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Obtaining Evidence in France for Use in the United States

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OBTAINING EVIDENCE IN FRANCE FOR USE IN THE UNITED STATES

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SUMMARY

I. INTRODUCTION

The profound differences that exist between the civil and common law legal systems surface immediately when one attempts to work with both systems at the same time. Often, these differences cause difficulties in judicial cooperation between European countries and the United States. The distinctions are accentuated and the difficulties heightened when there is a misconception or miscommunication on the part of judges or attorneys as to the principles underlying the foreign system.[1]

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[1] An example of this is the misconception on the part of civil law countries as to the meaning of pre-trial discovery. Many European attorneys and judges believe that pre-trial discovery is not an integral part of the American judicial proceedings. Another example is that the judiciary in the United States is of the firm belief that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (discussed infra) does not call for exclusivity, but rather is one means of obtaining evidence abroad. The latter concept is firmly rejected by almost all of the signatories of the Convention.

French litigants requesting information from United States courts usually do not confront difficulties in judicial cooperation, since discovery procedures in the United States are much broader than they are in France.[2] The French, however, are fairly representative of the European community in general, and until a few years ago discovery procedures in France were extremely weak.[3]

Recently, there have been changes in the French legal system that indicate an interest on the part of the French government to be more accommodating to foreign requests for written documents to be used as evidence. Article 10 of the French Civil Code, amended in 1972, is considered as a symbol of France's new legal perspective. It reads:

> Everyone is bound to cooperate with the judicial authorities (la justice) with a view to procuring the manifestation of the truth. He, who, in the absence of a legitimate motive, fails to respect this obligation when he has been legally required to do so may be forced to comply by penalty (astriente) or civil fine, and this without prejudice to [his being held liable in] damages [to the injured party].[4]

This provision reflects the French jurists' realization of the need for effective tools to allow the French judiciary to cooperate when requests for pre-trial discovery are made according to the Hague Convention. For example, Article 11 of the French *Nouveau Code de Procedure Civile* (New Code of Civil Procedure, NCPC)[5] includes language similar to Article 10 of the Civil Code, and Articles 138-141 of the new code, which deals with the production of documents, also contain similar provisions.

Perhaps most important are the 1971 amendments to the NCPC in relation to written evidence. [6] Article 134 allows for "astreinte," through which French judges may penalize parties who fail to comply with the new written evidence

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[2] The scope of discovery in the United States is extremely broad. Under the Federal Rules of Civil Procedure, information may be obtained regarding any matter that is relevant to the subject of the action as long as the information requested is "reasonably calculated to lead to the discovery of admissible evidence."

[3] The French have an overwhelming preference in favor of written evidence and a profound distrust of oral evidence. *See* Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 470 (1986).

[4] For American observers, it is difficult to understand why the amendment was needed. The modification itself as late as 1972 signals that there was a perception prior to that time that there was no need to find the truth in civil matters. After the amendment, the judge's fact-finding and determination power was somewhat enhanced, but he refused to take advantage of it. The parties are still precluded from searching for evidence on their own. *Id.* at 461-62.

[5] Nouveau Code de Procedure Civile.

[6] Articles 138 through 142 of the NCPC. *See* Appendix A for exact language.

provisions.[7] The "astreinte," designed to compel compliance with a court order, may be utilized whenever specific performance is ordered. Its application has been equated to United States proceedings for contempt of court.[8] Indeed, although, forceful discovery in civil litigation violates long-lived French tradition,[9] these recent modifications in theory and changes in attitude, even if slow in implementation, promise greater cooperation and closer ties in future years, placing France at the forefront of European law as it relates to discovery abroad.

This article outlines the alternatives available to American attorneys seeking to obtain evidence in France. Part II sets the stage leading to the existing differences between the two legal systems. It discusses what those differences are and why they are relevant. Parts III, IV and V discuss the legal actions and policies that France has developed in response to requests for the production of evidence to be used abroad. Part VII highlights the effects and reactions those actions have had in the United States. And finally, Part IX sets forth the current alternatives available to American attorneys seeking to conduct discovery in France.

II. DIFFERENCES BETWEEN THE FRENCH AND AMERICAN LEGAL SYSTEMS[10]

A. Differences in the Litigation Process Structure

In the United States, the litigation process is divided into the pre-trial and trial stages. In civil law countries, however, the trial does not involve one distinct and continuous process in court; rather, it consists of a series of events and court presentations which eventually lead to a judgment. This fundamental procedural difference has led civil law countries to misunderstand the concept of pre-trial discovery. The judiciary in France, as well as in Germany and other European nations, perceives the pre-trial proceeding as a preparatory stage that precedes the trial. Since discovery is classified as *pre-trial*, it is often categorized as being within the pre-litigation stage, and therefore rejected.

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[7] *See* Appendix B for the legislation on "astreinte."

[8] The "astreinte," a fine imposed for the performance of a contract or other obligation, was specifically provided in the NCPC to force the parties to comply with the requirements of these articles: "C'est surtout dans le but d'obliger les parties à communiquer et à restituer les pièces (art. 134, 136,943 nouv. C.) de contraindre les parties ou les tiers à fournir des documents ou justifications (art. 11, 139, 290 nouv. C. pour la vérification d'ecriture) que le recours à l'astreinte est envisagé." *See* J. VINCENT, PROCEDURE CIVILE 415 (1981), and P. HERZOG, CIVIL PROCEDURE IN FRANCE 560, 562 (1967).

[9] *See* Beardsley, *supra* note 3.

[10] For an in-depth analysis on differences in procedural systems, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986).

Furthermore, civil law countries argue that the pre-trial stage is not part of the litigation process, and that, consequently, it is not deserving of international *judicial assistance.*

The second fundamental distinction deals with the determination of law and of facts. In the United States, the court determines the issues of law and the jury the issues of fact. In France, however, the legal and factual issues are presented and decided upon by the same authority. The French believe that it is impossible to distinguish between legal and factual determinations without altering the nature of the litigation process. They are especially concerned that where fact determination is separate, as it is in the United States, it is difficult to monitor the activities of the fact-finder to assure that only facts that are directly relevant to the case are gathered.

B. Roles of the Participants in the Process

In the French legal system, the judge is the predominant figure responsible for factual and legal determinations, and for the application of the law. In the United States, however, the role of the judge is that of an intermediary between the parties. American attorneys are responsible for fact investigation and presentation on behalf of their clients, and are awarded extensive authority with little court supervision over their activities. In contrast, French judges, expected to be neutral umpires,[11] control the scope of the proceedings; determine the order in which evidence is presented; question the witnesses; and summarize and interpret testimony for the record (there is no verbatim transcript in France). French attorneys, unlike their American colleagues, have a limited role: they have little fact determination authority and are not allowed to present the facts; they make information that is available to them available to the court; suggest possible sources of information to the judge; and suggest questions for the witnesses to the judge.[12]

Because the role and powers of French lawyers are so restricted, American lawyers are able to utilize state power to discover information in direct conflict with France's procedural system and public policy (*ordre public*). As a result, there has traditionally been an inherent resistance on the part of the French judiciary toward the extraterritorial application of American discovery methods.

C. Treatment of the Information

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[11] Note that it was preferred at one time that judges have no knowledge of the facts of the case until the public hearing, and, at that point, they were only presented and empowered to learn information submitted by the parties themselves. *See* Beardsley, *supra* note 3, at 462.

[12] In practice, few attorneys suggest questions to the judge. Those that do, do not present more than three questions; doing so is construed as an indirect criticism of the judge.

American lawyers have an enormous control over the presentation of information. They are responsible for gathering and selecting relevant information prior to the trial, and, to a great extent, control the testimony of the witnesses. French lawyers, however, only *suggest* and *recommend* the information that they consider appropriate, which is then evaluated by the court. They have scant control over the presentation of information and have almost no say in relation to the testimony of witnesses, who present their evidence without any prior questioning.

The French believe information should be gathered and presented only where it is strictly and specifically relevant to the case, and that it must be presented to the judge without any prior manipulation.[13] In direct contrast, the American system supports the gathering of enormous amounts of general information, which can be manipulated at will and selected by the attorneys before it is presented in court for the benefit of the jury.

D. The Extent of Evidentiary Obligations

The range of evidentiary obligations in the United States is far-reaching. A party may be compelled to provide discovery information subject only to restrictions of relevancy and confidentiality. This broad range extends similarly to nonparties. In France, however, the obligations for the production of evidence are significantly more limited, particularly as they relate to nonparties.[14] The rules for parties and witnesses are unlike those in the U.S., and parties cannot be witnesses. Furthermore, in order for evidentiary production to be compelled in France, a high relevancy standard must be met. Business information is deemed worthy of strict protective measures, in part to prevent firms from gaining access to corporate secrets through the litigation process. In contrast, in the United States the boundaries of relevancy are extremely ample, and business information receives weaker protection, making it vulnerable to litigation.

III. THE HAGUE EVIDENCE CONVENTION

In an effort to overcome the differences that mar the judicial relations between France and common law countries, the United States in particular, France signed the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter the Convention) in 1974. Established in 1970, the Convention sets forth procedures to facilitate the taking of evidence. At present, there are over 20 signataries to the Convention.

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[13] Note that the parties do not present their testimony under oath. Parties in civil actions do not take an oath. *See* Beardsley, *supra* note 3.

[14] The French judicial system is designed to protect parties and nonparties from judiciary abuses in relation to discovery.

Before the United States joined the Convention in 1972, discovery abroad by American litigants was extremely difficult, or simply not possible. Many believed the Convention represented a major concession on the part of the European community to the United States. Since liberal judicial assistance was already available to foreign parties by United States Federal Law, the United States had much to gain and little to risk by joining the Convention.[15] The main goals of the Convention when it was enacted were to:

> Improve the existing system of Letters of Request; enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissions; and preserve all the more favorable and less restrictive practices arising from internal law, internal rules of procedure, and bilateral or multilateral conventions.[16]

The Convention was to provide foreign litigants with the needed instruments for obtaining evidence admissible in their courts, while at the same time respecting the internal laws and sovereignty of the country from which the evidence is requested. The Convention accommodated, to an extent, discovery *à l'Américaine*, while attempting to "preserve civil law judicial sovereignty and evidence gathering."[17]

France ratified the Convention in 1974 subject to an Article 23 declaration providing that letters of request for pre-trial discovery would not be executed. All of the original signataries, except three, ratified the Convention subject to Article 23 declarations, declining partly or fully the execution of Letters of Request seeking pre-trial discovery of documents.[18] France, along with Denmark, Finland, Luxembourg, Norway, Portugal, Sweden and the Federal Republic of Germany, stated originally that it would not execute Letters of Request for pre-trial discovery of documents. The United Kingdom, at whose request Article 23 was formulated, and Singapore, were more specific, providing

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[15] In his message to the Senate recommending the adoption of the Convention, former President Richard Nixon stated:

> Ratification of the convention will require many other countries, particularly civil law countries, to make important changes to the judicial assistance practice. This convention is a significant step forward in the field of international judicial cooperation. It will permit our courts and litigants to avail themselves of a number of improved and simplified procedures for the taking of evidence.

See Report of the U.S. Delegation to the Hague Conference, 8 I.L.M. 785, 804 (1969).

[16] *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.J.A. 651, 652 (1969); Report of the U.S. Delegation to the Hague Conference, 8 I.L.M. 785, 805 (1969).

[17] *See* the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, Arts. 9, 15, 21.

[18] The three countries that did not make Article 23 declarations were Czechoslovakia, Israel and the United States. *See* B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE Vol. 1, 228. Barbados, who joined the Convention later, similarly did not make declarations under Article 23. *See* 77(3) REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.P.] 581 (juill.- sept. 1988).

no assistance in the pre-trial discovery of documents if the Letters of Request required someone to:

> State what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

In 1980, Denmark, Finland and Sweden modified their Article 23 declarations, and made them identical to those of the United Kingdom and Singapore.[19] Following the example of the Scandinavian countries, France announced seven years later its intention to modify its Article 23 declaration. France's modification states that Article 23 does not apply "when requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure."[20] Clearly, the request must abide by the Convention's general requirements as to the nature of the requesting authority and respect for the requested state's public policy. [21]

By modifying its Article 23 declaration, France has reiterated its desire to eliminate "fishing expeditions" without thwarting international judicial assistance. Of critical importance was France's intention for the Convention to be the "sole means by which discovery demands emanating from other signatory countries would be carried out in French soil."[22] Criticism of the Convention in relation to France has traditionally centered on the limitations imposed on letters of request by the Article 23 rejection of pre-trial discovery, the lack of a compulsory process for diplomatic and consular officers and appointed commissioners, and the refusal of the French government to consider tax cases

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[19] These modifications were made following conversations between the American delegate to the Special Commission which studied the implementation of the Convention. The American delegate conceded that it was permissible under the Convention for a contracting party to refuse a Letter of Request from the United States that lacked specificity. He went on to request that contracting states review their declarations in light of extensive discussions on the nature of American discovery in the United States; and that they "reconsider their declarations denying assistance to American litigants solely for the reason that the request is issued at the pre-trial state of a civil suit." *See* B. RISTAU, *supra* note 18.

[20] The French government notified the Government of the Netherlands of its modification of Article 23 via a letter dated January 19, 1987. *See* 26 I.L.M. 880 (1987). The original French declaration reads: "La déclaration faite par la République française conformément à l'article 23 relatif aux commissions rogatoires qui ont pour object la procédure the 'pre-trial discovery of documents' ne s'applicque pas lorsque les documents demandés sont limitativement énumerés dans la commission rogatoire et ont eu lien direct et précis avec l'object du litige." *See* 77(3) R.C.D.I.P. 582 (juill. - sept. 1988).

[21] *See* Amicus Brief for the Government of France, 23, In Re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986).

[22] *Id.*

as civil or commercial matters.[23] Because in France fiscal issues are subject only to national law, American tax authorities cannot resort to the Convention to investigate or obtain evidence in an action against an American taxpayer.

Some of the criticism relating to the declaration has subsided since the French government amended Article 23, and, although the process for the taking of evidence by diplomatic or consular officers is noncompulsory, it usually functions properly. Still, the efficacy of the proceeding remains subject to the goodwill of the parties from whom evidence is requested.

IV. DOMESTIC LAW MODIFICATIONS

The New Code of (French) Civil Procedure, amended to provide for the internal application of the Convention in France, awards the investigating magistrate[24] a general power to utilize whatever methods are appropriate in order to generate evidence he deems admissible. His only limitation is that he is required to inform the parties of the proposed measures, and allow them to be heard. The magistrate may additionally provide an opportunity for the parties and/or third persons to provide their version of the facts. Third persons may do so in written form or through oral testimony.

Articles 249-55 of the NCPC[25] permit the magistrate to hear the advice of individuals considered to possess specialized technical knowledge. To accomplish his goals he may appoint a *huissier*[26] or an expert.[27] Some of the tasks entrusted to the expert may include: hearing the parties' comments and responding to their written statements; obtaining and examining all documents useful to his investigation; and gathering any information that could be useful in the evaluation of liabilities and awarding of damages.[28] The expert, who can

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[23] *See* Borel, *Opportunities for Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 44 (1979).

[24] A member of the deciding court known as the "juge de la mise en état," whose duties include preparing the case by supervising the exchange of documents between the parties and the submission of pleadings, and fixing deadlines. *See* Beardsley, *supra* note 3, at 467-68.

[25] *See* Appendix A.

[26] A *huissier* is a pseudo official individual responsible for matters such as service of process, the maintenance of order in the court, and the establishment of facts for various legal purposes. The term huissier has been loosely translated to mean bailiff. *See* Beardsley, *supra* note 3, at 469.

[27] An expert is a person appointed by the court for the purpose of pursuing a specific investigation named by the court. The expert is often technically skilled or possesses specialized knowledge in a particular field. His role is unlike that of an expert witness in an American trial. *Id.* at 469.

[28] The duties of the expert are described in articles 263-284 of the NCPC.

request assistance from the court whenever he deems it necessary,[29] performs the functions that are normally performed in a common law procedure.[30]

On its face, the NCPC appears to award the French judiciary powers equal or superior to those available in American courts.[31] In practice, these powers are never exercised to their full potential. Nevertheless, France is the only civil law country willing to make these important concessions of law. Articles 733-748 of the NCPC establish an exception to internal French procedural rules for foreign litigants proceeding under the Convention.[32] Article 738 specifically provides for prompt execution following the receipt of the letter of request; Article 742 prevents the refusal of letters of request where French courts would ordinarily have exclusive jurisdiction over the subject matter, would not recognize the cause of action, or would refuse to grant the relief sought. Similarly, Article 743 prevents a judge from refusing to execute letters of request, except where the request is outside his functions. Article 739, which adopts the text of Article 9 of the Convention, requires French courts to comply with special procedural requests, even when they are incompatible with internal law. It also provides for the production of a full transcript or recording of any oral examination (in place of the traditional summary utilized in France).[33]

V. BLOCKING STATUTE

Subsequent to the establishment of the NCPC, and in an effort to enforce the exclusive use of the Convention for evidentiary discovery, France enacted criminal procedures in the form of a blocking statute (the Act),[34] designed to prevent so called "fishing expeditions" on the part of litigants from the United States.[35] The blocking statute expanded on an earlier 1968 Act on the

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[29] *See* Article 279 of the NCPC.

[30] This is the only proceeding provided for by French civil procedure that is similar to common law trials. *See* Beardsley, *supra* note 3, at 459.

[31] Article 740 of the NCPC allows parties and their counsel to question witnesses directly once they have received judicial authorization. This means American attorneys who are not members of the French bar may question witnesses in France. In the United States, only attorneys who are members of the United States bar, and in some jurisdictions attorneys who are members of the local bar, may interrogate witnesses. *See* Amicus Brief for the Government of France, *supra* note 21. For the exact language, see Appendix A.

[32] *See* Appendix A.

[33] The transcription of oral testimony is not required under the Convention. According to the French government, "the provisions of the new procedural rules go beyond what is required by the Convention and evidence the Republic of France's good faith in promoting effective international judicial cooperation." *See* Amicus Brief for the Government of France, *supra* note 21.

[34] *See* Appendix C for exact text of the Act in English and French.

[35] A blocking statute is a law that makes it illegal for the residents of a country to disclose certain information to persons outside that country or to copy, inspect or remove documents located within that country in compliance with orders of foreign authorities. Other countries with blocking and secrecy statutes in effect include Australia, the Bahamas, Canada, the Cayman Islands, the

"disclosure of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons." The Act was enacted in response to the extraterritorial enforcement of United States antitrust laws; and to force American litigants to abide by the Convention, which they had been ignoring. France modeled its statute after the 1980 Protection of Trading Interests Act or British Protection Act, which was enacted to deter the extraterritorial enforcement of United States antitrust laws against companies in Great Britain.[36]

The Act, which is subject to treaties and agreements in force, seeks to prevent the taking of evidence in France for or on behalf of foreign judicial authorities. Enacted in 1980 as Act 68-678, it prohibits disclosing to all "foreign law authorities", including judicial authorities, documents or information of an "economic, commercial, industrial, financial or technical nature' if that disclosure 'is likely to affect the sovereignty, security or vital economic interests of France." It also prohibits anyone from "requesting, seeking or disclosing in writing, verbally, or in any other form documents or information of an economic, commercial, industrial, financial or technical nature for use as evidence with a view to or in the framework of foreign judicial or administrative proceedings."

Under the Act, individuals who receive a request of the kind described in the first two sections are obligated to inform the State. Furthermore, the statute stipulates penalties for violators of the first two articles, including possible imprisonment and a fine. By making articles One and One Bis subject to treaties and agreements, the Act allows (and encourages) exclusive information transfers and discovery regulated by treaties, particularly the Convention. Article One has two significant limitations. First, it prohibits only communications with foreign public authorities. Second, those prohibitions are dependent on the effects of the communication. Only communications capable or likely to harm French sovereignty, security, economic interests or public policy are prohibited. Article One Bis prohibitions are based on the function of the activities instead of their effect. It prohibits not just communicating, but requesting and investigating such information and documents as well. It applies to all persons, whether or not they have significant connections with France.

Netherlands, New Zealand, Panama, South Africa, and Switzerland.

[36] In order to respond to United States antitrust enforcement, the British Protection Act authorizes the United Kingdom Secretary of State to prohibit communications of commercial information harmful to the sovereignty of the United Kingdom. It permits United Kingdom defendants in an antitrust action abroad to recover the non-compensatory portion of treble damages, and it provides for enforcement, against assets in the United Kingdom, where foreign courts have held for the recovery of such non-compensatory damages, if the foreign country reciprocally enforces United Kingdom judgments for the recovery of such penalties. *See* Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 75 INT'L LAW. 589 (1981).

The legislative history indicates the Act was intended to protect French interests only from the abuses of foreign discovery procedures. Yet, all investigations, requests or communications specified in the Act by any persons while in France, if "leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings," are prohibited. This prohibition is not dependent on harm to French interests, which means it could be applied to communications and investigations in relation to the defense of French interests and not only the acts of plaintiffs and prosecutors.[37]

Criticism of the Act focuses on its broad terms. It is difficult to predict what constitutes harm as it appears in Article One, and what type of harm is required. For example, almost any lawsuit against a French party by an American company with a presence in France would require communication violative of the Act. It is important to note, however, that if the blocking statute were ignored in a case brought in an American court, and the parties wished to later enforce the judgment in France, the judgment would not be enforced.

VI. AMERICAN REACTION TO THE BLOCKING STATUTE: *Compagnie Française D'Assurance v. Phillips Petroleum*

Following the enactment of the Act, in *Compagnie Francaise d'Assurance v Phillips Petroleum*,[38] the French plaintiffs, Compagnie Francaise d'Assurance Pour le Commerce Exterieur ("COFACE"), an agency of the French government in the business of insuring French companies against the risk of nonpayment on export contracts; and Constructions Navales et Industrielles de la Mediterranee ("CNIM"), a French shipbuilder, brought suit against Phillips Petroleum Company ("Phillips"), a Delaware corporation, alleging that Phillips was responsible for the damages suffered by CNIM when the Liberian company with whom it had contracted to build ships, and in which Phillips had a shareholder's interest (Multinational Petrochemical Company (Petrochemical)), breached its contract. The plaintiffs alleged that Phillips had a controlling interest in Petrochemical and operated it as an "alter ego"; that CNIM was induced into contracting with Petrochemical, and that Petrochemical was acting as an agent of its shareholders when it entered into the contract with CNIM. As a result of plaintiff's suit, defendants made motions for the production of documents to which plaintiffs objected claiming that the documents fell within the governmental and executive privilege doctrines. Most importantly, they claimed that French Law No. 80-538 (the Blocking Statute) prohibited the production of the documents.

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[37] *See* Herzog, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981).

[38] Compagnie Francaise d'Assurance v Phillips Petroleum, 105 F.R.D. 16 (1984).

The Court rejected both arguments. First, it acknowledged that under certain circumstances a foreign government could claim Executive Privilege, but that plaintiff's officials conclusory statements did not describe specifically the supposed privileged information and the reasons for its confidentiality. The court also found that the Convention procedures for the taking of evidence abroad "are not exclusive or mandatory," and that although plaintiffs would violate French laws by complying, they had the alternative of withdrawing their complaints.[39]

The Court applied a comity analysis and balanced competing factors including: the vital national interests of the states involved; the extent and nature of the hardship that inconsistent enforcement actions would impose upon persons; the extent to which the required conduct would take place in the other state; the nationality of the parties; and the extent to which enforcement by the action of either state could reasonably be expected to achieve compliance with the rule prescribed by that state. The Court held that the plaintiffs had an unfair advantage when they were sued in the courts of their country by foreign litigants. Furthemore, the Court stated that the Act's legislative history gave "strong indications that it was never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts."[40] The court went on to cite the *Graco* decision,[41] in stating that the Act was an obvious manifestation of French dissatisfaction with American pre-trial procedures sanctioned in other countries. The Court went on to say that French interests in this case were less important than American interests in assuring that complete discovery was achieved. In summary, the Court concluded that neither Executive Privilege nor French law protected the plaintiffs from discovery that was within their control, and that the defendant was required to attempt discovery procedures through the Convention before requesting an order from the Court.

Taking the court's view as representative of the United States position in relation to French blocking statutes, it is clear they are not considered of consequence. Although the court does state that, "American courts should refrain, whenever it is feasible, from ordering a person to engage in activities

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[39] The Court said specifically: "Indeed, it must be remembered that the parties resisting discovery in this case are the plaintiffs rather than the defendant. A production order by this Court does not condemn plaintiffs to confinement in a French prison. It merely gives them a choice. They can withdraw their complaint voluntarily at any time or produce the requested documents and risk prosecution under French law." *See* Compagnie Francaise d'Assurance, *supra* note 38, at 31.

[40] *See* Compagnie Francaise d'Assurance, *supra* note 38, at 30.

[41] Graco Inc. v. Kremlin Inc., 101 F.R.D. 508 (N.D. Ill. 1984).

that would violate the laws of a foreign nation," it adds that comity is not mandatory, but rather a courtesy among nations.[42]

VII. *Aérospatiale*: THE U.S. SUPREME COURT'S VIEW OF THE HAGUE CONVENTION

A number of disputes as to the applicability of the Convention eventually led the U.S. Supreme Court to its controversial decision in the 1986 case of *In re Société Nationale Industrielle Aérospatiale*.[43] The decision examined questions as to the exclusivity and the relevance of the blocking statute.

In *Aérospatiale*, the French litigants/defendants petitioned the court for a writ of mandamus in an effort to avoid discovery. They asserted that they could not produce the requested documents because they were located in France and were therefore subject to the provisions of the Convention, which, in their view, was the exclusive means of obtaining discovery under the circumstances. They also claimed they were prevented from complying by the Act since the information requested fell within the limits specified in it. Denying the writ, the Supreme Court held that where litigants seek discovery of foreign evidence from a party subject to the court's jurisdiction, the Convention is not recognized as an exclusive or mandatory means of discovery;[44] and that the Convention is one of several alternatives available for foreign discovery along with the Federal Rules of Civil Procedure and any applicable United States statutes. The Court, however, did not find that the Convention had to be resorted to first in all cases prior to pursuing other discovery methods.[45] The Court also determined that

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[42] The court quotes Hilton v. Guyot, 159 U.S. 113, 163-64: "Comity, however, is not a matter of absolute obligation . . . it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, have due regard both to international duty and convenience, and to rights of its own citizens or of other persons who are under the protection of its laws." *See* Compagnie Francaise d'Assurance, *supra* note 38, at 28.

[43] In re Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542 (1987). For an assessment of the application of *Aérospatiale* by U.S. lower Courts see Born & Hoing, *Comity and the Lower Courts: Post-*Aérospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393 (1990).

[44] The Court cited the preamble to the Convention, saying it does not speak in mandatory terms; instead the Preamble declares the purposes of the Convention as facilitating discovery and improving cooperation among member states. The Court went on to say that the text does not require any member to use Convention procedures or to modify its internal provisions for evidence gathering. The Court particularly emphasized the word "may" utilized in the Convention as indicating the intention of the signataries to not make the Convention mandatory or exclusive. The Court also based its argument on the negotiating history of the Evidence Convention, saying it does not allow an exclusive interpretation but rather suggests that its drafters wished to facilitate discovery and not to restrict it.

[45] The Supreme Court rejected a comity approach providing that the Convention be used as a first resort by implying it did not possess the necessary lawmaking power to establish a general first resort rule. It also said that in any case it wold not be wise to establish such a rule since Convention procedures could, in some cases, prove burdensome in that they would be too time consuming and expensive.

the specific method to be used would vary depending on the specific circumstances of each individual case after it is subjected to a balancing test.

While the *Aérospatiale* majority held that use of the Convention for foreign discovery by American courts was optional, it missed the opportunity proposed by the dissent to require first consideration for the Convention for foreign discovery. The first consideration requirement would, critics of the majority opinion say, incorporate foreign expectations effectively and reduce judicial expenditures for cases requiring complicated balancing of American and foreign interests.[46] Although the Court did not require the Convention as a first resort, or even as a first consideration, neither did it indicate explicitly that a state could not do so.[47] Nevertheless, the Court did not indicate a party had a right not to have the Convention applied where the Court deems it appropriate.

VIII. METHODS OF REQUEST UNDER THE CONVENTION

Under the Convention, American litigants seeking evidence from France have three alternative modes of request: (a) Letters of Request, also known as International Letters Rogatory or *Commissions Rogatoires*; (b) the taking of evidence before a diplomatic or consular officer; and (c) the taking of evidence before an official commissioner. Of the three, the quickest and most efficient tends to be the second, but in order for it to be effective, the evidence must be provided by a willing party. Although letters of request are rarely refused, the entire procedure is time consuming and can be burdensome. Finally, the taking of evidence before an official commissioner is usually frowned upon by the French courts, who do not take kindly to awarding the appointee of an American court the authority its own advocates lack.

A. Letters Rogatory, Commissions Rogatoires

A letter of request must be sent by an American judicial authority to a the central authority in France, the Civil Division of International Judicial Assistance or "Service Civil de l'Entraide Judiciare Internationale," at the Ministry of Justice, 13, Place Vendome, 75001 in Paris. The letter should request the French authority to obtain evidence or engage in some judicial act.

Articles one through four of the Convention[48] provide that the letters rogatory must be written in French or accompanied by a French translation, and

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[46] *See The Hague Evidence Convention in U.S. Courts: Aerospatiale and the Path Not Taken, Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa, 107 S. Ct. 2542 (1987)*, 17 GEORGIA J. INT'L COMP. L. 591 (1987).

[47] Still, a Texas court recently indicated its belief that the first resort requirement had been settled by the Supreme Court in Aerospatiale by overturning its prior first resort holding in the case of Goldschmidt A.G. v. Smith, 676 S.W. 2d. 443 (Tex. App. 1984). The Goldschmidt holding was overturned in Sandsend Financial Consultants v Wood, 743 S.W 2d. 364 (Tex. App. 1988).

[48] *See* Appendix D for exact language.

must specify the authority requesting the execution and the authority requested to execute it; the names and addresses of the parties in the suit and their representatives; the type of proceedings and other relevant information; the evidence to be obtained; the names and addresses of the persons to be examined; the questions to be asked or the statement of the information they are to be asked; the documents or their property to be inspected; whether the evidence must be gathered under oath and the specific oath if it applies; and any specific procedures or methodology deemed to be necessary.

Following the amendment of the NCPC, an American court may request a verbatim transcript or deposition evidence and a procedure for direct and cross-examination.[49] With the consent of the judge, this request can be made in relation to either a party or a nonparty witness.[50] Once the French central authority receives the letter, it forwards it to the District Attorney of the corresponding jurisdiction, who will then forward it to a competent court. It is then up to the court or its appointed magistrate to act on it. The French judge has authority to order a party or nonparty to disclose and produce the requested written materials under penalty of a daily fine. He may also order the parties to appear in person, although he cannot fine them if they fail to do so. Witness must give evidence under oath unless they can present a valid excuse or are close relatives of one of the parties. Strict penalties are applicable for noncompliance.[51]

B. Depositions Before a Diplomatic or Consular Officer

In cases where the evidence is to be provided by a willing party, depositions before a diplomatic or consular officer may be the best option. The procedures for these depositions are stated in articles 15 and 16 of the Convention.[52] The evidentiary procedures permitted under this provision are the same as those permitted by letters of request: depositions, written interrogatories, and production and inspection of documents and other physical articles. The procedure will vary depending on the nationality of the party

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[49] Articles 739-49 of the NCPC provide in part: "The letter of request shall be executed in accordance with French law unless the foreign court has requested that a particular form should be used. If so requested in the letter of request, questions and answers shall be transcribed or recorded in full." And: "The parties and their counsel, even if they are foreigners, upon authorization by the judge, may ask questions. Such questions must be formulated in or translated into French, as must he replies which are made thereto." *See* Appendix A.

[50] Article 9 of the Convention indicates that the judicial authority providing the letter may follow its own methods and procedures; or follow any special method or procedure specified by the requesting authority, provided it is not violative of the internal laws of the requested state or impossible to perform as a result of the internal procedure or for other difficulties related to the requested state.

[51] Witnesses who fail to comply may be fined up to 10,000 French francs, and witnesses who give false evidence may be receive jail sentences of up between two and five years and be fined between 500 and 7,500 French francs. *See* Article 363 of the French Penal Code.

[52] *See* Appendix D.

involved. American nationals may provide evidence without prior consent from the court.[53] In regard to French citizens or nationals of a third country, France requires prior authorization from the central authority, the "Bureau de l'Entraide Judiciare Internationale" of the Ministry of Justice. In order to take evidence from French citizens or nationals of third countries, authorization is required from the central authority.

Under normal circumstances, authorization may be obtained subject to the following restrictions: the deposition must be taken within the Embassy grounds; the hearing must be open to the public; the Ministry of Justice must be advised in advance of the time and date; the witnesses must be summoned by written notice in French prior to the hearing date, and the notice must inform the potential witness that the procedure is voluntary and that failure to appear will not involve any criminal proceedings in the United States; that they may be represented by an attorney, that the parties to the case have consented to the deposition, or if they are opposed, the reasons for their opposition; and that the person summoned may invoke legal grounds for declining to appear or to provide the requested evidence.

C. Depositions Before a Person Commissioned by the Court

The final method for evidence gathering appears under Article 17 of the Convention.[54] It is difficult to secure and is looked upon with distrust by the French judiciary, who considers it inappropriate and suspect to procure counsel from the United States, at a greater expense, where it is possible to obtain the evidence through a consular official.

Article 17 provides that a properly appointed commissioner may take noncompulsory evidence in civil or commercial matters in a contracting state for use in litigation in another contracting state. A French or American lawyer may be appointed as a commissioner authorized to conduct proceedings for the taking of evidence in France, as permitted by the corresponding American jurisdiction. Prior consent is mandatory in all cases without regard to the nationality of the party involved. The authorization is subject to the same requirements stipulated under Article 16 for the taking of evidence by a consular or diplomatic officer. The request for authorization must also explain the reasons why this particular method was preferred, especially in light of the legal costs incurred. Where the appointed person is not a resident of France, the court also requires an explanation of the specific criteria relied upon to make the appointment. The authorization must be submitted by the Embassy to the *Bureau de l'Entraide Judiciare Internationale* of the Ministry of Justice 45 days in advance, and the

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[53] Since France did not impose a requirement under Article 15 of the Convention for prior approval in these cases, Americans may furnish evidence with ease under these provisions. *See* Borel, *supra* note 23, at 41.

[54] *See* Appendix D.

hearing must take place within the Embassy grounds. The embassy usually gives notice to the parties and provides the use of its facilities at a fixed rate. Additional expenses such as the cost of hiring an interpreter or a court reporter must be taken care of by the parties.

IX. CONCLUSION

In recent years, France has made great strides towards becoming more open and cooperative regarding discovery and evidentiary production for litigation abroad. Perhaps, as some commentators indicate, the tools for this improved cooperation are already in place but are not being taken advantage of by the justice system.[55] Nevertheless, France is at the European forefront on this type of legislation. Even more encouraging is the fact that French judges are more willing than ever before to exercise their new powers. The traditional tensions between public policy principles and international cooperation remain, but now there is a better understanding of the common law requirements and procedures for discovery.

France began its cooperative efforts on a modest note by signing the Convention with a strict Article 23 declaration in 1974. Later, irate at noncompliance with the Convention, it enacted a blocking statute which in effect forced those seeking discovery to use the Convention. The recent changes in France's legislation evidence its current willingness to cooperate with U.S. parties seeking discovery in France, provided they follow some basic ground rules and respect the spirit and provisions of the Convention. Despite the blocking statute, it is becoming increasingly easier for American attorneys to request written documents for evidentiary use in litigation in the United States.

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[55] *See* Beardsley, *supra* note 3, at 459.

APPENDIX A

Selected articles from the New Code of Civil Procedure of France

Title VII

The Judicial Administration of Proof

Sub-Title I
Written Evidence (pieces)

Chapter I

Communication of Written Evidence between the Parties

Art. 132. A party who relies upon (fait état) written evidence must communicate it to the other party to the proceeding.

The communication of written evidence must be spontaneous.

On appeal, a new communication of the written evidence already admitted during the trial at first instance is not required. Nevertheless, any party may request it.

Art. 133 If the communication of written evidence is not made, the judge may be requested informally to order such communication.

Art. 134. The judge, if necessary on pain of astreinte,[56] fixes the time-limit and, where appropriate, the method of communication of the written evidence.

Art. 135. The judge may exclude (écarter du débat) such written evidence as has not been duly communicated.

Art. 136. A party who fails to return the written evidence communicated to him may be compelled to do so, if necessary by astreinte.

Art. 137. The astreinte may be liquidated by the judge who has ordered it.

Chapter II

Obtaining Written Evidence in the Possession of Third Parties

Art. 138. If, during the course fo the proceeding, a party intends to rely upon an authentic instrument or one under private signature to which he was not a party or upon a writing in the possession of a third party, he may request that the judge seised of the case order delivery of a certified copy (expédition) or production of the instrument of writing.

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[56] *See* Law No. 72-626 of July 5, 1972, Arts. 5-8.

Art. 139. The request is made informally.

If he deems the request justified, the judge orders delivery or production of the instrument or writing, either the original, or a copy or an extract, according to the circumstances, under conditions and guarantees which he fixes, under penalty of astreinte if necessary.

Art. 140. The decision of the judge is provisionally enforceable, upon presentation of the original if necessary.

Art. 141. In the event of any difficulty, or if a legitimate impediment is invoked, the judge who has ordered the delivery or production may, upon request made informally, withdraw or modify his decision. The third party may appeal from the new decision within fifteen days from the date when it is pronounced.

Chapter III

Production of Written Evidence in the Possession of Party

Art. 142. Demands for production of evidence in the possession of the parties are made, and production takes place, in conformity with articles 138 and 139.

Title XX

Rogatory Commissions (Commissions rogatoires)

Chapter I

Internal Rogatory Commissions

Art. 730. Where the distance of the parties or those persons who must cooperate in the litigation, or the distance of the places, renders a journey too difficult or too burdensome, the judge may, upon demand of the parties or sua sponte, commission a court on the same or a lower level which it deems the most conveniently located within the Republic to undertake any judicial acts which he considers necessary.

Chapter II

International Rogatory Commissions

Section I

Rogatory Commissions Addressed to a Foreign State

Art. 733. The judge may, upon demand of the parties or sua sponte, arrange for proof-taking, and also other judicial acts which he considers necessary, to be performed in a foreign state, by giving a rogatory commission either to a competent authority of that state or to the diplomatic or consular authorities of France.

Art. 734. The secretary of the commissioning court addresses to the ministere public a certified copy of the decision ordering the rogatory commission accompanied by a translation procured by a party or parties.

Art. 735. The ministere public thereupon has the rogatory commission delivered to the Minister of Justice for transmission, unless transmission may be made directly to the foreign authority by virtue of a treaty.

Section II

Rogatory Commissions Originating in a Foreign State

Art. 736. The Minister of Justice transmits to the ministere public, within whose jurisdiction they must be executed, the rogatory commissions which are addressed to him by foreign states.

Art. 737. The ministere public thereupon has the rogatory commission delivered to the competent court to be executed.

Art. 738. From the reception of the rogatory commission, the prescribed operations are undertaken on the initiative of the commissioned court or of the judge whom the president of this court designates for this purpose.

Art. 739. The rogatory commission is executed in accordance with French law unless the foreign court has requested that a special form of procedure be followed.

If so requested in the rogatory commission, the question and the answers are transcribed or recorded verbatim.

Art. 740. The parties and their counsel, even if they are aliens, may, upon authorization by the judge, ask questions; these must be formulated or translated into the French language; the same applies to answers thereto.

Art. 741. The commissioned judge is required to inform the commissioning court which so requests of the place, date and place; the foreign commissioning judge may attend.

Art. 742. The judge may not refuse to execute a rogatory commission for the sole reason that French law claims exclusive competence, or that it does not know a cause of action (voie de droit) corresponding tot he complaint brought before the commissioning court, or that it does not permit the relief sought (resultat auquel tend) by the rogatory commission.

Art. 743. The commissioned judge may refuse, sua sponte or upon demand of any interested person, the execution of a rogatory commission which he considers outside the scope of his powers. He must refuse it if it is of a nature to injure the sovereignty or the security of the French state.

Art. 744. The ministere public must insure respect for the principles governing a lawsuit (principes directeurs du procés) during the execution of a rogatory commission.

In the event of a violation of these principles, the ministere pubic or an interested party may demand that the commissioned judge rescind the measures he has taken or annul the instruments establishing the execution of the rogatory commission.

Art. 748. The execution of rogatory commissions takes place without costs or taxes.

However, the sums due to witnesses, experts and interpreters and to any person cooperating in the execution of the rogatory commission are at the expense of the foreign authority. This applies also to the costs of implementing a special form of procedure upon the request of the commissioning court.

Title XXI

Final Provisions

Art. 749. The provisions of the present book apply before all courts of the judicial order deciding civil, commercial, social, rural or labor (prud'homale) matters, subject to the rules peculiar to each matter and the provisions peculiar to each court.

APPENDIX B

Law No. 72-626 of July 5, 1972

Creating a Judge for Execution and Relating to the Reform of Civil Procedure[57]

Title II

Of the Astreinte in Civil Matters

Art. 5. Tribunals may, even sua sponte, order an astreinte to insure the execution of their decisions.

Art. 6. The astreinte is independent of damages. It is provisional or definitive. The astreinte must be considered as provisional, unless the judge has specified its definitive character.

Art. 7. (Law No. 75-596 of July 1975.) In the event of a total or partial failure of execution or of delay in execution, the judge proceeds to the liquidation of the astreinte

Art. 8. Except where it is established that the failure to execute the judicial decision results from an accident (cas fortuit) or superior force (force majeure), the amount of the definitive astreinte may not be modified by the judge following its liquidation.

The judge has power to modify or suppress the provisional astreinte, even where the failure of execution is proven.

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[57] Petites Codes Dalloz: Nouveau Code de Procedure Civile et Code de Procedure Civile (72nd ed. 1979) at 118.

APPENDIX C

Blocking Statute: Law No. 80-538

The exact wording of the Act follows:[58]

Article One: "Without prejudice to international treaties or agreements, it is prohibited for any natural person of French nationality or residing habitually in French territory, and for any executive, representative, official, or agent of a juristic person having its headquarters or an establishment within French territory, to disclose to foreign public authorities, in written, oral, or any other form, in any place whatsoever, documents or information of an economic, commercial, industrial, financial, or technical nature when such disclosure would be detrimental to the sovereignty, security, and essential economic interests of France or to public order, as determined by the administrative authority if necessary."

Article One bis: "Subject to international treaties or agreements and to the laws, and regulations in force, no person may request, seek, or disclose, in written, oral, or any other form, documents or information of an economic, commercial, industrial, financial, or technical nature as possible evidence for purposes of, or in connection with, foreign legal or administrative proceedings."

Article Two: "Persons covered by the preceding articles shall inform the competent minister promptly when they receive any request concerning such disclosures."

Article Three: "Without prejudice to heavier penalties prescribed by law, any violation of the provisions of Article One and Article One bis of this law shall be punished by two to six months of imprisonment and by a fine of 10,000 to 120,000 francs or by one of these penalties only."

The exact wording in French follows:

Article 1er: "Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire français et à tout dirigeant, représentant, agent ou preposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intèrêts économiques éssentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que de besoin."

Article 1er bis: "Sous réserve des traités ou accords internationaux et des lois et règlements en viguer, est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier o technique tendant

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[58] *See* Ristau, *supra* note 18, Vol. 2, for English translation.

à la constitution de preuves en vue de procédures judiciaires ou adminstratives étrangères ou dans le cadre de celles-ci."

Article 2: "Les personnes visées aux articles 1er et 1er bis sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications."

Article 3: "Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1er et 1er bis de la présente loi sera punie d'un emprisonnement de deux mois à six mois et d'une amende de 10 000F à 120 000 F ou de l'une de ces deux peines seulement."

APPENDIX D

Selected portions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

CHAPTER I - LETTERS OF REQUEST

Article I

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

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

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

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify -

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

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

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

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

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

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

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

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

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

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

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

No legalization or other like formality may be required.

Article 4

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

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

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

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

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

Article 9

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

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

A Letter of request shall be executed expeditiously.

Article 10

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

CHAPTER II - TAKING OF EVIDENCE BY DIPLOMATICE OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

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

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

Article 16

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

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

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

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

Article 17

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

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

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

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

Article 21

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

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

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

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

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

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

CHAPTER III - GENERAL CLAUSES

Article 23

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