OBTAINING EVIDENCE IN FRANCE FOR USE IN UNITED STATES LITIGATION

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I. INTRODUCTION

Taking discovery pursuant to American-style discovery procedures is a markedly different proposition than conducting discovery in civil law countries such as France.[1] In civil law countries, American-style discovery has traditionally been unknown, and attempts by American litigants to conduct discovery in civil law countries pursuant to United States procedural rules have met with a variety of hostile responses from foreign governments.[2]

In the United States, three sources of procedural rules exist for the taking of evidence abroad. First, the United States is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Convention or Convention).[3] These discovery rules are available to civil and commercial law litigants in both federal and state trial courts when the evidence sought to be discovered is located in a country which is a signatory to the Convention. Second, various Federal Rules of Civil Procedure (FRCP) are available to effectuate foreign discovery in actions in federal district courts.[4] Finally,

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1. *See, e.g.*, CHRISTINE LÉCUYER-THIEFFRY & PATRICK THIEFFRY, LE RÉGLEMENT DES LITIGES CIVILS ET COMMERCIAUX ENTRE LA FRANCE ET LES ÉTATS-UNIS, 107-23 (1985); Patrick Thieffry, *European Integration and Transnational Litigation*, 13 B.C. INT'L & COMP. L. REV. 339, 356-57 (1990).

2. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 107-11; Thieffry, *supra* note 1, at 345-47.

3. Hague Convention for the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention]. The text of this Treaty is incorporated into the United States Code at 28 U.S.C. § 1781 (1988).

4. *E.g.*, the Walsh Act, 28 U.S.C. § 783 (1988), in conjunction with FED. R. CIV. P. 45(b)(2), for evidence pursuant to subpoena of U.S. nationals living abroad or residents of foreign countries; FED. R. CIV. P. 28(b), the principle provision under the federal rules for taking depositions abroad; FED. R. CIV. P. 34, requests for production of documents; Testimony in a Foreign Country, 37 C.F.R. § 1.684 (1993), U.S. Patent and Trademark Office rules relating to foreign depositions in patent interference proceedings. These measures are only available, however, if the persons from whom discovery is sought are subject to personal jurisdiction of U.S. courts. Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 394 (1990).

On April 22, 1993, the United States Supreme Court forwarded to Congress a series of amendments to the Federal Rules of Civil Procedure that included an amendment to FED. R. CIV. P. 28(b) relating to the taking of depositions abroad. Pursuant to the amendment, depositions may henceforth be taken, *inter alia*, pursuant to the provisions of the Hague Convention. Unfortunately, this amendment and the Committee Notes

state procedural rules, similar in terms and effect to the federal rules governing foreign discovery, are available in state court proceedings when foreign discovery is sought.[5] As will be seen, whether discovery abroad will be effectuated pursuant to the Hague Convention or pursuant to federal or state procedural rules is entirely within the discretion of the American trial court. To date, American courts have shown a strong bias against the Hague Convention.

In contrast to American-style discovery, the amount and types of discovery permitted in civil law countries is quite limited. Conflict results when American litigants attempt to avail themselves of United States-style discovery practices in civil law jurisdictions, as many civil law countries consider American discovery practices to be encroachments upon their internal security and judicial sovereignty. Consequently, a number of nations have passed legislation limiting the ability of foreign parties to conduct discovery upon their soil.[6] These statutes tend to be penal in nature, and are typically called "blocking" or "nondisclosure" statutes. The French enacted a blocking statute in 1980 in response to United States litigants' continued disregard of Hague Convention procedures.[7] This statute prohibits parties within its purview from requesting or producing evidence for use in foreign judicial proceedings other than through the procedures provided for by the Hague Convention, other international treaties, or express provisions of French law.[8]

In France, therefore, the only viable means of obtaining evidence for use in American proceedings without confronting French blocking legislation is the Hague Convention. The French Code of Civil Procedure[9] was amended to accommodate the Hague Convention. The

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which follow do not shed new light on the conflict between American procedural rules and the Hague Convention. In fact, they may further confuse the issue. Nonetheless, the amendment became law on December 1, 1993, barring further Congressional action.

5. Born & Hoing, *supra* note 4, at 406.

6. *E.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act, Austl. Acts. 1976 No. 121 (Austl.); Uranium Information Security Regulations, CAN. STAT. O. & R., 76-664 (P.C. 1976-2368, Sept. 21, 1976) (Can.); Protection of Trading Interests Act, 1980, ch. 11 (Eng.), *reprinted in* 47 Halsbury's Statutes 454, 456-57 (4th ed. 1988).

7. Law No. 80-538, Relating to the Communication of Economic, Commercial, Industrial, Financial, or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 D.S.L. 285 (Fr.). *See* LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 108, 120; Darrell Prescott & Edwin R. Alley, *Effective Evidence-Taking Under the Hague Convention*, 22 INT'L LAW. 939, 969 (1988).

8. Prescott & Alley, *supra* note 7, at 969.

9. Nouveau Code de Procédure Civile [C. PR. CIV.] (Dalloz 1993) (Fr.).

amendment allows for limited American-style discovery and examination of witnesses pursuant to letters of request from foreign courts.[10] Although France initially made a declaration forbidding the taking of common law-style, pre-trial discovery of documents when signing the Hague Convention,[11] it expressly modified this reservation in January of 1987.[12] Specifically, France declared that it will execute letters of request that seek pre-trial production of documents, provided the requested documents are enumerated in a letter of request made pursuant to the Hague Convention and have a direct and clear nexus with the subject matter of the litigation.[13]

Notwithstanding the amendments to the Code of Civil Procedure to conform to the Hague Convention's discovery provisions, discovery in France is still more limited than in the United States. With this in mind, it becomes incumbent upon the party seeking discovery in France to utilize to the greatest extent possible the pre-trial document discovery procedure permitted by France since 1987.

II. THE ABSENCE OF "DISCOVERY" IN FRANCE, UNITED STATES "EXPORTATION" OF AMERICAN DISCOVERY PRACTICES, AND THE FRENCH BLOCKING STATUTE

A. *The Absence of Discovery in France*

France's reluctance to allow discovery for use in United States litigation is due to the virtual nonexistence of American-style discovery in the French civil justice system.[14] In France, the party alleging the

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10. *Id.* arts. 138-39.

11. Hague Convention, *supra* note 3, art. 23.

12. Official Response from French Justice Ministry to Maître Patrick Thieffry (June 12, 1987). According to the French Justice Ministry,

> [L]e 19 janvier 1987, la France a modifié sa déclaration faite lors de la ratification de la Convention de la Haye...et accepte les commissions rogatoires qui ont pour objet la procédure de 'pre-trial discovery of documents' lorsque les documents demandés sont limitivement énumérés dans la commission rogatoire et ont un lien direct et précis avec l'objet du litige.

Id.

13. *Id.*

14. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 107-9.

facts has the burden of proving them, which is normally done by introducing written documents into evidence.[15] As a practical matter, the only significant qualification to this rule is that, prior to a hearing on the merits, the parties must exchange the documents upon which they intend to rely so that each party has the opportunity to analyze and elaborate upon the other's proofs.[16] While parties have the right to ask the court to order the production of a document,[17] this right is exercised only for particularly important documents, and court assistance in this respect is notoriously limited.[18] Furthermore, pre-trial depositions and interrogatories are almost completely unheard of in civil law countries.[19] In France, document demands and interrogatories are possible only with leave of the court.[20] Discovery from non-parties is not available except in personal injury actions, and the circumstances for which such discovery is available are more restricted than in the United States.[21] These narrow rules prevent "fishing expeditions" for evidence for use in United States legal proceedings.

During hearings, an equivalent to United States interrogation of witnesses via direct and cross-examination does not exist.[22] Written proofs are the principal form of evidence offered in most French proceedings.[23] A judge rarely allows for the appearance of witnesses or parties before the court.[24] The Code of Civil Procedure, however, does permit the judge to take oral testimony of witnesses.[25] For example, Articles 184-198 regulate personal appearances of one or more parties and Articles 204-230 regulate the appearance of non-party witnesses.[26] In both cases, however, no direct or cross-examination is permitted since the judge is the only party permitted to conduct questioning.[27] Each party

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15. *Id.* at 141-46.
16. *Id.* at 115-16. *See* C. PR. CIV. arts. 132-37.
17. C. PR. CIV. arts. 138, 142.
18. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 115-16.
19. *Id.* at 128-31.
20. C. PR. CIV. art. 134.
21. *Id.* arts. 138-41.
22. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 128-31.
23. *Id.* at 141-44. *See also* C. PR. CIV. art. 134.
24. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 128-129.
25. C. PR. CIV. arts. 132-42, 730-48.
26. *Id.* arts. 184-98, 204-30.
27. *Id.* at 128.

must give its opponent the evidence upon which it intends to rely.[28] More importantly, a party can petition the court to issue a subpoena compelling other parties or third parties to produce evidence.[29]

In a civil law system, expert testimony principally may be received only from court-appointed experts, who generally are not subject to oral examination.[30] In practice, the French expert plays somewhat the same role as the American court-appointed magistrate insofar as he is considered to be a neutral factfinder who issues conclusions based upon evidence presented by all parties. The parties attend meetings with the expert and, in some cases, are accompanied by their own "technical advisers."[31] In their pleadings and oral arguments before the court, the parties will debate the court appointed expert's findings.[32] The broad powers of court-appointed experts somewhat compensate for the absence of pre-trial discovery, at least with respect to technical and financial issues.[33] Attempting to convince the expert that he should compel the production of certain information or documents from an opponent is a tactic that somewhat parallels American-style discovery.

B. The French-American Discovery War

The United States has been a signatory to the Hague Convention since 1972, yet, as will be seen, United States courts have shown a strong preference for United States procedural rules as a means of effectuating discovery overseas. In its 1987 *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* decision,[34] the United States Supreme Court held that, notwithstanding the United State's adoption of the Hague Convention, discovery conducted on foreign soil for use in American proceedings need not necessarily be effectuated pursuant to the Hague Convention and instead may be carried out pursuant to federal or state rules of civil procedure. Lower federal and state court decisions rendered in the wake of *Aérospatiale* have uniformly discouraged use of the Convention, showing

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28. *Id.* art. 132.

29. *Id.* arts. 138, 142.

30. C. PR. CIV. art. 232.

31. *Id.* art 233.

32. LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 128-29.

33. *Id.* at 119.

34. Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522 (1987).

a strong preference for federal and state court rules.[35] In the face of America's historical predilection for use of its own procedural rules, many foreign countries have been reluctant to permit American-style discovery on their soil and have reacted with blocking legislation.[36]

1. *Aérospatiale* and Its Progeny: Hague Convention Procedures Held Nonexclusive

The United States Supreme Court held in *Aérospatiale* that the Hague Convention does not provide the exclusive and mandatory procedure for obtaining discovery in the territory of a foreign signatory,[37] and that there is no requirement that the Convention's procedures be used first.[38] The discovery controversy in *Aérospatiale* arose when the plaintiffs served the French defendants with requests for documents under Rule 34 of the FRCP, a set of interrogatories pursuant to FRCP 33, and a request for admissions pursuant to FRCP 36.[39] Subsequently, the defendants sought a protective order, insisting that, because they were French, the Hague Convention was the exclusive means by which discovery could be accomplished.[40] The defendants further argued that in, accordance with the French blocking statute,[41] they were forbidden to respond to discovery requests that did not comply with the Hague Convention.[42]

The Supreme Court held that, in theory, the Hague Convention is available to litigants "whenever [it] will facilitate the gathering of evidence by the means authorized in the Convention."[43] The Court held,

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35. *See generally* Stephen F. Black, *United States Transnational Discovery: The Rise and Fall of the Hague Evidence Convention*, 40 INT'L & COMP. L. Q. 901, 901-06 (1991) (showing how European negotiators doomed success of Hague Convention due to misunderstanding U.S. pre-trial discovery); Born & Hoing, *supra* note 4, at 393-407; Spencer Webber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 110 (1993).

36. *Id.*

37. *Aérospatiale*, 428 U.S. at 529.

38. *Id.* at 534.

39. *Id.* at 525.

40. *Id.*

41. For an English language article devoted to this statute, *see* Brigitte E. Herzog, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981).

42. *Aérospatiale*, 482 U.S. at 526 n.6.

43. *Id.* at 541.

however, that the trial court must undertake a case-by-case comity analysis to determine whether the Convention or the Federal Rules of Civil Procedure are to be utilized.[44] The trial court must consider: (1) the particular facts of each case; (2) the sovereign interests involved; and (3) the effectiveness of applying the Hague Convention.[45] The Court further signaled that particular attention should be paid to additional factors, including the importance of the documents or other information requested to the litigation, the degree of specificity of the request, the place where the information originated, the availability of other means of securing the information, the extent to which non-compliance with the request would undermine important United States interests, and the extent to which compliance with the request would undermine important interests of the country where the evidence is located.[46]

The Court suggested that certain simple discovery requests might be granted pursuant to United States procedural rules regardless of the availability of Convention procedures.[47] The Court also suggested that lower courts should be mindful of the following factors in supervising pre-trial proceedings: (1) the danger that unnecessary or unduly burdensome discovery might place foreign litigants at a disadvantage, given the additional cost of transporting documents or witnesses to and from foreign locations; (2) the danger that foreign discovery might be used for the improper purpose of motivating settlement instead of finding relevant and probative evidence; (3) the presence of special problems incurred by a foreign litigant stemming from its nationality or the location of its operations; and (4) any sovereign interest expressed by the subject foreign state.[48] Critically, the Court stated, "[w]e do not articulate specific rules to guide this task of adjudication."[49]

In response to *Aérospatiale*, most trial courts have avoided the delicate balancing process called for by the United States Supreme Court and have simply allocated the burden of proof to the party opposing the

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44. *Id.* at 544.

45. *Id.*

46. *Id.* at 544, n. 28 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437(1)(c) (1986)).

47. *Aérospatiale*, 482 U.S. at 545-46.

48. *Id.* at 546.

49. *Id.*

use of the Federal Rules of Civil Procedure.[50] The Federal Courts of Appeal called upon to review federal trial court decisions relating to the Convention's applicability have given almost complete deference to the discretion of the trial court.[51]

Rich v. KIS California, Inc.[52] is representative of such federal trial court decisions.[53] In *Rich*, the French proponent of the Hague Convention had the burden of demonstrating the necessity of using Hague Convention procedures.[54] This burden was not met because only simple discovery requests were at issue, specifically, ten interrogatories helping to establish jurisdictional facts for determining the propriety of exercising personal jurisdiction over the French defendant.[55]

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50. Waller, *supra* note 35, at 110. *See also* Born & Hoing, *supra* note 4, at 401-02. Born observed that trial courts: (1) have found the *Aérospatiale* comity analysis to be cumbersome and unhelpful; (2) have almost uniformly held that the party seeking to obtain first use of the Convention bears the burden of proof that comity requires such a result; and (3) have virtually never required litigants to abstain from direct extraterritorial discovery from foreign witnesses and instead resort in first instance to the Convention. *Id.* For state court cases that ruled on the availability of the Hague Convention, *see, e.g.*, Orlich v. Helms Bros., Inc., 560 N.Y.S.2d 10 (App. Div. 1990) (modifying trial court's discovery order to compel use of Hague Convention is "virtually compulsory"); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188 (Sup. Ct. 1988) (denying motion to compel use of Hague Convention); Sandsend Financial Consultants, Ltd. v. Wood, 743 S.W.2d 364 (Tx. App. 1988) (holding that trial court did not abuse its discretion by not invoking Hague Convention). *See also* David Westin & Gary B. Born, *Applying the Aérospatiale Decision in State Court Proceedings*, 26 COLUM. J. TRANSNAT'L L. 297 (1988).

51. *See, e.g.*, Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604 (3d Cir. 1991) (holding that trial court abused its discretion when it dismissed case for forum non conviens when discovery had been substantially completed); In re Anschuetz & Co. GmbH., 838 F.2d 1362 (5th Cir. 1988) (allowing district court discretion in applying discovery rules).

52. 121 F.R.D. 254 (M.D.N.C. 1988).

53. *See* In re Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J. 1987) (denying defendant's motion of use of Hague Convention because defendant failed to meet burden of establishing facts or sovereign interests and did not allege any special problems because of nationality or location of operations); Haynes v. Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988) (denying defendant's motion for use of Hague Convention because its use would prove more costly and time consuming than domestic discovery methods); Doster v. Schenk, 141 F.R.D. 50 (M.D.N.C. 1991) (denying defendant's motion for use of Hague Convention because defendant failed to satisfy burden of proof).

54. *Rich*, 121 F.R.D. at 257-58.

55. *Id.* at 258.

A few federal trial courts have endorsed use of the Hague Convention.[56] In *In re Perrier Bottled Water Litigation*,[57] the court held that the party who seeks application of Hague Convention procedures rather than the FRCP bears the burden of persuasion.[58] Notwithstanding adherence to this general principle, however, the court held that the Convention was applicable.[59] The court noted that the discovery sought was extremely broad and voluminous.[60] Further, the court concluded that discovery would impinge upon France's sovereign interests given: (1) France's strong objections to the Federal Rules of Civil Procedure; (2) its strong preference for the Convention as witnessed by the amendment of the French Civil Procedure Code to conform with Hague Convention; and (3) its enactment of a blocking statute to prescribe gathering of evidence outside of the Convention.[61] Finally, the court noted that Convention procedures would be effective given France's amendment of its Rules of Civil Procedure.[62]

Gould, Inc. v. Pechiney Ugine Kuhlmann[63] illustrates the federal appellate courts' complete deference to trial courts. The Sixth Circuit held that a trial court need not require conformity to the Hague Convention.[64] The defendants had previously refused to comply with discovery requests because the requests were not made pursuant to the Convention and the French blocking statute might subject the defendants to penal sanctions.[65] The trial court was ordered to follow *Aérospatiale* and analyze the particular facts, sovereign interests, and likelihood that resort to Hague Convention procedures would prove effective.[66]

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56. *See, e.g.*, Hudson v. Herman Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (holding use of Hague Convention did not unfairly prejudice opposing party).

57. 138 F.R.D. 348 (D. Conn. 1991).

58. *Id.* at 354.

59. *Id.* at 356.

60. *Id.* at 354.

61. *Id.* at 355.

62. *In re Perrier*, 138 F.R.D. at 355-56.

63. 853 F.2d 445 (6th Cir. 1988).

64. *Id.* at 452 n.6.

65. *Id.*

66. *Id.*

2. The French Blocking Statute and the United States Judiciary's Response

The French blocking statute[67] prohibits persons from either requesting or producing evidence for use in foreign judicial proceedings other than through the Hague Convention procedures, other applicable international treaties, or specific provisions of French law.[68] In one respect, this law is not a true blocking statute because it merely forces litigants to utilize Hague Convention procedures.[69] The French Senate did state, however, that the statute could be used as a bargaining chip with French parties involved in foreign litigation.[70] American courts

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67. The statute 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.
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> The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosure.

This translation of Law No. 80-538, *supra* note 7, art. 1-bis was utilized by the U.S. Supreme Court in *Aérospatiale*, 482 U.S. at 526 n.6.

68. *See* Prescott & Alley, *supra* note 7, at 969.

69. *Id.*

70. A report issued by the French Senate relating to the blocking law stated the legislative history surrounding the passage of the law:

> Discovery in the American legal system is very different from the means employed for the gathering of evidence in France. In the United States, these procedures are for the most part controlled by the litigants and are easily subject to abuse given that judicial supervision or authorization is normally absent. The French Civil Code, in contrast, affords to the judge vast and exclusive powers over the gathering of evidence.
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> In addition to the absence of judicial supervision, the American system allows for the taking of oral proofs, the result being a further extension of the investigatory powers of the litigants.
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> It is therefore the case that American litigants come to France without the knowledge of the French authorities to seek testimony for trial or in anticipation of trial, and engage in "fishing expeditions" for evidence. Foreign "commissioners," judges, lawyers, legal experts, or

have reacted with contempt toward blocking statutes. In *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,[71] the Supreme Court held that blocking statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence, even though the production of such evidence violates a blocking statute.[72] *Rogers* requires a court to examine three factors in deciding whether to compel discovery where a litigant confronts a blocking statute: (1) the importance of the policies underlying the United States statute which forms the basis for the plaintiff's claims; (2) the importance of the requested documents in illuminating key elements of the claims; and (3) the degree of flexibility in the foreign nation's application of its nondisclosure laws.[73] In *Aérospatiale*, the Court stated that such statutes do not require American courts to look to the Hague Convention as a first resort when seeking to effectuate international discovery.[74]

A number of American courts had addressed the 1980 French blocking legislation prior to the *Aérospatiale* decision. *Federal Trade*

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administrators venture to foreign countries in order to take depositions or obtain documents on behalf of their clients for present or future litigation. French law has heretofore not redressed practices such as these, which are contrary to our notions of public order and prejudicial to French citizens.

Furthermore, such pseudo-investigations are conducted for purposes which cannot be considered legal proceedings, for example, they are initiated by American administrative or regulatory bodies that lack jurisdiction for the purpose of monitoring compliance with American antitrust legislation. Another example is common law pre-trial discovery which serves to provide evidence to parties seeking to determine whether they have a legally redressable claim. This procedure is totally contrary to the basic principles underpinning our civil procedure code, and cannot be deemed a legal proceeding.

To complete the invasion of our sovereignty, these investigations are effectuated pursuant to procedural laws of the American state in which the court is sitting, many such rules being fundamentally offensive to our basic principles of civil procedure, e.g., freedom afforded to the plaintiff to pursue its investigations with impunity.

LÉCUYER-THIEFFRY & THIEFFRY, *supra* note 1, at 108 (citing Rapport du Sénat français préparatoire de la loi du 16 juillet 1980).

71. 357 U.S. 197 (1958).

72. *Id.* at 204-05.

73. *Id.*

74. *Aérospatiale*, 482 U.S. at 526 n.6.

Commission v. Compagnie de Saint-Gobain-Pont-à-Mousson[75] was the first American decision to include a discussion of the 1980 French blocking legislation.[76] *Saint-Gobain* arose out of the Federal Trade Commission's (FTC) investigation of the fiberglass insulation industry for possible antitrust violations, an investigation which included a probe of the French fiberglass manufacturer Saint-Gobain.[77] The FTC served the French holding company of Saint-Gobain via registered mail in Paris with four subpoenas *duces tecum*.[78] The main issue before the court was whether serving process on Saint-Gobain in Paris via United States certified mail pursuant to the Federal Trade Commission Act[79] was proper.[80] The court recognized that proper service of process under United States law would create an obligation to produce the subject documents, and that the wide-scale American pre-trial discovery in the field of antitrust that was then taking place overseas was prompting a number of countries to enact blocking legislation.[81] The court also speculated, pursuant to *Rogers*, that whether the presence of the French law would excuse a party's failure to comply with a subpoena would depend upon both the party's good faith efforts to secure a waiver from the French government of the blocking statute and a weighing of the respective interests of both the United States and France.[82] In dicta, the

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75. 636 F.2d 1300 (D.C. Cir. 1980). Shepard's erroneously states that this case was reversed at 934 F.2d 1188 (11th Cir. 1991). SHEPARD'S FEDERAL CITATIONS 233 (Supp. 1991-92).

76. *Id.* at 1325-27.

77. *Id.* at 1302.

78. *Id.* at 1304-05.

79. 15 U.S.C §§ 41 *et. seq.*.

80. *Id.* at 1306-07. The court found that accepted principles of international law did not condone such a mode of service, specifically, that the act of serving compulsory process violated the rule that one sovereign may not exercise its enforcement jurisdiction in the territory of another. *Id.* at 1313 n.67. The court's real task was to interpret the service provisions of the FTC Act. It held that the means of service chosen by the FTC did not comport with the customary and legitimate methods of effectuating service employed by American courts and administrative agencies. On that basis, the District of Columbia Court of Appeals reversed the trial court's order to enforce the FTC subpoena. *Id.* at 1306-07.

81. *Saint-Gobain*, 636 F.2d at 1325-26.

82. *Id.* at 1326 n.148. In an unusual gesture of judicial comity, the court suggested that, in an attempt to obtain an interpretation of the French blocking statute (a new statute at the time), "a district court might see fit to defer to the judgment of a foreign court regarding the applicability of the law." *Id.*

court stated that where two interpretations of a law are possible, it would interpret the law in the way least likely to conflict directly with the laws of another country (*e.g.*, the French blocking statute).[83]

The next decision to involve the French blocking statute, *Soletanche & Rodio, Inc. v. Brown & Lawbrecht, Inc.*,[84] was a patent infringement action brought by the American subsidiary of a French company against an American company. The American defendant served the plaintiff subsidiary with several interrogatories relating to the validity of the patent at issue.[85] The subsidiary refused to comply with the discovery request, arguing that the information sought was in the sole possession of its French parent, who was prohibited from divulging the information under the French blocking statute.[86] The court responded by issuing an order compelling either responses to the interrogatories or dismissal of plaintiff's suit.[87] Plaintiff moved to have the order vacated.[88]

Because compliance with the order would necessarily violate the French blocking statute, the court noted that French and American laws imposed inconsistent discovery obligations on the parties.[89] Relying upon the Ninth Circuit Court of Appeals' decision in *United States v. Vetco, Inc.*,[90] the court employed a five-part comity analysis to ensure that the respective interests of the parties and sovereigns would receive due consideration.[91] The analysis required examination of: (1) the national interests of each country; (2) the hardships to be endured by each party in the absence or presence of full discovery; (3) the country in which discovery would have to be made; (4) the nationalities of each party; and (5) the expectation that the various parties would have to comply with the respective national laws.[92]

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83. *Id.* at 1327.

84. 99 F.R.D. 269 (N.D. Ill. 1983).

85. *Id.* at 270.

86. *Id.* The French parent and that company's French parent were made involuntary plaintiffs to the action. *Id.*

87. *Id.*

88. *Id.* at 271.

89. *Soletanche*, 99 F.R.D. at 271.

90. 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

91. *Soletanche*, 99 F.R.D. at 271.

92. *Id.*

The court held that the American interest in not enforcing an invalid patent outweighed the French interest of protecting industrial documents, particularly in a case in which a plaintiff is seeking protection under American law from patent infringement while also seeking to avoid compliance with the accompanying requirements of American discovery law.[93] No hardship on the plaintiff was found in light of the fact that the French parents could apply to the French government for a waiver of the blocking statute.[94] The court noted that, in any event, the blocking statute required them to notify French authorities of the discovery request.[95] The court did not address the other comity factors because no hardship existed, thus compliance would be required even if the waiver was denied.[96] Therefore, the order mandating discovery was not dismissed.[97] In conclusion, the court suggested that failure to comply with the order would be grounds for dismissal without prejudice and with leave to reinstate the case upon compliance with the discovery request.[98]

In *Wilson v. Stillman & Hoag, Inc.*,[99] the plaintiff moved to obtain discovery from the French automobile manufacturer Peugeot in an action relating to a malfunctioning automobile.[100] Peugeot sought a protective order for the purpose of avoiding discovery.[101] Relying upon *Rogers*, the court held that the French blocking law did not per se bar the American court from ordering discovery or sanctions in the absence of compliance with its order.[102] Interestingly, the court interpreted the blocking statute as applying only to matters that involve "the national interests of France," or the "sovereignty, security, or essential economic interests of France," and not the economic interests of private French entities like Peugeot.[103] The court found no proof that Peugeot might be subject to criminal sanctions by the French were it to submit to

93. *Id.*

94. *Id.*

95. *Id.*

96. *Soletanche*, 99 F.R.D. at 272.

97. *Id.*

98. *Id.*

99. 467 N.Y.S.2d 764 (Sup. Ct. 1983).

100. *Id.* at 764.

101. *Id.*

102. *Id.* at 764-65.

103. *Id.* at 765.

discovery[104] because no French court had decided the issue.[105] Presumably in reference to *Rogers*, the court noted that Peugeot had not applied for a waiver of the statute's provisions.[106] In light of these considerations, Peugeot's motion for a protective order was denied.[107]

The *Graco, Inc. v. Kremlin, Inc.*[108] court offered an additional means of avoiding the French blocking law. It suggested that the French blocking statute could be avoided in part by removing sought-after documents from France and by conducting depositions of affected parties outside of France![109]

Adidas (Canada) Ltd. v. SS Seatrain Bennington,[110] featured a motion by a French litigant for protection from an American request for depositions and document production. The court was most critical of the French blocking statute, stating:

> It is inconceivable that [the blocking statute] is to be taken at face value as a blanket criminal prohibition against exporting evidence for use in foreign tribunals. For if it were, French nationals doing business abroad would be at the mercy of their business counterparts: they would be unable to redress breaches and frauds committed against them by suit in foreign courts since they would be barred from supporting their claims with their documents.
>
> One must conclude at the very least that exemptions from the statute's prohibitions are liberally available upon request...the legislative history of the statute gives strong indications that it was never expected or intended to be enforced against French subjects but was intended to

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104. *Wilson*, 467 N.Y.S.2d at 765.

105. *Id.*

106. *Id.*

107. *Id.* at 766. This decision is also curious because the court read the blocking statute in conjunction with France's adoption of the Hague Evidence Convention, and determined that the blocking statute as implemented by the Hague Convention was not a bar to discovery on the facts. While this is an accurate statement, the court neither gave a basis for its understanding of the interplay between the blocking statute and the Hague Convention, nor demonstrated an awareness of France's amendment of its Code of Civil Procedure to conform to the Hague Convention.

108. 101 F.R.D. 503 (N.D. Ill. 1984).

109. *Id.* at 521.

110. No. 80 Civ. 1911, No. 82 Civ. 0375 (S.D.N.Y. May 30, 1984).

> provide them with tactical weapons and bargaining chips in foreign courts.[111]

It concluded that the French company's predicament was "apparent rather than real," or rather, a result of its failure to request an exemption.[112] Thus, the motion for a protective order was denied.[113]

In the criminal case of *United States v. Gonzalez*,[114] the Second Circuit Court of Appeals, citing *Saint-Gobain*, noted that the French blocking statute was designed only to protect French businesses from excessive discovery in hostile foreign litigation.[115] Given the facts before it, the court held that a Filipino citizen charged in the United States with defrauding the French branch of a Portuguese bank could not invoke the French blocking statute in order to exclude documents that the French bank had volunteered for admission into evidence.[116]

In *Compagnie Française d'Assurance pour le Commerce Exterieur, et al v. Phillips Petroleum Co.*,[117] a French shipbuilder and

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111. *Id.* at 10. Footnote 4 of the decision states:

> A report to the French National Assembly recommended the law's adoption on the ground that it would offer French nationals a "legal excuse for refusing to supply the information and documents demanded of them [and] a juridical weapon which will at least make it possible for them to gain time. The conflict thus created will block matters for a time and will make it impossible to raise the conflict to a governmental level." With respect to the potential penalties, the report noted that "it is necessary not to misunderstand the actual scope of these penalties . . . [since] . . . these penalties are applied only on the improbable assumption that the companies would refuse to make use of the protective provisions offered to them. In all other cases, these potential fines will assure foreign judges of the judicial basis for the legal excuse which companies will not fail to make use of.

Id. at 10 n.4. *See* Nat'l Assembly Comm. on Production and Exchanges (Deputy Mayoud), Report No. 1814, 2d Sess., June 19, 1908, at 61, 63-64, Ex. 5 (Joint Appendix of *Seatrain and Navi Fonds*).

112. *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, No. 80 Civ. 1911, No. 82 Civ 0375 slip op. at 10 (S.D.N.Y. May 30, 1984).

113. *Id.*

114. 748 F.2d 74 (2d Cir. 1984).

115. *Id.* at 78.

116. *Id.*

117. 105 F.R.D. 16 (S.D.N.Y. 1984).

its French government insurer brought an action against a Liberian company and the Liberian company's American parent for breach of contract to purchase two natural gas tankers.[118] The defendants sought discovery of documents from the French plaintiffs, to which the plaintiffs interposed the defenses of governmental and executive privilege as well as the French blocking statute.[119] The judge ordered the plaintiffs to obtain a waiver of the blocking statute from the French government, which plaintiffs putatively obtained in part.[120] The defendants then moved to compel the production of the remainder of the documents.[121]

Much of the court's discussion turned on the pre-*Aérospatiale* analysis of whether to employ the Hague Convention or the Federal Rules of Civil Procedure to effectuate discovery in France, an issue which required further consideration of the blocking statute.[122] The plaintiffs contended that Articles 11 and 21 of the Hague Convention expressly exempted parties from complying with discovery requests when they would subject the party to sanctions pursuant to blocking legislation.[123] Relying on *Adidas*, the court held that the Hague Convention was inapplicable to a French party resisting document production in an American court because application of both the Convention and blocking statute would effectively place French litigants at a tactical advantage.[124]

Noting that the French and American laws imposed inconsistent discovery obligations on the parties, the court employed the comity analysis of *Soletanche*.[125] The court found an American interest in complete American-style discovery as a means of ensuring the full and fair adjudication of disputes in United States courts.[126] This interest was the protection of American nationals from unfair disadvantage when a blocking statute would unilaterally benefit foreign litigants.[127] France's interests were evidenced by the blocking statute and the potential hardship

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118. *Id.* at 21-22.

119. *Id.* at 22-23.

120. *Id.* at 24.

121. *Id.*

122. *Phillips Petroleum*, 105 F.R.D. at 26-32.

123. *Id.* at 26.

124. *Id.* at 28.

125. *Id.*

126. *Id.*

127. *Phillips Petroleum*, 105 F.R.D. at 30.

that would befall the French parties if they provided discovery in contravention of the blocking statute.[128] The court, citing *Adidas*, *Gonzalez*, and *Graco*, found that the French blocking statute was enacted merely to provide French litigants with a bargaining chip and a tactical advantage in foreign proceedings.[129] The court opined that plaintiffs could avoid potential French sanctions under the blocking statute simply by dropping the suit.[130] The court interpreted the French National Assembly Report as stating that penalties were only to be enforced against companies that failed to raise the blocking statute as a shield against discovery, thereby addressing the issue of whether compliance with the blocking statute could realistically be expected.[131] In conclusion, the court stated that plaintiffs could not come into American courts seeking redress from injury, and yet neglect their responsibility to disclose all relevant facts to their adversary, particularly in light of the "questionable motives" behind the French blocking statutes.[132]

Finally, *Great American Boat Company v. Alsthom Atlantic, Inc.*[133] involved a discovery request in the form of interrogatories and requests for the production of documents made to the French manufacturer Alsthom. Alsthom had moved to stay discovery pending resolution of a Motion to Compel Arbitration, which was denied.[134] Before deciding whether to stay proceedings, the court must examine: 1) whether the movant has made a showing of likelihood of success on the merits; 2) whether the movant has made a showing of irreparable injury if the stay is not granted; 3) whether the granting of the stay would substantially harm the other parties and 4) whether granting the stay would be in the public's interest.[135] The court determined that potential penalties to Alsthom flowing from the French blocking statute were but one factor to consider.[136] The court reproached Alsthom for failing to request a waiver of blocking statute sanctions from the French

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128. *Id.*

129. *Id.*

130. *Id.* at 31.

131. *Id.*

132. *Phillips Petroleum*, 105 F.R.D. at 31.

133. 1987 U.S. Dist. LEXIS 2805 (E.D. La. 1987).

134. *Id.* at *10.

135. *Id.* at *4-5 (quoting United States v. Baylor Univ. Medical Ctr., 711 F.2d 38 (5th Cir. 1983)).

136. *Id.* at *5.

government, and imposed penalties in the form of attorney fees and costs for its refusal to comply with discovery.[137]

Only two of the three major American cases subsequent to *Aérospatiale* have addressed the French blocking statute: *Rich v. KIS California, Inc.*, and *In re Perrier Bottled Water Litigation*. The court's discussion of the French blocking statute in *In re Perrier* was relegated to a footnote.[138] The *Rich* court, however, expressed contempt for the French statute.[139] In examining the "sovereign interest" element of the three-prong *Aérospatiale* analysis for determining whether to employ the Hague Convention or the Federal Rules of Civil Procedure, the court stated:

> The only factor defendants present is the French Blocking Statute. However, this statute, which is solely designed to protect French businesses from foreign discovery, is both overly broad and vague and need not be given the same deference as a substantive rule of law. In general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference.[140]

Notwithstanding opinions of American courts to the contrary, it is highly unlikely that a party subject to the French blocking statute could secure a waiver of compliance from the French government. Consequently, it the only sure means of effectuating discovery in France without confronting the French government is via the Hague Convention.

III. AVOIDING THE FRENCH BLOCKING STATUTE: THE HAGUE CONVENTION AND THE IMPLEMENTING PROVISIONS OF THE FRENCH CODE OF CIVIL PROCEDURE

The Hague Convention[141] provides two basic means for gathering evidence. Chapter I of the Convention sets forth the "letter of request" procedure.[142] This is the method of international judicial assistance

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137. *Id.* at *5-7.

138. *In re Perrier*, 138 F.R.D. at 352-53 n.3.

139. *Rich*, 121 F.R.D. at 258.

140. *Id.* (citations omitted).

141. 28 U.S.C. § 1781.

142. *Id.* arts. 1-14.

most commonly utilized by civil law systems and under which the production of evidence may be compelled. Chapter II of the Convention provides for the taking of evidence by diplomatic officers or commissioners, a procedure which is roughly analogous to the common law practice of taking evidence abroad by notice, stipulation, or through court-appointed commissioners.[143]

Of particular interest to the American practitioner is the amendment the French Code of Civil Procedure rendering effective the use of the Hague Convention.[144] More specifically, France amended its Code of Civil Procedure in an attempt to accommodate letters of request sought to be executed via American-style discovery practices.[145]

A. *The Hague Convention*

1. Chapter I Letters of Request

Letters of request are written requests for evidence, such as document requests, made by a United States judge to a foreign sovereign asking that evidence be provided under the Convention.[146] These letters must be sent to the designated central authority of the subject country without being transmitted through any other authority of that state.[147] A letter of request must contain the following information: (a) the authority requesting its execution and the authority requested to execute it, if known; (b) the names and addresses of the parties to the proceedings and their representatives, if any; (c) the nature of the proceedings for which the evidence is required; and (d) the evidence to be obtained or other judicial act to be performed.[148] Where appropriate, the letter shall also specify, *inter alia*: (a) the names and addresses of the persons to be examined; (b) the questions to be put to the person to be examined or a statement of the subject matter about which they are to be examined; (c) the documents or other property, real or personal, to be inspected; (d) the necessity of an oath or affirmation, and any special form to be used; and (e) any request under Article 9 for a special procedure or method.[149]

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143. *Id.* arts. 15-22.

144. C. PR. CIV. arts. 132-42, 730-48.

145. *Id.* arts. 138-39.

146. 28 U.S.C. § 1781, art. 2.

147. *Id.*

148. *Id.* art. 3(a)-(d).

149. *Id.* art. 3(e)-(i).

Article 4 of the Convention states that the letter must either be in the language of the authority requested to execute it or be accompanied by a translation into that language.[150] Article 4 also states, however, that the signatory state must accept a letter in either English or French or a translation into one of these languages, unless it has made a reservation under Article 33 to eliminate this provision.[151] All translations which accompany a letter must be certified as correct by a diplomatic officer, a consular agent, a sworn translator, or any other person so authorized in either country.[152]

If a central authority considers that the request does not comply with the provisions of the Convention, it must promptly inform the authority of the country of origin and specify its objections.[153] The requesting authority also has the right to be informed of the time and place of the proceedings in order that the concerned parties and their representatives may be present.[154] If requested, this information must be sent directly to the concerned parties or their representatives.[155] The judge may be present at the execution of the request, but prior authorization of the executing country may be required.[156]

The judicial authority that executes the letter of request must apply domestic law concerning the methods and procedures to be followed in executing the letter.[157] The executing country, however, will abide by a request that a special method or procedure be followed unless such a request is either: (1) incompatible with the internal law of the executing country; or (2) impossible to perform because of the executing country's internal practices and procedures or other practical difficulties.[158]

If compelled discovery becomes necessary, the executing country must apply the appropriate compulsory measures in the same manner as orders issued by its internal authorities or requests executed by parties in internal proceedings.[159] The party from whom evidence is sought may

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150. *Id.* art. 4.

151. 28 U.S.C. § 1781, art. 4.

152. *Id.*

153. *Id.* art. 5.

154. *Id.* art. 7.

155. *Id.* art. 7.

156. 28 U.S.C. § 1781, art. 8.

157. *Id.* art. 9.

158. *Id.*

159. *Id.* art. 10.

refuse to provide evidence if he or she has a privilege or duty to refuse production of the evidence under the law of the country of execution, or under the law of the requesting country, if knowledge of such a right has been communicated by the country of execution.[160] A signatory country may also specify that it will respect privileges and duties regarding the divulgence of evidence existing under the laws of third countries.[161]

The executing country may refuse a letter to the extent that the letter does not fall within the functions of its judiciary, or it considers that its sovereignty or security would be prejudiced by executing the letter.[162] A letter may not be refused because the executing state's laws do not recognize the underlying cause of action or because the executing country claims exclusive jurisdiction over the subject matter of the action.[163]

In the event a letter is not entirely executed, the executing state must immediately inform the requesting state and provide the reasons for its actions.[164] Costs incurred by the executing state related to the execution of letters are generally not recoverable, except for fees paid to experts and interpreters and any costs occasioned by the use of a special procedure requested by the state of origin under Article 9.[165]

2. Chapter II Evidence Gathering via Diplomatic Officers, Consular Agents, and Commissioners

Pursuant to Chapter II of the Convention, a diplomatic officer or consular agent may, in the territory of another signatory state and within the area where he or she functions, take evidence from nationals of a state which he represents in furtherance of proceedings commenced in the courts of the state which he represents.[166] Evidence may not be compelled, however, when it is gathered pursuant to Chapter II. A signatory state may declare that evidence can be taken by a diplomatic officer or consular agent only if the state's designated authority grants

160. *Id.* art. 11.

161. 28 U.S.C. § 1781, art. 11.

162. *Id.* art. 12.

163. *Id.*

164. *Id.* art. 13.

165. *Id.* art. 14.

166. 28 U.S.C. § 1781, art. 15.

permission.[167] Pursuant to this Chapter, a United States diplomatic agent or consular officer may take evidence from a United States national in the agent's or officer's assigned territory.[168]

Diplomatic officers and agents may also take evidence from either nationals of the state in which he exercises his functions or nationals of third states regarding proceedings in the state that he represents, provided that his host state either has given specific or blanket permission or has stated that evidence can be taken in this manner without its prior permission.[169] The officer or agent must comply with any conditions set forth in conjunction with the host state's grant of permission.[170]

A person who has been appointed "commissioner" for the purpose of taking evidence may take evidence in the signatory state in furtherance of proceedings commenced in another signatory state only if the signatory state within which the evidence is to be obtained either has given specific or blanket permission or has stated that evidence can be taken in this way without its prior permission.[171] The officer or agent cannot compel evidence to be given and must comply with any conditions set forth in conjunction with the host state's grant of permission and evidence.[172]

Notwithstanding the fact that evidence may not generally be compelled under Chapter II, a signatory state may declare that a diplomatic officer, consular agent, or commissioner may apply to its Central Authority for assistance in compelling the procurement of evidence.[173] The signatory state has complete discretion to dictate the terms of such a declaration.[174] If the evidence gathering state grants the agent, officer, or commissioner's application, however, it must apply its domestic measures for the compulsion of evidence.[175]

When evidence is gathered pursuant to Chapter II of the Convention, the signatory country in which evidence is to be gathered may dictate the time and place of the taking of evidence.[176] It also may

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167. *Id.*

168. *Id.*

169. *Id.* art. 16.

170. *Id.*

171. 28 U.S.C. § 1781, art. 17.

172. *Id.* art. 17.

173. *Id.* art. 18.9.

174. *Id.*

175. *Id.*

176. 28 U.S.C. § 1781, art. 19.

require that it be given "reasonable" advance notice of the time, date, and place of the taking of evidence.[177] In such cases, a representative of the Central Authority of the state in which evidence is to be gathered is entitled to be present,[178] because under Chapter II, all persons concerned may be legally represented.[179]

Under Chapter II of the Convention, the officer, agent, or commissioner gathering evidence may take any type of evidence that is not incompatible with the laws of the signatory country where the evidence is taken or contrary to any permission granted.[180] The officer, agent, or commissioner has the power to administer an oath or take an affirmation, within these limits.[181] Except when the evidence is to be taken from a national of the requesting country, any request for someone to appear or to give evidence must be written in the language of the place where the evidence is to be taken or be accompanied by a translation into that language.[182] Any such request must inform the person that legal representation is permitted and that the giving of evidence is not compulsory.[183] The latter information need not be supplied if the state in which evidence is to be taken has agreed to assist in compelling evidence pursuant to Article 18.[184] Evidence can be taken in a manner provided by the law applicable to the court in which the legal matter is pending, provided these means do not contradict the law of the signatory country where the evidence is to be taken.[185] Similar to the case in which a letter of request is used, the party from whom evidence is sought may refuse to provide evidence if that party has a privilege or duty to refuse to turn over evidence under the executing country's laws, or under the requesting country's laws, if the executing country has communicated its knowledge of such a right.[186] A signatory country may also specify whether it will respect privileges and duties regarding the divulgence of

177. *Id.*
178. *Id.*
179. *Id.* art. 20.
180. *Id.* art. 21(a).
181. 28 U.S.C. § 1781, art. 21(a).
182. *Id* art. 21(b).
183. *Id.* art. 21(c).
184. *Id.*
185. *Id.* art. 21(d).
186. 28 U.S.C. § 1781, art. 21(d).

evidence existing under the laws of third countries.[187] If an attempt to gather evidence under Chapter II fails due to a refusal to provide evidence, a letter of request may subsequently be employed, pursuant to Article 10, compelling the production of evidence.[188]

B. Implementation of the Hague Convention in France: France's Amendment of its Code of Civil Procedure

Contrary to America's negative image of evidence gathering in France, French procedural law contains a number of provisions that allow for the effective procurement of evidence in response to foreign letters of request.[189] Furthermore, such measures are all the more effective in light of France's willingness to process requests for pre-trial production of documents.[190]

Letters of request must be executed pursuant to French procedural law absent a specific request that they be executed according to foreign procedures.[191] Consequently, basic principles of the French civil justice system, as embodied in the Code of Civil Procedure, must be respected.[192] One such principle is the right of each party to fully address its opponent's arguments.[193] The obligation to respect French procedural norms is nonetheless tempered by the Code of Civil Procedure's mandate of judicial compliance with foreign letters of request.[194] This mandate requires that a judge not refuse to execute letters merely because: (1) French law has exclusive jurisdiction over the matter; (2) French law does not provide a cause of action for the plaintiff's claim; or (3) French law prohibits the gathering of the particular evidence sought.[195]

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187. *Id.* art. 21(e).
188. *Id.* art. 22.
189. C. PR. CIV. arts. 733-48.
190. *Id. See supra* note 12.
191. C. PR. CIV., art. 739, alinéa 1.
192. *Id.* art. 744, alinéa 1.
193. *Id.* art. 128-32.
194. *Id.* art. 744.
195. *Id.* art. 742.

Perhaps the most important concession to foreign discovery practices is the newly created right of the parties to interrogate witnesses.[196] The right to interrogate witnesses in French civil proceedings has traditionally been within the exclusive province of the French judge.[197] Despite this concession, however, the Code of Civil Procedure still reserves the decision to permit such questioning to the French judge presiding over the discovery proceedings.[198] The French judge's role in the discovery proceedings, however, is limited to simple administration.[199] The resolution of substantive legal questions remains the province of the foreign judge presiding over the primary litigation.[200] Article 740 further mandates that any such questioning and any responses be translated into French.[201]

Despite the French authorities' apparent willingness to allow for foreign discovery practices on French soil, a number of the amended articles describe circumstances in which the French judge may annul discovery obtained and procedural actions taken in the French proceeding.[202] One such circumstance occurs when the execution of a letter of request would infringe upon France's sovereignty or national security.[203] Additionally, in the event the judge concludes that a request seeks information over which he lacks jurisdiction, he may annul prior proceedings upon the request of a party.[204] Other circumstances in which annulment is possible, albeit vaguely defined, are those instances in which the request would require the French court to depart from the guiding principles of the Code of Civil Procedure.[205] In such a case, demand for annulment may be made upon the French court by a party or

196. C. PR. CIV., art. 740. Although not ordinarily permitted in French civil courts, the parties, their attorneys, and even the foreign judge may attend the proceedings. *Id.* arts. 740-41.

197. *Id.*

198. *Id.*

199. *Id.*

200. CHRISTIAN GAVALDA, LES COMMISSIONS ROGATOIRES INTERNATIONALES EN MATIÈRE CIVILE ET COMMERCIALE 15 (R.C.D.I.P. 1964); Andre Huet, LES CONFLITS DE LOI EN MATIÈRE DE PREUVE 15-17 (Dalloz 1975).

201. C. PR. CIV. art. 740.

202. *Id.* arts. 743-45.

203. *Id.* art. 743, alinéa 1.

204. *Id.*

205. *Id.* art. 744, alinéa 2.

by the French Justice Ministry.[206] If a request is annulled, the French judge must issue a ruling with an explanatory opinion.[207] The parties and the Justice Ministry are granted the right to appeal any decision granting or denying annulment within fifteen days of the date the ruling is issued.[208]

If an American litigant obtained discovery prior to such an annulment, one can only speculate as to whether the American judge would, in the grand tradition of *Aérospatiale*, ignore the French judge's ruling and admit the previously obtained evidence. Of course, it is virtually impossible that a judgment obtained in an American proceeding which admitted such "appropriated" evidence could ever be successfully enforced in France.

IV. CONCLUSION

Procedures for obtaining evidence in France for use in United States litigation leave much room for strategic manoeuvering. Gathering evidence in a Hague Convention country like France is a more complex proposition than the gathering of evidence in a country that is not a Hague Convention signatory. For example, Belgium, which is not a party to the Hague Convention, does not have a blocking statute, and most likely would address the entire issue as one of performance of letters of request under the principle of comity.

Many observations can be made concerning disputes with France. For example, must evidence gathered for trial be dealt with as being within the framework of pre-trial discovery? Such treatment would exempt the evidence from the French Article 23 reservation. France's 1987 modification of its Article 23 reservation can thus be used to the United States litigator's advantage.

What the French fear most is not the revelation of damaging material but rather the occurrence of "fishing expeditions," *i.e.*, any request that is not for a clearly identified document. The best explanation for this is that French jurists and business persons are traditionally unaccustomed to United States-style discovery and are therefore not psychologically prepared, materially equipped, or financially able to confront it. After all, the American brand of discovery is unique to the United States. Because American-style pre-trial discovery is without any

206. C. PR. CIV. art. 744, alinéa 2.

207. *Id.* art. 746, alinéa 1.

208. *Id.* art. 746, alinéas 2-3.

equivalent in civil law jurisdictions, United States lawyers should anticipate surprises as they navigate the minefield that is French discovery. These challenges will continue to exist despite the modification of the French Code of Civil Procedure to accommodate Hague Convention letters of request. Two of the largest obstacles to American discovery are the natural aversion of French parties to United States discovery practices and the predilection of French trial judges for French evidence gathering procedures. In France, a country in which several civil trials are completed in a single half-day hearing, United States litigants cannot expect a French judge to accommodate the requests of American attorneys for extensive discovery.[209]

209. Practitioners who will be taking evidence in France pursuant to the Hague Convention are strongly urged to consult the U.S. Embassy's "Taking Evidence in France in Civil and Commercial Matters," an unpublished memorandum of the United States Embassy, Paris, France, which contains exhaustive information about the actual mechanics of gathering evidence on French soil pursuant to the Convention, *e.g.*, notice periods relating to witnesses, to which government entity requests should be sent. The memorandum may be obtained by contacting the United States Embassy, Office of American Services, 2 rue St. Florentin, 75382 Paris CEDEX 08, France. A copy of this memorandum is also on file with the *Tulane Journal of International and Comparative Law*.