THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

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Presented by:

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Bob is the author of "Document Retention In the Electronic Age" *FICC Quarterly*, Vol. 51, No. 3, Spring 2001; "The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters" *FDCC Quarterly*; Vol. 53, No. 4, Summer 2004; "An Overview of Successor Liability Law" (To Be Published); "ISO 9000 and the European Directives: Application to Product Liability Litigation in the United States" *IDC Quarterly*, Vol. 9, No. 3, Third Quarter 1999; "False Arrest: Good Faith a Defense to Section 1983 Actions" 15 *Insurance Law Journal* 1213, 1974; "Use of Neutron Capture Gamma Rays for a Lunar Surface Compositional Analysis," 6 *Transactions of the American Nuclear Society* 179, 1963; and "Scintillation Spectrometer Measurements of Capture Gamma Rays from Natural Elements," *Private Report to the Atomic Energy Commission*, 1962.

He also was the author of "American Briefing," which appeared monthly in *Product Liability International*, Lloyds of London Press, Ltd., and wrote the Illinois Chapter in *Product Liability Defense - A State-by-State Compendium*, published by the Defense Research Institute.

Bob is also a frequent lecturer on the subject of Product Liability litigation and Risk Prevention. He has been certified as an Amusement Ride Safety Inspector by the National Association of Amusement Ride Safety Officials. He is also a licensed commercial pilot with multi-engine and instrument ratings, an avid skier and a sailor. He and his crew are Chicago-Mackinac Race winners and have won the Chicago Offshore Championship, as well.

Bob has had extensive trial and appellate experience in State and Federal courts and is a member of the Trial Bar of the United States District Court for the Northern District of Illinois. He is licensed to practice before the United States Patent Office, the United States Court of Appeals for the Seventh Circuit, the United States Supreme Court and the United States Court of Customs and Patent Appeals, as well as several U.S. District Courts and Courts of Appeal. He is a member of the state bars of both Illinois and Texas. In addition, he is an active member of the Product Liability and International Sections or Committees of the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel, the Illinois Association of Defense Trial Counsel, the Defense Research Institute and the American Bar Association.

Bob has been lead counsel on numerous multi-million dollar cases ranging from severe burns to quadriplegia and sudden death. He has successfully defended, on trial and appeal, more than 150 product liability cases involving toys and sporting equipment, amusement rides, medical devices, heavy industrial machinery, chemicals and other complex mechanical and chemical systems. Of this number only a very slight percentage of trials resulted in verdicts for the plaintiff, and each such verdict was substantially less than the pre-trial offer. On a *pro hac vice* basis, he has practiced before state and federal courts in more than 30 States.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters helps govern discovery in United States litigation when a party to the suit or even a third party is a foreign entity. The primary purpose of this Convention is to resolve the differences between the liberal discovery rules in the United States and more restrictive rules of foreign nations. Another purpose of the Hague Convention on Evidence is to codify the taking of depositions on notice and commission before consuls and court appointed commissioners. Other stated purposes include providing a means for securing evidence in such a manner as would be needed by the court where the action is pending and preserve favorable and less restrictive discovery practices that are set forth in individual countries' laws, rules, procedures and all international treaties and conventions.

Historically, differences in the various legal systems around the world have created barriers to discovery of evidence located outside the jurisdiction of the court where the cause of action is pending. For instance, in civil law systems, the judge controls the presentation of the evidence. No "pretrial" discovery exists, especially in countries such as Germany and Japan. In these nations, the judge will gather evidence over time through a series of hearings and written acts.

The evidence will be presented in a piecemeal fashion rather than in one long trial. Civil law countries also do not have preparation of witnesses. The lawyer will nominate a witness regarding a specific topic and then argue the significance of that testimony. In Germany, contact of non-party witnesses is actually unethical, so not only can you not prepare witnesses, but you cannot contact other witnesses to determine what he or she might say. Even if you want to prepare your witness, this may serve to your own disadvantage. In Germany, the testimony of prepared witnesses will be given very little weight, if any, by the judge.

Similar to the Hague Convention on the Service of Process, the Hague Convention on Evidence requires the designation of a Central Authority to receive Letters of Request, which are described below. Signatories have issued declarations that set forth the "Central Authority." These declarations also state whether the country has excluded the application of various portions of the Hague Convention, namely Articles 23 or 33. To determine whether a country has objected to these Articles, one should consult the declarations filed by that specific country.

Although the Hague Convention on Evidence states procedures by which foreign evidence can be obtained, the Convention is not the exclusive means for obtaining evidence. Later in my speech, I shall focus on the applicability of the Hague Convention on Evidence, as discussed in *Societe Nationale Industrielle*

Aerospatiale v. U.S. District Court for Southern District of Iowa, a case which decided whether the Hague Convention is the exclusive vehicle for obtaining discovery from foreign litigants or if discovery can be pursued under the Federal Rules of Evidence, and possible avenues of relief for burdensome discovery.

Under the Hague Convention and Federal Rules, one can take the deposition of willing witnesses but only under specific conditions. Some countries require case-by-case permission from the foreign central authority before the deposition can be taken. Article 17 of the Convention allows court appointed officers to take depositions but the restrictions are similar to the ones imposed on consular officers. Some countries, such as Denmark and Portugal, prohibit depositions by court appointed commissions. The United Kingdom approves depositions based on reciprocity. When arranging consular depositions, one deals directly with the American Embassy for that country. The U.S. consular officer will administer the oath. The counsel requesting the deposition must arrange for the witness's transportation, etc. and must provide the translator if necessary. Additionally, many countries do not have court reporters or interpreters. The duty to supply these services falls on the attorney requesting the deposition.

I would like to take a moment to comment on depositions and testimony taken outside of the United States. First, I highly recommend that the depositions should be videotaped. Because the individual is most likely outside the

subpoenaing power of the court, a videotape of the testimony will be easier for the judge or jury to understand. The videotape is a better method of presentation of the testimony. Second, if you decide to have the deposition videotaped, verify that the tape is formatted for play in the United States. Converting the video to the format used in the United States can be difficult and expensive. Many services will format for the United States. In a worst case scenario, you could always bring a videographer or at least the video camera and tapes from the United States to that country in order to procure a properly formatted videotape of the deposition.

Evidence may be compelled under the Hague Convention through the usage of a Letter of Request. The U.S. Court will send the request to the foreign central authority to compel production of evidence or testimony. The request should be translated into the official language of the country. One must be careful regarding the specific country in which the documents may be located. Many countries, except the Czech Republic, Israel, the Slovak Republic and the United States have objected to portions of Article 23 regarding the production of pre-trial discovery. 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 purposes of obtaining pre-trial discovery of documents as known in Common Law countries."

A few countries have enacted "blocking statutes" that make it illegal to produce documents or give testimony. A foreign entity being compelled to comply with discovery can apply for relief based on its own country's "blocking statute," a statute enacted to block the broad discretion of U.S. discovery. A district court will either require the party to comply or issue a protective order based on the statute. Although not mandatory, the district court must consider the foreign law when deciding whether or not to compel compliance.

Once such instance is the French statute that forbids a party from discovering information or documents from a French national. The United States courts have held that information is discoverable in spite of these statutes. In a footnote in *Aerospatiale*, the U.S. Supreme Court notes that these statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute." In fact, the Supreme Court noted that such an exercise of French legislation would be dictating to a United States district court judge what he may or may not do. The lesson to be learned by the dueling discovery practices is not that one statute or practice has more authority over the other. Instead, when considering whether to apply the Hague Convention on Evidence or the Federal Rules, such practices should be taken into consideration. If a witness or individual producing documents is uncomfortable with giving testimony or documents because of the

laws of that nation, the deposition and documents can be taken in another, perhaps adjoining, country that does not have such restrictive laws.

A Letter of Request is a document, under the authority of the United States courts, that asks the foreign state to allow evidence to be produced under the authority of its judicial system and pursuant to its own procedures and limitations. If a nation has signed the Hague Convention on Evidence, it is required to honor the request unless it prejudices its sovereignty or security or the request is not a function of its judiciary. The Letter of Request may ask for a specific method or procedure. If the procedure is compatible, then the request for the specific method should be granted. The Hague Convention on Evidence does allow for some flexibility in procedures and discovery. However, such procedures and discovery are limited by the internal statutes, cases, and procedures of the foreign nation.

To obtain the Letter of Request, one must make a motion pursuant to Rule 28(b) for the court to issue the Letter of Request. The Letter must specify the evidence to be obtained or the other judicial act to be performed. Additionally, the Letter must be in the language of the executing authority or accompanied by a certified translation into that language. The court will determine whether the issuance of the Letter of Request is reasonably calculated to lead to the discovery of admissible evidence and will issue the Letter on terms that are just and appropriate.

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for Southern District of Iowa*, the Supreme Court held that if a district court has personal jurisdiction over a foreign litigant, the Hague Convention procedures are not the exclusive means for obtaining discovery. The Supreme Court reasoned that the language of the Hague Convention was permissive thus its terms were not mandatory. As stated in the Convention, the purpose was to "facilitate the transmission and execution of Letters of Request" and to improve cooperation in judicial civil or commercial matters. Additionally, if the Supreme Court held that the Hague Convention was the sole means for obtaining foreign discovery, the sovereignty of the U.S. courts would be greatly undermined. Instead, the Hague Convention is another tool available when it would facilitate the gathering of evidence.

The United States Supreme Court stated that the preamble to the Hague Convention on Evidence does not speak in mandatory terms nor describe permissible transnational discovery and exclude all other existing practices. The Convention does not require nations to institute laws that implement the procedures nor does it require the nations to change their current practices to conform to the Hague Convention on Evidence. Supporting its opinion that the Convention is permissive rather than mandatory, the Supreme Court stated that the "absence of any command that a contracting state must use Convention

procedures when they are not needed is conspicuous." The Court points to the first paragraph of Article 1 of the Convention for its support. Article 1 states:

> In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

In determining whether discovery should proceed under the Hague Convention or the Federal Rules of Evidence, the U.S. court will consider the particular facts of the case, the sovereign interests involved, the burden placed on the foreign litigant by the proposed discovery, and the likelihood that the Convention would be an effective discovery device. The litigant requesting to use the Hague Convention rather than the Federal Rules of Evidence must show why the balancing test weighs in favor of using the Convention and not the Federal Rules.

In determining the balancing test, the Supreme Court looked to the Restatement (Third) of the Foreign Relations Law of the United States. The Court noted some factors to be used in determining the outcome of the balancing test. Those factors are: the importance to the litigation of the documents/information requested; the specificity of the request; if the information originated in the U.S.; the availability of alternative means to obtain the information; and the effects of noncompliance on the interests of the United States and the interests of the foreign country.

After service of process, a court will generally allow limited discovery on the issue of jurisdiction without resorting to the Hague Convention. The sole purpose would be to determine whether the court has jurisdiction over the defendant or not. District courts have stated that the Hague Convention should be used in situations where the evidence must be adduced abroad, such as depositions or facility inspections.

When obtaining evidence from a foreign affiliate, the Federal Rules of Evidence most likely will apply. The test for obtaining the information under the Federal Rules is whether the information is in the party's custody or control.

If you are seeking discovery from a foreign party, that party can seek a protective order from the court to proceed under the rules established in the Hague Convention on Evidence. The court will use the previously described factors and balancing test in order to determine whether it should issue such a protective order or to proceed under the Federal Rules. To try to make sure such a protective order is not issued, litigants should ensure that the discovery sought is narrowly tailored and targeted at obtaining discreet and material information. The second factor in the balancing test, the sovereignty of the other nation, often necessitates the review of privacy and privilege laws of that nation and whether noncompliance with the requested discovery would undermine the interests of the United States. Regarding the last factor, whether the Hague Convention's method would be efficient and productive, the courts will look to the time and expense

involved when proceeding under the Hague Convention as compared to the Federal Rules. The courts will also consider whether the other nation will allow such discovery methods.

If you are seeking discovery from a non-party entity, you should proceed under the rules set forth in the Hague Convention. For discovery from a non-party entity located outside of the United States, Letters Rogatory or Letters of Request may be used. See 22 C.R.F. § 92 and Federal Rules of Civil Procedure 28(b). You can also contact the Office of International Judicial Assistance at the Department of Justice in Washington, D.C.

I previously mentioned Letters of Request and the lengthy process necessary to use this method. For discovery, this method should be used to compel a nonparty foreign witness if the Hague Convention cannot be used. The foreign court has complete discretion in determining whether the Letter of Request will be executed or not. You are literally at the mercy of their discretion.

Let us take a look at the form of a Letter of Request. Under Article 7, you must state in the letter that the requesting party would like to be notified of the time and place of the proceedings. Under Article 9, the executing authority will apply its own law to the methods and procedures to be followed. In common law countries, the methods are similar to the U.S. Documents are requested and produced. In civil countries, facts are deduced through various hearings rather than through depositions and document productions. If the requesting party

wishes to follow the American system (the taking of an oath and a verbatim transcript), this must be specially requested, pursuant to Article 9, in the Letter of Request. The executing authority must make a substantial effort to comply but need fully comply with the request. Article 11 does provide for the assertion of privilege to refuse to give evidence.

If the discovery is too burdensome or if you wish to raise a privilege that the court refuses to accept, the penalty for non-compliance may be a sanction you are unwilling to chance. In such a case, one can use a "trick" to obtain Judicial Review of the ruling without taking the chance that if you do not eventually prevail you will have lost your case. The court can compel discovery, the party can refuse to comply, the court will issue a contempt citation and then the party can challenge the order on direct appeal of the contempt ruling. Thus, an interlocutory appeal can be heard on the discovery matter once the citation for contempt has been issued. Any party wishing to receive relief from discovery or Judicial Review can pursue this avenue. See, for example, *Bicek v. Quitter*, 38 Ill.App.3d 1027, 350 N.E.2d 125 (1976).

One last note before I give you some practice hints for obtaining foreign evidence. In many civil nations, experts are treated rather differently than in the United States. Instead of seeking out an expert who will give favorable testimony, the judge will usually chose the expert from an official list. The lawyers will give that expert the information and instruct her on the facts to

assume or investigate and frame the questions the court wishes to hear. The parties can witness the expert's activities such as interviewing a witness or reviewing an accident scene, however, other activities are done in private. The expert can question either party and witnesses to obtain evidence. Once the expert submits his findings, the court will determine the significance of those findings. The court can question the expert or require supplemental findings.

If you want to use a foreign expert for purposes of your own litigation in the United States, you must fully brief the expert on what to expect from discovery. You must inform him of the documents he will need to produce and the cross-examination to expect from opposing counsel. Foreign experts are typically not prepared for the onslaught of American discovery so it is necessary to inform her of the procedures so she can comply.

A few practice hints:

Practice Hints for obtaining Evidence:

1. Narrowly tailor discovery requests to the issues presented in the case. If the defendant is contesting personal jurisdiction, limit discovery to the issue of jurisdiction, proceed under the Federal Rules and move for a decision regarding jurisdiction prior to attempting any further discovery.

2. If objections are made, attempt to resolve them through discussion. Many times foreign litigants might want to avail themselves of the benefits of the Federal Rules, show good faith, avoid Rule 37 sanctions and possibly file a counterclaim against the U.S. entity.

3. If you need to take a deposition abroad, determine if the witness is willing and that the foreign country does not have a prohibition against the taking of the deposition. If so, the deposition can proceed under the Federal Rules by

stipulation, notice or commission. If you plan on taking the deposition in another country, make sure you have it videotaped and the videotape is formatted for viewing in the United States.

4. If proceeding under the Hague Convention, seek particular documents, not just all documents under the party's control. For example, do not request a blanket request for all correspondence but, rather, all correspondence from and between Party A and Party B from 2002 relating to Insurance Policy Number 123456. Also, the documents must exist and cannot be merely a potentially existing document.

5. Use a Letter Rogatory if you cannot proceed under the Hague Convention on Evidence. Proceed under the Hague Convention, when possible, for non-party witnesses and document productions. A Letter Rogatory should be used in instances where the nation where the individual or entity is located is not a signatory to the Hague Convention on Evidence.

6. If the discovery is too burdensome, one can apply for relief. If the court has applied the Federal Rules of Evidence, a party can move for the application of the Hague Convention on Evidence. The court will determine, based on the balancing test and additional factors, whether the Federal Rules will apply or the Hague Convention. If you are representing a foreign entity and wish to avoid broad American discovery, file for a protective order and seek to follow the rules set forth in the Hague Convention on Evidence. Then prior to the hearing on the motion, work with opposing counsel to narrow the scope of the discovery requests so they are more manageable and not so broad.

7. If a litigant seeks relief for a particular set of discovery, an interlocutory appeal can be pursued. The court must compel a litigant to comply with the discovery, a litigant must fail to comply with discovery, the court must issuance a contempt citation and the litigant can then appeal the contempt citation on discovery matters.

Conclusion

Overall, the basic underpinnings of the Hague Conventions on the Service of Judicial and Extrajudicial Papers Abroad and the Hague Convention on the

Taking of Evidence Abroad in Civil or Commercial Matters seek to create a minimal level for all signatory nations to meet for the appropriate topic. By coming together under the auspices of the Hague Conventions, the nations implicitly recognize a need to be sensitive to other cultures and other laws. As Justice Stevens noted in the majority opinion for *Aerospatiale*, “American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or location of its operations, and for any sovereign interest expressed by a foreign state.” Justice Stevens also stated that the American courts should be vigilant in protecting foreign litigations from “the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”

Bibliography

Besides the texts of the actual Hague Conventions, attached to the text of this speech, I also used the following sources:

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