International Discovery: Around the World in Ninety Minutes

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As long as the decisions of courts in other countries are accepted or rejected, while having great distrust and the desire to protect the fellow citizen against the foreign judge, instead of protecting his judgment against the disobedience of the national, there will be no hope for a perfect community of right and justice to arise among civilized nations.[1]

INTRODUCTION

This paper begins with an overview of the U.S. laws governing efforts to obtain evidence located outside the United States for use in U.S. litigation. It continues with a discussion of the relevant foreign laws that U.S. litigants will likely encounter when attempting to obtain evidence located in Canada, Mexico, England, France and China.[2] While there are several significant differences among

[1] Quotation by Hans Sperl.

[2] This paper is accompanied by an exhibit summarizing in table format the relevant applicable laws of each jurisdictions.

the five jurisdictions, they share one significant commonality: each demonstrates the importance to U.S. lawyers of fully considering all of their options for obtaining foreign evidence – an exercise that almost always mandates consultation with local counsel as soon as it is even suspected that such evidence may prove valuable to U.S. litigants.

UNITED STATES[3]

In general, there are two means by which a litigant in a U.S. court may obtain evidence located abroad:

- *First*, through the mechanisms provided by Rules 26 through 38 of the U.S. Federal Rules of Civil Procedure (the "Federal Rules"), the substance of which has been generally copied by U.S. state courts.
- *Second*, through the mechanisms provided by international conventions or treaties, such as the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention").[4]

This section provides an overview of both means as a basis for understanding how the respective legal systems in Canada, Mexico, England, France and China provide (if at all) for the gathering of evidence located within each jurisdiction. The section is also intended to identify resources of practical assistance to U.S. lawyers seeking to obtain foreign evidence for use in U.S. litigation.[5]

Relationship Between Federal Rules and Hague Convention

When the parties to a U.S. litigation include both U.S. and foreign litigants, it is fairly safe to assume that a dispute will arise over the procedures to be used for obtaining evidence located abroad. The relationship between the respective discovery procedures set forth in the Federal Rules and the Hague Convention was first examined by the U.S. Supreme Court twenty years ago in a case that continues to evoke controversy and commentary both within and beyond the United States.

The Aérospatiale Decision

Société Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa was a landmark case involving American plaintiffs who brought a federal lawsuit following the crash of an aircraft manufactured by French defendants.[6] The plaintiffs invoked the Federal Rules to seek

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[3] *Prepared by Christopher K. Tahbaz, a partner in the International Dispute Resolution Group of Debevoise & Plimpton LLP (New York office) with a broad range of international arbitration and litigation experience involving complex commercial disputes, together with Suzanne M. Grosso, a counsel also in the New York office and a co-chair of the International Subcommittee of the Commercial & Business Litigation Committee (ABA Section of Litigation) since 2006.*

[4] Formally, Hague Conference on Private International Law, Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, (Entered into force 7 Oct. 1972), U.N.T.S. 37/1976.

[5] For more comprehensive discussion of this topic, *see* Gary B. Born, *International Civil Litigation in United States Courts* (4th edition, Kluwer Law International 2006); Barton Legum ed., *International Litigation Strategies and Practice* (American Bar Association 2005); David J. Levy ed., *International Litigation: Defending and Suing Foreign Parties in U.S. Courts* (American Bar Association 2003). Highly recommended (indeed, a must-read) is Chapter 11 from Legum's book – *Ten Rules for Obtaining Evidence From Abroad*, authored by Glenn P. Hendrix.

[6] *Société Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa*, 482 U.S. 522 (1987).

discovery of evidence in France, and the defendants filed a protective motion to quash the discovery requests on the ground that French evidence could only be obtained through the Hague Convention. The district court denied the motion, and the appellate court denied a subsequent petition for review. As a result, the question squarely before the Supreme Court in *Aérospatiale* was whether a U.S. federal court must always require a party seeking to obtain evidence located outside the United States to utilize Convention procedures before utilizing the procedures available under the Federal Rules.

After examining the text of the Hague Convention, the Supreme Court concluded that the treaty was intended to be a "permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad."[7] The Supreme Court also concluded that comity did not require federal courts to employ a *per se* rule of first resort to the Convention.[8] Although the Supreme Court held that the Convention's application was not mandatory, it further concluded that "the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention."[9] Lower federal courts were left to determine, using a comity analysis, when resort to the Convention would be "appropriate" in any given case.[10] Federal courts have since applied the Supreme Court's decision in *Aérospatiale* – which was decided in the context of underlying merits discovery – also in the context of more limited jurisdictional discovery.[11]

U.S. federal courts have adopted, based on the majority opinion *Aérospatiale*, a three-factor inquiry for deciding whether to require use of the Hague Convention to obtain foreign evidence. The vast majority of lower courts to consider the issue have held that the party seeking use of the Convention bears the burden of persuasion with respect to each factor.[12] The three factors are:

- The particular facts of the case, including the nature of the requested discovery; *and*
- The sovereign interests at issue; *and*
- The likelihood that Convention procedures will prove effective.[13]

Federal courts may also apply the balancing test set forth in Section 442 of the Restatement (Third) of Foreign Relations Law in considering whether to issue and enforce a discovery order under the Federal Rules. Those factors include:

- The importance of the requested discovery to the U.S. proceeding.
- The specificity of the discovery requests.
- The origin of the information sought.
- Whether there are any alternative means of obtaining the requested information.
- The extent to which compliance with the discovery requests would undermine foreign interests.

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[7] *Aerospatiale*, 482 U.S. at 536.

[8] *Id.* at 543-44.

[9] *Id.* at 533, 541.

[10] For a discussion of the relationship between U.S. state discovery rules and the Hague Convention, *see* Westin & Born, *Applying the Aérospatiale Decision to State Court Proceedings*, 26 Colum. J. Transnat'l L. 297 (1988).

[11] *See, e.g., In re Vitamins Antitrust Litigation*, 120 F. Supp.2d 45 (D.D.C. 2000).

[12] *See, e.g., In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004); *Rich v. KIS California, Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988).

[13] *In re Meta Systems*, 111 F.3d 142 (Fed. Cir. 1997). *See generally* James Chalmers, *The Hague Evidence Convention and Discovery Inter Pares: Trial Court Decisions Post-Aerospatiale*, 8 Tul. J. Int'l & Comp. L. 189, 202-203 (2000).

- The extent to which non-compliance with the discovery requests would undermine U.S. interests.[14]

Aftermath of Aérospatiale

Aérospatiale has generated much controversy over the last twenty years. For example, it has been observed that U.S. federal courts generally do not give much weight to a "general" foreign sovereign interest requiring use of the Hague Convention to avoid potential discovery abuses.[15] In the words of one New Jersey district court: "If this were found to be the case, then there would be an automatic finding of an 'important sovereign interest' in every case."[16] Federal courts instead typically seek a showing of "how the specific discovery sought implicates any specific [foreign] sovereign interest" – a showing that in practice appears rather difficult to make.[17] (As Justice Blackmun foreshadowed in *Aérospatiale*, federal courts "not surprisingly" have "turn[ed] to the more familiar" Federal Rules[18] after "giving a passing nod to notions of comity.")[19] It also has been observed that federal courts generally do not find Convention procedures likely to be effective – although the basis for this assessment is often not much more than recitation of *dicta* from older cases that describe Convention procedures as lengthy and expensive.[20] (As Justice Blackmun also foreshadowed, "until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation.")[21]

Contributing to the controversy sparked by *Aérospatiale* are the objections voiced by many nations who view their agreement to the Hague Convention as sufficient compromise in the collective effort to facilitate transnational discovery. One of the means by which such nations have attempted "to frustrate the efforts of American litigators to obtain evidence" under the Federal Rules is by enacting so-called "blocking statutes" – or legislation that penalizes foreign citizens for complying with extraterritorial discovery requests.[22] There are three categories of blocking statutes: *(1)* those prohibiting compliance with any and all extraterritorial discovery requests; *(2)* those vesting discretionary authority with officials of the nation that enacted the legislation to prohibit compliance with specific extraterritorial discovery requests; and *(3)* those prohibiting compliance by certain industries with extraterritorial discovery requests.

The U.S. Supreme Court held in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers* that the mere existence of a blocking statute does not preclude use of the Federal Rules. Rather, the Supreme Court held that a party must show *(a)* that they are or were unable to comply with a U.S. discovery order because of the blocking statute, and *(b)* that the party's actions

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[14] Restatement (Third) of the Foreign Relations Law of the United States §442(1)(c) (1987).

[15] *See generally* Andrew N. Vollmer, *Revive the Hague Evidence Convention*, 4 ILSA J. Int'l & Comp. L. 475, 482 (1998); Gary Born & Scott Hoing, Comity *and the Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention*, 24 Int'l Law. 393, 404 (1990).

[16] *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990).

[17] *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386 (D.N.J. 1987).

[18] *Aerospatiale*, 482 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part).

[19] Glenn P. Hendrix, *supra*, n.4 at 106.

[20] James Chalmers, 8 Tul. J. Int'l & Comp. L. at 202.

[21] *Aerospatiale*, 482 U.S. at 561 (Blackmun, J., concurring in part and dissenting in part).

[22] Lawrence W. Newman & David Zaslowsky, Translational Litigation in U.S. Federal Courts 24 (1991).

were not willful or taken in bad faith.[23] Some lower federal courts apply a four-factor test for evaluating when foreign parties should not be expected to comply with a U.S. discovery because of a blocking statute.[24] The four factors are:

- The competing interests of the nations whose laws are in conflict; *and*
- The hardship of compliance on the party from whom the discovery is sought; *and*
- The importance to the litigation of the information and documents requested; *and*
- The good faith of the party resisting discovery.

Alternatively (or additionally), some courts look to Section 422 of the Restatement for purposes of this evaluation.

The reaction by U.S. federal courts to parties relying on blocking statutes to preclude use of the Federal Rules has been mixed – both generally and with respect to the same blocking statute (*e.g.*, the French blocking described, which is described below in the section specific to France). Some federal courts, after applying these factors, have held that the existence of a blocking statute requires use of the Hague Convention in lieu of the Federal Rules. Other federal courts have held that failure to comply with U.S. discovery requests because of a blocking statute warrants the imposition of sanctions; those courts have often consider showings of good faith (albeit ultimately unsuccessful) efforts to comply when deciding the appropriateness of the sanction. It is therefore essential that U.S. lawyers seeking to obtain discovery in a jurisdiction with a blocking statute be thoroughly familiar not only with the letter of the foreign law, but also with how the statute works in practice and how federal courts have ruled in discovery issues involving that statute.

Even when a U.S. litigant can successfully invoke the Federal Rules in lieu of the Hague Convention, there may be compelling reasons for nonetheless foregoing use of the Federal Rules in favor of the Convention. One such reason may be that a U.S. judgment will not be recognized and enforced in a foreign country if the underlying evidence was not obtained through the Convention – and this is a critical consideration where the judgment-creditor does not have sufficient assets in the United States to satisfy the judgment. Another reason may be, as described in the following sections, more extensive restrictions imposed by foreign jurisdictions on the scope and manner of obtaining discovery than would other be imposed by those jurisdictions if the Convention were utilized. And perhaps the most compelling reason may be, as also described below, sanctions (including criminal) imposed by foreign courts against U.S. counsel for litigants who are found to have violated blocking statutes.

Federal Rules

Discussion of the Federal Rules relating to U.S. discovery almost always begin with the principle that any and all non-privileged information relevant to the parties' claims and defenses (and in some circumstances, the subject matter of litigation) must be produced in response to discovery requests. The Federal Rules offer several means of gathering this broad range of pre-trial evidence; failure to comply with discovery requests issued under the Federal Rules is subject to judicially-imposed

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[23] *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

[24] *Minpeco, S.A. v. ContiCommodity Services, Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987).

sanctions.[25] The primary discovery tools provided in the Federal Rules involve the use of document requests, written interrogatories, and deposition testimony – each of which is discussed in turn below as applied to the gathering of evidence abroad.

Document Requests

Rule 34 of the Federal Rules permits any party in a U.S. litigation to request that *another party* produce any relevant documents that are in the possession, custody or control of the other party. It is irrelevant for this purpose whether the documents are physically located abroad. Additionally, Rule 34 may be used by a party to obtain the documents of another party's foreign parent, subsidiary or affiliate corporation. The ability to do so largely depends on questions of control between and among the various entities.

The only options available under the Federal Rules for any party seeking documents from a *non-party* – regardless of whether the documents sought are located within the United States or abroad – are:

- Voluntary compliance.
- Use of a subpoena pursuant to Rule 45, *provided* the non-party can be found within the geographical and jurisdictional limitations of the federal courts' subpoena power.[26]
- Use of a subpoena pursuant to Section 1783 of the U.S. Code, *provided* the documents are in the possession of a U.S. national or resident located abroad.

If the non-party properly is subject to a subpoena under Rule 45, the non-party "is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served."[27] A subpoena may be obtained under Section 1783 only if the applicant can show that the requested documents are "necessary in the interest of justice" and "that it is not possible to obtain ... the production of the documents … in any other manner."[28]

Written Interrogatories

Rule 33 of the Federal Rules permits any party in a U.S. litigation to serve written interrogatories (which must be answered under oath) on another *party*. The Federal Rules do not permit the use of written interrogatories as a means of obtaining discovery from *non-parties*.

Deposition Testimony

The Federal Rules specifically provide for depositions of witnesses located in other countries. Rule 28(b) permits such depositions:

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[25] Fed. R. Civ. P. 26-37.

[26] A federal court may issue a subpoena for service "at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the production specified in the subpoena. Fed. R. Civ. 45(b)(2). A subpoena may be served directly on a party, or in some cases, on an officer of a party or a branch office of the party. *See First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998). If this geographical limitation is satisfied, the federal court may enforce the subpoena only if the witness is subject to the court's personal jurisdiction. *See In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987), *overruled on other grounds by Braswell v. United States*, 487 U.S. 99 (1988).

[27] Fed. R. Civ. P. 45, 1980 Amendment, Subdivision (a).

[28] 28 U.S.C. §1783(a).

- Pursuant to any applicable treaty or convention.
- Pursuant to Letters of Request or Letters Rogatory (as a matter of international law, as opposed to letters issued pursuant to a treaty or convention).
- By notice before a person authorized to administer oaths in the place where the deposition is held, either by the law thereof or the law of the United States.
- Before a person commissioned by the court.

Rule 29 further provides for depositions by stipulation to "be taken before any person, at any time or place, upon any notice, and in any matter."

The first category of Rule 28 depositions – those taken pursuant to a treaty or convention – will be discussed below in this section in the context of the Hague Convention. The second category of Rule 28 depositions – depositions taken pursuant to "traditional" Letters of Request or Letters Rogatory (as opposed to those issued under the Hague Convention) – refers to a formal request sent by a U.S. federal court or diplomatic channels to a foreign court or diplomatic channels seeking judicial assistance in the collection of evidence located in the foreign jurisdiction. Importantly, the foreign court has no obligation to execute or enforce traditional Letters of Request or Letters Rogatory, and their processing is "a cumbersome, time consuming mechanism" that the U.S. Department of State advises "should not be used unless there is no alternative."[29] The third and fourth categories of Rule 28 depositions – depositions taken, respectively, by notice before a person authorized to administer oaths and a commissioner appointed by the court– as well as Rule 29 depositions taken by stipulation, can be conducted without foreign judicial assistance.

Depositions conducted pursuant to Rules 28 and 29 are subject to the requirements of Rule 30, which distinguishes between depositions of parties and non-parties. Any party may take the deposition of *another party*. For purposes of Rule 30, the deponent may include the officers, directors, or managing agents of the party to be deposed, and it does not matter whether the deponent is located in a foreign country. In contrast, a party may take the deposition of a *non-party* – regardless of whether the deponent is located within the United States or abroad – only if the non-party:

- Voluntary agrees to be deposed.
- Is within the subpoena power of the U.S. federal courts.
- Can be subpoenaed pursuant to Section 1783 of the United States Code.[30]

The circumstances under which a non-party properly will be subject to a subpoena under Rule 45 are summarized in footnote 25. A subpoena may be obtained under Section 1783 only if the applicant can show that the requested testimony are "necessary in the interest of justice" and "that it is not possible to obtain [the] testimony in admissible form without [a] personal appearance[.]"[31]

As a practical matter, the ability to depose witnesses abroad pursuant to the Federal Rules will be in many cases limited by the laws of the foreign country where the deposition will be conducted. These

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[29] U.S. Department of State, *Preparation of Letters Rogatory*, available at <http://travel.state.gov/law/info/judicial/judicial_683.html>.

[30] The circumstances under which a non-party properly will be subject to a subpoena under Rule 45 are summarized in note 25 above. A subpoena may be obtained under Section 1783 only if the applicant can show that the requested testimony are "necessary in the interest of justice" and "that it is not possible to obtain [the] testimony in admissible form without [a] personal appearance[.]" 28 U.S.C. §1783(a).

[31] 28 U.S.C. §1783(a).

limitations (many of which are described below in the sections specific to each country) may involve the style of deposition that is permitted to be conducted, the identity of persons authorized to administer oaths or be commissioned, and, most severely, the imposition of criminal or civil penalties. Notably, these limitations may be applied by the foreign country even to voluntary depositions. Although these limitations generally cannot be avoided by conducting the deposition at a U.S. Embassy located in the foreign country that imposes them in the first instance, they may be avoided by conducted the deposition in another country that both is convenient to the deponent imposing and does not impose any procedural limitations. The Department of State website is an invaluable initial resource for becoming familiar with limitations imposed by foreign countries on both depositions and other forms of discovery available under the Federal Rules.[32]

Hague Convention

The Hague Convention is a multilateral agreement that seeks to facilitate a reconciliation of distinct legal frameworks by establishing a uniform procedure for obtaining evidence located abroad. While expressly applicable, for contracting nations, in "civil or commercial matters," neither the text of the Convention nor its negotiating history provides any conclusive evidence as to the meaning and scope of this phrase.[33] This can be problematic, because common law and civil law jurisdictions have offered contrasting interpretations of the phrase (with common law jurisdictions not surprisingly offering a broader one than that offered by civil law jurisdictions).[34] There appears to be agreement, however, that the Convention does not apply in criminal proceedings.[35]

There are currently over forty nations that are parties to some or all of the Hague Convention. Each of these nations had the opportunity to make reservations and declarations regarding the applicability of each Article to the Convention. This makes application of the Convention different for each country, and the Hague Conference on Private International Law website is the best place to begin any evaluation of the applicability of the Convention in any given jurisdiction.[36]

Article 23 of the Hague Convention contains an important limitation on the ability to obtain pre-trial discovery. Specifically, it provides that contracting states are permitted "at the time of signature, ratification or accession," to declare that they will not execute letters of request issued in order to obtain pre-trial discovery of *documents*.[37] Thus far, over 30 of the contracting nations to the Convention – including Mexico, England, France and China – have filed limited reservations under Article 23 prohibiting some degree of pre-trial document discovery. Some nations – like Argentina, Australia, Denmark, Germany, Italy, Luxembourg, Monaco, Poland, Portugal, South Africa, Spain and

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[32] U.S. Department of State, *International Judicial Assistance, Notarial Services and Authentication of Documents*, *available at* <http://travel.state.gov/law/info/judicial/judicial_702.html>.

[33] Hague Convention, Art. 1, 15, 17.

[34] Bruno Ristau, International Judicial Assistance § 5-1-4 (2000 revision).

[35] *See United Kingdom v. United States*, 238 F.3d 1312, 1318 (11th Cir. 2001).

[36] The website of the Hague Conference on Private International Law contains a full status report showing *(a)* the dates of signatures, ratifications, accessions and entry into force; *(b)* the texts of declarations and reservations; and *(c)* the territorial units to which the Convention has been extended. *Available at* <http://www.hcch.net/index_en.php?act=conventions.status&cid=82#mem>. The general Hague Convention section of this website is also very helpful. That section is *available at* <http://www.hcch.net/index_en.php?act=conventions.text&cid=82>.

[37] While Article 23 is limited to documents, litigants in common law countries should be ready for obstacles in any attempt to gather evidence in a civil law country, regardless of the type of pre-trial discovery sought. Ristau, *supra* note 33, § 5-2-5.

Sweden – have filed reservations under Article 23 that essentially prohibit all pre-trial document discovery.[38]

The Hague Convention provides two general methods for obtaining evidence, and each of these methods is described in broad strokes below:

- *First*, through Letters of Request (sometimes referred to as Letters Rogatory).
- *Second*, through diplomatic or consular officers and appointed commissioners.

Letters of Request

The purpose of Letters of Request is to obtain evidence or to perform some other judicial act. Accordingly, Letters of Request may not be used to serve judicial documents, to obtain orders seeking provisional relief, or to obtain orders for the execution or enforcement of judgments. Nor can Letters of Request be used to obtain evidence located in the same country as the litigation in which the requested evidence will be used.[39]

The process begins when a U.S. litigant obtains from the U.S. court a Letter of Request asking the foreign state in which the evidence resides to allow for the production of evidence. The U.S. court must send the Letter of Request to the appropriate Central Authority of the foreign state. (Each contracting state is required under the Hague Convention to designate a Central Authority specifically for this purpose.)[40] A Letter of Request should typically be in the language of the executing authority or accompanied by a translation. However, unless a contracting state specifies otherwise, Letters in English or French are always permitted.[41] The Hague Conference on Private International Law website – as well as the sections on the five jurisdictions discussed below – again is the best place to begin researching the requisite contents and format of Letters of Request (including reproduction of a Model Letter of Request).[42]

Upon receipt, the Central Authority must transmit the Letter of Request to the foreign authority competent to execute it. The Hague Convention establishes that the foreign authority should normally apply its own law – including measures of compulsion for execution as if the Letter of Request were an order issued by the foreign state's own authorities. Nevertheless, requesting authorities are permitted to specify a special method or procedure for use by the executing authority. Requested procedures ought to be followed except in those instances when they are incompatible with the internal law of the state of execution or impossible by virtue of internal practice or procedure.[43] The Hague Convention does not define impossibility or incompatibility, nor does it provide examples of these two concepts.

Execution of an otherwise valid Letter of Request (*i.e.*, one that complies with the Hague Convention) may be refused only in those instances where the execution does not fall within the functions of the

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[38] Hague Conference on Private International Law, *available at* <http://www.hcch.net/index_en.php?act=conventions.status&cid=82#mem>.

[39] *See Ratliff v. Davis, Polk, & Wardwell*, 354 F.3d 165, 170-71 (2d Cir. 2003).

[40] Hague Convention, Art. 2.

[41] Hague Convention, Art. 4.

[42] Hague Conference on Private International Law, *available at* <http://www.hcch.net/index_en.php?act=conventions.text&cid=82>.

[43] Hague Convention, Art. 9 & 10.

foreign state's judiciary or where the foreign nation considers that its sovereignty or security would be prejudiced by execution of the letter. Execution may not be refused, however, in those instances where the law of the state of execution claims exclusive jurisdiction over the subject matter of the action or considers that its own law would not admit a right of action on it.[44]

Diplomatic or Consular Officers and Appointed Commissioners

The Hague Convention additionally provides for the taking of certain evidence abroad by U.S. diplomatic officers or consular agents and appointed commissioners. These methods of gathering evidence are limited in three key respects. *First*, unlike Letters of Request, U.S. diplomatic officers, consular agents and appointed commissioners *cannot compel* the production of evidence. *Second*, also unlike Letters of Request, these methods cannot be used to obtain *documents* located abroad and can be used only to take deposition testimony. *Third*, contracting states have the prerogative to declare that U.S. diplomatic officers, consular agents and appointed commissioners must first obtain permission from the foreign state prior to the deposition.[45] (And as with any deposition taken abroad, careful attention must be paid to the applicable foreign law regarding the taking of depositions generally.)

CANADA[46]

The relationship between Canada and the United States is one of the closest and most extensive in the world. This partially results from their sharing the world's longest undefended border[47] and daily bilateral trade of $1.6 billion.[48] It is also a result of their sharing a legal regime anchored in the tradition of common law. Despite this shared anchor, a number of differences exist between the two nations' legal systems. One of the major ways that the Canadian system diverges from the U.S. system is in the discovery process. This is compounded by the fact that, unlike many other countries, there is no treaty which governs the taking of evidence as between the two of them.

Understanding the Canadian System

The vast majority of civil claims in Canada are pursued through the provincial courts because the federal courts have very limited jurisdiction. As a result, the Canadian discovery process is generally governed by provincial rules of civil procedure. Although each of the Provinces has its own set of rules, they are very similar to one another. The only Province with substantially different rules is Quebec, which is governed by a civil code and follows a discovery process more similar to that of other civil law jurisdictions.

A few of the more significant differences between the U.S. and Canadian discovery processes are:

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[44] Hague Convention, Art. 5 & 12.

[45] Hague Convention, Art. 15 & 17.

[46] *Prepared by Brett Harrison, a partner with McMillan Binch Mendelsohn LLP (Toronto office) specializing in commercial and cross-border litigation, together with Geoff Moysa, an associate also in the Toronto office.*

[47] International Boundary Commission at <http://www.internationalboundarycommission.org/ibcpg2.htm>.

[48] Government of Canada, "The Canada – U.S. trade and investment partnership" available online at <http://geo.international.gc.ca/can-am/Washington/trade_and_investment/trade_partnership-en/asp>.

- Only one representative of a corporate party can be examined.
- An individual being examined must undertake to make inquires in order to provide answers to relevant questions asked at the examination.
- Although written interrogatories are not typically utilized, the answers to undertakings provided at the examination are provided in writing (in a manner similar to written interrogatories).
- Once answers to undertakings have been provided, a party has a right to re-examine on those answers.
- There is an implied undertaking that none of the evidence or information disclosed during the discovery process can be used "for any purposes other than those of the proceeding in which the evidence was obtained."[49]

Obtaining Discovery in Canada

The taking of evidence for use in a foreign proceeding is different in Canada than in most other jurisdictions. This is because, unlike many other nations (including the United States), Canada is not a party to the Hague Convention. Accordingly, parties seeking to compel Canadian evidence for use in a U.S. proceeding must utilize Letters of Request (also known as Letters Rogatory). This process involves two steps:

- *First*, the party seeking the evidence must bring a motion in a U.S. court for a Letter of Request seeking judicial assistance from Canada (for ease of reference, the "U.S. Motion").
- *Second*, the party must then bring an application in a Canadian court for an order enforcing the Letter of Request, and to require the witness to produce documents and attend examinations under oath in Canada (for ease of reference, the "Canadian Application").

Canada's provincial and federal Evidence Acts contain specific provisions allowing for the enforcement of Letters of Request. Canadian courts promote the comity of nations and are generally deferential to the decisions of foreign courts. The good news, therefore, is that Canadian courts will order the enforcement of Letters of Request in most cases. However, the decision to enforce Letters of Request is completely discretionary in Canada, and some Canadian courts have refused to enforce Letters of Request in certain circumstances.

The remainder of this section will set out the process for successfully utilizing Letters of Request in Canada, and will discuss some of the common pitfalls that may catch U.S. litigants off-guard. Unless otherwise specified, the process for obtaining documents is the same as for oral testimony.

The U.S. Motion

Procedure

A U.S. litigant seeking to compel a Canadian to provide evidence must start by bringing an interlocutory motion or application before the court in which the U.S. litigation is pending. Though Canadian law does not specifically require that the U.S. Motion be made on notice to other parties to the lawsuit, it does require that the Letter of Request be issued through a hearing.

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[49] Ontario Rules of Civil Procedure, Rule 30.1.01.

Relevant Law

The U.S. federal rules governing the issuance of Letters of Request are described above in the section specific to the United States.

Contents and Scope

The Letter of Request, together with the accompanying affidavit filed in support of the U.S. Motion, should reflect the factors that later will be considered by the Canadian court when it is asked to enforce the Letter. The affidavit is an important component of the U.S. Motion for two reasons. *First*, it will itself contain useful evidence that will be referred to by the Canadian court. *Second*, although the Canadian court will show deference to the U.S. court, the Canadian court will likely "look behind" the Letter to see what supporting evidence was before the issuing U.S. court.[50] Where the affidavit relies on the knowledge or belief of the swearing party, the source of that knowledge or belief must be explicitly stated – otherwise, a Canadian court will be wary of accepting the evidence contained in the affidavit.51

While the exact information included in the Letter of Request and affidavit will depend on the particular circumstances of each case, there are some general principles that provide a helpful starting point when thinking about how to craft the U.S. Motion.

- In view of the factors that will be considered by a Canadian court (which are described below), both the Letter and affidavit should be as specific as possible about the Canadian evidence sought.
- The Letter and affidavit should establish that the assistance of the Canadian court is necessary in the interests of justice. In particular, the Letter should state that the issuing U.S. court was shown that justice cannot be served between the parties unless the Canadian evidence is made available.
- It is also necessary for the Letter and affidavit to establish that the Canadian evidence cannot be obtained without the assistance of the Canadian court, which often requires establishing that the proposed witnesses will not voluntarily submit to examination. It is not sufficient to make a bare assertion that evidence sought is otherwise unavailable.52
- The Letter and affidavit should state that the Canadian evidence is intended for use in a pending U.S. litigation.
- The Letter and affidavit should also establish that there is a substantial likelihood that the Canadian evidence will be obtained in the manner proposed by the Letter.

The contents of the U.S. Motion necessarily conveys the scope of the requested discovery. U.S. and Canadian laws on the scope of discovery vary considerably. The rules of civil procedure governing each Province require that the requested discovery be relevant to a matter at issue in the case. "Relevance" is not interpreted as broadly under the Canadian provincial rules as under the U.S. Federal Rules, and Canadian courts will generally refuse to enforce discovery requests that are overly broad or general in nature on the basis that they constitute a mere "fishing expedition."[53]

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[50] *Presbyterian Church of Sudan v. Rybiak*, (2006) 215 O.A.C. 140, 33 C.P.C. (6th) 27, 275 D.L.R. (4th) 512 (Ont. C.A.) at para. 32.

[51] *EchoStar Satellite Corp. v. Quinn*, [2007] 11 W.W.R. 522, 71 B.C.L.R. (4th) 172, [2007] B.C.W.L.D. 6491 (B.C.S.C.) at para. 50.

[52] *Internet Law Library Inc. v. Matthews,* [2003] O.J. No. 1139 (Ont. S.C.J.).

[53] *Presbyterian Church*, (2006) 215 O.A.C. 140, 33 C.P.C. (6th) 27, 275 D.L.R. (4th) 512 (Ont. C.A.) at para. 31.

Canadian courts will specifically consider the scope of the requested discovery when considering a Letter directed to *non-parties*. For example, Canadian courts will weigh the burden being placed on the non-party witness compared to the need of the party requesting evidence. The more onerous a request on a non-party, the less likely it will be granted.[54]

The Canadian Application

Procedure

Once the U.S. litigant has obtained a Letter of Request from a U.S. court, the U.S. litigant must then bring an enforcement application to a Canadian court located in the Province where the requested witness resides. The Canadian Application, including a notice of application and supporting affidavit, must be prepared and served by a lawyer licensed in that Province.

Relevant Law

Enforcement of Letters of Request is governed principally by each Province's Evidence Act. Canadian judges are not required to enforce a Letter, and Canadian courts have commented that Canadian Applications should not be granted "routinely."[55] For instance, Section 60 of Ontario's Evidence Act provides that an Ontario Court "may" – not "shall" – order the examination of a witness in Ontario (and order that witness to appear for examination) whenever:

> *it is made to appear…that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which letters of request could be issued under the Rules of Civil Procedure, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal.*[56]

Nevertheless, judicial authority indicates that legislation like Section 60 will be read broadly with the aim of fulfilling, wherever possible, foreign requests for the gathering of evidence.[57] As a result, there is a rebuttable presumption that foreign courts acted responsibly in issuing Letters of Request.[58]

The law governing enforcement of Letters of Request also has been influenced by provincial civil procedure rules governing the examination of *non-party* witnesses by *Canadian* litigants. As an example, Rule 31.10 of the Ontario Rules of Civil Procedure provides that a Canadian court will not grant a Canadian litigant's request for an order compelling the examination of a non-party witness unless the court is satisfied that:

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[54] *Id.* at para. 35.

[55] *Advance/Newhouse Partnership v. Brighthouse Inc.*, (2005) 38 C.P.R. (4th) 559 at para. 6.

[56] *Evidence Act*, R.S.O. 1990, c. E. 23, s. 60(1). *See also* the *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 46 – 47.

[57] *Zingre, Wuest and Reiser v. The Queen et al.* (1981), 127 D.L.R. (3d) 223 at p. 230, 61 C.C.C. (2d) 465, [1981] 2 S.C.R. 392 and pp. 400-1, per Dickson J.: "Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect."

[58] *Advance/Newhouse*, (2005) 38 C.P.R. (4th) 559 at para. 15.

- The moving Canadian party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the non-party witness he or she seeks to examine; *and*
- It would be unfair to require the moving Canadian party to proceed to trial without the opportunity of examining the non-party witness; *and*
- The examination will not result in unfairness to the non-party witness the moving Canadian party seeks to examine.

Ontario courts have held that the requirements of Rule 31.10 need not be strictly complied with in the context of an application to enforce Letters of Request brought by *non-Canadian litigants*. But there is case law to the contrary suggesting that Letters of Request may not be enforced where no attempt has been made first to obtain the voluntary testimony of the requested witness.[59]

Contents and Scope

To satisfy the test under Canadian law for enforcing a Letter of Request, the applicant must establish through an affidavit that:

- The evidence sought is relevant; *and*
- The evidence sought is necessary for trial and will be adduced at trial, if admissible; *and*
- The evidence is not otherwise obtainable; *and*
- The order sought is not contrary to public policy; *and*
- The documents sought are identified with reasonable specificity; *and*
- The order sought is not unduly burdensome, bearing in mind what the relevant witnesses would be required to do were the action to be tried in Canada.[60]

The applicant must also show that:

- The U.S. proceeding is already pending or underway before a court or tribunal of competent jurisdiction; *and*
- The Letter of Request was granted at a hearing of the U.S. court; *and*
- Enforcement of the Letter of Request is absolutely necessary to do justice in the U.S. litigation; *and*
- The evidence sought is relevant to a substantial issue in the U.S. litigation (*i.e.,* is not required just to corroborate existing evidence or to attack witness credibility).

With respect to the relevancy requirement, care should be taken to ensure that the requested evidence is squarely related to the allegations set out in the U.S. complaint. In *Pecarsky v. Lipton Wiseman Altbaum & Partners*, the Ontario Superior Court of Justice refused to enforce a Letter of Request when there was considerable uncertainty as to whether the documents requested were properly related to the issues in the U.S. litigation. The Court found that the addition of the words "among other

[59] *Republic of France v. DeHavilland Aircraft* (1991), 1 C.P.C. (3d) 76 (Ont. C.A.).

[60] *Friction Division Products Inc. v. E.I. DuPont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722 at p. 732, 32 D.L.R. (4th) 105 (H.C.J.).

things" to the U.S. complaint was insufficient to justify the enforcement in Canada of such a broad document request.[61]

Canadian courts have discretion to enforce a Letter of Request only in part, such as by limiting the scope of questions to be asked during examination or documents ordered to be produced in accordance with Canadian laws of evidence and civil procedure.[62] If a Canadian court finds the request too broad, it is likely to – but will not always – order more restricted discovery than that requested (rather than reject the request in its entirety).

Deposition Tips and Traps

Canadian law will generally govern depositions conducted in Canada pursuant to Letters of Request. The U.S. and Canadian laws involving deposition procedures (including the procedure for making objections) differ in many significant respects. For instance, generally a party seeking testimony from a corporate party is only entitled under Canadian law to examine one representative of that corporation, unless consent or leave of the court is obtained. Many U.S. litigants do not know that they nevertheless can conduct their Canadian depositions under the U.S. Federal Rules – *provided* their Letters of Request are appropriately drafted.

Careful drafting is especially important in the context of depositions. An appropriately drafted Letter of Request, for example, can ensure that the deposition be conducted in Canada by counsel of record in the United States. Similarly, an appropriately drafted Letter of Request can allow for the videotaping of depositions, a practice not generally followed under the Canadian rules.

U.S. litigants should be aware that Canadian courts may require them to pay the costs – including attorneys fees – incurred by a non-party deponent pursuant to a Letter of Request. While the amount of such costs will depend on the extent of discovery necessary, Canadian courts will impose reasonable limitations. In one recent case, for example, the Ontario Superior Court of Justice ordered that the applicants pay the non-party deponent's costs up to a maximum of $6,000.[63]

U.S. litigants should also be aware that, unlike under U.S. law, Canadian law generally compels a deponent to answer incriminating questions (but protects the deponent against subsequent use of the incriminating testimony or of evidence derived from that testimony). Thus, in *EchoStar Satellite Corp. v. Quinn*, the British Columbia Supreme Court would not refuse to enforce a Letter of Request seeking the deposition of a Canadian witness solely on the grounds that enforcement might incriminate the witness in related proceedings.[64]

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[61] *Pecarsky v. Lipton Wiseman Altbaum & Partners*, (1999) 38 C.P.C. (4th) at para. 10.

[62] *Pandjiris Inc. v. Liburdi Pulsewed Corp.* (2002), 27 C.P.C. (5th) 319 (Ont. S.C.J.) at para. 14.

[63] *Advance/Newhouse*, (2005) 38 C.P.R. (4th) 559 at para. 15.

[64] *EchoStar Satellite*, [2007] 11 W.W.R. 522, 71 B.C.L.R. (4th) 172, [2007] B.C.W.L.D. 6491 (B.C.S.C.) at para. 57 (explaining that this was another factor to be weighed in determining the overall burden placed on the witness). *See also Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005), 255 D.L.R. (4th) 233 (Ont. S.C.J.) at paras. 57 – 59.

Conclusion

Despite the similarities between the U.S. and Canadian legal systems, it is far from simple for a U.S. litigant to obtain discovery in Canada. It is important that U.S. lawyers be well-informed about the process of obtaining and enforcing Letters of Request. It is equally important to involve Canadian counsel early in the process to ensure that the evidence sought is gathered is in the fastest and most efficient manner possible.

MEXICO[65]

Despite an increasingly stronger and consistent relationship between the United States and Mexico, including the permanent exchange of goods and services between both countries and the immense flow of people that has made our border one of the busiest, the process of obtaining evidence in one country for use in the other remains complicated and even ineffective. This section explains the process as it relates to the taking of evidence in Mexico, including some of the main problems for U.S. litigants arising out of that process.

Understanding the Mexican System

In Mexico, the relevant legislation provides that the judicial procedures conducted abroad will be conducted as set forth in Mexico's Federal Code of Civil Procedure and the international treaties and agreements to which Mexico is a party.[66]

> *Article 193. A trial may be prepared:*
>
> *IX By requiring the examination of witnesses and other statements that may be required in a foreign procedure.*

This means that the express authority exists to conduct hearings in which the examination of witnesses or other statements that are required in a foreign procedure are accepted; it also defines the possibility of submitting a file that is the result of a procedure abroad, the records of which may be valid in Mexico (and vice versa). It is important to point out here that the provision in question establishes that the testimonies by witnesses who were produced in accordance with the foreign procedural law should have full effect in Mexico.

Moreover, a Mexican court can apply foreign law just like the judges in the state whose law may be applicable would do it. In order to inquire into the text, validity, sense, and legal scope of the foreign law, the court may make use of information on the matter, and in fact may ask the Mexican Foreign Service for that.[67]

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[65] *Prepared by Enrique A. Hernández Villegas, a partner with Baker & McKenzie SC (Mexico City office), specializing in commercial and insurance litigation, together with Effie D. Silva, an associate in the Miami office.*

[66] Art. 108 of the Code of Civil Procedure for the Federal District.

[67] Art. 284 Bis of the Code of Civil Procedure for the Federal District.

Obtaining Discovery in Mexico

Mexico subscribed to the Hague Convention on March 18, 1970, in order to facilitate the transmission and execution of Letters Rogatory (also known as Letters of Request) and promote the approach of the various methods used for these purposes. To this end, Mexico designated the Ministry of Foreign Affairs, General Director of Legal Matters, as the Central Authority, subject to several reservations.

Mexico made express, full reservation of the provisions contained in Articles 17 and 18 of the Hague Convention in connection with the commissioners and the use of enforcement measures on the part of diplomatic and consular agents; that is to say, Mexico did not accept any commissioner and/or diplomatic agent who would proceed to make an arraignment act in the Mexican territory.

Also, Mexico made express reservations in connection with Article 23 of the Hague Convention, declaring that, according to local law, Mexico may comply with Letters Rogatory asking for the submission and transcript of documents only when the following requirements are met:

- The court procedure has started; *and*
- The documents have been reasonably identified as to date, contents, and other relevant information; they specify those events or circumstances that reasonably allow the requiring party that the documents so requested are known to the person from whom they are requested, or that they are or were in the hands or under control or safeguard of such person; *and*
- The direct relation between the evidence or the information being requested and the pending procedure should be identified.

On the other hand, Mexico declared that the Letters Rogatory may be sent to its judicial authorities not only single through the Central Authority, but also through consulates or diplomatic agents or through judicial proceedings (directly from one court to another), provided that, in the latter case, the signature legalization requirement is met.

Application of the Hague Convention

- Central Authority: Mexico established the Ministry of Foreign Affairs, General Director of Legal Matters, to serve as the Central Authority to serve as receiving agent for service requests from other contracting countries.
- Letters Rogatory Requirements: Letters Rogatory must provide written information to the Central Authority that identifies the name and address of the parties and, as appropriate, of their representatives; to state the nature of the subject, describing the facts briefly; to indicate the evidence being requested and, as appropriate, to include the names and addresses of the witnesses who will testify, the cross-examinations to be conducted, the documents or objects to be analyzed, and the request to take oath or solemn affirmation, indicating the method to be used, and to detail any special procedures to be observed, if required.
- Service of Letters Rogatory: The Letters Rogatory may be sent to the Central Authority. Once the central authority receives a request for service of documents from another signatory country, it must transmit the documents to the appropriate judicial or administrative authority for service according to the provisions of article 27 (a), which authorizes such service according to local law.
- Designation of Language: The Letters Rogatory should be drafted in the language of the required authority or have their translation attached. Letters Rogatory written in French or English are

accepted. Mexico requires that Letters Rogatory sent to its Central Authority or its Judicial Authorities must be written in Spanish or have the Spanish translation attached.

- No Need of Legalization: Letters Rogatory do not need to be legalized, meaning the moving party does not have to obtain an "Apostille" from the State Department or Secretary of State to give the public document full binding effect abroad. However, if the Letters Rogatory are transmitted by the same Judicial Authority, Mexico requires that Judicial Authority meet the signature legalization requirement.
- Ancillary Jurisdiction: The required Court is not a mere executioner but a collaborator of the foreign court and, for that reason, it is granted ancillary jurisdiction to solve any problems arisen during the introduction of Letters Rogatory. Consequently, it can apply the enforcement measures contemplated in its legislation, just like they are used in the local procedures.
- Applicable Law: In the case of Letters Rogatory, the procedural laws of the Court of destination are used; however, upon request of the court issuing such letters, some special formalities may be followed, unless they are incompatible with their legislation or prove to be impossible to comply with.
- Service of Letters Rogatory: The judge may be asked to inform the requiring authority of these circumstances, in order for the interested parties or their representatives to attend the proceeding.
- Exceptions to the Practice of Letters Rogatory: The Mexican States may refuse to serve Letters Rogatory in the following cases: (a) the party involved alleges a prohibition to declare that is contemplated in the law of the requiring Court or the required Court.; (b) what is being requested is not within the scope of the judicial power's authority; or (c) the proceeding is contrary to the security or sovereignty of the requested nation.
- Costs and Expenses: The required Court may ask the requiring Court for the refund of the expenses incurred in expert witness, interpreters, any special formalities that take place, or expenses previously authorized incurred by the person in charge of serving the Letters Rogatory.
- Admission of Evidence by Diplomatic Agents, Consular Officers, or Commissioners Appointed by the Requiring Court: They may accept evidence or obtain information (diplomatic agents and consular officers have authority only in the place where they are accredited and in connection with their fellow citizens), unless the accrediting country had expressly banned them from acting or unless prior authorization is required, but enforcement measures should never be used (since, in this case, it is necessary to request them from the competent authority in the requested State). Upon its adherence to the Hague Convention, Mexico made express, full reservation of the provisions contained in Articles17 and 18, in connection with the "commissioners" and the use of enforcement measures.
  - It is important to emphasize that, if the diplomatic agent or officer cannot perform the duty entrusted by the judges in their State, the requiring court is authorized to ask for such act to be carried out, through Letters Rogatory sent to the competent judicial authorities in the country where they should be performed. Finally, the Mexican legislation and the Organic Law of the Mexican Foreign Service allow our Consuls and Ambassadors to collaborate with our judicial authorities and, in furtherance of the foregoing, as of January 12, 1988, article 560 of the Federal Code of Civil Procedure indicates as follows: "In the matter of taking of evidence in litigation proceedings carried out abroad, the Embassies, Consulates, and Members of the Mexican Foreign Service shall abide by the provisions of the Treaties and Conventions to which Mexico is a party and to the provisions of the Organic Law of the Mexican Foreign Service, its rules, and other applicable provisions."

- The States have the power to refrain from carrying out proceedings derived from the pre-trial discovery of documents. All the country members may, upon subscribing to, adhering to, or ratifying the convention, declare that they will refrain from carrying out this kind of pre-trial proceedings that are contemplated in the common law procedural system. In this respect, Mexico declared that, under its law, only Letters Rogatory asking for the submission and transcript of documents whereby certain conditions are fulfilled can be served, but it categorically prohibits such resource in case of pre-trial discovery of documents, by indicating:

  Preparation of pretrial proceedings

  4. In connection with article 23 of the Convention, Mexico declares that, under its law, only letters rogatory asking for the submission and transcript of documents can be served when and if the following requirements are met:

  The procedure has already started (consequently, it prohibits the pretrial)

  The documents have been reasonably identified as to date, contents, and other relevant information; they specify those events or circumstances that reasonably allow the requiring party that the documents so requested are known to the person from whom they are requested, or that they are or were in the hands or under control or safeguard of such person.

  The direct relation between the evidence or the information being requested and the pending procedure should be identified.

Depositions

In the case of depositions, they can be obtained through the assistance of the judge who is hearing the case in Mexico. In this regard, Article 362 Bis establishes that "when it is required to produce testimonial evidence or depositions that will have effect in a foreign procedure, the witnesses or deponents may be cross-examined verbally and directly (by their parties of their counsel). To that end, it will be necessary to prove before the court conducting such procedure that the facts that are the subject matter of the cross-examination are related to the pending procedure and that there exists prior request from a party or the authority of origin."[68] Moreover, in accordance with the Hague Convention, upon request of the exhorting court some special formalities may be used, unless they are incompatible with the local legislation or prove to be impossible to comply with.

Production of Documents

In the case of production of documents, there is an important restriction, since, based on the reservation made by Mexico in connection with Article 23 of the Hague Convention, a limit is set for the U.S. procedure known as *pre-trial discovery of documents*. This consists of enabling each party to have access to the files of the other party without detailing which documents they are trying to find.

In this regard, Article 337 Bis establishes that the obligation to produce documents or copies in procedures conducted abroad will not include the production of documents or copies of documents

[68] Article 362 Bis & 337 Bis of the Code of Civil Procedure for the Federal District.

identified by "generic characteristics" or stating "among other documents." Mexican judges cannot order or conduct, under any circumstances, an inspection on archives to which the public has no access, except in the cases permitted by the Mexican law.

Moreover and in line with the above mentioned, the Federal Procedural Civil Code establishes and reinforces that the obligation to produce documents or copies in procedures conducted abroad will not include the production of documents or copies of documents identified by "generic characteristics." Mexican judges cannot order or conduct, under any circumstances, an inspection on archives to which the public has no access, except in the cases permitted by the Mexican law.

In the event the judge denies the request for taking evidence in Mexico, even though the requirements set forth in the Hague Convention have been met, the party interested in obtaining the evidence may file an appeal trying to get the Court of Appeals revise the judge's decision and, if possible, revoke it, in case the judge had failed to apply properly the provisions contained in the Convention.

In our procedural law regulations, if any evidence filed by the parties or third parties called to the trial is not received and or admitted, then an appeal is applicable, and even an *Amparo*-action (Mexican Constitutional Appeal-before the Federal Courts) against the judge's refusal to accept and process the Letters Rogatory may be filed.

We recently had a case *(Cristina Brittingham vs Ana María de la Fuente, Twelfth Court for Civil Matters in Monterrey, Case No. 2081/98)* where evidence dealing with expert witness document examination and graphology was successfully produced under the Hague Convention. This consisted of analyzing a document in Mexico in order to determine whether or not the ink was dry, which would give the experts an approximate date of when the document had been signed, by clipping a small piece of the document to determine the years elapsed after the text had been written on the paper. The purpose of this was to obtain an approximate date for the document. This evidence had been, at the time, ordered by the Judge of the District 341 Court in Webb County in Laredo, Texas.

Other Multilateral and Bilateral International Treaties

Mexico is a party to the Inter-American Convention on the Taking of Evidence Abroad (*Convención Interamericana sobre Recepción de Pruebas en el Extranjero*), signed in Panama on January 30, 1975, and to an additional protocol signed in La Paz Bolivia, on May 24, 1984. The United States is not a party to that treaty.

Mexico also signed the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (*Convenio sobre la Notificación o Traslado en el Extranjero de Documentos Judiciales o Extrajudiciales en Materia Civil y Comercial*), to which the United States is also a party.

Conclusion

As discussed above, in Mexico it is possible to facilitate the taking of evidence abroad in civil or commercial matters, with the limitations indicated above. Therefore, it can be said that in Mexico the Letters Rogatory that may be received will be served in accordance with the Mexican laws, although the court in Mexico may exceptionally simplify the formalities or apply the formalities other than the Mexican ones, upon request by the court of origin.

UNITED KINGDOM[69]

The United Kingdom is comprised of three main jurisdictions: *(1)* England and Wales; *(2)* Scotland; and *(3)* Northern Ireland. This article is concerned with what is easily the largest jurisdiction: England and Wales (for ease of reference, "England"). The general principle followed in England regarding requests to obtain evidence located in England for use in U.S. litigation is to give effect to such requests so far as is proper and practicable and to the extent that is permissible under English law.

Understanding the English System

Although an English court has wide powers to act of its own motion, the system relies in practice almost exclusively on the parties to investigate and present their cases. Like the United States, England has a common law civil judicial system that is adversarial as opposed to inquisitorial. There are, however, certain differences between the rules and procedures pursuant to which each system operates.

The main steps involved in English litigation once proceedings have been commenced are:

- Written statements of case (pleadings); *and*
- Disclosure of documents, including electronic documents (equivalent to discovery in U.S. litigation but generally more restricted than in the United States); *and*
- Exchange of written statements of all factual witnesses to be called at trial; *and*
- Exchange of written reports of expert witnesses (where expert evidence is required); *and*
- Trial, consisting of an oral hearing before the judge at which counsel make oral and written submissions, factual and expert witnesses are cross-examined orally by the opposing party, and documentary evidence is available to the judge.

Obtaining Discovery in England

The United Kingdom ratified the Hague Convention in 1976. The Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Evidence Act") was passed in the United Kingdom in order to give effect to the principles of the Hague Convention. Since there is no inherent jurisdiction to act in aid of a non-U.S. court, the powers available to the English courts to do so are limited to those authorized by this statute. Accordingly, the English High Court may order the taking of evidence in England at the request of a U.S. (or other non-U.K.) court only pursuant to the Evidence Act.

The spirit of the Evidence Act is to "enable judicial assistance to be given to foreign courts."[70] The Evidence Act does not reproduce the provisions of the Hague Convention, but contains additional material and is drafted with the intention of being able to apply to all types of evidentiary requests. Among other things, it gives the English courts the power to comply with Letters of Request issued pursuant to the Hague Convention from judicial authorities in other nations. Such power is

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[70] *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716.

discretionary, but it has been said that "it is the duty and pleasure of the English court to give all such assistance as it can to the requesting court."[71]

The remainder of this section will describe the scope of discovery permitted under the Evidence Act and application of the Evidence Act with particular emphasis on requests for documentary and oral evidence.

Scope of Discovery Under the Evidence Act

In *Tinto Zinc Corporation v Westinghouse Electrical Corporation*, the House of Lords (the highest appeal court in the United Kingdom, equivalent to the U.S. Supreme Court) held that, where the English High Court has jurisdiction to issue an order under the Evidence Act, the Court will not refuse to do so unless the application underlying the requested order would be regarded as frivolous, vexatious or an abuse of the court's process.[72] The English High Court thus has wide powers under the Evidence Act, including the issuance of orders that require: the examination of witnesses (either orally or in writing); the production of documents; the inspection, photographing, preservation, custody or detention of any property; the taking of samples of any property and/or the carrying out or any experiments on or with any property; and the medical examination of any person (including the taking and testing of samples of blood).[73]

But the English High Court's power is not boundless. Section 2(3) of the Evidence Act specifically provides:

> *[A]n order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.*

The English High Court can therefore order nothing more than what it could order regarding the disclosure of evidence for use in English proceedings.

Under Part 31 of the English Civil Procedural Rules, "standard disclosure" requires a party to disclose only: *(1)* the documents on which it relies; *(2)* the documents which adversely affect its own case; and *(3)* documents which harm or assist another party's case. It is for this reason that U.S. litigants may not successfully utilize the Hague Convention procedures to enforce in England wide-ranging discovery requests of an investigatory nature. Nor can U.S. litigants utilize the Hague Convention to seek obtain in England neutral "background" documents or "train of inquiry" documents (which are not themselves relevant to the issues in the case but which might lead a party to the discovery of

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[71] *United States of America v Philip Morris Inc.* (2004) EWCA Civ.330.

[72] *Tinto Zinc Corp. v Westinghouse Electrical Corp.* [1978] A.C 547.

[73] Evidence Act, Section 2(2).

documents which could be relevant). Instead, the evidence requested by U.S. litigants must be that which helps or harms either party's case in the U.S. litigation.

Section 2(4) of the Evidence Act imposes a further limitation on the English High Court's power to issue orders in aid of discovery for use in foreign proceedings. This section reflects the U.K. declaration made under Article 23 of the Hague Convention, which as noted above was intended to allow signatory nations to avoid discovery requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party. The U.K. declaration specifically reads:

> *In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:*
>
> *(a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or*
>
> *(b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.*

These restrictions severely limit the much more extensive scope of discovery available in the United States, which can include wide ranging requests to produce documents that might possibly (but not definitely) benefit a party. The restrictions also expressly prohibit the use of depositions to obtain testimony about such documents.[74]

The English High Court will consider whether the foreign litigant making the application and the foreign court issuing the underlying discovery request appreciated and considered the differences between the procedural rules of the different jurisdictions.[75] The High Court has the power to reject such a request in whole, or it alternatively may refuse to order parts of the application it considers excessive. While the High Court can make minor amendments to the request if drafted in a way it considers unacceptable, it has no powers to modify the original request so as to make substitutions different from that requested by the foreign court.

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[74] Dicey, Morris & Collins, *The Conflict of Laws, Volume 1* (2006) p.231.

[75] *First American Corp v Zayed* [1999] 1 W.L.R 1154 (CA).

Application of The Evidence Act

Procedure

Under the English Civil Procedure Rules, an application for an order under the Evidence Act must be made to the English High Court.[76] The application may be made without notice to the other side, or "*ex parte*."

The application, which seeks assistance in obtaining evidence located in England for use in a foreign proceeding, must be supported by written evidence and accompanied by a Letter of Request issued by or on behalf of the foreign court in which the foreign proceeding is pending.[77] The English High Court must be satisfied that the requested evidence will be used in a foreign proceeding which either has been instituted before the requesting foreign court or whose institution before that court is contemplated.[78] Where the foreign proceeding has been settled or discontinued, the High Court will refuse the application.[79]

Additionally, the English High Court must be satisfied that the requested evidence will be used in foreign proceedings "in any civil or commercial matter" as construed by both English law and the law of the requesting nation.[80] Although there is no internationally accepted definition of "civil or commercial proceedings," this term is understood under English law to include all proceedings other than criminal proceedings. In the absence of evidence to the contrary, the High Court will accept a statement of the foreign court through the Letter of Request that the requested evidence is required for use in civil or commercial proceedings.

Documentary Evidence

As noted above, the English High Court cannot issue a general discovery order to produce all relevant documents or classes of documents, as might typically be issued by a U.S. court. The statutory reference in Section 2(4) of the Evidence Act to "particular documents specified in the Letter of Request" is to be given strict construction. As a result, a request for English documents made under the Hague Convention must not be a wide ranging "investigatory examination," but must seek to obtain evidence for direct use in U.S. litigation.[81]

In the case of *Re Asbestos Insurance Coverage Cases*, the House of Lords formulated a test for determining whether a documents request satisfies the requirements of Section 2(4).[82] The House of Lords required:

- That "individual documents [be] separately described" in the request; *and*

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[76] Civil Procedure Rules 34.16 to 34.24 and Practice Direction 34.

[77] Evidence Act, Section 1(a).

[78] Evidence Act, Section 1(b).

[79] *Re International Power Industries Inc*, The Times, July 25, 1984 (1985) B.C. L.C. 128.

[80] Evidence Act, Section 9(1).

[81] *Re Westinghouse Uranium Contract Litigation MDL Docket No 235* [1978] AC 547.

[82] *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716.

- That evidence be produced to satisfy the judge that the individual documents actually exist or have existed.

In this particular case, the House of Lords refused to order the production of English documents pursuant to a request from a California court. The requested documents included: *(a)* documents evidencing written instructions from the respondents to obtain certain insurance policies; *(b)* documents evidencing written instructions to obtain certain other insurance policies; and *(c)* exemplars of certain excess comprehensive policies in use in the London insurance market during the period 1950-1966. The first two categories were held to constitute requests for conjectural documents which might or might not exist in the absence of any evidence that there was usually a single document or set of documents by which written instructions were provided for the issuance of insurance policies. The third category was refused as it was "clearly a description of a class of documents and not of particular documents," and also because the was not specifically defined such that the requested exemplar policies were limited to any particular insurance issuer. Since the request was far too wide to be given effect by the English courts, it was suggested that the request be returned to the California judge for reconsideration and amendment.

The *Re Asbestos Insurance Coverage Cases* illustrate a key point in practice for U.S. litigants. It is vital that both the request from the U.S. court and the application to the English High Court specify individual "particular documents" – otherwise the High Court will reject the request.

Oral Evidence

Depositions do not exist in (and thus are not available to obtain evidence for use in) English civil proceedings. Nevertheless, the English High Court will issue orders in appropriate cases for depositions to take place in England to assist in U.S. litigation. Where such a request is made to the High Court, it will be granted only if there is sufficient ground for believing that an intended witness can offer direct evidence on topics relevant to the issues in the case.[83] The decision regarding what is relevant is primarily a matter for the foreign court, and the High Court will typically accede to the request unless it would not be proper to do so or where the burden imposed on the intended witness would be oppressive.

In *First American Corp. v. Others*, it was held that the English courts should ask two questions when considering letters of request seeking oral evidence:

- *First*, whether the intended witness can reasonably be expected to possess relevant information on the topics of testimony.
- *Second*, whether the intention underlying the formulation of those topics is intended to obtain evidence for use at trial (rather than to obtain information purely for investigatory purposes).

A balance must be struck between the legitimate requirements of the foreign court and the burden granting the request would place on the intended witness. If necessary, the English courts will apply some safeguard against a wide-ranging examination.[84]

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[83] *First American Corp v Zayed* [1999] 1 W.L.R 1154 (CA).

[84] *Re Tinto Zinc Corp. v Westinghouse Electrical Corp.* [1978] A.C 547.

Under Section 3 of the Evidence Act, a party required to give evidence in England pursuant to a request from a foreign court has the protection of both the English rules of privilege and those of the law of the requesting foreign court. A witness can only claim privilege under U.S. law if the underlying Letter of Request expressly so provides, or if so provided in the application to the English High Court accompanying the request. In *United States v Philip Morris*, it was held that for an entire request to be refused on the grounds of privilege, the intended witness must show that he or she could claim privilege for each and every question within the scope of the request.[85] To the extent the witness can claim privilege only on some of the questions within the request, the witness must claim privilege on a question by question basis.

Finally, an intended witness will not be compelled to give oral evidence if doing so would be prejudicial to the security of the United Kingdom. Conclusive proof of such prejudice is provided through a signed a certificate by the Secretary of State.[86]

Conclusion

English courts will assist U.S. litigants in obtaining documentary and oral evidence for use in U.S. litigation based on the principles in the Hague Convention. However, English courts are required by the Evidence Act to take a far more restrictive approach than is common in the United States. U.S. lawyers would be well advised to liaise with English lawyers for advice before obtaining any discovery orders and Hague Convention Letters of Request from U.S. courts. English lawyers are best positioned to ensure as far as possible that the requested discovery – and in particular document requests – will be given effect in England.

FRANCE[87]

France and the United States have fundamentally different methods of gathering evidence for use in litigation. When evidence sought for use in a U.S. litigation is located on French soil, both French litigants and the French government have been seen to resist by claiming that allowing U.S. litigants to access such evidence infringes the judicial sovereignty of civil law nations. France ratified the Hague Convention in part to reconcile the differences between civil and common law nations to facilitate the gathering evidence in one jurisdiction for use in another. Efforts by U.S. litigants to obtain evidence located in France pursuant to the U.S. Federal Rules have given rise to objections following, in particular, the enactment of French "blocking" legislation.

Understanding the French system

As a civil law country, no discovery procedure exists in France comparable to that of the United States. In France, only limited evidence gathering is permitted, and it is controlled almost entirely by the trial court judge, not the parties. Disclosure of evidence depends essentially on the parties'

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[85] *United States v Philip Morris* [2004] EWCA Civ 330.

[86] Evidence Act, Section 3(3).

[87] *Prepared by Rajeev Sharma Fokeer, a senior associate with Foucaud Tchekhoff Pochet & Associés in Paris specializing in international commercial work, cross-border litigation and arbitration and entertainment law.*

spontaneous communication of documents in support of their claims, defences and counterclaims. In this respect, Article 9 of the French Code of Civil Procedure provides: "Each party must prove, according to the law, the facts necessary for the success of his claim."[88]

It is, nonetheless, always possible for a party to seek to obtain further evidence by applying for an injunction from a competent French court to order production of any relevant evidence that might be withheld by the opposing party or even a third party. A party may also request that the French court order certain pre-trial investigative measures (or any other measures) aiming at protecting or establishing evidence.[89] Such measures may include an order requiring expertise processes conducted independently by court-appointed experts on technical or financial matters.

Obtaining Discovery in France

The conflicts created by the coexistence of broad party-conducted U.S. discovery and the more restrictive, judge-controlled procedures in France have led both countries and others to ratify the Hague Convention.[90] The procedures for obtaining discovery in France pursuant to the Hague Convention are further governed by applicable statutes under the French Civil Litigation Code.[91] Application of the Hague Convention in France allows for two types of discovery, and each is discussed in greater detail below:

- *First*, the compulsion of evidence by using a formal Letter of Request from the competent requesting authority to the French authority (pursuant to the Chapter I of the Hague Convention).
- Second, the taking of voluntary evidence on notice and commission appointment (pursuant to Chapter II of the Hague Convention).

While the Hague Convention serves as a useful tool in obtaining extraterritorial evidence, it does not appear – at least in the eyes of U.S. courts (as explained above in the section specific to the United States) – to be a tool of exclusive application. French courts have neither expressly approved nor disapproved the position of the U.S. courts in this regard. Notwithstanding this silence, France (like other countries) has enacted legislation which proscribes divulging certain types of information in response to discovery requests where not otherwise required by international treaty or agreement. Such laws are commonly called "blocking statutes." The French blocking statute, codified as Law No. 80-538 of 16 July 1980, prohibits the disclosure of economic, commercial and technical documents and information to foreign legal entities and natural persons except where such disclosure is required by the Hague Convention. The French blocking statute is discussed separately below in this section.

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[88] Translation from official government website accessible at: <www.legifrance.gouv.fr/>.

[89] Code of Civil Procedure, Art. 145.

[90] The Hague Convention was designed to "*set up a model to bridge the differences between the common law and civil law approaches to the taking of evidence abroad*." *See* Letter of Submittal from the President Regarding the Hague Evidence Convention, S. Exec. Doc. No. A.1, 92d Cong., 2d Sess. (1972).

[91] Civil Litigation Code, Art. 736 *et seq.*

Application of the Hague Convention

Chapter I: Procedures for Compulsion of Evidence

Testimony and documentary evidence located in France may be compelled by using the "*Model Letter of Request*" provided in the Hague Convention. The evidence sought must be for purposes of either pending or future U.S. litigation.

An application must usually be filed with the relevant U.S. Central Authority or court for issuance of a Letter of Request. Article 3 of the Hague Convention contains certain mandatory provisions relating to the contents of the Letter of Request:

- Name of requesting U.S. authority, receiving French authority and court (if possible); *and*
- Name and address of parties and any representatives (if applicable); *and*
- Subject matter of pending or future litigation including a summary of material facts; *and*
- List of procedures requested (*i.e.*, depositions, statements, evidential documents etc.); *and*
- If depositions are requested, *(a)* the name and address of persons concerned, and *(b)* a list of questions to be asked or an account of facts on which such persons would be examined; *and*
- List of any documents requested; *and*
- Request to obtain statements under oath and, if applicable, type of oath to be used; *and*
- Any special type of procedures requested (*i.e.*, application of any U.S. Federal Rules) including verbatim transcripts, videotaping or participation in the proceedings, as provided under Article 739 of the French Civil Litigation Code.

The Letter of Request, accompanied by a certified French translation, must then be sent by the competent U.S. Central Authority to the French Central Authority, which is located at the Civil Division Office of International Judicial Assistance of the French Ministry of Justice. The Letter of Request will be transferred from the French Ministry to the competent French court via the Attorney General.[92]

The French court may reject the Letter of Request if *(a)* it is incomplete or irregular, *(b)* the court considers that it lacks the requisite jurisdiction, or *(c)* it is likely, according to the court, to contravene national sovereignty or security considerations. Any appeal against a refusal must be filed either by the French authority or the requesting party no later than 15 days following the refusal.[93]

In responding to a Letter of Request, the party may refuse to give evidence pursuant to a privilege or duty specified by the party.[94] This may be the case where a party invokes the application of Articles L.226-13 of the French Penal Code, under which:

> *The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000.*[95]

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[92] Civil Litigation Code, Art. 736 & 737.

[93] Hague Convention, Art. 9; Civil Litigation Code, Art. 743 &746. (The time limit is not extended because of distance.)

[94] Hague Convention, Art. 11.

[95] Translation from official government website accessible at: <www.legifrance.gouv.fr>/

Discovery also may be resisted under the Hague Convention on the ground that divulging the requested information would impair a substantial state interest of France.[96]

Depositions. The competent U.S. magistrate may attend the examination of the witnesses in France and must be informed of the corresponding time and date of depositions, which will be held in a competent French court. The French court has all discretionary powers to conduct the examination under the usual French procedural rules, and the judge typically asks all questions unless the French court expressly authorizes the requesting party and/or the requesting party's attorneys to ask questions. Of course, the French court may decide to apply the procedural rules of another jurisdiction if so requested in the Letter of Request. All questions and answers must be asked or translated in French.

Documents for Pre-trial Discovery. France initially formally objected to Article 23 of the Hague Convention, which allows for the pre-trial discovery of documents. France revised its position in 1987 and not entertains Letters of Request seeking the pre-trial discovery of French documents in certain circumstances. Specifically, the Letter of Request must provide a complete and exhaustive list of the requested documents explaining how each document has a direct and precise link with the subject matter of the foreign dispute. French courts have had the opportunity to clarify the manner in which such reservation ought to be construed ruling that:

- An exact description of the requested documents is not necessary. Instead, the documents must be identified with a reasonable degree of specificity based on certain criteria (such as date, nature and author); *and*
- The communication of documents could be validly requested over a longer period beyond that covering the material facts having given rise to the dispute.[97]

Chapter II: Procedures for Voluntarily Obtained Evidence

These procedures apply in connection with the gathering of evidence in France only for use in pending U.S. litigation.[98] Provided that the witnesses consent to such procedures, the discovery may be conducted either by a diplomatic (or consular) agent of the United States or by any other person (referred to as a "commissioner"). In practice, such discovery is conducted by attorneys. However, under French law, the attorneys of the parties involved in the litigation are not allowed to carry out the procedure.

The procedure must be expressly authorized by the French Ministry of Justice. To obtain such authorization, a formal written notice in French (a French translation must be enclosed if in English) must be sent to the persons to be heard and copied to the Ministry of Justice. The notice must state the following:

- The evidence is being taken pursuant to the Hague Convention provisions in the context of a pending litigation before a named foreign court; *and*
- The audition is voluntary and will not give rise to any criminal liability in the nation where the request originates; *and*

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[96] Hague Convention, Art. 11 & 21.

[97] Court of Appeal of Paris, 18 September 2003, n° 2002/18509.

[98] Hague Convention, Art. 15.

- The parties in the corresponding litigation consent to the taking of such evidence and, in the absence of consent, any objections raised and the reasons for such objections; *and*
- The person to be auditioned may be assisted by a lawyer; *and*
- The person to be questioned may raise any exemption from being a witness in his favour.[99]

Also the application to the French Ministry of Justice must state the reasons for which this procedure is being chosen over the Chapter I procedure relating to compulsion of evidence and list the selection criteria applying to the commissioner, if he is not a French resident. The civil division of the office of international judicial assistance must be informed of the date and time of the auditions.

The French "Blocking" Statute

The full translation of the French "blocking" statute reads as follows:

> *Article 1. Except when international treaties or agreements provide otherwise, no natural person of French nationality or habitually residing on French territory, nor any officer, representative, agent or employee of any legal entity having therein its principal office or establishment, may in writing, orally or in any other form, transmit, no matter where, to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which would threaten the sovereignty, security, or essential economic interests of France or public order, as defined by government authorities to the extent deemed necessary.*
>
> *Article 1bis. Except when international treaties or agreements and laws and regulations in force provide otherwise, no person may request, seek to obtain or transmit, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, intended for the establishment of evidence in connection with pending or prospective foreign judicial or administrative proceedings.*
>
> *Article 2. The persons referred to in Articles 1 and 1 bis are required to inform the relevant ministry immediately when they are asked to provide any such information.*
>
> *Article 3. Without prejudice to any heavier penalties that may be provided by law, any violation of the provisions of Article 1 and 1 bis of the present law shall be punished by imprisonment of from two to six months and a fine of from 10,000 to 120,000 francs or by one of these penalties.*[100]

The import of this legislation is to subject French individuals and entities to potential criminal sanctions for their compliance with discovery requests issued outside the Hague Convention. Accordingly, a French witness in receipt of a discovery request issued pursuant to the U.S. Federal Rules (as opposed to the Convention) will usually contest the applicability of the U.S. Federal Rules

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[99] Hague Convention, Art. 11.

[100] Law No. 80-538 of 16 July 1980.

on the ground that compliance will cause the witness to violate French law.[101] The French witness will instead ask the court to require that the U.S. litigants utilize the Hague Convention. Until recently, however, U.S. courts – as well as French courts – appeared quite reluctant to accept such a request.

In the U.S. courts, the trend has been to refuse to order application of the Hague Convention and instead permit U.S. litigants to seek to obtain foreign evidence using the U.S. Federal Rules – notwithstanding the consequences under the blocking statute if the French witness complies with the discovery requests. In justifying their position, the U.S. courts have sometimes stated that the French blocking statute is "overly broad and vague and need not be given the same deference as a substantive rule of law."[102] Other U.S. courts more moderately have ruled that the "protection of United States Citizens from harmful foreign products and compensation for injuries caused by such products [*i.e.,* aircrafts]" was stronger than France's interest in protecting its citizens "from intrusive foreign discovery procedures."[103]

In one rare French case on this subject, the French courts denied application of the blocking statute in order to give full effect to discovery measures ordered by the U.S. court pursuant to the U.S. Federal Rules.[104] With respect to concerns expressed by certain international law firms on this point, the then French Attorney General had originally stated that any information or documents communicated in the context of foreign legal proceedings would be lawful under the blocking statute so long as the sovereignty or security of the French state was not implicated. According to the French Attorney General, the blocking statute "…does not aim at affecting business relations with foreign countries nor does it intend to limit or control the relations between international lawyers and their clients, subject to state sovereignty considerations pursuant to article 1 [of the Statute]."[105] In other words, Article 1bis of the blocking statute was construed restrictively as intended to apply only where sensitive information likely to affect state sovereignty or security considerations is involved.

Yet the matter has taken a most unexpected turn lately in France. The French Supreme Court just confirmed earlier this year a Paris Court of Appeal decision which ordered a French attorney to pay to a French witness €10,000 in damages for violation of Article 1bis of the blocking statute.[106] In that matter, the French attorney was the French correspondent of a U.S. lawyer in a civil suit brought before the U.S. courts by the California Insurance Commissioner against MAAF (a French insurance company) regarding the takeover of Executive Life. The lawyer had tried to obtain information on the manner in which decisions had been taken by the MAAF board of directors from a former member of the MAAF board. The French court ruled, in rather wide terms, that the lawyer was liable under the

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[101] *Rich v. Kis California, Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988).

[102] *Id.* at 258.

[103] *Aerospatiale*, 482 U.S. at 527 n.11. *See also In re Perrier Bottled Water Litigation*, 138 F.R.D. 348 (D.Conn. 1991) ordering discovery under Hague Convention because France "emphatic[ally]" opposes discovery under the U.S. Federal Rules).

[104] Court of Appeal of Paris, 18 September 2003.

[105] Ministerial Reply, French official journal, Déb. Ass. Nat., January 26, 1981, rev. crit. DIP, p.373 (translation by author).

[106] Court of Appeal of Paris, 28 March 2007, n°06/06272.

blocking statute because the information sought was of economical nature and was intended to the establishment of evidence.[107]

Conclusion

In light of the fresh uncertainty surrounding the applicability and scope of the French blocking statute, it is, on balance, advisable for U.S. lawyers to rely on the Hague Convention procedures when seeking to obtain discovery in France (instead of a direct extraterritorial application of the U.S. Federal Rules). While this might prove more cumbersome, time-consuming and, potentially, more expensive, the Convention appears, as it stands in France, to be the safer and more legally secure route to ensuring the discovery of evidence located in France for use in U.S. litigation. U.S. lawyers should also consult with French lawyers early in the discovery process to understand what evidence realistically may be obtained – and on what timetable – in France.

CHINA[108]

The key to successfully gathering evidence in China is to start with an understanding that the Chinese legal system is complex, unpredictable and, although deep rooted in Chinese history, ever-evolving. Discovery procedures like those in the United States do not exist for domestic disputes in China. At best, a loose pre-trial investigation process exists that allows parties to collect and exchange evidence within a certain period of time designated by the court. But there are few penalties for failing to cooperate in the discovery process, and requests from the competent courts are occasionally refused by powerful entities or individuals. It is against this backdrop that discovery in international disputes occurs (or does not occur) in China.

The Hague Convention is of limited utility in China in large part because its implementation remains uncertain and unpredictable. This caveat applies both to the use of letters of request and to the stringent restrictions under Chinese law that severely restrict the taking of voluntary depositions even pursuant to Hague Convention procedures. Comparatively, bilateral judicial assistance treaties reached by China with other foreign states appear more effective; unfortunately, the United States is not a party to any such treaties regarding the gathering of evidence.

Understanding the Chinese System

The civil litigation system in China was not truly established until 1991 with the enactment of the 1991 Civil Procedure Law of the People's Republic of China. Before 1991, no formal civil procedure law existed in China, and the concept of discovery so common in the United States did not exist. Private litigants in China did not participate in gathering evidence; instead, judges held the discretion to investigate facts and develop the evidence even on issues not raised by the parties.

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[107] For a timely commentary on the experience of U.S. litigators with the French blocking statute, including the cases cited above, *see* Daniel Schimmel & Emmanuel Rosenfeld, *New Respect for Hague Evidence Convention in Discovery*, New York Law Journal (May 8, 2008).

[108] *Prepared by J. Joseph Tanner, a partner with Baker & Daniels LLP (Indianapolis office) who practices international litigation, arbitration and dispute resolution, together with Li Dan, an associate in the Beijing office.*

The development of China's Civil Procedure Law and corresponding reform of China's trial court system established the rights of litigants in China to discover evidence to support their claims. They did not, however, provide guidance on how discovery should be conducted, nor did they give parties the right to compel discovery. The China courts thus played an overwhelming role in the new discovery process, because only the courts had authority to order compliance with discovery requests. Moreover, the effectiveness of the new discovery process was inconsistent because of the China courts' limited ability to impose penalties for noncompliance. Simply put, the Civil Procedure Law provided the parties the right to gather evidence, but provided no procedures, timeline, or other assistance for exercise that right – which, not surprisingly, created problems for litigants in China.

In order to resolve the difficulty in gathering evidence in China, the China Supreme Court promulgated in late 2001 a regulation relating to civil litigation (the "Regulation"). This Regulation provided more specific procedures for collecting evidence and made collecting evidence the obligation – and not just the right – of the parties. Trial courts were given the discretion to determine the length of the discovery period and to organize the discovery process in a case. The Regulation further provided the conditions under which the parties could apply for judicial assistance with collecting and preserving evidence.

Although a large number of unknowns exists in the Chinese discovery system, China has made substantial progress over the past decade, considering its long history of having no real appreciation for the discovery process. One such example of progress is China's ratification of the Hague Convention. With China's admission into the World Trade Organization and its involvement in the global market, demands for more predictable evidence gathering systems in China to aid international disputes continue to increase. China has also signed bilateral treaties of judicial assistance with over 20 countries and reached certain arrangements with Hong Kong and Macau. Hong Kong and Macau are part of China but have independent legal systems and jurisdictions.

More advancement by China will no doubt be made in the future.

Obtaining Evidence in China[109]

Both U.S. laws and Chinese laws need to be consulted before any discovery involving China is attempted.

Applicable U.S. Laws

The methods of obtaining foreign discovery provided in the U.S. Federal Rules are described above in the section specific to the United States. Questions exist, however, about whether the Hague Convention is an exclusive means of discovery in China. Notwithstanding the U.S. Supreme Court's decision in *Société Nationale Industrielle Aerospatiale* (also discussed above) that the Hague Convention is neither the mandatory nor exclusive means for obtaining evidence abroad, China "seems to take the position that international treaties signed or joined by China are mandatory and

[109] For a more complete review of these issues than space permits here, *see* Fang Shen, Comment, *Are You Prepared For This Legal Maze? How to Serve Legal Documents, Obtain Evidence and Enforce Judgments in China, 72 UMKC Law Review 215 (2003)*. (Several of the issues identified in this section were confirmed by this excellent Comment and citations therein). *See also Transnational Litigation*: *A Practitioner's Guide*, Peoples Republic of China (October 2002) at pp. 1-2 for a more complete historical perspective.

exclusive."[110] As stated in Article 236 of China's Civil Procedure Law, "in requesting or offering judicial assistance, the procedures spelled out in the international treaties signed or joined by the PRC *shall* be followed; domestic channels shall be pursued in cases where there are no treaties."[111]

Applicable Chinese Laws

Article 263 of China's Civil Procedure Law provides that:

> *The request for and provision of judicial assistance shall be conducted through the channels stipulated in the international treaties concluded or acceded to by the People's Republic of China. Where no treaty relations exist, the request for and provision of judicial assistance shall be conducted through diplomatic channels.*
>
> *The embassy or consulate in the People's Republic of China of a foreign state may serve documents on, investigate, and take evidence from its citizens, provided that law of the People's Republic of China is not violated and that no compulsory measures are adopted.*
>
> *Except for the circumstances set forth in the preceding paragraph, no foreign agency or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents, carry out an investigation or take evidence within the territory of the People's Republic of China.*

Accordingly, China generally prohibits the taking of evidence in China by a U.S. agency or individual from anyone *other than U.S. nationals located in China* without the consent of relevant Chinese authorities. Furthermore, China has made it clear that it will refuse any request to take discovery which it deems may violate the sovereignty, security, or social and public interests of China.

China's Civil Procedure Law provides that international treaties agreed to by China shall prevail over the Civil Procedure Law itself. As a result, the official evidence-taking approaches enforceable in China are in order of priority: *(1)* methods provided by bilateral treaties reached by China and other countries; *(2)* methods under the Hague Convention; and *(3)* "Diplomatic Approaches" provided in the Civil Procedure Law, and similar arrangements between mainland China and Macau or Hong Kong. Each of these approaches is discussed in turn below.

Bilateral Judicial Assistance Treaties Reached by China

So far, China has entered into such bilateral treaties with over 20 other foreign states, including France, Spain, and Russia, but, unfortunately, not the United States. The content of the treaties varies largely depending on the relationship and similarity of the legal systems between China and these foreign states, and should be consulted for any matters involving signatory countries. For instance, under the Sino-Singapore bilateral treaty, a direct communication link between the relevant Chinese courts and Singaporean courts was established for reciprocal assistance in evidence collection, including involuntary depositions and document production.

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[110] Fang Shen, 72 UMKC L. Rev. at 228-229 n.69.

[111] Civil Procedure Law, Art. 236 (emphasis added).

Application of the Hague Convention

The Hague Convention became effective between the United States and China in 1998, although the Chinese government took a conservative attitude toward the Convention when adopting it. This arose from fear that China's judicial sovereignty might be infringed by the Western world, and from the uncertainties arising from the immature Chinese evidence system. Accordingly, China made certain reservations which effectively prohibit the use of various procedures otherwise set forth in the Convention for taking evidence in China. China's strong views in this regard resulted in the U.S. Department of State's issuance of the following warning:

> *The government of the People's Republic of China has advised the United States of the procedures it considers acceptable under Chinese law and practice concerning obtaining evidence in China. Taking evidence in China for use in foreign courts is problematic. China does not recognize the right of persons to take depositions, and any effort to do so could result in detention and/or arrest of U.S. citizen participants.*[112]

Using Letters of Request to Compel Discovery

Although parties may request compulsion of evidence in China pursuant to a Letter of Request (also referred to as a Letter Rogatory) under the Hague Convention, these measures "have not been particularly successful in the past."[113] As the U.S. Department of State has explained:

> *Requests may take more than a year to execute. It is not unusual for no reply to be received or after considerable time has elapsed, for Chinese authorities to request clarification from the American court with no indication that the request will eventually be executed.*[114]

The China Ministry of Justice is the "Central Authority" designated to receive the letters of request and to transmit them to the authority competent to execute them (*i.e.*, the Supreme Court in China).[115]

While a Letter of Request issued under the Hague Convention seeking to compel a deposition may be sent to China's Central Authority, it would be an exceedingly unlikely candidate for execution. With respect to a Letter of Request seeking to compel the production of documents (and as explained above in the section specific to the United States), Article 23 of the Convention permits contracting nations to declare that they will not execute a Letter of Request seeking the pre-trial discovery of documents. China exercised this reservation power and declared when it adopted the Convention that only requests for "documents [*(1)*] clearly enumerated in the Letters of Request and [*(2)*] of direct and close connection with the subject matter of the litigation will be executed."[116] The China Ministry of Justice and Supreme Court have significant discretion in applying this two-part test before permitting

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[112] *See* Department of State Circular ("Circular") found at <www.travel.state-gov/law/info/judicial/judicial_ 694-html>.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] China, People's Republic of: Reservations Declarations Notifications, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *provided in* PLI Order No. 14457, International Arbitration 2008, Supplemental Materials, PLI Litigation and Administrative Practice Course Handbook Series at 444 (NY Mar. 13, 2008).

a Letter of Request to be executed. The China Ministry of Justice, Supreme Court, or the relevant local courts may also refuse to execute a Letter of Request "if any matter requested by a foreign court for assistance would impair the sovereignty, security, or social and public interests of the PRC, the people's court shall refuse the request."[117]

The complexity of the Letter of Request process (*i.e.*, communications flowing from foreign judicial authority→China Ministry of Justice→China Supreme Court →China local court, and backwards), coupled with its inefficiency (usually one year or even longer), means that few litigants in China-related international actions successfully compel either documentary or testimonial discovery using Letters of Request under the Hague Convention. Indeed, lawyers in China have been told informally that the Beijing High Court executes approximately one such request per year.

Warning About Depositions By Diplomatic/Consular Officers and Appointed Commissioners

The Hague Convention also provides in Chapter II for depositions to be taken by diplomatic officers or consular agents and appointed commissioners. In many countries, depositions also are taken routinely by U.S. lawyers. Caution should be taken, however, before *any* depositions are taken in China, because – consistent with its prohibition against depositions – China declared that the provisions of Chapter II (Articles 16-22) are not applicable to China except for Article 15. Article 15 provides:

> *In civil or commercial matters, 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.*[118]

Accordingly, diplomatic and consular officers only may take voluntary depositions *of U.S. nationals located in China only if permission is given by China to do so*.

In an attempt to explain the issues further, the U.S. Department of State reports that, prior to its adoption of the Hague Convention, "China had communicated its views on the subject of obtaining evidence in a series of diplomatic notes to the U.S. Embassy in Beijing."[119] In 1981, the Chinese Ministry of Foreign Affairs advised the U.S. Embassy that if a U.S. court requested depositions of witnesses resident in China, a Letter of Rogatory through diplomatic channels would be required. China reiterated this view in a 1988 diplomatic note stating that a U.S. Consular officer's receipt of witness statements made under oath in China would violate the U.S.-China Bilateral Consular Convention. China reiterated this view again in 1996.[120] Stay tuned as the United States is seeking

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[117] Civil Procedure Law, Art. 260.

[118] Hague Convention, Art. 15.

[119] *See* Circular, *supra* n.108 (emphasis added).

[120] *Id.*

clarification of the right of U.S. Consular officers to take voluntary depositions of U.S. citizens in China after adoption of the Convention.

With respect to depositions by U.S. lawyers, generally China will not permit them, *even of willing witnesses*. The Civil Procedure Law specifically provides "no foreign agency or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents, carry out an investigation or take evidence within territory of the People's Republic of China."[121] The U.S. Department of State has commented in this regard that, "traditionally Chinese authorities do *not* recognize the authority or ability of foreign persons, such as American attorneys, to take voluntary depositions, *even before a U.S. Consular officer*."[122] In the State Department's words:

> *Given China's declaration on accession to the Hague Evidence Convention that it does not consider itself bound by Articles 16-22 of Chapter II of the Convention, China could well deem taking depositions by American attorneys or other persons in China, as a violation of China's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorneys and other participants.* [123]

The State Department further confirms that the right to administer oaths in China is strictly governed by Chinese law:

> *A person authorized to administer oaths in the U.S. may not be recognized by Chinese authorities as empowered to perform that function in China. Even a Chinese 'notary' or other person empowered to administer oaths may not be recognized by Chinese authorities as empowered to do so in connection with depositions, given China's strict position on that question.*[124]

Accordingly, the U.S. Department of State advises that conducting depositions by private individuals or under an oath to be administered by private persons could have serious consequences for the individual administering the oath as well as the other participants.[125]

"Diplomatic Approach"

In absence of either the Hague Convention or a bilateral treaty, a foreign state may still request to take evidence in China by following a diplomatic approach provided under a clause in China's Civil Procedure Law.[126] That is, a foreign judicial authority may send its requests to the China Ministry of Foreign Affairs through its embassy in China, and then the Ministry of Foreign Affairs will transmit such requests to the China Supreme Court. Upon the examination of the request, the China Supreme Court will re-transmit the request to the competent Chinese local courts for execution. This approach,

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[121] Civil Procedure Law, Art. 263.

[122] Circular, *supra* n.108.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Civil Procedure Law, Art. 263.

however, lacks specific mechanical provisions and is even more difficult for foreign nations to utilize effectively than procedures provided under the Convention.

Conclusion

U.S. lawyers seeking to gather evidence in China for use in U.S. litigation should consult not only with Chinese counsel, but also with the U.S. Department of State and U.S. Consular Service. Many foreign parties and their attorneys have gone to China and taken evidence in a non-public, unofficial way that ignores both the Hague Convention procedures and China's Civil Procedure Law. Doing so is extremely risky, could lead to personal arrest, could cause fines or restrictions to be placed on the client's China operations, could result in the evidence discovered to be not officially recognized in China, and could subject the evidence to "fruit of the poisonous tree" challenges. But while discovery is so difficult and unpredictable in China, there are several practical options for U.S. lawyers to consider:

- *First*, it should not be forgotten that when a Chinese person or entity is a party to a U.S. litigation and has assets subject to execution in the United States, the U.S. courts may force that party to provide documents or testimony or be subject to default or other sanctions. The mere possibility of such sanctions can often leverage "cooperation" from the Chinese party and alleviate the need for formal discovery in China.
- *Second*, because depositions can be taken outside of mainland China, persuading witnesses to travel to another jurisdiction to be deposed is a viable and often successful alternative.
- *Third*, parties can contractually designate in advance of a dispute how discovery of documents and testimony will occur in China. The fact that a party agreed to discovery may influence Chinese officials to permit the discovery, although the Chinese officials still may not compel enforcement.
- *Fourth*, because the United States and China are both signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, orders of arbitration panels are enforceable in China.[127] Therefore, discovery provisions that are made part of dispute resolution/arbitration agreements may be viewed as more enforceable. In addition, parties could agree to a forum to resolve their dispute other than the United States, which might be more favorably viewed by the Chinese government.

Discovery in China is still cumbersome, unpredictable, and fraught with peril. However, as China's legal and evidence systems evolve, and international market pressures mount, the Chinese system should continue to improve and become more predictable for U.S. lawyers seeking discovery in China in the future.

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[127] *See* 9 U.S.C. §§201-208.

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	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
Application of Hague Convention	• Canada is not a party to the Hague Convention. • Instead, parties seeking evidence must obtain Letters of Request (also known as Letters Rogatory) from U.S. Court. • Enforcement in Canada governed by provincial and federal Evidence Acts and common law.	• Mexico is a party to the Hague Convention. • The fundamental purpose of it is to make compatibles, to a certain extent, legal systems with different practices, i.e. pretrial discovery vs. Hispanic process.	• The United Kingdom is a party to the Hague Convention. • The U.K. has made a reservation regarding the pretrial discovery of documents. All the reservations can be found at the end of the Convention with the Central Authority information. • The Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Evidence Act") implemented the Hague Convention in the U.K. • Evidence is obtained pursuant to a letter of request from the U.S. (or other non-U.K.) court. The Convention provides a model format for the request. The request should be accompanied by a list of the questions to be posed to the witness by the English court. The request can also ask for permission for the U.S. attorney to ask questions of the witness.	• France is a party to the Hague Convention. • Application of the Convention in France allows for two types of discovery: (*a*) compulsion of evidence by using a formal letter of request; and (*b*) taking of voluntary evidence on notice. • There is some doubt in France as to whether the Convention is of exclusive application, in particular, in light of local "blocking" legislation.	• China is a party to the Hague Convention. • China took a conservative attitude toward the Convention when adopting it. It made certain reservations described below which effectively blocked various approaches to taking evidence. • Implementation of the Convention in China remains uncertain and unpredictable.
Scope of documentary discovery	• A party must disclose the existence of every document relating to any matter in issue in an action that is or has been in its power, possession, or control. • Documents must be "relevant to a matter in issue" in the case. This is generally a very low threshold and the court will typically exercise its discretion to compel disclosure, but	• The introduction of evidence in the service of Letters Rogatory should not be contrary to the legal provisions of the required State. • To take the action requested, the interested party will need to make available all the means required for the production of the evidence, i.e. appointment of expert witness, if required	• The English court is prohibited from making an order requiring a person to produce any documents for the U.S. proceedings other than particular documents specified in the order as being, or likely to be, in his possession, custody or power. The burden of proving this fact is upon the applicant, and there must be sufficient evidence	• Both documentary and testimony evidence located in France may be compelled by using the "*Model Letter of Request*" provided in the Convention and pursuant to applicable French rules of procedure. • The evidence sought must be for purposes of either pending or future U.S. litigation.	• According to China's Civil Procedure Law, Article 263, the U.S. Embassy or Consulate in China may serve documents on, investigate, and take evidence from U.S. citizens, provided that doing so does not violate the laws of China and that no compulsory measures are required. • China declared the provisions of

[1] Discovery in Canada is governed by the Rules of Civil Procedure in each province. While the Rules in each province are similar (except for those in the Province of Quebec, which is based on civil law), they are not identical; as a result, thus there will be differences in the specific procedures followed in each province. This chart reflects Ontario's Rules of Civil Procedure.

[2] The United Kingdom is comprised of three main jurisdictions: *(a)* England and Wales; *(b)* Scotland; and *(c)* Northern Ireland. The information in this chart relates to the largest U.K. jurisdiction, or England and Wales (for ease of reference, "England").

[3] Hong Kong and Macau are part of China, but they have independent legal systems and jurisdictions. This information in this chart does not relate to Hong Kong and Macau.

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
	disclosure is not typically as broad as in the US. • Document means any matter expressed or described upon any substance by means of letters, figures or marks. This includes electronic documents, voice recordings, computer data. • Courts will weigh the burden being placed on the witness compared to the need for the documents.	name and addresses of the parties, witnesses and other persons and data indispensable for the receipt or taking of evidence. • Specifically, in the matter of documents, to take the action requested, the Letter Rogatory should include: (i) the purpose of the evidence; (ii) a copy of the document showing that the Letter Rogatory is grounded in law and fact, identifying the indispensable documents necessary for the taking of evidence; and (iii) a summarized report of the process and a description of the requirements or special procedures set by the requiring organism. • The possibility is admitted to observe additional formalities or additional special procedures, provided they are compatible with the legislation of the required State and provided they can be complied with.	supporting this ground. • "Document" means anything in which information of any description is recorded. This extends to anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment. • The court is limited to ordering the production of "particular documents specified". This means individual documents separately described that are actual documents shown by evidence to exist or to have existed. The court has a discretion to reject a letter of request if the matters on which examination is requested are too widely drawn. • A person will only be required to give evidence which he would have been compelled to give in civil proceedings in England. The scope of documentary discovery in England is generally more limited than in the U.S. and does not include neutral background documents or documents which are not themselves relevant but which might lead on "a train of inquiry" to relevant documents. Under the Evidence Act the English Court will only order the disclosure of documents which are in the nature of proof to be used for the purposes of the trial, and not documents in the nature of pre-trial disclosure for the purposes of producing other documents which may be relevant to case.	• The letter of request, accompanied by a certified French translation, must then be sent by the competent U.S. central authority to the French central authority, who will, in turn, forward it to the competent French court via the Attorney General. • The French court may reject the letter of request if *(a)* it is incomplete or irregular, *(b)* the court considers that it lacks the requisite jurisdiction, or *(c)* the request is likely, according to the court, to contravene national sovereignty or security considerations. • Pre-trial discovery of French documents is permitted in certain circumstances only. Specifically, the letter of request must provide a complete and exhaustive list of the requested documents explaining how each document has a direct and precise link with the subject matter of the foreign dispute. • Procedures for voluntarily obtained evidence in France only apply for use in pending U.S. litigation and must be expressly authorized by the French Ministry of Justice via a formal written notice in French (a French translation must be enclosed if in English) which must be sent to the concerned persons and copied to the Ministry of Justice.	Chapter II (Articles 16-22) of the Convention are not applicable to China, except for Article 15. • Although diplomatic and consulate officers may gather discovery, permission from Chinese authorities is required. Accordingly, document discovery in China is unpredictable, at best. • China also declared when it adopted the Convention that only requests for "documents clearly enumerated in the Letters of Request and of direct and close connection with the subject matter of the litigation will be executed."

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
Scope of oral discovery	• Witnesses may be questioned on anything with a "semblance of relevance" to a matter in issue in the case. The pleadings define the scope of what is relevant. • Witnesses must provide relevant, non-privileged answers according to their information, knowledge and belief. • If a witness does not have an answer to a relevant question, the witness must undertake to supply an answer to that question in writing at a later date. • A party may examine any other party adverse in interest. • The party seeking oral discovery from a corporate party is entitled to examine only one representative of its choice, absent consent to examine additional representatives (which is rarely given). The representative may be an officer, director or employee.	• In the matter of depositions and testimonies to be produced by witnesses, the interested party will need to make available all the means required for the production of evidence: (i) the interrogatories, indicating the names and addresses of the parties; (ii)witnesses; (iii) experts; (iv) other persons; and (v) data indispensable for the receipt or taking of the evidence. • Moreover, the Letter Rogatory should include: (i) the purpose of the evidence; (ii) a copy of the document showing that the Letter Rogatory is grounded in law and fact; and (iii) a summarized report of the process and a description of the requirements or special procedures set by the requiring organism. • The possibility is admitted to observe additional formalities or additional special procedures, provided they are compatible with the legislation of the required State and provided they can be complied with. • In order to comply with the terms of the Letter Rogatory, the required court may use the enforcement means contemplated in its local procedural laws. • It is important to point out here that the fulfillment of a Letter Rogatory will not imply acknowledging the jurisdiction and or competence of the requiring court, nor the commitment to acknowledge the validity or the enforcement of a judgment issued to that end. • Mexico may refuse to introduce evidence prior to the judicial procedure pretrial discovery of documents.	• Whilst there is no pre-trial oral discovery mechanism in English proceedings, the English Court has the power under the Evidence Act to order written or oral depositions in England to assist U.S. proceedings. • Normally the examination will be conducted according to English law and English procedure unless a request is made by the U.S. court as to the particular manner for taking depositions. • As a matter of the discretion of UK courts, the request for oral discovery should only be acceded to where there was sufficient ground for believing that an intended witness might have relevant evidence to give on topics relevant to the issues in the case. • The test of relevance is primarily a matter for the U.S. court and the English Court should therefore accede to the request unless it would not be proper to do so or where the burden imposed on the intended witness would be oppressive. • If it appears necessary to apply some safeguard against an excessively wide-ranging examination, the order can be made subject to a suitably worded limitation. The English Court will also only permit questions of the witness which could be asked at trial in examination in chief of that witness. • As the examination should be conducted in the English mode, a company cannot be ordered to attend	• Where the competent French court has authorized a letter of request for compelled oral discovery, the court has all discretionary powers to conduct the examination under usual French procedural rules, and the judge typically asks all questions unless the French court expressly allows the requesting party and/or the requesting party's attorneys to ask questions. The French court may decide to apply the procedural rules of another jurisdiction if so requested in the letter of request. All questions and answers must be asked or translated in French. • Where witnesses consent to such procedure, and subject to prior notice and the authorization of the French Ministry of Justice, oral discovery may be conducted either by a diplomatic (or consular) agent of the United States or by any other person (referred to as a "commissioner"), usually an attorney but not an attorney acting for either of the parties in the US litigation.	• Article 263 of China's Civil Procedure Law provides THAT diplomatic or consulate officers may take voluntary depositions of U.S. nationals in China. However, China also has stated that it must give prior permission to do so. • China will not permit depositions to be taken by U.S. attorneys, even of willing witnesses. As stated by the U.S. Department of State, "China could well deem taking depositions by American attorneys or other persons in China, as a violation of China's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorneys and other participants."

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
			for examination on oath but a company or body corporate can be ordered to attend and produce specified documents by its proper officer.		
Written interrogatories	• Canada does not have a written interrogatory process similar to US Federal Rule 33. • It is possible, however, for the examining party to receive written answers by electing to conduct its examination in writing. Written examination is conducted by serving a list of questions on the party being examined. It is also possible (but rare) for a court to grant leave allowing a combination of written and oral discovery. Written examinations are governed by the same rules as oral discovery, and subject to additional rules. • If a witness is unable to answer a question on oral discovery, that witness may undertake to make inquiries and supply an answer to that question in writing at a later date.	• In the matter of depositions and testimonies to be discharged by witnesses, the interested party will need to make available all the means required for the production of evidence: (i) written interrogatories; (ii) indicating the names and addresses of the parties; (iii) witnesses; (iv) experts; (v) other persons; and (vi) data indispensable for the receipt or taking of the evidence. • Once the Letter Rogatory has been admitted by the judge who is hearing the case, a date and time will be set for conducting a hearing at the court that receives the depositions and/or testimony of a witness, and/or the expert's report in accordance with the request of the requiring authority. The parties will be sent prior notice of such hearing so that they may attend, and they can be assisted by their respective counsel. • Specifically, in the case of depositions, they can be obtained through the assistance of the judge who is hearing the case in Mexico. In this regard, article 362 Bis establishes that "when it is required to produce testimonial evidence or depositions that will have effect in a foreign procedure, the witnesses or deponents may be cross-examined verbally and directly; however, the procedural rules authorized the assistance of the parties and their counsel.	• The U.K. does not have a written interrogatories process similar to that in the U.S. • In English proceedings a written Request for Further Information can be made about another party's case, normally based on that party's pleadings. There is no procedure for asking questions of individual witnesses for other parties before oral cross-examination at trial. • However, the English court has the power under the Evidence Act to order that a witness provide written answers to a set of written questions. The procedure and scope for the questions is the same as for oral discovery.	• The same process as for obtaining documentary and/or testimony evidence will apply (see above corresponding Sections). • Under applicable rules of French procedure, France has no like evidence gathering process of written interrogatories. • It is, nonetheless, always possible for a party to seek further evidence by applying directly for an injunction from a competent French court to order production of any relevant evidence that might be withheld by the opposing party or even a third party. A party may also request that the French court order certain pre-trial investigative measures (or any other measures) aiming at protecting or establishing evidence. Such measures may include an order requiring expertise processes conducted independently by Court-appointed experts on technical or financial matters.	• China does not have a written interrogatory process similar to the U.S. Fed. R. Civ. P. 33.

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
		• Upon conclusion of the hearing, the court will issue the corresponding minutes (written minute), setting forth the production and reception of the evidence, either by (i) filing a written document or (ii) through the testimony of one of the parties or witnesses duly discharged. A certified copy of which will be returned to the requiring court together with any written evidence that may be included in the file. It is important to mention that verbatim transcripts, and or videotapes are not allowed.			
Costs	• Each party is responsible for the costs of producing its documents for discovery. • Parties only have an obligation to produce copies of documents for inspection, not to provide copies of documents. If a party wants copies of documents, it will be required to pay for them unless an arrangement can be reached between the parties. • A party seeking to examine a third party will generally be responsible for the costs associated with this examination.	• The costs and other expenses will be borne by the interested parties.	• Each party generally covers the initial expense of collecting, reviewing and producing its own documents and inspecting the other parties' documents. The producing party can normally charge photocopying costs if the receiving party wants copies (in addition to or instead of physical inspection). • The receiving party will normally be expected to pay the costs of evidence obtained from a third party, whether by way of documentary discovery or oral discovery, and will have to pay the reasonable expenses of the third party as well as the costs of taking a deposition.	• Under the Convention, the procedure is free except for costs relating to interpreters, expert witnesses or any special arrangements, all of which must be borne by the requesting authority.	• This issue of costs is not well established in Chinese law. Presumably, each party would be responsible for its costs incurred in taking or producing discovery.

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
Confidentiality and waiver of protection	• Evidence obtained in a discovery in one action generally cannot be used in other actions. • Evidence obtained in discovery is protected by a "deemed undertaking" that the evidence may not be used for any purposes other than those of the proceeding for which it was obtained. • This protection is lost when the evidence is filed in a court document or referred to in a public court hearing. • A party can waive this protection by consenting to the use of its evidence in other actions. • Evidence obtained on discovery can also be used to impeach a witness in other actions.	• Evidence obtained through the Convention generally cannot be used in other actions or proceeding and for any purposes other than those of the proceeding for which was obtained. • A party can waive this protection by consenting to the use of its evidence in other actions or proceedings.	• The general rule is that the documents being disclosed may only be used for the purpose of those proceedings in which they are disclosed. This confidentiality is lost in certain circumstances, for example where the document has been read to or by the court or referred to at a hearing which has been held in public. • A witness is entitled to claim legal privilege from providing documents or giving oral evidence. The English Court will give effect to a claim for privilege on any ground recognized by English law, even though it might not be recognized in U.S. law. The English Court will also give effect to a claim for privilege under U.S. law, even though it is not recognized under English law (for example, the Fifth Amendment to the U.S. Constitution). The claim for this type of privilege must be supported by a statement in the letter of request or be conceded by the requesting party.	• Under the Convention, in responding to a letter of request, the party may refuse to give evidence pursuant to a privilege or duty specified by the party. • Such objections may be made under French law by those having a "legitimate motive" not to depose i.e. if unable to attend, physically incapacitated etc. or on the basis of any diplomatic immunity, exemption or prohibition (for instance, confidentiality duties of certain professionals, direct line descendants and spouses). • Any objections under the laws of the foreign state (and stated in the Request or confirmed by the requesting authority) may also be raised by the person. • The French court may decide not to carry out the procedure on the basis of the objections unless the witness asks to reserve his objections "on the record". • If disclosure is sought outside the Convention, disclosing parties or witnesses, as well as those seeking such disclosure, may incur criminal liability under French blocking legislation, as construed in rather wide terms in a recent French Supreme Court decision on the subject.	• Confidentiality in international Chinese discovery also is an area that has not been fully developed. However, documents and testimony that are classified as China state secrets under China's Protection of State Secrets Law and its implementing regulations are prohibited from being given as evidence in domestic or foreign courts.

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
Third-party discovery	• Canadian courts are reluctant to allow the discovery of third parties. • The party seeking to examine a third party must satisfy the court that: o If has been unable to obtain the information elsewhere; o It would be unfair to require the party seeking the discovery to go to trial without examining the third party; and o The discovery will not unduly delay the trial, cause unreasonable expense to other parties, or result in unfairness to the third party.	• Mexican courts are reluctant to allow the requirement of any document and or depositions in case of a third parties. • According to our procedural rules, any party might be able to voluntary cooperate with the judicial authorities providing the requested information and or the requested documents; however, such cooperation is restricted, because, if the third-party alleges lack of relationship between the formal parties of the lawsuit (i.e,. plaintiff v.s defendant) the court would dismiss the motion by which any party try to compel the third-party to provide or submit information or evidence, precisely based on the lack of link.	• Under the Evidence Act, the English Court can order a third party to provide documentary discovery or oral discovery of a witness, but only on the basis described above.	• The admissibility or validity of a request for compulsion of evidence (documentary or oral) from a third party will fall under the scope of the French Court's discretion in authorizing (or not) the request made under the Convention. • If the evidence sought from the third party cannot be properly linked to the material facts of the dispute giving rise to the request, or the persons cannot be properly identified, the French court will be inclined to decide that it is irregular or incomplete. • Alternatively, it is always possible for a party to apply directly for an order from the French Court in respect of relevant evidence that might be withheld by a third party provided that such application does not serve the purpose of exerting undue pressure or discovering a fresh legal basis for future proceedings.	• The distinction between party and third-party discovery is not fully developed in China. It is important, however, that only discovery by the U.S. Embassy or Consulate of U.S. citizens is provided for in China's Civil Procedure Law.

	CANADA[1]	MEXICO	UNITED KINGDOM[2]	FRANCE	CHINA[3]
Other sources of useful information	• Ontario's *Rules of Civil Procedure*: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm • Ontario Civil Procedure. Holmested and Watson. Toronto, Ont.: Carswell 1984 +. • "So You Want to Depose a Canadian, Eh?" http://www.mcmbm.com/Upload/Publication/Depose%20a%20Canadian%200405%20for%20PDF.pdf	• Mexico´s Supreme Court of Justice http://www.scjn.gob.mx • Mexico´s Rules of Civil and Commercial Procedure: http://www.tsjdf.gob.mx/publicaciones/publicaciones_m2.htm	• Civil Procedure Rules http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm • Commercial Court Guide http://www.hmcourtsservice.gov.uk/publications/guidance/admiralcomm/index.htm • For Evidence for proceedings in other jurisdictions see Halsbury's Laws paras 1051 – 1059.	• Applicable French rules of procedure in the Code de Procédure Civile (French Code of Civil Procedure) accessible at French government website <http:www.legifrance.gouv.fr/> • For general information on the Convention, see official website of the Hague Conference on Private International Law: <http://www.hcch.net/index_en.php?act=conventions.text&cid=82> • For general contact information, see French Ministry of Justice website at: <http:www.justice.gouv.fr/> • « Le droit de la prevue devant le juge civil et l'attractivité économique u droit français" Study Note of 19 Oct 2005, by the Comparative Law Bureau of the Ministry of Justice Service of European & International Affaires, published on the following website: < http://www.gip-recherche-justice.fr/aed.htm>.	• Fang Shen, Comment, Are you Prepared for this legal maze? How to serve legal documents, obtain evidence and enforce judgment in China. 72 UMKC L. Rev. 215. • Transnational Litigation: A Practitioner's Guide, Peoples Republic of China, October 2002 • Department of State Circular found at www.travel.state-gov/law/info/judicial/_694-html, last visited April 8, 2008