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# The Unsolved Problem in Taking Evidence Abroad: The Non-Rule of *Aerospatiale*

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## I. Introduction

As our commercial, social and political worlds have been shrinking, it follows that our legal world has been shrinking as well. International commercial, social, and political contacts spawn transnational litigation of kinds and quantities unknown in several decades past. This increase in litigation presents more and different problems than our alleged home grown domestic litigation explosion. We regularly participate with litigants from different procedural systems and philosophies. This is particularly apparent when a United States (U.S.) litigant seeks discovery abroad or from a foreign litigant in the U.S. These procedural and philosophical differences create an "apples and oranges" problem. The apples of the U.S. discovery procedures are on a decidedly different tree than the oranges of European litigation systems.

It was presumably to resolve the apple/orange difficulty and to establish some common ground that the Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>1</sup> [hereinafter Hague Evidence Convention or Convention] was drafted. In 1972, the United States acceded to the Hague Evidence Convention. Since then, there has been wide disagreement amongst both courts and commentators as to the scope of the Convention and its applicability to discovery requests in proceedings in U.S. courts.

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1. 23 U.S.T. 2555, T.I.A.S. No. 7444, *opened for signature*, Mar. 18, 1970, *reprinted in* 28 U.S.C. § 1781 *et seq.* (1988 Supp.). After enumerating the Articles, the statute lists the states which are parties to the Convention, along with the various notifications, extensions, declarations, and reservations of the States. Also appended in the statutory reproduction is a Model for Letters of Request.

Concepts of judicial and national sovereignty dies with difficulty. U.S. courts particularly, have heard and have taken several different approaches in an effort (perhaps) to preserve what the court and U.S. parties perceive to be sacred privileges or even rights under our own Rules.

Several different interpretations of the Convention have been adopted by the courts, and perhaps some other unarticulated possibilities exist. Thus, there are, at least, six possible approaches to utilization of Convention procedures. One approach, advocated by avowed internationalists, mandates exclusive resort to Convention procedures. The Convention is a treaty and these internationalists aver that treaties are the supreme law of the land. The second approach merely requires a first resort to the Convention processes which then may be ignored if necessary discovery is thwarted. The third and fourth interpretations hold, respectively, that the Convention is intended to apply only to non-U.S. discovery and that the Convention is applicable only to discovery from non-parties. The fifth available option asserts that the Federal Rules of Civil Procedure (Federal Rules) or state discovery rules are generally applicable, but that comity principles must be examined to determine whether an attempt should first be made to apply Convention procedures. The sixth approach dictates that our own discovery rules reign supreme and the Convention only provides an interesting option.

In 1987, the Supreme Court of the United States moved to resolve the interpretation question. The court considered whether sanctions can properly be imposed, under our Federal Rules, upon a foreign litigant from whom discovery was sought without utilizing procedures outlined in the Convention. This was the issue in *Aerospatiale*.<sup>2</sup>

## II. What Is This Convention?

Before discussing the options which were available to the Court in determining whether our local, state, or federal discovery rules are applicable in litigation taking us beyond our own borders and to what extent the Convention is to be employed, it must be determined, through an examination of the Convention, just what the Convention does and what was intended.

The Hague Evidence Convention,<sup>3</sup> a result of the Eleventh Ses-

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2. *Societe Nationale Industrielle Aerospatiale and Societe de Construction D'Avions De Tourism v. United States District Court For the Southern District of Iowa*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 2542 (1987) [hereinafter *Aerospatiale*].

3. See 28 U.S.C. § 1781 (1988 Supp.). The Hague Evidence Convention was opened for signature March 18, 1970 and became the law of the U.S. on October 7, 1972. Other signatories to the Convention include Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, Netherlands,

sion of the Hague Conference on Private International Law in 1968, represents a revision of part of previous Conventions, the 1954 Hague Convention on Civil Procedure and the 1905 Hague Convention.<sup>4</sup>

The purpose of developing a new Evidence Convention was:

[i]n broad outline, . . . to:

- (a) improve the previous system of Letters of Request;
- (b) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing, on a limited basis, the Anglo-American concept of a court-appointed commissioner;
- (c) preserve all existing more favorable and less restrictive practices resulting from internal law or practice, or from bilateral or multilateral conventions.<sup>5</sup>

The three part purpose of the Convention reflects a response to the growing conflict between the broad discovery processes of the United States and the more restrictive systems of other nations, particularly the civil law countries. It attempts to strike a balance between U.S. discovery methods and the sovereignty of other nations. The guiding principle behind the drafting of the Convention was that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the state of execution and must be 'utilizable' in the forum of the state of origin where the action is pending."<sup>6</sup> Thus, the primary motivating factor behind the Hague Evidence Convention was to bridge the gap behind the common law and civil law systems.

The Convention is divided into three Chapters. Chapter I addresses Letters of Request; Chapter II concerns the taking of evidence by diplomatic officers, consular agents, and commissioners, while Chapter III concludes with the general clauses of the Convention. The three Chapters composing the Convention contain 42 Articles. The Convention sets forth a comprehensive evidence-gathering scheme, as described in the following summary, Article by Article.

#### A. Chapter I

Chapter I sets forth the basic requirements for the use of Let-

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Norway, Portugal, Singapore, Spain, Sweden, and United Kingdom.

4. B. RISTAU, *Obtaining Evidence Abroad Under the Hague Convention On the Taking of Evidence Abroad in Civil or Commercial Matters of March 17, 1970 T.I.A.S. No. 7444, 23 U.S.T. 2555, International Litigation and Arbitration: Practical Approaches and Considerations*, in I ABA SECTION OF LITIGATION & ABA SECTION OF INT'L L. & PRAC, 85 (1987) [hereinafter RISTAU].

5. *Id.* at 86.

6. Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 9 I.L.M. 37 (1969).

ters of Requests. Article 1 provides for the obtaining of evidence or performance of other judicial acts, in civil or commercial matters, between Contracting States by a Letter of Request. Although the Article limits the scope to "civil or commercial matters," a phrase adopted from the 1905 and 1954 Conventions,<sup>7</sup> this phrase is left undefined by the Convention. The absence of a definition, leaving any arising disputes to be resolved through diplomatic channels,<sup>8</sup> presents a potential problem illustrative of the basic apples/oranges differences existing between signatory nations. For example, a wrongful death action, civil in nature in the U.S. or U.K., may well be deemed to be part of the criminal prosecution of the bad actor in some civil law countries.<sup>9</sup> Accordingly, civil law systems do not interpret "civil or commercial" as encompassing tax and administrative matters, while Egyptian law excludes matters of personal status (family relations matters and succession) from the term.<sup>10</sup> Moreover, although some States use the requesting State's determination of "civil or commercial," the majority of Convention members believe that the executing State's interpretation should prevail.<sup>11</sup>

Article 1 requires that the evidentiary request come from a judicial authority and calls for a judicial proceeding or "other judicial act." The Article defines this term negatively providing no definition of its scope.

Beyond definitional loopholes the Article is stated in permissive terms. Specifically, a judicial authority *may* make a request by Letters of Request. Proponents of the view that the Convention provides only optional procedures often point to this language, as opposed to the mandatory "shall" language of the other Articles<sup>12</sup> and other Hague Conventions,<sup>13</sup> as evidence that the Convention was not intended to be mandatory and exclusive. This reliance on the use of permissive terminology, however, is misplaced. The Convention pro-

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7. Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 On the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter U.S. Delegation Report], 17 I.L.M. 1417, 1418 (1978).

8. *Id.*

9. Code of Criminal Procedure (Italy), Arts. 511-523; see also G. Glos, *Comparative Law*, p. 444 (1979).

10. Report on the work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter Permanent Bureau Report], 17 I.L.M. 1425, 1426 (1978). See also, U.S. Delegation Report, *supra* note 7, at 1418. France and Germany have indicated (through delegate and observer) that they would be flexible when receiving foreign requests which, in their systems, would be considered administrative. *Id.* at 1419.

11. Permanent Bureau Report, *supra* note 10, at 1426.

12. For example:

Article 2: "... shall designate a Central Authority . . . ."

Article 3: "A Letter of Request shall specify . . . ."

Article 4: "A Letter of Request shall be in the language . . . ."

13. See, e.g., Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638.

vides for various methods of taking evidence; since Letters of Request are one of these methods, it is more plausible to interpret the permissive language as permitting the use of this method as opposed to the others set forth in the Convention. Interpreting this language as evidence that the Convention itself provides only an option, renders the Convention superfluous and certainly does not advance the intended aims of creating an internationally accepted discovery process.

Article 2 deals with the establishment of the Central Authority,<sup>14</sup> to receive and transmit the Letters of Requests. Article 3 enumerates the required contents for a Letter of Request.<sup>15</sup> The Special Commission on the Operation of the Convention of 18 March 1970 On the Taking of Evidence Abroad in Civil or Commercial Matters (Special Commission), at its meeting at The Hague held June 12-15, 1978, drafted a model form of the Letters.<sup>16</sup> Article 4 sets forth the language requirement for the Letters, including provisions for establishing the language to be used, the allocation of costs for noncompliance with this requirement, and the requisite certification of translations.

Article 5, 6, and 7, respectively, address the duty of the Central Authority if it believes the Letter does not comply with the Convention, the course to be followed if the authority to whom the request has been addressed is not competent to execute it, and the means of serving notice upon the requesting authority of the when and where of the proceeding so that parties and their representatives may be present.

Presence of judicial personnel of the requesting State at the execution of the Letter is discussed in Article 8. Article 9 stipulates the

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14. The Department of Justice is the named Central Authority for the United States. 28 C.F.R. § 0.49 (1983).

15. Specifically, Article 3 reads:

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

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

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

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

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

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

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

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

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

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

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

No legalization or other like formality may be required.

16. Model annexed to the Permanent Bureau Report, *supra* note 10, at 1436-1439.

methods and procedures which the executing State must apply. This Article also includes a provision requiring the executing State<sup>17</sup> to follow any specially requested procedures unless they are incompatible with its internal law or impossible to perform. Further, Article 9 calls for "expeditious" execution of Letters.<sup>18</sup> The reference to the impossibility of performance does not permit refusal based upon custom or tradition, but may arguably refer only to the situation where a statute expressly prohibits the requested procedure.

Article 10 mandates the procedures to be employed by the executing State, following its internal law to compel compliance with the request. Article 11 addresses the exercise and recognition of privileges and duties to refuse to give evidence. Such privileges and duties are recognized only if they are recognized in the executing State or in the requesting State.<sup>19</sup> If a privilege exists in the requesting State, confirmed by the proper authority of the requesting State. The Article further permits a State to recognize privileges and duties of States other than the requesting and executing States.

Article 12 explicates grounds for refusal to execute. These grounds are based upon a determination that execution is not a function of the judiciary in the executing State and that the sovereignty or security of the executing State would be impinged. Article 12 also provides grounds upon which execution may not be refused, namely, that the executing State claims exclusive subject matter jurisdiction or does not recognize the action in its jurisprudence. One author notes that the provisions of Article 12 must be read in conjunction with the further grounds for refusal covered by Article 5.<sup>20</sup> Article 13 concerns the return of the requested documents and partially executed requests. Finally, Article 14 discusses reimbursement of costs.

## B. Chapter II

Chapter II which includes Articles 15 to 22 sets forth the requirements for taking evidence by diplomatic officers, consular

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17. The executing state is the state of whom the request for assistance is made, the requested state.

18. Fortunately, the potential problem arising from an anticipated refusal to permit cross examination, for example, which presumably may be incompatible with the internal law of a civil law country, has not yet represented much difficulty when Convention procedures are followed. As evidenced in *Corning Glass Works v. I.T.T.*, No. 76-0144 (W.D. Va.) the German court did, in fact, permit cross examination by counsel even though such a procedure was unknown in the German system cited in C. Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States — A Practical Guide*, [hereinafter Platto], 16 INT'L LAW. 574 (1982). See *supra* Platto for a detailed discussion of discovery procedures utilized.

19. Reference is made, for example, to the extensive business secrets privilege existing on the continent, particularly in Germany and Switzerland. See Articles 162, 273, and 321, Swiss Penal Code of Dec. 21, 1932 Governing Business and Manufacturing Secrets, Economic Espionage, and Professional Secrets, and Article 47, Federal Banking Law of Nov. 8, 1934 Governing Banking Secrecy.

20. *Supra* note 4, at 103.

agents, and commissioners. Article 15 permits a diplomatic officer or consulate agent to take evidence from a national of his own State, in civil or commercial matters, within the foreign Contracting State where he or she is employed. Article 16 extends this permission to evidence sought from nationals of the State wherein the officers or agents exercise their functions or from nationals of a third State, with the permission of and under the conditions set forth by the State of Execution. This same authority has been extended to commissioners by Article 17.

Articles 15, 16 and 17 confirm that the taking of evidence thereunder is without compulsion. Article 15 allows a State to declare that permission must first be obtained from the state of execution before employment of this method of evidence gathering. On the other hand, Article 16 and 17 permit declarations that prior permission is not required. Like Article 1, Articles 15, 16 and 17 employ the permissive language "may." As was argued above, the use of this language emphasizes that optional methods are provided by the Convention itself. These three sections set forth alternatives to the procedure set forth in Article 1, the Letter of Request.<sup>21</sup>

Article 18 permits declaration by the States that the three types of agents described in Chapter II may apply to the authority for assistance in obtaining evidence. Powers granted to the authority permitting use of Article 15-18, provision for legal representation, and the specific rules governing the taking of evidence by these three agents are dealt with, respectively, in Article 19, 20, and 21. Article 22 asserts that a failure of the method set forth in this Chapter does not foreclose the employment of Chapter I methods. This provision, as well, adds weight to the argument that "may" in the Prologue is necessary to point out that options within the Convention exist.<sup>22</sup>

### C. Chapter III

Chapter III sets out general clauses regulating the use of the Convention. Article 23, one of the Convention's most controversial provisions, allows a Contracting State to declare that it will not "execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries."<sup>23</sup> All Convention countries except the U.S., Barbados, Cyprus, Israel, and Czechoslovakia have registered an Article 23 declaration.<sup>24</sup> The limitation or opt-out provision of Article 23 refers only to documents and not to other forms of pretrial discovery. Although many opponents of

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21. Charter II of the Hague Evidence Convention.

22. See *supra* note 13 and accompanying text.

23. Article 23 of the Hague Evidence Convention.

24. 28 U.S.C. § 1781 (1988 Supp.).



the exclusive or mandatory view of the Convention look to Article 23 as evidence of its optional status, it is clear that this Article has been grossly misunderstood. The provision was included at the request of the United Kingdom to limit requests for documents which lack specificity, for example "produce all other documents" or "state all relevant documents."<sup>25</sup>

When the Article 23 issue was discussed at the meeting of the Special Commission, it became clear that a misunderstanding had ensued from poor drafting.<sup>26</sup> The States which invoked the Article 23 option apparently believed that "pre-trial discovery" permitted American litigants to employ discovery procedures prior to instituting an action, to see if any information might be gathered which could then form the basis of a suit;<sup>27</sup> the option was not invoked as a blanket refusal to comply with any U.S. requests prior to the time of trial.<sup>28</sup> After clarification, these States agreed to rethink their Article 23 restrictions.<sup>29</sup> Finland, Norway, Denmark, Sweden, and the Netherlands have already modified their opt-out declaration, joining the United Kingdom, to permit pretrial discovery of specifically designated documents as opposed to "all or other documents."<sup>30</sup>

Article 24 permits the designation of authorities as a receiving body, other than the Central Authority, permitting more than one Central Authority in Federal States. Article 25 concerns the designation of authorities for States with more than one legal system. Reimbursement of costs in special constitutional situations is addressed in Article 26. Article 27 enables a Convention State to permit other, less restrictive methods and procedures for evidence gathering than those set forth in the Convention. It is submitted that this Article has been misconstrued by those suggesting that the Convention is merely optional. Such a reading renders the entire Convention superfluous. Article 27 is obviously directed at civil law countries, permitting them to move even closer to U.S. broad evidence gathering methods if they choose. At the meeting of the Special Commission, in 1978, it was noted that no State had invoked Article 27 options,<sup>31</sup> and to date no significant declaration has been made.<sup>32</sup>

Article 28 enumerates those provisions of the Convention which can be modified by agreement between contracting states. Provisions concerning States which are members of previous Hague Conven-

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25. See *supra* note 10, at 1427-1428.

26. *Id.*

27. See *supra* note 7, at 1421.

28. See *supra* note 10, at 1428.

29. See *supra* note 7, at 1424; *supra* note 10, at 1428.

30. 28 U.S.C. § 1781 (1988 Supp.).

31. See *supra* note 10, at 1433.

32. 28 U.S.C. § 1781 (1988 Supp.).

tions on Civil Procedure are found in Articles 29, 30, 31, and 32. Article 33 explains reservations and Article 34 concerns declarations. Article 35 provides that designations, declarations, and reservations be filed with the Ministry of Foreign Affairs of the Netherlands. Settlement of Convention conflicts by diplomatic channels is mandated by Article 36. Ratification, effective dates, accession to the Convention, extension of the Convention to territories of the States, duration, denunciation, tacit renewal of the Convention, and notices given by the Ministry of Foreign Affairs of the Netherlands to the States are addressed in Articles 37, 38, 39, 40, 41, and 42, respectively.

In summary, the Hague Evidence Convention sets out procedures, replete with available options, governing the taking of evidence in foreign Contracting States. The Convention goal of providing evidence to litigants in the requesting State while minimizing the interference with evidence and procedural rules of the executing State was reached by striking a balancing between the broad U.S. methods and the narrower civil law procedures.

Although with this compromise the Convention effectively bridged the common law/civil law procedural gap, resort to the Convention on only an optional basis widens the jurisprudential chasm. Those who assert that the convention is optional and supplemental, as opposed to mandatory and exclusive, point to the Convention's permissive language, used in Articles 1, 15, 16, and 17, as support for their position. Drawing the conclusion that the Convention is optional, merely because permissive words are used, however, seems specious at best, as the Convention provides for various methods of taking evidence. The permissive language is better interpreted to refer to the option of using one of these methods provided as opposed to using the others.

### III. A Closer Look at the Options

Six different interpretations of the Convention have been postulated, governing the relationship of the Convention to the internal evidence rules of U.S. jurisdictions. Most of these interpretations were considered in the *Aerospatiale* decision. Each will be addressed at length.

#### A. *Treaty Supreme*

As previously noted, it may be contended that the procedures established by the Convention are permissive. This contention, however, renders the entire exercise in meeting, compromising, drafting, and adopting the Convention procedures meaningless. To promulgate a treaty or Convention which the parties may or may not recognize

or apply seem to be a useless act. A more reasonable interpretation of the "may" language is that pointed out by Professor Bishop.<sup>33</sup>

Bishop argues that although the Convention does not expressly state that it was intended to be exclusive, neither does it indicate that it was not to be exclusive. The permissive language of the Convention (the use of the word "may") reflects the choice available to litigants to utilize one of the three alternate methods of obtaining evidence provided in the Convention. Bishop submits that the comprehensiveness of the Convention and the provisions allowing countries to agree among themselves to other procedures (which would be unnecessary if the Convention were entirely permissive) is further evidence of the intended exclusiveness of the Convention. He astutely observes that interpretations by other countries and the original interpretation espoused in the first of three U.S. agency amicus briefs support the position that the Convention was intended to be exclusive.

Certainly the Convention and its discovery procedures would be supreme when juxtaposed with state discovery laws. The second paragraph of Article VI of the Constitution of the United States provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, the Constitution of the United States dictates that the Convention should certainly prevail over inconsistent provisions of state statutes. "... [T]he treaty making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments . . . ."<sup>34</sup>

It is unnecessary to review the debate that exists as to whether the supremacy clause of the Constitution was intended to grant treaties supremacy over federal law or whether the two were deemed to be on the same footing, as even under the latter interpretation the Hague Convention would supersede any conflicting provisions of the

33. Bishop, *Significant Issues in the Construction of the Hague Evidence Convention*, 1 INT'L LITIGATION Q. 2 (1985).

34. Neilson v. Johnson, 279 U.S. 47 (1929). See also U.S. v. Rauscher, 119 U.S. 407 (1886); Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554 (5th Cir. 1946), cert. den. 331 U.S. 808 (1947), reh'g. den. 331 U.S. 867 (1947); Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981); Holguin v. Elephant Butte Irrigation District, 91 N.M. 398, 575 P.2d 88 (1977); and Ex Parte Volkswagenwerk Aktiengesellschaft, 443 So.2d 880 (Ala. 1983).

Federal Rules of Civil Procedure. This result is dictated by the "last in time" doctrine, described long ago in *The Cherokee Tobacco* dictates the following result:

The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty.<sup>35</sup>

This doctrine has been applied regularly since that date.<sup>36</sup> Conflicting provisions of Federal Rules of Civil Procedures concerning the scope of discovery and sanctions for failure of compliance predate the effective date of the Hague Convention.

Other commentators also assert that the Hague discovery Convention is the exclusive means governing international procedure abroad. They concur with the Bishop position that the permissive language simply grants to signatories permission to use letters of request to obtain discovery as opposed to the alternative procedures provided by the Convention.<sup>37</sup>

### *B. Hague First*

The second interpretive option available requires that the Hague Convention be employed first in all instances. According to this interpretation, should that course be ineffective, a litigant would then be free to resort to procedures under the Federal Rules of Civil Procedure.

Several United States courts which considered the issue prior to the *Aerospatiale* decision have adopted this position. The California court in *Volkswagenwerk Aktiengesellschaft v. Superior Court*<sup>38</sup> modified its earlier position taken in *Volkswagenwerk Aktiengesellschaft v. Superior Court*.<sup>39</sup> The court carefully balanced the interests of the litigants with the sensitivities of the West German authorities. In *Volkswagenwerk*, inspection of premises and documents was requested, as well as interviews and depositions of persons in Ger-

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35. 11 Wall. 616, 624, 78 U.S. 616 (1870).

36. See, e.g., *Edye v. Robertson*, 112 U.S. 580 (1884); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Travelers Insurance Co. v. Panama-Williams, Inc.*, 597 F.2d 702 (10th Cir. 1979); *U.S. v. Crittenden*, 600 F.2d 478 (5th Cir. 1979) ("... we see no reason why we should not apply the most basic principle of statutory interpretation, (not to mention, of leap-frog itself). That principle, of course, is that the last leap wins.").

37. See, e.g., McLean, *The Hague Evidence Convention: Its Impact On American Civil Procedure*, 9 LOY L.A. INT'L & COMP. L.J. 17 (1986). McLean also argues effectively that the trend in our courts to hold that the Convention is merely permissive or optional will ultimately be detrimental to the United States in international relations.

38. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App.3d 840, 176 Cal. Rptr. 874 (1981).

39. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App.3d 503, 109 Cal. Rptr. 219 (1973).

many. In holding that first resort must be taken to Hague procedures, the court stated:

We regard our conclusion as an exercise in judicial self-restraint designed to serve what we regard as important international goals. We could perhaps read the Hague Convention broadly as a preemptive and exclusive rule of international evidence-gathering, binding upon us as the supreme law of the land under section 2 of article VI of the Federal Constitution. But we prefer to believe that the Hague Convention establishes not a fixed rule but rather a minimum measure of international cooperation; a reading of Article 27 of the Convention encourages us to conclude that this is indeed what the ratifying states intend.<sup>40</sup>

The California court applied the same principles in *Pierburg GmbH & Co. KG v. Superior Court*,<sup>41</sup> wherein a plaintiff served 315 interrogatories, exclusive of subparts, upon the defendant, a West German corporation, without using Hague procedures. The court observed that "[t]he foundation of the Convention is to avoid international friction where a domestic state court orders civil discovery to be conducted within the territory of a civil law nation that views such unilateral conduct as an intrusion upon its judicial sovereignty."<sup>42</sup> The court indicated that the United States was bound by the Convention as the supreme law of its land, and that judges are bound thereby as well. Hence, plaintiffs, therefore, were required to use the Convention first to obtain answers, seeking the cooperation and advice of West German attorneys and officials.

The *Philadelphia Gear* case,<sup>43</sup> in the Eastern District of Pennsylvania, likewise considered the Hague Convention the avenue of first resort. The court determined that it was not for the forum court to supplement the Hague rules and that first use of the Hague Convention was required. Thus, the plaintiff's motion to compel a West German corporate defendant to answer interrogatories and produce documents was denied. To the same effect was the *Eickhoff* decision<sup>44</sup> in which a West German corporation, through its American subsidiary, successfully terminated pretrial discovery.

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40. Volkswagenwerk, 176 Cal. Rptr. at 885-86.

41. *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App.3d 238, 186 Cal. Rptr. 876 (1982).

42. *Id.* at 881.

43. *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983).

44. *Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d 492 (W. Va. 1985). Application of a first resort requirement is also evidenced in *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984) and *T.H. Goldschmidt, A.G. v. Smith*, 676 S.W.2d 443 (Tx. App. 1 Dist. 1984).

### C. *Hague Intended for Non-U.S. Discovery*

The third option involves a determination that the intention of Hague was to limit its application to discovery of evidence which is outside the forum country. In other words, the Federal Rules could apply to the gathering of evidence which would occur within the United States, but Hague would govern depositions and documents sought beyond our territory. Some aspects of the *Messerschmitt* case<sup>45</sup> suggest this as a solution.

The *Messerschmitt* court determined that the Hague Convention did not apply to persons over whom the court had jurisdiction or to discovery which could occur in the United States. Accordingly, U.S. courts would not directly impose upon, for example, Germany or the German judicial system and the protection Germany seeks to provide its own nationals through its own internal procedural safeguards, when the objects of discovery are located in the United States. The court indicated that it would be patently unfair to permit a German defendant to take depositions here and to forbid the plaintiff to depose the German nationals who are located in the United States. The court conceded that taking deposition abroad raised another question.

The magistrate who originally considered the discovery requests in the *Aerospatiale* case in the U.S. District Court in Iowa concluded that the interests of the United States were stronger than those of France, particularly because compliance with the request for discovery would not have to take place in France. This concept of territory and the relationship of jurisdiction to territory is a well recognized American principle, in the *Pennoyer v. Neff*<sup>46</sup> vein.

This option has indeed a built-in problem. For the American courts to adopt such a position, a document drain away from this country to foreign climes could be expected in anticipation that our Federal Rules of Civil Procedure and attendant sanctions for non-compliance could not follow those documents.

### D. *Hague for Non-Party Discovery*

A fourth option, and one which seemingly has some merit on its face, is to interpret the Hague Convention as not being applicable to parties over whom the court has jurisdiction.<sup>47</sup> On the surface, this approach certainly seems fair when one merely seeks to impose upon

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45. *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985).

46. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 5765 (1877).

47. See D. MCINERNEY, *Effect of the Hague Evidence Convention on Federal and State Discovery Procedures*, FORDHAM CORP. L. INST. 353 (Chapter 17), wherein the author maintains with some force that the Convention procedures are mandatory only when dealing with a foreign non-party over whom the court has no jurisdiction.

foreign plaintiffs who utilize our courts the obligation to submit themselves to the rules applicable to proceedings in our courts. The issue becomes somewhat less clear, however, when the rules are imposed upon a defendant who is involuntarily summoned into an American court.

An argument popular with American plaintiffs is that a foreign corporation or person who elects to have such contacts with the United States which would enable them to do business, to make a profit, or enjoy the benefits of this country also subjects itself to the procedural rules of our court system when subject to litigation here. With the benefits of the American economy and free enterprise system come the liabilities or obligations attendant upon those rights.

One response to this argument is that the American concept of long-arm jurisdiction also differs from that concept in Europe, in the same fashion in which evidence and discovery rules differ. Few European jurisdictions "enjoy" the liberality of the minimum contacts rules of the U.S. Most civil law countries have no *International Shoe* concept and are often surprised by the perceived presumptuousness of our courts in reaching outside their borders to obtain jurisdiction over foreign nationals.

This option, which limits the Hague Convention to discovery of non-party witnesses and documents, is a popular one. The U.S. Circuit Court of Appeals for the Eighth Circuit in the *Aerospatiale* case held that "[w]hen the district court has jurisdiction over a foreign litigant, the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention."<sup>48</sup> This rationale is espoused in the Fifth Circuit *Anscheutz* case,<sup>49</sup> where the court held that where in personam jurisdiction has been obtained the Federal Rules would be applicable to that defendant. Likewise, the *Lasky* case,<sup>50</sup> in the Eastern District of Pennsylvania, likewise stands for the proposition that the Hague Convention was permissive in nature, and the Federal Rules applies where the court had jurisdiction over the party from whom discovery was sought. Though that court did give some lip service to principles of comity, it suggested that plaintiffs should not be delayed when it is apparent that the country where discovery is sought is unlikely to honor a pretrial discovery letter of request.

The counter-argument often made is that even if foreign businesses are subject to American courts and laws, the Hague Conven-

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48. *Aerospatiale*, 782 F.2d 120, 124 (8th Cir. 1986).

49. *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985).

50. *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

tion is part of U.S. law. Thus, should application of Convention procedures be detrimental to a U.S. citizen, but beneficial to the U.S., through its treaty makers and Senate, elected to make the Convention the law, to the benefit of international relations, and, as part of a national diplomatic policy, the Convention must be applied in our court system. This circuitous argument begs the question by assuming an intention to apply the Convention exclusively in such circumstances in the first place, which is the issue to be resolved.

*E. Federal Rules Apply but Comity Principles must be Applied to Determine Whether Resort to Hague is First Required*

Perhaps the *Laskey* case, as well as *Laker Airways Ltd.*,<sup>51</sup> more properly could be considered to fall within the fifth option, which we will find to be the one the Supreme Court adopted in *Aerospatiale*. Under this analysis, the Federal Rules are deemed applicable to litigation in the United States, but the court must first look to comity principles and apply a balancing test to determine whether there should be in fact a first resort to the Hague Convention.

The problem with the high-sounding application of comity principles is that we are left with uncertainty and an absence of the bright line that lawyers, and particularly persons in business, hope to find in determining rights and obligations. Mr. Justice Gray, in his 66 page opinion in *Hilton v. Guyot*,<sup>52</sup> analyzed the principle of comity as it relates to the enforcement of foreign judgments. Justice Gray in quoting Mr. Justice Porter of the Supreme Court of Louisiana, observed that

. . . comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; . . . that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court which decides, will prefer the laws of its own country to that of a stranger.<sup>53</sup>

A second observation by Professors Bernhard Grossfeld and C. Paul Rogers, in their article *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*,<sup>54</sup> is apt, albeit related to jurisdictional issues in an antitrust context:

Further, an approach which requires an American judge to trade off foreign interests with United States interests in a suit in which the plaintiff is typically American and the defendant

51. *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984).

52. *Hilton v. Guyot*, 159 U.S. 113 (1895).

53. *Id.* at 164-165.

54. 32 INT'L & COMP. L. Q. 931 (1983).



typically foreign is inherently suspect . . . . Then one is bound to view the foreign interests in the confines of his or her own legal system, resulting in a distorted perception of a foreign interest.<sup>55</sup>

Comity has been part of international law, expressly or implicitly, since its beginning. No bright line here. No blacks and whites. The principle is gray and often criticized. Comity is neither a matter of absolute obligation on one hand nor of mere courtesy or good will on the other. Simply stated, comity is a recognition that one nation gives in its territory to the acts of a sister nation having due regard both to international duty and convenience as well as to the rights of its own citizens and other persons under the protection of its laws.<sup>56</sup>

#### *F. Federal Rules Supreme (When in Rome)*

The sixth option available is perhaps the most radical. Its premise that the Federal Rules are in fact supreme has been summarily rejected. Such a view carries to the limit the concept that the Hague Convention is permissive and merely affords parties an option which they may or may not wish to utilize. The Federal Rules of Civil Procedure control, as would state procedure in a state court case.

The *Laker* case perhaps comes closest to articulating that view. It held suggesting that the Federal Rules apply in our federal courts. The court stressed that the Hague Convention was not designed to inhibit the gathering of evidence, but only to increase possibilities and options.<sup>57</sup> To suggest, however, that a treaty of the U.S., promulgated to provide an international procedure for evidence gathering, can be totally ignored and deemed inapplicable by a court in this country or elsewhere is totally without reason. This is particularly true when the Convention itself provides a specific procedure for opting out of certain of its provisions.<sup>58</sup>

#### *IV. Aerospatiale in Brief*

In *Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourism v. United States District Court For the Southern District of Iowa*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 2542

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55. *Id.* at 936.

56. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

57. In an excellent study, see Axel Heck *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231 (1986), analyzes the Convention beginning with the premise that the concept of discovery is alien to most other legal systems and reminding us that the Convention concept was initiated by the United States. Mr. Heck asserts that United States courts have actually breached international obligations established by the treaty in their insistence that they retain jurisdiction imposing sanction of the Federal Rules upon foreign nationals.

58. A Rallye is a type of short takeoff and landing (STOL) aircraft.

(1987) [hereinafter *Aerospatiale*], the Supreme Court of the United States addresses head-on the question of whether the Convention provides an exclusive, mandatory procedure for taking evidence abroad, or is applicable only under certain circumstances, or is merely an available option. The case arose from the crash, on August 19, 1980, of a Rallye<sup>59</sup> airplane, manufactured by the defendants. The crash occurred in Iowa. The plaintiffs instituted suit in the United States District Court for the Southern District of Iowa against Societe Nationale Industrielle Aerospatiale, a corporation which is wholly owned by the Government of France, and Societe de Construction d'Avions de Tourism, a wholly owned subsidiary of Societe Nationale Industrielle Aerospatiale.

The defendants complied with initial discovery requests under the Federal Rules of Civil Procedure to the extent that the information sought and furnished was located in the United States. Upon subsequent discovery requests, however, the defendants moved for a protective order, asserting that the Hague Evidence Convention provided the exclusive means for obtaining such discovery and further asserted that a French blocking statute<sup>60</sup> proscribed their compliance with the requests. The Magistrate denied the defendants' motion directed at answering interrogatories, producing documents, and making admissions which could be accomplished in the U.S. Denial was based on the ground that requiring resort to the Hague Evidence Convention for discovery in the U.S. would contravene United States' interests in protecting its citizens. (Option 3). The Magistrate granted the order requested as to oral depositions taken in France. He further decided that the blocking statute was not a factor since it was undetermined whether the statute would be applied to these discovery requests. The magistrate also concluded that United States' interests outweighed French interests.

The Court of Appeals for the Eighth Circuit<sup>61</sup> denied the defendants' petition for a writ of mandamus, holding that the Hague Evidence Convention applies to obtaining evidence from nonparties, but is not applicable to discovery requests from a foreign party properly subject to the court's jurisdiction. (Option 4). The court rejected

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59. French Penal Code Law No. 80-538. As the Supreme Court reported, in footnote 6 to the Majority Opinion, Article 1A of this so-called blocking statute provides, in pertinent part:

Subject to treaties or international agreements . . . it is prohibited for any party to request, seek, or disclose . . . documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

60. 782 F.2d 120 (8th Cir. 1986).

61. A first resort approach requires that the Hague Evidence Convention be employed in the first instance; if this approach proves unsuccessful, discovery may then proceed pursuant to the broader discovery rules of the Federal Rules of Civil Procedure.

a "first resort" approach,<sup>62</sup> based on international comity, and noted that existence of the blocking statute is relevant when considering the propriety of the discovery order and the imposition of sanctions for noncompliance.

The Supreme Court of the United States, in a five to four decision,<sup>63</sup> vacated the Eighth Circuit's decision and remanded. The Court held that although the Hague Evidence Convention is not exclusive or mandatory, the Court of Appeals was incorrect in suggesting that it is not even applicable to a foreign party subject to the court's jurisdiction. The Court further held that principles of comity must be utilized, but that the first resort approach is not required. Justice Blackmun, although concurring with the Majority's rejection of the extreme views, endorses a first resort approach.

To determine whether Convention procedures must be followed, the Court mandates a case by case analysis applying principles of comity. The comity analysis of the Restatement of Foreign Relations Law of the United States, recognized by the Court in footnote 28 to the Majority opinion in the *Aerospatiale* case suggests the following factors to be relevant in any comity analysis:

- (1) The importance to the . . . litigation of the documents or other information requested;
- (2) The degree of specificity of the request;
- (3) Whether the information originated in the United States;
- (4) The availability of alternative means of securing the information;
- (5) The extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine important interests of the state where the information is located.<sup>64</sup>

European scholars have expressed great disappointment in the *Aerospatiale* result. Professor Nicolo Trocker of the University of Siena and the University of Florence Law Schools, for example, has expressed a typical European flabbergastation. Trocker cannot understand that courts, particularly at the trial level, can be given the apparent power to apply or not apply provisions of a treaty sought first by the U.S. and designed to effect a compromise between the

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62. Joining Justice Stevens in the opinion of the Court were Chief Justice Rehnquist and Justices White, Powell, and Scalia. Joining Justice Blackmun, concurring in part and dissenting in part, were Justices Brennan, Marshall, and O'Connor.

63. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tent. Draft No. 7, 1986), as cited by the Court in footnote 28 to the Majority Opinion.

64. Lecture by Professor Nicolo Trocker "Transnational and Comparative Civil Litigation" at the University of Florence, Florence Italy (June 1987).

discovery system unique to the United States and the totally different concept of evidence taking prevalent in Europe, particularly on the continent.<sup>65</sup>

## V. Litigation in the Civil Law Court

To understand the position of Professor Trocker and the other European critics of the *Aerospatiale* decision, one must remind oneself that the civil trial outside the common law system varies greatly from ours. The lawyer in civil litigation serves a much different function on the continent of Europe than a courtroom lawyer serves in the United States. The role of the judge differs as well.

### A. *Pretrial Discovery*

Pretrial discovery in civil law countries in any formal sense is almost unknown. Pretrial taking of evidence by attorneys for the purpose of discovering relevant evidence or materials which could lead to relevant evidence is generally not permitted. Even in the common law motherland, the United Kingdom, blanket pretrial requests for documents, for instance, are not honored. No matter which of the available procedures are used to obtain the assistance of a British court in securing documents in Britain, the most certain way to guarantee refusal of a court to assist is to request "all documents relating to . . ." or "any other . . ." Assistance will, however, be given by British courts when specific requests are made for specific documents held by specific persons.<sup>66</sup>

Privileges protecting documents from discovery and subpoena are considerably broader in many European countries than in the U.S. West Germany in particular is extremely protective of business secrets and records.<sup>67</sup> The privacy of business documents and individuals is at the heart of some of these continental legal systems, particularly that of Germany, perhaps as a result of political experiences of the past. There is a lurking fear of state totalitarianism. The protection of individual documents as well as evidence to be given by individuals tends to offset the traditional role of the state in gathering evidence.

### B. *Duty of Securing Evidence*

In civil law countries it is the rule that the state, rather than

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65. See *supra* note 4, at 86.

66. "During the course of examination we were met with one major obstacle, which was the German business secret privilege . . . but the witnesses ultimately testified fully once assured that they could stop whenever they wished." Platto, *supra* note 18, at 584-5.

67. B. Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960).

private counsel, has the evidence-gathering function through its judiciary.<sup>68</sup> Kaplan mentions that Germans apply the principle of *jure novit curia* — the court knows without help from counsel and “lawyer participation is likely to be meager.”<sup>69</sup>

In a civil trial on the continent, evidence is taken by the judge. Logical relevance and the absence of an applicable privilege are generally the only criteria for admission of evidence. The judge conducts the examination of witnesses in an inquisitorial style as opposed to use of the adversary system as is employed in this country. It is the role of the court, not counsel, to obtain evidence. Counsel may only offer some guidance and some subtle suggestions.<sup>70</sup>

The civil trial on the continent is also episodic in nature. In one aspect it appears to be one long segmented pretrial conference with the judge wielding the net searching for sources of proof. Misunderstanding by a jury is of no concern because of the absence of juries in most civil trials. Evidence is not even a separate topic in the law or in law schools. Instead, it falls within the ambit of civil procedure.<sup>71</sup>

### C. *Secrecy Laws*

Banking secrecy laws in Switzerland prevent access to documents which would be easily accessible in this country. Many civil actions brought before a U.S. court by agencies such as the Securities Exchange Commission, Internal Revenue Service, and the like, would be regarded in Switzerland as administrative matters for which no legal assistance is available.<sup>72</sup> The Swiss also include in their penal code provisions protection for business and manufacturing secrets, much as the West Germans do.<sup>73</sup> Violation of the so-called secrecy laws can subject the violator to criminal prosecution. Swiss law prohibits the production of documents other than through a request for intergovernmental assistance.<sup>74</sup> Anyone attempting to

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68. See *supra* note 66.

69. See *supra* note 63. Professor Trocker refers to the implicit “three question rule” which suggests that a lawyer might suggest to the court three questions that the court could ask of witnesses. Any more than three and the court often takes offense.

70. As of our exclusionary rules dwindle, particularly under the new Federal Rules of Evidence approach in the United States, are we not indeed growing closer to the continental model? Perhaps the Europeans are also approaching us. In *Corning Glass Works v. I.T.T.*, *supra* note 18, the German judges permitted our lawyers to participate in cross examination, an anomaly in the German civil trial.

71. J. Schwarz, *A View From Abroad—Obtaining Evidence In Switzerland, International Litigation and Arbitration: Practical Approaches and Considerations*, in II ABA SECTION OF LITIGATION & ABA SECTION OF INT’L L. & PRAC. 61 (1987).

72. See *supra* note 19.

73. *Id.*

74. See, e.g., France: Commercial Documents Act 1968-80, and Decree No. 81-550 of 12 May 1981, Concerning the Transmission of Documents or Information of an Economic, Commercial or Technical Nature to Foreign Individuals or Legal Persons; United Kingdom:

take evidence on Swiss territory in violation of requirements is subject to imprisonment. Because of the extensive secrecy laws in Switzerland, Germany and other civil law countries and the fact that the court — the judge — is an arm of the state which is charged with the duty of taking evidence, an invasion of these state prerogatives constitutes, in the minds of Europeans, an offense to the sovereignty of the nation.

#### *D. Blocking Statutes*

Because it is a matter of sovereignty and because of the seriousness of the invasion by American litigants, many European countries have enacted so-called blocking statutes.<sup>75</sup> Blocking statutes, in effect, prevent a national of the enacting country from producing documents or giving evidence when sought by American litigants under American discovery rules. The enactment of the blocking statutes has oft been used as argument by those advocating a firm enforcement of sanctions under our own discovery rules in response to the European blocking efforts. This argument fails upon close examination of the offending foreign statutes. Blocking is dictated by these laws only when Hague Convention procedures are not used. The purpose of the statutes, therefore, is obviously not to frustrate American litigants in their effort to obtain information, but rather to force American litigants to follow the procedures to which they have ascribed by ratification of the Convention. Further, these statutes demonstrate a commitment of nations, which in their internal jurisprudence lack discovery concepts, to permit discovery despite their own reluctance when Hague procedures are followed. Rather than evidencing a total opposition to American-style discovery, these statutes are a recognition by other signatory states of the compromise position dictated by the Convention and of its mandatory nature.

Thus, the offense to our fellow signatories by U.S. failure to follow the Hague procedures is not simply based upon their perception that Americans have chosen to ignore an international agreement to which they are a party. But more importantly, also because in so doing the U.S. is also committing — and continuing to commit — an offense against their national sovereignty.

#### *VI. Reasoning of *Aerospatiale**

In reaching its conclusion that Federal Rules can be used after balancing interests under comity principles, the Supreme Court relies heavily on the text of the Hague Evidence Convention. Immedi-

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c.34 Evidence (Proceedings in Other Jurisdictions) Act 1975.

75. — U.S. —, —, 107 S. Ct. 2542, 2550.

ately, Court notes the relationship between the Federal Rules of Civil Procedure and the Hague Evidence Convention:

First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures . . . . Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.<sup>76</sup>

The Court promptly rejects its own first and second options since they are not supported by the text or the history of the Convention. The Court first notes the absence of mandatory language in the Preamble, in contradistinction to the Hague Service Convention<sup>77</sup> which was drafted prior to the Hague Evidence Convention, and the absence of any mandatory, exclusive, or limiting language within the text of the Convention itself. The Court highlights to the permissive language, employed in Chapters I and II of the Convention, as further support of its conclusion that the Convention is optional. Additionally, the Court asserts that Article 23, permitting a declaration by a Convention State that it will not execute a letter of request for purposes of pretrial document discovery, and Article 27, allowing Convention States to employ broader procedures than those set forth in the Convention, also support this conclusion. The Court fails to note that a conclusion that Convention procedures were only optional would render Article 27 totally superfluous.

The Court mentions other factors in the footnotes which are deemed to belie the mandatory nature of the Convention. These are the position of the United States Government, excerpts from Amram's Report, and three "insurmountable" asymmetries which the Court believed result from a holding of exclusivity, namely an

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76. 20 U.S.T. 361, T.I.A.S. No. 6638.

77. See \_\_\_\_\_ U.S. \_\_\_\_\_, \_\_\_\_\_, 107 S. Ct. 2542, 2555 (footnote omitted) (1987). Interestingly, though, the Court did not consider the country's overriding interest in maintaining harmonious international relations.

The practicing bar seems to disagree with the Court's contention here, though. Robert F. Brodegaard, a member of Weil, Gotshal and Manges in New York City, notes that one of the advantages in utilizing Convention procedures is its time-saving features, reducing discovery-gathering time from years to a few months. *Victory Abroad: A Guide to Foreign Discovery*, 14 LITIGATION 27, 29 (Winter 1988).

advantage to a foreign party who can proceed with discovery via the Federal Rules, a competitive advantage to foreign companies, and an advantage to some American parties depending on whether the opposing foreign party is a national of a contracting State.

The Court also employs the text of the Convention when it concludes that the Court of Appeals was incorrect in holding that the Convention was not applicable to foreign parties subject to the court's jurisdiction. The Supreme Court correctly observed that the Convention itself does not distinguish parties from nonparties or evidence within the control of a party in the forum country from evidence abroad. Thus, although it is not exclusive, the Court held that the Convention is applicable in the sense that it is an option to which a party may resort.

Conceding that the Convention is a viable option, the Court declines to adopt a first resort rule. The rationale for this conclusion seems to be an unsupported assertion that the Convention procedures would frequently be "unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules . . . [and] therefore inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts."<sup>78</sup> Although the Court states that it did not believe that foreign States would be offended by a first resort approach, knowing that refusal by an executing state could result in a subsequent overriding of that decision by discovery ordered by U.S. courts under the Federal Rules, it nonetheless held that the first resort approach is not required as a matter of comity since the language of the Convention does not so mandate.

The application, on a case by case basis, of a spongy comity criterion will hardly encourage certainly in the law. Additionally, the lower court, as part of the balancing process, is required by the *Aerospatiale* decision to "supervise closely" discovery procedures in order to determine the intrusiveness or reasonableness and the inappropriateness or appropriateness of Convention use as opposed to the Federal Rules application of each device employed. This will burden the court by requiring it to endure much costly and arbitrary decision making.

Thus, the Court concluded that the Hague Evidence Convention is not exclusive, that the Convention nonetheless does apply to foreign parties properly subject to an American court's jurisdiction, and that a first resort approach is not required. In so holding, the Court admonished that such discovery must be supervised with diligence and care. Specific guidelines for the lower courts, however, were not

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78. — U.S. —, —, n.4, 107 S. Ct. 2542, 2555 (citations omitted).



enumerated.

## VII. Reasoning of Blackmun Dissent.

In his separate opinion, Justice Blackmun agrees with the Majority's conclusions that the Hague Evidence Convention is applicable to foreign parties properly subject to the court's jurisdiction, such as the case here, and that the Convention does not provide the exclusive means for obtaining evidence abroad. He disagreed, however, with the Court's rejection of the first resort approach and its advocating a case-by-case analysis for which it provided little guidance.

Blackmun suggested that the Convention is in the United States' best interest, despite the restraint on commonly used discovery techniques, by opening up previously unavailable avenues for discovery and by promoting international harmony. He noted that the concessions made by the other Convention countries, particularly the civil law nations, in tolerating broader, foreign discovery methods makes it clear that the signatory countries expected first resort by the United States.

Blackmun criticizes the Court's leaving lower courts the option to require or not require use of the Convention, as such decision is a "political determination," better left to the executive or legislative branches. Not only are courts inexperienced in considering the interests of foreign nations, but they are liable to be subject to a "pro-forum bias." In a footnote, the Justice declared:

[o]ne of the ways that a pro-forum bias has manifested itself is in United States courts' preoccupation with their own power to issue discovery orders. All too often courts have regarded the Convention as some kind of threat to their jurisdiction and have rejected use of the treaty procedures . . . . There is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective. ". . . [C]ourts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests."<sup>79</sup>

Blackmun also differs with the Majority in its view that comity concerns dictate inquiry on a case-by-case basis. The Justice offers a three prong comity analysis. The interests of the foreign State, the interests of the United States, and the interests of all nations in maintaining a harmonious international legal system. Blackmun explains how the Majority erred in its analysis of these.

First, the Majority failed to grasp the extent to which U.S. ordered discovery violates the sovereignty of foreign nations. Blackmun

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79. \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 107 S. Ct. 2542, 2565.

noted the change of the Government's position concerning this foreign sovereignty, as revealed in various *amicus* briefs filed on its behalf. Convention procedures were agreed to by the signatory States and permit discovery under those procedures without a violation of sovereignty.

Second, two of the United States' interests are effectuating discovery for parties subject to the jurisdiction of its courts and fair and equal treatment to all parties. Blackmun states the Majority erred when considering the first interest, offering no support for its assertion that Convention procedures are too time consuming, expensive, and futile. He counters that the opposite appears to be true, by reasoning that discovery under the Federal Rules can be slow and expensive, and, in any event, that "saving time and money is not such a high priority in discovery that some additional burden cannot be tolerated in the interests of international goodwill."<sup>80</sup> He also indicates how the problematic Article 23 argument really results from misunderstanding. To some extent, this has been rectified by the nations invoking it. Additionally, Blackmun noted how the problem with the French blocking statute dissipates with resort to the Convention, since the law includes an exception for discovery under international agreements.

The Majority erred in addressing the second interest, fair and equal treatment to parties. The perceived discovery and economic advantages to the foreign party can be controlled by the court supervising the discovery to ensure equality amongst the parties. As for the concern that a party suing a non-Convention national will have an advantage over one suing a Convention national, Blackmun stated that the Convention was intended to promote the opposite result.

Third, use of the Convention is important to all nations in promoting international cooperation. Blackmun notes that resort to the Convention will not only aid discovery, encourages communication. This effect on international relations which transcends the legal system and mere discovery requests.

In summary, Justice Blackmun advocated a first resort approach under the Convention. If this attempt is unsuccessful, an individual comity analysis may then be warranted.

### VIII. A Criticism of *Aerospatiale* Opinion

In reaching its conclusion that the Hague Evidence Convention is not exclusive and does not mandate a first resort approach, the *Aerospatiale* Court did not reason well. The Court relied heavily,

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80. Vienna Convention On the Law of Treaties, May 23, 1969, Art. 31, 63 AMER. J. INT'L L. 875 (1969).

although not exclusively, on the language of the Convention itself. While the text of a treaty is an indicator of the intended meaning of the treaty,<sup>81</sup> it is not the sole method of interpreting the meaning of a treaty.<sup>82</sup> The Court correctly mentions that the Convention does not explicitly state that it is exclusive; however, neither does it state that it is not. Since the language does not specify what was intended, other methods of treaty interpretation must be applied.<sup>83</sup> Although, in addition to reliance on the text of the Convention, the *Aerospatiale* Court mentions, in passing in footnotes, the position of the U.S. Government and the negotiating history.<sup>84</sup> As reported by Amram, the Court failed to do a thorough treaty interpretation analysis, which would have supported a conclusion that the Convention is exclusive.

The Court further relied on the inclusion of permissive language, in Article 1, 15, 16, and 17, and on Articles 23 and 27 as

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81. *Id.*

82. Factors to consider when interpreting the meaning of a treaty include:

(a) the ordinary meaning of the words of the agreement in the context in which they are used;

(b) the title given the agreement and statements of purpose and scope included in its text;

(c) the circumstances attending the negotiation of the agreement;

(d) drafts and other documents submitted for consideration, action taken on them, and the official record of the deliberations during the course of the negotiation;

(e) unilateral statements of understanding made by a signatory before the agreement came into effect, to the extent that they were communicated to, or otherwise known to, the other signatory or signatories;

(f) the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it;

(g) change of circumstances, to the extent indicated in § 153;

(h) the compatibility of alternative interpretations of the agreement with (i) the obligations of the parties to other states under general international law and other international agreements of the parties, and (ii) the principles of law common to the legal systems of the parties or of all states having reasonably developed legal systems;

(i) comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritative text.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) § 147.

None of these factors is to be given priority over the others, although the ordinary meaning of the words must always be considered.

The latest Restatement, however, does not set forth these specific factors, but includes reference to them in the Comment to § 325. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). For a comprehensive discussion leading to the conclusion that the application of proper interpretation principles confirms the mandatory nature of the Convention, see R. Doak Bishop, *Service of Process and Discovery in International Tort Litigation*, 23, 1 TORT & INSURANCE L.J. 70 (Fall 1987).

83. For a comprehensive look at the impact upon case results which can be ascribed to intervention in litigation by government bodies through *amicus* briefs and otherwise, see *The Role of the United States Government in International Tort Cases*, D. Westin, 23 TORT & INSURANCE L.J. 537 (Spring 1988).

84. See *supra* note 18.

support for its conclusion that the Convention is not exclusive.<sup>85</sup> As was argued above, however, the permissive language only reflects the alternative methods provided by the Convention, while Articles 23 and 27 have been grossly misunderstood.

The Court's fear that the "three unacceptable asymmetries" would result from a holding of exclusivity, as well as its argument that Convention procedures are more time consuming and expensive and less certain to produce needed results, was amply refuted by Justice Blackmun. Further, there has been evidence from its use that the Convention States are more likely to cooperate, quickly and to more expansive requests, with resort to the established Convention procedures.<sup>86</sup>

The Court's reasoning reflects a certain degree of "judicial chauvinism," similar to the "pro-forum bias" mentioned by Justice Blackmun.<sup>87</sup> In one instance, the Court declared:

An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting State to the internal law of that State. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities.<sup>88</sup>

The Court's language reflects its reluctance to permit the Convention to invade the province of American courts. Despite its concern with the jurisdiction of the domestic courts, the protection of domestic litigants, and the furtherance of fast and fair litigation, the Court seems to overlook the overriding national interest in promoting and maintaining international harmony, in international legal cooperation as well as other areas, an interest which is emphasized by Justice Blackmun.

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85. \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 107 S. Ct. 2542, 2553.

86. *Supra* note 10, at 1426.

87. *Hudson v. Hermann Pfauder GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987).

88. *Id.* at 38-39. The court made two additional interesting points. First, this court was of the opinion that the party opposing resort to the Convention carries the burden of proving that use of these procedures would contravene U.S. interests. Second, in response to the argument that resort to the Convention is less efficient and costs more, the court noted that this may change as the Convention procedures become more familiar to U.S. litigants. *Id.* (This latter point is supported by a practitioner, Robert F. Brodegaard. *See supra* note 77.) The court further noted that:

Indeed, discovery under the Federal Rules is so liberal that the costs of litigation may be increased rather than reduced by the use of the Federal Rules, since litigants in this country are commonly flooded with irrelevant documents and information obtained through broad discovery requests and often must expend substantial resources to have attorneys and experts wade through them.

*Id.* at 38, n.4.

Thus, the Supreme Court was incorrect in its reasoning in *Aerospatiale*. This reasoning leads to the erroneous conclusion that the Convention does not provide the exclusive and mandatory procedures for obtaining evidence abroad.

#### IX. In Conclusion and In the Future

The Hague Evidence Convention was enacted to bridge the procedural gap between the broad discovery methods employed in evidence gathering in the common law systems, particularly those of the U.S., and the more restrictive methods used in the civil law systems. Specifically, it was created to solve the existing apples/oranges problem within transnational litigation. The Convention is a complete agreement, replete with a choice of procedures to use in obtaining foreign evidence and with optional provisions. The 1978 meeting of the Special Commission "revealed that the Convention dealt with real needs and that it constituted a useful and efficient bridge between the civil law systems and those of common law."<sup>89</sup>

Despite the completeness of the Convention — or perhaps because of it — the treaty has been the subject of numerous divergent interpretations by U.S. courts, resulting in at least the six different approaches which were discussed. Although the Supreme Court attempted to resolve the apples and oranges dispute in the *Aerospatiale* decision, the analysis of the Court's Opinion reveals that the problem remains unsolved.

In adopting the fifth option, that Federal Rules apply but comity principles must be applied to determine if resort to the Convention is first required, the Court failed to consider many factors normally used in treaty interpretation, factors which support the conclusion that the Convention is the exclusive means of obtaining evidence abroad. Further, the Court misconstrued the import of the permissive language used in the text of the Convention and overlooked the intention of the Article 23 and Article 27 provisions. Also, the Court's Opinion is laced with undertones of "judicial chauvinism." Justice Blackmun, in dissent, seems to have come closest to the true purpose and intent of the Convention in espousing the second option which requires first resort to Convention procedures.

In concluding that the Convention is not exclusive, that a first resort approach is not required, and that a case-by-case analysis must be employed by trial judges, with a dearth of guidance supplied by the Court, the Court fails to provide a bright line of which lawyers and courts are so fond. The trial court is required to apply a

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89. *Sandsend Financial Consultants, Ltd. v. Wood*, 743 S.W.2d 364, 366 (Tex. Ct. App. 1988). To the same effect is *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987).

balancing test to determine if resort to the Convention is necessary. If the lower courts follow the "judicial chauvanism" which seems to be poorly disguised between the lines of the Majority Opinion, it will be a rare U.S. lower court that can be so objective, in the face of a cession of its jurisdictional powers, as to be able to determine that sovereign interests of a foreign state outweigh its own.

If one can accept one district court's decision as paradigm of U.S. courts' post-*Aerospatiale* reaction, perhaps all is not lost for proponents of the Convention. In *Hudson v. Hermann Pfauter GmbH & Co.*,<sup>90</sup> a district court in New York, applying the analysis set forth by Justice Blackmun, granted the West Germany manufacturer's motion for a protective order requesting that resort to Convention procedures be required. In deciding to require first resort to the Convention, the court stated that "[t]o assume that the 'American' rules are superior to those procedures agreed upon by the signatories of the Hague Convention without first seeing those effective Convention procedures will be in practice would reflect the same parochial biases that the Convention was designed to overcome."<sup>91</sup>

This court, with sagacious reasoning, resolved the apples and oranges difficulty which the Supreme Court failed to do. It is unfortunate, indeed, that the Supreme Court failed to clear the confusion. Regrettably, confusion remains. Several courts have grasped the reference by the Supreme Court to the Convention as a "permissive supplement." Without reference to the application of comity principles as a balancing factor, one court has held, "as a permissive supplement, it is within the trial court's discretion to determine whether the Hague Convention procedures should be used as a first resort."<sup>92</sup>

It is apparent, therefore, that the *Aerospatiale* decision decided very little. The line drawn by the Court was not truly a line; the rule established by the holding is truly a non-rule. What hope is there for the Hague Evidence Convention or for the future of transnational litigation? The recent addition of Justice Kennedy to the Court could affect the next *Aerospatiale*-type decision. Or, perhaps it is now up to the Congress to declare to the courts that the Hague Evidence Convention is mandatory, exclusive in nature, and the supreme law of the land. A first resort requirement, at the least, would produce a healthy hybrid stemming from the apple/orange problem rooted in jurisprudential systems.

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90. 117 F.R.D. 33 (N.D.N.Y. 1987).

91. *Id.* at 38-39.

92. *Id.*

