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Judicial Treatment of the Hague Evidence Convention and the Worth of International Judicial Comity: In Re Anschuetz & Co.

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JUDICIAL TREATMENT OF THE HAGUE EVIDENCE CONVENTION AND THE WORTH OF INTERNATIONAL JUDICIAL COMITY: *IN RE* *ANSCHUETZ & CO.*

Thomas John Percy*

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INTRODUCTION

*In re Anschuetz & Co.*¹ marked the first time a federal court of appeals ruled on the Hague Evidence Convention² 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

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1. *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).

2. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter *Convention*]. A lengthy discussion of procedures under the Convention is beyond the scope of this paper. *See generally* Note, *Taking Evidence Outside the United States*, 55 B.U.L. REV. 368 (1975) (discussing Convention procedures in greater detail).

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.³ The Fifth Circuit held that absent one very narrow exception, the foreign party was subject to discovery under the Federal Rules.⁴

This Note details the substantial split in opinion among state and federal courts prior to the *Anschuetz* decision regarding the applicability 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.⁵ This Note postulates reasons why this trend will continue.

The Note then examines the court's analysis in *Anschuetz* and concludes that despite an evaluation of the available alternatives, the holding 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 adequate assistance from, or dispense adequate aid to, litigants in other

3. *In re Anschuetz & Co.*, 754 F.2d 602, 604-05 (5th Cir.), *petiton for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

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 practical problems and substantial expenses involved in taking evidence abroad); Note, *Obtaining 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).

nations.⁸

Attempts on the part of the United States to enter into treaties for international judicial cooperation met with limited success.⁹ Foreign governments generally permitted American attorneys to depose only United States citizens within their territorial limits.¹⁰ Document production was substantially limited as well.¹¹ 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 unable¹⁴ to give evidence, was required to resort to the cumbersome, dilatory, and inefficient letter rogatory.¹⁵ Success with this procedure required

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).

11. See generally Eder, *Powers of Attorney in International Practice*, 98 *U. PA. L. REV.* 840 (1950) (discussing problems with taking evidence abroad).

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.*

14. *Id.* at 528 n.8. Foreign local law often prohibits a witness from testifying other than before a domestic court. See Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 *INT'L LAW.* 35, 36-37 (1979) (examining in particular the various modes of providing evidence in France); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 *INT'L LAW.* 465, 466-68 (1983) (describing the Convention's effect on gathering evidence in the Federal Republic of Germany).

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.¹⁶ Unfortunately, the tension attributable to the basic differences between United States and foreign concepts of discovery often undermined successful extraterritorial evidence gathering.¹⁷ 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.¹⁸

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).

17. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 257-301 (1981) (describing the differences in discovery among common law countries); Eagles, *Disclosure of Material Obtained on Discovery*, 47 MOD. L. REV. 284, 284-88 (1984) (discussing European attitudes toward U.S. discovery). "Pre-trial disclosure as known in common law countries, and especially as known in the U.S., is unheard of" in civil law countries. PRACTICING LAW INSTITUTE, *Extraterritorial Discovery in International Litigation* 27 (1984).

18. *Letter of Submittal of Secretary of State William P. Rogers to the President Regarding the Evidence Convention*, 92d Cong., 2d Sess. (1972), reprinted in 12 I.L.M. 324 (1973) [hereinafter *Letter of Submittal*]; see also *Senate Committee on Foreign Relations of the Evidence Convention*, S. REP. NO. 25, 92d Cong., 2d Sess. 1 (1972), [hereinafter *Senate Committee on Foreign Relations*] (recommending that the Senate consent to ratification). See generally Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651 (1969) [hereinafter Amram] (describing commitment of the United States to the Convention and its interest in the new procedures).

7-26, 1968.¹⁹ The primary goal of the Convention was the continuing revision of Chapter II of the Hague Conventions on Civil Procedure of 1905 and 1954.²⁰ The Evidence Convention's development was initiated at the suggestion of the United States Department of State,²¹ and the United States played a leading role among the twenty-five nations drafting the Convention.²²

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,"²³ and to replace the imprecise concepts of comity and

19. Pub. L. No. 88-244, 77 Stat. 775 (1963); *Message From the President Transmitting to the Senate the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, SEN. EXEC. DOC. NO. A., 92d Cong., 2d Sess. (1972), reprinted in 12 I.L.M. 323 (1973) [hereinafter *Message from the President*]. The President's transmission to the Senate included both the Report of the Secretary of State and the Convention Rapporteur's Report. *Id.*

The Hague Evidence Convention followed the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, done Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter *Hague Documents Convention*]. The Hague Documents Convention was undertaken as a comprehensive revision of Chapter I of the Hague Civil Procedure of 1954, which superseded the Hague Civil Procedure Convention of 1905, both of which were adopted before the United States joined the Hague Conference on Private International Law. See U.S. Ratification, *supra* note 15, at 1104 (specifically discussing the provisions of the Convention); Note, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—A Comparison with Federal Rules Procedures*, 7 BROOKLYN J. INT'L L. 365, 367 (1981) (describing the Convention's history).

20. B. RISTAU, *supra* note 7, at 177. Chapter I of these Conventions discussed service abroad and resulted in the "Hague Service Convention." Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done at the Hague, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163 (entered into force for the United States Feb. 10, 1969).

21. Amram, *supra* note 18, at 104. With the success of the Documents Convention, the State Department recommended the Conference also revise Chapter II of the 1954 Hague Convention on Private International Law dealing with taking evidence abroad. *Letter of Submittal*, *supra* note 18, at 324. Every four years a session is held to draft conventions on various subjects in the area of private international law. See Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 16 N.Y.U. J. INT'L L. & POL. 1031, 1031 n.2 (1984) [hereinafter Radvan] (focusing on problems concerning the interpretation of the Convention's provisions, the position of the Convention within the United States, and the compulsion of discovery if the Convention fails to serve its intended purpose).

22. *Report of U.S. Delegation to the Eleventh Session of the Hague Conference on Private International Law*, 8 I.L.M. 785 (1969) [hereinafter *1969 Report of the U.S. Delegation*]. Philip W. Amram, who represented the United States on the Special Commission, was elected rapporteur of the Hague Evidence Convention. *Id.* at 805; see Amram, *supra* note 18, at 652 (describing the United States delegation's role in the development of the Hague Convention).

23. *Letter of Submittal*, *supra* note 18. The preamble to the Convention states, in part:

reciprocity with an international treaty.²⁴ 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.²⁵ The Convention is presently in force in seventeen states, and many of the signatories are major trading partners with the United States.²⁶

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 law²⁷ 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.

24. Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example In re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101, 120-23 (1980) [hereinafter Augustine].

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.

1969 Report of the U.S. Delegation, *supra* note 22, at 806. Evidence taking between common law countries has also been contentious. See Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1464 n.8 (1984) [hereinafter Mandatory Procedures] (discussing Anglo-American differences regarding evidence taking).

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.²⁸ One possible reason for this result is that only six other nation-states had ratified the Convention as of 1980.²⁹ 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.³⁰

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.³¹ Another set of rules provides that litigants must initially employ Convention procedures before resorting to applicable civil rules.³²

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.*

29. Augustine, *supra* note 24, at 121 n.104. Seventeen states have ratified the Evidence Convention. See 7 MARTINDALE-HUBBELL LAW DIRECTORY 14-15 (1986) (listing parties).

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).

31. *Cuisinarts, Inc. v. Robot Coupe*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (on LEXIS) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention). The court reasoned that:

[t]he 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.

Other court decisions deem the Convention to be exclusive. *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Augusta, S.P.A.*, No. 81-3984 (E.D. Pa. May 17, 1983) (order reversing order of Mar. 21, 1982); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Kantor v. Cycles Peugeot, S.A.*, No. 81-0423 (D.R.I. Apr. 14, 1982) (memorandum and order); *Langhans v. Johns-Manville Sales Corp.*, No. 535530-7 (Cal. Super. Ct. Aug. 25, 1981) (minute order); *Croxton v. Johns-Manville Sales Corp.*, No. L-6001079 (N.J. Super. Ct. May 20, 1980); see Comment, *Mandatory Procedures*, *supra* note 23, at 475-85 (concluding that only Convention procedures should be used to employ discovery abroad).

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.³³ 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 Eisengieberei 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); *Schroeder 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.³⁴ It is worth noting, however, that the United States Supreme Court has yet to decide³⁵ this issue³⁶ 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. 435, 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. Reifenhauer 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).

34. *Volkswagenwerk A.G. v. Falzon*, No. 77-722-371 NP (Mich. Cir. Ct. Oct. 7, 1980) (permitting plaintiffs to take depositions of German citizens in the Federal Republic of Germany). This, however, was not a case deciding the interplay of the Convention with the Federal Rules.

35. See generally *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983) (providing an insight into how at least two members of the Court would decide if presented with a conflict between the Convention and the Federal Rules).

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.³⁷

It is no coincidence that the same courts making this argument are least receptive to ordering use of Convention procedures.³⁸ 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.³⁹ Courts favoring resort to the Convention minimize the threat of the importance of the jurisdictional threat.⁴⁰

The second factor courts consider is the delay involved in using Convention procedures.⁴¹ This factor becomes particularly pertinent when the Convention is raised subsequent to the commencement of discov-

Mediterranee, S.A. v. Dorin, 93 A.D. 2d 1007 (N.Y.S.2d), *appeal dismissed and cert. denied*, 469 U.S. 913 (1984) (dismissing for lack of jurisdiction a case dealing with the interplay of the Hague Convention with the Federal Rules of Civil Procedure in 1984).

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).

37. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 522 (N.D. Ill. 1984); *see generally* Note, *Extraterritorial Discovery*, 25 VA. J. INT'L L. 249 (1984) (analyzing the decision in *Graco*).

38. *See In re Anschuetz & Co.*, 754 F.2d 602, 606 (5th Cir. 1985), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

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).

41. *See Struve, Discovery From Foreign Parties in Civil Cases Before U.S. Courts*, 16 N.Y.U. J. INT'L L. & POL. 1101, 1111 (1984) (comparing relative speed and efficiency of F.R.C.P. procedures); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 450 (S.D.N.Y. 1984) (stating that Hague Convention procedures are quite slow).

ery.⁴² A related consideration, cost to the litigants, is also frequently mentioned.⁴³ 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.⁴⁴ Courts weighing this factor often refer to article 23 of the Convention.⁴⁵ Article 23 allows the signatory state to refuse to execute letters of request for obtaining common law style document discovery.⁴⁶ This factor became important as the use of Convention procedures increased and some requests for evidence were denied.⁴⁷

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. Reifenhauer 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).

[T]he taking of evidence abroad in the face of determined opposition can be a long, expensive and difficult process, and both counsel and his client should carefully weigh the benefits and alternatives before proceeding. If, for example, the desired witness is a party or would be subject to subpoena in the United States, or would appear voluntarily anywhere, it would, in most instances, be preferable to proceed with discovery in the normal course under the Federal Rules of Civil Procedure before invoking the Convention.

Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States - A Practical Guide*, 16 INT'L LAW. 575, 576 (1982).

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. Reifenhauer 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.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.⁴⁹ Some courts require use of Convention procedures if the evidence is physically located abroad.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.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.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 *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.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

48. See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983) (documents in West Germany); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (LEXIS, Genfed library) (all documents located abroad).

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).

50. *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838, slip op. at 8 (N.D. Ill. Feb. 21, 1983) (LEXIS, Genfed library).

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).

51. See *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (stating that the fact that evidence is located abroad does not bar discovery through the Federal Rules of Civil Procedure).

52. *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838, slip op. at 8 (N.D. Ill. 1984).

53. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).

jurisdiction of United States courts.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.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.⁵⁶

The seventh, and often crucial factor, is whether use of the Convention advances the policy of international comity.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.⁵⁸ Courts that are adverse to ordering use of the Convention either ignore or circumscribe comity.⁵⁹

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

54. *Id.* at 519-20; Amicus Brief of the Federal Republic of Germany, *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985) [hereinafter FRG Amicus Brief].

55. FRG Amicus Brief, *supra* note 54, at 4-6.

56. *See* International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 445 (S.D.N.Y. 1984) (discussing the use of letters rogatory).

57. *See* Hilton v. Guyot, 159 U.S. 113 (1895) (offering the classic definition of comity). The Court stated:

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.

Id. at 163-64; *see also* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (defining comity); Volkswagenwerk v. Superior Court, 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874, 884 (1981) (discussing the considerations of comity in context of discovery).

58. Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 787, 186 Cal. Rptr. 876, 884 (1981) (requiring first resort to the Convention because of comity concerns and not treaty interpretations); *see* Vincent v. Ateliers de la Motobecane, 193 N.J. Super. 716, 721, 475 A.2d 686, 690 (1984) (use of proper diplomatic channels important to maintaining fair relations); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 (comity requires initial use of Convention procedures for discovering documents in West Germany).

59. McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958-59 (E.D. Pa. 1984) (ignoring comity considerations completely); *see* Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 921 (S.D.N.Y. 1984) (comity considerations do not require use of the Convention even where documents are located in Great Britain); International Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 450 (S.D.N.Y. 1984) (comity considerations relatively inapposite).

the discovery request, the more likely the intrusion into foreign judicial sovereignty.⁶⁰ Most courts have not explicitly weighed scope as a factor,⁶¹ however, it may precipitate substantial litigation.⁶²

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.⁶³ The firm Naviera Santa Catalina owned the vessel and had chartered it to Compania Gijonesa de Navegacion S.A. (Gijonesa).⁶⁴ On February 6, 1979, the owner of the damaged landing, the Mississippi River Bridge Authority, brought suit against Gijonesa and two unnamed foreign insurance companies⁶⁵ in Federal District Court for the Eastern District of Louisiana.⁶⁶ Gijonesa added Anschuetz & Co., GmbH, as a third party defendant to the suit on July 9, 1980.⁶⁷ The third party complaint alleged product liability against Anschuetz, the manufacturer of the M/V POLA DE LENA's failed steering device.⁶⁸

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,

60. *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).

61. See *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984). The court in *Murphy* stated:

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.

Id.

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.*

66. Petitioner's Brief, *supra* note 28, at 3. Jurisdiction of the court was invoked pursuant to 28 U.S.C. § 1333 (1983) (admiralty and maritime jurisdiction).

67. Respondent's Brief at 1, *Anschuetz & Co. v. Mississippi River Bridge Auth.*, *petition for cert. filed*, 106 S. Ct. 52 (1985).

68. FRG Amicus Brief, *supra* note 54, at 20.

1985, Anschuetz made numerous attempts to stifle production under the court's discovery orders.⁶⁹ 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,⁷⁰ 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.⁷¹ Responding to this attempt, Anschuetz filed a motion to quash the telephone deposition.⁷² The district court dismissed this motion on January 25, 1984.⁷³

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.⁷⁴ Subsequently, on February 22, 1984, the United States magistrate denied Anschuetz's motion for a Rule 26(c) protective order and ordered An-

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).

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. *Id.*

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].

71. Respondent's Brief, *supra* note 67, at 1-2.

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(c) 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.⁷⁵

By April 1984, Anschuetz's attempts to quash production took a different track, relying for the first time⁷⁶ on the Hague Evidence Convention. On or about April 13, Anschuetz's motions and appeals⁷⁷ to various judicial bodies based on the Convention were denied.⁷⁸ The Fifth

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. *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. *Id.* On March 30, 1984, Anschuetz filed a motion to reconsider its request for a protective order of February 21, 1984 which was denied. *Id.* at 3-4.

76. *See id.* (stating that the March 30 motion obliquely raised the Convention as a defense).

77. *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. § 1292(b). The motions were denied. *Id.*

78. *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.⁷⁹ Its decision was issued March 7, 1985.⁸⁰ The Supreme Court subsequently granted a writ of certiorari.⁸¹

III. ANALYSIS OF THE FIFTH CIRCUIT'S OPINION

In *In re Anschuetz*,⁸² the Fifth Circuit held that discovery of a party must take place under the Hague Evidence Convention⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ Third, considerations of international comity do not require mandatory first resort to the Convention beyond the two situations specified by the court.⁸⁷

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.

79. *In re Anschuetz & Co.*, 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).

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).

86. *In re Anschuetz & Co.*, 754 F.2d 602, 611 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985). *But see* Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 245, 186 Cal. Rptr. 876, 881 (1982) (arguing that Convention procedures are not limited to discovery taken abroad).

87. *See* Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 495 (1985) (principles of comity require serious deliberation and should carry significant weight with United States courts). *Contra* Oxman, *supra* note 33, at 761 (advocating use).

A. THE HAGUE CONVENTION IS NOT EXCLUSIVE

The court in *Ansuetz* was concerned with the inequities resulting from exclusive use of the Convention.⁸⁸ 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.⁸⁹ The court further stated that exclusive use encourages adversaries to conceal information.⁹⁰

This argument minimizes the fact that the critical factor is the locus of the evidence, not the nationality of the parties.⁹¹ 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.⁹²

In *Ansuetz* the court also stated that requiring exclusive use of Convention procedures would "work a drastic and very costly change" in the conduct of litigation.⁹³ The court noted litigation involving na-

88. *In re Ansuetz & Co.*, 754 F.2d 602, 606-07 (5th Cir.), *petition for cert. filed sub. nom. Ansuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985). The court asserted that the United States has an interest in "facilitating the manner in which foreign citizens doing business in the United States are available for litigation." *Id.* at 609 (quoting *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984)).

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.

Pierburg GmbH & Co. K.G. v. Superior Court, 137 Cal. App. 3d 238, 246, 186 Cal. Rptr. 876, 882 (1982).

93. *In re Ansuetz & Co.*, 754 F.2d 602, 612 (5th Cir.), *petition for cert. filed sub. nom. Ansuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985)(citing *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984)).

tionals of signatory states is increasing, thereby magnifying this problem.⁹⁴

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.⁹⁵ Moreover, not only are the new procedures a vast overall improvement on pre-Convention procedures,⁹⁶ but they specifically require a more expeditious treatment of requests.⁹⁷ Finally, delays attributable to the Convention's use will be reduced through familiarity and improved judicial relations.⁹⁸

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.⁹⁹ The court explained that these exceptions effectively swallow the rule because they "potentially bar a letter of request from being successfully executed at all."¹⁰⁰

While exceptions do exist, the court's use of the modifier "numerous"¹⁰¹ is inappropriate. Phillip Amram, *rappporteur* at the Convention

Accord Struve, Discovery From Foreign Parties in Civil Cases Before U.S. Courts, 16 N.Y.U. J. INT'L L. & POL. 1101, 1111 (1984) (stating that the Hague Convention procedures are significantly more costly than those under the Federal Rules of Civil Procedure).

94. *In re Anschuetz & Co.*, 754 F.2d 602, 612 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985); *Work v. Bier*, 106 F.R.D. 45, 53 n.12 (D.D.C. 1985) (quoting *Anschuetz*).

95. FED. R. CIV. P. 26; see *In re Agent Orange Product Liability Litigation*, 105 F.R.D. 577, 580-81 (E.D.N.Y. 1985) (multidistrict litigation).

96. See generally Augustine, *supra* note 24 (comparing the Federal Rules of Civil Procedure and the Hague Evidence Convention Procedures and ultimately recommending use of the Convention as the best mechanism for obtaining evidence located in ratifying countries).

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.*

99. *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). 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"¹⁰² was intended to be circumvented only where the foreign state's sovereignty would be violated.¹⁰³ Indeed, preventing violations of state sovereignty was a major concern of the Convention.¹⁰⁴

The Fifth Circuit cited article 23 of the Convention,¹⁰⁵ which provides for refusal of letters of request in common law style discovery,¹⁰⁶ as preventing successful employment of Convention procedures.¹⁰⁷ Despite the court's many assertions, including the incorrect statement that all signatories to the Convention adopted the reservation¹⁰⁸ in article 23,¹⁰⁹ article 23 has not prevented discovery from taking place.¹¹⁰

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.¹¹¹ 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.

106. *In re Anschuetz & Co.*, 754 F.2d 602, 610 n.21 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985); see Report on the Work of 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. 1425, 1427-28 (1978) (implying that pretrial discovery in the United States can occur before a legal proceeding has been initiated).

107. *In re Anschuetz & Co.*, 754 F.2d 602, 607-12 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985) (stating that one of its difficulties with using the Convention exclusively is Article 23) (citing *Murphy v. Reifenhauer K.G. Maschinefabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984)).

108. A reservation is a statement by a party to an international treaty revealing an intent to comply or not comply with a particular treaty provision. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27, *reprinted in* 8 I.L.M. 679 (1969) (establishing the legal effects of, and objections to, reservations).

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).

111. *In re Anschuetz & Co.*, 754 F.2d 602, 611 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

tem and the civil law judicial system for taking evidence abroad.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.¹¹³

Additionally, the court expressed concern with the effects on United States courts of requiring the Convention's exclusive use.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."¹¹⁵ This fear is not entirely well founded. Use of the Convention necessarily entails employing the good offices of a foreign court.¹¹⁶ This was also true of pre-Convention letters rogatory.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.¹¹⁸

The court also stated that the Convention's permissive language renders Convention procedures nonexclusive¹¹⁹ because the Convention's

112. *Id.* The court argued that "the foreign state's own procedures might foreclose or limit cross examination, full participation by counsel might not be allowed, or a verbatim record might not result, thus limiting admissibility of the testimony in an American court." See *id.* (citing Borell & Boyd, *Opportunities for and Obstacles to Obtaining Evidence for Use in Litigation in the United States: in France*, 13 INT'L LAW. 35, 40-41 (1979)); Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures*, 13 INT'L LAW. 5, 15 (1979).

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

114. *In re Anschuetz & Co.*, 754 F.2d 602, 612 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

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.¹²⁰ Furthermore, the court reviewed the Convention's legislative history and determined that the parties intended that the Convention's language was permissive.¹²¹ The court doubted whether the United States delegation, the State Department, or Congress intended exclusive use of the Convention.¹²²

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.¹²³ Despite this, however, civil law countries may have intended exclusivity.¹²⁴ Because Great Britain, another common law state, proposed the inclusion of article 23¹²⁵ in the Convention¹²⁶ 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.¹²⁷ 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.¹²⁸ Federal cases were dismissed because they re-

(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.

120. *In re Anschuetz & Co.*, 754 F.2d 602, 613 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

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).

124. See Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L COMP. L. Q. 646, 650-51 (1969) (describing the failure of civil law contracting states to appreciate British concerns with United States style discovery as a root cause of problems associated with exclusivity).

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

126. *In re Anschuetz & Co.*, 754 F.2d 602, 610 n.21 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985); *Mandatory Procedures, supra* note 23, at 464 n.8.

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.

128. *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal.

lied too heavily on the two California Court of Appeals' cases, *Volkswagenwerk* and *Pierburg*.¹²⁹ 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.¹³⁰ Also, the scope of discovery ordered in these cases was very broad.¹³¹ Accordingly, the state courts were too concerned with intruding on foreign sovereignty.¹³²

The court's analysis of these prior cases is incomplete.¹³³ Additional consideration is required as to why these courts, particularly the federal courts, ordered first resort to the Convention.¹³⁴ A more thorough examination reveals a strident concern with enhancing international judicial comity.¹³⁵

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.¹³⁶ The court embraced the familiar adage that a party does not need physical control of documents to have them accessed through pretrial discovery.¹³⁷ 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.¹³⁸

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

Rptr. 874 (1981); *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

129. *In re Anschuetz & Co.*, 754 F.2d 602, 606 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985) (citing *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 847 (1981) and *Pierburg GmbH Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982)).

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).

136. *In re Anschuetz & Co.*, 754 F.2d 602, 607 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

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.¹³⁹ Therefore, if the Convention is not implicated, then resorting to its procedures is never required.¹⁴⁰ The same logic is applied to the taking of voluntary depositions.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.¹⁴² Often a considerable portion of requested documents is located abroad. The same is true of witnesses.¹⁴³ As a result, there is a serious danger of implicating foreign sovereignty.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 *Ansuetz* 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.¹⁴⁵ The court noted that ig-

139. *Id.*

140. *Id.* The specious logic of this statement is alluring and subsequent court decisions heavily rely on it. See *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986) (declaring that since French judicial participation is not required, the Hague Convention does not apply); *Wilson v. Lufthansa German Airlines*, 489 N.Y.S. 2d 575, 577-78, 108 A.2d 393, 395-96 (1985) (holding that the information demanded does not impinge upon German sovereignty because it involved documents rather than a personal appearance or inspection).

141. See *In re Ansuetz & Co.*, 754 F.2d 602, 611 n.25 (5th Cir.), petition for cert. filed sub. nom. *Ansuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985) (declaring that the "logic of this position seems equally compelling with respect to people residing in another country").

142. See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 101 F.R.D. 58 (E.D. Pa. 1983) (stating explicitly that because most documents were located in Germany, first resort to the Convention was necessary).

143. See *id.* *General Electric Co. v. North Star Int'l*, No. 83 C 0838, slip op. (N.D. Ill. 1983) (stating that all needed documents are located in Germany).

144. *In re Ansuetz & Co.*, 754 F.2d 602, 613 (5th Cir.), petition for cert. filed sub. nom. *Ansuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985); see FRG Amicus Brief, *supra* note 52, at 8 (claiming that taking oral depositions in Germany would violate German sovereignty).

145. See *supra* notes 37-40 and accompanying text (stating that the district court retains authority to order further discovery under the Federal Rules if foreign authorities fail to fully cooperate in gathering the necessary evidence); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,222-23 (N.D. Ill. 1983) (holding that the sanctions and rules of the district court may be imposed if requests made pursuant

noring the receiving court's refusal to execute the letter of request would result in "the greatest insult to a civil law country."¹⁴⁶ Therefore, the court concluded that the interests of comity dictate that first resort to the Convention is not desirable.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰

Finally, the court held that trial courts should consider comity where relevant, however, it did not detail the kind of comity analysis required.¹⁵¹ 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*.¹⁵² For the

to the Convention are not satisfactorily fulfilled).

146. *In re Anschuetz & Co.*, 754 F.2d 602, 613 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985) (concluding that when United States courts only seek a foreign country's judicial cooperation as a mere formality before resorting to the Federal Rules, they offend the foreign authorities); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,223, 17,224-25 (holding that the court may apply its own Rules if foreign authorities do not adequately comply with requests for evidence). Such second guessing of foreign authorities by United States courts is highly offensive. *Id.*

147. *In re Anschuetz & Co.*, 754 F.2d 602, 613 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985).

148. FRG Amicus Brief, *supra* note 54, at 7.

149. *Id.* at 12-14.

150. *Id.* at 12-13.

151. *In re Anschuetz & Co.*, 754 F.2d 602, 614-15 (5th Cir.), *petition for cert. filed sub. nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 106 S. Ct. 52 (1985). In a subsequent decision, the court addressed this issue more fully. *See In re Messerschmidt Bolkow Blohm*, 757 F.2d 729 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (1986) (holding that while district courts should consider international comity when making discovery orders, the full range of sanctions permitted under the Federal Rules are still applicable at the court's discretion).

152. *See Lowrance v. Weinig*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985) (holding in a products liability action that the essential determination was whether discovery occurred within Germany); *Work v. Bier*, 106 F.R.D. 45, 55-56 (D.D.C. 1985) (ruling

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.¹⁵³ Moreover, courts today are very sensitive to added delays in litigation,¹⁵⁴ and any means that expedite pretrial discovery are welcomed.¹⁵⁵ Further, courts appear to believe that foreign corporate defendants use the Convention as a tool to weaken their opponents.¹⁵⁶ As it is often described, foreign defendants "seek to avoid producing documents" through interposition of the Hague Convention.¹⁵⁷

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

that the use of Convention procedures was not required by international comity where inordinate delay would result); *Testerton 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. Eickhoff 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. *In re Societe Nationale Industrielle Aérospatiale*, 782 F.2d 120, 124-45 (8th Cir.), 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 *Anschuetz*. *Societe Nationale Industrielle Aérospatiale*, 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. See generally *Oxman*, *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. 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).

155. *Wilson v. Lufthansa German Airlines*, 108 A.D.2d 393, 395, 489 N.Y.S.2d 575, 578 (1985) (indicating that a court will consider the costly and cumbersome nature of the Convention machinery in dealing with the problem of exclusivity).

156. *In re Anschuetz & Co.*, 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). 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." *Id.*

157. *Id.* at 612-14; *Lowrance v. Weinig*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985).

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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

The effect of the *Anschuetz* decision on international judicial comity may prove significant. United States litigants abroad may be negatively affected,¹⁶² and United States government attempts to protect sensitive economic and military technology may become more difficult.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ 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.

160. Lowrance v. Weinig, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985).

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.¹⁶⁶ Because these exceptions and conditions are expressly allowable under the Convention, they are presumptively a treaty obligation.¹⁶⁷ Arguably, as a matter of constitutional law, this approach is necessary¹⁶⁸ because a treaty "obligation" becomes part of the "supreme law of the land."¹⁶⁹ To its advantage this solution avoids the use of the highly indefinite principle of comity¹⁷⁰ 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.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,¹⁷² the United States State Department,¹⁷³ the President,¹⁷⁴ and Congress.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.¹⁷⁶ These situations are those instances where; (1) the preponderance of documents sought are located in the foreign state;¹⁷⁷ (2) the persons sought to be deposed, or respond to

166. See generally Convention, *supra* note 2.

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." *Id.*

168. B. RISTAU, *supra* note 7, at 253-56.

169. *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

170. See *supra* notes 24, 33, 40, 57-61, 87, 135 and accompanying text (discussing international comity as a judicial consideration).

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").

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).

173. See Letter of Submittal, *supra* note 18 at 324-35 (stating that no major changes are necessary in United States procedure).

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).

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).

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).

177. *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;¹⁷⁸ (3) the foreign party has insubstantial contacts with the forum,¹⁷⁹ or, if a corporation, no substantial corporate personnel in the forum.¹⁸⁰ Other considerations include the length of time elapsed since commencement of the suit,¹⁸¹ the desire and ability of the parties to share costs,¹⁸² and the track record of the receiving state; (a) in acting on the request;¹⁸³ (b) in fully responding to the request;¹⁸⁴ and, (c) in responding expeditiously.¹⁸⁵

This solution would satisfy the interests of foreign governments,¹⁸⁶ but not cause unfair delay or expenses to litigants before American courts.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.¹⁸⁸

To ensure maximum compliance with a letter of request, attorneys

178. Oxman, *supra* note 33, at 779-80; U.K. Amicus Brief, *supra* note 118, at 12-14.

179. *Id.*

180. Oxman, *supra* note 33, at 779-80.

181. Comment, *Mandatory Procedures*, *supra* note 23, at 614.

182. *Id.* at 614-15.

183. FRG Amicus Brief, *supra* note 54, at 13-14. The Federal Republic of Germany has stated that:

- a) its courts are guided by a spirit of cooperation when executing requests for judicial assistance under the Convention;
- b) it interprets requests literally without insisting on strict compliance with formalities;
- c) it permits the taking of voluntary testimony before U.S. consular officers and diplomats;
- d) it permits the production of documents to be used at trial;
- e) it allows the examination of witnesses relating to documents; and
- 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.

Id.

184. See FRG Amicus Brief, *supra* note 54, at 5-7 (discussing compliance by Federal Republic of Germany); U.K. Amicus Brief, *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).

185. *Id.*; see *infra* notes 95-98 and accompanying text (discussing expeditious use of the Evidence Convention).

186. FRG Amicus Brief, *supra* note 54, at 5-6; U.K. Amicus Brief, *supra* note 118, at 17-18.

187. See generally *Hickman v. Taylor*, 329 U.S. 495 (1947); *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied sub. nom. American Tel. & Tel. Co. v. MCI Communications Corp.*, 440 U.S. 971 (1979).

188. See FRG Amicus Brief, *supra* note 54, at 5-6 (inferring that foreign courts will honor letters of request for evidence which will not be used at trial); see *supra* notes 114-18 and accompanying text (discussing jurisdiction of federal and state courts).

should draft requests for assistance that are as specific as possible.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."¹⁹⁰ Requests should also state that the evidence is being sought for use in an ongoing judicial proceeding.¹⁹¹ Finally, judges should strictly scrutinize these requests to ensure maximum probability of execution.¹⁹²

CONCLUSION

The decision in *Ansuetz* 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.

Thomas John Percy

189. Augustine, *supra* note 24, at 126.

190. *Id.*

191. *Id.* Presumably this will clarify the judicial need for the requested information.

192. See Oxman, *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. *Id.*