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The Hague Evidence Convention: A Look at Its Provisions and Its Problems Comment.

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COMMENTS

The Hague Evidence Convention: A Look at Its Provisions and Its Problems

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I. INTRODUCTION

The Hague Evidence Convention (the "Convention")[1] will affect virtually every practicing attorney's career at some time.[2] No matter what the partic-

1. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 241. [hereinafter The Hague Evidence Convention].

2. Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 231 (1986). The American concept of discovery conflicts with most other legal systems. The Convention regulates transnational discovery and thus, plays an important role in any suit involving evidence located abroad. *See id.*

ular area of practice, an attorney may need to obtain evidence located abroad.[3] All too many attorneys, however, are not aware of the laws governing discovery procedures abroad until an opponent seeks a protective order requiring discovery in accordance with Convention rules. The parties in *In re Societe Nationale Industrielle Aerospatiale*[4] encountered this problem. The plaintiffs sought answers to interrogatories and made requests for admissions and production under the Federal Rules of Civil Procedure rather than the Convention rules.[5] The defendant French government-owned corporations sought a protective order.[6] The defendant insisted that because the information sought was located in France, the plaintiffs must comply with the Convention's discovery procedures.[7] The defendants also urged that compliance with the plaintiffs' request would subject them to criminal sanctions because French blocking statutes prohibited the taking of information for use in foreign proceedings.[8] Although the magistrate denied the defendant's motion for protection, the plaintiffs' failure to comply with the Convention resulted in a lengthy battle.[9] The case is now pending before the United States Supreme Court.[10]

A great deal of time and expense could have been saved had the plaintiffs followed the steps established in the Convention.[11] This comment will present a brief background of the Convention, explain the rules of the treaty, and discuss the inconsistent application of the Convention by the courts.

II. BACKGROUND

A. *History*

On October 26, 1968, the Eleventh Session of the Hague Conference on Private International Law revised and approved the Convention on the *Taking of Evidence Abroad in Civil or Commercial Matters.*[12] The Convention

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3. *See id.*

4. 782 F.2d 120 (8th Cir.), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986).

5. *See id.* at 123.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.* at 120.

10. *See id.*

11. *See generally* Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L L. 575 (1982)(step-by-step analysis of how to execute Letters of Request in compliance with Convention).

12. *See* Letter of Submittal from Secretary of State William P. Rogers, to the President Regarding the Evidence Convention, *reprinted in* 12 I.L.M. 324, 324 (1973) [hereinafter Letter of Submittal]; *see also Report of the United States Delegation to the Hague Conference on Private International Law*, *reprinted in* 8 I.L.M. 785 (1969). Once every four years the Hague Conference meets to review subjects in the area of private international law. The agenda for

was organized in response to the substantial increase in litigation involving foreign litigants,[13] and the number of lawyers frustrated by the difficulties encountered in obtaining evidence from foreign countries with different legal systems.[14] The Convention seeks to reconcile some of the evidentiary conflicts between civil and common law countries' concepts of evidence.[15]

In common law countries such as the United States, obtaining evidence is generally a private matter.[16] The parties are responsible for procuring and presenting the evidence.[17] In civil law countries such as France, however,

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the Eleventh Session included the three major draft Conventions on the Recognition of Divorces and Legal Separations, the Law Applicable to Traffic Accidents, and the Taking of Evidence Abroad in Civil and Commercial Matters. *See Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 786 (1969).

Drafts of each Hague Convention are written during the four year intervals by special commissions made up of experts in the legal field affected. *See id.* at 785. The United States delegation included Richard D. Kearney, Chairman, Phillip W. Amram, James C. Dezendorff, Kurt H. Nadelmann, Willis L.M. Reese and Arthur T. von Mehren. *See id.* at 786. Amram served as the Rapporteur and co-chairman of the special commission drafting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. *See id.* at 805. This Convention is a revision of Chapter I of the 1954 Hague Convention on Civil Procedure, which is itself a modification of a 1905 Convention. Twenty-five member states approved the draft, absent any dissenting votes. Texts to the Convention are written in both French and English. Although one text is not the precise translation of the other, the special words of art selected were intended to represent a common basis of understanding. No common law country had participated in either of the two previous Conventions. *See id.* at 804-05; Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651 (1969)(discussing history of Convention).

13. *See* Letter of Submittal, *reprinted in* 12 I.L.M. 324, 324 (1973); Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651 (1969).

14. *See* Letter of Submittal, *reprinted in* 12 I.L.M. 324, 324 (1973).

15. *See* The Hague Evidence Convention, 23 U.S.T. 2555, 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241 (Convention states signatories' desires to improve judicial co-operation and accommodation). The purpose of the Convention is to bridge gaps between different legal systems. *See, e.g.*, Message from the President Transmitting to the Senate the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 12 I.L.M. 323, 323 (1973); [hereinafter Message from the President] (stating problems sought to be solved by Convention); *Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 806 (1969)(brief discussion of conflicts between legal systems); Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651 (1969)(general discussion of differences between common and civil law countries and Convention's efforts to minimize differences); Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 HOUS. L. REV. 361, 363-67 (1982)(comparative discussion of civil and common law countries' legal systems).

16. *See Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 806 (1969); *see also* Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 12 I.L.M. 327, 327 (1973) [hereinafter Explanatory Report] (discussing nature of techniques used for obtaining evidence in common law countries).

17. *See Report of the United States Delegation to the Hague Conference on Private Inter-*

taking evidence is a judicial act.[18] A Letter Rogatory and a Letter of Request are methods of obtaining evidence used in civil law countries.[19] A Letter Rogatory is a judicial request addressing a foreign court.[20] The request seeks permission to examine a witness by written interrogatories in the foreign state.[21] The foreign court may allow oral interrogatories to be conducted under the foreign state's supervision.[22] The parties to the litigation merely assist judicial authorities.[23] Thus, the taking of evidence by an individual may constitute an infringement on a civil law state's sovereignty and be treated as a criminal act.[24] Additionally, in civil law countries the executing judge prepares a summary of the evidence, whereas in a common law country, evidence gathering techniques result in a verbatim transcript of the testimony.[25] Problems for attorneys in common law countries arose when civil law countries insisted on exclusively using complex and expensive procedures of Letters Rogatory and Letters of Request,[26] or simply refused judicial assistance for lack of a treaty or convention regulating the matter.[27] These basic differences laid the groundwork for the Convention: "Any system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending."[28]

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national Law, reprinted in 8 I.L.M. 785, 806 (1969). In common law countries the conventional methods of obtaining evidence include taking testimony by stipulation on notice and through commissions. Letters of request are not a common practice. *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

18. *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969). In civil law countries *commissions rogatories* (Letters Rogatory or Letters of Request) are commonly used. *See id.*

19. *See id.*

20. *See* Volkswagenwerk Aktiengesellschaft v. Superior Court, 109 Cal. Rptr. 219, 221 (Cal. Ct. App. 1973).

21. *See id.*

22. *See id.*

23. *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

24. *See* Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 107 (1973).

25. *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

26. *See* Letter of Submittal, *reprinted in* 12 I.L.M. 324, 324 (1973); *see also* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651 (1969)(stating difficulties with obtaining evidence in civil law countries).

27. *See* Letter of Submittal, *reprinted in* 12 I.L.M. 324, 324 (1973).

28. Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 327 (1973). Commission III prepared the Convention text. Dr. Arnold, chairman of the commission, set the standard which ruled the Convention's discussion. *See id.*

B. *Purpose and Scope*

The doctrine of "judicial sovereignty" provides the protective umbrella under which the three general objectives of the Convention were created.[29] While the Convention does not define the doctrine, the phrase implies deference to the supreme and independent judicial authority in every legal system.[30] The Convention seeks to: (1) improve the current Letters of Request system; (2) increase the methods available for taking evidence abroad by expanding the powers of consuls and creating powers for commissioners; and (3) preserve all of the existing internal laws and bilateral and multilateral conventions allowing for more lenient evidence-gathering practices.[31] As a result of implementing these objectives, several significant improvements in the taking of evidence have been realized.[32] The changes include: new language rules in the Letters of Request, the creation of a central authority to receive Letters of Request, a provision stipulating a witness' privileges and immunities, the use of commissioners to procure evidence, and a provision that a consul's power is determined by the nationality of a witness.[33] Additionally, in an attempt to create minimum rather than exclusive standards, the Convention included a provision preserving contracting states' rights to apply measures less restrictive than those created.[34] The Convention's scope

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29. *See Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 806 (1969); *cf.* The Hague Evidence Convention, 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241 (text implies meaning of term "judicial sovereignty").

30. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 327 (1973); *see also Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 807 (1969)(general discussion of integration of Convention's purposes and potential problems with judicial sovereignty).

31. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 327 (1973).

32. *See id.*

33. *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

34. The Hague Evidence Convention, art. 27, 23 U.S.T. 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 246; *see also Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 808 (1969). The Convention does not preclude a state's use of its own domestic law and practice if more liberal standards of international assistance are advanced. In particular, the United States' open system under 28 U.S.C. § 1781 and § 1782 remains unchanged. *See id.* The United States has made no reservations to preclude a contracting state's ability to obtain pretrial evidence under article 23 of the Convention. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987). However, a United States District Court may order a party to give testimony or produce documents for a foreign proceeding pursuant to a letter rogatory. *See* 28 U.S.C. § 1782 (1982). *See generally* Note, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—A Comparison with Federal Rules of Procedure*, 7 BROOKLYN J. INT'L L. 366 (1981)(comparative discussion of Convention rules and federal rules).

is limited to obtaining evidence[35] in civil or commercial matters abroad for use in judicial proceedings.[36] Although the Convention did not define the phrase "to obtain evidence," the experts of the special commission agreed that a liberal interpretation would suffice.[37] The extension of United States judicial law to the "taking of testimony or statements" and the "production of documents or other things" was decided by the commission as a fair description of the evidence referred to in the Convention.[38] Another limitation of the treaty is that only signatories are bound by its provisions.[39] Finally, the uncertainty as to whether the signatories must treat the Convention as a mandatory method of obtaining evidence is one of the greatest limitations.[40]

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35. *See* The Hague Evidence Convention, art. 1, 23 U.S.T. 2555, 2557, 847 U.N.T.S. 241, 241.

36. *See id.* arts. 1, 15, 23 U.S.T. at 2555, 2564, T.I.A.S. No. 7444, 847 U.N.T.S. at 244; *see also Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 808 (1969)(stating matters covered by Convention). Implicitly excluded in the definition of "civil or commercial matters" are criminal, tax, and administrative proceedings. *See Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1418-21 (1978).

37. *See Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1419 (1978). The term "civil or commercial matters" appears in the 1905 Hague Civil Procedure Convention and the 1954 Civil Procedure Convention. Never in the history of these agreements has there been a recorded disagreement between any Hague Conference members as to what is meant by "civil or commercial matters." The Conference delegations voted unanimously that a definition was not needed. *See Report of the United States Delegation to the Hague Conference on Private International Law, reprinted in* 8 I.L.M. 785, 808 (1969). A conflict arising from the interpretation of the phrase lends itself to arbitration through diplomatic channels. *See id.*; *see also* The Hague Evidence Convention, art. 37, 23 U.S.T. 2555, 2572, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 247; *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1418 (1978).

38. *See* 28 U.S.C. § 1782 (1982)(explaining implied definition of "obtaining evidence"); *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1419 (1978).

39. *See* The Hague Evidence Convention, 23 U.S.T. 2555, 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241. Eighteen states are parties to the Convention: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, Hong Kong, Gibraltar, the Sovereign Base Areas of Akrotiri, Dhekelia in the Island of Cyprus, the Falkland Islands and Dependencies, the Isle of Man, the Cayman Islands and the United States (including Guam, Puerto Rico and the Virgin Islands). *See id.*; *see also* Appendix A.

40. *Compare In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir.)(court with personal jurisdiction over litigant not required to use Convention), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986) *and* Graco, Inc. v. Kremlin, Inc.,

III. Discussion of the Convention Rules

Generally, when a court is confronted with determining the applicability of the Convention requirements, the party seeking evidence abroad has failed to conform to treaty regulations.[41] By simply abiding by the provisions, both the parties and the courts can be spared the time and expense of additional litigation.[42] The rules set out in the Convention are divided into four chapters: (1) Letters of Request; (2) Taking of Evidence by Diplomatic Officers, (3) Consular Agents and Commissioners; and (4) General Provisions.[43]

A. *Letters of Request*

The judicial authority of one contracting state (signatory of the treaty) may acquire evidence or seek the performance of some other "judicial act" from the authority of another contracting state by a Letter of Request (Letter) if the intended use is for "commenced or contemplated" judicial proceedings.[44] A contracting state may, however, refuse to execute Letters

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101 F.R.D. 503, 512-16 (N.D. Ill. 1984)(usage of Convention depends on outcome of balancing test) *with In re* Anschwetz & Co. GmbH, 754 F.2d 602, 602 (5th Cir. 1985)(Convention compliance required as matter of comity), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985) *and* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 876 (Cal. Ct. App. 1981)(Convention sets fixed minimum standard for gathering evidence abroad).

41. *See, e.g.*, *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 123 (8th Cir.)(plaintiffs requested information using Federal Rules of Civil Procedure), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 507 (N.D. Ill. 1984)(discovery requests to take evidence from France conformed with Federal Rules of Civil Procedure); Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 881 (Cal. Ct. App. 1981)(discovery procedures did not conform with Convention); Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 494 (W. Va. 1985)(order sought requiring compliance with discovery under Virginia Rules of Civil Procedure).

42. *See* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 878 (Cal. Ct. App. 1981)(several bitterly contested discovery motions extended discovery procedures).

43. *See* The Hague Evidence Convention, 23 U.S.T. 2555, 2557-76, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241.

44. *See id.* art. 1, 23 U.S.T. at 2557, T.I.A.S. No. 7444, 847 U.N.T.S. at 241. The phrase "other judicial act" excludes service of judicial documents, orders for protective or temporary measures, or the issuance of process executing or enforcing judgments or orders. *See id.* This exclusion of provisional and protective measures includes restraining orders, injunctions, receiverships, forced sales, and mandamus. Additionally, the state of execution must recognize the requested act under internal law as a judicial act. *See* Letter of Submittal, *reprinted in* 12 I.L.M. 324, 325 (1973). Several additional illustrations of judicial acts were discussed in the report to the draft Convention: obtaining the selection of an ephemeral receiver for property, securing public record extracts, obtaining a copy of a birth certificate, and requiring a defendant to give security as a protection against a future judgment favoring the plaintiff. *See*

seeking to obtain pretrial discovery.[45] Each state's designated Central Authority must receive the Letters directly from the judiciary or the party seeking the evidence.[46] Upon receipt, the Central Authority must transmit the Letter to the authority chosen by the state of execution (the contracting state in which the request is sought) to effectuate it.[47] The Convention lists in detail the information that must be contained in a Letter.[48] No requirement

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Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 329 (1973). Several countries, including the United Kingdom, did not favor broadening the Convention's scope to include "other judicial acts." They feared the vague term might cause problems in countries where the authorities were not accustomed to such acts. "Other judicial acts" might include: taking blood samples or medical samples, obtaining public documents, trying reconciliation, and advertising for evidence. *See* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646, 647 (1969). The United Kingdom strongly advocated the adoption of article 23 as the article sought to avoid the "fishing nature" of pretrial discovery and restrict the evidence obtained to that which the foreign court needed. *See id.* at 650-51.

45. The Hague Evidence Convention, art. 23, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 245. A refusal to execute such a Letter must be declared upon the state's ratification of the Convention. *See id.* With the exception of Barbados, Czechoslovakia, Hong Kong, Israel and the United States, all of the contracting states refuse to accept Letters for use in obtaining pretrial discovery documents. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987)(notes 1-14 of the supplement contain the declarations). *But see Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1421 (1978)(all contracting states except United States declared refusal to accept Letters for pretrial discovery evidence).

46. *See* The Hague Evidence Convention, art. 2, 23 U.S.T. at 2558, T.I.A.S. No. 7444, 847 U.N.T.S. at 241. Each state's authority may be established by internal law. *See id.* Also, more than one authority may be authorized to receive Letters of Request. In any case, the Letters can be sent to the Central Authority. *See id.* art. 24, 23 U.S.T. at 2568, T.I.A.S. No. 7444, 847 U.N.T.S. at 246. For example, the designated Central Authority in the United States is the United States Department of Justice. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987) (note 14 of supplement contains United States declarations). A state with more than one legal system can designate the authorities of one system to have exclusive competence for executing Letters pursuant to the Convention. *See* The Hague Evidence Convention, art. 25, 23 U.S.T. at 2568-69, T.I.A.S. No. 7444, 847 U.N.T.S. at 246. For a list of the names and addresses of each contracting state's Central Authority see Appendix A.

47. *See* The Hague Evidence Convention, art. 2, 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241.

48. *See id.* art. 3, 23 U.S.T. at 2558-59, T.I.A.S. No. 7444, 847 U.N.T.S. at 241-42. Required specifications include:

> a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
>
> 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, giving all necessary information in regard thereto;

of legalization or similar formality is prescribed in the Convention.[49]

The Convention initially requires a Letter to be in the language of the state from which the evidence is sought, or accompanied by a translation into such language.[50] The Convention goes on to state, however, that a contracting state must accept a Letter in French or English, or a translation thereof, unless an objection by reservation is made.[51] Either a diplomatic officer, consular agent, sworn translator or person so authorized must certify any translation of a Letter.[52] A state sending a Letter that fails to comply with the Convention provisions will be promptly notified of the objections by the executing state's Central Authority.[53] Another delay will be incurred if

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d) the evidence to be obtained or other judicial act to be performed. When appropriate, the Letter shall specify, inter alia

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Art. 11. *See id.* Appendix B following the text of this article contains a recommended model for Letters of Request.

49. *See* The Hague Evidence Convention, art. 3, 23 U.S.T. 2555, 2558-59, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 241-42. There is no definition given in the Convention for the term "legalization." *See id.*

50. *See id.* art. 4, 23 U.S.T. at 2559-60, T.I.A.S. No. 7444, 847 U.N.T.S. at 242.

51. *See id.* The following states will not accept Letters in or translated into French: Denmark, Finland, and Germany. These contracting states have made reservations: Denmark (Letters may be sent in Norwegian, Swedish, and English, but Denmark only obligated to return evidence taken in Danish); Finland (Swedish or English, but neither execution nor transmittal of evidence will be in English); France (Letters or translations must be in French), Germany (Letters or translation must be in German), Luxembourg (Letters accepted in French, English, and German); The Netherlands (takes Letters in Dutch, German, English, or French, or their translations); Portugal (Letters must be in Portuguese); Singapore (Letters must be in English); Sweden (accepts Letters in Danish and Norwegian but execution of Letters will be in Swedish only); and the United States (Letters accepted in French, English, and Spanish). The remaining states made reservations refusing to accept Letters, or their translation, in French. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987). When a state with more than one official language is prohibited by domestic law from accepting Letters in French or English for its whole territory, the acceptable language for specified parts of its territory must be declared. Absent such a declaration, without justifiable excuse, the state of origin will be responsible for the translating costs. *See* The Hague Evidence Convention, art. 4, 23 U.S.T. 2555, 2559-60, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 242.

52. The Hague Evidence Convention, art. 4, 23 U.S.T. 2555, 2559-60, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 242.

53. *See id.* art. 5, 23 U.S.T. at 2560, T.I.A.S. No. 7444, 847 U.N.T.S. at 242. The Central Authority of the receiving state will determine compliance. A few of the errors justifying such

the Letter is sent to a party not authorized to execute it.[54] Upon request, a contracting state may be kept informed of proceedings abroad so that the parties or their representatives may be present.[55] Presence at the Letter's execution, however, may require prior permission from the declaring state[56]—the state that has made a declaration pursuant to the convention provision.[57]

The state executing the Letter will apply its domestic laws governing the execution of Letters, unless the requesting party (contracting state seeking to obtain evidence in another state) has asked for another specific method.[58] If, however, performance is impossible due to internal practice and procedure or practical difficulties, the special requested procedures will not be followed.[59] Letters are subject to the same domestic rules of compulsion as those orders issued within the executing state.[60] Unlike internal orders, however, certain privileges or duties may excuse the party executing the Letter from giving the evidence.[61] For example, if the United States was the

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"objections" include: nonconformity with the article four language requirement; failure of the Letter to relate to article 1 "judicial proceedings"; non-issuance of a letter from a "judicial authority"; nonconformity to an agreement between the state of execution and the state of origin (articles 28(b), 32); a Letter's seeking pretrial discovery material after an article 23 declaration has been filed; a Letter's execution outside the judiciary duty in the state of execution under article 12; the controverted matter is not "civil or commercial" (article 1); the Letter involves an "other judicial act" as precluded by article 1; the Letter's execution would prejudice the state of execution's sovereignty or security. *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 332 (1973).

54. *See* The Hague Evidence Convention, art. 6, 23 U.S.T. 2555, 2560, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 242.

55. *See id.* art. 7, 23 U.S.T. at 2560-61, T.I.A.S. No. 7444, 847 U.N.T.S. at 242.

56. *See id.* art. 8, 23 U.S.T. at 2561, T.I.A.S. No. 7444, 847 U.N.T.S. at 243.

57. *See id.*

58. *See id.* art. 9, 23 U.S.T. at 2561, T.I.A.S. No. 7444, 847 U.N.T.S. at 243.

59. *See id.*; Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 333 (1973). The language attempts to maximize international cooperation by allowing the refusal of a special procedure only when compliance is impossible. *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 333-34 (1973).

60. *See* The Hague Evidence Convention, art. 9, 23 U.S.T. 2555, 2561, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 243.

61. *See id.* art. 11, 23 U.S.T. at 2562, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 243. A privilege or duty exists if it is created under the executing state's or the originating state's law, where the excuse is specified in the Letter or has been confirmed by the requesting authority to the requested authority. A contracting state may also formally declare respect for the duties and privileges of states other than those of origin and execution. To establish a prior duty under the state of origin's law, the issuing authority must take an affirmative step. The state may either acknowledge it in the Letter or wait until the witness claims the "foreign" duty or privilege at the executing tribunal. If a witness makes such a claim, the tribunal may seek the issuing authority's advice or ignore it. Where advice is sought, and the issuing authority responds and acknowledges the privilege or duty, the executing state will recognize it to the extent acknowledged. It is rare that litigants in the state of origin will want to restrict the

executing state and the documents requested were protected by the attorney-client or physician-patient privilege, the evidence would not be given to the requesting state.[62]

Refusal to execute a Letter may only occur in very limited circumstances.[63] Where an executing state determines that its sovereignty or security is threatened, or the execution of the Letter is not within the judiciary's authority, a Letter may be refused.[64] Any information concerning the problems or the execution of a Letter must be transmitted by the executing authority in the same manner used by the requesting state.[65] With the exception of costs incurred by using special procedures requested by the state of origin[66] and fees paid to experts and interpreters, the effectuation of Letters will not result in reimbursement to the state of execution of any taxes or costs.[67] Where the receiving state's law requires the parties to execute a Letter and the receiving authority is unable to do so, a representative may be appointed to obtain the evidence if the requesting authority consents.[68]

B. *Diplomatic Officers, Consular Agents, and Commissioners*

While Chapter II of the Convention provides an additional method of obtaining evidence abroad, every grant of power to diplomatic officers, consular agents, and commissioners (consuls) is subject to rights of reservation

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witness' testimony. Generally, the witness is limited to claiming the privilege and requesting the executing state to seek an acknowledgment from the origin state. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 335 (1973).

62. *See* TEX. R. EVID. 503; *see also* TEX. R. EVID. 509.

63. *See* The Hague Evidence Convention, art. 12, 23 U.S.T. 2555, 2562-63, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 243.

64. *See id.* A claim by the state of execution of exclusive jurisdiction over the subject matter or that a right of action is not admitted by domestic law does not justify refusal to execute a Letter. *See id.*

65. *See id.* art. 13, 23 U.S.T. at 2563, T.I.A.S. No. 7444, 847 U.N.T.S. at 243. The requested authority must inform the requesting state immediately of the reasons for any failure to comply in whole or part with the Letter. *See id.* The "requested authority" is that state from which the evidence is sought. *See id.*

66. *See id.* art. 14, 23 U.S.T. at 2561, T.I.A.S. No. 7444, 847 U.N.T.S. at 243. The "state of origin" refers to the state seeking to obtain evidence from another state. *See id.*

67. *See id.* art. 14, 23 U.S.T. at 2563-64, T.I.A.S. No. 7444, 847 U.N.T.S. at 243. A contracting state may request reimbursement from the state of origin when, in executing a Letter, constitutional limitations require them to do so. In this case, reimbursement may cover the service of process required to compel a person's appearance and the cost of any transcript of evidence obtained from that person. Subsequent to a request for reimbursement on constitutional grounds, any other contracting state may make a similar request. *See id.* art. 26, 23 U.S.T. at 2569, T.I.A.S. No. 7444, 847 U.N.T.S. at 246.

68. *See id.* art. 14, 23 U.S.T. at 2563-64, T.I.A.S. No. 7444, 847 U.N.T.S. at 243. When seeking approval, the requesting authority must inform the consenting authority of the estimated costs of the procedure. *See id.*

and optional clauses.[69] Only consuls authorized to take evidence by their own government may employ this alternate method.[70]

A consul may obtain evidence in a civil or commercial matter in the state where he serves as an agent, or where he exercises his official duties.[71] To aid proceedings in courts of the state he represents, a consul may also take evidence in the contracting state where he performs his official functions or a third state, absent compulsion by any state to obtain the evidence.[72] The consul, however, must have permission to obtain evidence from the authority in the state of execution and he must comply with the conditions specified in the grant of permission.[73] The same duties and privileges apply to an appointed commissioner.[74] An additional limitation is that, unlike a letter of request, the evidence obtained through consul may only be for commenced proceedings.[75] Thus, if litigation is merely contemplated, this method may not be used.[76] Also, no provisions for costs and expenses incurred by a con-

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69. *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 337 (1973). The differentiation in states' application of the "judicial sovereignty" doctrine was so vast that no rules of universal application could be created. Instead, the right of reservation makes even the minimum standards defeasible. *See id.* Portugal and Singapore are the only two states that exclude Chapter II of the Convention. Portugal, however, does not exclude article 15. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987)(notes 10, 11 of supplement list declarations of Portugal and Singapore).

70. *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 337 (1973). Chapter II merely gives a consul the privilege to secure evidence in a state of execution when the consul's state establishes that such a power is part of his official duties. If the domestic law in a consul's state does not authorize the taking of evidence, the Convention will not grant the officer a power denied by his own government. *See id.*

71. *See* The Hague Evidence Convention, art. 16, 23 U.S.T. 2555, 2564-65, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 244.

72. *See id.*

73. *See id.* Permission may be granted generally or for a particular case. Evidence may be obtained without the contracting state's prior permission if the state of execution so declares. *See id.* The following states declared that no permission was required: Czechoslovakia, Finland, the Netherlands (although permission is required for commissioners under article 17), the United Kingdom, Hong Kong, Gibraltar, the Sovereign Base Areas of Akrotiri, Dhekelia in the Island of Cyprus, Falkland Islands and Dependencies, Isle of Man, the Cayman Islands, and the United States. *See* Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987).

74. *See* The Hague Evidence Convention, art. 17, 23 U.S.T. 2555, 2565, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 244. Chapter II only grants consuls and commissioners the power to take evidence. The Convention does not give either of these officials the authority to perform "other judicial acts." *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 337 (1973).

75. *See* Amram, *Explanatory Report*, *reprinted in* 12 I.L.M. 327, 339 (1973). Unlike Letters of Request, which allow the evidence to be in connection with contemplated or commenced proceedings, a consul's authority is much more restricted. *See id.*

76. *See id.*

sul or commissioner performing his duties are given.[77]

A contracting state may advise a consul or commissioner to apply to a designated authority for assistance in obtaining evidence by compulsion.[78] When an application is granted, the state of execution must apply any appropriate measure of compulsion prescribed by domestic law as used in internal proceedings.[79] A consul or commissioner is granted the authority under articles 15, 16, or 17 to take evidence where:

> a. the evidence obtained is not compatible with the law of the state from which the evidence is taken, he may also take an affirmation or administer an oath within such limits;
>
> b. a request for a person to give evidence or to appear must be written or translated into the language of the state of execution, unless the person receiving the request is a national in the state where the proceeding is pending;
>
> c. absent a declaration to the contrary, the request informs the person that he is entitled to legal representation, and neither appearing nor giving evidence is mandatory;
>
> d. the method of obtaining the evidence as prescribed by the state in which the proceeding is pending, is compatible with the law of the state from which it is taken; and
>
> e. the privileges and duties in article 11 may be invoked by the person requested to give evidence.[80]

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77. *See id.* at 337. Since the state of execution will not participate in this method of obtaining evidence, unless the state elects to have an official representative present, the state of origin's laws will determine the payment of costs and expenses. *See id.* Costs and expenses may only present a problem when a witness' refusal to appear results in the consul or commissioner's request for assistance from the state of execution under article 18. This article provides that any assistance given subjects the consul or commissioner to any financial terms imposed by the state of execution. Thus, costs and expenses will probably be relegated to the consul or commissioner. Parties involved in the taking of evidence under the provisions of the second chapter may be legally represented. *See id.* at 327-37.

78. *See* The Hague Evidence Convention, art. 18, 23 U.S.T. 2555, 2566, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 248. The declaring state may require any conditions they deem adequate. Virtually any requirements regarding the time and place may be established by the authority granting the permission or application. *See id.* The main purpose of the rule is that somewhere there must be permission to apply for compulsions. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 339 (1973).

79. *See* The Hague Evidence Convention, art. 18, 23 U.S.T. 2555, 2566, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 245.

80. *See id.* art. 21, 23 U.S.T. at 2567, T.I.A.S. No. 7444, 847 U.N.T.S. at 245. If the person receiving the request is a national in the state of execution, permission must be granted by the state before the evidence may be taken. This allows the state to protect its nationals against potential pressure or abuse by a foreign consul. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 338 (1973).

The failure to obtain evidence under Chapter II resulting from a party's refusal to give evidence does not preclude the submission of a Letter of Request.[81] Thus, where a consul's attempt to obtain evidence fails, a requesting state may still exercise its option to submit a Letter.[82]

C. *General Clauses*

The final chapter of the Convention lists the general applications of its provisions.[83] Of central importance in this section is the emphasis on the signatories' ability to use less restrictive means to perform the techniques of evidence-gathering in the Convention.[84] Another portion of this chapter devotes itself to the effects of the Convention on preceding Conventions.[85] The treaty also stipulates that any disagreements resulting from application of the Convention provisions must be handled through diplomatic channels.[86] The Convention allows reservations only in reference to the language requirements of Letters and whether evidence may be taken by consuls and commissioners.[87] A reservation must be made when the contracting state signs, ratifies, or accedes to the treaty.[88] Reservations may, however, be

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81. The Hague Evidence Convention, art. 22, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 245.

82. *See id.*

83. *See id.* arts. 23-42, 23 U.S.T. at 2568-76, T.I.A.S. No. 7444, 847 U.N.T.S. at 245-49.

84. *See id.* art. 27, 23 U.S.T. at 2569, T.I.A.S. No. 7444, 847 U.N.T.S. at 246. Letters of Request need not be transmitted to judicial authorities solely through the designated Central Authorities if a state so declares. Where domestic law or practice allows, evidence may be taken by methods not provided for in the Convention. *See id.* The Convention does not seek to preclude agreements between two contracting states concerning: costs and fees (article 14); the manner executed Letters are returned to the requesting authority (article 13); the duties and privileges of witnesses refusing to give evidence (article 11); the use of languages (article four); the presence of judicial personnel at a Letter's execution (article eight); the methods of transmission; and the Chapter II provisions. *See id.* art. 28, 23 U.S.T. at 2570, T.I.A.S. No. 7444, 847 U.N.T.S. at 246.

85. *See id.* arts. 29-32, 23 U.S.T. at 2570-71, T.I.A.S. No. 7444, 847 U.N.T.S. at 246-47. This Convention replaces articles 8-16 of the Conventions on Civil Procedure in 1905 and 1954 for those parties present at the 1970 Convention who are also parties to either or both of the prior Conventions. *See id.* art. 29, 23 U.S.T. at 2570, T.I.A.S. No. 7444, 847 U.N.T.S. at 246. Article 23 of the 1905 Convention and article 24 of the 1954 Convention are not affected by the present Convention. *See id.* art. 30, 23 U.S.T. at 2570-71, T.I.A.S. No. 7444, 847 U.N.T.S. at 247. Agreements between parties incidental to the 1905 and 1945 Conventions apply to the present Convention absent agreements otherwise. *See id.* art. 31, 23 U.S.T. at 2571, T.I.A.S. No. 7444, 847 U.N.T.S. at 247. The present Convention does not demean prior Conventions' coverage of particular matters between parties which are or will become parties, notwithstanding the provisions of articles 29 and 31. *See id.* art. 32, 23 U.S.T. at 2571, T.I.A.S. No. 7444, 847 U.N.T.S. at 247.

86. *See id.* art. 36, 23 U.S.T. at 2572, T.I.A.S. No. 7444, 847 U.N.T.S. at 247.

87. *See id.* art. 33, 23 U.S.T. at 2571, T.I.A.S. No. 7444, 847 U.N.T.S. at 247.

88. *See id.* A state attempting to accede to the treaty must be a member of the United

withdrawn at any time.[89] Declarations may also be withdrawn or modified at any time.[90] The concluding provisions of the treaty discuss the duties of the Ministry of Foreign Affairs of the Netherlands in sending and receiving Convention information,[91] how and when a state may accede to the present Convention,[92] and how long the Convention will remain in force.[93]

IV. THE CONVENTION'S INCONSISTENT APPLICATION

Confusion reigns when courts are confronted with deciding whether or not to require application of the Convention rules. Instead of providing a source of uniformity, the Convention's applicability is determined by various lines of reasoning creating a myriad of conflicting interpretations.[94] *In re Societe Nationale Industrielle Aerospatiale*[95] will provide the Supreme Court with an opportunity to analyze and resolve the controversy for the first time.

A. *Mandatory v. Permissive Application of the Convention*

Nowhere is the judicial confusion more apparent than in the decisions' comments on "mandatory" and "exclusive" application of the treaty.[96]

Nations or one of its specialized agencies, the Conference or a Party to the Statute of the International Court of Justice. Even then, however, the Convention will only be effective between the acceding state and the other states that affirmatively "declare" acceptance of the accession. Accession is ineffective against those filing no declaration. *See* Amram, *Explanatory Report, reprinted in* 12 I.L.M. 327, 328 (1973).

89. The Hague Evidence Convention, art. 33, 23 U.S.T. 2555, 2571, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 247. After the sixtieth day from the date notice of withdrawal is given, the reservation will no longer be effective. Another state affected by a state's reservation may employ the same Convention rules against the reserving state. *See id.*

90. *See id.* art. 34, 23 U.S.T. at 2571, T.I.A.S. No. 7444, 847 U.N.T.S. at 241, 247.

91. *See id.* arts. 35, 39-40, 23 U.S.T. at 2572-74, T.I.A.S. No. 7444, 847 U.N.T.S. at 241, 247.

92. *See id.* arts. 39-40, 23 U.S.T. at 2573-74, T.I.A.S. No. 7444, 847 U.N.T.S. at 241, 248.

93. *See id.* art. 41, 23 U.S.T. at 2575, T.I.A.S. No. 7444, 847 U.N.T.S. at 241, 248.

94. *Compare* Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 876 (Cal. Ct. App. 1982)(Convention applies to initial discovery procedures) *and* Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 506 (W. Va. 1985)(use of Convention protects judicial sovereignty, thus comity dictates use of Convention procedures as first resort) *with In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 121 (8th Cir.) (personal jurisdiction precludes use of Convention), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986) *and In re* Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992, 997 (10th Cir. 1977)(application of treaty not mandatory but dependent on outcome of balancing test). *See generally* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231 (1986)(general discussion of conflicting case law).

95. 782 F.2d 120 (8th Cir.), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986).

96. *See, e.g., In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124-27 (8th Cir.)(existence of jurisdiction over foreign litigant determines applicability of Convention),

These discussions focus on interpreting article twenty-seven.[97] This article states that the Convention will "not prevent a Contracting State from: permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions; permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention."[98] There is little doubt that this article permits a state to use methods outside the Convention to obtain evidence.[99]

Some United States courts, however, have misinterpreted this provision regarding exclusivity and held that it allows a permissive application of the treaty.[100] In *In re Societe Nationale Industrielle Aerospatiale*, the appellate

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cert. granted, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 512-15 (N.D. Ill. 1984)(use of international discovery laws based on outcome of balancing test); Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 878-83 (Cal. Ct. App. 1982)(application of Convention matter of comity). *See generally* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 239 (1986)(focus of confusion is misconstrued issue of whether Convention exclusive vehicle).

97. *See* The Hague Evidence Convention, art. 27, 23 U.S.T. 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 246; Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983)(provision should be interpreted to promote international cooperation); Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 880 (Cal. Ct. App. 1982) (clause allows less restrictive methods to take evidence); *see also* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 886 (Cal. Ct. App. 1981)(Convention establishes minimum standards not fixed procedures).

98. The Hague Evidence Convention, art. 27, 23 U.S.T. 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 246.

99. *See id.* art. 27, 23 U.S.T. at 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. at 246; Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 497 (W. Va. 1985)(Convention not exclusive method of taking evidence); Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42, 48-50 (D.D.C. 1984)(discovery not limited solely to use of Convention); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958-59 (E.D. Pa. 1984)(Convention not complied with when party subject to court's jurisdiction thus allowing federal, not Convention, discovery rules); Cooper Indus. v. British Aerospace, 102 F.R.D. 918, 919-20 (E.D. Pa. 1984)(Convention discovery methods may be waived allowing alternative rules to apply); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519-24 (N.D. Ill. 1984)(alternative methods of taking evidence preserved by the Convention); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 361-63 (D. Vt. 1984)(since Convention not mandatory, other methods of obtaining evidence permissible); Lasky v. Continental Prods. Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983)(Convention provides permissive, not mandatory ways to get evidence); Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 880 (Cal. Ct. App. 1982)(subsequent to Convention compliance other methods of discovery may be used); Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 885-86 (Cal. Ct. App. 1981)(Convention preferred, but not only, means of getting evidence); Vincent v. Ateliers de la Motobecane, S.A., 475 A.2d 686, 690 (N.J. Super. Ct. App. Div. 1984)(discovery first must comply with Convention then other methods available); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443, 445 (Tex. App.—Houston [1st Dist.] 1984, no writ) (Convention not exclusive means of conducting discovery).

100. *See In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir.) (Convention procedures not required when court has jurisdiction over litigant), *cert. granted*,

court held that where it had jurisdiction over the foreign litigant, compliance with the Convention provisions was not required.[101] Additionally, courts have held that the Convention should be applied merely as a matter of comity.[102] Although the article encourages less restrictive means of taking evidence, nowhere does it ratify the exclusion of the prescribed methods.[103] Instead, the Convention establishes a minimum degree of international cooperation, rather than a fixed rule.[104] The misunderstanding is compounded by the fact that the standards are created by internal law.[105] Amidst their confusion, the courts requiring the application of the Convention have based their endorsement on principles of comity and judicial restraint,[106] rather than recognizing that the treaty has the force of supreme law in the United

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__ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *see also* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 507 (N.D. Ill. 1984)(treaty not used when litigant properly before American court); Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 878-83 (Cal. Ct. App. 1982)(Convention applied as matter of comity).

101. *See In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir.), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986).

102. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519-23 (N.D. Ill. 1984)(Convention not mandatory but a matter of comity); *see also* Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 878-83 (Cal. Ct. App. 1982)(Convention application based on comity).

103. *See* The Hague Evidence Convention, art. 27, 23 U.S.T. 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 246.

104. *See* Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 880 (Cal. Ct. App. 1982)(Convention standard for compromise between contracting states); *see also* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 876 (Cal. Ct. App. 1981) (Convention sets minimum standards). *See generally* Letter of Submittal from Secretary of State William P. Rogers, to the President Regarding the Evidence Convention, *reprinted in* 12 I.L.M. 324, 327 (1973) [hereinafter Letter of Submittal] (discussion of Convention and its intended effects).

105. *See* The Hague Evidence Convention, art. 27, 23 U.S.T. 2555, 2569, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 246.

106. *See* Lasky v. Continental Prods., 569 F. Supp. 1227, 1228-29 (E.D. Pa. 1983); *see also* Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 505-06 (W. Va. 1985)(comity requires judicial restraint when compelling foreign parties to violate foreign or domestic laws). Comity concerns arise when there are competing interests between jurisdictions. *See* Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984). While comity is not an absolute obligation, it is a matter of courtesy and goodwill. The recognition of one nation permitting within its boundaries the governmental acts of another nation, while maintaining convenience, international duty and respect for its own citizens, describes comity. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). International comity has traditionally been recognized by American courts. *See* Vincent v. Ateliers de la Motobecane, S.A., 475 A.2d 686, 690 (N.J. Super. Ct. App. Div. 1984). Comity is a complicated, elusive concept. The boundaries of its duties vary depending on the circumstances of each claim. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also* Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984)(Convention not mandatory but matter of comity).

States.[107] The purpose of ratifying the Convention is to require contracting states to execute foreign court requests by substituting non-enforceable acts of comity with international treaty obligations.[108] The treaty was created with the force of federal law and should be enforced as a matter of law rather than as an act of international comity.[109] Additionally, while similar to the United States Federal Rules of Civil Procedure,[110] the rules created by the Convention inherently create their own methods of modification and waiver

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107. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."). Rather than deciding whether the Convention procedures are mandatory, the courts base their decisions on comity and judicial restraint. *See* Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum, 105 F.R.D. 16, 27 (S.D.N.Y. 1984). *See generally* Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited*, 16 L. & POL'Y INT'L BUS. 963, 994-99 (1984)(discussion of supremacy clause and alternative enforcement theory of Convention); *see also* Note, *Waiver of Rights under the Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 7 LOY. L.A. INT'L. & COMP. L.J. 409, 423-26 (1984)(discussing treaty supremacy and international comity).

108. *See* 1 U.S. DEP'T JUST. CIVIL DIVISION PRACTICE MANUAL, INTERNATIONAL JUDICIAL ASSISTANCE 25 (1976). The distinction between a court's justification for enforcement of the Convention based on comity versus federal law is crucial. There is no "unremitting obligation" to uphold international comity when doing so would conflict with this country's domestic laws, whereas federal law is treated as the supreme law of the land. *See* Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 505 (W. Va. 1985).

109. *See* Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 (1973). Since the Convention is an international treaty it deserves recognition as the supreme law of the land. *See id.*; *see also* Laker Airways Ltd. v. Union de Transports Aeriens, 103 F.R.D. 42, 49 (D.D.C. 1984)(Convention is federal law); Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum, 105 F.R.D. 16, 35-36 (S.D.N.Y. 1984)(both Federal Rules of Civil Procedure and Convention should be recognized as supreme law). *See generally* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231 (1986)(explanation of courts' misunderstanding of Convention's applicability).

110. *See, e.g.*, FED. R. CIV. P. 12(h)(1) (specific defenses not made in motions, responsive pleadings or amendments are waived); FED. R. CIV. P. 38(d) (failure to properly file demand waives right to jury); FED. R. CIV. P. 71A(e) (defendant's failure to assert objection or defense to taking of his property waives that right); *see also* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 517 (N.D. Ill. 1984)(failure to properly assert attorney-client privilege waives right to protection); Nye v. Sage Prod., 98 F.R.D. 452, 453 (N.D. Ill. 1982)(privilege for all documents waived when some of same subject matter produced). Failure to invoke the Convention as to prior discovery does not waive its applicability in subsequent action. *See* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 n.5 (E.D. Pa. 1983); *see also* Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 877-78 (Cal. Ct. App. 1982)(litigant not estopped from asserting Convention due to failure to assert for prior discovery). *But see* Cooper Indus. v. British Aerospace, 102 F.R.D. 918, 918-19 (S.D.N.Y. 1984)(efficient judicial administration requires Convention be asserted before discovery or right waived); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984)(where defendant answered two sets of interrogatories cannot now raise Convention).

and, as international law, are not subject to arbitrary change by signatories' domestic discovery laws.[111] Article twenty-three, specifically, is a focus of contention when American courts attempt to determine the applicability of the Convention over the Federal Rules of Civil Procedure.[112] The provision allows contracting states to declare that they will not execute Letters issued seeking evidence for pretrial discovery as practiced in common law countries.[113] Of major concern to the courts in *Graco, Inc. v. Kremlin, Inc.*[114] and *In re Anschwetz & Co.*[115] was that enforcement of this provision would subject the American judicial system to foreign countries' control.[116] The courts, however, have overlooked three important factors: (1) the majority of signatories' misunderstanding of the term "pretrial discovery";[117] (2) the

111. *See* The Hague Evidence Convention, arts. 4, 7-9, 11-12, 14-28, 31-34, 41, 23 U.S.T. 2555, 2559, 2560-61, 2562-63, 2563-70, 2571, 2575, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 242-46, 247-48.

112. *See* The Hague Evidence Convention, art. 23, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 245. *Compare* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 522-23 (N.D. Ill. 1984)(imprecise wording and inconsistency with treaty purpose makes application questionable) *and* Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984)(article's conflict with domestic procedural rules glaring fault in Convention) *with* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 (E.D. Pa. 1983)(restrictions on article protect against abuse by other states) *and* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 885 (Cal. Ct. App. 1981)(Convention requires good faith thus application of article not too restrictive to benefit).

113. *See* The Hague Evidence Convention, art. 23, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 245.

114. 101 F.R.D. 503 (N.D. Ill. 1984).

115. 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985).

116. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 522-23 (N.D. Ill. 1984). The court in *Graco* feared that failure to enforce the Federal Rules of Civil Procedure on a foreign litigant over whom American courts have personal jurisdiction would necessarily give foreign authorities the power to arbitrarily determine the amount of discoverable evidence. *See id.*; *see also In re* Anschwetz & Co. GmbH, 754 F.2d 602, 612 (5th Cir. 1985)(unfathomable that treaty would give foreign authorities power to control litigation in American courts), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985).

117. *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1421-24 (1978). The report states that all contracting states, except the United States, declared objections in receiving Letters seeking pretrial discovery. After expressing concern over the impact this would have on American discovery procedures, the United States delegate investigated the reasons for the large number of declarations. The majority of explanations given by contracting states' delegates revealed a serious misunderstanding of the concept of "pretrial discovery." The delegates understood that the term referred to discovery proceedings prior to the instigation of a lawsuit. The American delegate then discussed that the rationale behind "pretrial discovery" was to allow disclosure to all parties of the relevant information in the possession of any party. *See id.* Subsequently, several states modified their declarations. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 267 (1986). Although the revised declarations

strict limitations imposed by articles nine and twelve;[118] and (3) respect for the vast differences between civil and common law countries.[119] The courts' oversight has fostered a belief that application of the Convention would conflict with the Federal Rules of Civil Procedure,[120] a result that was not sup-

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still refuse to accept Letters under article 23, the definition of "pretrial discovery" was narrowed to refer only to those requiring a person: "a. to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power," or "b. to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power." Designations and Declarations of Signatories to The Hague Evidence Convention, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1987). Perhaps it is with this understanding that the court in *Volkswagenwerk* encouraged compliance with the Convention despite declarations made under article 23. *See* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 885 (Cal. Ct. App. 1981).

118. *See* The Hague Evidence Convention, arts. 9, 12, 23 U.S.T. 2555, 2561-63, T.I.A.S. No. 7444, 847 U.N.T.S. 231, 243. Special methods or procedures, as requested by the requesting state, must be followed by the state of execution unless internal practice or procedure makes performance impossible, it is incompatible with domestic law, or practical difficulties render the procedure impossible. *See id.* art. 9, 23 U.S.T. at 2561, T.I.A.S. No. 7444, 847 U.N.T.S. at 243. Additionally, a Letter may only be refused to the extent that execution is not within the judiciary functions of the executing state, or the executing state's security or sovereignty would be prejudiced. That the executing state's internal law does not allow a right of action on it or claims exclusive jurisdiction over its subject-matter is insufficient grounds on which to refuse a Letter. *See id.* art. 12, 23 U.S.T. at 2562-63, T.I.A.S. No. 7444, 847 U.N.T.S. at 243.

119. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 235 (1986). Based on the fundamental differences between civil law countries' and the United States' methods of discovery, the Convention "represents an achievement of historic proportions." *Id.* Several courts, however, have refused to acknowledge this compromise by insisting on the application of American rules of discovery when attempting to obtain evidence abroad. *See, e.g.*, *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124-26 (8th Cir.)(jurisdiction over foreign litigant renders Convention inapplicable even though evidence located abroad), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 731-33 (5th Cir. 1985) (balancing interests of comity warranted domestic rules of procedure rather than Convention), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 52 (1985); *In re* Anschwetz & Co. GmbH, 754 F.2d 602, 604-05 (5th Cir. 1985)(litigants get no protection from foreign government if amenable to American jurisdiction), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985); Cooper Indus. v. British Aerospace, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984)(failure to assert Convention waived right thus Federal Rules of Civil Procedure apply); Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, 99 F.R.D. 269, 271-72 (N.D. Ill. 1983)(American interest outweighed foreign interests thus discovery governed by internal laws).

120. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 523 (N.D. Ill. 1984). A declaration under article 23 requires a restriction on the Federal Rules of Civil Procedure that is totally unacceptable. *See id.*; *see also In re* Anschwetz & Co. GmbH, 754 F.2d 602, 613 (5th Cir. 1985)(Federal Rules provide method of discovery when declaration makes signatory im-

posed to occur.[121] Ultimately, however, the provision sought only to limit discovery by requiring specific Letters of Request.[122] The purpose of a treaty is to create special rules for unique situations, not to repeal existing national legislation.[123]

Rather than recognizing the Convention as establishing new rights for obtaining evidence abroad,[124] at least one United States court has interpreted the treaty as allowing the application of American discovery procedures on foreign signatories.[125] Several decisions have allowed an exception to the

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mune to pretrial discovery under Convention), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985).

121. *See, e.g.*, Message from the President, *reprinted in* 12 I.L.M. 323, 323 (1973)(Convention requires change in civil law countries, not United States); Letter of Submittal, *reprinted in* 12 I.L.M. 324, 327 (1973)(present discovery procedures changed very little by treaty); Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 (1973)(no major changes in American discovery methods result from treaty). Domestic rules are kept intact since a treaty deals only with the law on an international scope. The Convention complements American law, it does not repeal it. Thus, turning to the concept of comity to justify its application merely creates an escape for United States courts. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 257 (1986).

122. *See Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 I.L.M. 1417, 1428 (1978); *see also* Note, *Waiver of Rights Under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 7 LOY. L.A. INT'L. & COMP. L.J. 409, 419-20 (1984)(discussion of controversy concerning article 23).

123. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 257 (1986).

124. *See id.* at 272. In no way does the Convention invalidate American law. Courts may determine what evidence should be sought abroad. The treaty merely gives United States courts direct access to information within the boundaries of other signatories. *See id.*

125. Lasky v. Continental Prods., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983). Judge Neucomer stated that article 27 specifically provides that the Convention "shall not prevent a contracting state from . . . permitting by internal law or practice, methods of taking evidence other than those provided for in this Convention." *Id.* Based on this interpretation, he held that the Federal Rules of Civil Procedure were in no way superseded by the Convention. Jurisdiction over a foreign litigant subjected that party, like any other party, to the Federal Rules of Procedure. *See id. But see* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983). Only the state in which the evidence is sought may unilaterally supplement the treaty provisions with its internal laws. The state of origin may not substitute Convention procedures with its own practices. *See id.*; *see also* Pieburg GmbH & Co. Kg. v. Superior Court, 186 Cal. Rptr. 876, 881 (Cal. Ct. App. 1982)(only nation whose judicial sovereignty infringed upon by foreign discovery procedures may waive Convention); Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 884 (Cal. Ct. App. 1981) (implementing domestic laws of contracting states allows replacement of Convention at will; must exercise judicial restraint); Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 502 (W. Va. 1985)(forum courts' supplementation of internal laws promotes diversity not uniformity among signatories).

treaty when a court has personal jurisdiction over a foreign litigant.[126] United States law, however, does not appear to justify these cases' inherent uncertainty dealing in treaties and international law.[127] Additionally, these holdings neglect to acknowledge that the Convention applies to the taking of evidence "abroad."[128] Thus, the Convention's application is determined not by the location of the litigant, but the location of the evidence. Nowhere does the instrument make an exception when a country has jurisdiction over a party.[129]

In an attempt to justify the treaty's rejection, courts implemented a balancing test.[130] The test entails a five-step analysis used by American judges to determine the applicability of the Convention when two states with jurisdiction require inconsistent conduct by a person.[131] The standard applied

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126. *See, e.g.*, *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir.)(although information sought is abroad, Convention not applicable because court has jurisdiction over party), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *In re* Anschwetz & Co. GmbH, 754 F.2d 602, 606 (5th Cir. 1985)(no immunity of foreign government to parties amenable to jurisdiction), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985); Slauenwhite v. Bekum Maschinenfabriken, GmbH, 104 F.R.D. 616, 619 (D. Mass. 1985)(personal jurisdiction precludes treaty application); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519-20 (N.D. Ill. 1984)(no protection by Convention to parties properly before American courts). *But see* Volkswagenwerk Aktiengesellschaft v. Superior Court, 109 Cal. Rptr. 219, 221 (Cal. Ct. App. 1973)(jurisdiction for corporation party not automatic subjection of internal practices to forum court). *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 251 (1986).

127. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 251 (1986).

128. *See, e.g.*, *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir.)(although documents located in foreign state's territorial jurisdiction precludes application of treaty), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *In re* Anschwetz & Co. GmbH, 754 F.2d 602, 615 (5th Cir. 1985)(production of documents and answers to interrogatories sought abroad does not require Convention), *petition for cert. filed*, __ U.S. __, 106 S. Ct. 52, 88 L. Ed. 2d 42 (1985); Slauenwhite v. Bekum Maschinenfabriken, GmbH, 104 F.R.D. 616, 619 (D. Mass. 1985)(since production of foreign witness voluntary, treaty rules not applicable); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520-21 (N.D. Ill. 1984)(Convention only requires compliance when evidence taken from witness abroad).

129. *See* The Hague Evidence Convention, arts. 1-42, 23 U.S.T. 2555, 2555-76, T.I.A.S. No. 7444, 847 U.N.T.S. 281, 241-49.

130. *See, e.g.*, Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 512-16 (N.D. Ill. 1984)(after balancing analysis Convention procedures determined inadequate); Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, 99 F.R.D. 269, 271 (N.D. Ill. 1983)(American patent law interest outweighed foreign official's interest in protecting documents); Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum, 105 F.R.D. 16, 30 (S.D.N.Y. 1984)(France's interests subordinate to American interests thus precluding application of Convention and balancing considerations). *But see* Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874, 885 (Cal. Ct. App. 1981)(comity balancing analysis requires application of Convention at least as initial measure).

131. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

includes consideration of each state's vital national interests, the nature and extent of the hardship caused by inconsistent enforcement actions imposed upon the person, the extent to which the conduct required will occur in the other state's territory, the person's nationality, and the extent to which either state's enforcement procedure may be reasonably expected to achieve compliance.[132] However, foreign states' interests seldom get much consideration when American courts apply this balancing test.[133] Although the American Law Institute improved the test by more precisely addressing transnational discovery conflict,[134] the revision appears to have gone unnoticed by the courts. Additionally, the restatement concerning conflicting discovery procedures has been finely tuned to address the conflicts confronting American courts.[135] This treatise too, however, provides for the production of documents located abroad absent compliance with international law.[136] These decisions represent yet another oversight by American courts. Rather than wasting time searching for loopholes in the Convention, courts should allow any conflicts arising from the treaty to be resolved through diplomatic channels.[137]

B. *Blocking Statutes*

Another factor that warrants consideration by American courts is the passage of foreign "blocking statutes."[138] These statutes, which prohibit the taking of documents and information to be used in a court or tribunal in a

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132. *See id.*

133. *See* Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. POL. 1061, 1066-70 (1984); *see also* Note, *Transnational Discovery: The Balancing Act of American Trial Courts and the Northern District of Illinois' New Approach to the Hague Convention*, 42 WASH. & LEE L. REV. 1285, 1292-93 (1985)(test outcome generally result of finding interest of United States paramount).

134. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 (Tent. Draft No. 3, 1982)(suggested considerations for resolving conflicting discovery methods between United States and foreign countries); *see also* Note, *Transnational Discovery: The Balancing Act of American Trial Courts and the Northern District of Illinois' New Approach to the Hague Convention*, 42 WASH. & LEE L. REV. 1285, 1293 (1985)(discussing improved steps of restatement).

135. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 (Tent. Draft No. 7, 1986).

136. *See id.* This restatement principally pertains to foreign litigants confronting the American court system. *See id.*

137. *See* The Hague Evidence Convention, art. 36, 23 U.S.T. 2555, 2572, T.I.A.S. No. 7444, 847 U.N.T.S. 241, 247. The Convention requires that all conflicts arising between contracting states must be resolved through diplomatic channels. *See id.*

138. *See* Law. No. 80-538 of July 16, 1980, *translated in* H. DE VRIES, N. GALSTON & R. LOENING, FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 8-50 to 51 (1986); *see also* Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, 99 F.R.D. 269, 273-74 (N.D. Ill. 1983)(translation attached to exhibit A); *see also* Production of Trading Interests

foreign country outside of international treaties,[139] are probably a manifestation of French and British discontent with the United State's treatment of the Convention.[140] Violating these laws can result in fines, imprisonment, or both.[141] Neither statute, however, appears to preclude evidence sought under the Convention.[142] Despite the protection of the treaty given by other contracting states,[143] American courts have consistently held that criminal sanctions in foreign states do not necessarily bar the compelling of evidence.[144] For instance, in *United States v. First National Bank*,[145] the court held that criminal sanctions did not bar the action requiring the petitioner to break domestic laws; instead, they required a balancing of interests.[146] So, while the blocking laws seem to create an effective deterrent for countries

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Act, ch. 11 (1980); 17 HALSBURY'S STATS. OF ENG. & WALES (4th ed.1986)(United Kingdom restrictions on use of evidence abroad).

139. *See* Law No. 80-538 of July 16, 1980, art. 4, *translated in* H. DE VRIES, N. GALSTON & R. LOENING, FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 8-50 to 51 (1986); *see also* Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, 99 F.R.D. 269, 273-74 (N.D. Ill. 1983)(translation attached to exhibit A); Production of Trading Interests Act, ch. 11 (1980)(restrictions in use of evidence abroad in United Kingdom).

140. Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 508 (N.D. Ill. 1984). French displeasure with American discovery procedures is manifest in the blocking statutes. This attitude is also reflected in several aspects of the Convention. *See id.*

141. *See id.* at 509.

142. *See id.* The French statute appears to protect the Convention in two ways: international treaties or arguments are excepted and the statute only prohibits requests by "foreign public authorities," not foreign courts as covered in the treaty. Since the British blocking statute precludes only vaguely stated requests and requests threatening the state's sovereignty or security, the Convention is protected. *See id. See generally* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 274-75, 277 (1986)(discussion of blocking statutes and impact on Convention).

143. *See, e.g.*, F. CONST. Tit. VI, art. 55, *translated in* H. DE VRIES, N. GALSTON & R. LOENING, FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 2-23 (1986)(treaties superior authority to laws); GRUNDGESETZ-KOMMENTAR, art. 25, nos. 8, 38, art. 59, nos. 40, 43 (I. von Munch 2d ed. 1983), *quoted in* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 231 (1986)(German Parliament ratified treaty to preempt general statutes); NETH. CONST. art. 94, *quoted in* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 642 (1986)(treaties apply over statutes if conflicting).

144. *See* United States v. First Nat'l Bank, 699 F.2d 341, 345 (7th Cir. 1983). Where criminal sanctions exist, a balancing of interests, rather than an automatic bar to domestic courts seeking evidence, will be considered. *See id. See, e.g.*, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-06 (1958)(United States courts may employ maximum efforts to recover evidence despite foreign sanctions); *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 126 (8th Cir.)(foreign law imposing criminal sanctions requires consideration not preclusion of suit), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 997 (10th Cir. 1977)(court may order production regardless of foreign illegality).

145. 699 F.2d 341 (7th Cir. 1983).

146. *See id.* at 345.

avoiding the Convention procedures, American courts have virtually eliminated their impact.[147]

V. CONCLUSION

The courts' misunderstanding of the Convention has minimized the impact of the first attempt by civil and common law countries to bridge the extensive differences in legal systems. What recognition has been given the treaty is limited at best. Instead of recognizing the validity of the treaty as federal law, courts have created exceptions and loopholes to avoid its effects. Although the exclusivity of the instrument is not an issue, the signatories' obligation to abide by it is. The courts' holdings imply that conforming with the Convention would be a relinquishment of control. They appear to disregard, however, the possibility of applying domestic law after exhausting the remedies provided in the Convention.[148] The Convention does not represent a usurpation of power, but a system of compromises designed to facilitate international cooperation. At the very least, Convention procedures should be used initially.

147. *See, e.g.*, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205 (1958)(maximum efforts may be used to obtain evidence abroad despite blocking statutes); *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 126 (8th Cir.)(courts consider criminal sanctions when using balancing test), *cert. granted*, __ U.S. __, 106 S. Ct. 2888, 90 L. Ed. 2d 976 (1986); *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 997 (10th Cir. 1977)(criminal sanction no bar to order compelling discovery).

148. *See* Note, *Transnational Discovery: The Balancing Act of American Trial Courts and the Northern District of Illinois' New Approach to the Hague Convention*, 42 WASH. & LEE L. REV. 1285, 1296 (1985)(application of Convention methods as first resort protects American courts' sovereignty by allowing subsequent application of domestic laws).

VI. APPENDIX A

Central Authorities of Contracting States
(Compiled from 28 U.S.C.A. § 1781 nn.1-14 (West Supp. 1987)).

1. Barbados — Registrar of the Supreme Court of Barbados
2. Czechoslovakia — Minister of Justice of the Czech Socialist Republic & Minister of Justice of the Slovak Socialist Republic
3. Denmark — Ministry of Justice
4. Finland — Ministry of Foreign Affairs
5. France — Ministry of Justice
   Civil Division of International Judicial Assistance
   13 Place Vendome
   Paris (1 er)
6. Federal Republic of Germany

Baden-Württemberg	das Justizministerium Baden-Württemburg (The Ministry of Justice of Baden-Württemberg), D 7000 Stuttgart
Bavaria	das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 München
Berlin	der Senator für Justiz (The Senator of Justice), D 1000 Berlin
Bremen	der Präsident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen
Hamburg	der Präsident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg
Hesse	der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden
Lower Saxony	der Niedersächsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover
Northrhine-Westphalia	der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine Westphalia), D 4000 Düsseldorf
Rhineland-Palatinate	das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz
Saarland	der Minister für Rechtspflege (The Minister of Justice), D 6600 Saarbrücken

Schleswig-Holstein	der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land Schleswig-Holstein), D 2300 Kiel

7. Israel — Director of Courts
   19 Jaffa Road
   Jerusalem
8. Italy — Ministry of Foreign Affairs
9. Luxemburg — Parquet Général
10. Netherlands — Public Prosecutor
11. Norway — Royal Ministry of Justice and Police
12. Portugal — Director-General of the Judiciary Department of the Ministry of Justice
13. Singapore — Registrar of the Supreme Court
14. Sweden — Ministry of Foreign Affairs
15. United Kingdom - Foreign and Commonwealth Office
    —including: Hong Kong
    Gibraltar
    Cyprus
    Falkland Islands
    Isle of Man
    Cayman Islands
16. United States — United States Department of Justice
    Washington, D.C. 20530
    —including: Puerto Rico
    Guam
    Virgin Islands

VII. APPENDIX B

Model for Letters of Request Recommended for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Request for International Judicial Assistance Pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters

Extracted from 28 U.S.C.A. § 1781 (West Supp. 1987) *N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of other languages.*

In order to avoid confusion, please spell out the name of the month in each date.

I. (*Items to be included in all Letters of Request.*)

1. Sender — (identity and address)

2. Central Authority of the Requested State — (identity and address)

3. Person to whom the executed request is to be returned — (identity and address)

II. (*Items to be included in all Letters of Request.*)

4. In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

5. a. Requesting judicial authority (article 3, a) — (identity and address)

   b. To the competent authority of (article 3, a) — (the requested State)

6. Names and adresses of the parties and their representatives (article 3, b)

a. Plaintiff _____

b. Defendant _____

c. Other parties _____

7. Nature and purpose of the proceedings and summary of the facts (article 3, c) _____

8. Evidence to be obtained or other judicial act to be performed (article 3, d) _____

III. *(Items to be completed where applicable.)*

9. Identity and address of any person to be examined (article 3, e) _____

10. Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, f) _____ (or see attached list)

11. Documents or other property to be inspected (article 3, g) _____ (specify whether it is to be produced, copied, valued, etc.)

12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3, h) _____ (In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)

13. Special methods or procedure to be followed (articles 3, i and 9) _____

14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7) _____

15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request _____

16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, b) _____

17. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by _____ (identity and address)

IV. (*Items to be included in all Letters of Request.*)

18. Date of request _____

19. Signature and seal of the requesting authority _____