REVIVE THE HAGUE EVIDENCE CONVENTION

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This article is about the Hague Evidence Convention[1] and the Supreme Court's decision in *Aerospatiale*.[2] Because of *Aerospatiale*, the Hague Evidence Convention is used only rarely for party discovery in United States litigation. That is unfortunate, and my purpose here is to suggest reasons and ways to revive use of the Convention. I will first discuss several aspects of the international discovery situation before *Aerospatiale*. Then I will discuss the *Aerospatiale* decision and the reaction of United States courts to it. Finally, I will propose circumstances in which United States courts should consider more frequent first use of the Convention. Extensive commentary about the Hague Evidence Convention and the *Aerospatiale* decision exists.[3]

I. THE SITUATION BEFORE *AEROSPATIALE*

Three aspects about the international discovery situation before the Aerospatiale decision are important. They are the opposition of foreign countries to United States methods of discovery, the adoption of the Hague Evidence Convention, and the various interpretations by United States

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1. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

2. Socit Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).

3. *See, e.g.*, D. EPSTEIN AND SNYDER, INTERNATIONAL LITIGATION 10.10-12 (2d ed. 1996); L. TEITZ, TRANSNATIONAL LITIGATION 173-76, 182-93 (1996 & Supp. 1997); A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 809-61 (1993); 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 159-243 (1995).

courts of the relationship between United States discovery and the Hague Evidence Convention.

Essential to an understanding of the appropriate role of the Hague Evidence Convention in United States litigation is the strong resentment of foreign countries to United States style of discovery, employing the traditional discovery methods available in federal and state rules of procedure.[4] The main foreign objections to direct United States discovery are its breadth and intrusiveness, and its control by the requesting party rather than a judicial official in the foreign country.[5] In civil law countries, the gathering of evidence is an exercise of judicial sovereignty.[6] The much more restrictive scope of foreign discovery, especially in civil law countries, generally reflects important foreign public policies, such as protection of personal and business privacy. Direct United States discovery has provoked strenuous foreign objections and resistance such as diplomatic confrontations, diplomatic protests, and retaliatory actions, including in particular the enactment of blocking statutes to prevent the production of information for purposes of United States litigation.[7]

Against this background of opposition, the United States ratified the Hague Evidence Convention in 1972. Currently, approximately twenty eight countries have ratified the Convention. The Conventions purpose was to establish a system for obtaining evidence located abroad that would be tolerable to the state executing the request and would produce evidence utilizable in the requesting state.[8] It was to bridge differences between the common law and civil law approaches to the taking of evidence abroad,[9] to standardize the form of the request, the languages to be used, and the reasons justifying refusal to execute a request, and to eliminate some of the

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4. No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 442 (1987).

5. *See* A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 664-71 (1993); D. EPSTEIN & J. SNYDER, INTERNATIONAL LITIGATION 10-4 - 10-7 (1996); L. TEITZ, TRANSNATIONAL LITIGATION 158-59 (1996).

6. *Aerospatiale*, 482 U.S. at 557-58 (Blackmun, J., concurring and dissenting); SNYDER *supra* note 5, at 10-14.

7. *See* RESTATEMENT, *supra* note 4, Reporters' Notes 1, 4 (discussing diplomatic protests and blocking statutes); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE 565-92 (1964) (quoting various diplomatic protests); A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 698-740 (1993); D. EPSTEIN & J. SNYDER, INTERNATIONAL LITIGATION 10-3 - 10-6 (1996); L. TEITZ, TRANSNATIONAL LITIGATION 158-59, 165 (1996).

8. *Aerospatiale*, 482 U.S. at 530.

9. *Id.* at 531 (internal quotation marks omitted).

unnecessary steps between the initiating and executing courts.[10]

The Convention has both procedural and substantive elements. For execution of letters of request sent by the judicial authorities of a signatory state to a competent authority in another signatory state, the only method in the Convention that involves the use of compulsion to obtain information,[11] the receiving state typically applies its own laws as to methods, procedures, and the extent of compulsion. The Convention also embodies several substantive protections. The person providing information may invoke any applicable privilege under the law of the state of execution or the law of the requesting state (Article 11). A receiving state may refuse to execute a letter of request that would prejudice its sovereignty or security (Article 12). Finally, Article 23 gives signatories the option of declaring that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. Nearly all countries that ratified the Convention have included some form of an Article 23 reservation.[12]

Starting in the 1980s, the Convention became the subject of litigation in the United States. The main issue in this litigation was whether and in what circumstances parties to United States litigation needed to use the procedures of the Convention rather than the standard direct discovery methods offered by federal and state procedural rules.

United States courts reached three main answers to this question.

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10. A. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 810 (1993).

11. The Hague Convention also provides for non-compulsory discovery through diplomatic officers, consular agents, and commissioners.

12. The modern form of the reservation states that the receiving country will not execute a letter of request requiring a person to state what documents relevant to the proceeding are or have been in the person's possession, custody, or power or to produce any documents other than particular documents specified in the request as being documents appearing to the requesting court to be or likely to be in the person's possession, custody, or power. *See* Report by the Permanent Bureau of the Hague Conference on International Law on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 28 I.L.M. 1556 (1989); Report by the Permanent Bureau of the Hague Conference on International Law on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 24 I.L.M. 1668, 1675-77 (1985); Report by the Permanent Bureau of the Hague Conference on International Law on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in 17 I.L.M. 1425, 1427-28 (1978); Socit Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 563-64 (1987) (Blackmun, J., concurring and dissenting) (the emerging view of [the Article 23] exception to discovery is that it applies only to requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court (internal quotation marks omitted).

Some concluded that the Convention's procedures are the exclusive method of obtaining information located in another signatory of the Convention. A party to United States litigation may not use direct discovery through the courts rules of procedure. Others decided that the Convention requires first but not exclusive use of its procedures. If initial resort to the Convention is not satisfactory, a party to United States litigation may use direct discovery through the court's rules of procedure. Finally, some courts found that the Convention has no applicability to discovery from a litigant that is subject to the United States court's personal jurisdiction. It applies only to discovery from a person not a party.

II. *AEROSPATIALE*

In *Aerospatiale*, the Supreme Court of the United States rejected both extreme interpretations and adopted a modified form of the middle ground. The case concerned requests for documents, answers to interrogatories, and admissions from two French companies that moved for a protective order for to require use of the Convention, citing the French blocking statute against foreign discovery other than through the Convention. The Court held unanimously that the Hague Evidence Convention was not the exclusive means of obtaining evidence located in a signatory state, with the majority noting that the opposite conclusion would create several asymmetries and potential unfairness to United States nationals or citizens of non-signatory countries involved in United States litigation.[13]

The Court also unanimously agreed that the principle of international comity required first use of the Convention, at least in some cases, although the Justices divided over the result produced by applying the comity doctrine. Five members of the Court in an opinion by Justice Stevens held that comity required only an ad hoc, case-by-case balancing of foreign and United States interests to determine when first use of the Convention is required. They noted that letters of request could be unduly time consuming, expensive, and less certain to produce needed evidence and urged trial courts to consider the following factors, among others: the sovereign interests of the United States; the sovereign interests of the relevant foreign state; the likelihood that resort to the Conventions procedures would be effective; the breadth and intrusiveness of requested discovery; and the special difficulties that foreign litigants encounter in responding to United States style discovery.[14] In a footnote, Justice

13. *Aerospatiale*, 482 U.S. at 540 n.25.

14. *Id.* at 544-46. In note 28, the majority said that what is now section 442 of the Restatement identifies the concerns that guide a comity analysis.

Stevens said the French blocking statute did not alter his conclusion, although it was relevant in a comity analysis because it identified the nature of the sovereign interests in nondisclosure of certain types of information.[15]

Four Justices concurred and dissented (Blackmun, Brennan, Marshall, and O'Connor), taking the position that comity required a general rule of first use of the Convention, subject to an exception for cases where resort to the Convention would be futile or when its procedures prove to be unhelpful. The dissent thought that the principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority and warned that the Court's ad hoc comity analysis will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently.[16]

III. THE SITUATION AFTER *AEROSPATIALE*

The *Aerospatiale* opinion has been heavily criticized,[17] and its promise of first use of the Convention is not being fulfilled. In particular, courts have complained about the unstructured balancing test of the majority in *Aerospatiale* and wished for more specific rules. Although a few United States courts ordered first use of the Convention, they for the most part do not do a sensitive, serious balancing of factors in individual cases and instead simply permit the use of direct United States discovery. The only real benefit of *Aerospatiale* has been that the courts rejecting the use of the Convention have tended to narrow the discovery requests in a way they probably would not have for domestic discovery.

A few United States courts have required first use of the Convention,[18] but most have not. Their reasons are that discovery under

15. *Id.* at 544 n.29.

16. *Id.* at 548, 554 (Blackmun, J., concurring and dissenting).

17. L. TEITZ, TRANSNATIONAL LITIGATION 189 (1996) (The *Aerospatiale* opinion has been severely criticized and rightly so, for its parochial approach to international cooperation and its gutting of the Hague Evidence Convention, leading basically to a last resort utilization approach).

18. *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 353-56 (D. Conn. 1991) (applying the Aerospatiale balancing test and holding that the Hague Convention applied to discovery requests against a French corporation because the discovery requests were intrusive, the FED.R.CIV.P. would infringe upon French judicial sovereignty, and no evidence suggested that the Convention's procedures would prove ineffective); Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 37-38 (N.D.N.Y. 1987) (relying on Justice Blackmun's concurrence and dissent rather than the majority's more complex balancing test and concluding that the Hague Convention governed the service of interrogatories against a West German manufacturer because the FED.R.CIV.P. would offend the sovereign interests of civil law countries such as Germany and because the Hague Convention does not frustrate the sovereign interests of the United States); Geo-Culture, Inc. v. Siam Inv. Management S.A., 936 P.2d 1063, 1067 (Or. Ct. App. 1997) (holding, without any discussion, that the Hague Convention applied to discovery of

the Convention produces unsatisfactorily limited amounts of information; discovery under the Convention is slow;[19] foreign nations typically do not have significant interests in limiting United States discovery; and the United States has significant interests in prompt, complete pretrial discovery. Of the courts refusing to order first use of the Convention, some have narrowed the discovery requests out of deference to foreign sensitivities,[20] but the majority have not.[21]

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jurisdictional facts); Knight v. Ford Motor Co., 615 A.2d 297, 299-302 (N.J. Super. Ct. Law Div. 1992) (holding that Hague Convention procedures, rather than New Jersey discovery rules, applied to discovery requests against a German corporation because New Jersey rules would infringe upon Germany's sovereign interests and no evidence suggested that the Convention procedures would be ineffective).

19. Haynes v. Kleinwefers, 119 F.R.D. 335, 338 (E.D.N.Y. 1988) (holding use of Convention would delay proceedings); Anglo American Ins. Group, P.L.C. v. Calfed Inc., 940 F. Supp. 554, 564 (S.D.N.Y. 1996) (holding Hague Convention more time-consuming than discovery under Federal Rules).

20. Fishel v. BASF Group, 1997 WL 587003, at *2-4 (S.D.Iowa) (granting plaintiff's motion to compel discovery against German corporations under the FED.R.CIV.P. because the discovery did not implicate Germany's sovereign interests and the Hague Convention procedures would unduly delay the proceedings, but limiting discovery); Bedford Computer Corp. v. Israel Aircraft Indus, Ltd., 114 B.R. 2, 6 (Bankr. D.N.H. 1990) (applying the FED.R.CIV.P. rather than the Hague Convention to discovery against an Israeli corporation because the discovery request did not prejudice Israel's sovereign interests and the Convention's procedures would delay the proceedings, but limiting the scope of the discovery to make it as unintrusive and pertinent as is appropriate in the circumstances); Rich v. KIS Cal., Inc., 121 F.R.D. 254, 258-60 (M.D.N.C. 1988) (applying the. to discovery against a French corporation because the FED.R.CIV.P. did not impinge on any specific sovereign interest of France, but narrowing the scope of the plaintiff's discovery requests); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 390-91 (D.N.J. 1987) (holding that the FED.R.CIV.P. governed interrogatories and requests for documents against a Swedish corporation because the Hague Convention procedures would have delayed discovery and the discovery did not violate any specific sovereign interest of Sweden, but streamlining the plaintiff's discovery requests on the ground that expansive discovery without concomitant relevance is not what the [*Aerospatiale*] Court envisioned).

21. *In re* Aircrash Disaster Near Roselawn, Indiana, 172 F.R.D. 295, 307-11 (N.D. Ill. 1997) (holding that the FED.R.CIV.P., rather than the Hague Convention, applied to discovery against French corporations because the discovery requests were not intrusive, the discovery would not jeopardize French sovereign interests, and the Hague Convention procedures would be complicated, time consuming, and expensive); Doster v. Schenk, 141 F.R.D. 50, 52-55 (M.D.N.C. 1991) (denying German defendant's motion for protective order and holding that the FED.R.CIV.P. applied to the plaintiff's discovery requests because the requests were not intrusive, they did not compromise Germany's sovereign interests, and the Convention's procedures would not be effective); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990) (permitting discovery under FED.R.CIV.P.); Roberts v. Heim, 130 F.R.D. 430 (N.D. Cal. 1990) (same); Haynes v. Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988) (applying the FED.R.CIV.P. to document requests and interrogatories against a West German defendant because the discovery was not extensive and the Hague Convention was more expensive and less effective than the FED.R.CIV.P.); Moake v. Source Int'l Corp., 623 A.2d 263, 265 (N.J. Super. Ct. App. Div. 1993) (affirming lower court's ruling that New Jersey discovery rules applied to interrogatories against a German corporation because discovery requests did not violate Germany's interests and no evidence suggested that the Hague

The Convention remains applicable or useful in certain situations. For example, United States courts use the Convention to compel information abroad from a person in a signatory country who is not a party to the litigation and not reachable by a subpoena.[22] Sometimes courts prefer the use of the Convention to obtain information from a non-party even if the party can be reached by a subpoena in the United States.[23] United States courts also typically require use of the Convention for discovery that will occur on the territory of a signatory, such as a deposition or a visual inspection.

This limited use of the Convention has not satisfied the objections of foreign countries to direct United States discovery. They have not come to accept the United States position on use of the Convention, although no particular international dispute about United States discovery is currently in the public eye. For example, foreign governments continue to file briefs objecting to United States discovery.[24] In addition, as recently as the early 1990s, when the United States proposed to amend the Federal Rules of Civil Procedure explicitly to allow United States courts to ignore the Hague Evidence Convention and even to authorize the use of discovery methods that violate the laws of foreign countries, several foreign countries strongly protested. They urged the use of discovery methods that involve the foreign government such as those in the Convention. The proposal was not adopted.[25]

Convention procedures would be more effective); *In re* Asbestos Litig., 623 A.2d 546, 549 (Del. Super. Ct. 1992) (holding that the plaintiff did not have to conduct discovery against a Finnish defendant under the Hague Convention procedures); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988) (applying New York's discovery rules, rather than the Hague Convention, to interrogatories and document requests against a West German corporation because the discovery did not implicate any specific sovereign interest of West Germany and the foreign party failed to demonstrate that the Hague Convention procedures would be effective); Sandsend Fin. Consultants, Ltd. v. Wood, 743 S.W.2d 364 (Tex. App. 1988) (affirming trial court's ruling that applied Texas rules to discovery involving a foreign corporation).

22. The Gap, Inc. v. Stone Int'l Trading, Inc., 1994 WL 38651 (S.D.N.Y.); Rich v. KIS Cal., Inc., 121 F.R.D. 254, 258 (M.D.N.C. 1988); Orlich v. Helm Bros., Inc., 560 N.Y.S.2d 10 (N.Y. App. Div. 1990).

23. Laker Airways, Ltd. v. Pan American World Airways, 607 F. Supp. 324, 326-27 (S.D.N.Y. 1985) (quashing subpoena duces tecum served on British nonparty's New York office but seeking documents usually stored in Britain and stressing importance of using the Convention because the antitrust action before the Court was an internationally sensitive matter).

24. Volkswagen, A.G. v. Valdez, 909 S.W.2d 900 (Tex. 1995) (dealing with section 442 of the Restatement, not the Hague Evidence Convention).

25. An article of which I am a co-author describes these events: The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases, 150 F.R.D. 221, 243-44 (1993).

IV. A PROPOSAL FOR REVIVING THE HAGUE EVIDENCE CONVENTION

In sum, United States lower courts rarely require first use of the Hague Evidence Convention for party discovery, having struck the balance under *Aerospatiale* too far toward United States interests, and foreign countries continue to object to the untempered use of direct United States discovery methods. This tension led to diplomatic incidents and friction in the past and threatens to continue to do so. The danger remains that, in some future case of significant interest to a particular foreign country, direct United States discovery will cause substantial damage to United States foreign relations.

United States courts therefore should shift the balance back toward foreign interests to some extent and resort to first use of the letter of request procedure in the Convention more frequently. United States courts should be more receptive to using the procedures of the Convention when, consistent with the main purposes of the Convention, doing so would significantly reduce the risk of foreign objections.

The purposes of the Convention suggest a few types of situations in which first use would make sense. As said at the beginning, the Convention has both procedural and substantive goals. It is mainly procedural in that it allows a requested state to use its own procedures to obtain evidence and thus to preserve its notions of judicial sovereignty. The Convention is also substantive. By involving government officials of the foreign country to review and participate in evidence gathering, the foreign government can narrow requests, ensure protection of its sovereign and national security interests, and ensure that its personal privilege and privacy laws are respected.

As a result, a United States court should use the letter of request system first when it would significantly advance these goals, that is, when the specific circumstances of the particular case indicate that:

1) The type of requested information has special protection under the laws of the foreign country (personal privacy, protection of intellectual property, trade secrets, or other information that could assist a foreign commercial competitor, state secrets, and bank secrecy).

2) The identity of the requested party raises special foreign concerns (such as a foreign state, an agency of a foreign sovereign, or foreign government official).

3) An unusual interest of the foreign country calls for the involvement of officials of that country in providing the

information so that its notions of judicial sovereignty are satisfied (the information might be applicable in parallel proceedings in the foreign country and the United States; the foreign country would want to take evidence in its way for its proceeding and to have the evidence taken only once).

Other categories might exist, just as exceptions could always exist. For example, on some occasions the United States court might need information quickly, and the procedures of the Convention would be too slow.

Under this approach, first use of the Convention would not be justified simply because the foreign country is a party to the Convention and prefers Convention procedures or because the information is located in the foreign country. In addition, use of the Convention would not be justified simply because the foreign country has a general blocking statute.

One virtue of this proposal is that it is true to the majority analysis in *Aerospatiale* and does not need any further international, judicial, or legislative action to be adopted. This approach merely urges that United States courts give more weight to certain foreign interests as reflected in foreign laws or policies. In accordance with the case-by-case comity analysis of *Aerospatiale*, this will result in more frequent first use of the Convention.