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The Hague Evidence Convention: The Need for Guidance on Procedures and Resolution of Conflicts in Transnational Discovery

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NOTES

The Hague Evidence Convention: The Need for Guidance on Procedures and Resolution of Conflicts in Transnational Discovery

ABSTRACT

As international commercial disputes become more common, United States courts increasingly face difficult issues involved in transnational discovery. Two frequently encountered issues are choosing whether to use the discovery procedures of the Federal Rules of Civil Procedure or the Hague Evidence Convention and whether to enforce a discovery order when the order conflicts with a law of the state in which discovery is to occur. Although the Supreme Court has addressed both of these issues, it has left lower courts considerable discretion to deal with these issues case by case. Lower courts, therefore, have not been uniform in their approaches to these questions, generally evidencing a bias toward the familiar Federal Rules over the Hague Convention and employing a wide array of approaches to conflicts. This Note examines the case law on these two questions and concludes that the Supreme Court ought to provide more guidance to the lower courts, in the interest of providing more certainty and fairness to United States international trading partners. The Note advocates a rule that favors Hague Convention procedures more often and suggests adoption of the comity analysis of the Restatement (Third) of the Foreign Relations Law of the United States for cases in which foreign law conflicts with discovery orders issued by United States courts.

TABLE OF CONTENTS

I. INTRODUCTION 186
II. EXTRATERRITORIAL DISCOVERY PROCEDURE 189
A. *The Hague Evidence Convention* 189
B. *The United States Supreme Court's Application of the Hague Evidence Convention in* Aérospatiale 191
1. Lower Court Proceedings 191
2. The Supreme Court Decision 192
C. *Application of* Aérospatiale *by Lower Courts* .. 195
III. CONFLICTS OF LAW IN TRANSNATIONAL DISCOVERY 199
A. Societe Internationale's *Good Faith Standard* 199
1. Lower Court Proceedings 199
2. The Supreme Court Decision 200
B. Restatements of Foreign Relations Law 201
C. *Circuit Courts' Approaches to Resolving Conflicts* 205
1. Early Second Circuit Cases 205
2. *Citibank II* 207
3. Adoption by Other Circuits of the *Second Restatement*'s Balancing Test 207
4. The Balancing Approach Coupled with Good Faith Considerations 212
5. Courts Adopting *Third Restatement* Balancing 213
IV. CONCLUSION 215

I. INTRODUCTION

As a true world economy becomes more of a reality, courts must resolve increasingly common commercial disputes between international parties efficiently to promote global economic health. One obstacle to efficient resolution of international litigation may be difficulties associated with transnational discovery. Particularly challenging to United States courts is the case in which the discovery provisions of the United States Federal Rules of Civil Procedure are in conflict with the law of the foreign state where the information to be discovered is located. In this ciricumstance, courts face early on the difficult task of

determining which transnational discovery procedures should be employed.

The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[1] (Hague Evidence Convention or Convention) attempts to facilitate discovery proceedings implicating different legal systems[2] by designating procedures for obtaining evidence located abroad.[3] A principal concern of the Convention was ensuring that discovery of evidence in a foreign state respects that state's laws and sovereignty while satisfying the discovery needs of the litigants and the courts.[4]

The United States Supreme Court has granted lower courts broad discretion in determining whether to follow the Hague Evidence Convention's procedures or the Federal Rules of Civil Procedure in cases involving transnational discovery.[5] Legal scholars have questioned lower courts' ability to make this determination reasonably[6] and have criticized the Supreme Court's decision in *Societe Nationale Industrielle Aérospatiale v. U.S. District Court, S.D. Iowa (Aérospatiale)*[7] for not giving lower courts more guidance. In any case, a survey of cases involving transnational discovery issues indicates that courts have favored the Federal Rules of Civil Procedure over Convention procedures in resolving these issues.[8]

Foreign states that threaten criminal liablity for the production of certain information located within their borders further complicate transnational discovery.[9] As with the question

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1. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]. The following states were parties to the Convention as of January 1, 1993: Argentina, Australia, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Mexico, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States. U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1993, at 352.

2. Hague Evidence Convention, *supra* note 1, 847 U.N.T.S. at 241.

3. Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-*Aérospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 386 (1990).

4. Hague Evidence Convention, *supra* note 1, 847 U.N.T.S. at 241.

5. *See* Born & Hoing, *supra* note 3, at 406.

6. *Id.* at 406-07.

7. *See* Societe Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. Iowa, 482 U.S. 522 (1987).

8. Born & Hoing, *supra* note 3, at 403.

9. *See infra* part III; *see generally* Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958).

of whether Convention procedures apply, the Supreme Court has given lower courts broad discretion and little guidance to determine whether to honor foreign laws blocking discovery.[10] Courts have used a case by case balancing test in determining the validity of foreign blocking laws.[11]

This Note considers which procedures courts should use when faced with extraterritorial discovery and how courts should determine when it is appropriate to order discovery that requires a litigant to violate foreign law. Section II(A) examines the discovery procedures of the Hague Evidence Convention. Section II(B) then discusses the Supreme Court's analysis in *Aérospatiale* concerning the applicability of the Convention in transnational discovery matters, and Section II(C) examines *Aérospatiale*'s impact on the lower courts. Next, Section III(A) examines the Supreme Court's decision in *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, which introduced the good faith standard into the conflict of laws analysis in the context of transnational discovery.[12] Section III(B) discusses the comity analysis suggested by the *Second* and *Third Restatements of Foreign Relations Law*. Section III(C) tracks the comity analysis employed by the circuit courts to determine whether to order extraterritorial discovery when compliance would force the party to violate foreign laws. This Note concludes that by encouraging courts to use the Hague Convention first and by providing lower courts with detailed guidance on how to resolve conflicts of law in transnational discovery cases, the Supreme Court would enhance the United States' relations with foreign trading partners and promote the development of a "world economy."

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10. *See generally Aérospatiale*, 482 U.S. at 522.

11. *See* David J. Gerber, *International Discovery After* Aérospatiale*: The Quest for an Analytical Framework*, 82 AM. J. INT'L LAW 521, 551 (1988).

12. *Societe Internationale*, 357 U.S. at 201.

II. EXTRATERRITORIAL DISCOVERY PROCEDURE

A. *The Hague Evidence Convention*

The Hague Evidence Convention establishes two methods of acquiring extraterritorial evidence: letters of request[13] and inquiries by diplomatic or consular agents or by appointed commissioners.[14] When using a letter of request, the party seeking discovery must submit to the court a letter describing the type of evidence sought.[15] The court then must give the letter to the designated "Central Authority" of the state where the evidence is located.[16]

The state of execution applies its own law and procedures in executing letters of request unless the requesting authority asks that another procedure be used.[17] The requested procedure, however, must not conflict with the internal laws or procedures of the executing state.[18] The executing state must honor the letter of request unless the request exceeds the authority of its judiciary, offends its sovereignty, or prejudices its security.[19]

Courts criticize the Hague Evidence Convention because most signatory states' Central Authorities do not anticipate discovery requests as broad as those typically allowed under the Federal Rules of Civil Procedure.[20] For example, Article 23 of the

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13. Hague Evidence Convention, *supra* note 1, arts. 1-14.

14. *Id.* arts. 15-22.

15. *Id.* art. 3.

16. *Id.* art. 2. Each signatory state must create a Central Authority to receive and execute letters of request from the judicial authorities of other contracting states. *Id.*

17. *Id.* art. 9. Article 9 of the Convention 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 the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

Id.

18. *Id.*

19. *Id.* art. 12. Article 12 also prohibits the state of execution from refusing to execute the letter solely because the state claims exclusive subject matter jurisdiction over the action or because the state's internal law does not recognize the particular right of action. *Id.*

20. Owen P. Martikan, Note, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the* Aérospatiale *Decision*, 68 TEX. L. REV. 1003, 1005 (1990).

Convention allows contracting states to refuse to execute letters of request seeking pretrial discovery.[21] Foreign states' judiciaries frequently have used Article 23 to refuse to fulfill letters of request from United States litigants.[22] By frustrating the discovery efforts of litigants Article 23 acts similarly to foreign "blocking statutes," statutes that forbid, as a matter of law, compliance with United States discovery orders.[23]

Signatory states also may use Article 33 to limit discovery. Chapter II of the Convention authorizes diplomatic officers, consular agents, and appointed commissioners to gather evidence in the contracting state in which they carry out their official duties or in another state to aid in proceedings that originated in the state that the agent serves.[24] These extraterritorial discovery mechanisms address common and civil law conflicts,[25] while allowing the requesting state to control the evidence gathering process.[26] However, because many signatory states found these mechanisms to be a greater interference with national sovereignty than letters of request, Article 33 allows contracting states to exclude Chapter II from their Convention obligations.[27]

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21. Hague Evidence Convention, *supra* note 1, art. 23. Article 23 states: "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 pretrial discovery of documents as known in Common Law countries." *Id.* One important distinction between civil and common law legal systems is that common law states generally allow pretrial discovery and civil law states do not. *See* Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 35 (N.D.N.Y. 1987) (discussing effect on "judicial sovereignty" of discovery in civil law states). One major criticism of the Convention by United States courts has been that all signatory states are not required to allow pretrial discovery under the Convention.

22. Born & Hoing, *supra* note 3, at 398.

23. *Id.* at 398-99 n.12.

24. Hague Evidence Convention, *supra* note 1, arts. 15-19.

25. *See id.*, 847 U.N.T.S. at 241.

26. Harold G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 244 (1986).

27. *Id.* "A State may at the time of signature, ratification or accession exclude, in whole or in part the application of the provisions of . . . chapter II." Hague Evidence Convention, *supra* note 1, art. 33.

B. *The United States Supreme Court's Application of the Hague Evidence Convention in* Aérospatiale

1. Lower Court Proceedings

In *Aérospatiale*,[28] the Supreme Court considered whether a federal district court must employ Convention procedures when foreign states might impose criminal sanctions for compliance with the discovery request. Three individuals brought suit against two corporations wholly owned by the French government,[29] alleging breach of warranty and negligent manufacture and sale of airplanes.[30]

Both sides initially conducted discovery pursuant to the Federal Rules of Civil Procedure.[31] Upon plaintiffs' second request under Rule 34 of the Federal Rules for the production of documents, the French corporations filed a motion for a protective order.[32] The corporations claimed that the Hague Evidence Convention exclusively governed pretrial discovery because the requested documents could be found only in a foreign state.[33] Further, the French corporations argued that they could not satisfy the discovery request under French penal law, which prohibited compliance with discovery requests that did not conform to Convention procedures.[34]

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28. Societe Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. Iowa, 482 U.S. at 524 (1987).

29. *Id.* at 522.

30. *Id.* at 525. Societe Nationale Industrielle Aérospatiale and Societe de Construction d'Avions de Tourisme were in the business of designing and manufacturing airplanes. A "Rallye" plane designed by these corporations crashed in Iowa on August 19, 1980, resulting in the actions brought against Aérospatiale. *Id.*

31. *Id.*

32. *Id.* The plaintiffs also requested a set of interrogatories pursuant to Rule 33 and an admission pursuant to Rule 36. *Id.*

33. *Id.* at 525-26.

34. *Id.* at 526. Article 1A of the French Penal Code Law No. 80-538, provides:

> Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial, or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

The magistrate denied the French corporations' motion for a protective order, and the Eighth Circuit Court of Appeals rejected the corporations' petition for a writ of mandamus against the magistrate.[35] The Eighth Circuit held that the Hague Evidence Convention did not apply if a district court had jurisdiction over a foreign litigant despite the fact that the evidence sought was located within the territory of a Convention signatory.[36] The Eighth Circuit rejected the defendants' argument that international comity required application of the Convention's procedures first and allowed resort to the Federal Rules of Civil Procedure only if the Convention procedures did not succeed.[37] The court agreed with the magistrate's decision that the French blocking statute should not prevent discovery under the Federal Rules of Civil Procedure.[38]

2. The Supreme Court Decision

The Supreme Court unanimously held that the Hague Evidence Convention was not the exclusive means for discovering evidence located in a signatory state.[39] The Court also unanimously rejected the plaintiffs' argument that "the Convention does not apply to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court."[40] Finally, the entire Court agreed that an international comity analysis should be used to determine the Convention's applicability, but the Court sharply divided on the form this analysis should take.[41]

The five justice majority[42] held that lower courts should apply an international comity analysis on a case by case basis to

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Id. at 526 n.6 (quoting French Penal Code Law No. 80-538 art. 1A). This type of penal law is known as a "blocking statute." *See* Born & Hoing, *supra* note 3, at 398-99 n.12.

35. *Id.* at 528.

36. *Id.* The French corporations argued that this interpretation of the applicability of the Convention rendered the entire Convention "meaningless." *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 539-40.

40. *Id.* at 540-41.

41. *Id.* at 547.

42. Justice Stevens delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Powell, and Scalia. Justice Blackmun filed an opinion concurring in part and dissenting in part, joined by Justices Brennan, Marshall, and O'Connor. *Id.* at 523.

determine the applicability of the Convention.[43] The majority rejected the petitioners' argument that a comity analysis required lower courts to use Convention procedures first before allowing discovery pursuant to the Federal Rules of Civil Procedure.[44] The Court declined to adopt such a general rule because it determined that an individual analysis of a foreign state's interests provided a better basis for comity analysis than would a general rule.[45] The majority concluded, "A rule of first resort [to the Hague Evidence Convention] in all cases would therefore be inconsistent with the overriding interest in the just, speedy, and inexpensive determination of litigation in our courts."[46]

The Court acknowledged that the comity analysis approved in Section 442 of the *Restatement (Third) of the Foreign Relations Law of the United States*[47] *(Third Restatement)* might not represent a consensus of international views on the scope of a federal district court's power to order discovery in the face of objections from a foreign state. The majority found Section 442's factors relevant to a district court's comity analysis, however.[48] The majority did not provide lower courts with any specific rules to guide their application of the comity factors and analysis.[49]

A strong dissent criticized the majority for ignoring the Hague Evidence Convention's importance.[50] It voiced concern that lower

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43. *Id.* at 543-44. The Court defined comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Id.* at 543 n.27.

44. *Id.* at 544.

45. *Id.* at 542-43. The majority noted, "the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate." *Id.*

46. *Id.*

47. In its opinion, the Court referred to the tentative draft of Section 437, which became Section 442 in the final draft of the *Third Restatement*. *See id.* at 544 n.28.

48. *Id.* at 544 n. 28. The factors listed in Section 442 are:

> (1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987) [hereinafter THIRD RESTATEMENT].

49. *Aérospatiale*, 482 U.S. at 546.

50. *See id.* at 548 (Blackmun, J., concurring in part and dissenting in part).

courts will resort to the Federal Rules of Civil Procedure discovery rules too quickly, to the detriment of United States foreign relations interests.[51] The dissent also noted that the Executive and Legislative branches are better suited than the courts to determine the proper procedures for transnational discovery.[52]

Furthermore, Justice Blackmun's dissent argued that the lower courts' comity analysis should be based on more definite rules than the majority's ad hoc balancing approach provided.[53] He endorsed the "first use" rule, opining that "first use" of the Convention's discovery procedures would best determine the success of its procedures.[54] The dissent encouraged courts to use the Convention to help avoid foreign perceptions of unfairness by United States courts which could be of great political cost to the United States in the future.[55] In closing, Justice Blackmun cautioned lower courts to recognize and attempt to accommodate the needs of the international commercial system in determining which discovery method to use.[56] He concluded that the Convention, endorsed by the United States, recognized those needs.[57]

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51. *Id.*

52. *Id.* at 552. Justice Blackmun stated:

> The Convention embodies the result of the best efforts of the Executive Branch, in negotiating the treaty, and the Legislative Branch, in ratifying it, to balance competing national interests. As such, the Convention represents a political determination--one that, consistent with the principle of separation of powers, courts should not attempt to second-guess.

Id.

53. *Id.* at 554.

54. *Id.* at 567. Justice Blackman noted, however, that he does not favor a rigid first use rule. For example, if a court determines that using the Convention would be futile, the court should not be required to use the Convention's procedures. *Id.*

55. *Id.* at 567-68. Blackmun throught that, because of the political, economic, and military strength of the United States, many states might hesitate to oppose discovery orders issued by United States courts. This practice over time could lead to an accumulation of resentment towards the United States that could eventually cause states not to cooperate with the United States in other matters. *Id.* at 568.

56. *Id.*

57. *Id.*

C. *Application of* Aérospatiale *by Lower Courts*

After *Aérospatiale*, lower courts continued to adopt a parochial view of discovery and, therefore, to favor the Federal Rules of Civil Procedure over the Hague Evidence Convention.[58] Courts generally have found the Convention procedures more time consuming and less efficient than the Federal Rules.[59]

The majority of lower court decisions resulted in "first use" of the Federal Rules of Civil Procedure in transnational discovery proceedings.[60] These decisions show the difficulty lower courts confront in applying *Aérospatiale*'s ad hoc comity analysis meaningfully.[61] Courts, therefore, fall back on their parochial bias toward the Federal Rules. For example, in *In re Bedford Computer Corp.*,[62] a bankruptcy court ordered extraterritorial discovery under the Federal Rules of Civil Procedure because "the only effect of using the Hague Convention rules would be to further delay this adversary proceeding."[63] The court noted that *Aérospatiale* made application of the Hague Evidence Convention rules an "option" that can be used in place of the Federal Rules on a case by case basis.[64]

In *Doster v. Schenk*,[65] a district court held that parties advocating "first use" of Convention procedures bear the burden of proving that the facts of a particular case warrant employing

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58 *See* Born & Hoing, *supra* note 3, at 394.

59. *See, e.g., In re* Bedford Computer Corp., 114 B.R. 2 (Bankr. D.N.H. 1990).

60. *See* Born & Hoing, *supra* note 3, at 394. Some scholars believe that *Aérospatiale* has made it more likely that courts in transnational discovery proceedings will ignore the Hague Evidence Convention in favor of using the more familiar Federal Rules of Civil Procedure. *Id.* at 406-07.

61. *Id.* at 406.

62. 114 B.R. 2 (Bankr. D.N.H. 1990).

63. *Id.* at 6. In *Bedford Computer*, the defendant, Israel Aircraft Industries Ltd. (IAI), filed a motion for a protective order in response to Bedford Computer Corporation's motion to compel discovery. IAI is an aerospace company organized under the laws of Israel, has its principal place of business in Israel, and is wholly-owned by the government of Israel. IAI based its motion for a protective order in part on the assertion that discovery should be conducted under the rules of the Hague Evidence Convention, not under the Federal Rules of Civil Procedure. *Id.* at 3.

64. *Id.* at 5. This statement reflects the court's bias in favor of using the Federal Rules. It also suggests that the court believed that the Federal Rules provide a default discovery method that should be employed in transnational discovery proceedings unless the facts in a particular case warrant the use of Convention procedures.

65. 141 F.R.D. 50 (M.D.N.C. 1991). In *Doster*, the plaintiffs were employees of a particle board plant designed and built by Schenk, a German contractor. The plaintiffs were injured in the course of their employment at the plant and brought a products liability action against Schenk. *Id.* at 51.

those procedures rather than the Federal Rules.[66] The court found that by failing to use the discovery conference procedure available in products liability actions, Schenk lost its right to argue for the use of the Convention used based on the alleged burden of the plaintiff's discovery requests.[67] Placing the burden of proof on the party seeking to use Convention procedures further evidences courts' general preference for using the Federal Rules of Civil Procedure.[68]

Unlike the *Bedford Computer* court, the *Doster* court at least attempted a comity analysis. However, the *Doster* court failed to discuss any interests Germany might have had in the application of the Convention. Noting its concern that Convention procedures might involve considerable time and expense, the court rejected the defendant's assertion of the Convention procedures' efficiency.[69] Thus, this court also showed a bias against using Convention procedures.[70]

Some courts have favored the comity analysis proposed by Justice Blackmun in his *Aérospatiale* dissent.[71] In *Hudson v. Herman Pfauter GmbH & Co.*,[72] a district court held that the proper method for determining which discovery procedure to use was Blackmun's three-pronged evaluation considering foreign interests, United States interests, and the mutual interests of all states in amicable international relations.[73] The court favored Justice Blackmun's approach largely because it stressed consideration of national interests over the concerns of individual

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66. *Id.* at 51. The court's holding followed the earlier decision by the same court in Rich v. KIS California, Inc., 121 F.R.D. 254 (M.D.N.C. 1988).

67. The court noted, "Defendant cannot at the same time frustruate attempts to simplify discovery and complain about it being burdensome." *Doster*, 141 F.R.D. at 53.

68. *See* Born & Hoing, *supra* note 3, at 401.

69. *Doster*, 141 F.R.D. at 54.

> It has been recognized that use of the Convention procedures in Germany can involve considerable time and expense. . . . However, the most notable aspect under this factor is that West Germany filed an exception to the Convention procedures for the production of documents and likely will not execute letters of request for documents.

Id.

70. *See id.*

71. *See, e.g.*, Knight v. Ford Motor Co., 615 A.2d 297 (N.J. Super. L. 1992); In re Perrier Bottled Water Litigation, 138 F.R.D. 348 (D.Conn. 1991); Hudson v. Herman Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987).

72. 117 F.R.D. 33 (N.D.N.Y. 1987).

73. *Id.* at 37 (quoting Societe National Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. Iowa, 483 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

litigants.[74] The *Hudson* court's evaluation of Germany's interests in applying the Hague Evidence Convention differs sharply from the *Doster* court's analysis.[75] The *Hudson* court noted that United States discovery procedures might be objectionable in West Germany because these procedures might violate rights protected by the West German Constitution.[76] Therefore, the court thought, use of the Convention in this situation would make it less likely that the United States would offend West Germany's sovereign interests in discovery proceedings because West Germany had consented to Convention procedures.[77]

Although the *Hudson* court recognized that Hague Evidence Convention procedures initially might be more expensive and time consuming than the Federal Rules of Civil Procedure,[78] it found that these inconveniences did not outweigh the Convention's overall purposes of facilitating transnational discovery and promoting comity.[79] The court also opined that as courts become increasingly familiar with Convention procedures, their use may be as efficient as using the Federal Rules.[80] Furthermore, the *Hudson* court noted that discovery under the Convention was less expensive than Federal Rules discovery because the Convention's procedures permit less discovery.[81] Therefore, litigants are less likely to be flooded with irrelevant material.[82]

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74. *Hudson*, 117 F.R.D. at 40.

75. *See id.* at 38.

76. *Id.* at 37-38. The Court stated that "evidence gathering by a private party from even a willing citizen is especially objectionable to West Germany, since use of American discovery procedures can violate rights protected by that nation's constitution." *Id.*

77. *Id.* at 38.

78. *Id.*

79. *Id.* at 40. "The Hague Convention not only serves the interest of international comity but also benefits common law countries by facilitating discovery in civil law jurisdictions without slighting the judicial sovereignty of the nations in which discovery is sought." *Id.*

80. *Id.* at 38. The court suggested that a current obstacle to the effective use of Convention procedures is the fact that both litigants and courts are less familiar with Convention procedures than with the discovery provisions of the Federal Rules. *Id.*

81. *Id.* at 38 n.4. "To assume that the 'American' rules are superior to those procedures agreed upon by the signatories of the Hague Convention without first seeing how effective Convention procedures will be in practice would reflect the same parochial biases that the Convention was designed to overcome." *Id.* at 38-39.

82. *Id.* at 39.

In *In re Perrier Bottled Water Litigation*,[83] another district court expressed its preference for Justice Blackmun's comity analysis.[84] This court, however, applied the *Aérospatiale* majority's comity analysis because it held that the Supreme Court's decision setting forth standards for applying the Convention controlled.[85] In evaluating France's sovereignty interests in applying Convention procedures, the *Perrier* court noted that France's sovereignty was implicated when discovery was sought from its citizens within France without the government's permission.[86] The court also noted that France, like other civil law states, disfavored the use of discovery procedures other than the Convention's within its borders.[87]

Addressing the plaintiff's argument that Convention procedures were too costly, the court held that efficiency concerns could not outweigh France's sovereignty interest.[88] Despite this court's pro-Hague Evidence Convention position, it found that the party seeking application of the Convention bears the burden of proving that it should be used.[89]

Thus, post-*Aérospatiale* case law clearly shows that courts have not applied the *Aérospatiale* majority's comity analysis uniformly, but instead generally have favored the Federal Rules of Civil Procedure over the Hague Evidence Convention procedures.[90] Although Convention procedures might be cumbersome, courts should bear in mind the importance of fostering international cooperation in judicial matters.[91] The *Aérospatiale* decision undermined the Convention's goals by

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83. 138 F.R.D. 348 (D.Conn 1991).

84. *Id.* at 354.

85. *Id.*

86. *Id.* at 355.

87. *Id.* at 355. *See generally*, Bernard H. 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).

88. *Perrier*, 138 F.R.D. at 354. "Although in theory, learning-curve costs might make Convention procedures more costly in terms of efficiency, such inconveniences alone pale beside the importance of respecting France's sovereign interests and the courts concern for fairness to foreign litigants." *Id.*

89. *Id.* This holding followed Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J. 1987). *Perrier*, 138 F.R.D. at 354.

90. In Knight v. Ford Motor Co., 615 A.2d 297 (N.J. Super. Ct. Law Div. 1992), a New Jersey court noted that lower courts' application of the *Aérospatiale* decision has not been uniform. *Knight*, 615 A.2d at 300. Specifically, the court in *Knight* compared the *Hudson* and *Benton Graphics* decisions to support its point. *Id.* at 300-01.

91. *See* Societe Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. Iowa, 482 U.S. 522, 568 (1987) (Blackmun, J., concurring in part and dissenting in part).

allowing courts, on a case by case basis, to use the Federal Rules of Civil Procedure rather than Convention procedures when Convention procedures would achieve the same results as the Federal Rules.

IV. CONFLICTS OF LAW IN TRANSNATIONAL DISCOVERY

The federal courts have disagreed whether a United States court may order a person in a foreign state to act in violation of that state's laws and to what extent a United States court may impose sanctions on a litigant who refuses to comply with such an order.[92] The Supreme Court addressed the problems caused by conflicting transnational discovery laws in *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*[93] (*Societe Internationale*).

A. Societe Internationale's *Good Faith Standard*

1. Lower Court Proceedings

In *Societe Internationale*, the Swiss company I.G. Chemie sued the United States for the return of property seized during World War II under the Trading with the Enemy Act.[94] I.G. Chemie made several motions to be relieved of its duty to produce banking records on the grounds that disclosure of these records would violate Swiss economic espionage and banking secrets laws and expose those responsible for the disclosure to criminal sanctions.[95] The United States then moved under Federal Rule of Civil Procedure 37(b)(2) for the court to dismiss I.G. Chemie's complaint because the company failed to comply with the production order.[96] Before ruling on the government's motion to dismiss, the district court referred the case to a special master for findings on the nature of the Swiss blocking laws and on whether

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92. *See, e.g.*, United States v. First National Bank (Citibank II), 396 F.2d 897 (2d Cir. 1968); *c.f.* United States v. Vetco, 691 F.2d 121 (9th Cir. 1981).

93. 357 U.S. 197 (1958).

94. *Id.* The Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. app. § 5(b), sets forth conditions under which an Alien Property Custodian, acting for the United States, may seize property of a foreign state or national during a period of war or national emergency of the United States.

95. *Societe Internationale*, 357 U.S. at 200.

96. *Id.*

I.G. Chemie had made a good faith effort to satisfy the court's production order.[97]

The special master concluded that the Swiss government complied with its laws in imposing a constructive seizure of the documents that the district court ordered I.G. Chemie to produce.[98] Although the district court affirmed the master's finding that the company made a good faith effort to satisfy the production order, the court granted the United States government's motion to dismiss.[99] After the Court of Appeals for the District of Columbia Circuit affirmed,[100] the Supreme Court reversed.[101]

2. The Supreme Court Decision

The Supreme Court held that because Swiss law prohibited the plaintiff from complying with the production order and because the plaintiff exhibited good faith in attempting to honor the order, dismissal of the plaintiff's complaint was not justified.[102] In support of this holding, the Court noted that a litigant's fear of criminal prosecution for complying with an order is a strong excuse for nonproduction.[103] Although the Court's holding required foreign litigants to make a maximum effort to comply with a lower court's production order,[104] *Societe Internationale* gave lower courts the discretion to apply a case by case balancing test, based on good faith, to determine when foreign laws may bar production.[105]

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97. *Id.* at 201.
98. *Id.*
99. *Id.*
100. *Id.* at 202.
101. *Id.* at 213.
102. *Id.* at 212.
103. *Id.* at 211. The court stated, "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.*
104. *Id.* at 205.
105. See *infra* part IV.C.4. for discussion of cases adopting the *Societe Internationale* good faith approach.

B. Restatements of Foreign Relations Law

The American Law Institute's *Restatement (Second) of the Foreign Relations Law of the United States (Second Restatement)* sets forth a balancing test to assist courts in solving jurisdictional conflicts.[106] Section 40 of the *Second Restatement* lists the following five nonexclusive factors that courts should consider to resolve jurisdictional conflicts:

> (a) the vital national interests of each of the states; (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of another state; (d)the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[107]

The *Second Restatement*'s factor analysis continues to be important because many circuits have used it to resolve extraterritorial discovery conflicts.[108] Further, the *Second Restatement* served as a base for the more sophisticated *Third Restatement* approach.[109]

Section 403 of the *Third Restatement* serves as a threshold test to determine whether a court may exercise jurisdiction in a particular matter.[110] Section 403 provides that, in the interest of comity, courts should reasonably limit the exercise of jurisdiction.[111] The reasonableness of exercising jurisdiction should be determined by considering factors including, but not limited to, the following:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between

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106. C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 485 (1992).

107. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1988) [hereinafter SECOND RESTATEMENT].

108. *See infra* parts III.C. 2-3.

109. THIRD RESTATEMENT, *supra* note 48, § 403. For a description of relevant differences between § 40 of the *Second Restatement* and § 403 of the *Third Restatement*, see *infra* notes 126-34 and accompanying text.

110. Sylvia B. Piñera-Vàsquez, Note, *Extraterritorial Jurisdiction and International Banking: A Conflict of Interests*, 43 U. MIAMI L. REV. 449, 476 (1988); *see* THIRD RESTATEMENT, *supra* note 48, § 403 n.10.

111. THIRD RESTATEMENT, *supra* note 48, § 403.

> the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation of another state.[112]

Section 403(3) provides that even though a court determines that it may reasonably exercise jurisdiction over a person or activity, if laws between the involved states conflict, then "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction" in light of the Section 403(2) factors.[113] The *Third Restatement*'s drafters believed that the additional requirement of examining the foreign law's importance would strengthen courts' comity analysis.[114]

Once a court determines that it is "reasonable" to exercise jurisdiction under Section 403, problems may arise because of overlapping jurisdiction.[115] When more than one state reasonably may exercise jurisdiction over the same matter, a litigant may be subject to conflicting mandates issued by the different states asserting jurisdiction.[116] Section 441, pertaining to foreign state compulsion,[117] and Section 442, pertaining to disclosure requests under United States law, were designed "to

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112. *Id.* § 403(2)(a)-(h).

113. *Id.* § 403(3).

> (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id.

114. *Id.* § 403 cmt. a.

115. *See id.* introductory note to ch. IV.

116. *See id.*

117. Section 441 protects litigants caught between conflicting commands when two states have jurisdiction over the same matter by determining preference between the conflicting exercises of jurisdiction.

reduce the severity of the dilemma" for persons caught between states' conflicting mandates.[118]

Section 441 describes certain principles of preference that apply to overlapping jurisdiction in order to protect litigants.[119] The major preference is a "territorial preference" which gives the state in which the relevant conduct is to occur a preference to exercise its jurisdiction.[120] In some situations, however, this territorial preference may not apply. Most commonly, the territorial preference does not apply when a foreign litigant doing business in the United States must make disclosures forbidden by the laws of that party's state.[121] Significantly, the litigant may assert the foreign compulsion defense under Section 441 only when the litigant would be subject to penal or severe sanctions in the state forbidding disclosure.[122]

Section 442 sets forth a two prong test for courts to determine the appropriateness of issuing and enforcing a discovery request. First, Section 442(1)(c) lists five factors that a court should consider to determine whether to order production of information from documents located abroad: (1) the importance of the documents in the litigation; (2) the specificity of the request; (3) the origin of the information; (4) the alternative means of obtaining the documents; and (5) the extent to which compliance would undermine United States or foreign interests.[123]

If a court determines that it is appropriate to order production and the litigant does not comply with the court's order because production would violate foreign law, Section 442(2)(b) instructs the court on when it should enforce its order. It provides that a court should not impose sanctions on a party for failing to comply with an order unless the party failed to make a good faith effort to comply with the court order or acted to conceal the requested information.[124] A court, however, may

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118. *See* THIRD RESTATEMENT, *supra* note 48, introductory note to ch. IV.

119. *See id.* § 441.

120. *Id.* § 441 cmt. a.

121. *Id.*

122. *Id.* § 441 cmt. c.

123. *Id.* § 442 (1)(c).

124. *Id.* § 442(2)(b). *Compare* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). Section 442(2) states:

> If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

make factual findings adverse to the litigant who fails to produce documents despite the litigant's good faith effort to produce the requested documents.[125]

The *Third Restatement* restructured the *Second Restatement*'s extraterritorial discovery balancing test in several ways.[126] First, Section 403 of the *Third Restatement*, initially used by courts to determine the reasonableness of asserting jurisdiction, incorporates factors from the *Second Restatement* Section 40 balancing test.[127] The *Third Restatement* offers a more comprehensive and complex set of factors which go further than those listed in Section 40 of the *Second Restatement*.[128] The *Third Restatement* downplays factor (e) of Section 40 of the *Second Restatement* which is "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."[129] Instead, the *Third Restatement* proposes consideration of the likelihood of conflict between the laws of the involved states.[130]

Second, the *Third Restatement* balancing test gives less weight than the *Second Restatement* test to hardship incurred by

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(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

THIRD RESTATEMENT, *supra* note 48, § 442(2).

125. THIRD RESTATEMENT, *supra* note 48, § 442(2)(c).

126. The *Third Restatement* states, "In contrast to prior § 40, reasonableness is understood here not as a basis for requiring states to consider moderating their enforcement of laws that they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe." *Id.* § 403 n.10.

127. *See id.* at § 403; SECOND RESTATEMENT, *supra* note 107, § 40.

128. *See* THIRD RESTATEMENT, *supra* note 48, § 403. For example, § 40 lists the nationality of the person required to produce evidence as a factor in determining what law will apply in a jurisdictional conflict. Section 403 expands Section 40's nationality factor to include other connections such as whether a litigant has a residence in the relevant state or whether the litigant has any economic connections with that state. *See* THIRD RESTATEMENT, *supra* note 48, § 403(b); SECOND RESTATEMENT, *supra* note 107, § 40(d).

129. SECOND RESTATEMENT, *supra* note 107, § 40.

130. THIRD RESTATEMENT, *supra* note 48, § 403(2)(h)

the party ordered to produce.[131] Section 403 of the *Third Restatement* still lists hardship on a litigant as a factor to consider when determining the reasonableness of the courts' assertion of jurisdiction.[132] Further, under the *Third Restatement*, courts should continue to consider hardship on litigants when determining whether it is appropriate to enforce a production order.[133] However, Section 403 gives courts discretion to consider what role the litigant's hardship should play in determining whether enforcement actions should be taken.[134]

C. *Circuit Courts' Approaches to Resolving Conflicts*

1. Early Second Circuit Cases

After the Supreme Court's 1958 *Societe Internationale* decision, the Second Circuit established its own line of precedent regarding extraterritorial discovery problems caused by the conflicting laws of involved states.[135] In *First National City Bank v. Internal Revenue Service*[136] *(Citibank I)*, the Second Circuit carefully analyzed the foreign law in conflict with the United States court's production order to determine whether to enforce the production order.[137] In this case, the Internal Revenue Service subpoenaed documents held in the bank's Panamanian branch.[138] The bank asked the court to vacate the subpoena because compliance would require bank personnel to violate Panamanian constitutional law.[139] The Second Circuit rejected

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131. Jones, *supra* note 106, at 488.

132. *See* SECOND RESTATEMENT , *supra* note 107, § 40(b); THIRD RESTATEMENT, *supra* note 48, § 403(d). The *Third Restatement* states its consideration for hardship on a litigant as "the existence of justified expectations that might be protected or hurt by the regulation." THIRD RESTATEMENT, *supra* note 48, § 403(d).

133. Jones, *supra* note 106, at 488.

134. *Id.* "Not all considerations have the same importance in all situations; the weight to be given to any particular factor or group of factors depends on the circumstances." THIRD RESTATEMENT, *supra* note 48, § 403 cmt. b.

135. *See* First National City Bank v. Internal Revenue Service (Citibank I), 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

136. 271 F.2d 616 (2d Cir. 1959).

137. *Citibank I*, 271 F.2d at 619-20.

138. *Id.* at 618.

139. *Id.* at 619. The bank argued that requiring production of the bank's records would cause bank employees to violate Article 29 of the Panamanian Constitution which provides that "correspondence and other private documents are inviolable and may not be seized or examined except by provision of a

Citibank's argument, finding that under the circumstances of the investigation Panamanian law would allow the ordered disclosure.[140] Thus, the analysis in *Citibank I* appropriately may be labeled a "pure comity" analysis because the court considered only the consequences the ordered disclosure would have in the context of the implicated foreign law.[141] Despite its holding, the court noted that if the ordered production would have violated Panamanian law, then the court would not have enforced the production order.[142]

Two years later, in 1960, the Second Circuit followed the same strict comity analysis in *Ings v. Ferguson.*[143] In *Ings*, the court found that based on principles of international comity, United States courts should not take action that would cause a party to violate a foreign state's laws.[144] The court held that whether removal of the bank records from Canada was prohibited was a question of Canadian law that had to be addressed by the Canadian courts.[145] The Second Circuit held that if the Canadian courts found that disclosure of the requested documents violated Canadian law, the motion to quash the production order should be granted.[146]

In *Citibank I* and *Ings*, the Second Circuit's analysis concentrated on whether the requested disclosure would violate the laws of the foreign state where the information was located. The Second Circuit's analysis in these cases conflicted with the Supreme Court's analysis in *Societe Internationale*, which implied that the illegality of ordered discovery in a foreign state would not bar United States courts from enforcing the orders.[147]

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competent authority and by means of legal formalities." *Id.* The bank also contended that the required production would cause the bank to violate Articles 88 and 89 of the Panamanian Code of Commerce which ban "any general . . . examination of the bookkeeping in the offices . . . of the merchants." *Id.* at 620.

140. *Id.* at 620.

141. *See id.* at 618.

142. *Id.*

143. 282 F.2d 149 (2d Cir. 1960). In *Ings*, agencies of Canadian banks located in New York appealed the district court's refusal to quash or limit subpoenas requiring the agencies to produce bank documents physically located in Canada. The Second Circuit modified the subpoenas by restricting them to documents held by the involved agencies in New York. *Id.* at 150.

144. *Id.* at 152.

145. *Id.*

146. *Id.*

147. David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 856 (1986).

2. *Citibank II*

In *United States v. First National Bank*[148] *(Citibank II)*, the Second Circuit departed from the precedent established in *Citibank I* and *Ings* and adopted the *Second Restatement*'s Section 40 balancing test. In *Citibank II*, the Second Circuit considered whether a litigant may refuse to comply with a subpoena requiring document production from a foreign state if production may subject the litigant to civil sanctions in the foreign state.[149] Citibank contended that it should not have to produce the ordered documents because compliance could subject Citibank to civil liability under German law.[150] The court called for a "careful balancing of the interests involved."[151] The court's analysis included balancing the national interests of the United States and Germany as well as the alleged hardships that Citibank would face if compelled to comply with the order.[152] Considering these factors, the court concluded that the district court could enforce the production order against Citibank.[153]

3. Adoption by Other Circuits of the *Second Restatement*'s Balancing Test

In *United States v. Field*,[154] the Fifth Circuit considered whether a district court could subpoena a Canadian citizen, present in the United States to testify before a grand jury even though this testimony might subject him to criminal liability in Canada.[155] The Fifth Circuit referred to the *Second Restatement* Section 40 balancing test, but did not consider all five of its

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148. 396 F.2d 897 (2d Cir. 1968). In this case, a federal grand jury investigating antitrust violations served a subponea duces tecum on the bank for documents located in New York and West Germany. Citibank refused to produce the documents located in Frankfurt on the grounds that production would subject Citibank to civil liability and fines. *Id.*

149. *Id.* at 898.

150. *Id.* at 902.

151. *Id.* at 901.

152. *Id.*

153. *Id.* at 902-03. In considering the United States interest in enforcing the production order the court focused on the grand jury's importance and stated that it would be very reluctant to allow relevant information to be kept from a grand jury. *Id.*

154. 532 F.2d 404 (5th Cir. 1976).

155. *Id.* In *Field*, the district court held Field, a Canadian citizen and managing director of a bank located in the Cayman Islands, in civil contempt for failing to answer grand jury questions. *Id.* While in the Miami airport, Field was served with a subpoena directing him to appear before the grand jury. *Id.*

factors.[156] Rather, the court limited its analysis to the first factor listed in Section 40, balancing only the interests of the states involved.[157] Under this analysis, the court found that the United States interest in the grand jury system outweighed the importance of the Cayman Islands banking secrecy laws.[158] Thus, the Fifth Circuit applied the Section 40 balancing test more narrowly than the Second Circuit did in *Citibank II*, which considered the states' interests as well as the hardship that the subpoena's enforcement would inflict on the litigant involved.[159]

In *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia (Nova Scotia I)*,[160] the Eleventh Circuit followed the *Field* court's reasoning and likewise applied a narrower Section 40 analysis. The *Nova Scotia I* court held that because compliance with the subpoena might cause the defendant bank to violate Bahamian penal laws, the district court correctly used the *Field* balancing test.[161] Like the Fifth Circuit in *Field*, the Eleventh Circuit in *Nova Scotia I* only weighed the interests of the United States in enforcing the subpoena against the Bahamian government's interests in enforcing its privacy laws.[162] Although the court found that the United States interest prevailed, it seemed to reach this conclusion by relying on the *Field* analysis rather than by actually inquiring into the importance of the Bahamian law.[163]

In *Nova Scotia II*,[164] the bank was served with another grand jury subponea and again refused to comply.[165] The district court again enforced the subpoena and found the bank in civil

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156. *See id.*

157. *Id.* at 405-07. For a discussion of Section 40, see *supra* notes 106-09 and accompanying text.

158. *Field*, 532 F.2d at 407. The court emphasized the importance of the grand jury: "To the degree that the ability to obtain evidence is crucial to all criminal justice proceedings, the need for broad authority in the grand jury is greatest." *Id.* at 408. *Accord* United States v. First National Bank (Citibank II), 396 F.2d 897, 903 (2d Cir. 1968).

159. *See supra* notes 148-53 and accompanying text.

160. *In re* Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982) [hereinafter *Nova Scotia I*].

161. *Id.* at 1389. In this case, the Bank of Nova Scotia appealed the district court's finding the bank in civil contempt for failing to comply with a court order enforcing a grand jury subpoena duces tecum. *Id.* at 1385. The bank argued that the subpoena should not have been enforced as a matter of international comity because compliance would have forced the bank to violate Bahamian law. *Id.* at 1389.

162. *Id.* at 1391.

163. *See* Jones, *supra* note 106, at 491.

164. *In re* Grand Jury Proceedings the Bank of Nova Scotia, United States v. Bank of Nova Scotia, 740 F.2d 817 (1984) [hereinafter *Nova Scotia II*].

165. Id. at 819-20; Piñera-Vàsquez, *supra* note 110, at 483.

contempt,[166] and the bank appealed the district court's action.[167] The Eleventh Circuit balanced national interests and found that the United States interest in enforcing drug laws outweighed the foreign state's interest in banking secrecy laws.[168] Unlike the courts in *Field* and *Nova Scotia I*, the court claimed it considered not only the conflicting national interests involved but also all of the other factors listed in Section 40 of the *Second Restatement*, although the court did not discuss any of the other factors in its opinion.[169] In any case, the Eleventh Circuit held that the district court acted properly in enforcing the subpoena and imposing sanctions.[170]

In *United States v. Vetco*,[171] the Ninth Circuit applied a more detailed balancing test than the Second, Fifth, and Eleventh Circuits applied in *Citibank II*, *Field*, and *Nova Scotia II* respectively.[172] Significantly, the *Vetco* court recognized all five factors of the *Second Restatement* Section 40 balancing test and used each factor to analyze the validity of the district court's discovery orders and sanctions.[173] Moreover, the Ninth Circuit examined two factors in its balancing test not included in *Second Restatement*'s Section 40. First, the court considered the

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166. *Nova Scotia II*, 740 F.2d at 819-20.

167. *Id.*

168. *See id.* at 829.

169. *Id.* at 829.

170. *Id.* at 832-33.

171. 691 F.2d 1281 (9th Cir. 1981).

172. In *Vetco*, the Internal Revenue Service issued summonses requesting Vetco's financial records and records from its foreign subsidiaries. *Id.* at 1283. Vetco refused to comply because compliance would require its employees to violate Swiss law. *Id.* In response, the court imposed contempt sanctions. *Id.* The Ninth Circuit held that possible criminal liability in Switzerland did not relieve Vetco of its duty to honor the court's enforcement of the summonses. *Id.* at 1281-82. The Ninth Circuit found that a balancing test favored enforcement of the summonses and imposition of sanctions. *Id.*

173. *Id.* at 1288-90. The court analyzed the vital national interests involved, the extent of hardship resulting from enforcement, the location of the ordered conduct, the nationality of the ordered party, and the expectation of compliance, as set forth in Section 40. The court held that "[i]n assessing the vital national interests of each of the states, a court ought to consider the degree of difference in law or policy, and the nationality of the parties affected." *Id.* at 1289. The court found that the United States interest in collecting taxes and prosecuting tax fraud outweighed Switzerland's interests in preserving the secrecy of business documents because the parties were subsidiaries of United States corporations and the IRS must keep the information it collects confidential. *Id.* In addition, the court was not persuaded that the appellants were in danger from the conflicting Swiss law because the Swiss Federal Attorney's office said that when production is pursuant to a United States court's enforcing an IRS summons, the appellants may have a viable defense to the Swiss law in question. *Id.*

importance of the requested documents to the requesting party's case.[174] Second, the court paid particular attention to whether another means of compliance existed.[175]

The Ninth Circuit did not evaluate whether Vetco made a good faith effort to fulfill the summons.[176] The court held that *Societe Internationale* did not control the *Vetco* decision because the district court made no finding as to whether Vetco had made a good faith effort to comply with the court's order.[177]

In *United States v. First National Bank of Chicago*,[178] the Seventh Circuit also employed the *Second Restatement* Section 40 balancing test to determine whether the district court had properly enforced an Internal Revenue Service summons which could have subjected the bank to criminal liability in Greece.[179] The Seventh Circuit balanced the factors listed in Section 40 of the *Second Restatement* and reversed the district court's decision to enforce the summons.[180] The Seventh Circuit paid particular attention to the nature of the hardship that compelling the action would have on the bank and its employees.[181] Also, the Seventh Circuit was influenced heavily by the fact that the bank was not a party to the litigation but only a neutral source of information that refused to produce the information only to avoid the imposition of criminal penalties on bank employees in Greece.[182]

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174. *Id.* The court found that the importance of the documents requested was a factor that it should analyze in addition to the § 40 factors because if the requested documents are only cummulative listings of information already produced then production should not be required. *Id.* The appellants, however, made no showing that the documents in question were only cumulative records of what was produced already. *Id.*

175. *Id.* Although the appellants claimed that there were several alternative means of complying with the production order, the court found that none of the suggested alternatives constituted a substantially equivalent alternative. *Id.*

176. *Id.* at 1287; *see supra* notes 102-05 and accompanying text.

177. *Id.*

178. 699 F.2d 341 (7th Cir. 1983).

179. In this case, the I.R.S. issued a summons to First Chicago requiring the production of the bank statements of two customers who had accounts with the bank's branch in Athens, Greece. *Id.* at 342. It is important to note that the result in *First Chicago* differs from the cases previously discussed in this Note because the court found that the United States interest in collecting taxes was outweighed by the other factors the court included in its balancing test. *Id.* at 346.

180. *Id.* at 345-46.

181. *Id.* at 345. For the bank and its employees in Greece, this hardship included exposure to criminal liability, possibly imprisonment. *Id.*

182. *Id.* at 346. The court wrote, "We think it significant in weighing the hardship factor that the bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation." *Id.* at 346.

In *United States v. Rubin*,[183] the Eighth Circuit also adopted the Section 40 balancing test. In this case, Rubin appealed his conviction in the district court for securities fraud.[184] Rubin argued that the district court erred in quashing a subpoena duces tecum served on an officer of a Cayman Islands bank.[185] As in *First Chicago*, the court noted that the bank officer, who was subpoenaed to produce information in violation of Cayman Islands law, was not a party to the litigation.[186] Thus, the Eighth Circuit upheld the district court's decision quashing the subpoena.[187]

Considering whether courts may order a person to take action in a foreign state that would subject that person to criminal prosecution in that state, the D.C. Circuit recognized that federal courts often have been divided on this issue. In *In Re Sealed Case*,[188] the court, although not adopting the Section 40 balancing test, discussed several circuit court decisions employing that analysis. The D.C. Circuit principally based its reversal of the district court's decision to hold the bank in civil contempt on the facts that the bank was a third party never accused of any wrongdoing and that compliance could subject bank employees to criminal liability in a foreign state.[189] Although it noted the sensitivity of matters when a court compels a person to comply with discovery that violates the laws of the state in which the materials are located,[190] the court upheld the district court's finding of contempt because the individual no longer had ties with the foreign state involved.[191] Therefore, the

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183. 836 F.2d 1096 (8th Cir. 1988).

184. *Id.* at 1097.

185. *Id.*

186. *Id.* at 1102. The court noted, "Rubin is attempting to obtain the records of Cayman Island residents who are neither the target of a United States criminal proceeding nor subject to the laws of the United States." *Id.*

187. *Id.*

188. 825 F.2d 494 (D.C. Cir. 1987). This appeal was taken from a district court's orders compelling a bank, owned by state X, and an individual to respond to a grand jury subpoena that would cause them to violate the laws of state Y. *Id.* at 495. The appellants refused to respond to the subpoena and the district court found both parties in civil contempt. *Id.* The D.C. Circuit reversed the district court's finding that the bank was in contempt, but upheld the court's finding that the individual was in contempt. *Id.* at 494. The D.C. Circuit did not reveal the parties' identities in an effort to maintain the secrecy of the grand jury proceedings which were not complete at the time of the appeal. *Id.* at 495.

189. *Id.* at 498.

190. *Id.* at 498-99. The court noted, "We have little doubt, for example, that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders." *Id.*

191. *Id.* at 497.

court held, he would not be subject to prosecution in that state unless he chose to return.[192]

4. The Balancing Approach Coupled with Good Faith Considerations

Although the circuit courts have adopted the *Second Restatement* Section 40 balancing test to determine whether to enforce discovery orders and impose sanctions on parties refusing to comply with those orders that violate foreign law, the circuit courts clearly have not applied the test uniformly. In fact, as shown by the discussion above, the circuits emphasize different Section 40 factors, and some circuits include additional factors in their analysis. Still another circuit has applied the *Second Restatement* Section 40 balancing test in conjunction with the good faith considerations of *Societe Internationale.*[193]

In *In re Westinghouse Elec. Corp. Uranium,*[194] the Tenth Circuit relied heavily on *Societe Internationale* as well as the balancing factors listed in Section 40. In this case, the Rio Algom Corporation and its president appealed the district court's decision to hold them in civil contempt for failing to comply with a discovery order.[195] Rio Algom, the plaintiff, argued that it should not be held in contempt because full compliance with the subpoena of documents located in its Canadian office would violate Canadian Uranium Information Securities Regulations.[196] The Tenth Circuit reversed the district court's finding of contempt.[197]

The Tenth Circuit began its analysis by observing that *Societe Internationale* calls for courts to balance relevant factors on a case by case basis when a litigant fails to comply with a discovery order because compliance would subject the litigant to civil or criminal liability in a foreign state.[198] The court used the Section 40 factors in carrying out its balancing test.[199] Additionally, the

192. *Id.*

193. *See In re* Westinghouse Elec. Corp. Uranium, etc., 563 F.2d 992 (10th Cir. 1977). It is noteworthy that the Supreme Court's *Societe Internationale* opinion has had little effect on the circuit courts' decisions involving conflicting laws in transnational discovery procedures.

194. 563 F.2d 992 (10th Cir. 1977).

195. *Id.* at 994.

196. *Id.*

197. *Id.* at 992.

198. *Id.* at 997.

199. *Id.*

court noted that Rio Algom diligently produced the materials it could produce without violating Canadian law.[200]

Furthermore, the Tenth Circuit noted that the district court apparently did not attempt to balance any of the interests involved but instead simply reasoned that "the law of the forum would prevail regardless of the particular facts."[201] Thus, the district court's approach clearly did not accord with *Societe Internationale* or the *Second Restatement*, and the Tenth Circuit was particularly hostile to the district court's reasoning in this case.

5. Courts Adopting *Third Restatement* Balancing

The Supreme Court in *Aérospatiale* suggested that courts should use the *Third Restatement* as a guide to comity analysis.[202] The Court, however, found that the concept of international comity requires a particularized analysis of the specific facts involved in each case and therefore that no general rules regarding comity analysis are appropriate.[203]

The Supreme Court's passing endorsement of the *Third Restatement* in *Aérospatiale*, however, has not caused the lower courts to change their comity analysis. Typically, courts continue to apply the *Second Restatement*'s Section 40 analysis on a case by case basis without the benefit of any general rules. For example, in *In Re Grand Jury Proceedings Yanagihara*,[204] a district court conducted a comity analysis using Section 40 of the *Second Restatement* even after the *Third Restatement* had been finalized and endorsed by the Supreme Court.[205] In a footnote,

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200. *Id.* at 998. The district court signed an order declaring that Rio Algom did not make a good faith effort to comply with the discovery order. *Id.* The Tenth Circuit found that the district court's evidentiary finding on this matter was clearly erroneous and that Rio Algom had, in fact, made a good faith effort to comply with the order. *Id.*

201. *Id.* at 999.

202. *See* Societe Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. Iowa, 482 U.S. at 533, 544 (1987).

203. *Id.* at 545-46. The Court opined: "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." *Id.* at 546.

204. 709 F. Supp. 192 (C.D. Cal 1989).

205. In *Yanagihara*, the court ordered a witness before the grand jury, Shams, to sign a consent decree giving the government access to his banking records. *Id.* at 193. The government sought these records in connection with the investigation of possible violations of United States tax law by Shams. *Id.* Shams argued that he would be in violation of Swiss banking secrecy laws if he signed the consent

the district court noted that the *Restatement* had been revised, but dismissed the revisions as immaterial to the case at hand.[206] This case illustrates the district courts' general disregard for the Supreme Court's endorsement of the *Third Restatement*.

The Seventh Circuit acknowledged the *Third Restatement* in *Reinsurance Co. v. Administratia Asigurarilor de Stat*.[207] In this case, the Seventh Circuit reviewed its *First Chicago* precedent in light of the new *Third Restatement*.[208] The court found the *Third Restatement* balancing test in Section 442 to be "substantially similar" to the balancing test set forth in Section 40 of the *Second Restatement*. Before discussing the new Section 442, the court applied the *Second Restatement* Section 40 balancing test to the facts. Under this analysis, the court paid particular attention to the vigorous enforcement of Romanian secrecy laws because these laws showed that Romania highly valued "service secrets."[209] The court found that the Romanian law at issue was not designed as a blocking statute to protect Romanian corporations from foreign discovery requests; rather, the law was directed at regulating domestic affairs.[210]

The court noted that Section 442 emphasized different factors in its comity analysis than Section 40, but thought that this difference did not alter the court's decision under Section 40.[211] The court, however, found that Section 442 made one important change in the court's comity analysis by including good faith as a factor that may be used at the court's discretion.[212]

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form. *Id.* The court found that the court ordered discovery did not violate principles of international comity. *Id.* at 192.

206. *Id.* at 196.

207. 902 F.2d 1275 (7th Cir. 1990).

208. *See id.* at 1281. In *Reinsurance Co.*, a Romanian reinsurer appealed the district court's finding that the company had breached a reinsurance treaty. *Id.* at 1275. The company sought relief from the court's discovery order which it claimed would subject its employees to criminal liability in Romania. *Id.* at 1275. The Seventh Circuit upheld the district court's judgment against the company but held that the plaintiff was not entitled to discover the requested information that was considered "service secrets" under Romanian law. *Id.* at 1275.

209. *Id.* at 1280. The court found that Romania "places a high price" on service secrets. *Id.*

210. *Id.* at 1280. Interestingly, before the Seventh Circuit decided this case, Romania's political structure had changed dramatically such that national secrecy was no longer so important to the Romanian government. *Id.* at 1281 n.4. Because neither the plaintiffs nor the defendant brought this information before the court, the Seventh Circuit decided the case based on the facts as set forth by the district court. *Id.*

211. *Id.* at 1282.

212. *Id.* at 1282; *see* THIRD RESTATEMENT, *supra* note 48, § 442(2)(a).

In *Richmark Corp. v. Timber Falling Consultants*,[213] the Ninth Circuit adopted the balancing factors listed in Section 442 of the *Third Restatement*, citing the Supreme Court's endorsement of the *Third Restatement* in *Aérospatiale*.[214] In this case, Timber Falling Consultants (Timber) won a default judgment against Beijing Ever Bright (Beijing), a corporation owned by the government of the People's Republic of China.[215] In an effort to execute the judgment, Timber sought worldwide discovery of Beijing's assets.[216] Beijing refused to comply with the district court's discovery order, and, accordingly, the district court held Beijing in contempt and ordered the imposition of discovery sanctions on the company.[217] Beijing argued that compliance with the discovery order would force it to violate China's secrecy laws and subject its employees to criminal prosecution.[218] The Ninth Circuit applied the *Third Restatement*'s Section 442 balancing factors for comity analysis as well as two factors from the *Second Restatement* Section 40 test: extent of hardship and expectation of compliance.[219] The Ninth Circuit upheld the district court's discovery order and the imposition of sanctions.[220]

IV. CONCLUSION

Courts have not applied the Supreme Court's *Aérospatiale* comity analysis uniformly in determining whether Hague Evidence Convention procedures or the Federal Rules of Civil Procedure should be used in transnational discovery matters. Although some courts have engaged in a detailed comity analysis to determine the applicability of the Convention in transnational

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213. 959 F.2d 1468 (9th Cir. 1992).

214. *Id.* at 1474-75.

215. *Id.* at 1471.

216. *Id.*

217. *Id.*

218. *Id.* Both the district court and the Ninth Circuit explicitly accepted Beijing's contention that the People's Republic of China's State Secrets Act prohibited disclosure of the information in question. *Id.* at 1474.

219. The court noted that the *Third Restatement*'s list of factors for comity analysis in Section 442 is not exclusive. *Id.* at 1475. In addition to the Section 442 factors, the Ninth Circuit considered, "the extent and the nature of the hardship that inconsistent enforcement would impose upon the person, . . . [and] the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." *Id.* (quoting SECOND RESTATEMENT, *supra* note 107, § 40).

220. *Timber Falling*, 959 F.2d at 1471.

discovery matters, other courts turn to the Federal Rules of Civil Procedure without undertaking any meaningful comity analysis.

Because many courts face crowded dockets, the lower courts typically have favored using the Federal Rules of Civil Procedure, which they characterize as more efficient than Hague Convention procedures. As some courts have recognized, Convention procedures could become a more efficient means of conducting transnational discovery,[221] but this will not occur until courts become familiar with these procedures through use.

The Supreme Court should encourage courts to use Hague Evidence Convention Procedures, which are designed to foster cooperation between different legal systems, rather than allowing courts to defer to the familiar Federal Rules of Civil Procedure. The best way to discourage lower courts' reliance on the Federal Rules is for the Supreme Court to reconsider its *Aérospatiale* decision and adopt the "first use" rule set forth in Justice Blackmun's dissent. Not only does the "first use" rule properly place emphasis on fostering good relations with our trading partners, it also provides lower courts with a bright line rule. Alternatively, the Supreme Court could create a presumption in favor of using Convention procedures, providing that the Federal Rules of Civil Procedure may be used in transnational discovery without first use of Convention procedures only in special circumstances.

Similarly, courts have not applied a uniform analysis when conflicting laws of other states arise in transnational discovery proceedings. The Supreme Court has provided lower courts with little guidance for determining how to resolve conflicts of law arising in the context of transnational discovery. Although most courts have turned to the *Second* or *Third Restatement*'s comity analysis to resolve these conflicts, the courts' analyses have varied widely. The Supreme Court should provide courts with more guidance regarding the weight lower courts should place on the different factors in *Third Restatement*'s comity analysis.

By establishing a bright line rule mandating first resort to Hague Evidence Convention procedures for transnational discovery and expressly adopting and explaining how lower courts should apply the *Third Restatement*'s comity analysis, the Supreme Court could help the United States take a great step toward improving its relations with foreign trading partners. These actions would help foreign businesses to predict the costs

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221. *See, e.g.*, Hudson v. Hermann Pfanter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987); *In re* Perrier Bottled Water Litigation, 138 F.R.D. 348 (D. Conn. 1991.

of doing business in the United States more accurately. Further, they would encourage trade with the United States by providing foreign firms with certainty that they will be treated fairly in the United States legal system.

John C. Plaster