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Waiver of Rights under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

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I. INTRODUCTION

Over the past several decades there has been a dramatic increase in the number of international business transactions. The proliferation of foreign goods imported into the United States and American products exported abroad, as well as the rise in multinational business cartels and agreements, has led to a rise in litigation in American courts involving foreign parties.[1] Litigation becomes more complicated and expensive when documents and witnesses are located in other countries.[2] Hiring foreign counsel, translators, and interpreters, as well as travel, is expensive. Moreover, American attorneys find themselves working in legal systems quite different from their own. The emergence of these problems has led to the adoption of laws and treaties designed to alleviate some of these difficulties by promoting cooperation among nations.[3]

In 1893, the Netherlands government established the Hague Conference on International Law.[4] The Hague Conventions on Civil Procedure of 1905 and 1954 were early efforts on the part of the Hague Conference and the signatory nations to bring about cooperation between nations in the area of international litigation.[5] The United States acted through observers at the 1956 and 1960 sessions

1. The "unparalleled expansion of international trade and travel in recent decades" resulted in a "substantial increase in litigation with foreign aspects," and created a need for an "international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad." LETTER OF SUBMITTAL FROM THE DEPARTMENT OF STATE TO THE PRESIDENT REGARDING THE EVIDENCE CONVENTION, SEN. EXEC. A, 92d Cong., 2d Sess. VI (1972), *reprinted in* 12 I.L.M. 323, 324 (1973) [hereinafter cited as LETTER OF SUBMITTAL]. *See also* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651 (1969).

2. LETTER OF SUBMITTAL, *supra* note 1.

3. *See infra* notes 4-22 and accompanying text.

4. LETTER OF SUBMITTAL, *supra* note 1, at VI, in 12 I.L.M. at 324.

5. Amram, *Rapport explicatif de M. Ph. W. Amram*, ACTES ET DOCUMENTS, 11th Sess., vol. IV, Conference de la Haye de droit international prive, at 202 (1970).

of the Conference, and participated as a member for the first time at the Tenth Session of the Conference in 1964.[6] At the 1964 Conference, the delegates revised Chapter I of the 1905 and 1954 Conventions and adopted the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention).[7] Following the adoption and general acceptance of the Service Convention, the United States suggested approaching the problems involved with taking evidence abroad.[8] The Eleventh Session of the Conference, building on and revising Chapter II of the 1954 Civil Procedure Convention,[9] drafted and approved the multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[10] (Evidence Convention) in October, 1968.[11]

The Evidence Convention sets forth the procedures for taking evidence in "civil or commercial"[12] matters involving the signatory states.[13] Prior to its adoption, differences in various legal systems around the world gave rise to conflicts and problems in conducting multinational litigation.[14] Diplomatic channels, which were sometimes used to obtain evidence, were usually slow. In addition, liti-

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6. LETTER OF SUBMITTAL, *supra* note 1, at V, in 12 I.L.M. at 324.

7. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter cited as Service Convention]. The United States Senate gave its consent to ratification on April 14, 1967. *Id.*

8. LETTER OF SUBMITTAL, *supra* note 1, at V, in 12 I.L.M. at 324; *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785, 804-05 (1969) [hereinafter cited as *Report*].

9. *Report*, *supra* note 8, at 805; P. AMRAM, EXPLANATORY REPORT ON THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, SEN. EXEC. A, 92d Cong., 2d Sess. 11 (1972), *reprinted in* 12 I.L.M. 327, 327 (1973) [hereinafter cited as EXPLANATORY REPORT].

10. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, codified at 28 U.S.C.A. § 1781 (West Supp. 1984) [hereinafter cited as Evidence Convention]. "The Convention received the unanimous approval of the House of Delegates of the American Bar Association at the meeting in Dallas in 1969." Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 n.6 (1973). The Evidence Convention was ratified by the Senate by a vote of 84 to 0. 118 CONG. REC. 20,623 (1972).

11. LETTER OF SUBMITTAL, *supra* note 1, at V, in 12 I.L.M. at 324.

12. Evidence Convention, *supra* note 10, art. 1.

13. The following states are parties: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxemburg, Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom, and the United States. 7 MARTINDALE-HUBBELL LAW DIRECTORY 12, 14 (1984).

14. LETTER OF SUBMITTAL, *supra* note 1, at VI, in 12 I.L.M. at 324. "The willingness of the Conference to proceed promptly with work on the evidence convention is perhaps attribu-

gators were often frustrated by the use of these diplomatic channels because the evidence which was eventually gathered was generally inadequate, and sometimes delivered in a form that would not be admissible in an American court.[15] The Evidence Convention is designed to correct some of these problems by increasing the use of letters of request, expanding the powers of diplomatic consuls, introducing commissioners into the system, ensuring that evidence is gathered in a legally admissible form, and preserving the favorable practices of the country responding to the request.[16]

The United States has attempted to encourage liberal cooperation between international courts.[17] For example, Congress enacted section 1782 of title 28 of the United States Code, which allows foreign tribunals the right to request liberal discovery against American parties to foreign suits.[18] It was hoped that other countries would

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table in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from coun ries [sic] with markedly different legal systems." *Id.*

15. Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 37 (1979):

> [Attorneys] have frequently engaged in legal tourism rather than have recourse to the traditional procedure of international letters rogatory. Indeed, in the absence of a specific judicial assistance treaty between France and the United States, letters rogatory, transmitted at a leisurely pace through diplomatic channels and executed in accordance with the rules laid down in the French Code of Civil Procedure, have generally provided American litigants with evidence of little or no practical value before courts in the United States.

Id. See also United States Ratification, *supra* note 10, at 106 ("The Convention effectively resolves the troublesome problem of assuring that the evidence taken will be effectively useful in the tribunal where it is to be introduced.").

16. The forty-two articles of the Convention are divided into three Chapters: letters of request, consuls and commissioners, and general provisions. According to the Department of State, the Convention is designed to:

> 1. Make the employment of letters of request a principal means of obtaining evidence abroad;
> 2. Improve the means for securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissioner;
> 3. Provide means for securing evidence in the form needed by the court where the action is pending; and
> 4. Preserve all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions.

LETTER OF SUBMITTAL, *supra* note 1, at VI, in 12 I.L.M. at 324. *See also* Convention on Taking of Evidence Abroad, S. EXEC. REP. No. 25, 92d Cong., 2d Sess. 1-2 (1972).

17. Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—A Comparison with Federal Rules Procedures*, 7 BROOKLYN J. INT'L L. 365, 368 (1981) [hereinafter cited as BROOKLYN].

18. 28 U.S.C. § 1782 (1982). Section 1782 provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . . To the extent that the order

reciprocate by granting similar American discovery requests,[19] but the hoped-for reciprocity did not materialize.[20] American discovery practices are virtually unknown in some foreign judicial systems, or exist in more limited scopes in other nations.[21] By adopting the Evidence Convention, the United States hoped to equalize the degree of judicial cooperation among nations.[22] As the situation stands now, an American party to a suit in an American court, or in a foreign court, is subject to very liberal discovery requests in comparison to parties from other nations.[23] A foreign defendant, by contrast, may raise the Evidence Convention and substantially limit the amount of discovery sought by American parties.[24]

The question arises, therefore, whether a foreign corporation or individual may bring suit in an American court, seek liberal discovery against a United States defendant, and yet limit discovery against itself under the Evidence Convention. Has that corporation or individual, by subjecting itself to the jurisdiction of the American federal or state court system, waived its rights under the Evidence Convention? This Comment examines whether the terms of the Evidence Convention may be used and interpreted to expand the rights of American parties against foreign nationals.

II. THE HAGUE CONVENTION

A. Historical Background and Intent

Many difficulties arise in international litigation as a result of basic philosophical and procedural differences between common and

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does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

For a discussion of the purpose and substance of this statute, see Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650 (1965).

19. BROOKLYN, *supra* note 17, at 368.

20. *Id.*

21. EXPLANATORY REPORT, *supra* note 9, at 15, in 12 I.L.M. at 329.

22. Amram, *supra* note 2, at 655.

23. *See supra* note 18 and accompanying text.

24. *Id.* Discovery abroad is limited for a number of reasons. American litigants may not be able to afford the cost of hiring translators or of traveling to another country. A more serious problem arises, however, as a result of the actual use of the Evidence Convention. The Convention generally requires the intervention of foreign judicial entities. Foreign courts are often reluctant to grant the discovery requests of American counsel because such liberal requests would not be granted in a proceeding in their own country. If the parties to the suit do not have to proceed through the Evidence Convention, and instead can utilize the Federal Rules of Civil Procedure or the applicable state statutes, the scope of evidence available to all litigants would be essentially equal.

civil law systems.[25] Because of the liberal attitudes toward discovery in the United States, foreign parties to suits here and abroad have a much wider range of potential sources of evidence in the United States than Americans have abroad.[26] This disparity could put an American plaintiff or defendant at a disadvantage.

The American concept of discovery derives from the English Chancery Courts.[27] Although the English and American systems have common origins, the procedures and philosophies of the two nations have developed to the point that they now incorporate very different opinions about the extent of allowable discovery.[28] Pretrial discovery in the United States is not merely commonplace, it is mandatory.[29] Discovery in the American system is designed to assist a litigant in preparing his case.[30] It is considered cost effective and

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25. "Due to these conceptual and linguistic factors, it sometimes is difficult to determine the extent to which foreign reluctance to cooperate in American pre-trial discovery procedures is the result of misunderstandings and the extent to which it is based on a dislike for the philosophies which underlie them." Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States*, 13 INT'L LAW. 5, 6 (1979). As one commentator has noted,

> The basic problem is easy to state. How does one legal system adjust its procedural mechanisms both to provide an effective response to the needs of another legal system and to obtain a meaningful response to its needs from that system when one or more of the procedural norms and philosophical bases upon which the two nations operate differ drastically?

The potential problems this may create are overwhelming. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1072 (1965).

26. *See* 28 U.S.C. § 1782 (1982); *see generally* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 608, [1978] 2 W.L.R. 81, 86, [1978] 1 All E.R. 434, 441 (H.L. 1977) (Wilberforce, L.J.) ("the United States pre-trial procedure, as laid down in the Federal Rules of Civil Procedure and particularly rules 26 and 30. . . . give wide powers, wider than exist in England, of pre-trial discovery against persons not parties to a suit.").

27. Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 INT'L LAW. 27, 27 (1979).

28. *Id.* "English lawyers familiar with American litigation have become concerned, if not appalled, at the consequences of the developments in the United States, especially in major international litigation." *Id.*

29. *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (attorneys for plaintiff sought, through interrogatories, statements made by witnesses to defense attorneys concerning the death of a seaman).

30. EXPLANATORY REPORT, *supra* note 9, at 15, in 12 I.L.M. at 329; *Reports on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 17 I.L.M. 1417, 1423 (1978) [hereinafter cited as *Special Commission Report*]:

> Discovery is designed (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide means of detecting and exposing false, fraudulent, and sham claims and defenses; (3) to inform the parties in advance of actual trial as to the real value of their claims and defenses, thereby encouraging settlements; (4) to expedite litigation; (5) to safeguard against surprise; (6)

efficient.[31] It allows both sides equal access to all pertinent information.[32] In contrast, English courts, as well as the courts of most other nations, view American discovery requests as "fishing expeditions," and are therefore either reluctant to comply with them or refuse altogether to do so.[33]

In civil and most common law nations, pretrial discovery is limited or nonexistent.[34] Evidence is gathered in those countries only for trial, as opposed to being used at the early investigatory stages of the case, and sometimes can only be gathered in the actual course of a trial.[35] As a result, American litigants will probably only be allowed to obtain specific evidence which they can prove will eventually be used in the trial of the action; broad document requests which are made with the hope that they may lead to relevant, specific information might not be granted.[36] Frustrated by these limitations and by the slow progress of discovery requests through diplomatic channels, attorneys have occasionally resorted to visiting foreign countries and gathering evidence themselves in their own way.[37] This has been

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to encourage extrajudicial settlement and compromise; (7) to simplify and narrow the issues; and (8) to expedite and facilitate the ultimate trial.

31. *See Special Commission Report, supra* note 30, at 1423.

32. *Id.* (citing United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958)).

33. *Special Commission Report, supra* note 30, at 1421. One English court, prior to the adoption of the Evidence Convention, stated its attitude toward American discovery this way:

> [I]t is plain that that principle [of discovery] has been carried very much further in the United States of America than it has been carried in this country. In the United States of America it is not restricted merely to obtaining a disclosure of documents from the other party to the suit, but there is a procedure, which might be called a pre-trial procedure, in the courts of the United States which allows interrogation not merely of the parties to the suit, or whom it may be thought may be witnesses in the suit but also of persons who may be witnesses in the suit, and which requires them to answer questions and produce documents. The questions would not necessarily be restricted to matters which were relevant in the suit, nor would the production be necessarily restricted to admissible evidence, but they might be such as would lead to a train of inquiry which might itself lead to relevant material.

Radio Corp. of America v. Rauland Corp., [1956] 1 Q.B. 618, 643-44, [1956] 1 All E.R. 549, 551.

34. EXPLANATORY REPORT, *supra* note 9, at 15, in 12 I.L.M. at 329.

35. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 608, [1978] 2 W.L.R. 81, 86, [1978] 1 All E.R. 434, 441-42 (H.L. 1977) (Wilberforce, L.J.).

36. *Rio Tinto*, 1978 A.C. at 609-10, [1978] 2 W.L.R. at 87-88, [1978] 1 All E.R. at 442-43 (Wilberforce, L.J.); Jacob & Jacob, *Civil Procedure Including Courts*, ANN. SURV. OF COMMONWEALTH L. 473, 473-74 (1977) ("In Ontario, as well as in England, an order in response to letters rogatory from a foreign court will only be made for the taking of testimony in the nature of proof for the trial, and not for the purpose of testimony for discovery [citations omitted].").

37. Borel & Boyd, *supra* note 15, at 37.

called "legal tourism."[38] In some countries, attorneys who take information and foreign citizens who give information in this way may be subject to criminal sanctions.[39] The only safe avenues open to American and other non-nationals abroad are, therefore, official diplomatic and judicial channels.[40]

Another restriction sometimes imposed by foreign courts is the prohibition against taking discovery from all but parties to the case.[41] Unlike United States courts which may assert jurisdiction over individuals who possess evidence or testimony which might be relevant to the case,[42] foreign courts, such as the English, often restrict the pretrial production of documents from the appearance of nonparty witnesses.[43]

Many countries not only wish to protect individuals under their jurisdiction, but particular types of documents as well.[44] In Switzerland, for example, all banking documents are restricted and are not subject to disclosure for discovery abroad.[45] Even when these documents are relevant to the trial, American counsel do not have access

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38. *Id.*

39. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 n.12 (1953):

> Art. 271 of the Swiss Penal Code, as translated, reads in part: "Whoever, on Swiss territory, without being authorized so to do, takes on behalf of a foreign government any action which is solely within the province of a [Swiss] government authority or a [Swiss] government official, whoever does anything to encourage such action, . . . shall be punished by imprisonment, in serious cases in the penitentiary."

40. Carter, *supra* note 25, at 7 ("American counsel conducting an unsupervised deposition or the inspection of documents in American fashion in a Civil-Law country may be improperly performing a public judicial act which is seen as infringing the foreign state's judicial sovereignty unless special authorization has been granted.") *See also* Miller, *supra* note 25, at 1077: "This reluctance to permit a foreign litigant or official to perform a judicial act within Switzerland without official intervention also is reflected in the way the Swiss government has construed some of the international agreements it has entered into dealing with the service of foreign judicial documents." Several factors contribute to Switzerland's reluctance to allow foreign individuals to conduct quasi-judicial proceedings in their country, namely, "its federal system of government, a strong conception of sovereignty, and a national policy of neutrality." *Id.* at 1074.

41. *See* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 608, [1978] 2 W.L.R. 81, 86, [1978] 1 All E.R. 434, 441 (H.L. 1977) (Wilberforce, L.J.).

42. *See id.* at 608, [1978] 2 W.L.R. at 86, [1978] 1 All E.R. at 441-42 (Wilberforce, L.J.).

43. BROOKLYN, *supra* note 17, at 405.

44. *See generally* Carter, *supra* note 25, at 7. Under article 273 of the Swiss Penal Code, it is a crime to release business secrets. A violation could result in imprisonment and a fine. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 n.13 (1953).

45. *See generally* Jones, *supra* note 44, at 520 n.13.

to them.[46] Some countries, wary of document requests in specific trials, have passed specific laws prohibiting their disclosure.[47] For example, as a result of American proceedings investigating an international uranium cartel, several nations passed statutes designed to prevent discovery of potentially relevant documents.[48] The parties then went to England, where the House of Lords eventually decided the issue of disclosure.[49] The English Court of Appeal had decided not to grant the American letters of request for various reasons, including the concern that the request was merely a "fishing expedition."[50] The case was then considered by the House of Lords. In *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*,[51] the English House of Lords also objected to the American discovery request. The British high court, although wishing to cooperate with the American court,[52] felt the discovery request was too broad because it was not sufficiently specific and it put British citizens at risk of criminal antitrust charges.[53]

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46. *Id.* at 520 n.13:

> Article 273 of the Swiss Penal Code, as translated, reads in part: "A person who, through spying, secures a manufacturing or business secret, in order to make it accessible to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, a person who makes accessible a manufacturing or business secret to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, shall be punished by imprisonment, in serious cases in the penitentiary. In addition a fine may be imposed."

Banking secrets are also protected. *Id.*

47. Carter, *supra* note 25, at 7. Examples of this type of legislation are: "the Province of Ontario's Business Records Protection Act, the United Kingdom's Shipping Contracts and Commercial Documents Act, and Canada's 1976 Uranium Information Security Regulations." *Id.* (footnotes omitted).

48. *See generally id.* Such legislation at times causes American litigants to go to great lengths in search of necessary documents which may be located abroad: "[Westinghouse has] tried and failed in Australia, Canada, France and South Africa [to acquire documents to prove the conspiracy]. We are told that in those countries regulations have been passed so as to forbid the documents of the [uranium] cartel being disclosed. Now Westinghouse seeks to get them from Rio Tinto in England." In re Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235, [1977] 3 W.L.R. 430, 435, [1977] 3 All E.R. 703, 707 (C.A. 1977) (Denning, M.R.), *rev'd*, Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, [1978] 1 All E.R. 434, [1978] 2 Lloyd's L.R. 81 (H.L. 1977).

49. In re Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235, [1977] 3 All E.R. 703, 707, [1977] 3 W.L.R. 430, 435 (Denning, M.R.).

50. *Id.*

51. [1978] A.C. 547, [1978] 2 W.L.R. 81, [1978] 1 All E.R. 434 (H.L. 1977).

52. *Id.* at 618, [1978] 2 W.L.R. at 95, [1978] 1 All E.R. at 449 (Dilhorne, L.J.).

53. *Id.* at 610, [1978] 2 W.L.R. at 88, [1978] 1 All E.R. at 443 (Wilberforce, L.J.) ("My Lords, I have much doubt whether the letters rogatory ought not to be rejected altogether. They range exceedingly widely and undoubtedly extend into areas, access to which is forbidden by English law.").

The result in *Rio Tinto* illustrates the difficulties encountered in international litigation. Although *Rio Tinto* is a post-Evidence Convention case, and therefore was not a consideration in the drafting of the Convention, it makes clear that the problems which existed before the ratification still exist to some extent today. The attitude among signatory nations is cooperative, but protective. Old concerns of judicial sovereignty and preservation of internal court procedures still remain[54] as a roadblock to gathering evidence in foreign tribunals.

The reluctance of courts to comply with document requests of another nation which would not be allowed in their own nation is understandable. Familiar and time-tested internal procedures are obviously preferred over the procedural dictates of a letter rogatory from a foreign court.[55] In addition, these attitudes are deeply rooted in national concepts of judicial sovereignty and a local court's jurisdiction over and protection of its own citizens.[56] Procedures followed in a civil law system especially are very different from those practiced in a common law jurisdiction, and the United States even has a number of variations from other common law states.[57] In a civil law system, evidence is gathered in court and the judge presides over the proceedings.[58] Attorneys take a very passive role in the trial.[59]

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54. Carter, *supra* note 25, at 6-7. "The clash of perspectives is particularly intense in the Civil-Law countries, where an American litigant encounters the doctrine of 'judicial sovereignty.'" *Id.* at 6.

55. According to one commentator,

> It is plain that the greatest obstacle to obtaining evidence in England is the negative view of, if not the outright hostility to, American-style discovery on the part of English lawyers and judges. This hostility permeates English attitudes and runs through all of the cases in which there have been problems about obtaining evidence in England.

Collins, *supra* note 27, at 29. *Cf.* Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 58 (1967) (footnotes omitted): "Despite recent efforts to acquaint American jurists with foreign procedural systems, American courts still distrust many procedures employed by foreign courts. American courts are therefore reluctant to dismiss any case if dismissal would force the parties to litigate abroad, particularly if the plaintiff is a domiciliary of this country." *See also* COMMONWEALTH SECRETARIAT, THE HAGUE CONVENTIONS ON THE SERVICE OF PROCESS, THE TAKING OF EVIDENCE AND LEGISLATION (prepared by D. McClean) (1979).

56. *See generally* Carter, *supra* note 25.

57. For a brief discussion of differences and difficulties which exist, see Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646 (1969).

58. *Report*, *supra* note 8, at 806. *See also* Borel & Boyd, *supra* note 15, at 36 (footnotes omitted) ("At this stage, control of the evidence gathering process passes from the parties to the judge, to whom the French Code of Civil Procedure grants broad and exclusive powers.").

59. "For the most part, however, the parties and their counsel are silent spectators, allowed to speak only when they are requested or authorized to do so by the judge." Borel & Boyd, *supra* note 15, at 37.

Although a judge presides over American lawsuits,[60] American attorneys have far more freedom than their foreign counterparts in determining the scope and manner of discovery. In other countries, only evidence relating specifically to the issues presented in court is considered relevant and discoverable; document searches common in the United States, conducted with only the idea that relevant information may be discovered, are not allowed.[61] For an American court to request a foreign court to go beyond the limits of their judicial authority is viewed as an infringement upon the foreign country's sovereignty.[62] An attorney attempting to conduct his own discovery outside judicial channels, as some have been known to do, is of course an even more blatant form of intrusion.[63] The result of these philosophical differences is that American parties to lawsuits are still subject to the broad discovery rules of the Federal Rules of Civil Procedure and section 1782, while at the same time they have only limited access to information located abroad and held by foreign parties to the suit.

The Hague Evidence Convention is an attempt to deal with the conflicting judicial systems of the world and facilitate cooperation between judicial bodies.[64] This is an open Convention, so that a number of states have been able to sign in the years following the original ratification.[65] The goal of the delegates to the Convention was to provide a framework for effective cooperation.[66]

B. Evidence Convention Provisions

The Evidence Convention provides for three ways of taking evidence abroad: through letters of request, by consular officers, or by court appointed commissioners.[67] Although the terms of the Convention are flexible, it was not the intention of the drafters that signatory nations should overlook unappealing provisions of the Convention.[68] While the drafters were careful to avoid any escape clauses,[69] certain

60. *Special Commission Report, supra* note 30, at 1423.

61. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547, 608, [1978] 2 W.L.R. 81, 86, [1978] 1 All E.R. 434, 441-42 (H.L. 1977) (Wilberforce, L.J.).

62. Carter, *supra* note 25, at 6-7.

63. *Id.* at 7.

64. *See generally* LETTER OF SUBMITTAL, *supra* note 1.

65. *See also* Explanatory Report, *supra* note 9, at 12, in 12 I.L.M. at 328.

66. *See generally* LETTER OF SUBMITTAL, *supra* note 2; *see also* Explanatory Report, *supra* note 9, at 11, in 12 I.L.M. at 327.

67. Evidence Convention, *supra* note 10.

68. *See Report, supra* note 8, at 810.

69. *Id.* ("It was the unanimous agreement of the delegations that no general 'escape

significant terms were left undefined.[70] This is a potential source of conflict when foreign and American courts begin to analyze and apply the Convention. In addition, signatory states had the option of ratifying the Convention with amendments, and several did.[71] These amendments, therefore, might have the effect of allowing such leeway in interpretation and procedure that the purpose of the Convention could be obliterated.

One significant provision of the Convention for American lawyers is article 23. This article allows a foreign tribunal to refuse to execute a letter of request for the purpose of pretrial discovery.[72] The article was added at the insistence of the British delegation, which saw the American discovery system as a potential evil raising considerable questions of the executing country's sovereignty and citizens' rights.[73] All states but the United States declared, pursuant to article 23 of the Convention, that they reserved the right not to grant requests for pretrial discovery.[74] Article 23 of the Convention was apparently not designed, however, to cut off all American discovery before a trial by jury had commenced.[75] The article was merely

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clause' should be introduced which would nullify in practice the request for a special procedure.")

70. EXPLANATORY REPORT, *supra* note 9, at 13, in 12 I.L.M. at 328. For example, the terms "judicial," "civil or commercial matters," or "obtain evidence" are not defined within the body of the Convention. *Id. See also Report, supra* note 8, at 808.

71. Evidence Convention, *supra* note 10, art. 33.

72. Article 23 provides: "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." Evidence Convention, *supra* note 10, art. 23.

73. Edwards, *supra* note 60, at 650-51:

> Discovery, however, is not known to continental systems of law because there the testimony is taken by the court and assistance is not given to the parties to the proceedings to obtain evidence. The majority of delegates of civil law countries therefore failed to appreciate, despite efforts by the United Kingdom delegation to explain the dangers, that it is essential that countries should be able to refuse a request for pre-trial discovery of a "fishing" nature or for the production of documents not directly required by a foreign court. It is believed, nevertheless, that the United Kingdom's interests are safeguarded by the provision in Article 23 that a contracting State may declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery.

74. In re Anschuetz & Co., GmbH, 754 F.2d 602, 610 n.21 (5th Cir. 1985); Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547, 609, [1978] 2 W.L.R. 81, 86, [1978] 1 All E.R. 434, 442 (H.L. 1977) (Wilberforce, L.J.); *Special Commission Report, supra* note 30, at 1421.

75. *Special Commission Report, supra* note 30, at 1428. The United States delegation to the Convention concluded that it "appears that when making this reservation the Contracting States did not intend to refuse all requests for evidence submitted by the American judicial authorities before the trial on the merits commenced before the jury." *Id.*

designed to require "specific" document requests.[76] This avoids "fishing expeditions" which are inconsistent with the laws of the foreign country and a violation of the rights of the foreign party under its own laws.[77] Apparently, there was some misunderstanding among some of the delegates about the American discovery system.[78] Certain delegates to the Convention perceived the American system as allowing discovery even in the absence of court proceedings of any sort;[79] the American delegate had to explain to them that discovery commences only after the filing of the initial court papers, and not before.[80] Such confusion may lead, of course, to a reluctance to fulfill American discovery requests.

The actual effect of the Convention is "to provide a set of minimum standards" with which contracting states agree to comply.[81] Consistent with this philosophy, more liberal procedures adopted by the states now or at sometime in the future are recognized.[82] Article 9 allows the executing state to apply its own internal law "as to methods and procedures to be followed."[83] If the requesting authority asks for a certain procedure to be followed, however, that request should

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76. *Id.* ("The reservation could reasonably be applied only in those cases where the lack of specificity in the Letter of Request was such that it did not permit sufficient identification of the documents to be produced or examined.") In fact, in the *Rio Tinto* case, the House of Lords particularly objected to the lack of specificity in the request for documents. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547, 610, 644, [1978] 2 W.L.R. 81, 88, 119, [1978] 1 All E.R. 434, 441, 470 (H.L. 1977) (Wilberforce, L.J. & Fraser, L.J.).

77. *Special Commission Report*, *supra* note 30, at 1421.

78. *Id.*

79. *Id.* The Commission explained:

> These delegates were of the view that "pretrial discovery" meant some sort of a proceeding permitted under American law prior to the institution of a lawsuit; as one delegate put it: "We understand that American lawyers can ask a court for permission to go on a broad fishing expedition, to determine whether there might be some evidence somewhere which would support a lawsuit. Our courts will have no part of such proceedings".

Id.

80. *Special Commission Report*, *supra* note 30, at 1423-24; *See also supra* note 30; Evidence Convention, *supra* note 10, art. 1. The Convention itself provides an exception to this rule, however; evidence or a statement may be obtained from a dying witness. The proceedings in which the evidence is to be used, however, in such a case, must be "commenced or contemplated." EXPLANATORY REPORT, *supra* note 9, at 14, in 12 I.L.M. at 329.

81. LETTER OF SUBMITTAL, *supra* note 1, at VI, in 12 I.L.M. at 324.

82. LETTER OF SUBMITTAL, *supra* note 1, at VI, X, in 12 I.L.M. at 324, 326; Evidence Convention, *supra* note 20, art. 27(b).

83. Evidence Convention, *supra* note 10, art. 9. That article provides:

> 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

be honored unless it is incompatible with the internal law of the executing state.[84]

Under article 12 of the Convention, refusal to execute letters is only allowed where (1) the "execution is not within the function of the judiciary" or (2) the "state of execution considers that its sovereignty or security would be prejudiced."[85] The language used is again very broad and is written in terms of cooperation.[86] If the requesting authority asks for a certain procedure to be followed, the executing authority will only deny that request if it is "incompatible" with local law or "impossible" to perform.[87] This article was discussed by the drafters at length so that no confusion would arise.[88] It was agreed that "impossible" did not equal inconvenient:[89] the higher standard of an actual violation of the local law was required before a request could be refused. In addition, if there are any problems with the letter of request, the executing state is to notify the requesting state promptly, with a letter of explanation.[90] This allows the executing state to correct the problem so that the letter can be reissued and the request fulfilled. Further, a claim by the state that they have exclusive jurisdiction over the subject matter is not an acceptable basis for refusal.[91] These efforts by the delegates to place severe limits on a court's ability to refuse a request demonstrates that the Evidence

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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.

84. *Id.*

85. LETTER OF SUBMITTAL, *supra* note 1, at VIII, in 12 I.L.M. at 325; Evidence Convention, *supra* note 10, art. 12.

86. Article 12 states:

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

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

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

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

Evidence Convention, *supra* note 10, art. 12.

87. Evidence Convention, *supra* note 10, art. 9 (for text of Article 9, see *supra* note 83).

88. *Report*, *supra* note 8, at 810.

89. LETTER OF SUBMITTAL, *supra* note 1, at VIII, in 12 I.L.M. at 325; *Report*, *supra* note 8, at 811.

90. Evidence Convention, *supra* note 10, art. 13: "In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons."

91. Evidence Convention, *supra* note 10, art. 12; LETTER OF SUBMITTAL, *supra* note 1, at VIII, in 12 I.L.M. at 325.

Convention is designed to facilitate cooperation and produce evidence, and not to put up hurdles for attorneys from the requesting state. Clearly, the Evidence Convention is designed with compliance in mind, through the easiest and most efficient means.[92]

Article 10 of the Convention provides procedures for compeliing the appearance of a witness or the production of requested documents.[93] This maintains the force of the Convention by permitting the executing country to use its internal law for enforcing orders. By using the corrective measures of the executing state under article 10,[94] the Convention maintains the spirit of article 9.

It is apparent from the purpose and background of the Convention that it was designed to make discovery easier, not more complicated or technical. By providing a broad framework (albeit with certain significant restricitons) for the taking of evidence abroad, the drafters attempted to take into consideration the complexities of a number of different judicial systems throughout the world. Problems arise, however, for American parties because of article 23 and because of foreign courts' continued reluctance to grant certain requests. The same broad language in the Convention which enables it to be applied in a number of very different judicial systems, in addition to the amendments adopted by various signatory nations, provide potential escape clauses to judicial officers reluctant to fulfill discovery requests which are inconsistent with their own local concepts of litigation.[95] To avoid some of these potential complications, the issue of exactly when the Evidence Convention must be applied is being litigated in American courts. Many courts have determined that the Convention is not the exclusive means of gathering evidence whenever a foreign

92. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS TO THE SENATE, SEN. EXEC. A, 92d Cong., 2d Sess. III (1972), *reprinted in* 12 I.L.M. 323, 323 (1973).

93. Evidence Convention, *supra* note 10, art. 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.

94. *Id.*

95. Actually, in many cases American courts are not even faced with the reluctance of a foreign judge to comply with a specific discovery request. The language of the Convention has provided fertile ground for debate between the parties to the suit before any letter of request is even issued. *See, e.g.*, Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983). In such cases, it is unclear whether the foreign court will be as uncooperative as some parties fear.

party is involved in a suit.[96] One possible way to reach this result is under a waiver theory. This Comment discusses the idea that a foreign plaintiff, by filing suit in the United States, has waived any right to assert the Evidence Convention.

III. THE EVIDENCE CONVENTION IN AMERICAN COURTS

A. Principles of Treaty Supremacy and International Comity

1. Status of treaties in the American legal system

The purpose of any treaty is to facilitate cooperation between nations.[97] It is assumed that every treaty has an equitable purpose which should be given effect when the treaty is interpreted.[98] The only time construction of the terms of the treaty comes into issue is when the document is capable of more than one reasonable interpretation.[99] Such is the case with the Evidence Convention, which is written in broad terms to accomodate the structures of a number of judicial systems. Thus, it is not surprising that there are cases in the American courts which provide conflicting interpretaions of the Convention.[100] The potentially limited scope of discovery under the Convention conflicts with established American ideas of court procedure and pretrial litigation activities, making courts and parties reluctant to apply its terms as literally written.[101]

A treaty is binding upon all of the parties who sign it, and the

96. The Evidence Convention, unlike the Service Convention, does not specifically state that it is the exclusive means for taking evidence when a foreign party is involved.

For further discussion of the exclusivity of the Convention, see Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733 (1983); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461 (1984).

97. A convention has the status of a treaty. *See* American Trust Co. v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957) (suit involving the interpretation of a tax treaty between the United States and Great Britain); Dr. Ing. H.C.F. Porsche A.G. v. Superior Court, 123 Cal. App. 3d 755, 756 n.1, 177 Cal. Rptr. 155, 156 n.1 (1981) (defendant automobile manufacturer requested the court to quash the service of a summons which was not served pursuant to the Hague Service Convention).

98. Reed v. Wiser, 555 F.2d 1079, 1088 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (suit involving heirs' rights to recover damages following an airplane crash, when the amount of recovery has been limited by an international convention); *see also American Trust Co.*, 247 F.2d at 152.

99. De Tenorio v. McGowan, 510 F.2d 92, 97 (5th Cir. 1975) (case involving a foreign widow's heirs' right to American property owned by widow's husband under a 1928 United States-Honduran treaty).

100. *See infra* notes 147-56 and accompanying text.

101. *Id.*

signatories must comply in good faith with its terms.[102] Although the constituent parts of a federal state, such as the individual states in the United States, may be delegated to enforce parts of a treaty, the ultimate responsibility for applying the document lies with the larger governmental entity.[103] The courts are the organ of government empowered to interpret treaties, as they interpret all federal legislation.[104] Although great weight is given to the opinions of the President and the Congress, the courts are the ultimate arbiters of conflicts in treaty interpretation.[105] There are various criteria for interpreting a treaty. The courts must take into account the intention of the government in making the treaty as well as the opinions of the executive branch.[106] However, intepretaions of treaties by the federal courts are binding on the state courts.[107] The supremacy clause of the United States Constitution grants a treaty supremacy over conflicting state laws.[108] Therefore, the Evidence Convention has supremacy

102. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 138 (1965) ("An international agreement is binding in accordance with its terms and each party has a duty to give them effect, except to the extent that they may be unlawful under the rule stated in § 116."). Comment a to § 138 explains:

> The rule stated in this Section is frequently referred to as *pacta sunt servanda*. If an orderly system of international legal relations is going to be effective it must have as a postulate that the parties to an international agreement commit themselves in good faith to carry out its terms. This has been recognized from the beginning of the development of international law.

Accord RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (Tent. Draft No. 1 1980). *Cf.* Performance Industries v. Honda Motor Co., No. 83-4863, slip op. (E.D. Pa. Mar. 1, 1985) (available on LEXIS) ("Although the United States may have agreed to be bound by the terms of the [Evidence] Convention, Japan has not, and I will not provide the defendants with the 'protections' of the Convention when Japan has not chosen to do so.").

103. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 comment a (Tent. Draft No. 1 1980).

104. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 150 (1965) ("Under the law of the United States, courts in the United States have exclusive authority to interpret an international agreement to which the United States is a party for the purpose of applying it in litigation as the domestic law of the United States."). *Accord* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 333 & comment a (Tent. Draft No. 1 1980).

105. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 149, 150, 151, 152 (1965).

106. *Id.* §§ 151-52; *accord* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 334 (Tent. Draft No. 1 1980).

107. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141, 144 (1965); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-4, at 167-71 (1978).

108. U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of

over any conflicting state discovery rule.

Although these principles of international law may seem straightforward, there are still a number of problems and complicating factors which affect the way in which the Evidence Convention is interpreted. Because the language of the treaty is often vague, a number of plausible interpretations may be made for each section of the document. In addition, it is not always clear to the courts whether the provisions of the treaty are in direct conflict with local procedures, or whether they have a choice as to which set of rules to follow.[109] In the latter circumstance, courts often choose familiar local practices before resorting to the Convention.[110]

The policies behind the supremacy clause and general principles of treaty interpretation are clear. International relations, in order to be peaceful and forceful, require a broad national policy, not piecemeal decisions by individual states.[111] In *United States v. Pink*,[112] a case involving seizure of United States property owned by Soviets, the Supreme Court dealt with the conflict between state law and treaties. The Court reiterated that "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty."[113] The Court

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the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Cf. 65 OP. CAL. ATT'Y GEN. 210, 210-12 (1982) (a treaty "properly acceded to by the United States . . . supersedes any inconsistent provision of state law even though the state is otherwise clearly authorized to act in the premises. (*United States v. Pink*, *supra* 315 U.S. at 230-231; *United States v. Belmont* (1937) 301 U.S. 324, 331-322 [sic].)").

Some of the earliest cases interpreting the treaty came from the California Court of Appeal. *See* Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 787, 176 Cal. Rptr. 874 (1981); Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). These cases concluded that the Evidence Convention is the primary means for obtaining evidence from foreign parties. Some courts have suggested that the California courts were reluctant to enforce state discovery practices in place of a federal treaty. Federal judges may be less hesitant to apply the Federal Rules instead of the Convention because of the equality between federal laws and treaties. Laker Airways v. Pan American World Airways, 103 F.R.D. 42, 50 (D.C. 1984).

109. Several courts have tried to analyze the issue of the exclusivity of the Convention on the basis of which law was passed by Congress last, the treaty or the Federal Rules. The last conflicting piece of legislation passed by Congress supersedes existing statutes. Since the Federal Rules were revised following the acceptance of the Convention, this analysis has not satisfactorily answered the question for most courts which have addressed the issue. In re Anschuetz & Co., GmbH, 754 F.2d 602, 608 n.12 (5th Cir. 1985).

110. *Cf.* COMMONWEALTH SECRETARIAT, *supra* note 55.

111. United States v. Pink, 315 U.S. 203, 230-31 (1949) (dispute arose between the United States and New York over title to assets formerly held by the Russian government).

112. *Id.*

113. *Id. See generally* 65 OP. CAL. ATT'Y GEN. 210, 211-12 (1982).

noted, however, that treaties "will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."[114] As a consequence, although treaties are the federal common law,[115] and are superior to the law of the states,[116] leeway will be given to state law when possible. The two systems of legislation need not be inconsistent; they may exist together allowing individual litigants and courts to incorporate both laws for the most effective course of action. Consequently, when treaties are interpreted broadly, courts may not find that the treaty is the exclusive and final word on the law in that area. The court may seek ways in which to harmonize potential conflicts and choose the course that is the most practical and fair to all parties in light of the facts of the case.

2. The judicial sovereignty of the foreign court

Even if a court determines that a state procedure or the Federal Rules is not inconsistent with the Convention, the court may decide to require the use of the Convention out of respect for the sovereignty of the foreign court over its own nationals. Most courts are very protective of their judicial sovereignty and hesitate to grant requests which sharply conflict with their established principles of litigation.[117] One of the earliest cases addressing these issues was *Volkswagenwerk Aktiengesellschaft v. Superior Court*,[118] a products liability action by an American plaintiff against a German corporation. In that decision, the court denied certain discovery orders because they "would impair the powers of the Federal Republic of Germany to control the property and personnel of an entity which it has created and which has

114. United States v. Pink, 315 U.S. at 230.

115. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 4-4, 167-71 (1978).

116. *Id.*; *see* United States v. Pink, 315 U.S. at 231.

117. Comment, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 748 (1974) (footnotes omitted):

> The dilemma for American courts has been to accommodate the conflicting principles of *lex fori* and effective enforcement, on the one hand, and concepts of due process and international comity, on the other. The gradual trend over the last fifteen years seems to have been towards a preference for the former, "enforcement" norm. There is, however, some weighty authority for proponents of the due process-comity position.

118. 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973). This case was decided before Germany ratified the Convention. The analysis the court uses in regard to the established procedures between the United States and Germany at that time is pertinent to later Hague Evidence Convention cases, and is often cited by other courts.

never left its protection."[119] Thus, despite the "generous provisions of the California discovery statutes," notions of international comity, it was held, require courts to avoid encroaching upon the sovereignty of another court system.[120]

This strict view of judicial sovereignty is not always respected with the same conviction, however. In a recent district court opinion, *Philadelphia Gear Corp. v. American Pfauter Corp.*,[121] the court held that the American plaintiff had to comply with the provisions of the Evidence Convention. In this products liability case, the court disagreed with the argument that "this treaty does not represent the exclusive means of gathering evidence abroad but rather was intended merely to supplement the less restrictive means provided by the Federal Rules of Civil Procedure."[122] Plaintiff in that case cited article 27 of the Convention, which permits a "contracting state" to use its own internal law or practice for taking evidence.[123] The court found this language vague and "not conclusive," but nevertheless held that principles of international relations and comity required a more restrictive interpretation of the Convention.[124] One court cannot "foist its legal procedures upon another."[125] Interestingly, the court then went on to hold that if the plaintiffs could not get the cooperation or discovery they needed through the Evidence Convention, they could then return to the court for further discovery orders.[126] Since the foreign defend-

119. *Id.* at 508, 109 Cal. Rptr. at 221.

120. *Id.* One possible approach is to require both sides to proceed under the Evidence Convention. *See* Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 236, 240, 186 Cal. Rptr. 876, 877-78 (1982). Whenever discovery is taken on foreign soil, this would make sense. It will not assist, however, an American party with all of its offices and assets in this country. To try to limit the amount of discovery taken here to conform with the limitations met abroad would be virtually impossible. The courts would have a difficult time drawing a line between acceptable discovery and requests which are too broad. In view of the strong policy in this country in favor of discovery and the Federal Rules, furthermore, any such result would be as inequitable as the system as it now stands might become.

This same issue of exclusivity has arisen with respect to the Service Convention. *Compare* Tamari v. Bache & Co., 431 F. Supp. 1226 (N.D. Ill. 1977) (court held that service pursuant to Federal Rule of Civil Procedure 4 was acceptable, even if it did not comply with Hague Service Convention), *with* Dr. Ing. H.C.F. Porsche A.G. v. Superior Court, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981) (court held that plaintiffs must comply with the Convention, and quashed service by local rule). *See also* Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

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

122. *Id.* at 60.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 61.

ant is doing business in the jurisdiction of the court, the court reasoned, it is always subject to any discovery orders issuing from that court.[127] Although the court states that it wishes to respect the rights and position of the foreign court, it then goes on to say that it will overlook the Convention if it does not provide the results it seeks. This arguably shows even less respect for the foreign court, because the judge is only willing to cooperate and respect the foreign court's decision if his requests are fully complied with.

A number of courts have determined that, contrary to the California cases, ordering discovery pursuant to American rules does not violate foreign sovereignty. These decisions are often based upon the notion that the Evidence Convention is only operable when evidence is physically located abroad. Several courts have taken a very restrictive view of how much evidence is located abroad.[128] If a corporation has offices in the United States or does substantial business here, the court may find that document requests can be fulfilled within the jurisdiction of the United States, and therefore they refuse to apply the Evidence Convention.[129] Even if the foreign party asserts that the documents would have to be sent over from abroad, some courts have held that sending over the documents would merely be an act preparatory to discovery, and therefore it was not necessary to go through the judicial channels required by the Evidence Convention.[130] Similarly, if a deposition is set in the United States or if interrogatories are most likely to be answered by American counsel, some courts have held that there is no need to resort to the Convention, and instead follow the Federal Rules of Civil Procedure.[131]

The courts in these cases reason that the Evidence Convention is concerned with respecting the sovereignty of the foreign court, and not to protect the parties to the suit.[132] If discovery is conducted on American soil, and the jurisdictional boundaries of the foreign court are never invaded, that court's sovereignty is not violated.[133] Because

127. *Id.*

128. In re Anschuetz & Co., GmbH, 754 F.2d 602, 615 (5th Cir. 1985).

129. *Id.*

130. Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 521 (N.D. Ill. 1984) (patent infringement suit; defendant was ordered to comply with discovery requests which did not intrude on French soil); Adidas (Canada) Ltd. v. SS Seatrain Bennington, No. 80-1911, slip op. (S.D.N.Y. May 30, 1984) (available on LEXIS) (French defendant's motion for a protective order against "American-style" discovery denied).

131. *See* In re Anschuetz & Co., GmbH, 754 F.2d 602, 611 n.25 (5th Cir. 1985).

132. *See infra* note 169.

133. These arguments do not, however, solve the dilemma over foreign nonparty witnesses

the American court has jurisdiction over the parties, the argument continues, it can order them to comply with any provision of the Federal Rules.[134] This argument can, however, be criticized for failing to recognize a foreign court's interest in protecting the rights of its own nationals. The response to that criticism is that American discovery procedures may be part of the cost of doing business in the United States.[135]

B. Jurisdiction over Foreign Parties

A foreign corporation becomes a proper defendant to a suit and subject to the jurisdiction of American courts when it has sufficient minimum contacts with the state to make it amenable to the laws of that state.[136] Personal jurisdiction is, however, "a waivable defect,

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over whom the American court does not have jurisdiction; presumably, the Evidence Convention would have to be applied to depose any such individual if they do not voluntarily come to the United States.

134. In re Anschuetz & Co., GmbH, 754 F.2d 602, 615 (5th Cir. 1985).

135. In a related context, American courts have not always hesitated to require a foreign party to comply with a discovery request which another nation may object to. In *Societe Internationale pour Participations Industrielles v. Rogers*, the Supreme Court addressed the question whether a foreign plaintiff should be required to comply with a discovery request when the production of the documents sought may result in a violation of Swiss law. 357 U.S. 197, 205 (1958). *Societe* involved a Swiss holding corporation trying to recover assets which were confiscated by the American government under the Trading with the Enemy Act. The Court decided that "United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts [at discovery] to the maximum of their ability." *Id.* The Court noted that, if the foreign plaintiff does not or cannot comply, "[t]his is not to say that petitioner will profit." *Id.* The Court stated that since the plaintiff has the burden of persuasion on the issues, failure to produce the documents may hurt its own case, and thus the Court determined that noncompliance should affect only the adequacy of the plaintiff's proof, and not preclude the case from court. *Id.* at 213. Although *Societe* is a pre-Evidence Convention case, the Court at that time clearly favored good faith attempts at compliance with discovery orders on the part of foreign plaintiffs. *See id.* at 205-06. Having brought their suit in American courts, documents within the "control" of the plaintiff were subject to discovery. *Id.* at 204-05. Lower courts have differed in their application of *Societe*. *See* Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960).

136. International Shoe v. Washington, 326 U.S. 310 (1945).

A troublesome issue arises when the court sanctions a party who refuses to produce discovery documents needed to prove the court's ability to assert personal jurisdiction. For a discussion of these issues, see Note, *Civil Procedure—Discovery Sanctions in a Jurisdictional Context*: Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 32 U. KAN. L. REV. 471 (1984); Comment, *Discovery—Power to Impose Sanctions for Failure to Make Discovery on Jurisdictional Issues*, 13 MEM. ST. U.L. REV. 109 (1982); Note, Compagnie des Bauxites de Guinea v. Insurance Company of North America: *Personal Jurisdiction Established by Sanction*, 11 CAP. U.L. REV. 837 (1982).

which must be asserted by the party who would take advantage of it."[137] When a foreign corporation files a suit or asserts a counterclaim, it waives any objection it may have had to in personam jurisdiction.[138] By agreeing to be subject to the laws of the state as a plaintiff or counterclaimant, does the foreign plaintiff or counterclaimant then agree to become subject to local discovery rules?[139] Applying the philosophy of the drafters of the Convention that the Convention should be construed liberally as a minimum standard of cooperation, and noting the emphasis toward complying with all reasonable discovery requests which is apparent in a number of recent cases,[140] it would appear that foreign corporations may lose their right to argue that the Evidence Convention and not local discovery rules apply to them. Once a party becomes subject to the court's jurisdiction, there is evidence that they may become subject to all local procedural rules, including discovery practices, instead of the more restrictive Evidence Convention.

A number of cases, some very recent, have touched on the effect of the court's jurisdiction on the rights of the parties. The 1973 *Volkswagenwerk* case declared that courts "have no jurisdiction over per-

137. C. WRIGHT, LAW OF FEDERAL COURTS 19 (3d ed. 1976), *citing* Federal Rule of Civil Procedure 12(h)(1) and Petrowski v. Hawkeye-Security Insurance Co., 350 U.S. 495 (1956).

138. *See generally id.*

139. In an analagous context, a state can consent to the jurisdiction of an American court by bringing suit in that court, and waive any right to claim sovereign immunity. National City Bank of New York v. Republic of China, 348 U.S. 356, 363 (1955). In *National City Bank*, the Republic of China brought suit to recover funds placed in an account with defendant bank. National City Bank then filed two counterclaims seeking affirmative relief. China argued that the counterclaims invaded its sovereign immunity. The Court disagreed. According to the majority, the situation involved "a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." *Id.* 348 U.S. at 361-62. *See also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1607(c) (1982).

This argument is even stronger in a case involving discovery against a foreign commercial enterprise instead of a foreign government. Even under the theory of sovereign immunity, an exception is made to the doctrine when the foreign state commits a tort or carries on a commercial enterprise as well as whenever the government waives the right, either explicitly or by implication. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1982).

In International Society for Krishna Consciousness, Inc. v. Lee, 18 Av. Cas. (CCH) 18,317, 18,323 n.15 (S.D.N.Y. Feb. 28, 1985), the court states that "[e]ven foreign governments may be sued in American courts for actions undertaken in their commercial capacity in the United States [citations omitted], and, if amenable to United States substantive law, are presumably also subject in those proceedings to American procedural law." *See also* In re Anschuetz & Co., GmbH, 754 F.2d 602, 604-05 n.3 (5th Cir. 1985).

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

sons or property outside their territory."[141] The 1981 *Volkswagenwerk* court, however, held that "[o]nce a foreign corporation is properly subject to a court's jurisdiction, it (like any other party validly joined in a local lawsuit) may with technical propriety be ordered to act or to refrain from acting, in matters relevant to the lawsuit, at places outside the state."[142] Thus, the court held, the internal affairs of the foreign corporation are subject to the orders of a California court, as long as the corporation is properly a party to the suit.[143] The court went on to say that the law of the forum governs procedural matters.[144] Finally, the court determined that if a court has personal jurisdiction over a party, that party must comply with discovery procedures which are essential parts of that court's jurisdiction, on pain of default.[145]

Nevertheless, although the court did not question its power to issue any discovery order, as a matter of judicial restraint, the 1981 *Volkswagenwerk* court determined that the plaintiff must proceed pursuant to the Convention.[146] Thus, if a foreign defendant is subject to the court's jurisdiction and therefore its procedures, it follows that a foreign plaintiff who files suit in an American court, thereby waiving any objection to jurisdiction, should also be required to follow local court procedure, including local discovery rules. If the foreign party is willing to subject itself to the American judicial system, the foreign court cannot object, especially if discovery is conducted here.

Two recent federal district court cases approached this issue but reached somewhat different conclusions. In *Schroeder v. Lufthansa German Airlines*,[147] the court agreed that when a foreign party joins a

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141. 33 Cal. App. 3d at 507, 109 Cal. Rptr. at 221.

142. 123 Cal. App. 3d at 856, 176 Cal. Rptr. at 883-84. *But see* Oxman, *supra* note 96, at 739-44. Oxman argues that jurisdiction alone is not a strong enough rationale for compelling discovery from a foreign defendant.

143. 123 Cal. App. 3d at 856, 176 Cal. Rptr. at 883.

144. *Id.* at 856, 176 Cal. Rptr. at 884.

145. *Id.* at 857-58, 176 Cal. Rptr. at 884:

> That VWAG should have been chartered by, and should maintain its manufacturing facility in, a jurisdiction which would regard these California discovery orders as violations of its sovereignty seems happenstance so far as the California action is concerned: A strong argument can be made that as a legitimate party to a California action VWAG may be required to elect between the demands of the California court and the sensitivities of the West German Government, and to risk the sanctions authorized by California law should it elect not to give the required discovery.

See also Coopman v. Superior Court, 237 Cal. App. 2d 656, 660, 47 Cal. Rptr. 131, 134 (1965).

146. 123 Cal. App. 3d at 858-59, 176 Cal. Rptr. at 885.

147. Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. Sept. 15, 1983).

suit in the United States and does not contest jurisdiction, that party may then be required to conform to local procedural rules.[148] The court goes on to say, however, that apart from these technical rules of jurisdiction, the court should exercise self-restraint in discovery matters.[149] Principles of international comity require the court to adopt more restrictive discovery measures pursuant to the Evidence Convention, even when other principles of law would allow local rules to govern the situation.[150]

In *Lasky v. Continental Products Corp.*,[151] the district court stated outright that federal jurisdiction over a foreign party subjects that litigant to the Federal Rules of Civil Procedure.[152] In *Lasky*, a products liability action, the foreign defendant asked that all discovery requests be made pursuant to the Evidence Convention.[153] The court determined, however, that the plaintiffs should be allowed to pursue their discovery request.[154] The court found that the defendant should be subject to general local discovery provisions.[155] A contrary result, the judge held, "would severely restrict the plaintiffs' scope of discovery," because the German ratification of the Convention specified that pretrial discovery requests would not be honored.[156] This court, therefore, directly seeks documents which the foreign nation says through the Convention it does not wish to produce.

Schroeder and *Lasky* illustrate the courts' disagreement regarding principles of personal jurisdiction and the effect courts' jurisdictional rights have over the choice of procedure to be followed: local or Evidence Convention. The 1981 *Volkswagenwerk* case and *Schroeder* acknowledge that standard principles of law might allow them to compel discovery under the local rules rather than under the Convention. Both courts go on to say that there are other principles the court should take into account when applying these priniciples to formulate a discovery order. Ideals of international comity may require a degree of judicial self-restraint.[157]

148. *Id.*
149. *Id.*
150. *Id.*
151. Lasky v. Continental Products Corp., 569 F. Supp. 1227 (E.D. Pa. 1983).
152. *Id.* at 1228.
153. *Id.*
154. *Id.* "The existence of federal jurisdiction over a foreign entity subjects that entity, like any other litigant, to the provisions of the Federal Rules of Civil Procedure." *Id.*
155. *Id.*
156. *Id.* at 1229.
157. *Id.* at 1228.

Nevertheless, the courts recognize their power to enforce the local rules, and several courts have applied them. *In re Anschuetz & Co.*[158] is the only federal court of appeals decision to discuss the exclusivity of the Evidence Convention. In that case, the Fifth Circuit held that "the Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign, Hague Convention state nationals, subject to in personam jurisdiction in a United States [c]ourt."[159] The court then states that, "[h]aving been found reachable under the Louisiana long-arm statute, Anschuetz is subject to the Federal Rules discovery provisions."[160] Ultimately, plaintiffs had to employ the Evidence Convention in order to take the involuntary deposition of a party in the foreign country, but any evidence gathered in the United States could be requested through the Federal Rules.[161]

In the vast majority of Evidence Convention cases officially reported, the Evidence Convention is raised by foreign defendants. Although the courts have split on their approach as to whether the Evidence Convention is the exclusive means of obtaining discovery from foreign defendants, certain issues continue to arise. Courts emphasize their jurisdiction over the parties to the suit. Their concern with compliance with the Convention often arises only when deponents and documents are actually located abroad. Yet, even in these situations, and even when foreign law may subject a party to penalties for complying with the discovery request,[162] courts have required at least a good faith effort at compliance.

In the case of a plaintiff who brings suit, the arguments in favor

158. 754 F.2d 602 (5th Cir. 1985).

159. *Id.*

160. *Id.* The parties may then raise the challenge of documents and witnesses located abroad. In the case of a corporation, at least, courts have held that a witness may not "resist the production of documents on the ground that the documents are located abroad. [Citations omitted.] The test for the production of documents is control, not location. [Citation omitted.]" Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983) (foreign defendant sought relief from a contempt sanction for failing to produce documents subpoenaed by the grand jury). *See also* United States v. First Nat'l City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968) (grand jury subpoena requiring defendant Bank to produce documents located at a branch office in Germany); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984) ("Arguably at least, the Evidence Convention has no application at all to the production, in this country, by a party within the jurisdiction of this court, of evidence pursuant to the Federal Rules of Civil Procedure.").

161. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 524 (N.D. Ill. 1984) (plaintiff did not have to comply with Evidence Convention for discovery located in the United States).

162. *See supra* note 135.

of the use of the Federal Rules is even stronger. In such a case, plaintiffs are not unwilling participants in the American judicial process, brought into court on the basis of "minimum contacts." Here, plaintiffs are aware, beforehand, of the procedures and effort expected of them by the courts. Although this alone does not answer the question of the sovereignty of the foreign court, it seems that if the party is willing to waive any objection it may have to suit,[163] and waive its ability to choose a foreign court to litigate where they will be protected from broad discovery requests,[164] then the interests of the foreign court are lessened, and the threat to its sovereignty is reduced.[165]

C. Waiver of Rights Under the Evidence Convention

Personal jurisdiction over a party alone may not be a sufficient basis for applying local discocvery rules in place of the Evidence Convention. In addition, the location of the evidence sought may not always provide the best answer to the question of the exclusivity of the Evidence Convention. One possible theory to apply to the exclusivity issue is that of waiver.

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163. Courts have differed in their approach to the timing of the foreign defendant's raising of the Evidence Convention as the appropriate method for making discovery requests. *Compare* Cooper Indus. v. British Aerospace, 102 F.R.D. 918, 918-19 (S.D.N.Y. 1984) (holding that defendant waived its right to assert the Evidence Convention because they did not seek relief at the time the discovery request was made, but instead chose to ignore discovery requests), *with* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 n.5 (E.D. Pa. 1983):

> I find no merit in plaintiff's argument that [defendant] is estopped from asserting the applicability of the Hague Convention because it served discovery requests upon plaintiff pursuant to the Federal Rules of Civil Procedure, rather than by the convention procedure. The convention is at issue only when a litigant from a signatory country seeks evidence in another signatory country other than where the case is pending. [Defendant's] request did not seek to take any evidence abroad. It was directed to a party residing in the country where the litigation was initiated.

164. *See infra* note 174 and accompanying text.

165. *Cf.* Murphy v. Reifenhauser KG Maschinenfabrik and Rextrusion Systems, 101 F.R.D. 360 (D. Ver. 1984). In *Murphy*, the defendant objected to the interrogatories and request to produce propounded by plaintiff. Defendant waited three years before it began to request compliance with the Evidence Convention. *Id.* at 360. The court held that plaintiff did not have to proceed under the Evidence Convention; because of the American court's strong interest in quickly resolving the case, principles of comity did not preclude use of the local rules:

> The United States has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here. West Germany has a clear interest in protecting the integrity of its judicial rights and procedures, but we find that interest less compelling in this instance than, for example, where a non-party witness is sought for deposition or where the scope of discovery sought involves more intrusive methods.

Id. at 363.

Like personal jurisdiction, litigants can and do waive rights they may otherwise assert. Once a party agrees to be bound to the jurisdiction of the court, that party agrees to be bound by the court's decision and its procedures.[166] Once waived, the right cannot be reclaimed.

Traditionally, the procedural law of the forum has controlled in any lawsuit.[167] Many of the recent decisions of the courts seem to recognize this principle, although some choose not to demand use of local rules because of a strong belief in judicial self-restraint and comity.

When a party agrees to become bound to the powers of the courts of one nation, it also agrees to be bound by its procedural law.[168] This analysis does not destroy the force and purpose of the Evidence Convention. The Convention still provides an effective means for gathering evidence abroad which is not otherwise available in the United States. As long as discovery is conducted in the United States, the foreign court's sovereignty is not violated.[169] If a foreign plaintiff refuses to comply with a discovery request, the court can apply sanctions. Without this power, a foreign plaintiff has a great advantage over a United States defendant: the plaintiff can choose his forum, and have the advantages of both the Federal Rules of Civil Procedure against his opponent and his own nation's limits on discovery.

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166. In re Anschuetz & Co., GmbH, 754 F.2d 602, 604-05 n.3 (5th Cir. 1985); International Society for Krishna Consciousness v. Lee, 18 Av. Cas. (CCH) 18,317, 18,323 n.15 (S.D.N.Y. Sept. 11, 1984).

167. It might be argued that article 9 of the Convention, by stating that local procedures should be followed by the executing state unless a contrary and feasible procedural request is made by the requesting state, recognizes the strength of local discovery rules. This article can also be read, however, as merely applying to the form of the request and answer, and not the substance. This is especially clear considering that article 23, the prohibition against pretrial discovery, has been adopted by so many signatories.

168. *See supra* note 166.

169. One court has pointed out that it is the foreign court, and not the litigant, which has the authority to waive sovereignty over evidence located abroad. Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 236, 245, 186 Cal. Rptr. 876, 881 (1982). Absent a party to the suit violating a foreign law, however, this overlooks the party's control over any documents in his possession, plus, in the case of a foreign plaintiff, his ability to choose the site for the trial. While the documents may not be gathered through judicial channels abroad, if the foreign entity has sufficient contacts to file suit in an United States court, then presumably it has sufficient contacts to produce documents or answer interrogatories here. Even in situations where foreign law may be violated if documents are produced, American courts have been very reluctant to excuse anything less than a good faith effort on the part of the foreign party to comply with reasonable discovery requests.

IV. SANCTIONS

Many of the cases cited have suggested that discovery should be attempted under the provisions of the Convention if at all possible. The next problem lies in when and what sanctions to apply for those who do not comply with discovery orders under the Convention or under local rules. Article 10 of the Convention allows for methods of compulsion under the executing country's law for those who do not comply with the Convention itself.[170]

If the trial court issues an order on its own, not pursuant to the Evidence Convention, compliance may be difficult and sanctions may be impossible. It is unlikely that a foreign court will impose sanctions for an order it did not execute, so resort to the foreign party's home forum offers little hope. Enforcement, therefore, lies with the American court. The cases suggest alternatives to article 10. In the 1973 *Volkswagenwerk* case, the court noted that noncompliance may result in a default judgment.[171] In another context, the Court in *Societe Internationale pour Participations Industrielles v. Rogers* rejects the extreme default judgment, and suggests that other sanctions would be appropriate if one party did not comply.[172] In that case, however, the Court pointed out that the lack of evidence would hurt the foreign plaintiff (since the foreign plaintiff had the burden of proof) and that this was a type of sanction imposed on the noncomplying party.[173] In some of these cases, it may be difficult to acquire the assets of the sanctioned party to pay the other side. The theory is that if the foreign entities have sufficient contacts with the state for jurisdiction, they can be expected to comply with state law.[174] Once jurisdiction is

170. Evidence Convention, *supra* note 10, art. 10. For text of article 10, *see supra* note 93.

171. 33 Cal. App. 3d at 508, 109 Cal. Rptr. at 221.

172. 357 U.S. 197, 212 (1958).

173. *Id.* at 212-13.

174. *Volkswagenwerk*, 123 Cal. App. 3d at 856, 176 Cal. Rptr. at 883.

The forum non conveniens cases use an analagous line of reasoning. In these cases the court must decide if the case should be tried in its jurisdiction, or dismissed to be litigated in a foreign court. The availability of evidence is a large consideration in these cases. An alien plaintiff makes himself amenable to the court system by filing suit. *See generally* Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57 (1967). In the area of forum non conveniens decisions, some courts have retained jurisdiction over "nominally 'alien' plaintiffs." *Id.* at 71. If the plaintiff is an "essentially American enterprise," a United States court may refuse to dismiss a case in favor of a foreign court. *Id.* In Chemical Carriers, Inc. v. L. Smit & Co. Internationale Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957), the courts were wary that American shipowners were trying to block suits by calling themselves foreign corporations. *Id.* at 889. The court there retained jurisdiction. *Id.* In Mobil Tankers Co. v. Mene Grande Oil Co., 236 F. Supp. 362 (D. Del. 1965), *rev'd*, 363 F.2d 611 (3d Cir. 1966), *cert. denied*, 385

established, the court also has jurisdiction to impose certain specific sanctions.

Many cases emphasize a need to apply the Evidence Convention as a first option, and then apply sanctions for noncompliance with the treaty provisions. Many courts advocate a balancing approach on a case-by-case basis.[175] If the court applies local or federal procedures, the full range of sanctions is available to them for failures to comply. If a party invokes the legal and equitable powers of the American court, then arguably they should be fully aware and subject to that court's enforcement powers as well.

V. CONCLUSION

The Evidence Convention provides a procedural framework with which the signatory nations can structure foreign discovery requests. Because different attitudes exist toward discovery in the several signatory nations, actual use of the Convention varies. American courts

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U.S. 945 (1966), and Constructora Ordaz, N.V. v. Orinoco Mining Co., 262 F. Supp. 91 (D. Del. 1966), the connection between the corporation and the United States was even more tenuous than it was in *Chemical*, but the courts nevertheless refused to dismiss on forum non conveniens grounds. The courts held that the suits were actually between two Americans, and, therefore, should be conducted in United States courts. (For a discussion of these cases, see Note, *The Convenient Forum Abroad*, *supra*, at 71-72).

These cases all face the problem of what is an "essentially American" enterprise. These principles relate to the issue in this Comment. If the contacts of the foreign party are sufficient to bring them into American courts, they may be sufficient to allow the courts to exercise their full jurisdictional powers over the litigants, including discovery requests. If a foreign manufacturer sells a large quantity of goods in the United States, even though they are manufactured abroad, does that place the manufacturer in such a position within the American economy that he should be subject to local process and procedures? Such a requirement may be the reasonable and logical result of their sales and contacts within the local court's area of jurisdiction. In Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), the court decided that the case should be dismissed on forum non conveniens grounds. One of the concerns of the court was that litigation in the United States would require the parties to obtain evidence through the Federal Rules of Civil Procedure and the Evidence Convention, and both sources were so limited that the parties could not effectively litigate the suit here. *Id.* at 788-89. The court feared that foreign courts may withhold evidence altogether, or provide it in such a limited form that the parties could not conduct a "full-fledged American-style" discovery process. *Id.* In addition, they found costs to be so high, that it would be better to litigate in a foreign jurisdiction where the evidence would be more readily available and the parties would be on more equal footing. *Id.* In Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983), after a strong statement that international comity required the American party to comply with the Evidence Convention, the court then stated that any problems which arise under the Convention could later be addressed to the American court because the foreign company is still subject to the American court's jurisdiction.

175. *Volkswagenwerk*, 123 Cal. App. 3d 787, 176 Cal. Rptr. 874 (1981); *Philadelphia*, 100 F.R.D. 58 (E.D. Pa. 1983).

will honor almost all discovery requests. Foreign courts, in contrast, may not grant American pretrial discovery orders which are incompatible with their legal systems.[176] The consequences of these differences are felt when an American party to a suit is subject to liberal evidence gathering, while that same party is limited in the scope of its discovery against the foreign party. This creates inequity in the court proceedings.

Several arguments can be made for prohibiting an alien plaintiff or counterclaimant from invoking the restricted rights under the Evidence Convention. The very terms of the treaty do not necessarily prohibit the use of standard American discovery procedures.[177] In addition, it can be argued that by subjecting itself to the jurisdiction of the court, the foreign plaintiff fully submits itself to the local legal system and waives any rights it may have under the Convention or under foreign law. Although a foreign court may ultimately thwart attempts at pretrial discovery and decide that sovereignty is too important to permit what it considers intrusive document and witness requests, American courts up to this point have often been anxious for foreign parties to comply with all requests. The safest route seems to be to require a good faith effort under the Evidence Convention for discovery actually conducted abroad. Failing that, an uncooperative foreign party can arguably be subjected to the liberal local discovery rules, or face sanctions.

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176. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547, [1978] 2 W.L.R. 81, [1978] 1 All E.R. 434 (H.L. 1977).

177. Evidence Convention, *supra* note 10, art. 10; In re Anschuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985).