REPORT ON SURVEY OF EXPERIENCE OF U.S. LAWYERS WITH THE HAGUE EVIDENCE CONVENTION LETTER OF REQUEST PROCEDURES

International Litigation Committee
Section of International Law & Practice
(SILP)
American Bar Association

Submitted to:
Office of Legal Adviser
for Private International Law
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INTRODUCTION

The Hague Conference on Private International Law ("Hague Conference") has convened a Special Commission to review the practical operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention" or "Convention").[1] The Special Commission will meet from October 28, 2003 to November 4, 2003 in The Hague.[2] The last such Special Commission to review the operation of the Hague Evidence Convention was convened in 1989.[3]

The Office of Legal Adviser for Private International Law of the U.S. State Department requested input from practicing litigators for the purpose of identifying issues that should be raised at the Special Commission meeting. Accordingly, the International Litigation Committee ("ILC") of the Section of

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[1] Hague Evidence Convention, 3 U.S.T. 2555, T.I.A.S. No. 744, 28 U.S.C. § 1781. The Special Commission is also reviewing the practical operation of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

[2] For more on the Special Commission, *see* http://www.hcch-net/e/workpgro/lse_intro.html.

[3] *See* Report on the Work of the Special Commission of April 1989 on the operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 28 INT'L LEGAL MATERIALS 1556 (1989) (hereinafter "1989 Special Commission Report").

International Law and Practice ("SILP") of the American Bar Association ("ABA")[4] initiated a survey to elicit feedback from American lawyers concerning their experience with the letter of request procedures under the Hague Evidence Convention. A copy of the questionnaire is attached as Appendix A.[5]

This report summarizes the results of the survey and, on the basis of the survey data and other feedback received by the ILC, presents recommendations to the Office of Legal Adviser concerning issues that might be raised at the meeting of the Special Commission.

[4] ABA members represent approximately half of all lawyers in the United States. The Section of International Law and Practice of the ABA includes over 13,000 members and serves as one of the primary links between the American legal profession and its counterparts around the world. The ABA International Section's mission is to "promote interest, activity and research in international and comparative law and related areas; to further its development; to diffuse knowledge thereof among members of the legal profession and others; to formulate professional opinion thereon; to promote professional relationships with lawyers similarly engaged in foreign countries; and to implement Goal VIII of the [American Bar] Association, 'to advance the rule of law in the world.'"

[5] The survey form was developed by Glenn P. Hendrix (Arnall Golden Gregory, LLP, Atlanta), with substantial input by Robert F. Brodegaard (Thacher Profit & Wood, New York). The following attorneys and ABA staff members also provided invaluable feedback: Donald J. Hayden (Baker & McKenzie, Miami), Barton Legum (Office of Legal Adviser), Rachel Pittman (SILP staff), Thomas B. McNamara (Davis Graham & Stubbs, LLP, Denver), and several attorneys at Arnall Golden Gregory, LLP who "pre-tested" the questionnaire.

I. BACKGROUND

A. The Hague Evidence Convention

The Hague Evidence Convention allows U.S. litigants to obtain evidence in "civil or commercial matters" from 37 other jurisdictions.[6] The Convention sets forth two basic methods of gathering evidence. Chapter I outlines the procedure for "letters of request," which are requests from a "judicial authority" for the purpose of "obtain[ing] evidence which is … intended for use in judicial proceedings, commenced or contemplated." Each signatory designates a "central authority" to receive letters of request and oversee their execution. The court submits the letter of request directly to the foreign central authority, which in turn forwards it to the appropriate foreign judicial authority to obtain the requested evidence. The evidence is then returned via the same route. The requesting court may be informed of the time when, and the place where, the witness examination will take place, in order that the parties and their representatives may attend. If so indicated in the letter of request, this information is sent directly to the parties or their counsel. Under article 10 of the Convention, compulsory process is available against recalcitrant witnesses "in the instances and to the same extent as are provided by [the foreign state's] internal law" for domestic proceedings. Chapter II of the Convention provides for the taking of evidence from voluntary witnesses by diplomatic officers or commissioners. The ILC survey focused solely upon the Chapter I letter of request procedures.

B. Distribution of the Survey Form

The questionnaire was posted on the websites of SILP and the Litigation Section of the ABA. The chairs of the International Litigation Committees of SILP and the Litigation Section[7] sent emails to members of their committees soliciting responses to the survey. Emails soliciting responses were also sent to SILP's International Commercial Dispute Resolution Committee and U.S.-based members of the International Litigation Committee of the International Bar Association.

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[6] A complete list of member nations, together with their declarations and reservations and sample forms, is available on the Hague Conference website at http://www.hcch.net/e/status/stat20e/html.

[7] SILP is grateful for the assistance of Donald J. Hayden, Co-Chair of the International Litigation Committee of the Litigation Section.

The SILP International Litigation Committee also compiled a compendium of 116 reported cases decided after the Supreme Court's landmark decision in *Societe National Industrielle v. United States District Court*[8] that cite the Hague Evidence Convention.[9] A list of 203 attorneys who participated in those cases and their email addresses was compiled from the compendium,[10] and emails were sent to each of them requesting that they participate in the survey.

II. OVERVIEW OF THE SURVEY RESULTS

There were 72 responses to the survey, including 42 from attorneys who had used the Convention letter of request procedures.[11]

The respondents who indicated having used the Convention procedures seem to represent a fairly broad cross-section of the legal community. Many of the larger multi-national firms are represented, together with several regional firms, and numerous small firm lawyers. Sixteen states and the District of Columbia are represented among the respondents who identified themselves on the form.[12]

The ILC also received helpful feedback in the form of a detailed narrative from Legal Language Services, Inc. ("LLS"), which provides international litigation support services to law firms.

?? Hague Evidence Convention Contracting States Represented in the Survey Responses

?? The United Kingdom ("UK") is the most common destination for letters of request from the United States – 21 of 40 respondents who answered this question indicated that they had used the Convention procedures in that country. The UK was followed by France (18); Germany (17); Switzerland (8); Hong Kong (7); Italy (4); Argentina, Mexico, the Netherlands and Spain (3 each); Denmark, Israel, Singapore, and South Africa (2 each); and Australia, Barbados, China, Kuwait, Turkey, and Venezuela (1 each).

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8 428 U.S. 522 (1987).

9 The compendium is posted on the SILP website at http://www.abanet.org/interlaw/divisions/business/intl-lit/compendium-hague.pdf. The compendium was prepared by Thomas B. McNamara, Glenn P. Hendrix and Martha Charepoo.

10 A SILP intern, Arsineh Arakel, performed this task.

11 Many respondents did not answer each and every question, however, and thus, there are fewer than 42 responses to most of the questions.

12 A list of the respondents who identified themselves is attached as Appendix B.

?? After asking respondents to indicate the countries with which they had Convention experience, the questionnaire included the following instruction: **"[I]f you have participated in Convention discovery of evidence from more than one country, we ask that you choose only one such country and answer the following questions as to only that country. Please select the country with respect to which you believe your experience would be most helpful to the Hague Conference. Obviously, we would be delighted if you would complete separate questionnaires as to each country for which you have Convention experience, and we encourage you to do so."** The purpose of this instruction was to ensure that the responses could be related back to experience in a particular country.

?? 24 of 40 respondents (62%) had experience with more than one country, as reflected in the following breakdown:

Number of Countries in Which Respondent Used Convention Procedures	Number of Respondents
6	3
5	3
4	5
3	4
2	9
1	16

Despite being requested to fill out additional forms for each country with which they had Convention experience, virtually all of the respondents completed only one form for only one country.[13]

?? The countries "selected" by the respondents, and with respect to which they completed the questionnaire, included: France (11 responses), the UK (10), Switzerland (7), Germany (5), Australia (2), Hong Kong (2), Italy (2), the Netherlands (2), Argentina (1), Barbados (1), Singapore (1), and Venezuela (1).

[13] The single exception was an attorney who completed questionnaires as to 4 countries in which he had used the Convention procedures.

?? **Overall Assessments of the Effectiveness of the Hague Evidence Convention Letters of Request Procedure**

?? As noted, most of the respondents had Convention experience in two or more countries, but filled out a survey form as to only one country. Assuming that they followed the instruction to complete the form as to the country with respect to which their "experience would be most helpful to the Hague Conference," this may have introduced an element of bias into the results. Most respondents would presumably tend to select a country with which they had encountered problems.

?? Even so, many respondents were positive about their experience with the Convention. Eleven of 28 respondents indicated that their experience was "more satisfactory" than they had anticipated. They were responding as to their experiences in the UK (4 respondents), Germany (3), Switzerland (2), Hong Kong, and the Netherlands.

?? The 17 respondents who indicated that their experience with the Convention was "less satisfactory" than they had anticipated were responding as to France (6 respondents), the UK (4), Switzerland (2), Barbados, Germany, the Netherlands, and Venezuela.

?? Although 60% of respondents stated that their experience was "less satisfactory" than expected, 24 of 33 (73%) respondents indicated that they were "glad" they had used the Convention and would again initiate the Convention procedures under the same circumstances. They were responding as to their experiences in the UK (5 respondents), France (4), Germany (3), Switzerland (3), Italy (2), the Netherlands (2), Argentina (1), Barbados (1), and Singapore (1). The 9 respondents who indicated that they were not "glad" that they had used the Convention and would not initiate the Convention procedures again under similar circumstances were answering as to their experiences in the UK and France (3 respondents each), Switzerland (2), and Germany. Three other respondents answered, "I don't know".

?? 18 of 30 respondents indicated that testimony obtained through the Convention had an impact on the ultimate disposition or settlement posture of the case. (5 respondents indicated that it had no impact; 7 indicated that they did not know).

? ? **Effectiveness of Measures of Compulsion**

?? 12 of 33 respondents had experienced a situation in which the foreign judicial authority required the attendance of the witness through measures of compulsion (e.g., subpoena, etc.), but such measures did not result in the appearance of the witness.

?? One respondent commented: "use [the Convention] in France if you have to, but don't expect them to do anything if the witness refuses to show or produce docs." Another respondent complained of the same problem in France, claiming that "the result appeared protective of major French company."

? ? **Methods and Procedures for Taking Oral Testimony**

American parties seem to have generally been afforded leeway in witness examinations:

?? 20 of 24 respondents who directly examined the witness indicated that they were permitted to conduct an American-style cross-examination. The exceptions were in Switzerland (2 respondents) and France (also 2 respondents).

?? With regard to respondents who did not directly conduct the witness examination,

- questioning was conducted exclusively by the judge in 3 instances, (in Switzerland, France, and Germany);

- one respondent, commenting as to his experience in Switzerland, indicated that the examination was conducted by "foreign judicial authority [with] follow up by me as long as on topic of written question;"

- another respondent, commenting as to his experience in Germany, indicated that the examination was conducted in accordance with "each of the first three choices above [i.e., by American counsel, foreign counsel, and the foreign judicial authority], but primarily [by] the foreign judge."

?? Although most respondents were satisfied with the examination procedure, 9 of 27 respondents indicated that the means by which the testimony was taken before the foreign judicial authority

diminished the utility or effectiveness of the procedure. Their comments were as follows:

> "No ability to compel videotaped deposition for use at trial." (France)
>
> "No follow up questions." (France)
>
> "No effective cross-examination." (Switzerland)
>
> "The answers were incomplete or evasive. Answers could not be followed up." (Switzerland)
>
> "The judicial authority started by the written questions attached to our letter request. Once that process was completed, counsel were allowed to ask follow up questions but only to the extent they fell under the scope of the written questions." (Switzerland)
>
> "Unable to cross-examine and critical questions suggested to the Court to ask the witness were rejected without explanation." (Germany)
>
> "The court insisted on the witness and all lawyers speaking in French, although the witness and both sides' lawyers were native English speakers. Thus, all questions had to be translated from English to French, and then all answers from French to English." (France)
>
> "Lack of clarity in answers." (Switzerland)

?? 6 respondents reported instances in which the foreign judicial authority upheld an evidentiary privilege that would not likely have been upheld by the American court issuing the letter of request (in Barbados, France, Germany, the UK, Venezuela, and Switzerland).[14]

?? 23 of 30 respondents indicated that a verbatim transcript was taken. In every instance in which no verbatim transcript was taken, the record of the testimony was deemed by the survey respondent to be substantially accurate. One of the respondents, while indicating that the summary was substantially accurate, did

[14] Of course, the assertion of an evidentiary privilege recognized in the state of execution and not the state of origin is permitted pursuant to article 11 of the Convention.

complain that the lack of a verbatim transcript "diminish[ed] its value in an American court."

?? Only 3 respondents indicated having an evidentiary objection upheld in the United States with regard to testimony obtained through the Convention. (The respondents' answers pertained to France, Germany and Venezuela).

?? **Requests for Documents**

?? 14 of 30 respondents indicated that they received all of the documents sought in a letter of request. The countries from which the documents were obtained were the UK (4 respondents), France (3) Switzerland (2), Italy (2), the Netherlands, and Argentina.[15]

?? In the remaining 16 instances, the foreign judicial authority did not compel production of the documents. The countries at issue were France (5 respondents), the UK (4), Switzerland (2), the Netherlands, Germany, and Venezuela. In 4 of these instances, however, the foreign judicial authority "blue penciled" the request and compelled production of some of the documents requested (in Germany, the Netherlands, the UK, and Venezuela).

?? The reasons given for the denial of document requests were as follows:

	Response Total
the foreign country deemed the request as one for "pretrial discovery" (the UK – 4 respondents ; Switzerland – 2; Germany – 1; the Netherlands – 1)	8
the documents were not identified with sufficient specificity (Hong Kong, Italy, the UK, Venezuela)	4
a claim of privilege (Germany, Switzerland)	2
Other:	
"no real compulsion, witness and docs never appeared" (France)	1

[15] One respondent did not indicate the country from which documents were obtained. Another respondent, who had utilized the Convention procedures more than ten times in France, indicated that he had obtained the requested documents in certain instances, but not in others.

	Response Total
"Names of plaintiffs were not revealed; Court insisted that true names of plaintiffs be provided" (France)	1
"The local court deemed the request improper and questioned the jurisdiction of the US court" (Switzerland)	1
"Fishing expedition" (the Netherlands)	1
"blocking statute" (France)	1
"simply declined without particular explanation" (France)	1

?? **Timeframes for Execution of Letters of Request**

?? With regard to oral testimony, the average length of time from issuance of a letter of request until the parties' receipt of the evidence or a final determination was as follows:

	Response Percent	Response Total
1 month or less	0%	0
1-2 months	12.5%	4
2-4 months	53.1%	17
4-6 months	18.8%	6
6-9 months	6.2%	2
9-12 months	0%	0
12-18 months[16]	6.2%	2
more than 18 months	0%	0
N/A (never received the evidence or a final determination)	3.1%	1

?? With respect to documents, the execution periods were as follows:

	Response Percent	Response Total
1 month or less	0%	0

[16] The answers of 12-18 months pertained to a letter of request directed to Switzerland and France.

1-2 months	11.1.%	3
2-4 months	37%	10
4-6 months	33.3%	9
6-9 months	3.7%	1
9-12 months	0%	0
12-18 months[17]	3.7%	1
more than 18 months	0%	0
N/A (never received the evidence or a final determination)	11.1%	3

?? These periods are consistent with the report of a 1985 Special Commission of the Hague Conference that the average length of time to execute a letter of request is between one and six months.[18]

?? A slight majority of respondents (19 of 37) indicated that use of the Convention letter of request procedure did not delay case management or trial of the domestic litigation.

?? **Reasons for Non-use of the Convention**

?? Asked whether they had ever considered using the Convention letter of request procedures, but elected not to, respondents with experience using the Convention indicated the following reasons:

	Response Percent	**Response Total**
Insufficient familiarity with the Convention procedure (either generally or with respect to a particular country)	3.4%	1
Concerns over delays	51.7%	15
Concerns regarding the assertion of foreign evidentiary privileges	27.6%	8
Inability to conduct an American-style witness examination	37.9%	11
Inability to identify the documents sought with the specificity required by the foreign country	34.5%	10
Expense to the client	31%	9

[17] The answer of 12-18 months pertained to France.

[18] Hague Conference on Private International Law: Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 24 INT'L LEGAL MATERIALS 1668, 1674 (1985) (hereinafter "1985 Special Commission Report").

	Response Percent	Response Total
Other:	24.1%	
"The UK will not allow 'discovery' under the Rule 26 because it is considered a 'fishing expedition' under their laws. We went to enormous effort and expense and obtained no discovery."		1
"Voluntary arrangement for witnesses giving deposition evidence"		1
"Took a voluntary deposition"		1
"Bar of pretrial discovery"		1
"Animosity of Swiss courts to American courts and litigants"		1
"Concern it would be deemed pre-trial"		1
"Arbitrary judicial bias favoring nation's witness"		1
N/A	20.7%	6

?? In responding to the same question, respondents with no experience using the Convention gave the following reasons:

	Response Percent	Response Total
Insufficient familiarity with the Convention procedure (either generally or with respect to a particular country)	28.6%	4
Concerns over delays	64.3%	9
Concerns regarding the assertion of foreign evidentiary privileges	21.4%	3
Inability to conduct an American-style witness examination	42.9%	6
Inability to identify the documents sought with the specificity required by the foreign country	0%	0
Expense to the client	50%	7
Other:		
"Proceeded with a voluntary deposition"	21.4%	1
"Court ordered discovery under Federal Rules of Civil Procedure"		1
"Stipulations regarding discovery"		1

	Response Percent	Response Total
N/A	14.3%	2

It is perhaps significant that respondents with no Convention experience were more concerned over possible delays than those who had Convention experience.

?? One of the questions asked:

> "Have you ever been involved in a case in which a party agreed not to file a motion to require resort to the Convention letter of request procedure with respect to a foreign witness in exchange for an agreement that the discovery proceed on stipulated terms (e.g., that the deposition occur in the witness' country of residence, etc)?"
>
> Of the 50 respondents who answered this question, 32 responded "yes."

III. ISSUES FOR THE SPECIAL COMMISSION MEETING

A. Denial of Requests for Oral Testimony That Are Deemed to Constitute "Pretrial Discovery"

The Hague Evidence Convention provides for the obtaining of "evidence" that is "intended for use in judicial proceedings."[19] A few contracting states, most notably, the United Kingdom, draw a distinction between letters of request for the purpose of obtaining "evidence", on the one hand, and for the purpose of obtaining "pretrial discovery", on the other. The Convention itself makes that distinction only with respect to the pretrial discovery of *documents*. Specifically, article 23 of the Convention provides that:

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

There is no counterpart provision in the Convention with respect to oral depositions. Nevertheless, requests for oral depositions which an English court

[19] Hague Evidence Convention, *supra* note 1, at art. 1.

deems are being sought for "discovery" purposes, rather than as "evidence", may be denied. This issue is addressed in further detail below.

1. Survey Responses Concerning the UK

Prior to detailing the concerns of certain respondents regarding their experience in the UK, it should be emphasized that most respondents seemed satisfied with the disposition of their requests by the English courts. For instance, although 21 respondents indicated having utilized the letter of request procedure in the UK, only 10 selected that country for their focused response,[20] which might imply that the other 11 did not encounter significant problems. Furthermore, 8 of the 10 who focused their responses on the UK had no Convention experience with any other country, and the UK was thus the only country as to which they could respond.

Of the 10 respondents who focused on the UK, only 4 indicated that their experience was "less satisfactory" than they had anticipated prior to first using it; 4 responded that it was "more satisfactory"; and 2 responded, "I don't know". Five of 8 indicated that they were "glad" they had utilized the procedure in the UK and would initiate it again under the same circumstances.[21] Indications of effective use of the letter of request procedures by American litigants in the UK can be found in the case law.[22]

Nevertheless, the few respondents who indicated a negative experience expressed very strong sentiments. For instance, one respondent stated: "Concerning my experience in attempting to obtain American discovery in the UK, if told I must resort to the Hague Convention to obtain necessary discovery in the UK – I will run from the room screaming."[23] Another respondent indicated that:

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[20] As previously indicated, after asking respondents to indicate the countries with which they had Convention experience, the questionnaire included the following instruction: "[I]f you have participated in Convention discovery of evidence from more than one country, we ask that you choose only one such country and answer the following questions as to only that country. Please select the country with respect to which you believe your experience would be most helpful to the Hague Conference. Obviously, we would be delighted if you would complete separate questionnaires as to each country for which you have Convention experience, and we encourage you to do so." (Emphasis in original).

[21] Two of the respondents who answered as to the UK did not respond to this question.

[22] *See e.g., LNP Engineering Plastics, Inc. v. Miller Waste Mills, Inc.*, 77 F. Supp. 2d 514 (D. Del. 1999) (letter of request issued from US court on September 8, and English court issued deposition summons seven days later, on September 15).

[23] She explained further that: "We won at the trial court in the UK. Defendants then appeared and we lost at the intermediate court after being forced to hire a 'silk' and a second barrister. The reported decision makes clear that because we were seeking 'discovery' under Fed. R. Civ. Pro. 26 and 'discovery' is not allowed under English law because 'discovery' amounts to a fishing

> We faced severe hostility to our request because of the "fishing expedition" reputation that has been given to US discovery practice. We obtained a letter request in a case in the federal court in New York to question several witnesses residing in England, and started a proceeding in London, UK, to enforce it, including getting an "Examiner" appointed by the court in London. However, the court in London later decided the request was not enforceable. The questioning was opposed by an English entity (that was not a party to the action in New York), but which was fearful that the witnesses (employees and former employees) might give answers which could create liability problems. To protect them, the court ruled that the letter request lacked sufficient detail the [sic] on the subjects for the questioning and issued a decision that cited the witness protection attitudes in case law and the provisions of English statutory enactments on the subject. . . . We were told that to pass muster in England the letter request from the US court needed to give specific reasons why the questioning was relevant and necessary for the evidence at trial and should have included a list of the questions to be asked. Essentially the petition submitted to get the US court to issue the letter request needed to anticipate and answer the opposition we faced in England. Our efforts to provide these details to the London court, as a response to the local opposition, were rejected on the basis that they had not been considered by the US court. Our effort to get documents was also rejected.

At least one U.S. court has also noted difficulties with letters of request to the UK. In *First American Corp. v. Price Waterhouse LLP*, the court observed that: "A letter of request served by First American in the same underlying lawsuit has been the subject of enforcement proceedings in Britain. The letter of request sought the testimony and documents of specific PW-UK partners. The English court refused to enforce the letter of request, because First American was seeking pretrial discovery not provided for under the Hague Convention or British law."[24]

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expedition – we were not going to get the information we sought – at all! I have no confidence that any American litigant will ever receive discovery they seek from a UK court under the Hauge [sic] convention. The 'silk' I hired told me we would never win as long as Rule 26 contained the word 'discovery'. My experience convinced me that despite the fact the UK is a signator of the Hauge [sic] Convention, it will never respect American discovery requests. Further. American litigants will bear the expense of a losing attempt in the UK courts where the loser pays."

[24] 154 F.3d 16, 22 (2d Cir. 1998).

To some extent, such dissatisfaction arises from the UK's long-standing refusal to honor requests for documents that are not identified with a high degree of particularity (i.e., date of letter, sender, recipient, subject matter, etc.). Indeed, all 4 respondents who indicated that their experience with the UK was "less satisfactory" than they had anticipated had requested documents and did not obtain them.[25] As a practical matter, this issue will continue to be problematic in view of the UK's article 23 reservation.

Nevertheless, the survey responses also raise what may be a more fundamental concern regarding oral depositions. As discussed in the following section of this Report, several recent reported English cases have applied restrictive standards to letters of request from the U.S. for oral depositions, and not merely to requests for document discovery.

2. Reported English Cases Involving Letters of Request from the United States

The UK "Evidence (Proceedings in Other Jurisdictions) Act of 1975" (the "Evidence Act") prohibits courts from making an order requiring "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 English court. In accordance with that provision, the English rules distinguish between (i) evidence in the nature of proof to be used for the purposes of the trial and (ii) evidence in the nature of pre-trial discovery to be used for purposes of a train of enquiry which might produce evidence for trial.

In a 1978 decision, *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*,[26] Lord Diplock stated that the Evidence Act:

> prohibits the making of an order for the examination of a witness not a party to the action for the purpose of seeking information which, though inadmissible at the trial, appears to be reasonably calculated to lead to the discovery of admissible evidence. This is permitted by rule 26 of the United States Federal Rules of Civil Procedure.

Yet, Lord Diplock also indicated that he "would not be inclined to place any narrow interpretation on the phrase 'evidence' to be obtained for the purposes of civil proceedings." He stated further that the court should generally "be prepared to accept the statement by the requesting court" as to the purpose of

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[25] It should be noted, however, that 4 other respondents did obtain the documents requested, and a fifth received some of the documents through a "blue pencil" exercise by the court.

[26] [1978] A.C. 547 (H.L.), 1977 WL 58879.

the examination and should not refuse a letter of request unless it is "satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the court."

Likewise, in the same case, Lord Keith opined:

> In the face of a statement in letters rogatory that a certain person is a necessary witness for the applicant, I am of opinion that the court of request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purposes of determining in advance whether the evidence of that person will be relevant and admissible. That is essentially a matter for the requesting court.

Thus, while strictly scrutinizing the document requests, *Westinghouse* applied a relatively liberal standard regarding requests for oral testimony that was highly deferential to the requesting court.

Similarly, in a 1985 case, *In re Asbestos Insurance Coverage Cases*,[27] the House of Lords upheld a challenge to a document request, but allowed oral depositions to proceed, observing that:

> Each of these three appellants admits that he is in a position to give some evidence that is relevant to the co-ordination proceedings. It may be that they will be asked for evidence about matters which are outwith their experience, and which they are not qualified to deal with. If so, they can say so. It would be quite inappropriate, even if it were possible, for this House or any English court to determine in advance the matters relevant to the issues before the Californian courts on which each of these witnesses is in a position to give evidence.

Based on such rulings, most commentators have noted the difficulties of obtaining documents from the UK, but have concluded that "[r]equests for oral testimony will generally be granted where the letter of request states that a person is a necessary witness."[28]

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27 [1985] E.C.C. 531, 1985 WL 311458.

28 Darrell Prescott & Edwin Alley, *Effective Evidence-Taking Under The Hague Evidence Convention*, 22 INT'L LAW. 939, 972 (1988); *see also*, Robert C. O'Brien, *Compelling the Production of Evidence by Non-Parties in England Under the Hague Convention*, 24 SYRACUSE J. INT'L L. & COMM. 77 (1998) ("United States courts have apparently adequately demonstrated that requested evidence is intended for use at trial merely by making the recital and noting the date of the pending trial and, where appropriate, that the discovery cut-off date in the underlying case has passed."); Edward L. Kling, *United Kingdom*, in ANTITRUST TRIAL PRACTICE HANDBOOK SERIES

That no longer appears to be the case. In an influential 1986 article, Sir Lawrence Collins challenged the "myth" that had "developed that the power of reservation under Article 23 for pre-trial discovery of the documents means that the contracting states are bound to execute letters rogatory from the United States . . . seeking oral depositions for discovery purposes."[29] Collins maintained that requests for oral depositions for "pretrial discovery" purposes are no less objectionable than pretrial discovery requests for documents.[30] With regard to the fact that article 23 applies on its face only to pretrial discovery of documents, Collins allowed that this article was "perhaps only partially successful in drafting terms."[31] Regardless of the actual wording of the Convention, however, Collins maintained that "the representatives of the United Kingdom could not have intended 'evidence' to include discovery, since it was well established in the English case law that 'evidence' or 'testimony' is material in the nature of proof for the trial."[32] Collins seems to acknowledge that "between 1976 and 1985 the prevailing orthodoxy in the discussions at the Hague Conference" was contrary to his position.[33] Nevertheless, according to one commentator, Collins' "view is now widely accepted in England."[34]

That view is certainly reflected in the recent case law.[35] Indeed, in one recent decision, the Court of Appeals appears to cite article 23 as applying to all "pretrial discovery" from non-parties, including oral depositions:

> Once again time and money is being spent in the English courts over Letters Rogatory requesting the English court to order the production of documents *and oral depositions* from third parties to litigation in the United States of America. That time and money would be unnecessary, if those seeking the request from the United

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VOLUME 1: OBTAINING DISCOVERY ABROAD at 27 (John F. McClatchey et al. eds. 1990) ("The potentially extraordinary hurdle that needs to be overcome in relation to documents is not the same in the case of oral testimony."); Charles Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States*, 16 INT'L LAW. 757 (1982) ("In our experience [in the UK], the deposition request which obtained only a general description of the subject matter of the examination, was approved in the first instance, but the document request was closely scrutinized.").

[29] Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 INT'L COMP. L. Q. 765, 780 (1986).

[30] *Id.* ("There is no difference in principle between documentary and oral discovery in this respect.").

[31] *Id.* at 783.

[32] *Id.* at 777.

[33] *Id.* at 782.

[34] Campbell McLachlan, *Obtaining Evidence in England in Aid of a US Proceeding,* 77 PLI/Comm 181, 184 (1998).

[35] *See e.g.*, *State of Minn. & Blue Cross & Blue Shield v. Philip Morris*, [1998] I.L. Pr. 170, 1997 WL 1105492 *(*citing Collins' article with approval).

> States Court appreciated the differences between the attitude of the United States Courts to the making of "discovery" orders against non-parties, and the attitude of the English court to the making of such orders. *The United Kingdom, when becoming parties to the Hague convention concluded in 1970, registered a reservation pursuant to Article 23 which became enshrined in the Evidence (Proceedings in Other Jurisdiction) Act 1975 making it clear that discovery against non-parties was something the English court would not provide because it simply was not part of its procedure*.[36]

In several recent cases, requests for oral depositions have been deemed to constitute "fishing" and have been disallowed.[37] The English courts have reached that result notwithstanding recitals in the letter of request in which the U.S. court indicated that the deposition was sought for use at trial. In at least one such case, the English court's decision seemed to turn primarily on the fact that the moving papers to the U.S. court in connection with the deposition made passing references to the word "discovery."[38]

The foregoing discussion should be tempered with a few observations. First, as previously noted, the overall experience of American lawyers with the UK seems to be positive. According to the ILC survey, the UK is the leading destination of letters of request from the United States, and the ILC is grateful for the assistance provided by English courts under the Convention.

Furthermore, in some of the reported cases, problems might have been avoided had the proponent of the request involved English counsel earlier in the process. Indeed, American lawyers would be well-advised to retain English counsel even prior to submitting the application for a letter of request to the U.S. court.

Finally, some of the recent English decisions might be explained in part by the nature of the cases. For instance, *Philip Morris* was a tobacco case, which may have been viewed with disfavor by the English court. In other cases, concerns regarding the breadth of the request might have been legitimate. In one of the reported cases, for instance, the proponent of the request sought testimony from 26 witnesses.

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[36] *Genira Trade & Finance, Inc., et al. v. Refco Capital Markets Ltd.*, [2001] C.P. Rep. 15, 2001 WL 1347093 (emphasis added).

[37] *See e.g.*, *id.*; *Philip Morris*, [1998] I.L. Pr. 170, 1997 WL 1105492; *Lloyd's Register of Shipping et al. v. Hyundai MIP Dockyard*, [2001] High Court QBD, 2001 WL 1422850; *APA Excelsior v. Premiere Technologies, Inc.*, [2002] EWHC 2005, 2002 WL 31523279.

[38] *See e.g.*, *APA Excelsior*, 2002 WL 31523279.

3. Problems with the Discovery/Evidence Distinction in the Context of Oral Testimony

Regardless of these explanations, however, the seeming erosion in the case law of the distinction between the standards for evaluating requests for oral and documentary evidence is a matter of concern that should be broached at the Special Commission meeting.

The Convention, on its face, restricts only "pretrial discovery of documents," and makes no reference to restrictions on requests for oral testimony.[39] Different treatment of document discovery and depositions might make some sense. As noted by Professor Hazard, "[a]lthough discovery depositions are more numerous and more lengthy [in the United States] than abroad, they are similar to examinations at trial in other common-law systems and examinations at hearings in civil-law systems. But document discovery American style is something unto itself."[40] Document discovery is "something unto itself" under the terms of the Convention as well, and article 23 reservations cannot be extended to cover requests for oral depositions.

In addition, the distinction between "discovery" and "evidence" depositions is not tenable. Often, an attorney will know that a witness has knowledge of matters at issue in the case and is in a position to give evidence relevant to those issues, but does not know in advance what answers to the questions the witness will give.[41] This does not turn the deposition into a "fishing expedition." If the testimony from a foreign deposition proves useful, it may be used at trial in accordance with Federal Rule of Civil Procedure 32. If not, it will likely be used by the other side. Either way, the deposition is taken for use as "evidence."

Furthermore, the focus on evidence "in the nature of proof for the trial" does not take into account the extensive use of deposition testimony in the United States as evidence in support of motions for summary judgment. Article 1 of the Convention provides for obtaining evidence that is intended for use in

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[39] *Id.* at 781.

[40] Geoffery C. Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1676 (1998).

[41] One recent English decision seems to acknowledge this point. *First Am. Corp. v. Sheik Zayed bin Sultan Al-Nahyan*, [1997] I.L. Pr. 179, 1998 WL 1042425. In *First American*, Justice Scott observed that: "In framing questions to ask a witness from whom no proof has been taken, the questioner can be expected to ask a number of preliminary questions in order to feel his way in. This is not fishing. It is a normal technique of examination. A topic for legitimate questioning may have merely background significance. I repeat that, in my opinion, if there is sufficient ground for believing that an intended witness may have relevant evidence to give on topics which are relevant to the issues in the action, a Letter of Request seeking an order for the oral examination of the witness on those topics cannot be denied on the ground of fishing." *Id.* Nevertheless, the court rejected the requests as overly broad and "oppressive." *Id.*

any "judicial proceedings." Thus, deposition testimony cited in a dispositive motion is no less "evidence" than testimony presented at trial. Following a trilogy of landmark U.S. Supreme Court cases decided in 1986,[42] summary judgment procedure has emerged in the United States as "the new fulcrum of civil dispute resolution".[43] The percentage of civil cases proceeding to trial in the federal courts dropped from 8.5% of all pending cases in 1973 to just 1.8% in 2002.[44] The percentage of cases terminated by summary judgment, on the other hand, more than doubled between 1975 and 2000, from 3.7% to 7.7%.[45] (Of course, the vast majority of cases are resolved by settlements between the parties).

Finally, the English decisions do not seem to take into account changes in American civil procedure and discovery practices over the past twenty-five years. For instance, in describing discovery in the United States, cases continue to quote Lord Diplock from the 1978 *Westinghouse* decision – "The approach to discovery in jurisdictions such as the United States is sometimes categorized unattractively, and perhaps inappropriately, as 'fishing'".[46] The changes in discovery rules since that time are succinctly summarized by Professor Arthur R. Miller, one of the United States' foremost scholars on domestic civil procedure:

> Rule 26, the centerpiece of the discovery process, has undergone dramatic revisions as a result of amendments in 1983, 1993, and 2000 that provide for greater judicial control over the discovery process and set limitations on the availability of discovery. The initial – somewhat tentative – step in 1983 directed the district court to set limits on "redundant" or "disproportionate" discovery and imposed a good-faith and reasonable-inquiry standard on attorneys for all motions, requests, and responses . . .
>
> The 1993 amendments were much more dramatic, mandating . . . a meeting of counsel to formulate and submit a discovery plan to the court, including an identification of the issues and a timetable, and a heightened duty to supplement information provided in the discovery process. In addition, the Rules now set presumptive limits

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42 *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

43 Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000).

44 *Id.;* Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, Table C-4A.

45 Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion", "Liability Crisis", and Efficiency Cliché's Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U.L. REV. 982, 1049 (2003).

46 *Philip Morris*, 1997 WL 1105492, *quoting Westinghouse* (Diplock, L.J.), 1977 WL 58879.

> on the number of depositions and interrogatories each party is allowed, requiring court approval to exceed these numbers. . . .
>
> Work continued on the discovery rules and in 2000 . . . additional limitations on discovery emerged. Perhaps most significant is the modification of the language of the scope-of-discovery provision, which since 1938 had embraced anything "relevant to the subject matter of the action" but now reads anything "relevant to a claim or defense in the action." The advisory committee note indicates that the change "signals" to judges their "authority to confine discovery." . . .
>
> Especially in conjunction with Rule 16,[47] the amended discovery rules give the judge substantially greater control over the process.[48]

Thus, although the right to "discovery" is undoubtedly broader in the United States than in other countries, the stereotype of discovery constituting a "fishing expedition" run amok, without judicial supervision or oversight,[49] does not take into account recent developments.[50]

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[47] Federal Rule of Civil Procedure 16 addresses case management by the court and was amended in 1993. Professor Miller notes that the effect of the 1993 amendment, "in conjunction with other contemporary changes in practice, has been to transform the presiding judge's role from that of neutral arbiter to case supervisor." Miller, *supra* n. 45, at 1012.

[48] *Id*. at 1013-14. *See also* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?* 52 DEPAUL L. REV. 299, 301 (2002) ("The rapid pace of amendments to the federal discovery rules has brought expanded case management, discovery conferences, pretrial conferences, required attorney consultations, more stringent certification, numeric discovery limits, the concept of proportionality, mandatory disclosure, [and] a redefinition of 'scope'"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New Work Order* 7 TUL. J. INT'L & COMP. L. 153, 183 (1999) "([T]he cumulative effect of the changes that have been made [to the discovery rules] already move beyond mere tinkering. . . . [I]t could be said that America is finally eliminating the 'extravagant' features of discovery, opening the way to accommodation with the practice of the rest of the world"); Alba Conte & Herberg B. Newberg, 3 NEWBERG ON CLASS ACTIONS § 9.10 (4th ed. 2003) ("Revisions to Rule 26 governing discovery generally have been specifically designed to control both discovery excesses and avoidance."); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery 'Reform'"* 64 SUM LAW & CONTEMP PROBS. 197 (2001).

[49] Hazard, *supra* n. 40, at 1676. ("Put bluntly, the impression of American discovery in most foreign countries is that of an alien legal regime conducting a warrantless search in someone else's domestic territory.").

[50] Of course, as with most stereotypes, this one was always grossly exaggerated. A 1997 study of the Federal Judicial Center (a governmental entity) reported that "empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are

The ILC respects the right and obligation of English courts to protect witnesses from vexatious or oppressive letters of requests emanating from foreign courts, but believes that greater deference should be afforded to statements by U.S. courts in letters of request that the testimony sought is, indeed, intended for use as "evidence" in the proceeding.

B. "No Show" Witnesses

As indicated in the overview section of this letter, 12 of 33 survey respondents indicated having problems with "no show" witnesses.[51] The Convention offers a mechanism for compelling discovery from recalcitrant witnesses. Specifically, article 10 provides that the requested state "shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law" for internal proceedings.

Unfortunately, the internal law of certain countries may provide for only minimal penalties if a witness fails to appear or, indeed, may not provide for any measures of compulsion at all with respect to certain classes of witnesses. For instance, in many civil law countries, the parties to an action cannot be compelled to testify. This will not generally present a problem for an American litigant because a party to a U.S. lawsuit will be subject to the Federal Rules of Civil Procedure. Nevertheless, certain civil law jurisdictions also treat certain individuals as being equivalent to a party and therefore not subject to compulsion. This might include, for example, the members of the board of directors of a stock corporation, the managing director(s) of a company with limited liability, the general partner(s) of a limited partnership, and all partners in a general partnership. Thus, a situation may arise in which a foreign corporate entity is subject to jurisdiction in the United States, but various individuals affiliated with the corporation, who may be critical witnesses, are not. In that event, the American litigant may not be able to compel the individual to testify

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proportionate to the stakes of the litigation, and that discovery generally – with notable exceptions – yields information that aids in the just disposition of cases." Thomas E. Willging et al. *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525, 527 (1998). *See also* Subrin, *supra* n. 48, at 308 ("What neither foreign commentators on American discovery nor homegrown conservative critics tend to mention is the extensive empirical research in our country demonstrating that in many American civil cases, often approaching fifty percent, there is no discovery, and in most of the remainder of the cases there is remarkably little").

[51] *See also Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 246 F.Supp.2d 285, 289 (S.D.N.Y. 2003) (in determining whether to issue letters of request to France, court noted that one party had already spent "nearly two years … attempting to take the testimony of the French Witnesses through coercive means").

under U.S. law, and since that individual is treated as a "party" under the foreign law, he or she is not subject to compulsion in the foreign jurisdiction either.

It may be that little can be done about this issue because, again, contracting states are required to apply measures of compulsion only to the extent required by their internal laws.[52] Nevertheless, this is a problem in certain cases for U.S. litigants and should perhaps be noted to the Special Commission.

A more fundamental issue relating to the non-appearance of witnesses was noted by Legal Language Services, Inc. ("LLS"), which provides international litigation support to law firms:

> LLS . . . is often surprised by the willingness of foreign judges to honor last minute requests by the witness's counsel which delay the hearing date. LLS is generally able to secure a place on the foreign docket within 4 to 6 weeks of filing a Request and obtain a hearing date within 2 to 3 months. However, decisions to reschedule a hearing date within 5-7 days of that date are not uncommon, especially in France, Spain and the Netherlands. It is also not uncommon for such a hearing to be rescheduled in this way 3 to 4 times, stretching overall turnaround time to 5-6 months.
>
> Foreign hearings are expensive – LLS typically bills $3,000-$5,000 day for interpreters, interpreting equipment and court reporters (which must sometimes be brought in from neighboring countries) excluding the cost of hotels and transportation and the billable time of the attorneys themselves. As a result, delays and rescheduling are enormously expensive to US counsel. In some instances, the witness' counsel has managed by such tactics to frustrate US counsel to the point of abandoning the Request altogether.

Foreign judicial authorities might be encouraged to take this issue into account when considering requests for continuances.

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[52] In the Explanatory Report to the Convention, Philip Amram observed that: "The requesting authority cannot ask the executing authority to grant compulsion in the execution of the Letter to any extent greater than the compulsion which would be applied, under the same circumstances, in a domestic proceeding in the State of execution." Philip Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. A, p.11, 92d Cong., 2d Sess. 11 (1972), *reprinted* in 12 INT'L LEGAL MATERIALS 327 (1973).

C. Methods And Procedures For Examining Witnesses

As indicated in the overview, most survey respondents seemed satisfied with the means by which testimony was taken before the foreign judicial authority. This is a remarkable testament to the Convention, as the methods and procedures for examining witnesses in civil law countries, in particular, differ significantly from those in the United States. In many countries, for instance, the witness, who is not sworn, initially gives an uninterrupted narrative of his version of the facts; thereafter the judge acts as examiner-in-chief, with counsel asking only follow-up questions, subject to leave of the court, and without using leading questions. In fact, in certain countries, the attorney does not pose his follow-up questions directly to the witness, but rather provides them to the court, which then presents them to the witness. In lieu of a verbatim transcript, the judge pauses from time to time to dictate a summary of the testimony for the file. The summary is read back to the parties and the witness for their approval and suggestions on how the wording might be improved.

The differences between legal systems are smoothed out to some extent by article 9 of the Convention, which provides that a judicial authority that executes a letter of request shall apply its own law as to the methods and procedures to be followed, but "will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedures or by reason of practical difficulties." Several countries have taken significant measures to implement article 9. For instance, France incorporated article 9 into its Civil Procedure Code (Noveau Code de Procédure Civile).[53]

Nevertheless, a few respondents to the SILP survey indicated that the method by which witnesses were examined diminished the utility or effectiveness of the procedure. Their comments were as follows:

> "No follow up questions." (France)
> "No effective cross-examination." (Switzerland)
> "The answers were incomplete or evasive. Answers could not be followed up." (Switzerland)
> "The judicial authority started by the written questions attached to our letter request. Once that process was completed, counsel were allowed to ask follow up questions but only to the extent they fell under the scope of the written questions." (Switzerland)

[53] Art. 739, N.C.P.C.

> "Unable to cross-examine and critical questions suggested to the Court to ask the witness were rejected without explanation." (Germany)
> "Translation process slow and burdensome." (France)[54]

These responses are consistent with the observations of legal commentators.[55]

On the other hand, as to each of the three countries referenced in these comments – France, Switzerland and Germany – several respondents indicated being quite satisfied with the examination procedures, which bears out an observation by Legal Language Services, Inc. that "the personality and experience of the presiding judge is an important factor in determining the degree to which US counsel will be accommodated."[56]

Philip Amram, the rapporteur at the proceedings that resulted in the Convention, described the intent of article 9 as follows:

> To be "incompatible" with the internal law of the State of execution does not mean "different" from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition. No Civil Law delegation suggested that his country had constitutional or statutory provisions which would prevent the examination of witnesses and the preparation of the transcript of the testimony "Common Law style". …

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[54] Under the French procedure, the attorney's questions and the answers of the witness must be translated into French, even if the witness is a native English speaker. *See* Art. 740, N.C.P.C.

[55] For instance, one French lawyer observes that although "in theory the door is open to a cross examination before the French court, . . . there is little chance of the court agreeing to this, especially as its inexperience of this system will hardly encourage the lawyers acting for the parties to insist on this being done in accordance with common law practice." Jean-Louis Delvolvé, *France in* OBTAINING EVIDENCE IN ANOTHER JURISDICTION IN BUSINESS DISPUTES at 86 (Charles Platto & Michael Lee eds. 2d ed. 1993). *See also* Judith L. Holdsworth, et al., *Germany*, *in* TRANSNATIONAL LITIGATION – A PRACTITIONER'S GUIDE GER-56 (Richard H. Kreindler et al. eds. 1997) ("The extent to which a German judge will permit deviation from German procedures in executing a Letter of Request for testimony from a German national depends on the directives he has received from the Central Authority, the individual judge's preferences, and the facts and circumstances of the case."); *In re Vitamin Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25070 (D.D.C. Sept. 10, 2001) (special master's report) (citing French legal expert for the proposition that "[w]hile depositions where counsel may ask questions can be taken, cross-examination is up to the French judge").

[56] *See also* 1989 Special Commission Report ("Cross-examination was not felt to raise any legal problems . . . Practical problems were foreseen, however, owing to the inexperience of lawyers in civil law countries in such matters"); 1985 Special Commission Report ("it appeared that the courts in civil law countries generally will allow for depositions to be taken 'common law' style if so requested, even though they may sometimes have difficulties conducting a cross-examination").

> There is a clear difference between "impracticable" and "impossible of performance". The latter is a much heavier burden to assume. This was deliberate. The basic intent is to maximize international cooperation and to minimize the possibilities of refusal to cooperate. It is not sufficient for the foreign practice to be "difficult" to administer or "inconvenient"; compliance must be truly "impossible".[57]

Although most courts and judges seem to be applying article 9 in an appropriate manner, this does not appear to be occurring consistently. The ILC believes that foreign central authorities should promote more consistent application of American procedures in witness examinations conducted pursuant to U.S. letters of request.

D. Video Depositions

Three respondents complained of the inability to conduct videotaped depositions in France. One of them stated:

> One French judge refused to allow videotaping even though French procedure now allows for videotaping (as our local counsel pointed out to the court), but the court ruled that French "practice" was opposed to videotaping. The US should request that the French Ministry of Justice instruct judges not to oppose reasonable discovery requests for purely subjective reasons.

We have also been provided with a copy of a decision by a Paris court, dated March 4, 2003, denying a request for a video deposition.

The Report of the 1989 Special Commission included the following reference to video depositions:

> Particular methods or procedures for taking evidence which had been requested included video evidence, and the opportunity for cross-examination of witnesses. Most delegations did not envisage problems with requests for video recordings, but the representatives of Luxembourg, Denmark and Sweden considered that there would be difficulties with such requests under their laws.

A video deposition is a useful device in arriving at the truth. Unlike a deposition recorded by stenographic means, a video deposition affords the

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[57] Philip Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. A, p.12, 92d Cong., 2d Sess. 11 (1972), 12 INT'L LEGAL MATERIALS 327 (1973).

fact-finder, be it a judge or jury, the opportunity to evaluate the credibility and demeanor of the witness. Videotaping can also help resolve or avoid disputes among interpreters. The ILC believes that video depositions should be accommodated under article 9 of the Convention.

E. Logistical Issues

LLS noted various logistical problems in arranging for depositions under the Convention letter of request procedure. In particular, foreign judges or law clerks often reject requests to:

- Extend the allotted time for the hearing from 1-2 hours to at least 7 hours per witness (as provided by US federal rules)
- Bring in court reporters even though a dictated summary will be provided by the foreign court (LLS' experience is that a hearing may result in 300-400 pages of verbatim transcript but at the same time only 10 pages of court summary)
- Have audio tape backup as a quality control for court reporters (often denied)
- Bring in videographers (virtually always denied, even though very helpful for cases going to trial where witness testimony will be presented to a jury, and as a quality control for interpreters)[58]
- Force the witness into the courtroom when the witness says he/she has extended business trips or vacation time and cannot honor the hearing date[59]
- Arrange for long-distance participation by opposing counsel by telephone
- Have a room large enough to accommodate attorneys, witnesses and support staff (formal hearings sometimes held in judge's chambers, where space is cramped)
- Allow counsel to object to answers or ask for clarification

[58] *See supra* Section III.D.
[59] *See supra* Section III.B.

?? Bring in large quantities of documents to the hearing for presentation to the witness

These issues might be brought to the attention of the Special Commission.

F. The Nature Of "Pretrial" Discovery

Although not raised as an issue in the survey, the United States delegation to the Special Commission should perhaps emphasize that "pretrial" does not mean prior to the filing of the action. The issue was previously raised at the 1978 and 1985 Special Commission. As stated in the 1989 Special Commission Report:

> The United States Experts emphasized as they had done in 1978 that the expression "pre-trial" does not literally mean: "before the commencement of the proceedings." The fact-finding process can only be engaged after institution of civil proceedings, i.e. after a complaint has been filed with the court and summons been served on the defendant.

Although contracting states with long-term experience under the Hague Evidence Convention seem to understand this point, some of the newer contracting states may not.

For instance, in an otherwise excellent commentary on the Hague Evidence Convention, a staff attorney for the Russian High Commercial Court stated, in connection with a discussion of article 23, that pretrial discovery enables a party to "obtain, even before the institution of legal proceedings, access to documents at the disposal of the opposing party for preparation of the complaint and for future legal proceedings."[60]

Confusion on this point arises because civil law systems do not typically recognize distinct "pretrial" and "trial" phases in civil litigation. Since cases are decided by a judge, rather than a jury, civil proceedings tend not to culminate in a "trial" in the sense of a single, concentrated event in which jurors from the community gather to hear testimony, consider evidence, and render a verdict. Rather, the typical civil proceeding in a civil law country consists of a series of meetings and written communications between attorneys and the judge, with evidence, testimony, motions, and rulings presented in installments. Pretrial discovery, whereby each side is afforded a preview of the other's proof in order

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[60] V.V. Starzhenetskii, *Kommentarii k Gaagskoi Konventsii 1970 goda o poluchenii za granitsei dokazatel'stv po grazhdanskim ili torgovym delam [Commentary on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970]*, in GRAZHDANIN I PREDPRINIMATEL' V ROSSIISKOM I ZARUBEZHNOM SUDE: PRAVOVAYA POMOSHCH [THE CITIZEN AND ENTREPRENEUR IN RUSSIAN AND FOREIGN COURT: JUDICIAL ASSISTANCE] 100-01 (2002). In the original Russian, this sentence reads in context as follows: "? ??????? ?????? ?????????, ???? ?? ?????? ? ???????? ???????? ? ?? ?? ??????? ?? ? ?? ?????? ????? ???????? ???????????? ?????? ? ????? ????? , ??????? ?? ?? ? ???????? ???? ????????? ??????? , ??? ?????????? ???????? ?????????, ??? ?????????? ? ????? ?? ? ???????? ? ????????????." In referring to "pretrial discovery", the text uses the term "?????????? ?????? ???", which literally means "pre-judicial discovery".

to prepare for trial, is less essential to a system of trial by installment than it is to the common law system in which the "trial" constitutes a culminating event.

The United States should perhaps ensure that there is no misunderstanding at the Special Commission regarding the nature of "pretrial" discovery.

G. Benefits to Foreign Litigants of the *Aerospatiale* Decision

In *Societe National Industrielle Aerospatiale v. United States District Court,* the United States Supreme Court considered whether the Hague Evidence Convention preempts the Federal Rules of Civil Procedure with regard to obtaining evidence from abroad.[61] In deciding this issue, the Court essentially had four options: (1) rule that the Convention was the exclusive means of obtaining discovery from parties located in Convention countries; (2) rule that the Convention had no application to discovery of foreign persons over whom the American court had personal jurisdiction; (3); rule that resort should first be had to the Convention procedures; or (4) rule that the issue should be decided case-by-case using a comity analysis.[62] The Court unanimously rejected options (1) and (2), and by a 5 to 4 margin elected the fourth option -- case-by-case analysis of whether the Convention procedures should be used.[63]

In view of *Aerospatiale*, any request for accommodation of American letters of request might be greeted to some extent with a response of "what have you done for us?"

One obvious response is that U.S. courts are perhaps the most accommodating in the world with regard to rendering assistance to foreign courts seeking evidence.[64] Such assistance is in no way contingent on reciprocity.

Second, in a number of recent cases, state courts have applied the *Aerospatiale* comity analysis to require first resort to the Hague Evidence Convention.[65]

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61 428 U.S. 522 (1987).

62 *Id.*

63 *Id.*

64 *See* 28 U.S.C. § 1782. The legislative history for this provision, enacted in 1964, stated that "[e]nactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." S. Rep. No. 1580, 88th Cong. 2d Sess., *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793-94.

65 *See, e.g.*, *Umana v. SCM SpA*, 291 A.2d 446 (N.Y. App. Div. 2002) (in action against Italian manufacturer, court upheld lower court's decision "requiring the plaintiff to follow the Convention procedures in the first instance"); *Husa v. Laboratories Services S.A.,* 740 A.2d 1092

Finally, the *Aerospatiale* decision extended special protection to foreign litigants, stating:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration.[66]

Thus, although U.S. courts do not typically mandate first resort to the Convention, they will often intervene to limit discovery in ways that would not have been likely in purely domestic litigation.[67] In effect, the *Aerospatiale* opinion raises foreign litigants to the status of a protected class for whom the judge will exercise special vigilance to protect them against potentially abusive discovery tactics.[68]

Based upon *Aerospatiale*, foreign parties are often in a position to extract discovery concessions from the other side based on a threat to file a motion seeking resort to the Convention procedures (which, even if unsuccessful, will delay the case).[69] That point is reflected in the survey results. One of the questions asked:

(N.J. Super. Ct. App. Div. 1999) (requiring use of the Convention, New Jersey court observed "we are more generous in our use of the Convention's procedures than the [federal] courts"); *Geo-Culture, Inc. v. Siam Inv. Mgmt.*, 936 P.2d 1063 (Ore. App. 1997).

66 428 U.S. at 547.

67 *See, e.g., DBMS Consultants, Ltd. v. Computer Assoc. Int'l, Inc.,* 131 F.R.D. 367, 370 (D. Mass. 1990) (foreign deposition of former employee of defendant ordered taken in writing rather than orally when "it would be unjust and inappropriate to request a full-blown oral examination, with the attendant time, travel and money constraints for all involved, when a simpler procedure may yield the desired information"); *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 349 (D. Conn. 1997) (approving Federal Rules discovery, but only on the condition that the discovery requests be narrowed); *In re Bedford Computer Corp.*, 114 B.R. 2, 6 (Bankr. D.N.H. 1990); *Oxford Indus. Inc. v. Luminco, Inc.,* 1990 WL 181488, at *2 (E.D. Pa. Nov. 19, 1990).

68 Indeed, foreign parties fare well in American courts generally. In the U.S. federal courts, for instance, foreign plaintiffs win 80% of their cases, as compared to a plaintiff win rate of only 64% in wholly domestic cases. When domestic plaintiffs sue foreign defendants, the plaintiff win rate drops to 50%. "Thus, domestic plaintiffs fare worse than foreign plaintiffs, and furthermore, domestic defendants fare worse than foreign defendants." Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts,* 109 HARV. L. REV. 1120 (1996).

69 *Cf., Boss Mfg. Co. v. Hugh Boss AG*, 1999 WL 20828 (S.D.N.Y. 1999) (current managing agent and former employee of German defendant agreed to waive applicability of Hague Evidence subject to deposition being conducted in Germany); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886 (E.D. Pa. 1998).

Have you ever been involved in a case in which a party agreed not to file a motion to require resort to the Convention letter of request procedure with respect to a foreign witness in exchange for an agreement that the discovery proceed on stipulated terms (e.g., that the deposition occur in the witness' country of residence, etc).?

Of the 50 respondents who answered this question, 32 responded "yes."

CONCLUSION

The Hague Evidence Convention has been remarkably successful in bridging differences between the common law and civil law approaches to obtaining evidence and has significantly streamlined the procedures for compulsion of evidence from abroad. Members of the ILC are grateful for the assistance available from foreign judicial authorities. We hope the comments in this report will be accepted in the spirit in which they are offered – as a constructive effort to further enhance the effectiveness of this remarkable system for judicial cooperation between nations.

Thank you for the opportunity to submit this report.

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Committee,
Section of International Law and Practice
American Bar Association

Robert F. Brodegaard
Vice-Chair, International Litigation
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APPENDIX A

Questionnaire on Experience Under the Hague Evidence Convention

The International Litigation Committees of the International and Litigation sections of the ABA are conducting this survey as part of a study of the effectiveness of the "letter of request" procedure under the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (the "Convention").

The results of the study will be used by the Office of Legal Adviser of the U.S. State Department at a Hague Conference review meeting regarding the operation of the Convention. The Hague meeting is scheduled for October 28 – November 5, 2003. In order to conduct a meaningful analysis of the data prior to that meeting, we need your response as soon as possible.

The survey questionnaire was designed to make your entries as effortless as possible. **Most of the questions require only checking "yes" or "no" boxes. We estimate that it will take approximately 10 minutes to complete.**

1. Have you ever participated in discovery of evidence from abroad (either as counsel for the requesting or responding party) through the Convention letter of request procedure?

- ✍ Yes
- ✍ No

If no, please proceed directly to Part VI.

2. If yes, how many times have you participated in the Convention letter of request procedure?

- ✍ Once
- ✍ 2-5 times
- ✍ 6-10 times
- ✍ More than 10 times

3. If you have participated in discovery of evidence from abroad through the Convention letter of request procedure, please indicate which country or countries were involved:

- ✍ **Argentina**
- ✍ **Barbados**
- ✍ **Bulgaria**
- ✍ **Cyprus**
- ✍ **Denmark**
- ✍ **Finland**
- ✍ **Germany**
- ✍ **Israel**
- ✍ **Kuwait**
- ✍ **Luxembourg**
- ✍ **Monaco**
- ✍ **Norway**
- ✍ **Portugal**
- ✍ **Singapore**
- ✍ **South Africa**
- ✍ **Sri Lanka**
- ✍ **Switzerland**
- ✍ **United Kingdom**
- ✍ **Venezuela**
- ✍ **Australia**
- ✍ **Belarus**
- ✍ **China**
- ✍ **Czech Republic**
- ✍ **Estonia**
- ✍ **France**
- ✍ **Hong Kong**
- ✍ **Italy**
- ✍ **Latvia**
- ✍ **Mexico**
- ✍ **Netherlands**
- ✍ **Poland**
- ✍ **Russia**
- ✍ **Slovenia**
- ✍ **Spain**
- ✍ **Sweden**
- ✍ **Turkey**
- ✍ **Ukraine**

2. Part II

With regard to the following questions, if you have participated in Convention discovery of evidence from more than one country, we ask that you choose only one such country and answer the following questions as to only that country. Please select the country with respect to which you believe your experience would be most helpful to the Hague Conference. Obviously, we would be delighted if you would complete separate questionnaires as to each country for which you have Convention experience, and we encourage you to do so.

4. Consistent with the immediately preceding instructions, please indicate the country with respect to which you will be completing the following questions of this questionnaire. Please select one country:

- ✍ **Argentina**
- ✍ **Barbados**
- ✍ **Bulgaria**
- ✍ **Cyprus**
- ✍ **Denmark**
- ✍ **Finland**
- ✍ **Germany**
- ✍ **Australia**
- ✍ **Belarus**
- ✍ **China**
- ✍ **Czech Republic**
- ✍ **Estonia**
- ✍ **France**
- ✍ **Hong Kong**

- ✍ **Israel**
- ✍ **Kuwait**
- ✍ **Luxembourg**
- ✍ **Monaco**
- ✍ **Norway**
- ✍ **Portugal**
- ✍ **Singapore**
- ✍ **South Africa**
- ✍ **Sri Lanka**
- ✍ **Switzerland**
- ✍ **United Kingdom**
- ✍ **Venezuela**
- ✍ **Italy**
- ✍ **Latvia**
- ✍ **Mexico**
- ✍ **Netherlands**
- ✍ **Poland**
- ✍ **Russia**
- ✍ **Slovenia**
- ✍ **Spain**
- ✍ **Sweden**
- ✍ **Turkey**
- ✍ **Ukraine**

5. If you have participated in Convention discovery in that country on more than one occasion, please state how many times:

- ✍ 2-5 times
- ✍ 6-10 times
- ✍ More than 10 times

The next section relates to oral examinations or depositions. If your discovery experience related only to document requests, please proceed directly to Part IV.

3. Part III (Depositions)

NOTE: If you have obtained evidence from that country in multiple instances, please respond to the following questions as to your typical experience with that country. If your experience with that country has varied, you will have an opportunity to supplement your "yes" or "no" responses in space provided at the end of the questionnaire.

6. Did you experience a situation in which the foreign judicial authority required the attendance of the witness through measures of compulsion (e.g., subpoena, etc.), but such measures did not result in the appearance of the witness?

- ✍ Yes
- ✍ No

7. Did you attend the oral examination/deposition?

- ✍ Yes

✍ No

8. If yes, please indicate who questioned the witness:

✍ me or other American counsel
✍ foreign counsel
✍ the foreign judicial authority
✍ N/A
✍ Other (please specify) _____

9. If the parties' counsel examined the witness, were they able to conduct an American-style cross-examination?

✍ Yes
✍ No
✍ N/A

10. Did the foreign judicial authority uphold the assertion of any evidentiary privileges that would not likely have been recognized by the U.S. court issuing the letter of request?

✍ Yes
✍ No
✍ N/A

11. Was a verbatim transcript taken of the testimony?

✍ Yes
✍ No

12. If no verbatim transcript was taken, was the summary of the testimony substantially accurate?

✍ Yes
✍ No
✍ I don't know
✍ N/A

13. Did the means by which the testimony was taken before the foreign judicial authority diminish the utility or effectiveness of the procedure?

✍ Yes
✍ No

✍ I don't know

14. If yes, please indicate how the utility or effectiveness of the procedure was diminished:

_____
_____
_____
_____
_____
_____
_____

15. Was the testimony used in any proceeding before the U.S. court (e.g., at trial, in support of a motion, etc.)?

✍ Yes
✍ No

16. If yes, were any objections upheld as to the admissibility of the Convention evidence that was obtained?

✍ Yes
✍ No
✍ N/A

17. Did the evidence obtained through the Convention procedure have any impact on the ultimate disposition or settlement posture of the case?

✍ Yes
✍ No
✍ I don't know

18. What was the length of time (or average length of time, if you used the Convention procedure in multiple instances) from the issuance of the letter of request until the parties' receipt of the evidence (or other final determination concerning the disposition of the letter of request)? *If you are not able to determine the precise length of time, please respond to the best of your recollection (we are not asking you to retrieve your files from archives).* Please check one:

✍ 1-2 months
✍ 2-4 months
✍ 4-6 months

- ✍ 6-9 months
- ✍ 9-12 months
- ✍ 12-18 months
- ✍ N/A (e.g., never received the evidence or a final determination)

19. If you used the Convention procedure in multiple instances, please comment as to any letters of request that were executed far outside the above-referenced average length of time for execution of such requests:

_____
_____
_____
_____
_____
_____
_____

NOTE: If the discovery was a <u>request for documents</u>, continue on to the next section. If not, go to Part V.

4. Part IV (Request for Documents)

NOTE: If you have obtained evidence from a particular country in multiple instances, please respond to the following questions as to your <u>typical</u> experience with that country. If your experience with that country has varied, you will have an opportunity to supplement your "yes" or "no" responses in space provided at the end of the questionnaire.

20. Did the foreign judicial authority compel production of all of the documents requested?

- ✍ Yes
- ✍ No

21. If no, please indicate the reason (check all that apply):

- ✍ the foreign country deemed the request as one for "pretrial discovery"
- ✍ the documents were not identified with sufficient specificity
- ✍ a claim of privilege
- ✍ N/A
- ✍ Other (please specify) _____

22. If you did not obtain all of the documents requested, did the foreign judicial authority limit or "blue pencil" the request and compel production of some of the documents requested?

- ✍ Yes
- ✍ No
- ✍ N/A

23. Were documents obtained through the Convention procedure used in any proceeding before the U.S. court (e.g., at trial, in support of a motion, etc.)?

- ✍ Yes
- ✍ No
- ✍ N/A

24. If yes, were any objections upheld as to the admissibility of the documents?

- ✍ Yes
- ✍ No
- ✍ N/A

25. Did the documents obtained through the Convention procedure have any impact on the ultimate disposition or settlement posture of the case?

- ✍ Yes
- ✍ No
- ✍ I don't know
- ✍ N/A

26. What was the length of time (or average length of time, if you have used the Convention procedure in multiple instances) from the issuance of the letter of request until the parties' receipt of the evidence (or other final determination concerning the disposition of the letter of request)? *If you are not able to determine the precise length of time, please respond to the best of your recollection (we are not asking you to retrieve your files from archives).* Please check one:

- ✍ 1 month or less
- ✍ 1-2 months
- ✍ 2-4 months
- ✍ 4-6 months

- ✍ 6-9 months
- ✍ 9-12 months
- ✍ 12-18 months
- ✍ more than 18 months
- ✍ N/A (i.e., never received the evidence or a final determination)

7. If you used the Convention procedure in multiple instances, please comment as to any letters of request that were executed far outside the above-referenced average length of time for execution of such requests:

_____
_____
_____
_____
_____

5. Part V (Effectiveness of the Process)

If you represented the party that initiated the use of the Convention letter of request procedure, please respond to the following questions:

28. Did you associate foreign counsel to assist in processing the letter of request through the foreign central authority?

- ✍ Yes
- ✍ No

29. If yes, do you believe that this significantly expedited the process?

- ✍ Yes
- ✍ No
- ✍ I don't know
- ✍ N/A

30. Viewing the question with the benefit of hindsight, would you again initiate the use of the Convention letter of request procedure under the same circumstances? (i.e., are you glad you did it?)

- ✍ Yes
- ✍ No
- ✍ I don't know

31. Was your experience with the Convention more or less satisfactory than you had anticipated prior to first using it?

- ✍ more satisfactory
- ✍ less satisfactory
- ✍ I don't know

32. Did use of the Convention letter of request procedure delay case management or trial of the domestic litigation?

- ✍ Yes
- ✍ No

6. Part VI (Reasons for not Using the Convention)

33. Please indicate whether you have ever considered using the Convention letter of request procedures, but elected <u>not</u> to, as a result of (check all that apply):

- ✍ insufficient familiarity with the Convention procedure (either generally or with respect to a particular country)
- ✍ concerns over delays
- ✍ concerns regarding the assertion of foreign evidentiary privileges
- ✍ inability to conduct an American-style witness examination
- ✍ inability to identify the documents sought with the specificity required by the foreign country
- ✍ expense to the client
- ✍ N/A
- ✍ Other (please specify) _____

34. Have you ever been involved in a case in which a party agreed not to file a motion to require resort to the Convention procedure with respect to a foreign witness in exchange for an agreement that the discovery proceed on stipulated terms (e.g., that the deposition occur in the witness' country of residence, etc.)?

- ✍ Yes
- ✍ No

7. Part VII (Additional Information)

35. Please use this space if any of your preceding answers require further elaboration or explanation:

_____

_____

_____
_____
_____

36. Please provide any other comments or proposals that might be pertinent to an assessment of the Convention's letter of request procedure:

_____
_____
_____
_____
_____

37. Would you like to receive an electronic copy of the final study report and be listed in the appendix as one of the survey respondents?

✍ Yes
✍ No

38. If yes, please provide us with your name, firm, address, phone number, and email:

_____
_____
_____
_____
_____

8. Thank You

Thank you for completing the questionnaire on experience under the Hague Evidence Convention.

If you have participated in Convention discovery in more than one country, please complete a separate questionnaire, with respect to each country. Please return the questionnaire to: Glenn P. Hendrix, Arnall Golden Gregory LLP, 1201 W. Peachtree Street, Suite 2800, Atlanta, Georgia 30309-3450.

If you have any questions regarding the questionnaire or this project, please contact:

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APPENDIX B

Respondents to Hague Evidence Convention Survey

Anonymous (28 Respondents)
Craig M. J. Allely, Holland & Hart, LLP, Denver, CO
Brigitte M. Anderson, Anderson Law Firm, Three Forks, MT
Randall K. Anderson, Keogh, Caisley, Tunbridge, Wells, United Kingdom
Harry L. Arkin, Arkin and Associates, P.C., Denver, CO
William M. Barron, Alston & Bird, New York, NY
Robert Brodegaard, Thacher Profit & Wood, New York, NY
Peter I. Broeman, Ullman Furhman Broeman & Platt, P.C., Morristown, NJ
Theresa L. Busch, Freeman, Freeman & Salzman, P.C., Chicago, IL
Bernardo M. Cremades, B. Cremades & Asociados, Madrid, Spain
James Martin Dickstein, Shapiro Morin & Oshinsky, LLP, Washington DC
Christopher H. Dillon, Burke & Parsons, New York NY
Grant J. Esposito, Mayer Brown Rowe & Maw, New York, NY
Adam Freedman, Schulte Roth & Zabel LLP, New York, NY
Gregory F. Hauser, Alston & Bird LLP, New York, NY
Donald J. Hayden, Baker & McKenzie, Miami, FL
Eckhard R. Hellbeck, White & Case, Washington, DC
Glenn P. Hendrix, Arnall Golden Gregory LLP, Atlanta, GA
Thomas B. Kenworthy, Morgan Lewis & Bockins LLP, Philadelphia, PA
David J. Levy, Fulbright & Jaworski L.L.P., Houston, TX
Dana C. MacGrath, O'Melveny & Myers LLP, New York, NY
Harold Maier, Vanderbilt Law School, Nashville, TN
Orual Marlow II, Morris, Lendais, Houston, TX
Clifford R. Michel, LeBoeuf, Lamb, Greene & MacRae, L.L.P., New York, NY
Michael L. Morkin, Baker & McKenzie, Chicago, IL
Michael L. Novicoff, Reuben & Novicoff, Los Angeles, CA
John B. Pinney, Graydon Head & Ritchey, Cincinnati, OH
Daniel M. Press, Chung & Press, P.C., McLean, VA
Mitch Purcell, Theler Reid & Priest, San Francisco, CA
Evgeny Reyzman, Baker & McKenzie, Moscow, Russia
Alice C. Richey, Kennedy Covington Lobdell & Hickman, Charlotte, NC
Steven Richman, Duane Morris, Princeton, NJ
Gerald Ross, Fryer & Ross LLP, New York, NY
Joe Samarias, Wilmer, Cutler & Pickering, Tysons Corner, VA
Judith Sapp, Komondorok LLC, Portland, ME
Howard J. Schwartz, Porzio, Bromberg & Newman, Morristown, NJ
Philip Schwartz, Fairfax, VA
Margaret D. Stock, Stock & Donnelley LLC, Anchorage, AK

Robert A. Swift, Kohn Swift & Graf PC, Philadelphia, PA
A. Katherine Toomey, Baach Robinson & Lewis, Washington, DC
William R. Towns, Attorney-Mediator, San Antonio, TX
Martha K. Wivell, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN
Mark E. Wojcik, The John Marshall Law School, Chicago, IL