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INTRODUCTION

In re Anschuetz & Co.\(^1\) marked the first time a federal court of appeals ruled on the Hague Evidence Convention\(^2\) procedures for taking evidence from a foreign party. The essential question was whether a German national, as a party before the court, was subject to the broad...
discovery provisions of the Federal Rules of Civil Procedure or
whether, as a national of a signatory to the Convention, was subject to
the more limited Convention procedures. The Fifth Circuit held that
absent one very narrow exception, the foreign party was subject to dis-
covery under the Federal Rules. 3

This Note details the substantial split in opinion among state and
federal courts prior to the Anschuetz decision regarding the applicabil-
ity of the Convention to foreign signatory nationals. Since the decision
in Anschuetz, however, every state and federal court presented with
this issue has followed the reasoning of the Fifth Circuit. 4 This Note
postulates reasons why this trend will continue.

The Note then examines the court's analysis in Anschuetz and con-
cludes that despite an evaluation of the available alternatives, the hold-
ing is subject to attack for not fully considering the sovereign interests
of the Federal Republic of Germany. Furthermore, the note concludes
that the Fifth Circuit superficially examined ordering first resort to the
Convention in attempting to satisfy the conflicting interests involved.
Finally, the Note offers a proposal articulating circumstances when a
court should order first resort to Convention procedures.

I. PRIOR HISTORY

A. THE SITUATION PRIOR TO THE CONVENTION

Prior to the adoption of the Hague Evidence Convention, procedures
for taking evidence abroad were chaotic. 6 These procedures were often
discretionary and subject to a myriad of obstacles. 7 The result was that
both foreign and United States courts consistently did not receive ade-
quate assistance from, or dispense adequate aid to, litigants in other

3. In re Anschuetz & Co., 754 F.2d 602, 604-05 (5th Cir.), petition for cert. filed
4. Id. at 615.
5. See infra note 152 (adumbrating cases).
6. See Jones, International Judicial Assistance: Procedural Chaos and a Program
for Reform, 62 YALE L.J. 515 (1953) (discussing taking evidence, service of process
and obtaining information on foreign law prior to the Convention); Taking Evidence by
Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, ABA
SECTION OF INT'L & COMP. LAW PROCEEDINGS 37, 46-69 (1959) (discussing the prac-
tical problems and substantial expenses involved in taking evidence abroad); Note, Ob-
taining Testimony Outside the United States: Problem for the California Practitioner,
29 HASTINGS L.J. 1237 (1978) (discussing the procedural and evidentiary problems
facing the international litigant).
7. See generally 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND
COMMERCIAL) 14-117 (1984) [hereinafter B. Ristau] (describing means by which
United States and foreign courts render judicial assistance absent a convention or
treaty).
Attempts on the part of the United States to enter into treaties for international judicial cooperation met with limited success.\(^8\) Foreign governments generally permitted American attorneys to depose only United States citizens within their territorial limits.\(^9\) Document production was substantially limited as well.\(^1\) Ignorance of the practice and purpose of United States discovery procedures was principally responsible for foreign hostility to United States evidence gathering methods.\(^12\)

Due to the general lack of a coordinating agreement, a litigant seeking evidence in a state prohibiting United States style discovery practice,\(^13\) or in a state where the witness was unwilling or legally unable\(^14\) to give evidence, was required to resort to the cumbersome, dilatory, and inefficient letter rogatory.\(^15\) Success with this procedure required

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8. Jones, supra note 6, at 516, 518-34. See generally P. Dyer-Smith, Federal Examinations Before Trial and Depositions Practice §§ 602-810 (1939) (discussing means by which United States litigants can obtain evidence abroad).

Civil law states have taken steps toward remedying these problems through a comprehensive series of treaties assuring judicial assistance. Jones, supra note 6, at 516.

9. See generally A. Stern, Getting the Evidence (1936) (containing information on twenty-three countries); Jones, supra note 6, at 523-29 (examining the results of United States efforts in this area).

10. P. Dyer-Smith, supra note 8, at §§ 602-810; Jones, supra note 6, at 523-25; see Heilpern, Procuring Evidence Abroad, 14 Tulane L. Rev. 29, 40 (1939) (discussing the difficulties involved in securing evidence abroad). Heilpern states that the difficulties surrounding the securing of evidence abroad are such as to confound any general practitioner not experienced in such matters. Id. Even to one who has the necessary experience, the delays and red tape involved in an effort to secure such evidence create a formidable psychological barrier in the prosecution of a litigation. Id.; see also Note, Foreign Depositions Practice in American Civil Suits - A Judicial Stepchild, 96 U. Pa. L. Rev. 241 (1947) (discussing the lack of formal procedures for importing testimony).


12. See Jones, supra note 6, at 526-28 (discussing various reasons for hostility).

13. See id. at 520-21 (describing a 1949 incident in Switzerland as illustrating the problem in attempting to take evidence without resort to the letters rogatory). Three Dutch attorneys took evidence from a Dutch citizen in Switzerland who had filed suit against the Dutch government. Id. After questioning, the Dutch citizen signed a copy of his oral responses. The Dutch lawyers were subsequently arrested and jailed, charged with usurping sovereign functions of the Swiss government. Id.


15. Jones, supra note 6, at 529-30. Letters rogatory passed through "as many as a
the cooperation of the receiving state, which in turn depended on indefinite principles of comity and reciprocity. Unfortunately, the tension attributable to the basic differences between United States and foreign concepts of discovery often undermined successful extraterritorial evidence gathering. As a result of years of frustration with this grossly inadequate process, the United States delegation to the Hague Conference on Private International Law actively participated in drafting the Hague Convention on Taking Evidence Abroad.

B. THE HAGUE EVIDENCE CONVENTION

The Hague Evidence Convention resulted from the work of a multinational drafting and negotiating commission at the Eleventh Session of the Hague Conference on Private International Law, held October dozen offices in their long journey to the foreign court and home again with an opportunity for delay or loss at each stop." Id. The authentication of letters rogatory proceeded as follows:

American letters rogatory are issued in the name of the President of the United States by the presiding justice of the court and are signed by the clerk. One of the judges of the court signs and certifies that the clerk is really the clerk of the court; the Attorney General of the United States certifies that the judge belongs to the court issuing the letters; the Secretary of State legalized the signature of the Attorney General; and finally, the Secretary of the Legation of the United States in the country of the court of execution authenticates the signature of the Secretary of State [before it is acted upon by the foreign court].

Id. at 529 n.41; see 4 MOORE'S FEDERAL PRACTICE D 8.05 (2d ed. 1950) (providing a form for a letter rogatory); see also Von Mehren, Discovery Abroad: The Perspective of the Private Practitioner, 16 N.Y.U. J. INT'L L. & POL. 985 (1984) (explaining that American ideas are aimed at a more rational and less adversarial approach towards discovery abroad); Amram, The United States Ratification of the Hague Convention on Taking Evidence Abroad, 67 AM. J. INT'L L. 104, 106-07 (1973) [hereinafter U.S. Ratification] (discussing the difficulties of requiring the jurisdiction to use compulsion even if accepted).

16. See infra notes 24, 33, 40, 57-61, 87, 135 and accompanying text (describing comity as a consideration in ordering resort to the Convention).


The primary goal of the Convention was the continuing revision of Chapter II of the Hague Conventions on Civil Procedure of 1905 and 1954. The Evidence Convention’s development was initiated at the suggestion of the United States Department of State, and the United States played a leading role among the twenty-five nations drafting the Convention.

In an effort to deal effectively with the problems of obtaining evidence abroad, the drafters proposed to fill “the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad,” and to replace the imprecise concepts of comity and


23. Letter of Submittal, supra note 18. The preamble to the Convention states, in part:
reciprocity with an international treaty. A guiding principle that all parties seemingly adopted throughout the drafting process was the creation of a method of taking evidence that was both “tolerable” to the state where it is taken and “utilizable” to the forum state. The Convention is presently in force in seventeen states, and many of the signatories are major trading partners with the United States.

C. JUDICIAL TREATMENT OF THE HAGUE EVIDENCE CONVENTION

Although the Convention has been in force in the United States since 1972, only a relatively small body of case law exists interpreting the

The states signatory to the present Convention, Desiring to facilitate the transmission and execution of Letter of Request and to further the accommodation of the different methods which they use for this purpose, Desiring to improve mutual judicial co-operation in civil or commercial matters, Have resolved to conclude a Convention to this effect.

Hague Evidence Convention, supra note 2, at preamble.


The act of taking evidence in a common-law country without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the ‘judicial sovereignty’ of the host country, unless its authorities participate or give their consent.


25. Letter of Submittal, supra note 18, at 6, 13 I.L.M. at 324; see Amram, supra note 18, at 651 (stating that the Convention should be a workable instrument).

26. Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Great Britain, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Northern Ireland, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United States and Yugoslavia are signatories to the Evidence Convention. Barbados, Cyprus, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom (including the possessions of Hong Kong, Gibraltar, areas of Akrotiri and Dhekelia on the island of Cyprus, and the Falkland Islands), and the United States, including Guam, Puerto Rico and the Virgin Islands ratified the Convention. 7 MARTINDALE-HUBBLE LAW DIRECTORY 14-15 (1986); see Sandman, Gathering Evidence Abroad: The Hague Evidence Convention Revisited, 16 LEGAL PROBS. INT'L BUS. 963, 974 (1984) (discussing membership in the Convention).

27. With international trade increasing, particularly with the importation of foreign goods into this country raising the number of possible suits by United States citizens,
Hague Convention. One possible reason for this result is that only six other nation-states had ratified the Convention as of 1980. Furthermore, most American lawyers are relatively unfamiliar with the Convention's provisions, especially in comparison to their familiarity with local, state, and Federal Rules of Procedure.

When the Hague Evidence Convention is deemed applicable, courts have applied it in one of four ways. One set of rulings states Convention procedures are the exclusive means of conducting discovery abroad. Another set of rules provides that litigants must initially employ Convention procedures before resorting to applicable civil rules.

and the addition of signatory states (Japan, Greece, Turkey, Spain and Canada are all still considering ratification), the number of suits in this area could increase dramatically.

28. Petitioner's Brief at 9, Anschuetz & Co. v. Mississippi River Bridge Auth., petition for cert. filed, 106 S. Ct. 52 (1985) [hereinafter Petitioner's Brief]. Most discovery orders are never published because they are interlocutory in nature and therefore not appealable. Id. Counsel for petitioner in Anschuetz estimated that there are 1,500 cases pending in United States courts in which German companies are parties and in which the discovery of foreign evidence is at issue. Id.


30. See Newman & Burrows, Discovery Abroad — The Hague Convention, N.Y.L.J., April 23, 1985, at 1, col. 1 (discussing how this factor will quickly fade as the utility of the Convention becomes popularized); see also N.Y.L.J., March 8, 1985, at 1, col. 2 (discussing the use of the Convention in a local state case).


[the ratification of the Convention brings to a climax years of efforts in the United States by those interested in modernizing and improving international and judicial assistance. Neither in the language of the Convention itself nor in any official communique regarding the effect of the Convention is there any indication that the U.S. Delegation[,] or any other party to the Convention viewed the Document as optional in nature.]

Id.


32. Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981) (ruling first on the interplay of the Convention with domestic civil rules). The court overturned the trial court's discovery order which required, inter alia, that the plaintiff be allowed to inspect the defendant's premises and copy relevant documents in its technical library, conduct informal interviews with and take depositions of defendant's employees at its plant; all these activities to take place in
A third series of holdings do not require use of Convention procedures, however, comity considerations may dictate resort to the Convention in the particular case. Finally, some courts have held that Convention

Germany. The court of appeals stated:

[W]e stress that we do not question the jurisdiction of the trial court to order Volkswagenwerk, as a party to the lawsuit before it, to give discovery in West Germany. With the qualifications we have stated under California law, the orders are appropriate to the action and VWAG is legitimately subject to the orders. We conclude only that the trial court, in the exercise of judicial restraint based on international comity, should have declined to proceed other than under the Hague Evidence Convention at this stage.

Id. at 858.

In Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982), involving another attempted discovery of a German corporation, a different panel of the California Court of Appeals reached the same result. In that case the plaintiff served written interrogatories on the defendant, who objected that they were not in conformity with the Hague Evidence Convention. Plaintiffs made no effort to serve their interrogatories in compliance with the Convention, claiming they could not afford to translate all 315 interrogatories into German as required by the Convention. Id. at 241, 186 Cal. Rptr. at 878.

The court in Pierburg agreed with the court in Volkswagenwerk by stating a "California court should require litigants seeking such discovery to first attempt to comply with the Convention before allowing the litigant to disregard it." Id. at 240, 186 Cal. Rptr. at 877. The court also ruled that a party cannot waive its right to insist that discovery proceed, at least initially, under the Hague Evidence Convention by failing to insist on compliance as to prior discovery by other parties to the action. Id. at 244, 186 Cal. Rptr. at 881.

Every subsequent reported case by a state appellate court also required at least initial use of Convention procedures. See Gebr. Eickhoff Maschinenfabrick Und Eisenegieberie v. Starcher, 328 S.E.2d 492, 504-06 (W. Va. 1985) (holding a suit for damages under strict liability for severance of plaintiff's arm while operating defendant's machine that principles of international comity require use of Convention procedures until such attempts prove useless); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443, 447-49 (Tex. Ct. App. 1984) (ruling in a contract suit by an American corporation against a German corporation that court order requiring deposition be taken in West Germany of German nationals was improper absent an initial attempt under the terms of the Convention); Vincent v. Ateliers de la Motobecane, 193 N.J. Super. 716, 721, 475 A.2d 686, 690 (1984) (holding in tort action against French manufacturer of mopeds that plaintiffs were required to initially go through proper diplomatic channels via Convention procedures).

Several federal district courts also required initial use of Convention procedures. See General Electric Co. v. North Star Int'l, Inc., No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (on LEXIS) (memorandum opinion in a contract action ordering use of Convention procedures as a first resort where documents sought are all located in West Germany); Schroder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222, 17,224 (N.D. Ill. Sept. 15, 1983) (memorandum opinion in a tort action requiring first resort to Convention procedures where interrogatories will be answered by a German national residing in Germany); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 (E.D. Pa. 1983) (plaintiff's document and interrogatory request in a tort action requiring the production of documents from West Germany must first employ Convention procedures).

33. This is the position adopted by the Fifth Circuit in both In re Anschuetz, 754 F.2d 602, 614 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985), and In re Messerschmitt Bolkow
procedures are never required. It is worth noting, however, that the United States Supreme Court has yet to decide this issue and, con-

Blohm, 757 F.2d 729, 732 (5th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986). In a recent decision, the Eighth Circuit Court of Appeals adopted the rationale and holding of the Fifth Circuit. In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986). On a petition for writ of mandamus in a products liability action, the Eighth Circuit adopted the Anschuetz rationale that requiring initial use of Convention procedures while reserving the right to order the discovery if that attempt proved unsuccessful was "a [general] policy [that] would defeat rather than promote international comity." Id. at 126.

Prior to Anschuetz, many district courts adopted this position. See Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 921 (S.D.N.Y. 1984) (holding that despite fact documents located in Britain, comity considerations do not require use of Convention procedures); International Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 453, 450 (S.D.N.Y. 1984) (labeling the conflict between German sovereignty and American discovery as "hypothetical"); Adidas, Ltd. v. SS Seatrain Bennington, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984) (on LEXIS) (holding there is no conflict between the Federal Rules of Civil Procedure and the Convention, as the purpose of the Convention was to resolve disputes between civil law and common law countries over the gathering of evidence abroad).

Lasky v. Continental Products Corp., 569 F. Supp. 1227 (E.D. Pa. 1983) was the first reported federal decision resolving a conflict between the Hague Evidence Convention and the Federal Rules. After deciding the Rules do not necessarily conflict with Convention procedures, the court prophetically stated that comity considerations will sometimes prove more appropriate. Id. at 1228-29. The district court ruled that because the requested documents were located in Germany, first resort to the Federal Rules would be "inappropriate." Id. at 1229; see also Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360, 363-65 (D. Vt. 1984) (adopting this view); Oxman, The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U. MIAMI L. REV. 773, 779-94 (1983) (hereinafter Oxman) (adopting the position that initial resort should be to the Convention).


Over defendants' objections, Justice O'Connor granted a stay of a state court order permitting plaintiffs to take depositions of German citizens in Germany. Justice O'Connor stated that such action would violate the Hague Evidence Convention. Id.

In an earlier proceeding in the same case Chief Justice Burger granted a stay pending disposition of plaintiff's application for leave to appeal the discovery order before the Michigan Supreme Court. Id. at 1303-04. Justice O'Connor reasoned that the Chief Justice "must have concluded that there was a substantial chance that the four Justices would agree to consider the case on merits, that there was a significant chance that the applicant would prevail, and that the injury resulting from the denial of a stay would be irreparable." Id. at 1304 (emphasis added). Justice O'Connor then granted the stay pending disposition of the application for a stay before the Supreme Court of Michigan. Id.

Therefore, by implication, Justice O'Connor interprets the significance of the initial stay, granted by the Chief Justice, as indicating that the Chief Justice believes at least four other members of the Court would join him in ruling the Hague Evidence Convention must be followed when seeking discovery of a foreign national. But see Club
sequently, considerable divergence in judicial opinion exists.

Courts consider nine principal factors in formulating their positions on the proper application of the Convention's provisions. The first and most important factor is the protection of the court's jurisdictional powers. The court in *Graco, Inc. v. Kremlin, Inc.* stated:

> The solicitude for the judicial sovereignty of civil law countries shown in *Schroeder, Philadelphia Gear* and *Pierburg* apparently is unmatched by any recognition that they are suggesting a startling limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court. 87

It is no coincidence that the same courts making this argument are least receptive to ordering use of Convention procedures. 88 Nearly every other court, including those that require use of Convention procedures in the first instance, state judicial authority extends to ordering a party to respond to discovery requests whether the party resides in this country or abroad. 89 Courts favoring resort to the Convention minimize the threat of the importance of the jurisdictional threat. 90

The second factor courts consider is the delay involved in using Convention procedures. 91 This factor becomes particularly pertinent when the Convention is raised subsequent to the commencement of discov-

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36. The Supreme Court granted certiorari in two cases; *In re Messerschmidt Bolkow Blohm*, 757 F.2d 729 (5th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986); *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986).


39. *See Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 50, 61 (E.D. Pa. 1983) (stating that "of course in the event that such efforts prove futile, further resort may be sought from this court").

40. *See Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17, 224 (N.D. Ill. 1983) (reasoning that mandatory reference to Convention procedures is consistent with our "principles of jurisdiction and due process" and satisfies the needs of international comity).

A related consideration, cost to the litigants, is also frequently mentioned. As with the first factor, courts favoring use of the Convention deemphasize this consideration.

The third factor courts consider is the probability that resort to the Convention produces the desired information. Courts weighing this factor often refer to article 23 of the Convention. Article 23 allows the signatory state to refuse to execute letters of request for obtaining common law style document discovery. This factor became important as the use of Convention procedures increased and some requests for evidence were denied.

42. See International Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 450 (S.D.N.Y. 1984) (stating "the significance of this consideration is enhanced by the pendency of this litigation for nine years."); see also Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360, 365 (D. Vt. 1984) (holding that the United States plaintiff need not follow the Convention when the West German manufacturer had already answered two sets of interrogatories without raising the Convention issue).

43. See Pain v. United States Technology Corp., 637 F.2d 775, 790 (D.C. Cir. 1980) (stating that "regardless of whether or not foreign evidence would be fully available were trial to be conducted here, there can be little doubt that the cost to the litigants of employing such procedures would be exceedingly high."); Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 241, 186 Cal. Rptr. 876, 878 (1982) (noting that cost of translating 315 interrogatories into German is prohibitively high); Doyle, Taking Evidence Abroad by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, A.B.A. SECTION OF INT'L & COMP. L. PROCEEDINGS 37, 46-49 (1959) (discussing expenses and problems with interpreters, court reporters, witnesses, and local counsel abroad).

44. See Oxman, supra note 33, at 782 (stating that the reluctant party should not be required to use those procedures if they prove futile); Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984) (stating that the Convention's "most glaring fault" is Article 23); see also Wilson v. Lufthansa German Airlines, 107 A.D.2d 393, 395-96, 489 N.Y.S.2d 575, 577 (1985) (characterizing required use of the Convention as "an exercise in futility" because Germany had specifically stated its intent not to execute letters of request issued to obtain pretrial discovery).

45. Convention, supra note 2, at art. 23.

46. See Radvan, supra note 21, at 1042-46 (discussing article 23 of the Convention); B. RISTAU, supra note 7, at 235-51 (discussing foreign court interpretations of a party's declarations under article 23).

47. See Comment, Mandatory Procedures, supra note 24, at 1464 (discussing responses to requests). There is the additional concern that foreign parties will "hide behind" the Convention. See supra notes 37-40 (discussing how federal courts retain jurisdiction upon failure of a party to comply in discovery), infra note 90 (concerning delays in litigation), 154-57, and accompanying text (discussing deliberate production avoidance).
The fourth factor courts examine is the physical location of the evidence.\textsuperscript{48} If the evidence is located in this country, even if it is in the possession of a foreign party, all courts view the evidence as clearly outside the scope of the Convention.\textsuperscript{49} Some courts require use of Convention procedures if the evidence is physically located abroad.\textsuperscript{50} Most courts, however, state that the mere fact evidence is located abroad is insufficient to require use of the Convention to obtain that evidence.\textsuperscript{51}

The fifth factor courts rely on is location of the discovery processes. Courts favoring use of Convention procedures assume that a discovery order issued in the United States for evidence located abroad results in discovery actually taking place in a foreign country.\textsuperscript{52} The predominant view, however, is that despite the evidence's physical location abroad, actual discovery takes place in the United States. As the court in \textit{Graco} stated:

This court believes that discovery does not "take place within (a state's) borders" merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country. The court's view is the same with respect to people residing in another country.\textsuperscript{53}

Courts, favoring limited applicability of the Convention, widely employ the sixth factor, status as a person or party. The basic premise is that non-party foreigners, unlike parties, are not subject to the personal


\textsuperscript{49} See Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442, 444 (D. Del. 1982) (holding that the Hague Evidence Convention is not applicable to documents located in the United States).


\textsuperscript{51} The nationality of the party from whom discovery is requested was also a factor considered in some of the earlier cases. See Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983) (considering party's nationality as key factor); Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 242, 186 Cal. Rptr. 876, 881 (1982) (ruling applicability of the Hague Convention not limited to discovery taken abroad; key factor is the nationality of the party from which the discovery is being sought). This position, however, has been sharply criticized and no recent decision cites it as a factor. Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 518-19 (N.D. Ill. 1984).


jurisdiction of United States courts.\textsuperscript{54} If the non-party foreigner resides in a civil state, any attempt to obtain discovery violates that state's judicial sovereignty. Therefore, that state can properly expect the Convention's protection. Those courts favoring use of Convention procedures point out that the Convention makes no distinction between persons and parties.\textsuperscript{55} This distinction, however, did exist in practice before the Convention. The two principal situations requiring the use of letters rogatory did not involve a party before the court.\textsuperscript{56}

The seventh, and often crucial factor, is whether use of the Convention advances the policy of international comity.\textsuperscript{57} Courts receptive to ordering primary resort to the Convention cite comity, both judicial comity as well as the more general comity regarding respect among nations, as the principle justification for their holding.\textsuperscript{58} Courts that are adverse to ordering use of the Convention either ignore or circumscribe comity.\textsuperscript{59}

The eighth and final factor, related to preservation of comity, is the scope of the discovery ordered. Some courts suggest that the broader

\begin{itemize}
\item \textsuperscript{54} Id. at 519-20; Amicus Brief of the Federal Republic of Germany, \textit{In re Anschuetz & Co.}, 754 F.2d 602 (5th Cir.), \textit{petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.}, 106 S. Ct. 52 (1983) [hereinafter FRG Amicus Brief].
\item \textsuperscript{55} FRG Amicus Brief, \textit{supra} note 54, at 4-6.
\item \textsuperscript{57} \textit{See} Hilton v. Guyot, 159 U.S. 113 (1895) (offering the classic definition of comity). The Court stated:
\begin{quote}
Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.
\end{quote}
\end{itemize}
the discovery request, the more likely the intrusion into foreign judicial sovereignty. Most courts have not explicitly weighed scope as a factor, however, it may precipitate substantial litigation.

II. FACTS OF IN RE ANSCHUETZ

On February 3, 1979, a Spanish vessel, the M/V POLA DE LENA, struck a landing on the Mississippi River in New Orleans, Louisiana, damaging the landing and two ferry boats. The firm Naviera Santa Catalina owned the vessel and had chartered it to Compania Gijonesa de Navegacion S.A. (Gijonesa). On February 6, 1979, the owner of the damaged landing, the Mississippi River Bridge Authority, brought suit against Gijonesa and two unnamed foreign insurance companies in Federal District Court for the Eastern District of Louisiana. Gijonesa added Anschuetz & Co., GmbH, as a third party defendant to the suit on July 9, 1980. The third party complaint alleged product liability against Anschuetz, the manufacturer of the M/V POLA DE LENA's failed steering device.

Following the termination of several jurisdictional questions, all parties actively participated in discovery. Beginning with Gijonesa's first attempt to serve Anschuetz with discovery requests in October 1983, and continuing until to the Fifth Circuit’s final decision on March 7,

The United States has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here. West Germany has a clear interest in protecting the integrity of its judicial rights and procedures, but we find that interest less compelling in this instance than, for example, where a non-party witness is sought for deposition or where the scope of discovery sought involves more intrusive methods.

62. See In re Anschuetz & Co., 754 F.2d 602, 608 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985) (holding that "[i]f the discovery sought . . . in Germany becomes particularly intrusive . . . then the court may order resort to the Convention") (emphasis added).
63. Petitioner's Brief, supra note 28, at 3.
64. These two companies have since merged. In re Anschuetz & Co., 754 F.2d 602, 604 n.2 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985).
65. Petitioner's Brief, supra note 28, at 3. The suit was later joined by two construction companies doing work on the landing at the time of the accident. Id.
68. FRG Amicus Brief, supra note 54, at 20.
1985, Anschuetz made numerous attempts to stifle production under the court's discovery orders. After Gijonesa failed under a production order to procure sufficient information regarding the type, design, and maintenance of the M/V POLA DE LENA steering system, it attempted to employ a Rule 30(b)(6) telephone deposition to identify those Anschuetz personnel who would have knowledge of the location, type, and number of pertinent documents. Responding to this attempt, Anschuetz filed a motion to quash the telephone deposition.

The district court dismissed this motion on January 25, 1984.

Soon after the district court ruling, both Anschuetz and Gijonesa filed opposing motions regarding the conduct and scope of the ongoing discovery, thereby sharpening the production disagreement. Subsequently, on February 22, 1984, the United States magistrate denied Anschuetz’s motion for a Rule 26(c) protective order and ordered Anschuetz to identify those Anschuetz personnel who would have knowledge of the location, type, and number of pertinent documents. The district court eventually ruled that Anschuetz was subject to its jurisdiction. In re Anschuetz & Co., 754 F.2d 602, 604 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985).

A two year battle then ensued regarding whether the Spanish shipyard, Empresa Nacional De Bazan, which Anschuetz sought to bring in as another third party defendant, was subject to the court’s jurisdiction. Id. at 605. Ultimately, the court ruled it did not have personal jurisdiction.

69. Petitioner’s Brief, supra note 28, at 3. The initial question resolved by the district court was whether sufficient personal contacts existed to allow the court personal jurisdiction over Anschuetz pursuant to Louisiana’s long arm statute. La. REV. STAT. ANN. § 13.3201 (West Supp. 1986) (stating that in essence a court may exercise personal jurisdiction over a nonresident who causes damage either through his or his agent’s action or omission taking place within the state or through his action or omission occurring outside the state with which he has sufficient contact or could have reasonably foreseen that his manufactured product might very well have found its way therein). The court eventually ruled that Anschuetz was subject to its jurisdiction. In re Anschuetz & Co., 754 F.2d 602, 604 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985).

70. See Respondent’s Brief, supra note 67, at 1 (describing pretrial discovery). The exact date of these requests is October 12, 1983. Most, if not all, of the requested information was located in the Federal Republic of Germany. Amicus Brief of the United States at 3, In re Anschuetz & Co., 754 F.2d 602, 608 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985) [hereinafter U.S. Amicus Brief].


72. Id.

73. Id. at 3-4.

74. In re Anschuetz & Co., 754 F.2d 602, 608 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1985). Anschuetz also argued that Gijonesa was asking for “another bite at the apple” as it had the opportunity to depose Anschuetz personnel in Spain in 1981. Id. The Fifth Circuit apparently believed this was a general Rule 26(e) motion. Id. at 1-2. In the interim, on January 20, Gijonesa served Anschuetz with interrogatories requesting the identification of the Anschuetz organization during the period 1976-79. Id. at 3. The District Court dismissed the motion as moot because Anschuetz and Gijonesa had entered into a discovery agreement. The agreement called for Gijonesa to limit the scope of the document requests (rendering the Rule 30(b)(6) telephone requests unnecessary) and for Anschuetz to designate a corporate representative and other witnesses deposed in Germany. Id.
Schuetz to comply with most of Gijonesa's discovery requests.\textsuperscript{75}

By April 1984, Anschuetz's attempts to quash production took a different track, relying for the first time\textsuperscript{76} on the Hague Evidence Convention. On or about April 13, Anschuetz's motions and appeals\textsuperscript{77} to various judicial bodies based on the Convention were denied.\textsuperscript{78} The Fifth

\textsuperscript{75} Respondent's Brief, supra note 67, at 2. Gijonesa again was dissatisfied with Anschuetz' compliance with the court's orders and filed a motion requesting sanctions. \textit{Id.} at 2-3. On March 23, 1984, the Magistrate granted the motion and ordered Anschuetz to pay the expense to have a Gijonesa attorney travel to Germany to take preliminary depositions of the Anschuetz employees to determine if they had knowledge of the suit's subject matter. \textit{Id.} On March 30, 1984, Anschuetz filed a motion to reconsider its request for a protective order of February 21, 1984 which was denied. \textit{Id.} at 3-4.

\textsuperscript{76} See \textit{id.} (stating that the March 30 motion obliquely raised the Convention as a defense).

\textsuperscript{77} \textit{Id.} at 3-4. On or about April 13, 1984, Anschuetz (1) moved for a protective order to stay the depositions, then scheduled to take place in Germany on May 2, 1984; (2) appealed to the district court the magistrate's orders that documents be produced and that depositions not be stayed; and (3) sought to amend the document production and deposition orders to permit interlocutory review by the Fifth Circuit pursuant to 28 U.S.C. \textsection{} 1292(b). The motions were denied. \textit{Id.}

\textsuperscript{78} \textit{Id.} In its decision the district court stated:

We have a party, we have a jurisdiction, and under Rule 34 a party is required to produce documents which are in its possession, custody or control. I don't think there is any doubt but that Anschuetz' documents involved in this matter are under its control. The fact that the documents are in West Germany is, to this Court, immaterial. The Court has jurisdiction over Anschuetz. Anschuetz can produce the documents in the United States, and be subject to our discovery provisions. The treaty was not designed to create a Chinese wall among nations. It was designed to facilitate the securing of evidence among various nations, giving due deference to the various differences which exist within their judicial systems. The Court does not believe that it's mandatory, nor does the Court even believe that it's applicable where the Court had in personam jurisdiction over a non-party defendant insofar as Rule 34 is concerned, and insofar as Rule 30(b)(6) is concerned. I'm frank to say that, in the event that a deposition was required from a non-30(b)(6) witness, the treaty would have to be applied in order to secure that deposition testimony, if indeed the deposition testimony was to be taken. Or if I were to send, or any court send, a commission, that would be subject to the provisions of the rule; or if letters rogatory were sent to someone not a party, or to some person who is an agent of a party, but who might have in his personal possession, as opposed to its corporate possession, some relevant document, I think the Court would have to proceed on the basis of the treaty to secure these. But to say that the combination of Rule 5, which permits the service of motions and discovery motions and so forth on counsel of record, Rule 34, which requires a party to produce records which are in his possession, custody or control, subject, of course, to protective order of the Court, or Rule 30(b)(6) which requires that a private corporation who is a party designate one or more officers, directors or managing agents to testify, and to permit them to testify pursuant to the discovery provisions, are all subject to the Hague Convention, to this Court make no sense at all.

The Court has personal jurisdiction over Anschuetz. The Court intends to enforce the provisions of the Federal Rules of Civil Procedure as to this party over which it has jurisdiction to the same extent that it would enforce those rules
Circuit, however, decided to hear the dispute and granted Anschuetz a writ of mandamus. Its decision was issued March 7, 1985. The Supreme Court subsequently granted a writ of certiorari.

III. ANALYSIS OF THE FIFTH CIRCUIT'S OPINION

In In re Anschuetz, the Fifth Circuit held that discovery of a party must take place under the Hague Evidence Convention only with the taking of an involuntary deposition conducted in a signatory country. Use of the Convention is also required when persons, not parties subject to the court's in personam jurisdiction, are ordered to produce documents or other evidence in a signatory state. Through this holding the Fifth Circuit established three principles. First, the Hague Convention procedures are not exclusive when a United States court has personal jurisdiction. Second, production constitutes discovery taken in the United States, and, accordingly, foreign judicial sovereignty is not violated when documents are ordered produced in the United States. Third, considerations of international comity do not require mandatory first resort to the Convention beyond the two situations specified by the court.

against any party over which it has jurisdiction. The motion, accordingly, will, therefore be denied on that ground.

Transcript of the April 13, 1984 Hearing, at 8, reprinted in Petitioner's Brief, supra note 28, at 32a-34a.


80. Id. at 605.

81. Id. at 614.

82. Id. at 615.

83. Id. The court seemed to indicate extraordinary discovery requests, those that are "particularly intrusive," may constitute a third situation warranting the Convention's use. Id. The court in Anschuetz, however, was clear that this situation "does not mandate the Convention's use, it would merely afford the court the option to order the parties to conduct discovery under the Hague Convention." Id.

84. Id.

85. Id. at 611. But see Oxman, supra note 33, at 741-44 (stating that the concern is not legal but proprietary and that the better view would recognize the sensitive nature of international order where multiple concurrent jurisdictions are involved).


A. THE HAGUE CONVENTION IS NOT EXCLUSIVE

The court in Anschuetz was concerned with the inequities resulting from exclusive use of the Convention. The court believed exclusivity would be unfair because it gives foreign litigants an advantage over American litigants. Foreign litigants employ the full range of discovery devices available under the Federal Rules of Civil Procedure while United States litigants would be limited to using the more restrictive procedures required by the Convention. The court further stated that exclusive use encourages adversaries to conceal information.

This argument minimizes the fact that the critical factor is the locus of the evidence, not the nationality of the parties. If the evidence is located abroad, every litigant, not just United States citizens, may be restricted from using the broad discovery provisions under the Federal Rules.

In Anschuetz the court also stated that requiring exclusive use of Convention procedures would "work a drastic and very costly change" in the conduct of litigation. The court noted litigation involving na-


89. Id. at 606-07.

90. Id. This would be "a result directly antithetical to the express goals of the Federal Rules and the Hague Convention which aim to encourage the flow of information between adversaries." Id. at 606; see Hickman v. Taylor, 329 U.S. 495, 500-02 (1947) (stating that because mutual knowledge of all the relevant facts is essential to proper litigation, discovery rules are to be construed broadly to allow information gathering). The basic assumption of this argument, that a litigant will violate United States law, is highly suspect.

91. Oxman, supra note 33, at 783.

92. Id. Oxman notes that "[A] foreign plaintiff trying to secure evidence from a foreign branch of an American defendant might well be required...to use the Convention procedures." Id. Likewise, the California Supreme Court made it clear that two parties seeking the same discovery are not treated differently: [E]qual protection arguments apply only where persons who are similarly situated receive disparate treatment. Here, plaintiffs and defendant are not so situated[.] Should defendant seek answers to written interrogatories from its co-defendants, who are also West German nationals, and those co-defendants assert the applicability of the Hague Evidence Convention, then Pierburg would be treated in the identical manner as plaintiffs must now be treated. This state may not, and does not, treat two parties seeking the same discovery differently.


tionals of signatory states is increasing, thereby magnifying this problem. 64

While the court is correct in recognizing that use of Convention procedures is more costly than resort to domestic rules of procedure, it ignores the power of United States courts to distribute costs among, and impose time limits upon, the litigants. 65 Moreover, not only are the new procedures a vast overall improvement on pre-Convention procedures, 66 but they specifically require a more expeditious treatment of requests. 67 Finally, delays attributable to the Convention's use will be reduced through familiarity and improved judicial relations. 68

After reviewing the applicable Federal Rules on taking evidence abroad, the court considered the numerous exceptions to the foreign state's obligation to execute letters of request. 69 The court explained that these exceptions effectively swallow the rule because they "potentially bar a letter of request from being successfully executed at all." 70

While exceptions do exist, the court's use of the modifier "numerous" 71 is inappropriate. Phillip Amram, rapporteur at the Convention

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97. *See Convention,* *supra* note 2, at art. 9 (stating that letters of request "shall be executed expeditiously").

98. Oxman, *supra* note 33, at 734 n.3 (stating that American attorneys' and foreign judges' lack of familiarity with Convention procedures and the judicial processes of the other country often is a major factor in delaying completion of foreign discovery) Of course, with time and accumulated experience the delays will be significantly reduced. *Id.*


The Hague Evidence Convention provides:

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings. Convention, *supra* note 2, at art. 10.

100. *In re Anschuetz & Co.,* 754 F.2d 602, 609-10 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.,* 106 S. Ct. 52 (1985).

101. *Id.* at 610.
and United States representative on the Special Commission that drafted the Convention, emphasized that use of the phrase "shall apply . . . compulsion" was intended to be circumvented only where the foreign state's sovereignty would be violated. Indeed, preventing violations of state sovereignty was a major concern of the Convention.

The Fifth Circuit cited article 23 of the Convention, which provides for refusal of letters of request in common law style discovery, as preventing successful employment of Convention procedures. Despite the court's many assertions, including the incorrect statement that all signatories to the Convention adopted the reservation in article 23, article 23 has not prevented discovery from taking place.

Additionally, the court in Anschuetz stated that even if discovery abroad is available, use of the Convention would limit the "breadth of evidence" usually forthcoming under our rules of discovery. In support, the court listed several differences between our common law sys-

102. Convention, supra note 2, at art. 10.
103. Amram, supra note 18, at 652, 53. Article 12 of the Convention states "The execution of a letter of request may be refused only to the extent that . . . (b) the state addressed considers that its sovereignty or security would be prejudiced thereby." Convention, supra note 2, at art. 12. Therefore, a state may not refuse to execute a letter of request solely on the ground that under its internal law the state of execution claims exclusive jurisdiction over the subject matter of the action, or that its internal law would not admit a right of action on it. Id.
104. Amram, supra note 18, at 652.
105. Convention, supra note 2, at art. 23.
109. See Radvan, supra note 21, at 1042 (noting Israel and Czechoslovakia have not adopted the reservation). It should be remembered that a state may drop reservations at will. Convention, supra note 2, at art. 34.
110. See FRG Amicus Brief, supra note 54, at 10-13 (describing West German cooperation with numerous pretrial discovery requests).
tem and the civil law judicial system for taking evidence abroad.\textsuperscript{112} Once again, the court’s conclusion is suspect. Provisions in the Convention allow transmitting courts to request that certain procedures, such as those used by United States courts, be employed in the execution of letters of request.\textsuperscript{113}

Additionally, the court expressed concern with the effects on United States courts of requiring the Convention’s exclusive use.\textsuperscript{114} The court considered it “patently obvious” that requiring use of Convention procedures would cause the forum court to relinquish control over conduct of the discovery process, raising the specter of “very serious interference with the jurisdiction of United States courts.”\textsuperscript{115} This fear is not entirely well founded. Use of the Convention necessarily entails employing the good offices of a foreign court.\textsuperscript{116} This was also true of pre-Convention letters rogatory.\textsuperscript{117} Trust in the foreign court’s good faith efforts to execute properly the letter of request will dissipate these concerns and foster increased international judicial cooperation.\textsuperscript{118}

The court also stated that the Convention’s permissive language renders Convention procedures nonexclusive\textsuperscript{119} because the Convention’s


113. Convention, supra note 2, at art. 9; see infra note 183 (describing West German intent to comply with Convention Procedures).


115. See id. (citing Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984)). The Court reasoned that “treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals.” Id. See generally Comment, Mandatory Procedures, supra note 23 (discussing interference with the jurisdiction of United States courts).

116. See Convention, supra note 2, at art. 12 (noting that execution of a letter of request may be refused if the execution does not fall within the functions of the executing states’ judiciary, or the recipient state believes execution would prejudice its sovereignty or security.)

117. See supra note 15 (describing the procedure for letters rogatory).

118. See Comment, Mandatory Procedures, supra note 23, at 1464 (discussing the responses of several states to requests under the Hague Evidence Convention); Amicus Brief of the Government of the United Kingdom of Great Britain and Northern Ireland at 17-19, Societe Nationale Industrielle Aerospatiale v. District Court, 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986) [hereinafter U.K. Amicus Brief] (stating a foreign state’s willingness to assist United States courts generally should be considered in determining proper resort to the Convention).

119. In re Anschuetz & Co., 754 F.2d 602, 608 n.11 (5th Cir.), petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 106 S. Ct. 52
language emphasizes cooperation, not mandatory procedures. Furthermore, the court reviewed the Convention's legislative history and determined that the parties intended that the Convention's language was permissive. The court doubted whether the United States delegation, the State Department, or Congress intended exclusive use of the Convention.

The Fifth Circuit's analysis of this issue is sound. A review of all available materials on the history of the Convention and the United States delegation indicates no United States intent to require exclusive use of the Convention. Despite this, however, civil law countries may have intended exclusivity. Because Great Britain, another common law state, proposed the inclusion of article 23 in the Convention at the time the Convention was drafted, the civil law countries may not have realized that they agreed to assist United States litigants' conducting United States style discovery. Given American refusal to employ Convention procedures, it is arguable that the Convention was a document founded on a fundamental misunderstanding and therefore destined to be discarded.

The court distinguished cases requiring use of Convention procedures in a variety of ways. Federal cases were dismissed because they re-

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(1985). The Court properly refused to use the language of article 27 in arriving at this conclusion. Id. There is support for using article 27. Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983). The better view, however, is that article 27 refers to what a receiving court may use. Amram, supra note 18, at 107; Comment, Mandatory Procedures, supra note 23, at 1477.


121. Id. at 613 n.28.

122. Id. at 615 (citing Oxman, supra note 33, at 760).

123. See Oxman, supra note 33 at 758-61 (discussing the numerous sources).


125. Convention, supra note 2, at art. 23.


127. Id. The Federal Republic has repeatedly expressed its view that the Convention was, and is, exclusive. FRG Amicus Brief, supra note 54, at 5-9. The French Senate, angered by United States litigants' disregard for Convention procedures, made it a criminal offense to request or transmit certain evidence for use in a foreign proceeding in a matter unauthorized by the Hague Convention. See Herzog, The 1980 French Law on Documents and Information, 75 AM. J. INT'L L. 382 (1981) [hereinafter Herzog] (describing French measures to limit the abuse of extraterritorial application of United States law). Therefore, it may be inferred that France also intended Convention procedures to be mandatory.

lied too heavily on the two California Court of Appeals’ cases, Volkswagenwerk and Pierburg. The state cases were found “not to be well reasoned” because they were decided by state courts that, in general, are more inclined to yield to a federal treaty over state rules of civil procedure. Also, the scope of discovery ordered in these cases was very broad. Accordingly, the state courts were too concerned with intruding on foreign sovereignty.

The court’s analysis of these prior cases is incomplete. Additional consideration is required as to why these courts, particularly the federal courts, ordered first resort to the Convention. A more thorough examination reveals a strident concern with enhancing international judicial comity.

B. Discovery Ordered Produced Here Takes Place Here

The Fifth Circuit unequivocally proclaimed that discovery ordered produced in the United States does not violate the Convention’s intent to protect judicial sovereignty. The court embraced the familiar adage that a party does not need physical control of documents to have them accessed through pretrial discovery. The court then advanced the notion that matters preparatory to producing documents or answering interrogatories in this country, even if they take place in a foreign country, do not constitute discovery in that foreign state.

The court grounds this argument in the belief that acts not calling

130. Id.
131. Id.
132. Id. at 608-09.
133. Id.
134. See generally Oxman, supra note 33, at 779-95 (arguing that a careful balancing of interests which resulted in a determination that first resort, while reserving the right to ultimately employ the Federal Rules of Civil Procedure, best satisfied all interests).
135. See supra notes 24, 33, 40, 57-61, 87 and accompanying text (discussing comity as an important judicial consideration).
137. See id. (citing Cooper Industries v. British Aerospace, 102 F.R.D. 918, 919 (S.D.N.Y. 1984)).
138. See id. at 611 (citing Adidas (Canada) Ltd. v. S/S Sea Train Bennington, 80 Civ. 1 911 (S.D.N.Y. May 30, 1984)).
for German judicial participation do not implicate the Hague Convention.\footnote{139} Therefore, if the Convention is not implicated, then resorting to its procedures is never required.\footnote{140} The same logic is applied to the taking of voluntary depositions.\footnote{141} Using the term “preparatory” to describe a party’s compliance with a discovery order is often not truly descriptive of the degree of work done within the foreign state.\footnote{142} Often a considerable portion of requested documents is located abroad. The same is true of witnesses.\footnote{143} As a result, there is a serious danger of implicating foreign sovereignty.\footnote{144}

C. CONSIDERATIONS OF COMITY DO NOT REQUIRE USE OF THE CONVENTION IN THE FIRST INSTANCE

Holding that the Convention is not exclusive, and then defining narrowly what constitutes discovery taken abroad, the court in \textit{Anschuetz} then examined comity considerations as a potential reason for ordering first resort to Convention procedures. The court stated that United States courts necessarily retain jurisdiction even when they order initial resort to Convention procedures. Therefore, if the receiving court does not execute the letter of request to the United States sending court's satisfaction, then the sending court may nonetheless order the foreign party to produce under the Federal Rules.\footnote{146} The court noted that ig-
noring the receiving court's refusal to execute the letter of request would result in "the greatest insult to a civil law country." Therefore, the court concluded that the interests of comity dictate that first resort to the Convention is not desirable.

The court's conclusion contradicts the view of the Federal Republic of Germany that given the opportunity the Convention will prove a workable and satisfying means of gathering evidence. The court's view also contradicts common sense. Civil law states would obviously prefer first resort to the Convention rather than no resort at all. Furthermore, even if resort to Convention procedures proves unsuccessful, the Federal Rules allow judges to distribute the added costs of discovery and to effectively deal with the added delays.

Finally, the court held that trial courts should consider comity where relevant, however, it did not detail the kind of comity analysis required. As a result, trial courts are left to consider this problem on their own.

IV. EFFECTS OF THE ANSCHUETZ DECISION AND A PROPOSAL FOR CHANGE

A. EFFECTS OF THE DECISION

Every court deciding this issue, including the Eighth and Ninth Circuits, has adopted the Fifth Circuit's holding in Anschuetz. For the
following reasons, this trend is likely to continue. Courts will circumvent the Convention because of their familiarity with, and greater certainty of, their own procedures.\textsuperscript{153} Moreover, courts today are very sensitive to added delays in litigation,\textsuperscript{154} and any means that expedite pretrial discovery are welcomed.\textsuperscript{155} Further, courts appear to believe that foreign corporate defendants use the Convention as a tool to weaken their opponents.\textsuperscript{156} As it is often described, foreign defendants "seek to avoid producing documents" through interposition of the Hague Convention.\textsuperscript{157}

The Fifth Circuit's light dismissal of comity considerations in \textit{Anschuetz} has resulted in encouraging courts to neglect the effect that circumvention of Convention procedures will have on foreign sovereignty and international judicial comity.\textsuperscript{158} In civil states taking evi-

that the use of Convention procedures was not required by international comity where inordinate delay would result); Testerion Inc. v. Skoog, No. 4-84-911, slip op. (D. Minn. Aug. 9, 1985) (LEXIS, Genfed file, District file) (holding in a contract suit that once in personam jurisdiction exists, discovery may proceed under the Federal Rules); Wilson v. Lufthansa German Airlines, 108 A.D.2d 393, 395, 489 N.Y.S.2d 575, 578 (1985) (holding in a products liability action that resort to the Convention was not required by a comity analysis despite location of the evidence in Germany); Gebr. Eickoff Maschinenfabrik und Eisengieberei v. Starcher, 328 S.E.2d 492, 501 n.13, 504-06 (W.Va. 1986) (comity considerations do not require use of the Evidence Convention on German nationals).

The Eighth Circuit was faced with the interplay of the Federal Rules of Civil Procedure, the Convention and a French blocking statute. \textit{In re Societe Nationale Industrielle Aerospatiale,} 782 F.2d 120, 124-45 (8th Cir.), \textit{cert. granted,} 106 S. Ct. 2888 (1986) (adopting the Fifth Circuit's view that unless the discovery actually takes place in France, the Convention is not applicable and international comity need not be considered).

The Ninth Circuit also adopted the holding in \textit{Anschuetz.} Societe Nationale Industrielle Aerospatiale, 788 F.2d 1408, 1410-11 (9th Cir. 1986) (ruling that the Federal Rules of Civil Procedure, and not the Hague Evidence Convention, govern discovery of documents from foreign parties).

153. \textit{See generally} Oxman, \textit{supra} note 33 (stating that a court's familiarity with local rules and its close relationship with the local bar causes it to often unilaterally circumvent the Convention in favor of the more familiar rules).

154. \textit{See Fed. R. Civ. P. 1} (mandating that the Rules of Civil Procedure be interpreted to secure a just, speedy, inexpensive resolution to each action).


156. \textit{In re Anschuetz & Co.,} 754 F.2d 602, 614 (5th Cir.), \textit{petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.,} 106 S. Ct. 52 (1985). The court stated "[i]t does not require Prometheus (sic) to foresee that United States litigants [read plaintiffs] would soon find it impossible to obtain necessary discovery from foreign based parties." \textit{Id.}


158. Lowrance v. Weinig, 107 F.R.D. 386, 389 (W.D. Tenn. 1985) (describing how the Anschuetz court's failure to thoroughly examine German sovereign interests and the effects of non-resort on international comity have encouraged other courts to ignore
dence is a judicial function reserved solely for trial judges. Therefore, the sovereign interests of a civil state are implicated because their citizens are compelled to perform judicial acts within their territory. Nevertheless, United States courts have summarily concluded that because all discovery in their cases was to occur in the United States, no analysis of international comity need be made. Courts reached this conclusion despite the fact that documents being sought were located abroad and those who would respond to the interrogatories were foreign nationals living in their respective countries.

The effect of the Anschuetz decision on international judicial comity may prove significant. United States litigants abroad may be negatively affected, and United States government attempts to protect sensitive economic and military technology may become more difficult. Considered together with signatory civil states' severe restrictions regarding our discovery procedures, this decision may reduce the number of parties to the Convention and ultimately result in a return to the use of letters rogatory with the extensive concomitant difficulties for litigants.

B. ORDERING FIRST RESORT IS OFTEN THE BETTER ALTERNATIVE

The decision in Anschuetz will result in little or no use of Hague Evidence Convention procedures. This is an unfortunate result because of the efficiency and cost advantages the Convention affords to all parties. Additionally, use of the Convention avoids many unfortunate instances involving affronts to foreign judicial comity.

There are two ways to breathe life back into the Hague Evidence Convention. First, require exclusive resort to the Convention where the receiving state makes the Convention the sole means to gather evidence for use in an extraterritorial judicial proceeding. To discern which parties adopted the position requires reference to the exceptions and the effects of their refusal to employ Convention procedures.

159. Herzog, supra note 127, at 383-84.
161. See B. Ristau, supra note 7, at 257-59 (discussing who may take evidence in civil law countries).
162. See Oxman, supra note 33, at 786 (stating that the resentment and animosity of foreign nations resulting from their coerced acceptance of the violation of judicial sovereignty may have adverse effects on United States litigants in foreign courts).
163. Id. at 769 n.99.
164. See supra note 16 and accompanying text (detailing the complicated processes of letters rogatory).
165. B. Ristau, supra note 7, at 253-56.
conditions found within the body of the Evidence Convention.\textsuperscript{166} Because these exceptions and conditions are expressly allowable under the Convention, they are presumptively a treaty obligation.\textsuperscript{167} Arguably, as a matter of constitutional law, this approach is necessary\textsuperscript{168} because a treaty "obligation" becomes part of the "supreme law of the land."\textsuperscript{169} To its advantage this solution avoids the use of the highly indefinite principle of comity\textsuperscript{170} and therefore aids in avoiding international judicial animosity.

This approach, however, ignores the clearly expressed intent of the United States that the Convention is not the only means for United States courts to order discovery abroad.\textsuperscript{171} This argument, therefore, imposes on United States courts an interpretation of the Convention in direct contradiction to that expressed by the United States delegation,\textsuperscript{172} the United States State Department,\textsuperscript{173} the President,\textsuperscript{174} and Congress.\textsuperscript{175}

A second solution to the conflict of interest problems inherent in these cases is to require United States courts to employ Convention procedures as a first resort in circumstances where sovereign judicial interests are strongly implicated.\textsuperscript{176} These situations are those instances where: (1) the preponderance of documents sought are located in the foreign state;\textsuperscript{177} (2) the persons sought to be deposed, or respond to

\textsuperscript{166} See generally Convention, supra note 2.
\textsuperscript{167} U.S. Const. art. IV, cl. 2. The privileges and immunities clause states that "each state shall accord to the citizens of each and every other state those privileges and immunities which it accords to its own citizens." \textit{Id.}
\textsuperscript{168} B. Ristau, supra note 7, at 253-56.
\textsuperscript{170} See supra notes 24, 33, 40, 57-61, 87, 135 and accompanying text (discussing international comity as a judicial consideration).
\textsuperscript{171} See U.S. Ratification, supra note 15, at 105 (stating that the Convention would effect "no major changes in United States procedure [nor require] changes in United States Legislation or Rules").
\textsuperscript{172} See 1969 Report of the U.S. Delegation, supra note 22 at 820 (stating that no major changes in United States procedure and practice would be necessary).
\textsuperscript{173} See Letter of Submittal, supra note 18 at 324-35 (stating that no major changes are necessary in United States procedure).
\textsuperscript{174} See Message From the President, supra note 19 (adopting position that no changes in United States procedure are necessary); Amicus Brief of the United States at 11-19, Societe Nationale Industrielle Aerospatiale v. District Court, 782 F.2d 120, 124-25 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986) (No. 85-0695) (stating that comity never requires use of the Convention).
\textsuperscript{175} See Letter of Submittal, supra note 18 (discussing the need for the Convention and the fact that no changes in United States law were necessary to adopt).
\textsuperscript{176} See Oxman, supra note 33, at 781 (agreeing with the practice of California courts to compel litigants to first attempt discovery in conformity with the Convention).
\textsuperscript{177} \textit{Id.} at 779-80; see also U.K. Amicus Brief, supra note 116, at 16-17 (discussing physical location as a consideration).
interrogatories, are foreign nationals of the signatory state residing in that state;\textsuperscript{178} (3) the foreign party has insubstantial contacts with the forum,\textsuperscript{179} or, if a corporation, no substantial corporate personnel in the forum.\textsuperscript{180} Other considerations include the length of time elapsed since commencement of the suit,\textsuperscript{181} the desire and ability of the parties to share costs,\textsuperscript{182} and the track record of the receiving state; (a) in acting on the request;\textsuperscript{183} (b) in fully responding to the request;\textsuperscript{184} and, (c) in responding expeditiously.\textsuperscript{185}

This solution would satisfy the interests of foreign governments,\textsuperscript{186} but not cause unfair delay or expenses to litigants before American courts.\textsuperscript{187} Because United States courts retain their jurisdictional prerogatives, subsequent resort to the Federal Rules for discovery will ensure the full and fair exchange of information.\textsuperscript{188}

To ensure maximum compliance with a letter of request, attorneys

\begin{itemize}
\item \textsuperscript{178} Oxman, \textit{supra} note 33, at 779-80; U.K. Amicus Brief, \textit{supra} note 118, at 12-14.
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} Oxman, \textit{supra} note 33, at 779-80.
\item \textsuperscript{181} Comment, \textit{Mandatory Procedures}, \textit{supra} note 23, at 614.
\item \textsuperscript{182} \textit{Id.} at 614-15.
\item \textsuperscript{183} FRG Amicus Brief, \textit{supra} note 54, at 13-14. The Federal Republic of Germany has stated that:
\begin{itemize}
\item a) its courts are guided by a spirit of cooperation when executing requests for judicial assistance under the Convention;
\item b) it interprets requests literally without insisting on strict compliance with formalities;
\item c) it permits the taking of voluntary testimony before U.S. consular officers and diplomats;
\item d) it permits the production of documents to be used at trial;
\item e) it allows the examination of witnesses relating to documents; and
\item f) it has in connection with this brief expressed its intention to consider the practical experience gained so far and to be gained in the future, in connection with the promulgation of regulations for pre-trial production of documents.
\end{itemize}
\textit{Id.}
\item \textsuperscript{184} See FRG Amicus Brief, \textit{supra} note 54, at 5-7 (discussing compliance by Federal Republic of Germany); U.K. Amicus Brief, \textit{supra} note 118, at 17-19 (discussing foreign state's willingness to assist United States courts as a favorable indication that the Convention should be employed).
\item \textsuperscript{185} \textit{Id.; see infra} notes 95-98 and accompanying text (discussing expedient use of the Evidence Convention).
\item \textsuperscript{186} FRG Amicus Brief, \textit{supra} note 54, at 5-6; U.K. Amicus Brief, \textit{supra} note 118, at 17-18.
\item \textsuperscript{187} See \textit{generally} Hickman v. Taylor, 329 U.S. 495 (1947); American Tel. \& Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), \textit{cert. denied sub. nom. American Tel. \& Tel. Co. v. MCI Communications Corp.}, 440 U.S. 971 (1979).
\item \textsuperscript{188} See FRG Amicus Brief, \textit{supra} note 54, at 5-6 (inferring that foreign courts will honor letters of request for evidence which will not be used at trial); \textit{see supra} notes 114-18 and accompanying text (discussing jurisdiction of federal and state courts).
\end{itemize}
should draft requests for assistance that are as specific as possible.\textsuperscript{189} Such specificity will avoid allegations that the requests are not designed to produce evidence actually for trial and minimize foreign displeasure with "pretrial discovery."\textsuperscript{190} Requests should also state that the evidence is being sought for use in an ongoing judicial proceeding.\textsuperscript{191} Finally, judges should strictly scrutinize these requests to ensure maximum probability of execution.\textsuperscript{192}

CONCLUSION

The decision in \textit{Anschuetz} inadequately considered foreign sovereign judicial interests. Further analysis of these interests would have involved the Fifth Circuit in a more reasoned approach to the conflicts of interest inherent in use of the Hague Evidence Convention. Requiring exclusive use of the Convention in all cases involving foreign signatory nationals is not the answer to these conflicts. Requiring courts to undertake a reasoned evaluation of comity in each case, however, would result in harmonizing these various conflicting interests.

\textit{Thomas John Percy}

\textsuperscript{189} Augustine, \textit{supra} note 24, at 126.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} Presumably this will clarify the judicial need for the requested information.
\textsuperscript{192} See Oxman, \textit{supra} note 33, at 778 n.130 (discussing recent amendments to Rule 26(k) of the Federal Rules of Civil Procedure authorizing greater judicial involvement in pretrial discovery). As in entirely domestic litigation, increased judicial supervision of discovery in international litigation recognizes that the litigants will at times exceed the reasonable bounds of permitted discovery. \textit{Id.}