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THE HAGUE EVIDENCE CONVENTION: ARE FOREIGN PARTIES REQUIRED TO PROVIDE BROAD DISCOVERY IN UNITED STATES LITIGATION?

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I. INTRODUCTION

In 1970 fourteen nations, including the United States, became signatories to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention or Convention).[1] These nations, through the Convention, expressed the desire not only to accommodate the variously employed methods of dis-

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1. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (effective Oct. 7, 1972) (codified at 28 U.S.C. § 1781 (1972)) [hereinafter Hague Evidence Convention]. (Ratified by and in effect in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany (West Germany), Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden, United Kindgom, and United States). For the background to the adoption of the Convention by the United States, see generally Amram, *U.S. Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104 (1973); Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters — Message from the President of the United States*, Sen. Exec. A, 92d Cong., 2d Sess. (Feb. 1, 1972); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646 (1969); *Report of the U.S. Delegation on the Evidence Convention*, 8 I.L.M. 804 (1969).

covery but also to facilitate judicial cooperation among the signatories in civil and commercial matters.[2]

Under the Hague Evidence Convention, the standard method employed for requesting discovery is issuance of Letters of Request.[3] A judicial authority of one state may request in such a Letter the competent authority of another signatory to gather evidence[4] or "perform some other judicial act."[5] Each contracting state must designate a "Central Authority"[6] as an intermediary between the requesting judicial authority and the performing competent authority.

Article 3 of the Convention delineates what a Letter of Request should contain.[7] The requesting authority may, for example, specify the questions put to those examined[8] as well as any special method or procedure to be followed in executing the Letter.[9] The executing authority, however, may refuse to follow the requested special procedure if it is incompatible with the internal law of its state or if performance is impossible due to the state's internal practice or procedure.[10]

The executing state's judicial authority is obligated to apply appropriate compulsion measures to the same degree as it would in internal proceedings.[11] The party concerned may decline to give evidence only if he has a privilege or duty to refuse that is recognized in either the executing state[12] or in the requesting state, if that state has specified such privilege or duty in the Letter or, if at the request of the executing state, the requesting state confirms the privilege or duty.[13] On the other hand, the executing state may refuse to perform its obligations only to the extent that execution is not part of its judi-

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2. Hague Evidence Convention, *supra* note 1, Preamble.

3. *Id.* art. 1.

4. *Id.* However, no Letter may be used to procure evidence unintended "for use in judicial proceedings, commenced or contemplated." *Id.*

5. *Id.* This phrase "does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures." *Id.*

6. *Id.* art. 2. Each state's Central Authority is organized according to that state's own laws.

7. *Id.* art. 3. Article 4 declares that the Letter must be in the language of the executing state, but that state may accept a Letter in English or French unless it has specifically reserved under article 33 the right to receive a Letter only in its native language. *Id.* art. 4. The executing state's Central Authority has the responsibility to inform the requesting state of its objections to Letters which, in its opinion, do not comply with the Convention's provisions. *Id.* art. 5.

8. *Id.* art. 3(f).

9. *Id.* art. 3(i).

10. *Id.* art. 9. Normally, the executing judicial authority applies its own law regarding methods and procedures to follow. *Id.*

11. *Id.* art. 10.

12. *Id.* art. 11(a).

13. *Id.* art. 11(b).

ciary's functions[14] or the state considers such execution as compromising its sovereignty or security.[15] However, allegations of the executing state's exclusive jurisdiction over the action's subject matter or its internal law's lack of recognition of such a claim are insufficient grounds for refusal to execute a Letter.[16]

Articles 23 and 27 are probably the most important provisions of the Hague Evidence Convention for the purpose of analyzing the Convention's relationship to requests for discovery under the Federal Rules of Civil Procedure (Federal Rules). Under article 23, a signatory at the time of ratification may choose not to execute Letters requesting pre-trial discovery of documents recognized in common law countries.[17] As restrictive as this provision may be to American judicial processes, article 27 provides nations some flexibility in extending the Convention's applicability. Article 27 states: "The provisions of [this] Convention *shall not prevent* a Contracting State from . . . (b) permitting, by internal law or practice, any act provided for [herein] to be performed upon less restrictive conditions; [or] (c) permitting, by internal law or practice, methods of taking evidence other than those provided for [herein]."[18]

The foregoing examination of the Hague Evidence Convention's provisions evidences many remaining ambiguities and potential loopholes. This article briefly outlines the history of United States judicial interpretations of the Convention's impact on pre-trial discovery in American courts. This overview culminates in a detailed discussion of the United States Supreme Court's 1987 decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court (Iowa)* (*hereinafter Societe Nationale*).[19] The discussion of this case will focus on the guidelines, or lack thereof, delineated for lower federal courts in future litigation.

II. Decisions of the Federal District Courts

Five recent decisions[20] by the first three United States federal appellate courts to consider the impact of the Hague Evidence Conven-

14. *Id.* art. 12(a).
15. *Id.* art. 12(b).
16. *Id.* art. 12.
17. *Id.* art. 23.
18. *Id.* art. 27(b)-(c). Subsection (a) states that signatories are not prevented from "declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2." *Id.* art. 27(a).
19. 55 U.S.L.W. 4842 (U.S. June 15, 1987).
20. *See* Societe Nationale Industrielle Aerospatiale v. United States District Court (Alaska), 788 F.2d 1408 (9th Cir. 1986); *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986), *judgment vacated and remanded sub nom.*, 55 U.S.L.W. 4842 (U.S.

tion on pre-trial discovery in American courts have sharply narrowed the scope of potential special treatment applicable to foreign parties. Prior to these five appellate decisions, American district courts considering the domestic application of the Convention struggled with uneven results to two conceptually difficult and often intertwined questions. First, if a foreign national from a signatory nation is a party to a lawsuit in a United States court, retain discovery addressed to that party be conducted exclusively and mandatorily pursuant to the Convention? Second, if the discovery activity or proceeding is to take place physically inside the territory of a foreign signatory nation in connection with litigation in a United States court, must such discovery be conducted exclusively and mandatorily pursuant to the Convention?

The courts generally treated both questions as being related to the Convention's perceived goal of insuring that signatory nations would refrain from intruding on each other's sovereignty over the conduct of judicial affairs in their national territory. Thus, some of these decisions seemed to require use of the Convention for discovery addressed to a foreign party merely because the party was a national of a signatory country, provided such discovery, *e.g.*, interrogatories, necessarily "t[ook] place abroad" or implied "obtaining evidence within" the foreign country.[21]

Other courts reaching the same result required at least a first resort to the Convention when addressing discovery to a foreign party from a signatory nation as a matter of discretionary comity. These courts emphasized their perception that the discovery was to take place within the territory of the foreign country.[22] This "locus" anal-

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June 15, 1987); *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729 (5th Cir. 1985), *judgment vacated sub nom.*, 55 U.S.L.W. 3848 (U.S. June 23, 1987); *In re* Anschuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985), *judgment vacated sub nom.*, 55 U.S.L.W. 3848 (U.S. June 23, 1987); *In re* Ljusne Katting, A.B., No. 85-2573, slip op. _____ (5th Cir. Dec. 11, 1985).

21. *See, e.g.*, Gilbert v. Josef Timmer Mfg. Co., No. CV-81-2340 (Ala. Cir. Ct. July 5, 1983); Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); Langhans v. Johns-Manville Sales Corp., No. 535530-7 (Cal. Super. Ct. Aug. 25, 1981); Cuisinarts, Inc. v. Robot Coupe, S.A., No. DN-CV-80-0050083-S (Conn. Super. Ct. July 22, 1982) (the Convention "represents the sole avenue open to an American party wishing to obtain evidence in one of the contracting states"); Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) ¶ 17,222 (N.D. Ill. 1983) ("what is important is where the named defendant is"); Wahl v. Lufthansa German Airlines, No. 83-2-13449 (Ill. Cir. Ct. Apr. 12, 1984) (oral ruling); Cannon v. Arburg Maschinenfabrik, No. 80-L-2275 (Ill. Cir. Ct. July 21, 1983); Croxton v. Johns-Manville Sales Corp., No. L-6001-79 (N.J. Super. Ct. May 20, 1980); Worthington v. Polymer Machinery Corp., No. 83-2131 (E.D. Pa. Jan. 12, 1984).

22. *See, e.g.*, Thompson v. Continental Mach. & Tool Co., No. EC-81-181-LS-P (N.D. Miss. Sept. 21, 1983); Van Dongen v. Arburg Maschinenfabrik, No. L-71021-81 (N.J. Super. July 1, 1983); Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Augusta, S.p.A., No. 81-3984 (E.D. Pa. May 17, 1983); Cantor v. Cycles Peugeot, S.A., No. 81-0423 (D.R.I. Apr. 14, 1982). *See also* McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 959 (E.D. Pa. 1984)

ysis was relatively straightforward regarding depositions[23] and inspection of physical facilities taking place in the foreign signatory country,[24] but less clear when involving interrogatories[25] and requests for production of documents.[26]

Broad agreement emerged among the courts on only two general principles. These principles were that the Hague Evidence Convention was inapplicable to discovery conducted within the United States,[27] and that United States courts must resort to the Convention's use when seeking discovery from non-parties located in foreign signatory countries over whom the United States court had no personal jurisdiction.[28]

A separate line of cases, culminating in the Fifth, Eighth and Ninth Circuits decisions, chose to emphasize neither the nationality of the foreign party from whom discovery was sought nor the location of the witnesses, documents, or information sought for discovery purposes. Instead, for these courts, the determinative factor was that once a United States court has proper *in personam* jurisdiction over a foreign party, that party must comply with the applicable local discovery rules regardless of its foreign signatory nationality. Thus, in an influential 1984 decision,[29] federal District Judge Susan Getzendanner ordered a French corporate defendant to provide the plaintiff with answers to interrogatories and documents, even though the information and documents sought were located in France.[30] Judge Getzendanner reasoned:

> [D]iscovery does not "take place within [a state's] borders"

(producing documents located in West Germany or compelling answers to interrogatories in that country would amount to "efforts . . . substantially equivalent to producing evidence in that country") (dictum).

23. *See, e.g.*, Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686 (1984); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443 (Tex. Civ. App. 1984).

24. *See, e.g.*, Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982).

25. *See, e.g.*, Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686 (1984).

26. *See, e.g.*, General Elec. Co., Medical Sys. Div. v. Northstar Int'l, Inc., No. 83-C-0838 (N.D. Ill. Feb. 21, 1984); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443 (Tex. Civ. App. 1984).

27. *See, e.g.*, Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442, 444 (D. Del. 1982); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984).

28. *See, e.g.*, Laker Airways, Ltd. v. Pan Am. World Airways, 1 Fed. R. Serv. 3d 621 (S.D.N.Y. 1985). *See also* Pain v. United Technologies Corp., 637 F.2d 775, 788-90 (D.C. Cir. 1980) (dictum), *cert. denied*, 454 U.S. 1128 (1981).

29. Graco v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984).

30. *Id.*

> merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country. The court's view is the same with respect to people residing in another country. If they are subject to the court's jurisdiction, or if the court can compel a party to produce them under Fed. R. Civ. P. 37(d), then the court may order that they be produced for deposition; violation of the other country's judicial sovereignty is avoided by ordering that the deposition take place outside the country.[31]

Courts following this "personal jurisdiction" analysis have consistently rejected the demands of foreign parties from signatory nations that requested discovery be conducted pursuant to the Convention.[32] In several instances, these courts have found that, even if any such special treatment might be required or suggested by the Convention, it was inapplicable because a waiver had occurred either through tardy invocation of the Convention or by the party's prior reliance on local rules of procedure in propounding or responding to discovery requests.[33]

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31. *Id.* at 521.

32. *See, e.g.*, Lasky v. Continental Prods. Corp., 569 F. Supp. 1227 (E.D. Pa. 1983); International Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984) (magistrate's decision); Compagnie Francaise D'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16 (S.D.N.Y. 1984); Adidas (Canada) Ltd. v. S.S. Seatrain Bennington, Nos. 80-Civ-1911 (PNL) and 82-Civ-0375 (PNL) (S.D.N.Y. May 30, 1984) (available on LEXIS); Slauenwhite v. Bekun Maschinenfabriken, GmbH, 104 F.R.D. 616 (D. Mass. 1985) (magistrate's decision); Laker Airways, Ltd. v. Pan Am. World Airways, 103 F.R.D. 42 (D.D.C. 1984); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Pa. 1984); Cantor v. California, No. 85227 (Cal. Super. Ct. Apr. 14, 1981); Morton-Norwich Prods., Inc. v. Rhone-Poulenc, S.A., No. 6525 (Del. Ch. Nov. 24, 1981) (available on LEXIS); Wilson v. Stillman & Hoag, Inc., 121 Misc. 2d 374, 467 N.Y.S.2d 764 (Sup. Ct. 1983); McKenna v. Fiat S.p.A., No. 81-2676 (Pa. Ct. of C.P. July 20, 1983).

33. *See, e.g.*, Boreri v. Fiat. S.p.A., No. 82-02316 (D. Mass. Aug. 10, 1984) (affirming magistrate's order of Feb. 22, 1984); Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918 (S.D.N.Y. 1984); Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360 (D. Vt. 1984). *But see In re* Ljusne Katting, A.B., No. 85-2573, slip op. at 11 (5th Cir. Dec. 11, 1985) ("A civil litigant may not waive the applicability of the Convention merely by failing to invoke it as to prior discovery or early in a proceeding brought by an opponent to compel involuntary discovery."); Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876, 881 (1982) ("The Convention may be waived only by the nation whose judicial sovereignty would thereby be infringed upon."). *See also Messerschmitt*, 757 F.2d at 733-34 (foreign corporation's creation of wholly-owned United States subsidiary corporation does not by itself constitute a waiver of rights under the Hague Evidence Convention).

III. DECISIONS OF THE FEDERAL CIRCUIT COURTS

As noted, the Fifth, Eighth and Ninth Circuits relied on the personal jurisdiction analysis as the better reasoned view. Warning against the danger of allowing use of the Convention to disadvantage American parties litigating against foreign parties in the courts of the United States, these Circuits have held that the Convention cannot be used by foreign litigants as a shield to prevent pre-trial discovery by their adversaries.[34] These courts expressed their displeasure with what they perceived as costly, time-consuming, frustrating, cumbersome, and narrow discovery procedures authorized by the Convention.[35] Furthermore, the courts noted an evident lack of reciprocity between the liberal approach taken by the United States (allowing broad evidence-gathering inside its territory) and the normally restrictive European approach (allowing almost none or no American-style discovery).[36]

Rejecting a number of lower court decisions giving great deference — and even pre-emptive, mandatory effect — to the Convention, the

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34. Two other federal appellate courts have discussed the potential impact of the Hague Evidence Convention on United States discovery without deciding any of the possible conflicts arising from the Convention. *See* Boreri v. Fiat S.p.A., 763 F.2d 17, 19-20, 24-25 & nn.4, 5, 8 & 9 (1st Cir. 1985); Pain v. United Technologies Corp., 637 F.2d 775, 788-90 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

35. In France, for instance, a Letter of Request will be executed only if it is in the French language or accompanied by a translation in French; Letters can only be executed through the Civil Division of International Judicial Assistance at the French Ministry of Justice in Paris, to which they must be sent by the American court.

36. West Germany, for instance, has declared pursuant to Article 23 of the Convention, that "it will not, in its territory, execute Letters of Request for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." *See generally* Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Shemanski, *Obtaining Evidence in the Federal Republic of German: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465 (1983). Similar difficulties are encountered by United States litigants in the United Kingdom. The Hague Evidence Convention is implemented in England by the Evidence Proceedings in Other Jurisdictions Act of 1975, which grants the High Court power to issue orders requiring persons within England to give evidence or produce documents for use in foreign courts. The Act limits discovery to such matters as would normally be permissible in English civil proceedings. Accordingly, the Act requires that: (a) document requests must separately and specifically describe each document that is sought; (b) documents to be produced or testimony to be given must be sought for use at trial and thus must be admissible at trial; and (c) broad privileges from discovery available under English law must be recognized (English law recognizes some evidentiary privileges different from those under United States law). *Id.* A recent application of the Act is found in *Re* Asbestos Insurance Coverage Cases, [1985] 1 All E.R. 716. There, the House of Lords refused to require the production of documents requested for United States litigation because they were not described with sufficient particularity in the Letter of Request. Similarly, English courts will not order a deposition without evidence of "considerable probative weight" providing "strong prima facie grounds for believing that [the deponents] could give admissible evidence." Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 635 (opinion of Lord Diplock).

three federal appellate courts required French, West German, and Swedish corporations to submit to broad pre-trial discovery requests pursuant to the Federal Rules, rather than in accordance with the Convention's Letter of Request procedure.

The circuit courts' rulings in effect required the European litigants to answer requests for admissions and interrogatories, produce documents, and provide desposition witnesses without compliance with Convention procedures, even though the necessary information, documents, and witnesses were physically located in the foreign signatory nations. In one of the five cases, however, it was held that when the discovery at issue is physical inspection of a manufacturing plant located in the foreign country, it initially must be sought through the Convention mechanism.[37]

In the first of the five decisions, *In re Anschuetz & Co., GmbH*,[38] the Fifth Circuit ruled that a West German corporation defending a third-party product liability complaint in a United States district court in Louisiana must locally provide the third-party plaintiff with responses to interrogatories, production of documents, and deposition witnesses pursuant to the Federal Rules.[39] The requested information and documents were physically located in Kiel, West Germany, and the deponents, employees of the West German corporation, were residents of Kiel. Although West Germany, like the United States, is a Convention signatory, the Fifth Circuit held that resort to the Convention was not necessary to obtain discovery from the West German party.[40] Judge Brown, writing for the majority, stated: "After much reflection, we conclude that the Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign, Hague Convention state nationals, subject to *in personam* jurisdiction in a United States Court."[41]

Shortly thereafter, in *In re Messerschmitt Bolkow Blohm GmbH*,[42] the Fifth Circuit reiterated its *Anschuetz* holding. It required a West German corporation defending a helicopter crash ac-

37. *In re* Ljusne Katting, A.B., No. 85-2573, slip op. _____ (5th Cir. Dec. 11, 1985).

38. 754 F.2d 602 (5th Cir. 1985), *judgment vacated sub nom.*, Anschuetz & Co., GmbH v. Mississippi River Bridge Auth., 55 U.S.L.W. 3848 (U.S. June 23, 1987).

39. 754 F.2d at 603.

40. *Id.* at 602.

41. *Id.* at 604. Perhaps ironically, although Judge Brown spoke in his *Anschuetz* opinion about the danger of allowing a foreign party to gain an advantage over a "United States adversary" through use of the Hague Evidence Convention in a court of the United States, *id.* at 606, the party seeking the discovery at issue in the case was defendant Compania Gijonesa de Navegacion, S.A., not an American party but a Spanish corporation; Spain is not a signatory to the Convention.

42. 757 F.2d 729 (5th Cir. 1985), *judgment vacated sub nom.*, Messerschmitt Bolkow Blohm GmbH v. Walker, 55 U.S.L.W. 3848 (U.S. June 23, 1987).

tion in Texas federal district court to produce locally to the plaintiff documents physically located in West Germany and deposition witnesses who were West German citizens employed by the defendant in West Germany.[43]

In the third Fifth Circuit opinion dealing with the Convention, the court, in *In re Ljusne Katting, A.B.*,[44] ruled that a Swedish manufacturer of anchor chains defending a shipwreck case in Texas must produce its officers, directors, or managing agents for deposition in Houston without resort to Convention procedures.[45] However, the court did hold that, as a matter of international comity, the Convention procedures should be used when issuing a subpoena to a Swedish resident and in connection with a requested inspection of the Swedish corporation's manufacturing plant located in Sweden.[46]

More recently, the Eighth Circuit, in *Societe Nationale*,[47] cited with approval the *Anschuetz* and *Messerschmitt* decisions. The court required two government-owned French corporate defendants litigating an airplane accident case in Iowa to respond to plaintiffs' interrogatories, requests for admissions, and requests for production of documents, despite the information's and documents' physical presence in France.[48] The Eighth Circuit observed that French judicial sovereignty would not be disturbed by this request for discovery. "[O]ur ruling will not require any discovery to take place in France,

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43. 757 F.2d at 731.

44. No. 85-2573, slip op. at 10 (5th Cir. Dec. 11, 1985).

45. *Id.* at 11.

46. *Id.* at 10, 12.

> An order to enter a place in Sweden and a subpoena to a Swedish resident must be issued by the appropriate judicial authority in Sweden, after resort to the Hague Convention. . . . [I]f the Hague Convention procedures fail to produce [disclosures "equivalent" to those obtained under the Federal Rules of Civil Procedure], other procedures and sanctions are available. The Hague Convention procedures should, therefore, be given an opportunity to prove their worth.

Id. The Fifth Circuit cited as authority for its holding that a physical inspection inside the territory of a foreign signatory nation requires compliance with the Convention Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982). There, the Alameda County, California, Superior Court had ordered a West German corporate defendant to permit plaintiff to inspect and photograph its automobile manufacturing plant in Wolfsburg, West Germany. Finding that mandating such discovery under the California Discovery Act might violate "West German judicial sovereignty," the First District Court of Appeals vacated the order below. The court concluded, as a matter of international comity, that the Convention "provides an obvious and preferable alternative means of obtaining evidence from within West Germany." *Id.* at 859, 176 Cal. Rptr. at 885.

47. 782 F.2d 120 (8th Cir. 1986), *judgment vacated and remanded sub nom.*, Societe Nationale Industrielle Aerospatiale v. United States District Court, Iowa, 55 U.S.L.W. 4842 (U.S. June 15, 1987).

48. 782 F.2d at 122. For a more detailed factual and procedural discussion of this case, see *infra* notes 58-71 and accompanying text.

and therefore the Convention's purpose of protecting French judicial sovereignty will not be undermined."[49]

Similarly, in *Societe Nationale Industrielle Aerospatiale v. United States District Court (Alaska)*,[50] the Ninth Circuit rejected the claim of a French government-owned corporate defendant in a helicopter crash action in Alaska. The defendant argued that the plaintiff's request for production of documents located in France, relating to service problems with the helicopter, must be propounded in accordance with the Convention.[51] In a brief *per curiam* opinion, the court held that, although possible resort to Convention procedures should be considered in every case as a matter of international comity, the Convention is not the exclusive vehicle for obtaining documents located within the territory of a foreign signatory.[52]

In all five cases, the European defendants sought to be allowed to respond to the plaintiffs' discovery requests through the procedures set forth in the Convention, rather than the Federal Rules. However, the three appeals courts categorically rejected the notion that the Convention could be invoked as a mandatory or pre-emptive method of discovery by foreign parties superseding the Federal Rules.[53]

The Fifth, Eighth, and Ninth Circuits left open the Convention's possible application to certain kinds of "particularly intrusive"[54] discovery — *e.g.*, depositions to be held inside the national territory of a signatory nation — as a matter of voluntary or discretionary international comity. Besides physical inspections of facilities located in a foreign signatory nation, only two methods of discovery possibly required applications of the Convention acknowledged by the appellate courts exist. These methods are when discovery is to be obtained

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49. 782 F.2d at 124-25.
50. 788 F.2d 1408 (9th Cir. 1986).
51. *Id.* at 1409.
52. *Id.* at 1408.
53. The Fifth Circuit observed in *Anschuetz*:

> [T]he federal rules and a federal treaty [are] essentially on equal footing . . . . The Federal Rules of Civil Procedure have the force and effect of federal statutes . . . . In many circumstances, conflict of such laws may be resolved by applying a last in time rule causing the most recent law to supersede. . . . In this instance, however, where ratification of the Hague Convention occurred after adoption of the federal rules, but before the 1980 and 1983 amendments to those rules, none of which mentioned the Convention, we decline to make such an apparently arbitrary ruling.

754 F.2d at 608 n.12 (citations omitted). The court made no reference to the September 6, 1984, preliminary draft of proposed amendments to the Federal Rules of Civil Procedure which would amend Rule 28(b) to include the Letter of Request terminology of the Hague Convention when depositions are to be taken in foreign countries. *See* Preliminary Draft Pamphlet, Comm. on Rules of Practice 7 Procedure of the Judicial Conference of the United States, Fed. R. Serv. 2d (Sept. 1984).

54. *Anschuetz*, 754 F.2d at 615.

from a non-party, including a party's non-managerial employees, over whom the United States court lacks personal jurisdiction, and where the evidence sought must be obtained inside the territory of a foreign signatory to the Convention.[55]

IV. THE 1987 SUPREME COURT DECISION

In lieu of a Supreme Court decision clarifying the role of the Convention when invoked in United States litigation, the Fifth, Eighth, and Ninth Circuit decisions became strong authority for a developing majority view that the Convention does not supersede the obligations of foreign parties to comply with domestic discovery procedures when litigating in American courts.[56] In 1983 and 1984, the Supreme Court considered two cases in which it could have dealt with the discovery problems raised by the Convention but it declined both opportunities. Rather the Court dismissed both appeals without opinion on the ground of lack of jurisdiction.[57]

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55. *E.g., Societe Nationale (Alaska)*, 788 F.2d at 1411, n.3; *Societe Nationale*, 782 F.2d at 125; *Ljusne Katting*, No. 85-2573, slip op. at 9; *Messerschmitt*, 757 F.2d at 733; *Anschuetz*, 754 F.2d at 615.

56. After the Fifth Circuit's decision in *Anschuetz*, its "personal jurisdiction" analysis was followed in *Messerschmitt*, *Ljusne Katting*, and the two *Societe Nationale* cases, and in: Work v. Bier, 106 F.R.D. 45 (D.D.C. 1985) (magistrate's order) (requiring West German corporate and individual defendants to submit to depositions and answer interrogatories in the United States, as well as to produce documents located in West Germany, pursuant to Federal Rules rather than the Convention); Testerion, Inc. v. Skoog, Civ. No. 4-84-911 (D. Minn. Aug. 9, 1985) (available on LEXIS) (denying motion for protective order by West German corporation, a counterclaim defendant, requesting that counterclaim plaintiffs propound all their discovery requests pursuant to the Hague Evidence Convention); Lowrance v. Weinig, 107 F.R.D. 386 (W.D. Tenn. 1985) (denying motion for protective order by West German corporate defendant seeking to avoid producing documents located in West Germany and answering interrogatories where plaintiff did not propound discovery pursuant to the Hague Evidence Convention); Wilson v. Lufthansa German Airlines, 108 A.D.2d 393, 489 N.Y.S.2d 575 (1985) (requiring West German corporate defendant to provide discovery to plaintiffs without resort to the Hague Convention). *But cf.* Gebr. Eickhoff Maschinenfabrik & Eisengieberei mbH v. Starcher, 328 S.E.2d 492 (W. Va. 1985) (although the Convention is not the exclusive means by which American litigants may obtain evidence located abroad, as a matter of international comity third party plaintiffs should first resort to Convention procedures to seek discovery from third party defendant, a West German corporation).

57. In Volkswagenwerk A.G. v. Falzon, 104 S. Ct. 1260 (1984), at issue were orders of a Michigan state trial court directing Volkswagen, a West German corporate defendant, to allow twelve of its present and former employees — all West German nationals — to be deposed by the plaintiffs at Volkswagen's plant in Wolfsburg, West Germany, pursuant to the Michigan civil procedure rules. In Club Mediterranee, S.A. v. Dorin, 105 S. Ct. 286 (1984), a French corporation defending a personal injury action in the New York state courts had been directed to answer plaintiff's interrogatories pursuant to the state's civil procedure rules. The defendant's contention was that the Convention had to be followed because the information and corporate officers needed to answer the interrogatories were located in France. The Court was given a third useful opportunity to review this area of the law. On October 7, 1985, as it did previously in the *Falzon* and *Dorin* cases, the Court requested the Solicitor General to file a brief presenting the views of the United States government in connection with the petitions for

Finally, in 1987 the Court tackled this issue. In *Societe Nationale II*, the U.S. Supreme Court held that the Hague Evidence Convention did not provide exclusive or mandatory procedures for obtaining documents and information from a foreign litigant.[58] The decision in *Societe* arose from a suit alleging negligence and breach of warranty following a plane crash in Iowa which injured the two American plaintiffs.[59] The defendant, a French corporation which manufactured the plane that crashed, responded to discovery requests by seeking a protective order from the U.S. District Court for the Southern District of Iowa on the ground that the Hague Evidence Convention procedures were mandatory and the plaintiffs' discovery requests had not complied with them.[60] The district court refused to issue the protective order and the defendant sought a writ of mandamus from the U.S. Court of Appeals for the Eighth Circuit. The Court of Appeals, in denying the petition for mandamus, held that the Hague Evidence Convention did not apply to the production of evidence in the foreign litigant's possession so long as the district court has jurisdiction over the foreign litigant.[61]

The U.S. Supreme Court reversed the Eighth Circuit Court of Appeals conclusion that the Convention "does not apply" to discovery requests made to foreign litigants that are subject to the jurisdiction of an American court. The Supreme Court held that while the Convention does not provide exclusive or mandatory procedures for discovery of materials or information in a foreign signatory's territory, the Convention procedures are available when they will facilitate the gathering of evidence.[62]

In holding that the Convention procedures are an optional means of obtaining materials and information located in a foreign signatory's territory, the Supreme Court limited the conditions under which the Convention procedures are applicable. The Court first held

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certiorari filed by the West German litigants in the *Anschuetz* and *Messerschmitt* cases. 106 S. Ct. 52 (1985). In his brief, filed on March 24, 1986, Solicitor General Charles Fried suggested that the Supreme Court should deny certiorari review, because "we believe that the court of appeals' decisions, while containing some troublesome language, are essentially correct." Brief for the United States as Amicus Curiae, at 6. The Solicitor General went on to urge, however, that in accordance with "principles of international comity," American courts should utilize Convention procedures "in appropriate cases to avoid unnecessary international friction resulting from American procedures for pretrial discovery." *Id.* at 8. The Supreme Court at first granted certiorari review in the *Messerschmitt* case on April 21, 1986; then, on June 9, 1986, it vacated that order. 106 S. Ct. 2887 (1986). Simultaneously, however, it granted certiorari review in the Eighth Circuit's *Societe Nationale* case, also on June 9. *Id.* at 2888.

58. Societe Nationale v. United States District Court, S.D. Iowa, 107 S. Ct. 2542 (1987).
59. *Id.* at 2546.
60. *Id.* at 2546-47.
61. *Id.* at 2547-48.
62. *Id.* at 2554.

that a general rule of first resort to the Convention procedures was not required under the language of the Convention.[63] The Court then held that comity considerations should be addressed by district courts based on the reasonableness and intrusiveness of discovery requests as they are made.[64] Although the Supreme Court did not establish any specific rules to guide the district courts for the prevention of abusive discovery requests, it did state that American courts should be conscious of foreign interests and sensitive to concerns of foreign litigants based on nationality and sovereignty interests.[65]

The dissenting opinion in *Societe Nationale II* agreed that the Hague Evidence Convention does not establish exclusive discovery procedures but argued that a case by case approach undermines the political branches that negotiated and ratified the Convention and fails to respect sovereignty and comity considerations as fully as the Convention does.[66] The dissent, unlike the majority, would follow a general rule of first resort to Convention procedures rather than render the Convention to an optional or advisory role.[67] Moreover, the lack of standards in the majority opinion for consideration of comity issues may create the same problems that the Convention was designed to resolve.[68]

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63. *Id.* at 2554-55. The majority held that a rule of first resort would be unwise since the Hague Convention procedures would be "unduly time consuming and expensive' and less likely to produce the evidence needed than the Federal Rules of Civil Procedure. This additional delay and expense would be in conflict with the "overriding interest" in "just, speedy, and inexpensive" determination of litigation in U.S. courts.

64. *Id.* at 2555-56. U.S. district courts will address comity limitations on discovery requests in future cases on a case by case basis. The majority in *Societie Nationale II* expressly abstained from setting specific rules to guide the district courts but stated that the reasonableness of discovery requests "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".

65. *Id.* at 2557.

66. *Id.* at 2558-62. The dissent by Justice Blackmun asserted that the majority decision limiting the effect of the Hague Convention is not consistent with the principle of separation of powers. The issue of foreign evidentiary discovery is best addressed by the Executive and Congress, and the courts are ill equipped to balance the interests of the United States and foreign nations. Moreover, too few judges have experience in international affairs or sufficient knowledge of foreign legal systems to enable the judiciary to effectively recognize and deal with the relevant interests of foreign litigants.

67. *Id.* at 2558 and 2567. Justice Blackmun stated that a general "rule of first resort" approach would not be be a rigid rule and the traditional comity analysis employed by courts would be appropriate in a case where it appears that evidence will not be given under the Hague Convention procedures. Even then, the Hague Convention procedures would assist in determining what discovery requests would be accepted by another state.

68. *Id.* at 2568.

V. Conclusion

The Supreme Court decision in *Societe Nationale II* does not fully resolve the uncertainty over the application of the Hague Evidence Convention. The decision did settle the conflict in the circuit courts on whether the Convention procedures were applicable, but the conditions under which they are to be followed were not articulated in the majority opinion. Therefore, the circumstances under which the Hague Evidence Convention procedures will be applied remain unclear, and the Hague Convention procedures will continue to be applied without uniform standards.