Rico v. Kachkar, No. CIV. 07-1606 (ABC/BJM), 2009 WL 530087, at *2 (D.P.R. Jan. 7, 2009) (denying the request of defendants to bar the use of trial "deposition notes" taken in Oslo, Norway, on the grounds that the notes are not a verbatim transcript of the deposition); *see also* United States v. Salim, 855 F.2d 944, 952 (2d Cir. 1988).

94. *See* Fed. R. Civ. P. 26(b).

Blocking statutes are more tailored in scope and restrict the transfer of documents or information for use in foreign proceedings. Both areas of law are developing rapidly around the world, requiring courts to keep abreast of changes in the law. For example, several U.S. courts have ordered discovery even when the party being compelled to produce evidence contends that foreign data protection laws or blocking statutes prohibit the ordered disclosure.[95]

While the data protection laws and blocking statutes discussed below may pose hurdles to accomplishing the discovery required in any given case, data protection officers in the specific country of concern may be willing to consider specific requests for exemptions from general prohibitions on a case-by-case basis.

a. Data Protection Laws

Of the numerous jurisdictions that have enacted data protection laws, the European Union (EU) is the most often encountered in U.S. courts. The EU Data Privacy Directive provides a framework for implementation of local data protection laws by individual member jurisdictions.[96] The EU Directive broadly defines personal data to mean "any information relating to an identified or identifiable natural person,"[97] which may include all communications containing a name, address, identification number, or other identifying information, such as information within a To/From/CC field of an e-mail or memo.

The EU prohibits production of certain categories of sensitive personal data (racial or ethnic origin, political opinion, religious and philosophical beliefs, trade-union membership, and data concerning the person's health or sex life) except when the subject has freely consented to such production.[98] Violations of these laws can result in hefty fines payable to the person whose data were impermissibly retained, disclosed, or transferred. Parties to U.S. proceedings have

95. *See, e.g.*, *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJHHBP, 2006 WL 3378115, at *3 (S.D.N.Y. Nov. 16, 2006); Columbia Pictures Indus. v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *12 (C.D. Cal. May 29, 2007). *See also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 544, n.29 (noting that U.S. courts can order a party to produce evidence even though the act of production may violate a foreign statute).

96. *See* Council Directive 95/46, art. 8, 2005 O.J. (L 281) (EC).

97. *Id.* art. 2(a).

98. *See id.* art 8.

raised data protection laws as a basis for limiting discovery or other requests for increased access to protected documents, and some U.S. courts have enforced those limitations.[99]

Information on data protection laws in several jurisdictions can be found in Appendix A.[100]

b. Blocking Statutes

Many foreign countries find U.S.-style discovery to be problematic because of its breadth and scope.[101] A number of states have responded to concerns about the extraterritorial application of U.S. law, particularly pretrial discovery procedures, by enacting blocking statutes that restrict or prohibit the transfer of documents or information for use in foreign proceedings, including U.S. federal court proceedings.[102]

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99. *See, e.g.*, *In re* 28 U.S.C. § 1782 of Okean B.V., No. 12 Misc. 104 (PAE), 2013 WL 4744817, at *2 (S.D.N.Y. Sept. 4, 2013) (Ukranian and Russian data protection laws impose limits on ability of requested party to respond to request under 28 U.S.C. § 1782); Gerling Global Reinsurance Corp. of Am. v. Quackenbush, No. Civ. S-00-0506WBSJFM, 2000 WL 777978, at *9–10 (E.D. Cal. June 9, 2000) (granting preliminary injunction against enforcement of state statute that could infringe constitutional grant of federal authority over foreign affairs by, *inter alia*, conflicting with European data protection laws); Salerno v. Lecia, Inc., No. 97-CV-973S(H), 1999 WL 299306 (W.D.N.Y. Mar. 23, 1999) (motion to compel documents in Europe denied pursuant to EU Directive and German data protection law).

100. The Sedona Conference has developed a set of principles on electronic document production based on discussions among judges and practitioners from both the United States and the European Union. These principles are meant to serve as a guideline for parties and judges in addressing the unique challenges of electronic document production. In addition, the Sedona Conference has issued a set of principles addressing international discovery, disclosure, and data protection. For further information, see The Sedona Conference, https://thesedonaconference.org/ (last visited Mar. 31, 2015); The Sedona Conference International Principles on Discovery, Disclosure & Data Protection, https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20International%20Principles%20on%20Discovery%2C%20Disclosure%20%2526%20Data%20Protection (last visited Mar. 31, 2015). *See also* Appendix E, Sample Rule 16 Pretrial Order Addressing International Discovery Issues, ¶ 11.

101. *See generally* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 534–46 (1987).

102. *See In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 352–55 (D. Conn. 1991) (discussing view of several civil law countries regarding U.S.-style discovery within their borders, and ordering plaintiff to employ Hague Convention procedures to obtain discovery of evidence located in France in accordance with French law).

The French blocking statute is among the most frequently litigated of these statutes, and makes it illegal for any French national, resident, or agent of a judicial entity to "request, seek or disclose information, written, orally, or in any other form . . ., that is directed toward establishing evidence in view of legal or administrative proceedings abroad," except as provided by the Hague Convention or other international treaties.[103] Blocking statutes and other similar laws often contemplate sanctions for parties in violation of their provisions, including the German Federal Data Protection Act,[104] Swiss bank secrecy act,[105] French Blocking Statute,[106] and Chinese state secrecy laws.[107] Thus, a foreign party receiving a U.S. request for discovery may face the dilemma of either (a) disobeying the U.S. discovery request and possibly being subject to sanctions, or (b) complying with the request but running afoul of the laws of its own country.

Parties may object to discovery on the basis of conflicting foreign law, which courts generally analyze using the multifactor test described in the following section.

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103. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980 on the Disclosure of Documents and Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Physical and Legal Entities], Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], art. 1 bis (author translation).

104. *See* Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-CV-1345-L DHB, 2013 WL 941617, at *9 (S.D. Cal. Mar. 11, 2013), *on reconsideration in part*, No. 10-CV-1345-L DHB, 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013); *see also* German Federal Data Protection Act, § 43: "Anyone who, without authorization . . . stores, modifies or communicates . . . any personal data protected by this Act which are not common knowledge shall be punished by imprisonment for up to one year or by a fine."

105. *See* Minpeco, S.A. v. ContiCommodity Servs., Inc., 116 F.R.D. 517, 525–26 (S.D.N.Y. 1987).

106. *See* Bodner v. Banque Paribas, 202 F.R.D. 370 (E.D.N.Y. 2000), although note that the court held that the statute did not seem likely to be enforced. *But see* Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) ("legislative history of the statute gives strong indications that it was never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts.")

107. *See* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477 (9th Cir. 1992).

Appendix A sets out whether certain key jurisdictions have blocking statutes.

c. Resolving Objections Based on Conflicting Foreign Law

As a rule, U.S. courts do not automatically excuse foreign parties from complying with discovery requests in deference to conflicting foreign law.[108] Judges tasked with deciding an objection on this basis refer to the well-accepted multifactor test in the Restatement (Third) of Foreign Relations Law § 442(1)(c):

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[109]

Some courts also take into account the nature (i.e., civil or criminal) and severity of possible sanctions,[110] as well as the question whether

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108. *See, e.g.*, Devon Robotics v. DeViedma, No. 09-CV-3552, 2010 WL 3985877, at *3–6 (E.D. Pa. Oct. 8, 2010) (granting discovery in a U.S. proceeding despite objections that it would violate Italian law); *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. July 23, 2010) (granting motion to compel despite a conflicting South African blocking statute, because of strong U.S. policy interest in enforcing its antitrust laws). *But see In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010) (denying U.S. discovery in light of EU Data Privacy Directive and an EU amicus brief urging prevention of disclosure of protected data).

109. Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987) (numbering added); *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 534–44 (1987). Courts in the Second Circuit also consider the additional factor of "the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery." *Minpeco S.A.,* 116 F.R.D. at 523.

110. *Compare* Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S 197, 211 (1958), *with* Pershing Pac. W., LLC v. MarineMax, Inc., No.10-CV-1345-L DHB, 2013 WL 941617, at *9 (S.D. Cal. Mar. 11,

the law appears likely to actually be enforced against that party,[111] and an analysis of the motives of the blocking statute at issue.[112]

When a party fails to comply with an order for production, U.S. courts typically consider the conflicted party's good faith effort to comply with the discovery request (including requesting permission from local authorities to produce the evidence) when deciding whether to impose sanctions of contempt, dismissal, or default.[113] Even when a court does not sanction a non-complying party, the court may nonetheless make findings of fact adverse to that party.[114]

2013), *on reconsideration in part*, No. 10-CV-1345-L DHB, 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013) (considering civil penalties under German law, but recalling that "[b]locking statutes such as [the German Federal Data Protection Act] do not deprive American courts of the power to order a party to produce evidence under the Federal Rules, although the production of evidence may violate the statute and subject the defendant to penalties"); Salerno v. Lecia, Inc., No. 97-CV-973S(H), 1999 WL 299306, at *3 (W.D.N.Y. Mar. 23, 1999) (refusing to order discovery where "there are serious legal ramifications for those entities that disclose personal information in contravention of European Union and Germany data protection laws); *Minpeco, S.A.,* 116 F.R.D. at 523.

111. *See Bodner*, 202 F.R.D. at 375 (denying motion for protective order where "the French Blocking Statute does not subject defendants to a realistic risk of prosecution").

112. *Minpeco S.A.,* 116 F.R.D. at 524 (distinguishing the Swiss bank secrecy laws, which "have the legitimate purpose of protecting commercial privacy" from French, Dutch, and other statutes, which do not deserve deference because they are designed to frustrate U.S. laws or policies); *see also In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1143 (N.D. Ill. 1979) (regarding Canadian legislation).

113. *See* Restatement (Third) of Foreign Relations Law of the United States § 442(2)(a) (1990); Linde v. Arab Bank, PLC, 269 F.R.D. 186, 197–200 (E.D.N.Y. 2010) (ordering discovery sanctions despite threat of criminal prosecution for violation of bank secrecy laws when defendant intentionally failed to meet discovery obligations and other factors weighed in favor of sanctions); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) (affirming contempt sanction when foreign corporation failed to make showing of good faith effort to comply with discovery order by attempting to obtain waiver of foreign state secrecy laws).

114. *See* Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 227 (E.D.N.Y. 2008) (citing with approval § 442(1)(b) of the Restatement (Third) of Foreign Relations Law of the United States for the proposition that "[f]ailure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party").

In cases in which parties are likely to face challenges during the discovery process on the basis of data privacy laws or blocking statutes, the court initially may consider issuing an order requiring the parties to approach the data or privacy administrator of the relevant foreign country to seek its cooperation and assistance. This first step could increase efficiency and the likelihood of success in obtaining the requested discovery. If these efforts are unsuccessful, the court may next consider issuing an order to compel.

2. Competing Sovereignty and Other National Interests

Courts in many countries are wary of discovery requests by a party in a foreign proceeding that seek to obtain evidence located in the domestic jurisdiction from a domestic entity. This is especially true with respect to cross-border requests by parties to U.S. proceedings because U.S.-style discovery is viewed in many foreign jurisdictions as extraordinarily broad and open-ended.

To determine whether to enforce a discovery request that implicates competing sovereignty interests of a foreign jurisdiction, U.S. courts consider principles of international comity, which the Supreme Court has described as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[115] Comity principles are not black-letter rules that courts must follow, yet they are more than "mere courtesy and good will."[116]

Comity issues can arise in a number of contexts. During discovery, parties often make arguments based on comity considerations to resist disclosure of evidence possessed by a foreign entity in a foreign jurisdiction according to the rules of the forum court.[117] The restatement

115. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 534–44 n.27 (1987).

116. *In re* Maxwell Commc'n Corp. plc, 93 F.3d 1036, 1046 (2d Cir. 1996).

117. *See, e.g.*, Brief of Amicus Curiae the Republic of France in Support of Petitioners, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727501, at *7 ("Discovery requests in accordance with American rules by American litigants and, *a fortiori*, discovery orders by American courts directly to French nationals in France, undermine the sovereignty of the Republic of France by usurping the powers and duties of the French judiciary in the discovery process.").

approach discussed above is the analytical approach used by courts to decide such issues.[118]

In *Wultz v. Bank of China Ltd.*, the U.S. District Court for the Southern District of New York issued a series of decisions applying the seven-part comity analysis to requests for discovery from a Chinese state-owned bank that would have violated Chinese bank secrecy laws. The court acknowledged that the discovery requested could violate Chinese bank secrecy laws, but ordered the defendant bank to produce documents. However, the court narrowed the request to discovery permitted under the Federal Rules of Civil Procedure and carved out one exception for regulatory documents created by the Chinese government, whose production was clearly prohibited by Chinese law.[119] The court later grappled with objections to discovery on the basis that such discovery would violate Chinese laws governing anti-money laundering and other illegal transactions,[120] and also considered assertions by the defendant bank that several thousand documents were privileged under Chinese law a year after the court's initial October 2012 order.[121]

In the recent case *Argentina v. NML Capital Ltd.*, the United States, as amicus curiae, argued that considerations of international comity support the interpretation of the Foreign Sovereign Immunities Act (FSIA) to preclude discovery of extraterritorial evidence in aid of execution of a judgment against a foreign sovereign.[122] The Supreme Court disagreed, finding that the FSIA did not contain any provision "forbidding or limiting discovery in aid of execution of a foreign-

118. *See supra* section II.D.1.c. Comity considerations also may lead a U.S. court to dismiss an action before it in deference to parallel proceedings in a foreign jurisdiction, particularly in the cross-border insolvency context. *See, e.g.*, Allstate Life Ins. Co. v. Linter Grp., 994 F.2d 996, 999 (2d Cir. 1993) (comity may dictate dismissal when "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated" (citation omitted)).

119. Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 555–61 (S.D.N.Y. 2012).

120. Wultz v. Bank of China Ltd., No. 11 CIV. 1266 SAS, 2013 WL 132664 (S.D.N.Y. Jan. 10, 2013); Wultz v. Bank of China Ltd., 942 F. Supp. 2d 452, 455 (S.D.N.Y. 2013).

121. Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 484 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 CIV. 1266 SAS, 2013 WL 6098484 (S.D.N.Y. Nov. 20, 2013).

122. Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

sovereign judgment debtor's assets," and rejected the United States' argument on the basis of comity.[123] However, the Court noted that, although the discovery sought was not precluded by the FSIA,

> we have no reason to doubt that . . . "other sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, *which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state*."[124]

3. Foreign Privileges or Immunities

Another potential defense to a discovery request in an international dispute involves the invocation of foreign privileges and immunities. How foreign courts consider this issue often depends on how the request for the production of evidence is made.

When discovery is sought pursuant to a Hague Convention letter of request,[125] the Convention provides that the witness may invoke privileges under the law of the requested state.[126] The witness may also invoke privileges under the law of the requesting state, but only if the privilege is specifically mentioned in the letter of request or confirmed by the requesting authority.[127]

When the request for information is made outside the context of the Hague Convention, a party's ability to invoke a foreign privilege or

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123. *Id.* at *8, *11.

124. *Id.* at *11–*12, n.6 (citations omitted; emphasis added).

125. For background on the Hague Convention, see *supra* section II.C.1.

126. Article 11 of the Hague Convention provides that

> [i]n the execution of a letter of request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—
>
> a) under the law of the State of execution; or
>
> b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.
>
> A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Hague Convention, *supra* note 16, art. 11.

127. *Id.*

immunity is less clearly defined. Courts typically begin their analysis with Federal Rule of Evidence 501, which provides that

> [t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[128]

For Rule 501 purposes, the "common law" that governs a claim of privilege also governs the "choice of law" question whether a privilege arising under foreign law should apply.[129]

The issue arises primarily in the context of patent law, and the leading means of analyzing choice of law concerns in this regard involves the "touch base" analysis developed by courts within the Second Circuit.[130] Under the "touch base" analysis, "any communication touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving [a foreign country] will be governed by the applicable foreign statute."[131] If, in the latter case, multiple foreign jurisdictions are at issue, the court "defers to the law of the country that has the 'predominant' or 'the most direct or compelling interest' in whether [the relevant] communications should remain confidential, unless that for-

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128. Fed. R. Evid. 501.

129. *See* Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618 (KMW)(HBP), 2005 WL 1925656, at *2 (S.D.N.Y. Aug. 11, 2005); VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 14–15 (D. Mass. 2000); Kenneth W. Graham, Jr., 23 Fed. Prac. & Proc. Evid. § 5435, n.33 (1st ed. 1977) ("There is no evidence that Congress ever thought about this choice of law problem and, therefore, no reason to assume that Rule 501 was intended to require the application of American privilege law to transactions that take place in another nation.").

130. *See, e.g.*, Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 66 (S.D.N.Y. 2010) (U.S. privileges applied to communications between the plaintiff, a U.S. entity, and the former in-house intellectual property counsel of its Italian affiliate); Astra Aktiebolag v. Andrax Pharm., Inc., 208 F.R.D. 92, 98–99 (S.D.N.Y. 2002) (applying, variously, German, Korean, and U.S. laws of privilege to different sets of documents).

131. *Astra Aktiebolag*, 208 F.R.D. at 98 (quoting Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 520 (S.D.N.Y. 1992)) (internal quotation marks omitted).

eign law is contrary to public policy of [the] forum."[132] "The jurisdiction with the 'predominant interest' is either 'the place where the allegedly privileged relationship was entered into' or 'the place in which that relationship was centered at the time the communication was sent.'"[133]

The Second Circuit "touch base" rubric has been considered, adopted, or rejected by courts in other circuits.[134] One court that has explicitly rejected the "touch base" approach, the Northern District of Illinois, instead follows a comity-based approach that looks "to the foreign nation's law to determine the extent to which the privilege may attach."[135] Other courts have followed the Restatement (Second) of Conflict of Laws, which states that the governing law is "that of the

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132. *Id.* at 98–99 (quoting *Golden Trade*, 143 F.R.D. at 522) (holding that documents "touched base" with the United States because almost all documents were communications with outside U.S. counsel or related to patent applications or litigation in the United States, and therefore U.S. privilege law applied).

133. *Id.* (quoting *Golden Trade,* 143 F.R.D. at 521–22) (holding that Germany, and not Sweden, had the most compelling interest in whether certain documents were protected from disclosure because documents either implicated the law of Germany, or were legal advice from outside German counsel, or were Swedish communications conveying the advice of outside German counsel).

134. *See, e.g.*, AstraZeneca LP v. Breath Ltd., No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800, at *5 (D.N.J. Mar. 31, 2011) (employing "touch base" analysis and holding that communications did not "touch base" with United States because they did not involve U.S. patent applications, U.S. proceedings, or communications with U.S. attorneys); Tulip Computers Int'l, B.V. v. Dell Computer Corp., 210 F.R.D. 100, 104 (D. Del. 2002) (noting that court's adoption of the "touch base" test and holding that communications did not "touch base" with the United States when they concerned foreign patent issues and other matters relating solely to matters outside the United States), *aff'd and adopted sub nom.* Tulip Computers Int'l B.V. v. Dell Computer Corp., No. CIV.A. 00-981-KAJ, 2003 WL 24046752 (D. Del. Feb. 10, 2003); VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 16 (D. Mass. 2000) (interpreting the "touch base" analysis to mean that the issue of which country's privilege should apply to "a reference to a United States patent that is more than incidental should be governed by a traditional choice of law analysis, that is, looking to the laws of the country with the most direct and compelling interest in the reference"); Odone v. Croda Int'l PLC, 950 F. Supp. 10, 13–14 (D.D.C. 1997) (following "touch base" rubric and holding that documents "touched base" with the United States because they dealt with whether a U.S. citizen was to be named in the patent as a co-inventor, and later the U.S. patent was affected, which became the subject of the suit).

135. Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 535, *on reconsideration in part*, 194 F.R.D. 624 (N.D. Ill. 2000).

state with the most significant relationship with the [relevant] communications."[136]

Although a number of U.S. courts limit themselves to this two-step analysis (i.e., whether the foreign country's privilege law applies and whether that law would prevent disclosure), some courts have adopted a third element and have refused to compel disclosure when the documents sought would not have been subject to discovery in the foreign country and would be privileged in the forum court.[137] Those courts reason that compelling production under such circumstances would run counter to considerations of international comity and would offend the public policy of U.S. courts in preventing disclosure of materials considered privileged here.[138]

136. Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442, 444–45 (D. Del. 1982); Restatement (Second) of Conflict of Laws § 139(1) (1969).

137. *See, e.g.*, Astra Aktiebolag v. Andrax Pharm., Inc., 208 F.R.D. 92, 102 (S.D.N.Y. 2002) (refusing to compel production of Korean documents that are not protected by any Korean privilege but (a) would have been covered by U.S. attorney–client and work product protections, and (b) would not have been discoverable in a Korean proceeding because of the limited disclosure regime in that country).

138. *See id.*; Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 69–70 (S.D.N.Y. 2010) (applying U.S. privilege law because application of Italian law would violate public policy of the court).

III. Discovery in the United States to Assist Proceedings in a Foreign Jurisdiction

Although U.S. district courts will commonly grapple with international discovery issues in the context of a party seeking material located abroad for use in a U.S. proceeding, they may also face incoming requests seeking discovery in the United States from parties involved in litigation proceedings abroad. These requests can be separated into two groups: those that are made under the Hague Convention and those that are made under 28 U.S.C. § 1782.[139] The Hague Convention is reproduced in Appendix B, and 28 U.S.C. § 1782 is reproduced in Appendix D.

A. Requests Made Under the Hague Convention

As discussed earlier, letters of request under the Hague Convention must follow a very specific procedure.[140] The request must be sent from a contracting state of the Hague Convention to the U.S. central authority. The designated central authority in the United States is the Office of International Judicial Assistance at the Department of Justice.[141]

The Office of International Judicial Assistance will submit the letter of request to the U.S. Attorney's Office, which is responsible for making an application to the appropriate federal district court.[142] The

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139. Note that letters rogatory are generally received within the framework of § 1782. Section 1782(a) specifically states that orders may be granted "pursuant to a letter rogatory issued . . . by a foreign or international tribunal." Historically, requests were made through letters rogatory pursuant to 28 U.S.C. § 701 (since repealed). *See, e.g.*, *In re* Letters Rogatory from Examining Magistrate, 26 F. Supp. 852 (D. Md. 1933). Now, courts follow the procedures set out in § 1782 when executing these letters. *See In re* Letters Rogatory from Tokyo Dist., 539 F.2d 1216 (9th Cir. 1976); *In re* Letter Rogatory from Justice Court, Dist. of Montreal, 523 F.2d 562 (6th Cir. 1975); *In re* Letters Rogatory, etc., 385 F.2d 1017 (2d Cir. 1967).

140. *See supra* text accompanying note 42.

141. *See United States—Central Authority (Art. 2) and Practical Information: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,* Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=authorities.details&aid=528 (last visited Mar. 5, 2015).

142. *See supra* section II.C.1 for a discussion of relevant considerations regarding a request made under the Hague Convention.

procedures set out in the Hague Convention are binding for all contracting states. As described above in section II.C.1.c, letters of request may only be rejected on very limited enumerated grounds.

Although the Hague Convention procedure is mandatory, some courts apply the criteria outlined under 28 U.S.C. § 1782 when assessing whether discovery ought to be granted.[143] As discussed further in the following section, 28 U.S.C. § 1782 is a discretionary device that is unrelated to the Hague Convention.

B. Requests, Including Letters Rogatory, Made by an Interested Person or a Foreign or International Tribunal Under 28 U.S.C. § 1782

The purpose of 28 U.S.C. § 1782 is to allow U.S. district courts to order discovery in the United States "for use in a proceeding in a foreign or international tribunal."[144] Given the breadth of the language, most

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143. *See In re* Request for Judicial Assistance from the Dist. Court in Svitavy, 748 F. Supp. 2d 522, 524 (E.D. Va. 2010); *In re* Letters Rogatory from the Local Court, 29 F. Supp. 2d 776, 779 (E.D. Mich. 1998) ("Provisions governing the taking of evidence in accordance with § 1782 are set forth in . . . the Hague Convention"); *In re* Letter of Request from the Boras Dist. Ct., 153 F.R.D. 31 (E.D.N.Y. 1994) ("The Hague Convention, which governs letters rogatory, essentially imposes the same conditions as those in section 1782"); *In re* Request for Judicial Assistance from the City Court of Jonkoping, Sweden, No. 3:96 MC 419 EBB, 1997 WL 1052017 (D. Conn. Oct. 10, 1997) (applying § 1782 to a discovery request made pursuant to "a letter rogatory issued . . . in accordance with the Convention on Taking Evidence Abroad.").

144. The full text of the statute reads as follows:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

requests for discovery to assist with a foreign proceeding, including letters rogatory, will generally come within the scope of the statute. For a court to grant a request under § 1782, the request must meet certain statutory requirements (see *infra* section III.B.1). Meeting the statutory requirements does not require a federal district court to grant a § 1782 application, but merely gives it the authority to do so.[145] The court will usually consider several discretionary factors in deciding whether to grant the request in whole or in part (see *infra* section III.B.2). Once the court decides to exercise its discretion to order discovery, the order may adopt the practice and procedure of the foreign or international tribunal for the taking of evidence[146] or it may follow the procedures contained in the Federal Rules of Civil Procedure.[147]

1. Statutory Requirements Under § 1782

A federal district court may order discovery of evidence under § 1782 when the following requirements are met:

- the person from whom discovery is sought resides or is found in the district;
- the discovery is for use in a proceeding in a foreign or international tribunal;
- the application is made by a foreign or international tribunal or any "interested person"; and
- the request seeks evidence, whether it be the "testimony or statement" of a person, or the production of "a document or thing."[148]

> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1782.

145. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004).

146. *See* 28 U.S.C. § 1782(a).

147. *See id.*; Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1272 (11th Cir. 2014) ("[O]nce the section 1782 factors are met and the district court is therefore authorized to grant the application, the federal discovery rules, Fed. R. Civ. P. 26–36, contain the relevant practices and procedures for the taking of testimony and the production of documents." (citation omitted)).

148. 28 U.S.C. § 1782. In many cases (especially in the Second Circuit) courts have taken the fourth criterion for granted. *See*, *e.g.*, Schmitz v. Bernstein, Liebhard &

The procedural elements under § 1782 are relatively straightforward.[149] Applications may be made on an ex parte basis, although any application granted on an ex parte basis may be challenged by a party by raising objections and filing a motion to quash or vacate the order within thirty days of the date of its entry.

There is some dispute as to whether and how magistrate judges may grant orders under § 1782 pursuant to 28 U.S.C. § 636.[150] On the one hand, some courts have held that consideration of a request under § 1782 is analogous to a standard discovery request and may therefore be referred to a magistrate judge as a "non-dispositive" question under § 636(b)(1)(A).[151] Under this standard, the decision of the magistrate judge may only be reviewed when it is "clearly erroneous or contrary to law."[152] On the other hand, some courts have held that decisions on § 1782 requests are "dispositive" because they constitute the totality of the action in U.S. courts.[153] Under this standard, magistrate judges may only enter recommendations for disposition, which are reviewed de novo on the request of either party.[154]

Lifshitz, LLP, 376 F.3d 79, 83 (2d Cir. 2004); *In re* Microsoft Corp., 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006). Other circuits have considered all four criteria. *See*, *e.g.*, *In re* Clerici, 481 F.3d 1324, 1331–32 (11th Cir. 2007); *In re* IPC Do Nordeste, LTDA, No. 12-50624, 2012 WL 4448886 (E.D. Mich. Sept. 25, 2012).

149. *See* Gushlak v. Gushlak, 486 F. App'x 215, 217 (2d Cir. 2012); *In re* Mesa Power Grp., LLC, No. 2:11-mc-280-ES, 2012 WL 6060941, at *2 (D.N.J. Nov. 20, 2012).

150. *See generally* S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration,* 1 Stan. J. Complex Litig. 295 (2013).

151. *See* Four Pillars Enters. Co. v. Avery Dennison Corp., 308 F.3d 1075 (9th Cir. 2002); United Kingdom v. United States, 238 F.3d 1312, 1319 (11th Cir. 2001) (standard under § 1782 is "identical to that used in reviewing the district court's ordinary discovery rulings"); Chevron Corp. v. E-Tech Int'l, No. 10cv1146-IEG(Wmc), 2010 WL 3584520 (S.D. Cal. Sept. 10, 2010) (collecting and discussing previous decisions on the subject).

152. 28 U.S.C. § 636(b)(1)(A).

153. *See* Phillips v. Beierwaltes, 466 F.3d 1217, 1222 (10th Cir. 2006); 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3068.3 (2d ed. 1982) (noting that although discovery disputes generally are viewed as non-dispositive, motions under § 1782 are dispositive matters).

154. 28 U.S.C. § 636(b)(1)(B).

On appeal, the statutory requirements will be reviewed de novo.[155] Each of these statutory requirements is discussed in further detail below.

a. Person Must Reside or Be Found in the District

For the purpose of this statute, the location of an individual is based on his or her physical presence, even if temporary.[156] A defendant corporation typically resides at its place of incorporation or headquarters, or where it undertakes "systemic and continuous local activities."[157] However, requests under § 1782 generally remain subject to subpoena restrictions, including restrictions against imposing undue hardship.[158] Also, a person may only be subpoenaed for documents in his or her possession, custody, or control, a test that may not necessarily be met when the evidence is in the possession, custody, or control of a foreign affiliate of the U.S. entity.[159]

b. For Use in a Proceeding in a Foreign or International Tribunal

Applications under § 1782 are only permitted when they seek to assist a "proceeding in a foreign or international tribunal."[160] In *Intel Corp. v. Advanced Micro Devices Inc.,* the Supreme Court interpreted this requirement liberally, allowing requests for discovery to assist administrative and quasi-judicial proceedings abroad when the tribunal in

155. Ecuadorian Plaintiffs v. Chevron Co., 619 F.3d 373, 375 (5th Cir. 2010).

156. *See* 28 U.S.C. § 1391(c)–(d).

157. *In re* Inversiones y Gasolinera Petroleos Valenzuela, No. 08-20378-MC, 2011 WL 181311, at *7 (S.D. Fla. Jan. 19, 2011); *see also* Caremark Therapeutic Servs. v. Leavitt, 405 F. Supp. 2d 454, 459 (S.D.N.Y. 2005); *In re* Thai-Lao Lignite (Thail.) Co., 821 F. Supp. 2d 289, 293–94 (D.D.C. 2011) (finding that the corporation from which discovery was being sought did not reside or was not found in the district because its place of registration and headquarters were not in the district; likewise finding that another corporation from which discovery was being sought did not reside or was not found in the district because it did not have an office or any other systematic and continuous contacts with the district).

158. *In re* Gushlak, No. 11-MC-218 (NGG), 2011 WL 3651268, at *4 (E.D.N.Y. Aug. 17, 2011).

159. *See In re* Godfrey, 526 F. Supp. 2d 417, 424 (S.D.N.Y. 2007); Doe Run Peru S.R.L. v. Trafigura AG, 2011 U.S. Dist. LEXIS 154559, at *3 (D. Conn. Aug. 23, 2011).

160. 28 U.S.C. § 1782(a).

question "acts as a first-instance decisionmaker."[161] The Supreme Court also found that the proceedings need not be "pending" or "imminent," although a "dispositive ruling" should "be within reasonable contemplation" at the time the application is made.[162] This definition, although broad, does not extend to cover officials who are agents of governmental policy, rather than those with an essentially impartial, adjudicatory function.[163]

There is, however, some uncertainty as to the scope of the definition of "foreign or international tribunal." For instance, it is not yet clear whether international arbitral tribunals constitute foreign or international tribunals for the purposes of § 1782.[164]

U.S. district courts have been fairly consistent in their approach to international arbitral tribunals established pursuant to investment treaties between two states, finding that such tribunals come within

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161. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (finding that an antitrust investigation by the Directorate-General for Competition of the EU Commission (DG Competition) constituted a proceeding in a foreign tribunal given that such DG Competition acted as a first-instance decision maker on antitrust matters); *see also In re* Clerici, 481 F.3d 1324, 1333 (11th Cir. 2007) (finding that the proceeding need not be adjudicative in nature). *But see* Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24, 27 (2d Cir. 1998) (holding that the proceeding must be adjudicative in nature).

162. *Intel*, 542 U.S. at 258–59.

163. *See, e.g.*, Okubo v. Reynolds (*In re* Letters Rogatory from the Tokyo Dist. Prosecutor's Office), 16 F.3d 1016, 1019 (9th Cir. 1994) (holding that a foreign prosecutor was not a "tribunal" within the meaning of the law, although it could still be an "interested person"), Fonseca v. Blumenthal, 620 F.2d 322, 324 (2d Cir. 1980).

164. GEA Group AG v. Flex-N-Gate Corp. and Shahid Khan, 740 F.3d 411, 419 (7th Cir. 2014) ("[T]he applicability of section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain."); Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014) (vacating its prior decision in Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987 (11th Cir. 2012), in which it held that a private commercial arbitration proceeding qualified as a "proceeding before a foreign or international tribunal" under § 1782, "leav[ing] the resolution of the matter for another day."); NBC v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999) (holding that Congress "did not intend for [§ 1782] to apply to an arbitral body established by private parties"); *see generally* Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 Stan. J. Int'l L. 51 (2011); Strong, *supra* note 150.

the scope of § 1782.[165] U.S. courts are less consistent in their treatment of private international arbitral tribunals.[166] Since *Intel*, some courts have decided that private international tribunals should come within the scope of § 1782, noting that Congress did not limit the application of the statute to government-sponsored tribunals.[167] Other courts have not generally extended § 1782 to apply to private international arbitrations, finding that the *Intel* case did not reach this issue and that it remains an open question.[168]

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165. *See, e.g.*, *In re* Oxus Gold, No. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (finding that an arbitral tribunal is a foreign tribunal when the arbitration was "being conducted within a framework defined by two nations" pursuant to a bilateral investment treaty, and governed by the UNCITRAL Arbitration Rules); *In re* Winning (HK) Shipping Co., No. 09-22659-MC, 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010); *In re* Chevron Corp., 709 F. Supp. 2d 283 (S.D.N.Y. 2010).

166. Some courts explicitly differentiate between these two types of arbitral proceedings on the grounds that investment arbitrations are sponsored by states and commercial arbitrations are purely private and therefore outside the scope of § 1782. *See In re* Norfolk Southern Corp., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (holding that "a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, 'a body operating under the United Nations and established by its member states,' and purely private arbitrations established by private contract") (citing *In re Oxus Gold*, 2007 WL 1037387, at *6); *see also In re Winning*, 2010 WL 1796579; OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009); *but see* Hans Smit, *International Litigation Under the U.S. Code*, 65 Colum L. Rev. 1015, 1021 (1965) ("the term 'tribunal' embraces all bodies exercising adjudicatory power, and includes . . . arbitral tribunals") (quoted in *Intel*, 542 U.S. at 258).

167. *See In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1226 (N.D. Ga. 2006); *In re* Hallmark Corp., 534 F. Supp. 2d 951, 954–55 (D. Minn. 2007); *In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) (finding that assistance would only be appropriate if the foreign arbitral tribunal first approves the assistance); Comision Ejecutiva v. Nejapa Power Co., LLC, No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) (noting "the Supreme Court's decision in *Intel* and post-*Intel* decisions from other district courts indicate that section 1782 does indeed apply to private foreign arbitrations").

168. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31, 34 (5th Cir. 2009); *In re* Operadora DB Mex., S.A., No. 6:09-vc-383-Orl-22GJK, 2009 WL 2423138, at *9 (M.D. Fla. Aug. 4, 2009); *In re* Dubey, 949 F. Supp. 2d 990, 994–95 (C.D. Cal. 2013); *In re Norfolk Southern*, 626 F. Supp. 2d at 885 (mistakenly distinguishing between UNCITRAL tribunals as "state-sponsored" arbitral bodies and "purely private arbitrations"). Another open question is whether U.S.-sited international arbitrations may count as "foreign or international tribunals" for the purposes of § 1782. Such proceedings are deemed to be international for the purposes

Although there is not a great deal of case law on the subject, it appears that the "international tribunal" language of § 1782 is designed to include a broad range of courts that operate on an international or supranational level. For example, the Supreme Court has held that it is "[b]eyond question" that the European Court of Justice qualified as a tribunal under § 1782.[169] Similarly, one of the key drafters of the statute later wrote that "Section 1782 ensures that an important international court . . . and litigants before such a court can be given any reasonable assistance they may require."[170] It is to be expected that this provision would cover courts such as the International Court of Justice, European Court of Human Rights, and International Criminal Court.[171]

c. Application Made by a Foreign or International Tribunal or an Interested Person

Two types of applicants may seek discovery under 28 U.S.C. § 1782: a foreign or international tribunal, on the one hand, and an interested person, on the other.[172] A request from a foreign or international tribunal will most likely take the form of a letter rogatory.[173] Appendix C is a sample letter rogatory.

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of the Federal Arbitration Act, 9 U.S.C. §§ 1–16, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997). However, there is no case law on the subject in the context of § 1782. *In re* Dubey, 949 F. Supp. 2d 990, 995–96 (C.D. Cal. 2013) (noting that all previous decisions have dealt with arbitral proceedings sited outside the United States).

169. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257 (2004).

170. Smit, *supra* note 166, at 1027 n.73 (1965).

171. *See generally* Strong, *supra* note 150.

172. *See* 28 U.S.C. § 1782(a) ("[t]he order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person").

173. *See* 28 U.S.C. § 1782(a) (providing that an order made under § 1782(a) "may be made pursuant to a letter rogatory issued"); *see also In re* Letters Rogatory from Tokyo Dist., 539 F.2d 1216 (9th Cir. 1976); United Kingdom v. United States, 238 F.3d 1312 (11th Cir. 2001).

Letters rogatory or requests from foreign or international tribunals will often come through the U.S. State Department.[174] Title 28 U.S.C. § 1781(a)(1) authorizes the U.S. State Department to accept a letter rogatory from a foreign tribunal and then direct the letter to the U.S. government agency to which it is addressed.[175] That agency then forwards the letter to whichever U.S. district court may exercise jurisdiction over the party or witness and make the appropriate discovery order. A letter rogatory or request may also be made directly from the foreign or international tribunal to a federal district court (or other tribunal, officer, or agency, as applicable).[176] Requesting discovery directly from a U.S. district court under § 1782 is faster than submitting a letter rogatory to the State Department. However, some foreign jurisdictions only admit evidence obtained pursuant to the latter approach.

The statute also allows an "interested person" to seek judicial assistance to obtain evidence in the possession of a person in the United States An interested person need not be a party in the foreign proceeding. Rather, an interested person is anyone who "possess[es] a reasonable interest in obtaining [judicial] assistance."[177] In the *Intel* case, the U.S. Supreme Court found that a complainant who triggered an antitrust investigation by the European Commission was considered to be an "interested person."[178] The Supreme Court came to this conclusion given that the complainant played a "significant role in the process," including having submitted information for the commission's consideration.[179]

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174. Note that letters of request coming in under the Hague Convention ought to be considered separately under the Hague Convention criteria discussed in section II.C.1.

175. With regard to criminal matters, the United States has entered into a number of Mutual Legal Assistance Treaties (MLATs). *See* U.S. Dep't of State, *Treaties In Force*, http://www.state.gov/s/l/treaty/tif/index.htm (last visited Mar. 5, 2015). More information on MLATs is available in Funk, *supra* note 5.

176. *See*, *e.g.*, *In re* Clerici, 481 F.3d 1324 (11th Cir. 2007).

177. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004); *see also In re* Letter of Request from Crown Prosecution Serv., 870 F.2d 686, 689–90 (D.C. Cir. 1989).

178. *See Intel*, 542 U.S. at 256.

179. *See id.*

d. Seeking Evidence

Requests made under § 1782 must seek evidence located in the United States.[180] In this regard, § 1782 may not be used for other purposes, for instance as a tool to enforce foreign judgments.[181] "Evidence" includes documents and depositions.[182] Requests for evidence need not be limited to materials that would otherwise be discovered in the foreign jurisdiction if the materials were located there.[183] Similarly, it is not necessary for an applicant to show that U.S. law would have allowed the discovery if the litigation had been properly venued here[184] or that the foreign or international tribunal will admit the evidence into the foreign proceeding.[185]

2. Discretionary Factors in Granting an Application Under § 1782

Once the statutory requirements have been met, the U.S. district court has broad discretion to grant a § 1782 discovery application. The U.S. Supreme Court has identified four factors that should be considered in this regard:

1. whether the documents or testimony is within the foreign tribunal's jurisdictional reach;
2. the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to assistance from a U.S. court;
3. whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and

180. *In re* Application of Ecuador, No. C-10-80225 MISC CRB (EMC), 2011 WL 736868, at *10 (N.D. Cal. Feb. 22, 2011) (questioning whether information was located within the district); Tyler B. Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 in Aid of Foreign and International Litigation and Arbitration*, 22 Am. Rev. Int'l Arb. 135, 143–62 (2011).

181. *See In re Clerici*, 481 F.3d at 1332.

182. *See* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014).

183. *See Intel*, 542 U.S. at 260–61; Marubeni Am. Corp. v. LBA Y.K., 335 F. App'x 95, 98 (2d Cir. 2009); *In re* Chevron Corp., 633 F.3d 153, 163 (3d Cir. 2011).

184. *See Intel*, 542 U.S. at 263.

185. *See* Anselm Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 82 (2d Cir. 2012).

4. whether the request is unduly intrusive or burdensome.[186]

These discretionary factors are generally applied "in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance in [U.S.] courts."[187]

The application of the discretionary factors listed above is reviewed by appellate courts for abuse of discretion.[188]

a. Documents within Foreign Tribunal's Reach

The U.S. Supreme Court suggested in *Intel* that courts ought to consider whether the foreign tribunal has the requested evidence within its reach, stating:

> when the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . . In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.[189]

Framed in slightly broader terms, the relevant inquiry has been articulated as "whether the evidence is available to the foreign tribunal."[190]

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186. *See Intel*, 542 U.S. at 264.

187. *Id.* at 252 (citation and quotation marks omitted); *see also* Schmitz v. Bernstein, Liebhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 2004); *In re* Microsoft Corp., 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006).

188. *See Intel*, 542 U.S. at 255; *In re* Clerici, 481 F.3d 1324 (11th Cir. 2007); *Marubeni*, 335 F. App'x at 98; Ecuadorian Plaintiffs v. Chevron Co., 619 F.3d 373, 375 (5th Cir. 2010).

189. *Intel*, 542 U.S. at 264.

190. *In re Microsoft*, 428 F. Supp. 2d at 194.

b. Nature of the Foreign Proceedings and the Foreign Tribunal's Receptivity to Assistance

Applications made by foreign or international tribunals tend not to give rise to concerns about whether the foreign forum is receptive to judicial assistance.[191] Rather, this discretionary factor primarily concerns applications made by interested persons.

A party opposing an application under § 1782 generally bears the "burden of demonstrating offense to the foreign jurisdiction, or any other facts warranting the denial of a particular application."[192] The foreign tribunal's disallowance of pretrial document discovery is not sufficient evidence to suggest that the foreign tribunal would not be receptive to a U.S. court's allowing discovery of the same documents.[193] A number of U.S. courts have denied a request for discovery under § 1782 when the foreign tribunal in question explicitly opposed the discovery sought through a submission to the court,[194] although other U.S. courts have held that the opposition of the foreign court to evidence produced through a § 1782 request is not necessarily dispositive.[195]

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191. *See, e.g.*, *In re Clerici*, 481 F.3d at 1335.

192. *See In re Chevron,* 633 F.3d at 162 (quoting Bayer AG v. Betachem Inc., 173 F.3d 188, 190 (3d Cir. 1999)).

193. *Id.* at 163 (cautioning against "conflat[ing] the question of whether a foreign court would allow analogous discovery leading to the production of documents with the question of whether that court would consider evidence revealed in a section 1782 proceeding.").

194. *See In re Microsoft*, 428 F. Supp. 2d at 194 (rejecting a request for discovery under § 1782 on the grounds, in part, that the European Commission, the commission hearing the ongoing antitrust proceeding for which Microsoft sought discovery, wrote a letter explicitly opposing U.S. judicial assistance and the discovery sought by Microsoft); Schmitz v. Bernstein, Liebhard & Lifshitz, LLP, 376 F.3d 79, 84–85 (2d Cir. 2004). This should be distinguished from circumstances in which a foreign tribunal opposes the U.S. court's assistance in gathering evidence for the purposes of assisting a separate foreign proceeding. *See, e.g.*, *In re* Chevron, 749 F. Supp. 2d 141, 161 (2010).

195. *See In re* Republic of Ecuador, No. C-10-80225 MISC CRB, 2011 WL 736868, at *7 (N.D. Cal. Feb. 22, 2011) (stating that "[a]bsent evidence that the foreign tribunal will reject the evidence sought, the Court is not inclined to consider whether the foreign tribunal is likely to accept it," and recalling a prior order that provided that "even opposition by the foreign court 'would not necessarily carry the day.'").

c. Attempts to Circumvent Foreign Proof-Gathering Restrictions

Applications made by foreign or international tribunals are unlikely to raise concerns that they seek to circumvent foreign proof-gathering restrictions, since a foreign tribunal would not be inclined to circumvent its own restrictions.[196] However, an application made by an interested person, especially to discover evidence in the possession of a party that is also subject to the jurisdiction of the foreign tribunal, may raise suspicions that it seeks to avoid restrictions that might otherwise apply in the foreign forum. Federal courts have been careful not to usurp the ability of a foreign tribunal to proscribe or circumscribe the proof-gathering process on grounds such as confidentiality. An application seeking evidence that attempts to circumvent such requirements will be less likely to be granted by the U.S. court, since to do so "would contravene the purpose of § 1782 by pitting this Court against the [foreign tribunal], rather than fostering cooperation between them."[197]

d. Unduly Intrusive or Burdensome Requests

When an application under § 1782 is found to be unduly intrusive or burdensome, courts may grant the request in part or tailor the discovery order, as opposed to rejecting it altogether.[198] Discovery orders under § 1782 are governed by the Federal Rules of Civil Procedure, which describe what constitutes an unduly burdensome request.[199]

196. *See, e.g.*, *In re Clerici*, 481 F.3d at 1332, 1335.

197. *In re Microsoft*, 428 F. Supp. 2d at 194–95.

198. *In re* Mesa Power Group, LLC, No. 2:11-mc-280-ES, 2012 WL 6060941, at *12–13 (D.N.J. Nov. 20, 2012) (granting certain discovery requests considered "narrowly tailored to the subject matter" and denying other requests as "overbroad and unduly intrusive or burdensome," including a request for all correspondence between Samsung and Canadian officials, as these documents would not provide information or insight into the primary issue in the international arbitration); *see also id.* at 14 ("[W]hen dealing with foreign parties, American courts must exercise special vigilance to protect foreign parties from unduly burdensome discovery requests, which may disadvantage them in the proceeding. Whenever possible, the Court must attempt to minimize the discovery requests' costs and inconveniences.").

199. *See* 28 U.S.C. § 1782(a) ("[t]o the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure"); *see also In re* Gushlak, No. 11-MC-218 (NGG), 2011 WL 3651268, at *6 (E.D.N.Y. Aug. 17, 2011); Fed. R. Civ. P. 26(g)(1)(B)(iii).

Specifically, Federal Rule of Civil Procedure 45 sets out standards for protecting responding parties from unduly burdensome subpoenas.[200] Factors that may help to determine whether a request is overly burdensome include "relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."[201] In particular, a request may be found to be unduly intrusive or burdensome when it seeks confidential or privileged documents.[202] A discovery request may also be deemed overly burdensome when discovery was equally available in both the foreign and domestic jurisdictions.[203] The party opposing the discovery request must show, with specificity, how the request is unduly intrusive or burdensome.[204]

C. Voluntary Cooperation

Unlike the law in many foreign jurisdictions, U.S. law does not impose any restrictions or requirements on U.S. persons who voluntarily comply with foreign requests for documentary evidence or oral testimony.[205] Thus, foreign litigants may depose or seek other discovery from compliant U.S. persons without any involvement of U.S. courts

200. *See* Fed. R. Civ. P. 45(c)(3)(A)(iv).

201. *In re Gushlak*, 2011 WL 3651268, at *6 (citing Nova Biomedical Corp. v. i-STAT Corp., 182 F.R.D. 419, 422–23 (S.D.N.Y. 1998)).

202. *See* 28 U.S.C. § 1782(a) (providing that "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege"); *In re Microsoft*, 428 F. Supp. 2d at 196.

203. *See In re* IPC Do Nordeste, LTDA, No. 12-50624, 2012 WL 4448886, at *8 (E.D. Mich. Sept. 25, 2012) (citing Heraeus Kuzler, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. 2011)) ("One abuse would be for a party to seek discovery in a federal district court that it could obtain in the foreign jurisdiction, thus gratuitously forcing his opponent to proceed in two separate court systems.").

204. *See* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014).

205. *See Synopsis of Responses to the Questionnaire of May 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention)*, Hague Conference on Private International Law, http://www.hcch.net/upload/wop/2008synopsis20.pdf (last visited Mar. 5. 2015) (noting ten states that are parties to the Hague Convention and that have domestic laws barring the disclosure of evidence in certain circumstances). For the United States, see 28 U.S.C. § 1782(b).

or other organs of government. To ensure that discovered material is admissible in the foreign proceeding, the requesting party should comply with the rules and form requirements of the foreign jurisdiction.

IV. Conclusion

This guide provides an introductory overview of the complex international discovery issues a federal court judge may face in a civil proceeding. It highlights key issues and summarizes common international discovery practices to assist U.S. courts in proactively identifying and managing these procedures and potential issues. As this guide seeks to make clear, to ensure the efficient management of the international discovery process, parties and courts alike are best served by careful planning early in the case.

Recommended Reading

Graig J. Alvarez, *Conducting Discovery in Foreign Countries*, *in* International Litigation—Defending and Suing Foreign Parties in U.S. Federal Courts (David J. Levy ed., ABA 2003).

Gary Born & Peter Rutledge, International Civil Litigation in United States Courts (5th ed. 2011).

The Hague Conference on Private International Law on the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.text&cid=82.

Transnational Litigation: A Practitioner's Guide (John Fellas ed., Thompson Reuters 2013).

U.S. Department of State, International Judicial Assistance, http://travel.state.gov/content/travel/english/legal-considerations/judicial.html.

U.S. Department of State, International Judicial Assistance, Country Information, http://travel.state.gov/content/travel/english/legal-considerations/judicial/country.html.

Appendices

Appendix A: Discovery Practices in Selected Jurisdictions

While it is the responsibility of counsel to provide the court with relevant foreign law and procedure, it may be helpful for judges to have a basic understanding of issues that arise when parties to a U.S. proceeding seek transnational discovery. This appendix is intended to assist judges by providing a starting point if a party to a dispute seeks discovery in one of the jurisdictions addressed in this appendix.

Argentina

Overview

In Argentina, at the federal level, evidentiary issues are governed by the Federal Civil and Commercial Procedural Code (*Código Procesal Civil y Comercial de la Nación*) (CPC). Each of the twenty-three provinces has enacted its own Civil and Commercial Procedural Code. Likewise, the City of Buenos Aires has a procedural code that governs matters in which the city government is a party. The most populated and economically relevant subnational jurisdiction is the Province of Buenos Aires. The Civil and Commercial Procedural Code of Buenos Aires (*Código Procesal Civil y Comercial de la Provincia de Buenos Aires*) (CPBA) has discovery rules that are similar to the federal rules in the CPC (Chapter V, Sects. 358–478).

Pretrial discovery of documents as understood in common law countries is not generally available in Argentina (Law 23,480, Sect. 2). Under limited circumstances, however, there are certain types of evidence that a potential plaintiff may ask a court to collect before a suit is filed (CPC, Sects. 326–329; CPBA, Sects. 326–329). Parties to the litigation, as well as third parties who possess documents relevant to the case, may be ordered to produce those documents (CPC, Sect. 387; CPBA, Sect. 385). If a party to the litigation refuses to do so, the court may draw a negative inference (CPC, Sect. 388; CPBA, Sect. 386).

At trial, the judge will examine witnesses based on the judge's own questions or those formulated by the parties (CPC, Sect. 442; CPBA, Sect. 440). Witnesses may refuse to answer questions under certain circumstances, including if (a) the answer would subject them to criminal prosecution or affect their honor; or (b) they cannot answer

without revealing a military, professional, scientific, artistic, or industrial secret (CPC, Sect. 444; CPBA, Sect. 442).

Seeking Discovery in Argentina

The Hague Convention entered into force on July 7, 1987, with declarations and reservations under Articles 23 and 33. Argentina will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as is the practice in common law countries (Art. 23 Declaration). Argentina excludes the application of Chapter II of the Hague Convention (addressing the taking of evidence by diplomatic officers, consular agents, and commissioners) (Art. 33 Reservation).

Argentina has indicated that when a foreign state is party to the Hague Convention, the procedures of the Hague Convention are mandatory. Argentina considers the following types of proceedings to fall within the scope of "civil or commercial matters" under the Hague Convention: bankruptcy or insolvency, insurance, social security, employment, taxation, and consumer protection.

The Hague Convention is the only means through which foreign parties may take a deposition (voluntary or involuntary) in Argentina. Requests for judicial assistance with respect to testimony should include the interrogatories for the requested witnesses (CPC, Sect. 370). Hearings for oral examinations take place exclusively before a judge (CPC, Sect. 34; CPBA Sect. 34) or judicial clerk (when a judge delegates his or her authority to a clerk) (CPC, Sects. 38, 360).

The central authority designated to receive letters of request in Argentina is the Office of International Assistance Department—Office of the Legal Advisor, Ministry of Foreign Affairs, International Trade and Worship.

Data Privacy/Protection Laws and Blocking Statutes

There is no blocking statute in force in Argentina. Personal data privacy protection is provided in the Federal Personal Data-Protection Act (No. 25,326). This Act does not preclude disclosure of personal data without consent when such disclosure is required by the court. Generally, restrictions placed on the disclosure of information under such provisions will not apply when disclosure is required by the Ar-

gentine judiciary (Sects. 5, 23) or is needed to assist in international judicial proceedings (Sect. 12).

A person or entity might not be compelled to answer questions or produce documents that would be prejudicial to Argentina's national security (Sect. 17).

Australia

Overview

In Australia, the Federal Court Rules 2011 (Cth) govern discovery at the federal level. In addition, each state or territory has its own discovery rules (for example, the Uniform Civil Procedure Rules 2005 (NSW); Civil Procedure Act 2010 (VIC)). Evidentiary issues in federal court are governed by the Evidence Act 1995 (Cth), the Foreign Evidence Act 1994 (Cth) (FEA), and the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth).

Pretrial discovery of documents as understood in common law countries is not generally available in Australia.

Seeking Discovery in Australia

The Hague Convention entered into force on December 22, 1992, with declarations and reservations under Articles 8, 15, 16, 23, 33, and 40. Among these declarations and reservations, Australia will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as is the practice in common law countries (Art. 23 Declaration). The Hague Convention has been implemented in Australia by state legislation. States and territories have, with minor variations, adopted similar schemes, and their individual rules apply to the execution of letters of request (for example, the Evidence Act 1958 (Vic), pt 1, div 1C; Evidence Act 1977 (Qld), div 3, pt 3; Evidence Act 1906 (WA), ss 115–118A; Evidence on Commission Act 2001 (Tas); Evidence Act 1971 (ACT), pt 12B; Evidence Act 1939 (NT), div 2, pt 6; *cf*. Evidence Act 1929 (SA), s 59F).

Australia considers the following types of proceedings to fall within the scope of "civil or commercial matters" under the Hague Convention: bankruptcy, insurance and employment law claims, and others. Implementing statutes in Australia make it clear that the Convention does not cover criminal matters (Evidence on Commission Act

(1995) (NSW), s 33; Evidence on Commission Act 2001 (TAS), s 5, Evidence Act 1906 (WA), s 117).

Some state laws expressly permit courts to give effect to letters of request by issuing only orders for the production of documentary evidence (Evidence on Commission Act (1995) (NSW), s 33(3)(b); Evidence on Commission Act 2001 (TAS), s 5(3)(b)); Evidence Act 1906 (WA), s 117(3)(b)). Other state laws authorize courts to issue orders for the production of documents attendant to an examination (Evidence on Commission Act 1988 (QLD), pt 2; Evidence Act 1958 (Vic), pt 1, div 1C).

When a witness is willing to give evidence without the issuance of a subpoena, depositions may be taken without an order of an Australian court. A diplomatic officer or consular agent may take evidence with compulsion upon application to the Attorney-General's Department of the Commonwealth of Australia. A court has the power to order testimony from individuals if the purpose for which the foreign court desires the testimony is use, or possible use, as evidence at trial (*Pickles and Ors v Gratzon and Ors* [2002] NSWSCR 688 (5 August 2002), citing *Application of Forsyth; Re Cordova v Philips Roxane Laboratories Inc* (1984) 2 NSWLR 327, Clarke J).

The central authority designated to receive letters of request is the Secretary of the Attorney-General's Department of the Commonwealth of Australia. However, in each state and territory the Registrar or Prothonotary of the Supreme Court has been designated as an additional authority. In practice, letters of request and other enquiries are referred to state or territory law departments. A U.S. court may send the letter of request directly to Australia's central authority.

Australia has stated that the Hague Convention is not the only method available to a state party to obtain evidence abroad, and that there is nothing to prevent one state from approaching another state outside of the mechanism to obtain and provide evidence.

Further information on seeking discovery in Australia can be found on the Australian Attorney-General Department's website at http://www.ag.gov.au/pil.

Data Privacy/Protection Laws and Blocking Statutes

Section 42 of the Foreign Evidence Act 1994 permits the Australian Attorney-General to prohibit by order the production of a document

or the giving of evidence by an Australian citizen or resident. The Attorney-General must not exercise this power unless he or she is satisfied that it is desirable to do so for the purpose of preventing prejudice to Australia's security.

Section 7 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 permits the Attorney-General to prohibit by order the production of a document in a foreign court or the giving of evidence by an Australian citizen or resident in cases in which (a) such an order is desirable to protect the national interest; (b) the jurisdiction of the foreign court is contrary to international law, comity, or practice; or (c) the action taken by the foreign authority is contrary to international law, comity, or practice.

Canada

Overview

The Canada Evidence Act (CEA), R.S.C. 1985, c. C-5, s. 43–51 is the federal statute that applies to the taking of evidence relating to proceedings in courts outside of Canada. Most provinces also have additional statutes regarding the rules of evidence (for example, the Ontario Evidence Act, R.S.O. 1990, c. E-23). The Ontario Evidence Act (OEA) applies "to all actions and other matters whatsoever respecting which the Legislature has jurisdiction" (Article 2), while the CEA applies to "criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction" (Article 2). The CEA further adds that the relevant part "shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof."

Discovery is available from adverse parties in an action and, in certain instances, from non-party witnesses. Recent jurisprudence indicates that pretrial discovery of documents as understood in common law countries is available under Canadian law. When the production of documents is requested, parties are permitted to petition a Canadian court directly to compel the production of documents.

Seeking Discovery in Canada

Canada is not a party to the Hague Convention. The CEA, R.S.C. 1985, c. C-5, s. 46 and various provincial statutes governing the law of evidence, such the Ontario Evidence Act, R.S.O. 1990, c. E.23, s. 60, grant Canadian courts the authority to enforce letters rogatory at the discretion of the court. The CEA expressly states that it applies to any "civil, commercial and criminal" matter pending before a foreign court or tribunal. The language of provincial statutes may differ. For example, section 60(1) of the Ontario Evidence Act refers to "an action, suit or proceeding" in the foreign court or tribunal.

A request from a foreign court or tribunal is given full force and effect unless it is contrary to the public policy of the jurisdiction to which the request is directed or otherwise prejudicial to the sovereignty of the citizens of that jurisdiction (*R. v. Zingre* [1981] 2 S.C.R. 392, para. 18; *Germany (Federal Republic) v. Canadian Imperial Bank of Commerce*, CarswellOnt 102, para. 24).

Canadian courts will exercise their discretion to enforce a foreign letter of request. Under section 46(1) of the CEA, there are four prerequisites to the Court's exercise of its discretion: (1) it must appear that a foreign court wants to obtain the evidence; (2) the witness whose evidence is sought must be within the jurisdiction of the court that is asked to make the order; (3) the evidence sought must be in relation to a civil, commercial, or criminal matter pending before the foreign court; and (4) the foreign court must be a court of competent jurisdiction (*Germany (Federal Republic) v. Canadian Imperial Bank of Commerce*, 1997 CarswellOnt 102, para. 7).

If the prerequisites are met, the Canadian courts will decide whether to exercise their discretion by considering whether (a) the evidence sought is relevant; (b) the evidence sought is necessary for trial and will be adduced at trial, if admissible; (c) the evidence is not otherwise obtainable; (d) the order sought is not contrary to public policy; (e) the documents sought are identified with reasonable specificity; and (f) the order sought is not unduly burdensome, considering what the relevant witnesses would be required to do, and produce, were the action to be tried in Canada (*Re Friction Division Products, Inc. and E. I. Du Pont de Nemours & Co. Inc. (No. 2)*, (1986), 56 O.R. (2d) 722 (H.C.), para. 25; *Treat Canada Ltd. v. Leonidas*, 2012 CarswellOnt 14784, para. 19).

Recent court decisions suggest that provincial legislation specifically allows for judges to enforce a request from a foreign court for pretrial discovery of documents and witnesses. The Court of Appeal of Ontario characterized section 60(1) of the Ontario Evidence Act as "a procedure for obtaining pre-trial discovery" (*Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 CarswellOnt 5042, para. 37). In general, Canadian courts will only order an examination for the purpose of gathering evidence to be used at a trial (*R. v. Zingre,* [1981] 2 S.C.R. 392, para. 22). Since *R v. Zingre*, the position on granting requests dealing with pretrial discovery has changed, and a number of decisions have acknowledged that there is no rule against making such an order (*Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 CarswellOnt 5042, para. 63, *citing R. v. Zingre,* [1981] 2 S.C.R. 392 para. 22; *Fecht v. Deloittte & Touche*, (1996), 28 O.R. (3d) 188 (Gen. Div.), para. 23; *France (Republic) v. De Havilland Aircraft of Canada Ltd.*, (1991), 3 O.R. (3d) 705 (C.A.), para. 31).

Canadian courts will reject requests for documents and witness depositions which are vague and would not otherwise have been enforced in the Canadian context (*Treat Canada Ltd. v. Leonidas*, 2012 CarswellOnt 14784, para. 21, interpreting *R. v. Zingre,* [1981] 2 S.C.R. 392).

If the witness is willing to be deposed for a U.S. civil litigation, parties may arrange to depose the witness without prior consultation or permission from Canadian authorities.

Letters rogatory requesting that a Canadian judicial authority compel a witness to testify or produce documents should be addressed to the court with jurisdiction over the witness or documents. In these circumstances, a Canadian lawyer will be required to assist.

Data Privacy/Protection Laws and Blocking Statutes

Certain provinces in Canada have enacted blocking statutes, such as the Ontario Business Records Protection Act, R.S.O. 1990, c. B.19 (BRPA) and the Quebec Business Concerns Records Act. Section 1 of the BRPA prevents the removal of business records from a point in Ontario to a point outside Ontario. However, some provincial blocking statutes, including the BRPA, have specific exceptions to allow courts to order production under the laws of Ontario or Canada

(BRPA, Sect. 1(d) examined in *Germany (Federal Republic) v. Canadian Imperial Bank of Commerce*, 1997 CarswellOnt 102, para. 32).

The Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 allows the Attorney General to block extraterritorial measures from being taken in Canada, including the taking of evidence in Canada without consent.

France

Overview

The relevant law governing the taking of evidence in France is the Code of Civil Procedure (*Code de procédure civile*) (C.P.C.).

Pretrial discovery of documents as understood in common law countries is not available in France. Requests for the production of evidence are governed by Articles 138 and 139 of the C.P.C., which allow a party during the course of a proceeding to request a judge to order the production of evidence (C.P.C., Art. 142).

Seeking Discovery in France

The Hague Convention entered into force on October 6, 1974, with declarations and reservations under Articles 4, 16, 17, and 23. France has declared that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries (Art. 23 Declaration). However, France has further clarified that this declaration does not apply if the letter of request provides an "exhaustive list" of the documents sought and those documents have a direct and precise link with the object of the procedure. "Exhaustive list" means that the documents are identified with a reasonable degree of certainty, following a number of criteria, such as their date, type, or author (CA Paris, 18 September 2003, JurisData No. 2003-18509). France considers the following types of proceedings to fall within the scope of "civil or commercial matters" under the Hague Convention: bankruptcy, insurance, social security, employment, antitrust, and consumer protection matters.

In considering a request for judicial assistance, French courts may take into account the producing party's objections to producing the requested documents, including those based on privilege. The judge's

decision to allow discovery is discretionary (S. Guinchard, *Droit et pratique de la procédure civile* (7th ed. 2012), Nos. 341-42 and 341-52).

In a letter of request, the documents requested must be sufficiently specified (Cass Civ 2, 15 March 1979, [1979] Bull Civ II, No. 88). Voluntary depositions of U.S. citizens in France are permitted. However, depositions of French citizens and nationals of third countries require permission from the French central authority and require a commission from the United States; this rule also applies when the individual is willing to participate voluntarily. A request for a deposition must be submitted at least 45 days prior to the proposed deposition date and must include detailed information, including the questions to be put to the witness or a statement of the subject matter of examination. Hearings for oral examinations take place before a judge (S. Guinchard, *Droit et pratique de la procédure civile* (7th ed. 2012), No. 342-150).

The central authority designated to receive letters of request is the Ministry of Justice. The letter of request must be accompanied by a French translation (Art. 4, para. 2 Declaration).

France has indicated that when a foreign state is party to the Hague Convention, the procedures of the Hague Convention are mandatory to pursue evidence. French law requires that requests for evidence for the purpose of a foreign judicial or administrative proceeding be made pursuant to an applicable treaty, law, or regulation (Law No. 68-678 of 26 July 1968, *as modified* by Law No. 80-538 of July 16, 1980, art. 1 *bis*). Violations carry penalties of six months of imprisonment and a fine of € 18,000.

Data Privacy/Protection Laws and Blocking Statutes

Pursuant to Article 5(1) of Council Regulation (EC) No. 2271/96 of 22 November 1996, no person shall comply with requests from U.S. courts based on or resulting directly or indirectly from a list of foreign laws purported to have extraterritorial application.

Article 25(1) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 further restricts France's ability to transfer personal data to the United States by requiring that the United States be shown to provide an adequate level of protection for the personal data.

Germany

Overview

The relevant law governing the taking of evidence in Germany is the German Code of Civil Procedure Zivilprozessordnung (ZPO).

Pretrial discovery of documents as understood in common law countries is not available under the ZPO (Federal Court of Appeals (BGH), June 4, 1992, NJW 1992, 3096 (3099)). To protect the interests of the party bearing the burden of proof, German courts have established a number of rebuttable presumptions in favor of that party with regard to information withheld by the opposing party (*Geimer, Internationales Zivilprozessrecht*, 7th ed. 2013, § 10 para. 35).

There is no general obligation to produce documents to assist the opposing party. Under certain circumstances, the court may order a party to produce a document (e.g., if the substantive law requires it (ZPO, §§ 421 et. seq.)). A witness can only be compelled to testify by a court-issued subpoena (ZPO, §§ 377, 380(1)). At trial, the presiding judge conducts the witness examination (ZPO, §§ 373, 396–397). Following that examination by the court, both parties have the right to examine the witness through their legal counsel.

Seeking Discovery in Germany

The Hague Convention entered into force on June 26, 1979, with declarations and reservations under Articles 4, 18, 16, 23, 33, and 35. Germany excludes the application of Chapter II of the Hague Convention (addressing the taking of evidence by diplomatic officers, consular agents, and commissioners) if German nationals are involved (Art. 33 Reservation). In addition, Germany will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries (Art. 23 Declaration). However, German law provides that requests for documents during pretrial discovery may be executed once the German Minister of Justice has (a) specified the requirements for such execution in a federal regulation *and* (b) determined that executing the request would not violate fundamental principles of the law of civil procedure and would ensure the protection of the legitimate interests of the parties concerned (Implementation Act, § 14, para. 2). As such a regulation has yet to be enacted, all requests for pretrial discovery of documents will

be refused (Munich Court of Appeals (OLG München), Oct. 31, 1980, IIC 1982, 759 (761)).

While Germany will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents, requests for the deposition of witnesses about the content of certain documents during pretrial discovery may be granted, as they are not excluded by the Hague Convention (Munich Court of Appeals (OLG München), November 27, 1980, November 27, 1980, IIC 1982, 762 (764); Düsseldorf Court of Appeals, July 6, 2007, NJW-RR 2008, 78 (79 et. seq.)).

According to the Munich Court of Appeals, the letter of request must describe the subject matter of the witness examination in relatively broad terms (Munich Court of Appeals (OLG München), November 27, 1980, IIC 1982, 762 (764)). However, there is a split among Courts of Appeal as to what this requirement means in practice. And the views of German central authorities are divided with respect to whether a letter of request must enclose a list of questions for a witness.

The German Ministry of Justice must preapprove all requests for depositions, and all depositions must take place on U.S. consulate grounds. Germany and the United States have agreed, through exchange of diplomatic "notes verbale," that a U.S. consular officer may take the voluntary testimony of a German citizen (Note Verbale of Auswärtiges Amt 512–521.60 USA, published in IPRax 1993, 224).

Section 7 of the Implementation Act requires every German state (*Bundesland*) to designate its own central authority to facilitate procedures under the Hague Convention (states often designate their respective Ministry of Justice or the Presiding Judge of the Court of Appeals). A list of the current German central authorities for the respective states can be found in *Pabst*, Münchener Kommentar zur ZPO, 4th ed. 2013, HBewÜ Art. 2 para. 9. A U.S. court or individual may send the letter of request directly to the relevant central authority. Letters of request should be prepared in duplicate and translated into German (Implementation Act, § 9).

Data Privacy/Protection Laws and Blocking Statutes

Personal data privacy protection is governed by the Federal Data Protection Act (*Bundesdatenschutzgesetz*) (BDSG). The transmission of personal data to foreign authorities is restricted if the person con-

cerned has a legitimate interest in withholding his or her data. Such a legitimate interest exists in particular when the authority requesting transmission of data does not provide for a level of data protection equivalent to the level provided under German law (BDSG, § 4b, para. 2(2)). The European Commission has designated the United States as a country with an inadequate level of data protection (under Articles 25(1) and 6 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals) with regard to the processing of personal data and on the free movement of such data. Therefore, all data transfers to the United States are subject to special restrictions set forth in Sections 4b, para. 2(3) and 4c of the BDSG.

Furthermore, ZPO §§ 142(2) and 338 Nr. 4 protect business secrets with respect to witness statements and production of documents. The German Penal Code (§§ 201 et. seq.) protects privileged information.

Hong Kong

Overview

The High Court Ordinance (Cap 4) (HCO) is the primary legislation governing civil procedure in Hong Kong. Order 24 of the Rules of the High Court (RHC) specifies the particular rules governing discovery. Additionally, courts in Hong Kong regard the commentaries in the Hong Kong Civil Procedure (White Book) as highly authoritative.

Order 24, Rule 1(1) of the RHC requires parties to an action, after the close of pleadings, to disclose documents that are in the parties' possession, custody, or power and relevant to matters at issue in an action.

Upon a party's application, Section 42(1) of the HCO empowers the Court in Hong Kong to order a non-party to disclose relevant documents if the non-party appears to be likely to have or has had such relevant documents in his or her possession or power. Order 24, Rule 7A of the RHC further states that the applicant should specify the documents sought in the application.

Order 26 of the RHC contains procedures governing discovery by interrogatories, which generally consist of written and relevant questions that a party may require the other party to answer concerning matters at issue in an action. In addition to the relevance requirement,

the interrogatories (a) must not engage in a fishing expedition, and (b) must be necessary either for disposing of the matter fairly or for saving costs (*Sit Ka Yin Priscilla v EOC & Others* DCEO 11/1999).

Order 39, Rule 1 of the RHC contains procedures governing the taking of evidence by deposition, before trial, of a witness who will be unable to attend the trial. Such deposition evidence is not automatically admissible at the trial, unless the party who wishes to rely on such deposition evidence further satisfies the Court in Hong Kong at the time of the trial that the deponent is dead, beyond the jurisdiction of the Court in Hong Kong, or unable to attend the trial because of sickness or other infirmity.

Seeking Discovery in Hong Kong

The Hague Convention entered into force on August 22, 1978, with declarations and reservations in relation to Articles 4, 16, 23, and 33. Hong Kong excludes the application of Chapter II of the Hague Convention (addressing the taking of evidence by diplomatic officers, consular agents, and commissioners) except for Article 15 (Art. 33 Reservation). The Court in Hong Kong will not give effect to a letter of request for the purpose of obtaining pretrial discovery of documents as known in common law countries (Art. 23 Declaration; *Primarius Capital LLC v. Jayhawk Capital* [2009] 4 HKLRD 58). Part VIII of the Evidence Ordinance (Cap 8) (EO) and Order 70 of the RHC provide the domestic framework that implements the Hague Convention in Hong Kong.

The general principle governing the taking of evidence in aid of foreign civil proceedings is that the Court in Hong Kong will "strive to give effect to a letter of request if at all possible" in deference to international comity (*Re Troielli* [1995] 2 HKC 785). The Court in Hong Kong will not render such assistance if, for example, the court regards the application as "frivolous, vexatious or an abuse of the process of the court" (*Angela Chen v. Vivien Chen* [2011] HKEC 1607).

Section 74 of the EO defines "civil proceedings" as "proceedings in any civil or commercial matter." While addressing a similar provision in the United Kingdom, the House of Lords applied the laws of both the United Kingdom and the requesting jurisdiction in determining whether the set of foreign proceedings at issue indeed constituted civil proceedings for the purpose of the relevant legislation (*Re State of*

Norway's Application [1990] 1 AC 723). The Court in Hong Kong will most likely adopt the United Kingdom's position in this regard (paragraph 70/1/15 of the White Book cites *Re State of Norway's Application*) and approach the matter on a case-by-case basis.

The Court in Hong Kong generally defers to the requesting court regarding a document's relevance and admissibility in relation to the foreign proceedings, yet retains the discretion to amend or curtail any term of the letter of request that is improper, impermissible, or impracticable under Hong Kong laws (paragraphs 70/1/24 and 70/1/30 of the White Book).

Voluntary depositions may be conducted in Hong Kong regardless of the nationality of the witness, provided no compulsion is used. Section 77(1) of the EO provides that a person being examined pursuant to Order 70 of the RHC cannot be compelled to give evidence which he or she cannot be compelled to give in Hong Kong or in the requesting jurisdiction. Also, under Order 70, Rule 6 of the RHC, if a person claims that certain information enjoys privilege under the laws of the requesting jurisdiction, and if such information is taken as evidence in Hong Kong, then the Court in Hong Kong must retain such evidence, pending the requesting court's determination on the issue of privilege.

The central authority designated to receive letters of request is the Registrar of the High Court of the Hong Kong Special Administrative Region of the People's Republic of China.

Data Privacy/Protection Laws and Blocking Statutes

There is no blocking statute in force in Hong Kong. Principle 3 in Schedule 1 of the Personal Data (Privacy) Ordinance (Privacy Ordinance) confines the use of any personal data collected to the purpose of its initial collection. However, section 58 of the Privacy Ordinance provides an exception to Principle 3 and allows such personal data to be used for prevention, preclusion, or remedying (including punishment) of unlawful or seriously improper conduct, dishonesty, or malpractice.

The Court in Hong Kong may limit discovery of technical secrets to only selected individuals in an action, who in turn are under the court's order not to use or disseminate further the discovered materi-

als, to ensure both full discovery and adequate protection of the technical secrets (Order 24, Rules 15 and 15A of the RHC).

Singapore

Overview

In Singapore, at the federal level, the relevant rules governing discovery are provided by the Rules of Court (Chapter 322, R 5, Revised Edition 2006).

In civil proceedings, applications for pretrial discovery may be made to the court under Order 24 of the Rules of Court. Order 24 provides for general and specific discovery. Under general discovery, a party has to provide discovery of all documents that it relies on, and documents that could adversely affect its case or adversely affect or support the other party's case. Specific discovery, which allows a party to seek discovery of specific documents or classes of documents, extends to documents that may lead to a "train of inquiry" resulting in the obtaining of information that may adversely affect the party's case or adversely affect or support the other party's case. Parties need only provide discovery of documents that are or have been in their possession, custody, or power. Applications will not be granted if the court is satisfied that discovery is not necessary for the fair disposal of a matter or for the saving of costs.

Examination by deposition is available when necessary "for the purposes of justice" under Order 39 of the Rules of Court, although depositions may only be received in evidence if certain requirements are met (Order 38 Rule 9 of the Rules of Court). Interrogatories are available when necessary for the fair disposal of a matter or for the saving of costs under Order 26 of the Rules of Court. A party may be requested, by way of notice, to admit specified facts under Order 27 of the Rules of Court.

Seeking Discovery in Singapore

The Hague Convention entered into force on December 26, 1978, with declarations and reservations under Articles 4 and 23. Singapore excludes the application of Chapter II of the Hague Convention (addressing the taking of evidence by diplomatic officers, consular agents, and commissioners). Singapore will not execute letters of request is-

sued for the purpose of obtaining pretrial discovery of documents as known in common law countries (Art. 23 Declaration).

Requests for evidence from foreign authorities are governed by the Evidence (Civil Proceedings in Other Jurisdictions) Act (Chapter 98, Revised Edition 1987) (Evidence in Other Jurisdictions Act) and Order 66 of the Rules of Court (Chapter 322, Rule 5, Revised Edition 2006) (Order 66). The Evidence in Other Jurisdictions Act may apply to countries that are not parties to the Hague Convention (Singapore Civil Procedure 2013, para. 66/5/1).

The general principle is that a request from a foreign court for assistance in obtaining evidence for civil proceedings in that court will ordinarily be given effect "so far as is proper and practicable, and to the extent that is permissible under Singapore law" (Singapore Civil Procedure 2013, para. 66/5/2). Under the Evidence in Other Jurisdictions Act, the term "civil proceedings" is defined as "proceedings in any civil or commercial matter"; it does not include "proceedings arising out of any fiscal, monetary or revenue law or measure" (Evidence in Other Jurisdictions Act § 2).

The types of proceedings that fall within the scope of "civil or commercial matters" under the Hague Convention are "subject to judicial interpretation." Based on an English case that is likely to be a source of guidance, it is "a wide general term, covering all kinds of suits, petitions, summonses, applications for orders and so forth, of which courts are competent to take cognisance" (Singapore Civil Procedure 2013, para. 66/5/3, *citing In re Extradition Act, 1870, Ex parte Treasury Solicitor* [1969] 1 W.L.R. 12).

Pursuant to section 4 of the Evidence in Other Jurisdictions Act, the Singaporean court may require a person to produce specified documents that appear to be, or are likely to be, in the person's possession, custody, or power. Under section 5(1) of the Evidence in Other Jurisdictions Act, a person may avoid production by referring to relevant laws of Singapore or the laws of the country or territory of the requesting court. Under section 4(3) of the Evidence in Other Jurisdictions Act, a Singaporean court limits the taking of written and oral examination of witnesses to steps that can be taken for obtaining evidence in Singapore civil proceedings.

The central authority designated to execute letters of request is the Supreme Court of Singapore. Letters of request must be in English.

Data Privacy/Protection Laws and Blocking Statutes

Personal data privacy protection is provided in the Personal Data-Protection Act 2012 (Act No. 26 of 2012). However, the Act does not preclude disclosure of personal data without consent when such disclosure is necessary for court proceedings. Provisions that regulate the disclosure of information by the public and private sectors also exist in various other statutes and subsidiary legislation. Restrictions placed on the disclosure of information under such provisions may not apply when disclosure is required or permitted by a Singaporean court (Banking Act (Ch. 19, Rev. Ed. 2008) Third Sch.; Infectious Diseases Act (Ch. 137, Rev. Ed. 2003) § 25).

Under Section 5(3) of the Evidence in Other Jurisdictions Act, a person may not be compelled to answer any question or produce any document that would be prejudicial to the security of Singapore.

The court may tailor the terms of its discovery order to allow for full disclosure while providing adequate protection for the material for which a party claims secrecy (Singapore Civil Procedure 2013, para. 24/3/38).

Switzerland

Overview

The Swiss Civil Procedure Code (RS 272) (CPC) governs civil proceedings in Switzerland. However, each Swiss state (canton) has its own civil procedure rules.

Pretrial discovery of documents as understood in common law countries is not available in Switzerland. According to the CPC, both the parties to the proceedings and third parties have a general duty to produce documents when so requested by the judge (CPC, Art. 160). If a third party refuses to produce the requested documents without any valid reason (grounds of privilege described below), sanctions may apply (for example, a fine, CPC, Art. 166). If a party refuses to cooperate without a justified reason as set out in section 2 of the CPC, the judge may take the party's refusal into account when weighing the evidence (CPC, Art. 164).

Under the CPC, a witness must testify in front of the court. Out-of-court witness statements (or so-called affidavits) are not admissible in ordinary Swiss civil proceedings (François Vouilloz, *La preuve dans*

le Code de procédure civile suisse, published in *Pratique juridique actuelle*, PJA 2009, p. 830 et seq., p. 840).

Some cantonal decisions seem to have admitted written testimony in civil proceedings. However, such written testimony is considered as simple written evidence (CPC, Art. 177) and cannot replace in-court testimony (OGer/LU of 16.6.2011, no. 3B 11 21).

Even though the oral examination of witnesses is the rule in Switzerland, the court may obtain information in writing in some instances, such as when the formal examination of a witness is deemed unnecessary (e.g., obtaining a medical certificate instead of the physician's testimony) (CPC, Art. 190).

Seeking Discovery in Switzerland

The Hague Convention entered into force in Switzerland on January 1, 1995, with declarations and reservations under Articles 1, 2, 4, 8, 15, 16, 17, and 23. Switzerland will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries except under limited circumstances (Art. 23 Declaration). Letters of request related to pretrial discovery will not be executed by Swiss authorities, if and to the extent that (a) the request has no direct and necessary relationship to the proceeding; (b) the person is required to identify all documents relating to the case which are in his or her possession or over which he or she has power of disposal; (c) the person is required to produce documents in his or her possession that are not mentioned in the letter of request; and (d) the request may damage legally protected interests of the person concerned (for example, business secrets) (Art. 6 Declaration, Federal Office of Justice (FOJ) Guidelines, p. 27; CPC, Art. 156).

The Federal Office of Justice (FOJ) has indicated that it interprets the provision "civil or commercial matter" broadly, though it does not include criminal or tax matters (FOJ Guidelines, p. 5).

Most cantons require questions for a witness by letter of request to be drafted with sufficient certainty and clarity (otherwise, the request is returned for redrafting). When a foreign authority participates in the gathering of evidence on Swiss soil, the Swiss judge assumes full control over the civil proceedings (FOJ Guidelines, p. 25). The Swiss judge is the only person entitled to use coercive means (for example,

fines) against any person who fails to cooperate with a letter of request (FOJ Guidelines, p. 25).

Evidence may be taken by diplomatic officers, consular agents, and commissioners of the foreign state, without compulsion only with prior authorization by the Federal Department of Justice and Police (FDJP) (Art. 5 Declaration; FOJ Guidelines, p. 22). The request should be addressed to the relevant Cantonal central authority. In order to speed up the procedure, a copy should also be sent to the FOJ (FOJ Guidelines, p. 22). It should be noted, however, that authorization to proceed is granted only when it is impossible or unreasonable to leave the collection of evidence to the Swiss judicial authorities (FOJ Guidelines, p. 32).

Under Swiss civil procedure, a party or a witness may claim privilege from giving any evidence. The witness may invoke any of the privilege grounds contained in the CPC, such as the privilege against self-incrimination (in both criminal and civil matters), the privilege not to testify against close family relatives, attorney–client privilege, as well as the privilege not to disclose a secret if such disclosure is punishable under Swiss criminal law or if the person invoking the privilege is able to show prima facie that there is an overriding interest in maintaining secrecy (CPC, Arts. 160 lit. b, 163, 165, 166).

The central authorities designated to execute letters of request are specific to each canton. More precisely, the competent central authority is the cantonal authority of the place in which the request has to be executed (Cantonal central authorities) (Art. 2 Declaration, and Art. 2 and 24 Convention; FOJ Guidelines, 3d edition 2003, latest update January 2013, p. 21). However, a letter of request may also be lodged with the FOJ in Bern, which will then forward it to the competent Cantonal central authority (Art. 2 Declaration). Depending on the place in Switzerland in which the assistance is sought, the letter of request may need to be translated into German, French, or Italian (Art. 3 Declaration).

Switzerland has indicated that when a foreign state is party to the Hague Convention, priority should be given to procedures provided in the Hague Convention when requesting judicial assistance with respect to discovery (Art. 1 Declaration).

Data Privacy/Protection Laws and Blocking Statutes

The collection of evidence in connection with legal proceedings constitutes an act of public authority and is not left to the discretion of the parties. The collection of evidence in Switzerland for the purposes of a foreign proceeding (including witness interviews, collection of documents, and other fact-finding efforts) may implicate Swiss criminal law, unless it occurs within the frame of a mutual assistance proceeding in judicial matters. The Swiss Criminal Code (RS 311.0) (SCC) contains several provisions with respect to the protection of territorial sovereignty (SCC, Arts. 271, 273, 299) and, in particular, prohibits anyone from carrying out activities that may violate the territorial sovereignty of Switzerland.

All data relating to individuals or legal persons are, under Swiss law, protected by the Federal Data Protection Act of 12 June 1992 (RS 235.1) (DPA). In addition, Article 47, paragraph 1 of the Federal Act of 8 November 1934 on Banks and Savings Banks (SR 952.0) (the Banking Act) provides for the protection of banking secrecy, and any breach of banking secrecy may trigger criminal sanctions. Thus, to avoid any issues in relation to Article 47 of the Banking Act, the disclosure of information covered by the Act should occur within the frame of international mutual assistance proceedings.

The above-mentioned blocking statutes and other provisions of the SCC, as well as the restrictions set out in the DPA, do not apply, as a matter of principle, to the extent that the relevant evidence is collected within the frame of international mutual assistance proceedings. SCC, Article 321 provides rules governing the breach of professional confidentiality, and SCC, Article 28(a) relates to the protection of sources. Unlike the other above-mentioned provisions of the SCC, both rules will also apply in the frame of mutual assistance proceedings (*a contrario* SCC, Art. 271; Banking Act, Art. 47; DPA, Art. 2).

United Kingdom

Overview

The United Kingdom Civil Procedure Rules (CPR) govern the collection of evidence in civil proceedings in the United Kingdom.

Pretrial discovery of documents as understood in the United States is not available in the United Kingdom (*Panayaiotou v Sony Music En-*

tertainment (UK) Ltd [1994] Ch. 142). Under CPR 31.6, standard disclosure requires a party to disclose only (a) the documents on which he or she relies; (b) the documents that adversely affect his or her case, adversely affect another party's case, or support another party's case; and (c) the documents that he or she is required to disclose by a relevant practice direction.

Document requests are available under CPR 31.12. The court may make an order for specific disclosure or specific inspection. An order for specific disclosure is an order that a party must do one or more of the following things: (a) disclose documents or classes of documents specified in the order; (b) carry out a search to the extent stated in the order; and/or (c) disclose any documents located as a result of that search.

Witness depositions are available under CPR 34.8 upon application to the court. A judge, court examiner, or any other person appointed by the court will take the deposition.

Seeking Discovery in the United Kingdom

The Hague Convention entered into force on September 14, 1976, with declarations and reservations under Articles 8, 18, 23, 27, and 33. The United Kingdom considers the following types of proceedings to fall within the scope of "civil or commercial matters" under the Hague Convention: bankruptcy or insolvency, reorganization under bankruptcy law, insurance, employment, and consumer protection, among others. The Evidence (Proceedings in Other Jurisdictions) Act 1975 (1975 Act) gives effect to the principles of the Hague Convention as supplemented by RSC Order 70. The authority of an English court to order persons within its jurisdiction to provide oral or documentary evidence is exclusively statutory, contained in the 1975 Act as supplemented by RSC Order 70.

A U.K. court may order evidence to be obtained in the United Kingdom when it is satisfied that (a) the request is issued by a court that exercises jurisdiction in any other part of the United Kingdom or in any country or territory outside the United Kingdom; *and* (b) the evidence concerned is to be obtained for the purpose of civil proceedings that have been instituted before the requesting court or whose institution before that court is contemplated (1975 Act, § 1).

The United Kingdom will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in countries such as the United States (Art. 23 Declaration). Thus, a letter of request for evidence that is being used as part of a chain of inquiry to discover material that *might* lead to obtaining admissible evidence at trial will not be executed, even if such a practice is permitted in the foreign state (e.g., U.S. Fed. R. Civ. P. 26 (*Penn-Texas Corporation v. Murat Anstalt* [1964] 1 QB 40)). The United Kingdom has further declared that it understands "Letters of Request issued for the purpose of obtaining pretrial discovery of documents" as including any letter of request that requires a person to (a) state what documents relevant to the proceedings to which the letter of request relates are, or have been, in his or her possession, custody, or power; or (b) produce any documents other than particular documents specified in the letter of request as being documents appearing to the requested court to be, or to be likely to be, in his or her possession, custody, or power (Art. 23 Declaration).

In executing a letter of request, a U.K. court may order the production of "particular documents." The House of Lords has explained that the term "particular documents" means individual documents separately described. A generic description of several documents (for example, monthly bank statements for August to September) may be used, but the exact document in each case must be clearly indicated (*Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331). Furthermore, "particular documents" must be actual documents shown by evidence to exist or to have existed. General requests like a request "for any memoranda, correspondence, or other documents relevant therein," are too broad and will be struck out (*Rio Zinc Corporation v. Westing House Electric Corporation* [1978] AC 547).

In executing a letter of request, the court may issue a summons to compel the attendance of the witness. If the order is willfully disobeyed, the witness may be charged with contempt of court (CPR 34.10, 81). RSC Order 39 provides for the examination of witnesses "in like manner as at the trial of a cause or matter." Letters rogatory may specifically direct the examination to take a certain form (e.g., written questions). Voluntary depositions of a willing witness in civil or commercial matters pursuant to a commission or on notice are permitted regardless of the nationality of the witness.

The central authority designated to execute letters of request is the Senior Master, Foreign Process Section, Royal Courts of Justice. A U.S. court or individual may send the letter of request directly to the United Kingdom's central authority. The letter of request should be made on notice under CPR 23 (PD 34A.5).

It is unclear whether the United Kingdom considers the procedures of the Hague Convention to be mandatory in pursuing evidence when a foreign state is party to the Hague Convention. In 1986, the United Kingdom filed an amicus brief with the Supreme Court in the *Aérospatiale* litigation[206] in which it supported the view that the convention was not mandatory. The CPR states that in cases in which witness evidence must be taken under compulsion, or when the government of a country might not readily consent to a special examiner taking evidence in its country, a letter of request "would certainly be needed."

Data Privacy/Protection Laws and Blocking Statutes

The 1975 Act limits discovery under certain circumstances. A person will not be compelled to give evidence if it is prejudicial to the security of the United Kingdom (1975 Act, § 3(3)). This provision is in addition to the claim for privilege on the ground that disclosure of the document would be injurious to the public interest (1975 Act, § 3(1)).

The Data Protection Act of 1998 (DPA) may limit discovery. The DPA protects "personal information," and it could therefore limit the disclosure of documents containing such personal information. In *Durham County Council v. Dunn*, [2012] EWCA Civ 1654, however, the Court of Appeal recognized that the DPA does not provide a novel ground on which to refuse discovery, but that there should be a "balancing exercise" between the right to a fair trial and the protection of personal information. The court also noted that the DPA contains an exemption for court proceedings.

Under section 4 of the Protection of Trading Interests Act 1980, a U.K court is prohibited from making an order under section 2 of the 1975 Act if the request "infringes the jurisdiction of the United King-

206. Brief of Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Penthenes, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727497.

dom or is prejudicial to the sovereignty of the United Kingdom" (1975 Act, § 4).

If the U.K. court determines that a request for judicial assistance in a civil matter is an attempt by a foreign state to exercise extraterritorial jurisdiction in penal or tax matters, the British Government will view the request as prejudicial to U.K. sovereignty and the U.K. court will refuse to execute the request. (*See Rio Zinc Corporation v. Westing House Electric Corporation* [1978] AC 547.)

A witness may claim privilege from giving any evidence that he or she could not be compelled to give under the law of England or the foreign country (1975 Act, § 3(1)). U.K. law recognizes the privilege against self-incrimination in both civil and criminal proceedings; public interest immunity, which limits the scope of discovery with respect to documents that would be injurious to the public interest (for example, because withholding of the documents is necessary for the proper functioning of a public service); and communications made without prejudice (1975 Act, § 3(4)).

Appendix B: The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[207]

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

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

Chapter I – Letters of Request

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

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207. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force Oct. 7, 1972). The text of the Hague Convention and additional information are available on the official website of the Hague Conference on Private International Law. *See Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Hague Conf. on Private Int'l Law, http://www.hcch.net/index_en.php?act=conventions.text&cid=82.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

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

Article 3

A Letter of Request shall specify -

a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

b) the names and addresses of the parties to the proceedings and their representatives, if any;

c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* -

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

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

Article 11

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

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

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

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

Article 12

The execution of a Letter of Request may be refused only to the extent that -

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Chapter II – Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

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

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

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

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

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

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

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

Article 18

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

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

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence -

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

Chapter III – General Clauses

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for

the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from -

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from -

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

b) the provisions of Article 4 with respect to the languages which may be used;

c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

f) the provisions of Article 14 with respect to fees and costs;

g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following -

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

d) any withdrawal or modification of the above designations and declarations;

e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more

of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following -

a) the signatures and ratifications referred to in Article 37;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

c) the accessions referred to in Article 39 and the dates on which they take effect;

d) the extensions referred to in Article 40 and the dates on which they take effect;

e) the designations, reservations and declarations referred to in Articles 33 and 35;

f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Appendix C: Sample Letter Rogatory[208]

NAME OF COURT IN SENDING STATE REQUESTING JUDICIAL ASSISTANCE

NAME OF PLAINTIFF
V.
NAME OF DEFENDANT

DOCKET NUMBER

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE (LETTERS ROGATORY)

(NAME OF THE REQUESTING COURT) PRESENTS ITS COMPLIMENTS TO THE APPROPRIATE JUDICIAL AUTHORITY OF (NAME OF RECEIVING STATE), AND REQUESTS INTERNATIONAL JUDICIAL ASSISTANCE TO (OBTAIN EVIDENCE/EFFECT SERVICE OF PROCESS) TO BE USED IN A (CIVIL, CRIMINAL, ADMINISTRATIVE) PROCEEDING BEFORE THIS COURT IN THE ABOVE CAPTIONED MATTER. A (TRIAL/HEARING) ON THIS MATTER IS SCHEDULED AT PRESENT FOR (DATE) IN (CITY, STATE, COUNTRY).

THIS COURT REQUESTS THE ASSISTANCE DESCRIBED HEREIN AS NECESSARY IN THE INTERESTS OF JUSTICE. THE ASSISTANCE REQUESTED IS THAT THE APPROPRIATE JUDICIAL AUTHORITY OF (NAME OF RECEIVING STATE) (COMPEL THE APPEARANCE OF THE BELOW NAMED INDIVIDUALS TO GIVE EVIDENCE/PRODUCE DOCUMENTS) (EFFECT SERVICE OF PROCESS UPON THE BELOW NAMED INDIVIDUALS).

(NAMES OF WITNESSES/PERSONS TO BE SERVED)

(NATIONALITY OF WITNESSES/PERSONS TO BE SERVED)

(ADDRESSES OF WITNESSES/PERSONS TO BE SERVED)

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208. This sample letter rogatory was taken from the U.S. Department of State, *Preparation of Letters Rogatory*, http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html (last visited Mar. 5, 2015).

(DESCRIPTION OF DOCUMENTS OR OTHER EVIDENCE TO BE PRODUCED)

FACTS

(THE FACTS OF THE CASE PENDING BEFORE THE REQUESTING COURT SHOULD BE STATED BRIEFLY HERE, INCLUDING A LIST OF THOSE LAWS OF THE SENDING STATE WHICH GOVERN THE MATTER PENDING BEFORE THE COURT IN THE RECEIVING STATE.)

(QUESTIONS)

(IF THE REQUEST IS FOR EVIDENCE, THE QUESTIONS FOR THE WITNESSES SHOULD BE LISTED HERE).

(LIST ANY SPECIAL RIGHTS OF WITNESSES PURSUANT TO THE LAWS OF THE REQUESTING STATE HERE).

(LIST ANY SPECIAL METHODS OR PROCEDURES TO BE FOLLOWED).

(INCLUDE REQUEST FOR NOTIFICATION OF TIME AND PLACE FOR EXAMINATION OF WITNESSES/DOCUMENTS BEFORE THE COURT IN THE RECEIVING STATE HERE).

RECIPROCITY

THE REQUESTING COURT SHOULD INCLUDE A STATEMENT EXPRESSING A WILLINGNESS TO PROVIDE SIMILAR ASSISTANCE TO JUDICIAL AUTHORITIES OF THE RECEIVING STATE.

REIMBURSEMENT FOR COSTS

THE REQUESTING COURT SHOULD INCLUDE A STATEMENT EXPRESSING A WILLINGNESS TO REIMBURSE THE JUDICIAL AUTHORITIES OF THE RECEIVING STATE FOR COSTS INCURRED IN EXECUTING THE REQUESTING COURT'S LETTERS ROGATORY.

SIGNATURE OF REQUESTING JUDGE

TYPED NAME OF REQUESTING JUDGE

NAME OF REQUESTING COURT

CITY, STATE, COUNTRY

DATE

(SEAL OF COURT)

Appendix D: 28 U.S.C. §§ 1781–1783

28 U.S.C. § 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

> (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and
>
> (2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

> (1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or
>
> (2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any nec-

essary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1783. Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign coun-

try. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

Appendix E: Sample Rule 16 Pretrial Order Addressing International Discovery Issues[209]

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

JOHN DOE	**CIVIL ACTION**
v.	**NO. _____**
[LIST]	

PRETRIAL ORDER RE INTERNATIONAL DISCOVERY

AND NOW, this _____day of _____, 2015:

Pursuant to the Court's authority under Rule 16, F.R.Civ.P., the parties having advised the Court [the Court determining from review of the pleadings and any other initial papers in the case] that international discovery may be involved, which may result in substantial delays in concluding discovery, the Court sets special procedures for expediting international discovery.

The provisions of this Order are intended to facilitate the parties taking of discovery outside the United States and/or pursuant to the laws of other countries, and will enable the Court to promptly rule on any disputes that arise concerning international discovery.

It is therefore **ORDERED:**

1. Within _____ days, any party which intends to initiate discovery outside of the United States shall file and serve a statement making disclosure of its intention as of this time, including, but not limited to, the following:

(a) Whether applications will be made under the Hague Convention or any other treaty.

209. We thank U.S. District Judge Michael M. Baylson (E.D. Pa.) for providing a sample Rule 16 Pretrial Order addressing international discovery issues for inclusion in this guide.

(b) Whether Letters Rogatory will be used.

(c) Whether parties abroad are likely to be deponents in this case.

(d) Whether documents located outside the United States will be sought for production, including, but not limited to, electronically stored information ("ESI").

(e) Whether a party is aware of any blocking statutes or data protection laws that may apply to a request for discovery in a particular country, and if so, identify the country and if possible cite the laws which may be applicable.

2. Within _____ days, other parties shall respond to this initial disclosure of foreign discovery, by commenting:

(a) To what extent it will or will not oppose such discovery.

(b) If there will be opposition, state concisely the nature of the opposition and the reasons.

3. Within _____ days after the response, the parties shall meet and confer to discuss reaching agreement, or narrowing disputes concerning:

(a) Conducting discovery outside of the United States, pursuant to the Federal Rules of Civil Procedure or otherwise.

(b) What date shall be set to complete international discovery.

(c) Whether any objections will be presented to this Court and, if so, when.

(d) Whether any protective order will be sought and the extent to which disputes remain as to the contents of a protective order.

4. The Court set a deadline for the initiation of any discovery to take place outside the United States as _____ [date].

5. Motions that may be necessary or appropriate on international discovery issues will be filed no later than _____ [date]. Responses will be due within fourteen (14) days, and a reply brief should be filed within fourteen (14) days thereafter.

6. In most countries with blocking statutes and/or data protection rules, an authorized official or judge within that country may be permitted to negotiate, hear, and/or authorize disclosure of information for use in litigation, even though it is arguable that a blocking statute or data protection law may be construed otherwise. In each party's pretrial disclosures on international discovery, the Court requires each party relying on any such statute or rule to state:

(a) Its knowledge of this practice as applied to this case;

(b) Its position on this issue;

(c) The contact information for the official or judge in each country who is likely to be knowledgeable or authorized to act within that country.

7. The Court anticipates having pretrial conferences with counsel to discuss the course, progress and any problems in international discovery. The first conference will take place on _____ [date]. Subsequent conferences will be scheduled on a need basis. If problems and issues arise frequently, the Court may schedule conferences on a regular basis.

8. Counsel who do not practice regularly in this District may appear by telephone by notifying Chambers at least 48 hours prior to any pretrial conference.

9. Counsel appearing at these conferences, whether in person or by telephone, shall be authorized to speak on behalf of their client, and shall discuss with their client issues as they are arising so that they can accurately inform the Court of their position.

10. If it appears that certain discovery is relevant in this case, but cannot be secured by normal means of discovery through the Federal Rules of Civil Procedure, or any convention or other recognized international procedure, the Court may undertake itself initiation of communications with any data protection officer of a foreign country or court of a foreign country to determine if such discovery can be authorized, facilitated and completed on a prompt basis.

11. The obligations stated above apply throughout this litigation, and apply to any initiation of international discovery.

12. The Court encourages the parties to adopt, in this case, the Sedona Conference Principles of International Discovery, Disclosure and Data Protection as follows:

(a) With regard to data that are subject to preservation, disclosure, or discovery, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.

(b) Where full compliance with both Data Protection Laws and preservation disclosure and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.

(c) Preservation or discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.

(d) Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict.

(e) A Data Controller subject to preservation, disclosure, or discovery obligations should be prepared to demonstrate that data protection obligations have been addressed and that appropriate data protection safeguards have been instituted.

(f) Data Controllers should retain Protected Data only as long as necessary to satisfy legal or business needs. While a legal action is pending or remains reasonably anticipated, Data Controllers should preserve relevant information, including relevant Protected Data, with appropriate data safeguards.

BY THE COURT:

_____

, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

JOHN DOE	**CIVIL ACTION**
v.	**NO. _____**
[LIST]	

ORDER TO INITIATE PROCEEDINGS UNDER HAGUE CONVENTION

AND NOW, this ___ day of _____, 2015, upon consideration of defendant's Motion for Issuance of Letters of Request Pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, it is hereby **ORDERED** that said Motion is **GRANTED.**

It is further **ORDERED** that the original executed copies of the Letters of Request attached to defendant's Motion as Exhibits A and B shall be provided to counsel of defendant to serve and execute in conformity with the Hague Convention.

BY THE COURT:

_____
, U.S.D.J.

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Tim Harkness is a litigation partner at Freshfields Bruckhaus Deringer US LLP who represents international clients in complex commercial litigation and advises them with regard to U.S.-based risk. His cases frequently involve allegations of fraud and breaches of contractual or fiduciary duties. Mr. Harkness has represented professional services and private equity firms, banks, manufacturers, and media companies in civil trials, multidistrict class action litigation, and commercial arbitrations in over fifteen states, in state, federal, and bankruptcy courts. He has handled international discovery issues relating to over twenty countries outside of the United States, including Malta, Argentina, Brazil, South Africa, China, the Cayman Islands, and the United Kingdom. He has also represented clients before the Securities and Exchange Commission, federal grand juries, and Congress. Mr. Harkness received his J.D., cum laude, from the University of Michigan, where he was Contributing Editor to the Law Review, and his B.A., cum laude, from Yale University.

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