



1-1-1992

## The Taking of Evidence in France

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### Recommended Citation

Rosemary A. Bruckner, *The Taking of Evidence in France*, 5 *TRANSNAT'L LAW* 759 (1992).

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## *Practitioner's Perspective*

### **The Taking of Evidence in France**

Rosemary A. Bruckner\*

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The author wishes to thank Robert W. Byrd II, of Jeantet & Associés, Paris, France, for his invaluable advice in researching this article, and for reviewing an earlier draft.

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I. INTRODUCTION

This article will assist the transnational practitioner faced with acquiring evidence in France. It will first describe the procedures for taking evidence in France and second, discuss the framework of international judicial cooperation between French courts and foreign courts on accepting and obtaining evidence from abroad.

II. FRENCH TRIAL PROCEDURE

A. *Generally*

France follows the civil law, rather than the common law. In French civil and commercial matters, as opposed to criminal matters, there is no jury and no trial in the sense of a single, dramatic, concentrated, and uninterrupted presentation of all matters which bear on a dispute. Therefore, there is no need to divide a civil lawsuit into pre-trial and trial phases. France follows the civil law practice of developing a case through a series of successive hearings, at some of which evidence is taken; there is no pre-trial examination. When testimony is taken at one of the successive hearings, it automatically becomes part of the record.<sup>1</sup>

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1. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 338 (5th ed. 1988).

B. The Pre-hearing Phase

In French civil or commercial litigation, pre-hearing procedures are streamlined. As a general rule, discovery is minimal or non-existent; there are no depositions and no direct or cross-examination of parties or third-party witnesses before or during the hearing. Instead, heavy reliance is placed on written evidence.<sup>2</sup> A *dossier de plaidoirie*,<sup>3</sup> which summarizes the oral argument and contains the written supporting evidence, is simply submitted to the court either prior to the hearing<sup>4</sup> or at the hearing itself.<sup>5</sup> The hearing itself will consist only of oral argument by counsel and will rarely exceed more than one or two hours, even in complex litigation.<sup>6</sup>

III. THE FRENCH PROCEDURE FOR GATHERING EVIDENCE

The "golden rule" of evidence-gathering in French civil procedure is that a party who wishes to use a piece of evidence must, of his own accord, furnish such evidence to the opposing party.<sup>7</sup> It is in the best interest of the parties to produce evidentiary documents voluntarily. Unless the evidence is challenged as, for example, to its authenticity, the party can use the evidence at trial without being subject to further conditions. In short, the discovery devices used in France are weak compared to those used in certain other jurisdictions.<sup>8</sup>

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2. Christian Bouckaert & Robert W. Byrd II, *Trial and Court Procedures in France*, in TRIAL AND COURT PROCEDURES WORLDWIDE 138-44 (Charles Platto ed. 1990).

3. This translates to English as "pleading file."

4. This is the practice before some French commercial courts. For a discussion of the French court system, see generally Bouckaert & Byrd, *supra* note 2, at 140-44.

5. This is the practice before the *tribunaux de grande instance* and the Courts of Appeal.

6. Bouckaert & Byrd, *supra* note 2. The heavy reliance on written evidence is partly due to custom and partly due to Article 1341 of the French Civil Code [C. CIV.] which requires production of written documents if the subject matter of an action exceeds a certain amount, currently set at 5,000 French francs. Article 1341 applies to civil, but not to commercial transactions. *Id.*

For an English translation of the French Civil Code and Code of Civil Procedure, see GEORGE A. BERMAN ET AL., *FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION* (1987).

7. *Id.*, citing CODE DE PROCÉDURE CIVILE [C. PR. CIV.] art. 132. In accordance with the civil law tradition, new evidence may be introduced at trial and on the first appeal. SCHLESINGER ET AL., *supra* note 1.

8. See, e.g., FED. R. CIV. P. 26-37 (governing U.S. federal trial courts).

*A. Discovery*

Article 10 of the French Civil Code<sup>9</sup> declares that everyone must cooperate with the judiciary in order to facilitate the search for truth. To that end, Article 10 permits a judge to impose fines when parties fail to cooperate. However, even though a judge has the authority to compel production of evidence, such authority is seldom exercised. As a result, recent revisions of French civil procedure have brought about few significant changes regarding the discovery process.

Some discovery devices were introduced by a decree of September 9, 1971, and are now included in the French Code of Civil Procedure.<sup>10</sup> The Code provides methods of discovery for evidence in the possession of an adverse party or of a third person.<sup>11</sup> A party can be ordered to appear personally before the court in order to answer questions.<sup>12</sup> However, the resulting interrogation will be conducted by the court rather than by counsel, and it will not take place under oath. Also, these measures of discovery will occur only if the court, which has discretion in such matters, orders them. A judicial order for such discovery is enforceable by a fine.<sup>13</sup>

*B. The Judge's Role*

*1. In General*

French judges are generally very reluctant to order the production of evidence. There are three major obstacles to obtaining such an order:

- (a) A party must submit a specific request to enforce the production of evidence, insofar as the judge cannot order such production *ex officio*;
- (b) the evidence requested must be clearly identified and its relevance to the dispute must be clear; and

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9. CODE CIVIL [C. CIV.] art. 10 (Fr).  
10. See generally C. PR. CIV. arts. 132-322 (Fr).  
11. C. PR. CIV. arts. 138-142.  
12. C. PR. CIV. arts. 184-198.  
13. SCHLESINGER ET AL., *supra* note 1.

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- (c) even if an order is obtained, the person in possession of the evidence requested may raise a number of objections based, for example, on confidentiality, privilege or professional secret.<sup>14</sup>

A reading of the French Procedural Code could yield the conclusion that the judge plays a very active role in the evidence-gathering process, but this conclusion is only partly true. The judge has the power to order or carry out, at the request of a party, the following measures:

- (a) He may carry out personal investigations as to the facts;
- (b) he can hear testimony from the parties;
- (c) he can hear third-party witnesses (subject to a rather complicated procedure); or
- (d) he can designate experts.<sup>15</sup>

In practice, the only measure a judge will ordinarily take is the designation of experts.<sup>16</sup>

### 2. *The Designation of Experts*

The designation of experts has become automatic in certain types of litigation, such as in product liability or construction matters, and it is customary in many other types of litigation. A French judge will designate an expert to determine the causes of injury or damage and frequently to put a monetary amount on injury or damage suffered.<sup>17</sup>

Although French judges are free to designate any expert they choose, experts are usually chosen from an official court-approved list of specialists from various fields. An expert may be designated even prior to the action on the merits through adversary summary proceedings.<sup>18</sup>

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14. Bouckaert & Byrd, *supra* note 2, at 112. See James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 474-75 (1986) (discussing obstacles to the compulsory production of evidence).

15. C. PR. CIV. arts. 132-322.

16. Bouckaert & Byrd, *supra* note 2, at 112-13.

17. See *id.* at 113.

18. *Id.*

All parties to the litigation must be invited to attend the expert's meetings and to participate in any investigations which an expert may undertake.<sup>19</sup> The parties may elect to offer the testimony of their own experts in addition to that of the official expert. Although not obligatory under the procedural rules, the official expert will usually submit a written report to the court on completion of the investigations. Generally, the court will follow the opinion of the court-appointed expert, even though the report is not binding on the court.

#### IV. GATHERING EVIDENCE IN FRANCE FOR SUTTS FILED ABROAD

##### *A. Introduction*

As explained above, the evidence-gathering process in France is subject to the discretion of the court. This practice is the logical outgrowth of the fundamental concept in civil law countries that the taking of evidence is not a private matter, but a function of the state. This function of the state may be performed only by judges or other officials deriving their authority from the local sovereign.

This basic difference in civil law and common law attitudes can cause problems when an action is brought in one country, but an item of evidence to be used in that action is located in another country. Fortunately, these problems have been resolved or alleviated by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, commonly known as The Hague Evidence Convention.<sup>20</sup>

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19. C. PR. CIV. arts. 242, 243, 266, 268, 275, 278, 279.

20. 23 U.S.T. 2555, T.I.A.S. No. 7444 (March 18, 1970) [hereinafter Convention]. The Convention entered into force for France on October 6, 1974, and for the U.S. on October 7, 1972. For the text of the Convention and a list of the countries adhering to it, see MARTINDALE-HUBBELL LAW DIGEST-CANADIAN & INTERNATIONAL LAW DIGEST, UNIFORM ACTS, ABA CODES, PART VI, SELECTED INTERNATIONAL CONVENTIONS, IC-14 through IC-18 (1990) [hereinafter MARTINDALE-HUBBELL]. See also 28 U.S.C.A. 1781 (Supp. 1991).

B. *The Hague Convention*

1. *The Scope of the Convention*

The Convention is limited by its terms to the taking of evidence in civil or commercial matters.<sup>21</sup> The United States defines a civil or commercial matter as any matter that is not criminal.<sup>22</sup> Civil law jurisdictions interpret the scope of the Convention more narrowly. Civil law jurisdictions generally tend to exclude from the scope of the Convention not only criminal matters, but also government fiscal and administrative matters, as well as other cases in which the government is the plaintiff.<sup>23</sup>

At the April 1989 Special Commission meeting at The Hague, the delegates concluded that the historical evolution of the Convention suggested a more liberal interpretation of "civil or commercial matters," such that bankruptcy, insurance, and employment might fall within the scope of the term. The Special Commission concluded tax matters were not covered by the Convention, but it allowed for the possibility that evolution could, in the future, encompass these matters.<sup>24</sup>

2. *Means of Gathering Evidence under the Convention and France's Code of Civil Procedure*

In an effort to bridge the gap between common law and civil law jurisdictions, the Convention provides two basic means for gathering evidence from a foreign country. The first is the Letter of Request procedure set forth in Chapter 1,<sup>25</sup> which is commonly used by civil law countries. The second is the taking of evidence by diplomatic

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21. Convention, *supra* note 20, arts. 1, 15, 17.

22. Darrell Prescott & Edwin R. Alley, *Effective Evidence-Taking under the Hague Convention*, 22 INT'L LAW. 939, 946-47 (1988) (citing *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, 17 I.L.M. 1417, 1418 (1978)).

23. *Id.*

24. See Edwin R. Alley, *New Developments Under the Hague Evidence and Service Conventions: The 1989 Special Commission*, 17 INT'L BUS. LAW. 380, 381 (1989).

25. Convention, *supra* note 20, arts. 1-14.



officers or commissioners, set forth in Chapter II,<sup>26</sup> which is similar to the common law practice of taking evidence abroad by notice, stipulation, or through court appointed commissioners.<sup>27</sup>

*i. Letters of Request*

A judicial authority of a contracting state may address a Letter of Request to the designated Central Authority of another contracting state.<sup>28</sup> The French Declarations to the Convention state that the Central Authority appointed by France for the receipt of letters of request is the Civil Division of International Judicial Assistance.<sup>29</sup> The Letter of Request must be written in French, or accompanied by a French translation.<sup>30</sup>

The French Central Authority will forward the Letter of Request to the District Attorney<sup>31</sup> of the jurisdiction in which it is to be executed. The District Attorney will then direct the letter to the competent court which will, itself or through a magistrate appointed by it, take the required action.<sup>32</sup>

Under Article 3 of the Conventions, a Letter of Request must specify the following:<sup>33</sup>

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

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26. *Id.* arts. 15-22.

27. Prescott & Alley, *supra* note 22.

28. Convention, *supra* note 20, arts. 1, 2.

29. The French term for "Central Authority" is *Service Civil de l'Endraide Judiciaire Internationale*. According to the U.S. Embassy Information Sheet entitled *Taking Evidence in France in Civil and Commercial Matters*, reprinted *infra* at app. A, the specific address for the French Central Authority is:

Bureau de l'Endraide Judiciaire Internationale  
Direction des Affaires Civiles et du Sceau  
Ministere de la Justice  
13 place Vendome  
75042 Paris Cedex 01  
France.

30. See MARTINDALE-HUBBELL, *supra* note 20.

31. The French term for "District Attorney" is *ministere publique*.

32. Convention, *supra* note 20, arts. 736-738. See Jacques Borel and Stephen M. Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35 (1979).

33. Convention, *supra* note 20, art. 3.

- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, with all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed;
- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the persons to be examined;
- (g) the documents or other property, real or personal, to be inspected;
- (h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used; and
- (i) any special method or procedure to be followed under Article 9.<sup>34</sup>

The Letter of Request must specify whether any special method or procedure should be followed in taking the evidence.<sup>35</sup> For example, a U.S. court might request that evidence be obtained by verbatim transcript, and it may include a procedure for direct and cross-examination. The requested authority must follow any special method or procedure if it is not incompatible with the internal law of the state of execution or impossible to perform by reason of internal practice, procedure, or practical difficulties.<sup>36</sup>

France recognized that the Convention would be rendered ineffective insofar as common law countries are concerned unless French judicial authorities could comply with such requests. These requests are not normal procedures under French Law.<sup>37</sup> Therefore, France amended its Code of Civil Procedure in 1975 to accommodate Convention requests.<sup>38</sup> Under the amended law, the Letter of Request will be executed in accordance with French law unless a special procedure has been requested.<sup>39</sup> If requested, a verbatim transcript (not just a summary) will be taken. The amended law also

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34. See Borel & Boyd, *supra* note 32, at 38-39. Article 9 enables litigants to request that a witness be placed under oath, that a verbatim transcript of the examination of the witness be prepared, and that the witness be subject to cross-examination. However, the Convention permits this procedure only to the extent to which it does not conflict with a signatory state's internal law. Prescott & Alley, *supra* note 22 at 953-54.

35. Convention, *supra* note 20, art. 3(i).

36. *Id.* art. 9.

37. Borel & Boyd, *supra* note 32.

38. Decree No. 75-1123, 1975 J.O. (Dec. 5, 1975) (Fr.).

39. C. PR. CIV. art. 739.

allows direct and cross-examination,<sup>40</sup> and it permits a foreign judge to attend the proceedings.<sup>41</sup>

The French court may not refuse to execute a Letter of Request solely on the grounds that France claims exclusive jurisdiction over the subject matter or does not recognize the substantive cause of action that is the subject of the litigation.<sup>42</sup> A French court may refuse to execute a Letter of Request if it considers the request beyond its jurisdiction or likely to threaten the sovereignty or security of France.<sup>43</sup> The judge has discretionary power in this determination. However, either the District Attorney or the parties themselves may appeal an adverse decision to the Court of Appeals.

The Convention provides that in executing a Letter of Request, the requested authority should apply such means of compulsion as would be appropriate in similar situations under internal law.<sup>44</sup> Pursuant to this authority, a French judge may resort to those enforcement measures provided by the French Code of Civil Procedure.

A French judge may order the personal appearance of the parties. If they refuse to appear, the judge may draw adverse inferences with respect to issues about which they would be expected to provide evidence.<sup>45</sup> Witnesses must give evidence under oath unless they have a legitimate excuse for not doing so or are a relative of a party.<sup>46</sup> Witnesses who fail to appear and those who refuse, without legitimate excuse, to produce evidence or take an oath may be fined between 100 and 10,000 francs.<sup>47</sup> Witnesses who give false evidence may be fined from 500 to 7,500 francs and may be imprisoned for two to five years.<sup>48</sup>

Initially, France declared under Article 23 of the Hague Evidence Convention that it would not execute Letters of Request issued for

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40. *Id.* art. 740.

41. *Id.* art. 741.

42. *Id.* art. 742.

43. *Id.* art. 743.

44. Convention, *supra* note 20, art. 10.

45. C. PR. CIV. arts. 184-186, 198.

46. *Id.* arts. 206, 211.

47. *Id.* art. 207.

48. *Id.* art. 211; CODE PÉNALE [C. PÉN.] art. 363.

the purpose of obtaining pre-trial discovery of documents. However, France modified its declaration regarding Article 23 to state that such declaration does not apply “when the requested documents are enumerated limitatively in the letter of request and have a direct and precise link with the object of the procedure.”<sup>49</sup> That is, France will not object to the execution of letters of request seeking the pre-trial discovery of documents provided that the requested documents are enumerated in the Letter of Request and have a direct and clear nexus with the subject matter of the litigation.<sup>50</sup>

*ii. Gathering Evidence through Diplomatic Officers or Commissioners*

Attendance before a diplomatic officer or commissioner for the purpose of producing evidence will not be compelled in France.<sup>51</sup> Although special conditions may be imposed in certain cases, permission will be granted to take evidence from French or third-party nationals under the following general conditions:

- (a) Evidence shall be taken only within the confines of Embassies or Consulates;
- (b) the date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;
- (c) evidence shall be taken in premises accessible to the public;
- (d) persons requested to give evidence shall be served with an official instrument in French, or accompanied by a translation into French, and that instrument shall mention:
  - (1) That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and that

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49. Letter received by the Permanent Bureau of the Hague Conference on January 19, 1987, cited in Martindale-Hubbell, *supra* note 20. See Prescott & Alley, *supra* note 22, at 966-67.

50. Letter from the French Minister of Justice to the Minister of Foreign Affairs (August 19, 1986), annexed as app. to French Amicus Brief in support of Petitioners, *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

51. See Declarations pursuant to Article 16 of the Convention, reprinted in MARTINDALE-HUBBELL, *supra* note 20.

- evidence relates to legal proceedings pending before a jurisdiction specifically designated by a contracting state;
- (2) that appearance is voluntary and failure to appear will not give rise to criminal proceedings in the state of origin;
  - (3) that the parties to the trial are consenting or, if not, the grounds of their objections;
  - (4) that, in the taking of evidence, the person concerned may be legally represented; and
  - (5) that a person requested to give evidence may invoke a privilege or duty to refuse to produce or give evidence.<sup>52</sup>
- (e) the Civil Division of International Judicial Assistance shall be kept informed of any difficulties that may arise.<sup>53</sup>

France has declared, pursuant to Article 17 of the Convention, that prior approval is required whenever evidence is to be taken by commissioners without regard to the nationality of the person from whom evidence is sought. Permission for the taking of evidence by commissioners is granted under the same conditions as set forth above for the taking of evidence by diplomatic officers from French or third-party nationals, with the additional requirement that the request for permission must specify:

- (a) The motives that led to choosing this second method of taking evidence, rather than using a Letter of Request, considering the judiciary costs incurred; and
- (b) the criteria for appointing commissioners when the person appointed does not reside in France.

### *C. France's Blocking Statute*

In 1980, France enacted what has frequently been characterized as the "blocking statute,"<sup>54</sup> in response to many U.S. litigants'

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52. A copy of these requests must be transmitted to the Ministry of Justice.

53. See Declaration pursuant to art. 16 of the Convention, reprinted in MARTINDALE-HUBBELL, *supra* note 20.

54. Law 80-538, 1980 J.O. 1799, 1980 D.S.L. 285 (July 16, 1980). The actual language of the law provides:

Subject to treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, seek or disclose, in writing, orally, or otherwise, economic, commercial, industrial, financial or technical documents, or information leading to the

disregard of Convention procedures and out of concern for the integrity of its territorial and judicial sovereignty.<sup>55</sup> The statute prohibits persons from requesting or producing evidence for use in foreign judicial proceedings by means other than the procedures which the Convention, other applicable treaties, or specific provisions of French law provide.<sup>56</sup> Criminal penalties are imposed for violations of the blocking statute.<sup>57</sup> Although some commentators and practitioners view the statute as a French effort to block or impede extraterritorial discovery by U.S. courts,<sup>58</sup> in reality it simply channels requests for evidence through existing procedures.<sup>59</sup>

#### V. THE *AÉROSPATIALE* CASE

For many years there has been an active debate, both within and without the United States, over the issue of whether foreign parties to U.S. litigation are subject in the first instance to U.S. discovery procedures, or instead, to the rules of The Hague Evidence Convention.<sup>60</sup> In *Société Nationale Industrielle Aérospatiale v. United States District Court*,<sup>61</sup> decided in 1987, the United States Supreme Court held unanimously that the Convention is not the exclusive means of discovery for signatories to thereto. The Court also held, by a vote of five to four, that there exists no rule of first resort to the Convention, rather the Convention constitutes one means, but not the exclusive or mandatory means, for obtaining

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constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

*Id.*, translation reprinted in *Société Nationale Industrielle Aérospatiale v. United States District Court* 482 U.S. 522, 526 n.6 (1987).

55. Prescott & Alley, *supra* note 22, at 969.

56. *Id.*

57. Edwin R. Alley & Charles Platto, *US Supreme Court establishes Rules for Discovery of Foreign Parties: The Aérospatiale Case*, 15 INT'L BUS. LAW. 353, 353 (1987).

58. See, e.g., Joseph P. Griffin, *Procedures for Civil Discovery outside the United States after Aérospatiale*, 15 INT'L BUS. LAW. 350, 351 (1987).

59. Prescott & Alley, *supra* note 22, at 969.

60. Alley, *supra* note 24; Alley & Platto, *supra* note 57 at 353.

61. 482 U.S. 522 (1987).

evidence from foreign parties over which a U.S. court has jurisdiction.<sup>62</sup>

The Court's decision requires lower courts to engage in a detailed comity analysis based upon the facts of each case, by means of a balancing test, in order to determine whether to order the use of Convention procedures or to conduct discovery under the Federal Rules of Civil Procedure. The comity analysis should examine and weigh:

- (a) The competing interests of the governments involved (e.g., the U.S. interest in full discovery versus the foreign principles of judicial sovereignty, and the interest of all signatories in maintaining a smoothly functioning international legal system);
- (b) the likelihood that the Convention procedures would be effective;
- (c) the intrusiveness of the discovery requests (e.g., whether the requests seek trade secrets or matters affecting the national defense of a foreign sovereign);
- (d) the origin of the information being sought;
- (e) the costs of transporting the witnesses, documents, or other evidence to the U.S.;
- (f) the skill with which the requests are drafted (i.e., are they clear, specific, and limited to obtaining relevant information?);
- (g) the importance to the litigation of the documents or information sought; and
- (h) the availability of alternative means of securing the information.<sup>63</sup>

However, the Court declined to provide specific rules to guide lower courts through the balancing process.<sup>64</sup> Lower courts must weigh carefully foreign litigant's claims that they would be unduly burdened if they were subject to intrusive gathering of evidence beyond the scope permitted by the Convention.<sup>65</sup>

Considering the application of France's blocking statute, the *Aérospatiale* majority held that the statute did not deprive U.S. courts of the power to order a party, subject to its jurisdiction, to produce evidence. Instead, the statute is used in the Court's balancing test,

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62. Alley & Platto, *supra* note 57, at 354.

63. Prescott & Alley, *supra* note 22, at 940.

64. *Id.* at 941, *citing* 107 S.Ct. at 2557.

65. Alley & Platto, *supra* note 57, at 355.

representing France's interest in the non-disclosure of particular information sought in discovery.<sup>66</sup>

Only if a foreign individual or entity is not a party and not located in the United States, but is called upon to give evidence or produce documents as a non-party witness abroad, will the procedures of The Hague Evidence Convention govern in the first instance.<sup>67</sup> Thus, the primary impact of *Aérospatiale* falls on foreign parties to U.S. litigation over whom a U.S. court can obtain jurisdiction; the Convention may not apply to such parties.<sup>68</sup>

*Aérospatiale* represents a critical point in the life of The Hague Evidence Convention. The purpose of the Convention was to bridge the gap between the common law and civil law systems by replacing vague concepts of comity and judicial discretion with an orderly system of international evidence-gathering.<sup>69</sup> Based on a survey of recent U.S. cases, many lower courts are not applying the balancing test for the comity analysis in the manner intended, as set out in *Aérospatiale*.<sup>70</sup> Therefore, the *Aérospatiale* decision appears to threaten existing international legal cooperation.<sup>71</sup>

The transnational practitioner must note that *Aérospatiale* limits the scope of the Convention's application, and that lower courts may fail to apply *Aérospatiale*'s balancing test as the Supreme Court intended. These twin factors leave the practitioner with little guidance as to when the Convention will apply to discovery requests. A practitioner who wants the Convention to apply will have to convince a lower court by a demonstration which employs the *Aérospatiale* comity analysis. Such a demonstration will require the

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66. *Id.* at 335-36.

67. Alley, *supra* note 24.

68. Alley & Platto, *supra* note 57, at 355.

69. Prescott & Alley, *supra* note 22, at 942.

70. Joseph P. Griffin & Mark N. Bravin, *Beyond Aérospatiale: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and their Proposed Amendments to the Federal Rules of Civil Procedure*, 25 INT'L LAW. 331, 346-47 (1991).

71. *Id.*; See generally Alley & Platto, *supra* note 57 (discussing the impact of *Aérospatiale*).



practitioner to make a complete record of the factors in the balancing test and to properly apply them.<sup>72</sup>

## VI. CONCLUSION

Evidence gathering in France is a state matter and is therefore subject to the discretion of French courts, a situation different from the one prevailing in common law states. Because problems can arise during discovery when suit is brought in a common law country and evidence bearing on the suit is located in a civil law country, The Hague Evidence Convention, to which the U.S. and France are signatories, was, in part, intended to resolve or alleviate such problems.

By statute, France has altered its law to accommodate requests for evidence from foreign suits under the Convention, and to ensure that such requests follow procedures within the Convention, other relevant treaties, or specific provisions of French law. In the U.S., the *Aérospatiale* decision has vested lower courts with substantial discretion to perform a comity analysis to determine whether the Convention or U.S. rules of civil procedure should govern discovery requests. As a result, the Convention may not apply to foreign parties over whom U.S. courts can obtain jurisdiction. Unfortunately, the U.S. approach may undermine the goals of the Convention. It is hoped that all signatory nations to the Convention will continue to build upon their past experiences in order to further the development of international legal cooperation, particularly in the taking of evidence.

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72. Prescott & Alley, *supra* note 22, at 939. If the Convention does apply to a discovery request, see Alley & Platto, *supra* note 57, app., for a model of the Letters of Request used under the Convention.

APPENDIX A  
U.S. EMBASSY INFORMATION SHEET

EMBASSY OF THE UNITED STATES OF AMERICA  
OFFICE OF AMERICAN SERVICES  
2, rue Saint Florentin  
75382 Paris Cedex 08

**\*\* TAKING EVIDENCE IN FRANCE \*\***  
**\*\* IN CIVIL AND COMMERCIAL MATTERS \*\***

Since October 1974, The Hague Convention of 1970 on Taking of Evidence Abroad in Civil and Commercial Matters has been in force in France. Arrangements to take evidence in France for use in civil cases before courts in the United States must therefore be made in accordance with the general provisions of that Convention, and be subject to certain specific provisions established by the French Government.

The Convention of 1970 provides three means by which evidence may be taken:

- DEPOSITION BEFORE A LOCAL JUDICIAL AUTHORITY BY MEANS OF LETTERS ROGATORY (LETTERS OF REQUEST)
- DEPOSITIONS BEFORE A DIPLOMATIC OR CONSULAR OFFICER
- DEPOSITIONS BEFORE A PERSON COMMISSIONED BY THE COURT

**DEPOSITION BEFORE A LOCAL JUDICIAL  
AUTHORITY BY MEANS OF LETTERS ROGATORY  
(LETTERS OF REQUEST)**

By these means, a judicial authority in the United States requests the competent French judicial authority to obtain evidence or to perform some other judicial act. Such letters rogatory should be addressed by the court in the United States to the Bureau de l'Entraide Judiciaire Internationale, Direction des Affaires Civiles et du Sceau, Ministère de la Justice, 13, place Vendôme, 75042 Paris Cedex 01, France. Documents must be written in French, or accompanied by a translation in French, and should specify:

- (a) The authority requesting its execution and the authority requested to execute it (name of the court), or the "appropriate judicial authority in France;"
- (b) the name and addresses of the parties to the proceedings, and their representatives;
- (c) the nature of the proceedings, and all necessary information pertaining to it;
- (d) the evidence to be obtained;
- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the witnesses, or a statement of the subject matter on which they are to be examined;
- (g) the documents or other property to be inspected;
- (h) whether the evidence is to be given under oath or affirmation, and any specific form of oath that must be used;

- (i) whether any special procedure or method should be followed in taking the evidence.

In the absence of special instructions under items (b) and (i), the French court executing the letters rogatory will follow its own normal procedures.

The court issuing the letters rogatory may ask to be informed of the date and place of the proceedings, and parties to the case and their representatives may be present. Judges of the requesting court may also be present at the proceedings.

There are no fees required for the execution of letters of requests; however, the French court may require reimbursement for any fees paid to experts or interpreters, or expenses incurred as a result of use of special procedures requested by the U.S. court.

**DEPOSITIONS BEFORE A DIPLOMATIC  
OR CONSULAR OFFICER:**

Evidence may be taken in France by deposition before a diplomatic or consular officer of the United States (Articles 15 and 16 of the Convention and Title 28 United States Code, Section 2072). Depositions may only be taken by commission issued by the competent court. Depositions on notice for French nationals or third-country nationals living in France will not be approved by the French Ministry of Justice. The Ministry of Justice also will not approve requests to take evidence as pre-trial discovery for cases not yet pending in court.

The commission should be issued to “any consular officer of the United States assigned to (the city where the Consulate is, or in the case of Paris, the Embassy), France” rather than to any specific name or title of consular officer. (See attached sample of a commission.)

American consular officers may take depositions from witnesses of American nationality on Embassy or Consulate premises, without special restrictions.

Before evidence may be taken from French nationals or third country nationals residing in France, authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The Embassy or Consulate must have all the documents pertaining to the case at least 45 days before the deposition is to be held. The following specific provisions must be met:

- The deposition must be held on Embassy or Consulate premises. If participants wish to hold the deposition elsewhere, [sic] they must explain fully why it cannot be held on Embassy or Consulate premises, and the Ministry of Justice will decide whether such a request can be approved.
- The deposition must be open to the public.
- The date and time of the deposition must be communicated to the Ministry of Justice in advance.
- The witnesses must be summoned by written notice in French at least 15 days in advance of the deposition date. The written notice, sent by the Consulate or Embassy, must include assurances that appearances are voluntary, that the witnesses may be represented by a lawyer, and that the parties to the case have consented to the deposition.

The Embassy or Consulate will request authorization for the deposition from the Ministry of Justice.

Consular fees:

There is no charge for the use of a hearing room or for advance preparations. There is a statutory fee of \$90.00 an hour for the assistance of the consular officer at the deposition, and/or \$35.00 an hour for the presence of a consular assistant.

The estimated fee must be deposited in advance in the form of a certified check in dollars, payable to the U.S. Treasury. Any balance remaining after the service has been performed will be refunded, and any additional due is payable either upon completion of the deposition or, in the case of long depositions, at regular, mutually established intervals.

Stenographers and/or Interpreters:

Embassies and Consulates are unable to provide the services of stenographers or interpreters. The interested parties must arrange for a court stenographer to take down the testimony and transcribe it, unless the answers are of the "Yes" and "No" type, and space is provided on the interrogatories for the witnesses to give [sic] brief responses. If the testimony is to be taken in any language other than English, the interested parties must arrange for a court interpreter. A list of qualified stenographers and interpreters is available from the Embassy or Consulate where the deposition will be held.

Ministry of Justice authorization

In all cases involving witnesses of French nationality or third-country nationals residing in France, the Embassy or Consulate must have the information or documents listed below at least 45 days before the deposition is to be held. This timing is necessary in order to allow sufficient time to obtain authorization from the Ministry of Justice, provide the required advance notice to witnesses, and finalize internal arrangements for the deposition. All the documents in the following list must be provided, with French translations of each:

- The commission to take the deposition, referring to The Hague Convention, with precise information on:
  - The name of the court;

- The name of the judge or issuing authority,
- The names of parties to the case and their representatives
  
- The names and addresses (and telephone numbers, if available) of all witnesses to be summoned.
  
- The questions to be put to the witnesses, or a statement of the subject matter on which they are to be examined.
  
- The names of any of the parties, or their representatives, who plan to attend the deposition.
  
- The name, address, and telephone number of the stenographer and interpreter who have been selected, if any.
  
- Whether the parties to the case have consented to the deposition, and if not, the reasons for any objection which has been made.
  
- A suggested date for the deposition, if there is a preference, in no case less than 45 days after the Embassy or Consulate receives the above information.

We will also require a certified check for the estimated consular fees, made out to "U.S. Treasury."

The Embassy or Consulate will notify all parties planning to attend the deposition of the date set as soon as authorization has been received from the Ministry of Justice.

**DEPOSITION BEFORE A PERSON COMMISSIONED  
BY THE COURT**

Evidence may also be taken in France by deposition before any competent person commissioned by a court in the United States. Authorization must be obtained in advance by the individuals

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participating in the deposition from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. All information listed under "Ministry of Justice authorization" above should be sent to the Ministry of Justice at least 45 days before the deposition will be held.

In addition, the request for authorization from the Ministry of Justice must include:

- An explanation of the reasons for choosing this method of taking evidence, taking into account the judicial costs involved; and
- The criteria for designating the individual commissioned to take evidence

The Embassy or Consulate does not normally assist in requesting the Ministry of Justice authorization in cases where the commissioner is not a consular officer.

The hearing must be held within the Embassy or Consulate. All of the other provisions and the general procedure described above for depositions before a consular officer must be followed, except that there is no consular fee because the services of a consular officer are not required.



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Sample of a Commission to Take a Deposition

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

(Name)	)	
	)	
Plaintiff,	)	82-CIV-127
	)	
v.	)	COMMISSION TO ANY
	)	CONSUL OR VICE CONSUL
(Name) et. al.,	)	OF THE UNITED STATES
	)	ASSIGNED TO PARIS,
Defendant	)	FRANCE

You have been duly appointed and are hereby authorized, pursuant to the Articles of The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, to cause (Name), residing at (Address) as a witness in the above entitled action pending in this court, under oath (or affirmation) upon the interrogatories and cross-interrogatories annexed to this commission (or orally); to reduce his/her testimony to writing and make such books, papers, or other articles that said witness may produce and identify as Plaintiff's Exhibits or the Defendant's Exhibits in the manner indicated in the interrogatories or cross-interrogatories (or on oral examination).

When the commission is executed in accordance with directions attached, the commission and the deposition are to be returned to the clerk of this court (complete address) with all speed.

WITNESS the Honorable (Name), Judge of said court, the 12th day of July 1987.

(Seal)

\_\_\_\_\_  
(Name) ,  
Clerk

By: \_\_\_\_\_  
(Name) ,  
Deputy Clerk