

International Comity and Chapter II of the Hague Evidence Convention

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KAB Avocats, Paris, France

The Hague Evidence Convention has been much maligned and neglected by litigants since the US Supreme Court decision in *Aérospatiale*.¹ The rule adopted in that decision, and repeated in the *Restatement (Third) on the Foreign Relations Law of the United States* (§ 442(c)), requires US courts to balance the foreign sovereign's interests in using the Convention against the interests of the United States in obtaining requested discovery.

A close examination of recent US practice, however, shows that the simplified procedures of Chapter II of the Hague Evidence Convention are, in fact, widely used and have become the "go to" solution when discovery is sought from a cooperative party or third-party witness in France, as set out below.

In *Aérospatiale*, the Supreme Court ordered discovery under the Federal Rules of Civil Procedure notwithstanding the French Blocking Statute,² which imposes criminal penalties on French firms that provide discovery outside the context of the Convention. The Court held the Hague Evidence Convention was merely optional, and this created a problem for French companies that needed to comply with the Blocking Statute.

However, at that time there had never been a prosecution or penalty under the French Blocking Statute, leading the Court to conclude that the burdens and costs imposed on the parties in complying with Hague Convention procedures could not be justified by any significant legitimate sovereign French interest.

Accordingly, there was some hope that this attitude of US courts would change after the criminal conviction of a Paris attorney was upheld by the French Supreme Court, in the 2007 case of *Christopher X*.³ Finally, here was a French judicial determination that serious sovereign interests underlie the Blocking Statute,⁴ and which could prompt US courts to accord greater weight to the French interests in the *Aérospatiale* comity balancing test.

¹ *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, Aérospatiale*, 482 U.S. 522 (1987) (hereafter, "*Aérospatiale*")

² The French Blocking statute provides:

"Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith."

Aérospatiale, 482 U.S. 522 (1987)(footnote 6).2

³ Cour de Cassation, Chambre Criminelle, Paris, Dec. 12, 2007, No. 07-83228.

⁴ Violation of the French statute carries penalties of up to 6 months' imprisonment and up to 18,000 € in criminal fines.

During this time, the American Bar Association took the useful initiative, through the House of Delegates, to adopt a resolution urging tolerance and respect by US courts for foreign blocking statutes, including privacy rules.⁵

Alas, it was not to be. A series of U.S. District Court decisions from 2008 to the present⁶ held that the French Blocking Statute still did not deserve much esteem; in these reported cases discovery was ordered under the Federal Rules of Civil Procedure without recourse to Hague Convention procedures.

One respected observer pithily summarized the US court's approach, commenting on one of these cases, "Take that, ABA!"⁷

But these cases are only the tip of the iceberg, and because they are reported with great fanfare, they unfortunately get all the attention. The hidden part of the iceberg is the fact that common practice in US courts for discovery in France is to use the Hague Convention Commissioner procedure because it is fast, efficient, and allows all parties to comply with their local law without imposing any burden or delay on the other US parties or the Court's calendar.

The Hague Evidence Convention provides two procedures to transfer evidence from abroad to the US, one long and sometimes difficult (Chapter I), the other very fast (Chapter II).⁸

So, what is Chapter II, and what does it provide?

Chapter II provides for the appointment of a Commissioner by an official of the Requesting State (the US judge), who is then approved by the Central Authority of the Requested State (France, the Ministry of Justice), and who then oversees the production and transfer of the evidence.⁹ The Commissioner cannot be counsel to a party in the litigation. Typically the Commissioner will be an attorney located in France.

⁵ *RESOLVED, That the American Bar Association urges that, where possible in the context of the proceedings before them, U.S. federal, state, territorial, tribal and local courts consider and respect, as appropriate, the data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data sought in discovery in civil litigation.*

https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.authcheckdam.doc.

⁶ *Strauss v. Credit Lyonnais S.A.* (249 F.R.D. 429) ; *In re Global Power Equipment Group* (no. 06-11045, 2009 WL 346212) ; *In re Air Cargo Shipping Services Antitrust Litig. MDL* (no. 06-MD-1775, 2010 WL 1189341 (29 March 2010)) ; *MeadWestvaco Corp. v. Rexam PLC* (no. Civ. A. 1:10-511, 2010 WL 5574325)

⁷ Ted Folkman, *Case of the Day: In re Air Cargo Shipping Services Antitrust Litigation*, LETTERS BLOGATORY, <https://lettersblogatory.com/2012/04/06/air-cargo-shipping/>

⁸ The discovery at issue in the *Aérospatiale* case was Chapter I discovery.

⁹ Article 17 of the Hague Evidence Convention provides,

The US judge is requested by the parties, on motion and often (but not necessarily) by stipulation, to issue an order appointing the Commissioner in France. This Order will include the judicial request for international judicial assistance under the Hague Convention that will be submitted to the French Central Authority (the Ministry of Justice). The US Order, and any exhibits, is then translated into French and filed with the Ministry of Justice with a request for authorization.

The time required by the French Ministry of Justice to review and authorize the application can vary from as little as 48 hours to about two weeks from the time the translated US Order is filed with the Ministry, depending on whether the Ministry is informed of any urgency such as an imminent discovery cut-off.

After reviewing the submitted file and authorizing the discovery, the Ministry will confirm the authorization in a letter to the Commissioner or the parties. The Ministry will ask the Commissioner to send a formal notice to the witness (for a deposition) or the party producing the requested documents (for documents), reciting the French conditions to Article 17 discovery that appear in the French reservations to Hague Convention ratification.¹⁰

The process of deposition or document request thereafter is very similar to discovery under the Federal Rules of Civil Procedure:

- Depositions may take place in law firm, hotel conference facilities, or other appropriate venue agreed by the parties.¹¹
- A stenographer may take verbatim transcripts of a deposition.
- A videographer may record a video of witness testimony.
- Counsel and the parties may be present at the deposition.

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and*
- b) he complies with the conditions which the competent authority has specified in the permission. [...]*

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>

¹⁰ The persons who are to give evidence must receive due notice in the form of an official summons drawn up in French or accompanied by a translation into French, and stating:

- (a) that the taking of evidence for which the person concerned is summoned is based on the provisions of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, and is part of the judicial proceedings taken in a court designated by a Contracting State by name;
- (b) that appearance for the giving of evidence is voluntary and that non-appearance cannot lead to prosecution in the requesting State;
- (c) that the parties to any action consent to it or, if they do not, their reasons for this;
- (d) that the person who is to give evidence is entitled to legal advice;
- (e) that the person who is to give evidence can claim dispensation or prohibition from doing so.

<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=501&disp=resdn>

¹¹ While the French reservations to Chapter II of the Hague Convention require that “the evidence must only be taken within the precincts of the Embassies,” in practice this condition is waived by the French Ministry as the US Embassy in Paris no longer hosts Hague depositions due to security concerns. Id.

- The deposition may be organized by video (with counsel or parties participating from abroad).
- An interpreter can be available if needed for the witness.
- Questions may asked by counsel and do not need to be communicated beforehand to the witness or opposing counsel; follow-up questions by counsel and cross-examination of the witness are allowed.
- Objections may be preserved for the record.
- Confidentiality stipulations may be agreed by the parties, either those agreements already in place in the US litigation, or specific arrangements for the testimony or documents obtained in France.
- Local US discovery rules or party stipulations, such as standing objections, can also apply if specified by the parties in the US Court's Order.
- Time and place of the deposition are set by the parties and the witness.
- No French judge is present.
- The witness may invoke any privilege that may apply in either the US or France (see Hague Evidence Convention, par. 11).

France allows such special procedures in Hague Convention requests, provided they are specifically referenced in the US court's order and accompanying request for international judicial assistance. Accordingly, the draft Order submitted to the US court should be reviewed by the French Commissioner or French counsel.¹²

When it is so simple and seamless to organize discovery under Chapter II, is there any reason to invoke the balancing test of *Aérospatiale* to deny a motion to appoint a Hague Commissioner?

While this approach works in France, and certain other countries, it remains impossible (with respect to requests for the production of documents) in countries that have adopted a broad Hague Convention Article 23 reservation. Article 23 limits US-style pre-trial document discovery, as it provides that a Contracting State may:

“declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”¹³

However, this does not apply to France which narrowed its Article 23 Reservation on January 19, 1987, as follows:

The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pre-trial discovery of documents does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure.¹⁴

¹² Article 739 of the French Code of Civil Procedure allows such foreign methods, “The letters rogatory will be implemented in accordance with French law unless the foreign court has requested that it should be implemented in a particular manner.” These generous rules are considered to apply in practice equally to Chapter II discovery, allowing for broad flexibility.

¹³ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>

Because France has narrowed its Article 23 Reservation, the scope of pre-trial documents is very broad, and arguably coterminous with the breadth of allowable discovery under the Federal Rules of Civil Procedure. In the *Executive Life* matter, and interpreting for the first time the French Reservation, the Paris Court of Appeals ruled in 2003 that document requests for broad categories of documents are authorized under the narrow Reservation, specifically identifying why the rather broad discovery requests in the US litigation were, in fact, “enumerated limitatively”, and therefore acceptable under French law.¹⁵

The Hague Commissioner procedure has been used, for example, by the Southern District of New York, in cases such as *In re: Commodity Exchange, Inc., Gold Futures and Options Trading Litigation*, No. 14-MD-2548-VEC (Valerie E. Caproni, J.) and in *Sullivan v. Barclays PLC*, No. 13-cv-02811 (PKC) (P. Kevin Castel, J.), and *Lataillade v. LVMH Moët Hennessy-Louis Vuitton SE*, No. 16 Civ. 6637 (PAE) (Paul A. Engelmeyer, J.), as well as in many other federal and state jurisdictions across the United States.¹⁶

¹⁴ <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=501&disp=resdn>. Other countries that have either not adopted an Article 23 Reservation, or have narrowed the scope of the Reservation, include: Czech Republic, Finland, India, Israel, Korea, the Russian Federation, Singapore, Mexico, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, Venezuela).

¹⁵ Paris Court of appeals (1st Chamber; section C), September 18, 2003 (RG 2002/18509) (I represented the California Commissioner of Insurance in this appeal).

[...] “Whereas because the Commissioner does not have the documents in his possession, an accurate description of each requested document may not be expected; Whereas under the terms of the reservation raised by the French government, the document list is restrictive, as the documents are identified with a reasonable level of specificity based on different criteria such as their date, nature, or author;

Whereas in this case, the judge of the requesting State established, in the letter of request and its Exhibit – the fact that it restates the requesting party’s claims is of no significance – a list of the documents sought, which reads in page 12 “the time period for all these requests, unless otherwise stated, is from January 1, 1990 to the present”; Whereas Mr. Marc LADREIT de LACHARRIERE alleges that “the factual background provided in the letter of request only refers to five possibly relevant years being 1991 to 1995”; Whereas however, all documents demanded do not exclusively relate to the 1990-2002 period as for certain documents the relevant period is shorter, i.e., from 1991 to 1996, (this is specifically true of the documents relating to any control, influence or supervision exercised by CREDIT LYONNAIS or ALTUS over NEW CALIFORNIA and AURORA, minutes of board meetings or executive committee meetings of CREDIT LYONNAIS, ALTUS and their affiliates); Whereas, therefore, the letter of request is sufficiently restricted timewise;

Whereas the document list consists of various themes under which documents are listed according to events; Whereas the fact that certain documents are requested under multiple themes is only due to the presentation method as one and the same document may serve as evidence on several accounts; [...]

¹⁶¹⁶ I was appointed Commissioner in each of these matters. Other matters in which I have been counsel or Commissioner, and in which the courts have accepted the Chapter II Hague process, include:

- *Foreign Exchange Benchmark Rates Antitrust litigation* (S.D.N.Y.) (2017) - *In Re LIBOR Antitrust Litigation* (S.D.N.Y. 2016)
- *Laydon v. Mizuho Bank Ltd. et al*, case No. 1:12-cv-03419-GBD (S.D.N.Y 2016)
- *SEC v. Javier Martin-Artajo, et al* (“London Whale”) (S.D.N.Y. 2015)
- *Cathode Ray Tube antitrust litigation* (N.D. Cal.) (2014)
- *In re Nortel Networks, Inc., et al* (Delaware Bankruptcy Ct., 2014)
- *Probate proceeding of Huguette M. Clark* (NY County Surrogate’s court, 2013)
- *TCW v. Gundlach*, Case BC450413 (Cal. Superior Ct., filed 2010)

These appointments are all court orders on the dockets, but are not reported decisions; the only opinions that are reported are the ones that disregard the Hague under *Aérospatiale*.

Given the regular recourse to the Chapter II Hague Commissioner process for discovery in France, and notwithstanding the occasional “take that” judicial refusal to require use of the Hague Convention, it is fair to say that recourse to the Convention has become “standard” practice in US courts. This is very much as Justice Blackmun suggested in his *Aérospatiale* concurrence.

*In my view, the Convention provides effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence-gathering. I therefore would apply a general presumption that, in most cases, courts should resort first to the Convention procedures.*¹⁷

This position, sometimes called “First Use” of the Hague Convention procedures, has been formally adopted by at least one State court in the US.¹⁸

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- *Trueposition v. Ericsson (E.D. Pa.) (2014)*
 - *Axa Mediterranean Holdings SA v ING Insurance International BV*, New York State Sup.Ct., Manhattan, filed 2010 (652110/2010)
 - *Zurich Insurance v. Universal Pictures*, Case No. 09MC345 (C. Dist. Cal., filed 2009)
 - *In re Vivendi Universal, S.A. Secs. Litig.*, No. 02 Civ. 5571(RJH) (HBP), 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006)
 - *Sports Management Plus, et al. v. Herbert Rudoy*, No. CV2003-010486 (Arizona 2005)
 - *Abbott Laboratories v. Impax Laboratories, Inc.*, 2004 WL 1622223 (D. Del. 2004)
 - *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 2004 WL 1622427 (D. Del. July 15, 2004)
 - *Thales Avionics v. Matsushita Avionics*, No. SACV 041-454-JVS (C.D. Cal. 2004)
 - *Resonant Medical v. Varian Medical*, no. 337-TA-555 (U.S. Int’l Trade Comm’n 2004)
 - *Reliant Pharmaceuticals v. Abbott Laboratories, et al.* (Dist. Del., filed 2004)
 - *Abbott Laboratories v. Par Pharmaceuticals*, N°. 03-120 (JAP) (Dist. NJ, filed 2004)
 - *Pierre Chappier, et al. v. Taitbout Prévoyance*, No. BC 173700 (Sup. Ct. of California, LA County)
 - *Unimed-Besins v. Paddock Laboratories*, N° 03-CV-2503-TWT (Dist. Ga. 2003)
 - *Ortho-McNeil Pharmaceuticals v. Barr Laboratories*, No. 99-CV-00235 (GEB) (Dist. NJ, filed 2001)
 - *In re Vitamins Antitrust Litigation*, 120 F. Supp.2d 45 (D. D.C) (2001)
 - *California Commissioner of Insurance (Executive Life Insurance Company) v. Altus Finance, et al.*, No. 99-02829 AHM (C.Dist. Cal., filed 1999)
 - *AIG Retirement Services v. Altus Finance, et al.*, No. CV 05-1035-JFW (C. Dist. Cal., filed 1999)

¹⁷ 482 U.S. at 549.

¹⁸ *Husa v. Laboratoires Servier, SA*, Sup. Ct. N.J. App. Div., November 12, 1999, available on the internet at : <http://caselaw.findlaw.com/nj-superior-court-appellate-division/1131982.html> (consulted April 9, 2018) (“We are persuaded that the Convention should be utilized unless it is demonstrated that its use will substantially impair the search for truth, which is at the heart of all litigation, or will cause unduly prejudicial delay.” The court noted in particular that, as it was a State court not a Federal jurisdiction,

“In the present case, however, the choice is between the Convention and New Jersey procedural and substantive law. Consequently, we perceive no conflict with federal supremacy, if, in exercising the option to resort to the Convention, we are more generous in our use of the Convention’s procedures than the United States’ courts. Moreover, because the present litigation is in a state court, we are not concerned with issues regarding the distribution of power among the three branches of the federal government. *But see, American Home Assurance Co. v. Société Commerciale Toutélectrique*, 104 Cal.App.4th 406 (2002) (“While it is arguable that states are free to require more generous recourse to

For discovery in France, and in other countries with a limited Article 23 reservation, the availability of fast and simple discovery that complies fully with local law in the place of production can be an indicator of the witness' good faith in invoking foreign law as a defense to participate in discovery: the quick and efficient alternative places the burden on the foreign party to explain why the voluntary procedures of Chapter II are not sufficient to allow the requested discovery.

Of course, this use of the Hague Commissioner process does not address other fraught international discovery situations, such as obtaining discovery from uncooperative third parties who will not voluntarily consent to the Chapter II process (where resort to Hague Chapter I may be needed), or the need for the foreign party also to comply with local data protection or privacy rules that may constitute a separate "blocking statute" hurdle to discovery.¹⁹ But the availability of the simple Hague Chapter II process prevents the wholesale and reflexive invocation of a broad foreign blocking statute to seek avoidance of any and all discovery in US proceedings that is common in other jurisdictions that have adopted the broad Article 23 reservation.

Above all, the Chapter II process allows French parties who wish to comply with US discovery obligations to do so quickly, creating no delay in the US proceedings, while also complying with their French law obligations under the Blocking Statute. Unlike in the *Aérospatiale* case, where the French defendant tried to escape the reach of US law by invoking the Blocking Statute as a defense to participate in discovery, the Chapter II process is most often invoked by French litigants in US proceedings as a simple way to comply with both US and French laws.

Problem solved.

Paris, November 2018

the Hague Convention's optional procedures than was contemplated in *Aérospatiale* [citing *Husa*], we are not inclined to do so").

One can wonder why this generous New Jersey reading of the Hague Convention, consistent with *Aérospatiale*'s ruling that the Convention is optional and not mandatory, has not been followed by other State jurisdictions that also have the same latitude and flexibility in interpreting the Convention.

¹⁹ See for example, article 48 of the EU General Regulation on Data Protection (GDPR), meant to channels transfers of personal data in discovery through international treaty procedures, such as those of the Hague Evidence Convention in the same way as the French Blocking statute:

Any judgment of a court ... of a third country requiring a controller ... to transfer ... personal data may only be recognized ... if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State....