SOME REFLECTIONS ON TRANSNATIONAL DISCOVERY

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"No aspect of the extension of the American legal system beyond the territorial frontier of the United States," according to the new Restatement of Foreign Relations Law, "has given rise to so much friction as the request for documents associated with investigation and litigation in the United States" [1]. While the rules and guidelines proposed in the Restatement for this and other aspects of transnational activity have engendered continuing controversy, no one seems to have quarreled with the quoted statement. Why should this be so?

A complete exploration of the subject of fact-gathering in the United States (U.S.) and other countries would require at least a small book, and also a knowledge of procedural systems around the world that, I suspect, no single individual possesses.

Without any presence at completeness, therefore, I want to suggest in this brief article some of the reasons for the sharp controversy that prevails on this subject, and to put forward some ideas that might reduce the intensity, if not the frequency, of the conflicts.

1. Perceptions

The rest of the world – notably the United Kingdom (U.K.) and Western Europe, but also other states that have encountered the problem – thinks U.S. lawyers, agencies, and prosecutors, start lawsuits or investigations on minimal bases, and rely on their adversaries or targets to build their cases for them [2]. Everyone likes to talk about fishing. In discussing the Federal Rules of Civil Procedure, then less than a decade old, the U.S. Supreme Court announced in 1947 that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case" [3]. In fact, in the case in which that statement occurred,

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the Court denied a discovery request made by a plaintiff to see the records of conversations by the defendant's lawyer with witnesses to an accident.

But the English courts have raised precisely that cry. For instance, in *Radio Corp. of America v. Rauland Corp.* [4], an American company, RCA, had brought a patent infringement action in federal court in Chicago, and the defendants, Rauland and Zenith, two other American corporations, defended and counterclaimed on the basis of an allegation that RCA had engaged in an unlawful patent-pooling and cross-licensing arrangement with numerous other companies, including the British concerns English Electric and E.M.I. The defendants obtained from the U.S. district judge a letter rogatory requesting that the English court require English Electric and E.M.I., as well as certain of their officers, to appear before a U.S. consul to "produce such documentary evidence as is in [their] custody or possession ... and is relevant and material to the issues pending in the [Chicago] suit," and also to answer oral interrogatories propounded to them. The High Court judge in London granted part of the request. On appeal, it was turned down in its entirety. Lord Chief Justice Goddard, summarizing a longer opinion, wrote:

> this is merely an attempt to get evidence in the course of discovery proceedings which are known to the American courts ... [as] a sort of pre-trial before the main trial. It is an endevour to get in evidence by examining people who may be able to put the parties in the way of getting evidence. That is mainly what we should call a "fishing" proceeding which is never allowed in the English courts [5].

Americans, on the other hand, have sometimes tended to think of the rest of the world as engaged in a massive conspiracy of concealment masquerading as privacy, blocking others designed to protect wrongdoing, and secrecy laws intended to draw corporate and sovereign veils over all kinds of evil, from drug dealing to tax evasion to commercial fraud to manufacture of defective products.

No doubt there is some basis for both of these perceptions. American lawyers, both in private actions and in governmental investigations, are sometimes grasping, often lazy, and think nothing is wrong with a discovery request that begins "All memoranda, documents, or other records ..." [6]. That discovery is overused, misused, and abused in the U.S. has become almost a cliché among American observers of the domestic litigation process, though there is disagreement about both the extent of the problem and the cure [7]. It is also true that blocking and secrecy laws, and exaggerated respect for separate incorporation among members of a commonly controlled economic enterprise, are used to prevent disclosure of facts that ought to be disclosed, and sometimes lead to miscarriage of justice. Companies owned and controlled from the U.K. but located in South Africa or Mozambique supplied oil to Rhodesia contrary to British and United Nations sanctions, though this was not permitted to be brought out in an English court [8]. Société Internationale (or I.G. Chemie, or Interhandel) was in fact a repository of assets of

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I.G. Farben, the engine that drove Hitler's war machine, though the documents that would have confirmed that link were covered by Swiss banking secrecy [9]. But not all American discovery is abusive, and the idea that American lawyers use discovery to fabricate a cause of action that they were not sure even existed is vastly overdrawn. Correspondingly, while some foreign confidentiality laws are designed, or used, to cloak crime or fraud, that cannot be said of the great majority of transactions carried out under such regimes, and certainly not of the techniques of fact-gathering used in continental legal systems. Each side – the American, the British, and the continental – views the others in comparison with its own system and finds it in some way objectionable. My impression, however, is that the adverse perceptions greatly outrun the justified objections; litigation proceeds in foreign developed countries on the basis of a body of relevant fact roughly comparable to that on which litigation proceeds in the U.S. Of course, some actions now almost commonplace in the U.S. – class actions, product liability suits, private (treble damage) antitrust actions, to name just a few – are either unknown or very rare abroad. Also, litigation invoking transnational discovery tends to involve other sources of tension, such as the reach of judicial and prescriptive jurisdiction of the forum state. Often objections to the cause of action, private or governmental, take the form of objection to discovery, when something else is really at stake.

The first lesson, I submit, is a lesson of disaggregation. Both sides, or rather all sides, should separate concerns about disclosure/concealment from differences about other aspects of procedure – contingent fees, for example, or juries – as well as about substance [10].

The second lesson relates more directly to the perceptions – and misperceptions – that each side has of the other's fact-gathering or fact-suppression techniques. Foreign-based litigants in the U.S. and their governmental sponsors should look at requests or orders for discovery not from the point of view of "what is next if this request is complied with?" – an attitude that will inevitably reflect inaccurate generalized perceptions – but rather from the point of view of the justification of the particular request or order. Correspondingly, American litigants or investigators should frame their requests in light of these perceptions, and endeavor to demonstrate that the particular request does not confirm, but rather is distinguishable from the American reputation in this area of arrogance and overreaching.

2. Some Facts

It is difficult – especially for an academic who has not served in the trenches – to satisfy the need. If I know more about English and continental practice than most American lawyers, and more about American practice than
most English and continental lawyers, I still do not have enough of a feel for how any of the systems functions with respect to discovery to write with confidence about them. Does the American system, for example, really encourage settlements, or does it more often turn a lawsuit into a financial endurance contest? Does the English practice preserve too much of the sporting element and the Oxford/Cambridge oral tradition, or is it a rational system for preparing the real contest before the judge [11]? Has the European system wisely separated the investigation of facts from the adversary process of legal argument or has it turned litigation over to tired bureaucrats? Does any of the systems come closer to the search for truth — or should one say justice — than the others? Just in stating the questions in this way suggests that to some extent there is dissatisfaction, but also self-satisfaction, with each of these systems.

It may seem odd to have divided this discussion of discovery into three, rather than two, systems. But if the civil law countries of the West have roughly comparable systems of fact-gathering, the common law countries in this respect have moved in quite different directions. At the most general level, all the states of the common law world are in one camp, those of the civil law world in the other. In the American, as in the English system, discovery takes place between completion of pleadings and commencement of the trial, and is conducted essentially by the lawyers. In the continental system, in contrast, there is no real trial in civil cases, and hence no division between trial and pre-trial.

2.1. Civil Law Countries

In the civil law system, the judge is literally in charge of finding the facts. He reads the documents supplied by counsel, sends for any public records that seem relevant to the contentions of the parties and keeps the dossier. He can require the parties to produce documents at his own initiative or at the parties' suggestion [12]. If he chooses to hear testimony, he summons the witness and conducts an oral examination. Counsel are entitled to be present, and to suggest questions or ask questions directly after the judge has completed his examination [13]. When the witness has finished — or at intervals if the testimony is lengthy — the judge will dictate a summary of the testimony, which becomes another document in the dossier. Thereafter, counsel may suggest further lines of inquiry, including further document production or testimony from additional witnesses, but it is the judge who is in charge, and if he regards a document or testimony as not necessary or relevant, the document will not be requested or the witness not called. This progression may, in a complicated case, take place several times before the dossier is closed. The adversary process is preserved in legal argument, which, depending on the country or the court in question, may be before the same judge, before a panel
that includes him, or before a different panel or judge. Discovery, European-style, however, is a judicial function, not just in the sense of an exercise of sovereignty, as it sometimes seems in America, but in an everyday operational sense. It is also relevant, I think, that in most European countries, in contrast to the Anglo-Saxon world, the judge is likely never to have practiced law, but to have opted for a judicial career soon after finishing his or her university studies. Thus, the European judge is rather like an umpire in American professional baseball, who works his way up from the minor to the major leagues, but typically has not been a professional player or manager [14].

2.2. England

On this level, as already noted, the continental system stands on one side, the common law system on the other. Looking just a bit further at the English system it is apparent that it differs substantially from the practice under the Federal Rules of Civil Procedure, as well as most state systems, in the U.S. Under the English practice [15], discovery is almost entirely limited to documents in the control of the parties. Within fourteen days after the close of pleadings, each side’s solicitor prepares and sends to his adversary a list of documents which are or have been in his client’s possession relating to the matters in dispute[16]. Thereafter, each party is entitled to inspect the documents on the list of the other, and to make copies of any non-privileged documents which it did not already have. Lawyers are duty and honor bound to see that this process is faithfully carried out, and that their client does not withhold documents that should be disclosed. If one party believes the other has not made complete discovery, he may request an order from the court requiring the other party to give an affidavit that it has disclosed all relevant documents; also, he may apply to the court for an order directing the other party to produce a particular document that the applicant believes or suspects is in the other party’s possession. In some instances, documents may be made available for inspection subject to an order precluding disclosure to third parties. A document not disclosed in discovery may not later be introduced into evidence by the party that should have disclosed it, and failure to make disclosure may give rise to sanctions, including striking of a claim or defense and contempt (committal) [17].

If the scope of discovery of documents is not as wide in England as it is in the U.S., because it must be relevant not just calculated to lead to admissible evidence [18], it does appear that as between parties both sides are likely to have the same documents at their disposal in preparing for trial. But there is no pre-trial discovery of third parties, and there is no examination before trial, apart from preservation by deposition of the testimony of aged or ill persons or those about to leave the realm. Discovery is generally not available against non-parties [19], though they may be summoned as witnesses at the trial, and
may be required to bring specified documents with them. But except for expert witnesses to be called by a party, the substance of whose testimony may be required to be disclosed in advance [20], counsel will learn for the first time at the trial what the witnesses called by the other side have to say [21].

2.3. United States

Just to complete this inevitably superficial survey, consider how one should explain American-style discovery to non-Americans [22]. First, as in England, discovery takes place following completion of pleadings and is supposed to be completed before the case is set down for trial. Also, as in England, discovery is supposed to be done by lawyers, without intervention by the judge, though this is changing as the rule makers seek to curb various perceived excesses in discovery practice [23]. Counsel have a wide array of devices at their disposal, including discovery of documents and inspection of properly written interrogatories, requests for admission, and depositions of parties and non-party witnesses [24]. Though the federal rule on document discovery is by its terms limited to parties, non-parties can be summoned for deposition, and by use of a subpoena duces tecum they can generally be required to produce documents for inspection and copying.

A deposition, often referred to as an examination before trial or EBT, is typically a kind of dress rehearsal for a courtroom appearance. The witness appears accompanied by his counsel or, if he is a non-party, accompanied by counsel of the party that did not call him, and is examined under oath by counsel for the other party, with a shorthand reporter recording all questions and answers. This is followed by “cross-examination,” “re-direct,” and “re-cross,” until no more remains to be said. Only the judge is absent. Objections to questions are noted, and either the witness answers subject to the objection, or if he is directed not to answer by his counsel, the question remains without answer. Generally, the deposition cannot be introduced directly into evidence at trial, but it gives both sides an idea of the witness’ knowledge and attitude, and of course any discrepancies between the deposition and testimony in court can be brought out at the trial [25].

Though there are some limits to discovery, for example, the attorney-client privilege, and though the court can step in and impose additional limits when it thinks discovery has gone on too long or become unnecessarily cumulative or unduly burdensome [26], the basic thrust is expansive. Rule 26(b)(1) of the Federal Rules of Civil Procedure says that parties may obtain discovery regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Discovery is not limited to the claim or defense of the party seeking discovery, but may extend as well to the claim or defense of any other party. Moreover, and in sharp contrast to the English practice, discovery may extend to the existence (or not) of any documents,
even if the party requesting disclosure does not know what it is looking for, and to "the identity and location of persons having knowledge of any discoverable matter." Rule 26 says expressly that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The operational rule in discovery, as James and Hazard put it, is that anything is discoverable "unless its disclosure is prohibited by specific limitations on scope" [27]. Failure to comply with discovery requests of opposing counsel may lead to court orders to comply, and failure to obey those orders subjects the recalcitrant party to a wide array of sanctions, including striking of claims or defenses, findings adverse to the non-complying party, and contempt of court [28].

By the time a case comes to trial – if it does so at all – the effect of discovery is that each side knows quite well what the other side will say, though of course it is not sure what will impress the court or jury. Many issues of fact will disappear because the evidence is all one way. Often – and this is one of the claimed advantages – pre-trial discovery leads to a settlement that would not have been possible without discovery. The presentation of evidence at trial may well be smoother, because each side has heard it before. Also, the effect of delay between the events giving rise to the action and the trial is to some extent reduced, because witnesses (including in American parlance the parties) have their own prior depositions to refresh their recollections. On the other hand, discovery American-style itself delays the time between joinder of issue and trial, and it unquestionably increases the costs of litigation, sometimes massively so. When the parties are unevenly matched economically, this is an advantage for the party with the deeper pocket. To some extent, however, this advantage, which typically inures to large corporations, insurance companies, and governmental agencies, is compensated for by the system of contingent fees, whereby the costs of discovery – disbursements and legal fees – are absorbed by counsel in anticipation of sharing in the ultimate judgment.

Perhaps the most problematic feature of the American system of discovery, especially as seen from abroad but also as understood by American observers [29], is that it changes the legal position of the parties: claims that could not successfully be brought because they could not be proven became possible. This is most notable in medical malpractice and product liability cases, but may also be important in commercial fraud and antitrust actions. Sometimes this effect works for defendants, for instance in discovering that plaintiff suffered from an illness or injury incurred before the act alleged to have caused the harm complained of; on balance, however, discovery, American-style, seems to favor plaintiffs, litigation in general, and those – the United States seems to have more of them than any other country – who seek to use litigation to upset the applecart.
To round out the picture, it should be said that the model of discovery in private civil litigation is used by investigative and enforcement agents of government as well – especially in regard to documents. Investigations may be launched even before a lawsuit is brought, and requests can go out for production of documents, often in very sweeping, undefined form [30]. So, too, can criminal investigations, conducted nominally by grand juries, but in fact usually run by a prosecuting attorney. Some of the most contentious transnational discovery problems have arisen not through civil discovery as described above, but through government initiatives in civil or criminal proceedings [31]. Of course it is also true that the targets of such discovery requests have the strongest incentives to resist disclosure, not only of their own files but of records of those whom they have dealt with, such as banks and brokerage houses. These subjects are not discussed further here, but they form a background to disputes regarding civil discovery: if the problems here addressed can be resolved, these problems would be next on the agenda [32].

3. Some Suggestions

Does any of these systems produce justice in greater measure than the others? Professor Langbein, an American-based comparatist, wrote recently of the German advantage in civil procedure [33], by which he meant primarily the German (and by inference, similar European) techniques for assembling the facts pertinent to legal disputes. But he is clearly in a minority. While there are movements everywhere for reform at the margin [34] – probably most active in the United States – the legal profession in each system thinks of its procedures as the norm, and the other systems, whether or not it understands them, as somehow unfortunate.

No one, however, has a right to assume that the system he is accustomed to will prevail in all respects in litigation touching on more than one country or legal system. This is such a truism that one is almost embarrassed to put it in print. The whole subject of conflict of laws since the founding of the subject in the late Middle Ages has been concerned with the way one state's legal system copes with events that took place or had effect in another state [35]. But where conflict of laws has been weakest – one may almost say non-existent if one excludes the neighboring subject of jurisdiction and judgments – is the subject of procedure.

It used to be said that substantive law is governed according to the applicable rules of choice of law, but that procedure is governed by the law of the forum [36]. But clearly such a statement was too simple – an issue might be "substantive" for some purposes, "procedural" for others [37]. Statutes of frauds, periods of limitations, burdens of proof on such issues as contributory fault and standing to sue were typical examples of issues that were in some
sense *adjective*, as contrasted with *substantive* law, yet were not ineluctably excluded from the choice of law process. We soon learned to grope for rules or approaches to these subjects, not always with perfect success [38], but at least with the understanding that these issues were different from such subjects as whether motions are heard on Tuesdays or Fridays, whether one judge handles all phases of a case, whether a jury consists of six or twelve persons (or indeed whether a jury is available at all), which side makes its closing arguments first, whether related counterclaims must be raised or may be saved for a later day, and whether interlocutory appeals are permitted. Without, it seems, thinking about the question, we have placed the means of procuring evidence in this second category, the category to which the techniques and values of conflict of laws are not generally relevant.

When the other jurisdiction involved — i.e., the state where a witness resides, documents are kept, or a factory is located — was one with a similar system of discovery, this created relatively little difficulty. New York and Pennsylvania, Bavaria and North Rhine Westphalia, England and Ireland are sufficiently similar that choice of law is not an issue. As transactions and litigation have become more and more internationalized, it is clear that the problem is a real one. My contention is that at least in the first instance the problem is not one of jurisdiction, nor of sovereignty, but of choice of law.

Having made this point, to be sure, is far from solving the problem. Choice of law in the last quarter of the twentieth century rarely yields precise, uniformly accepted answers. But choice of law invites thinking about the considerations of forum versus locus law in terms of interests, expectations, and fairness, in a way that the debate over transnational discovery has not often seen. There is one big proviso, however. Choice of law holds promise in this context only if each forum regards the law of the other as merely different, not fundamentally unacceptable. To take an easy example, if examinations of witnesses in France or Germany are recorded through summaries by the judge or a court official [39], whereas in the United States and England they are transcribed verbatim [40], it requires no great leap of faith or swallowing of pride for the United States to permit a witness to be examined in New York or Chicago by a German judge or his delegate, who will make a summary of the testimony, subject to the witness’ approval, for use in a German lawsuit [41]; nor is it difficult for a German judge or official to accept that a deposition given in Germany for use in an American proceeding be taken down word-for-word in shorthand.

I have, of course, chosen the easiest example, skipping over momentarily the more difficult questions — may the witness be examined at all? may he be compelled to testify? what questions may he be required to answer? what documents can he be ordered to produce? what privileges can he invoke. My point thus far has been only to illustrate that so long as issues of procedure are regarded as matters of taste and not of fundamental faith, choice of law shows
promise. A rule that says "the forum where the testimony is to be used determines the manner in which the testimony will be recorded" is a sensible and unobjectionable rule. A different rule, to the effect that "the manner of recording an oral deposition is governed by the way such a deposition would be recorded if it were to be used in the jurisdiction where it is given," would also be possible, but it would make less sense, and would call for a second rule at each forum concerning the admissibility of testimony thus recorded [42]. The first rule is clearly simpler and more persuasive. It focuses on the needs and interests of the place of litigation, and reflects the absence of any countervailing interest of the other state that might be impaired by following the lex fori. But note that the proposed rule has not asked what the underlying action was about, what law was applicable to the transaction, or even what law had the most significant connection with the activity about which the witness was being interrogated. None of these factors would be useful in answering our very simple first question: how should a deposition be recorded?

Consider a more difficult issue: suppose, whether through letter rogatory or otherwise, a non-party witness is examined in country B in connection with a lawsuit in country A. A question is put to him that he would rather not answer. The proponent of the question says it is a perfectly appropriate question under the law of A, and whether the question or the answer would be admissible under the law of B is without significance. The witness says "I am in B, and B's rules relating to interrogation of witnesses should govern." Who is right?

In the first instance, of course, if B's compulsory process is invoked, a judge in B will have to decide. But should he really say what the High Court judge in Rauland said in reviewing the order of a Master directing the witnesses to answer the questions put in the letter rogatory issued by a U.S. court? "The enforcement of such an order against any company or person not a party to the action would, I think, be grossly oppressive when judged by the standards of our own civil procedure, and I do not propose to judge it by any other standard (emphasis added)" [43].

At some level, the italicized phrase is correct; country B should not, for the sake of a lawsuit in A, give up its privilege against self-incrimination, and I am prepared to say that if the witness has such a privilege under the law of either A or B, it should be available [44]. Devotion to the privilege against self-incrimination is powerful enough so that it probably trumps choice of law analysis. But a rule in B (contrary to the rule in A) that non-party witnesses cannot be examined before trial is not, I submit, of equal force; nor is a rule in country C that the judges do the examining while in country A counsel do it; nor a rule in country D that a document might be inadmissible at trial and therefore not disclosable, while in A it would be admissible or would be disclosable even if not ultimately admissible. It seems to me that each of these examples is more analogous to our easiest illustration, covering recording of
the preceeding, than to the example concerning the privilege against self incrimination. If I am right about that, the court in B, C, or D should ask itself “what interest of this country would be impaired by granting the request,” and not (to paraphrase Professor Higgins in My Fair Lady)”why can’t A be like us?”

As for the question of “fishing expeditions,” there may be more involved than a question of taste; I have difficulty, however, in finding any high moral principle in the debate, as contrasted with expressions of the exaggerated perceptions outlined in Part 1 of this article. Not seldom, I suspect, the game is rather one of “hide and seek.” A recent decision of the House of Lords, In re Asbestos Insurance Coverage Cases [45], may serve as an illustration. The facts are complicated, but the stakes were high.

Four major American manufacturers of asbestos, including the Johns-Manville Corporation, were (and are) defendants in numerous class as well as individual tort actions by people who had worked in asbestos plants, alleging harm from ingestion of asbestos fibers for which the manufacturers should be held responsible. The manufacturers, in turn, brought suit in Superior Court in San Francisco against a number of insurance companies as well as several underwriting syndicates at Lloyd’s of London [46]. Simplifying a complex set of facts somewhat, the manufacturers sought a declaration that the insurers and underwriters (a) were required to defend the actions brought on behalf of the workers; and (b) were required to indemnify the manufacturers against any liability that might be found. The issuers and underwriters (1) denied that certain alleged coverages, dating back to 1920, existed at all; (2) disputed the extent of coverage – i.e., contended either that the policies only covered claims brought in the period of the policy, or that the policies in force throughout the period of exposure to asbestos should cover the manufacturers’ liability in proportion to the time that any given policy was in force; (3) disputed the construction of the policies, in particular as to the level when so-called “excess” liability attached; and (4) alleged that the manufacturers had not adequately disclosed to the insurers and underwriters their knowledge of the hazards of asbestos. The amounts involved, as is well known, are staggering [47].

Many of the policies in question, it turned out, had been placed (skipping intermediaries) through a London brokerage firm, Sedgwick. Now the Superior Court in San Francisco, through a letter of request issued pursuant to the Hague Evidence Convention [48], requested the testimony of certain persons employed by or associated with Sedgwick, and the production of various documents from Sedgwick’s files.

The individual witnesses sought relief from any duty to give testimony; Sedgwick did not contest the request for the policies themselves, but resisted all the requests that related to written instructions by the insured to the brokers and to the applications for the policies. The policies were identified by numbers and dates of issue.
The High Court judge who first heard the matter sustained the letter of request with respect both to oral testimony and, for the most part, to production of the documents requested; the Court of Appeal (2-1) affirmed with respect to testimony and most of the documents. The House of Lords affirmed as to testimony of the individuals, but rejected all the contested document requests. Citing Rauland and Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [49], the House of Lords said that the Evidence (Procedure in other jurisdictions) Act of 1975, which had been enacted in preparation for adherence by the U.K. to the Hague Evidence Convention, speaks of particular documents, not classes of documents, and that these must be actual documents, i.e., the proponent must know that the documents exist. The requests here failed on both counts. "If for all that appears," Lord Fraser wrote, "it is possible that instruction for some policies may have been given verbally and that there were no written instructions for those policies."

Thus, the request, "in effect calls for production of 'written instructions if any'," and that was not good enough to meet the test of actuality. It follows that the request then must be considered as one for "all or any documents falling within the class consisting of written instructions," but such a request would fail the test of particularity [50].

Would the requests have been approved if the American attorneys who drafted the letter of request had been more precise, and had asked for "written instructions, or notes of oral instructions from the insured to Sedgwick"? Since one supposes that insurance brokers arranging cover either deal in written instructions or make notes of telephone instructions, such a request ought to cover all the policies in question, and thus meet the actuality test; it seems doubtful, however, that even such an amended request would meet the particularity test. Lord Fraser explained, borrowing from the dissent in the Court of Appeal:

[As] order for production of the respondents' "monthly bank statements for the year 1984 relating to his current account" with a named bank would satisfy the requirements of [the Evidence Act of 1975], provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for "all the respondents' bank statements for 1984" would ... refer to a class of documents and would not be admissible [51].

With all respect, I do not understand the distinction, at least if the second example also names a bank; even if it does not but it is clear that the request relates, say, to London bank accounts, the distinction being drawn is a very thin membrane indeed, hardly a great wall between unjustified snooping and reasonable trial preparation or fact-finding. Coming back to the Asbestos Insurance cases, it is difficult to see how English interests (as contrasted with the interests of the underwriters) would be harmed by ordering the evidence disclosed [52]. Why should the English courts, as F-2, not say in respect to
documents, what the House of Lords said in upholding the requests to take the oral testimony of the named witnesses:

[T]he court of request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible. This is essentially matter for the requesting court [53].

Could one not make this statement the basis of a general principle of choice of law applicable to transnational fact-gathering for purposes of litigation? Without diverting too much energy at this point into the drafting of a precise rule, the principle might be formulated something like this:

Reasonable requests for disclosure of information for use in a civil action pending in another state may be carried out, and if necessary, supported by order of the court or other authority of the state where the witness of information is located, in accordance with the law of the state where the action is pending. [54]

I do not, as noted, want at this preliminary stage to dwell too long on details of drafting. If this were a statute or treaty, there would need to be more explanations, definitions, and possibly some exceptions.

The question of the right not to give evidence — “privilege” in American and English lawyers’ parlance — is particularly troublesome. However, I am here proposing only a principle. But note that the principle does not depend on an international agreement. Further note that it does not distinguish between documents and testimony, between information requested from parties and non-parties; or between requests made directly from one party to another, as under several provisions of the U.S. Federal Rules of Civil Procedure [55], or requests pursuant to court order, as under Rule 37(a) of the U.S. Federal Rules, or Sections 524 and 429 of the German Code of Civil Procedure (ZPO), Article 11 of the French New Code of Civil Procedure, or Order 39 of the English Rules of the Supreme Court [56]. Thus, the principle does not depend on a system of state-to-state commitments to judicial assistance, though it could easily accommodate such a system, and as we shall see in the final part of this essay, might make such a system function much more effectively than at present.

The key to the principle, of course, is the word “reasonable,” a word that some lawyers and legislators fear, but that the drafters of the U.S. Constitution, for instance, found quite useful [57]. My feeling is that a consensus around the concept of reasonableness in this narrow area of the law should be possible to construct. If that it true, then the Hague Evidence Convention, which is supposed to address this subject, can be saved, and indeed be made into a useful channel and symbol of international cooperation. If not, the Convention will fade into irrelevance, and transnational discovery will turn ever more into a power contest — threats of sanctions on one side, increased use of blocking statutes and exorbitant privileges on the other — and litigation conducted on less than the best information.
4. The Hague Evidence Convention

What then of the Hague Evidence Convention? It presently has seventeen state parties, including many (though not all) of the major industrial states of the West, and a number of other states are considering becoming parties. The basic techniques of the Convention are sound. Each state party designates a Central Authority to receive Letters of Request for judicial assistance from courts in other state parties. If litigation is pending in state $A$ for which information located in state $B$ is desired, the court in $A$ sends its request, in a standard form, to the Central Authority in $B$, and the Authority, usually the Ministry of Justice or comparable organ, forwards the request to the appropriate court. That court summons the witness (or custodian of documents) for examination, if necessary through compulsory process. The record of the examination and any documents furnished, or an explanation why the witness could not be examined or the documents produced, are then sent through $B$'s Central Authority to the court in $A$, where they may be used or not according to the laws of $A$. To the extent state $B$ regard the taking of evidence as a judicial function, the requirement is met by the engagement of the court in both $A$ and $B$.

So far, so good. The creation of channels of communication, a standard form, and some rules about authentication and translation are useful improvements over prior, often improvised practices of judicial assistance [58]. But has the Convention worked as it was supposed to, as a bridge between the common and civil systems [59]?

I think it must be said that the answer is no, at least as far as the United States is concerned. One signal that this is so is the astonishing amount of litigation in the United States concerning the question of whether resort to the Convention is (1) required, or (2) even if not, whether “considerations of comity” normally call for resort to the Convention before an order can be given to a party for testimony of witnesses or production of documents situated abroad [60].

Whatever the outcome of this controversy, pending before the U.S. Supreme Court as these lines are written, it is clear that those resisting discovery — typically defendants [61] — regard the Convention as a shield, and those who seek discovery — typically plaintiffs — usually give up the effort when told to resort to the Convention [62]. That certainly is not the way the Convention was advertised.

When I first looked at the Hague Evidence Convention, I thought that while mandatory use of the Convention could not be derived from the text, resort to the Convention as a matter of judicial discretion and preference with respect to discovery orders for information located abroad was persuasive [63]. If there was an international agreement for cooperation among states, why not use it; if there were issues of law — for instance whether a given privilege under
the law of \( B \) was applicable – having the courts of \( B \) pass on the claim of privilege made sense. And if resort of the Convention by American lawyers meant that the judge where the litigation was pending would need to approve – and presumably screen – discovery requests directed abroad, so much the better [64]. On further study, however, I am disappointed by the Convention, for two principal reasons.

First, because Article 23, drafted by the British and eagerly embraced by nearly all the other state parties (except for the United States), gave – not preserved but bestowed – the right to member states to declare that they would not execute Letters of Request issued "for the purpose of obtaining pretrial discovery of documents as known in Common Law countries." The majority of states made blanket declarations under Article 23, and thus, made mandatory document production through the Convention virtually impossible for use in American litigation [65], since as perhaps the Europeans had not understood, but the British surely must have, by the time the pre-trial stage is finished and the trial starts, the opportunity for discovery in the sense of eliciting documents or testimony is over. All requests for documents originating from American courts, in order words, are by definition "pre-trial discovery;" thus, one can expect more cases such as the \textit{Corning Glass Works v. International Telephone and Telegraph Corp.} [66] case in Germany, in which the third party witnesses were required to testify against their will, but could not be made to produce documents. Mr. X could be asked, "Were you at a meeting in Paris on September 15 with representatives of the plaintiff?" Answer: Yes. "Did you make a memorandum of what occurred at the meeting?" Answer: Yes. "May we see the memorandum?" Objection sustained [67]. That, I submit, makes little sense in a patent/antitrust case [68]. In product liability litigation, which has been the occasion of most of the controversy concerning discovery and the Hague Evidence Convention, and where what is sought are designs, engineering data, test results, and the like, it makes the Convention useless. To be sure a number of states, following the United Kingdom, have modified their original declarations to limit their refusals to execute document requests under the Convention to requests that require a person (a) to state what documents relevant to the proceedings are or have been in his possession; and (b) to produce any documents other than particular documents specified in the Letter of Request [69]. We saw what that meant in the \textit{Asbestos Insurance} cases – some improvement, but a good deal less than receptivity to even a fairly well-focused discovery request [70]. At least as regards the states that have maintained their original blanket refusals to execute American document request under Article 23, including France and Germany, "considerations of comity" (to use an expression I do not like but which is often used in this connection) do not, I submit, call for deference, when the court has jurisdiction over a party and it has in its power the possibility of bringing the documents and employees/witnesses to the United
States for examination. If Article 23 were eliminated – or substantially revised – I would be prepared to re-examine the question [71].

But there is a second, more subtle reason that I find the Hague Evidence Convention disappointing. The approach of the Convention, it seems to me, proceeds too much from the point of view of sovereignty and public international law, not from the point of view of conflict of laws or private international law. It is probably correct as a general principle of public international law that no act in support of the exercise of jurisdiction by state A can be carried out in state B without B’s consent [72]; it seems to me, however, that by now such consent should be taken for granted among like-minded states, and not bestowed as a concession to be bargained about [73]. The Hague Evidence Convention, in other words, is useful in bringing the measures of compulsion of B to bear on witnesses in B for use in litigation in A (and vice versa); it is not designed to enable B’s courts or authorities to sit in judgment on the laws and practices of A.

Article 12 of the Convention says, in pertinent part:

The execution of a Letter of Request may be refused only to the extent that
(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary;
(b) the State or addressed considers that its sovereignty or security would be prejudiced thereby [74].

Perhaps it is necessary to retain something like paragraph (b). It should be clear, however, that the state, as contrasted with its courts, really does not have a role to play; its organs should carry the mail, not read or judge it. Moreover, unless someone seeks to use international judicial assistance to pry out military secrets or internal government discussions, which seems improbable [75], a state should not consider that its sovereignty or security would be prejudiced by a request for discovery [76]. The fact that state B may like a cartel in which party to a lawsuit in A is alleged to be engaged, or may be concerned that its enterprises will get a bad name if design flaws in their products are exposed, is not a justification to interfere with private litigation.

Article 9 of the Convention says:

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.
However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance … [77].

This is satisfactory as far as it goes, and usually takes care of the first, and easiest of the problems mentioned here – whether the record will be kept verbatim or summarized, and whether counsel or the presiding judicial officer will do the questioning. But it is not sufficient.

I would like to see an additional provision that would set forth something like the principle proposed in Part 3 of this article:
"As to the scope of the request, and the admissibility of any information procured through the facilities of the Convention, the law to be applied will ordinarily be the law of the state of origin of the request."

Would such a provision be incompatible with Article 11 of the Convention, which in effect provides that a person may refuse to give evidence in response to a Letter of Request in so fast as he has a privilege or duty to refuse to give evidence under the law of either State B or State A? I must confess that I have not solved this problem, which straddles the public/private law division. Clearly, it deserves more thought. Possibly a reader of these lines can come up with a suggestion, either in this journal or elsewhere.

So far as the rights not to give evidence are widely accepted, such as the attorney-client, husband-wife, and self-incrimination privileges, perhaps doctor-patient and priest-penitent as well, there is no real problem: even if the "privilege" were interpreted somewhat differently at the margin – say whether a communication with in-house counsel or a patent agent qualifies for the attorney-client privilege – I would be content to let B’s law govern. When it comes to additional entitlements not to testify, however, such as the Japanese privilege not to bring disgrace on one’s employer [78], or the German entitlement not to give out information whose release an enterprise regards as commercially disadvantageous [79], I am less clear. Ideally, there would be some agreement on the relationship between the right to refuse to answer and the duty to give evidence.

Failing that, it would seem to me at least worth exploring whether the right to withhold evidence would not depend on the law of the place with the most significant relationship to the transaction about which evidence is sought. If, for example, it were alleged that X, Y, and Z arranged in state A to divide up markets and not challenge each other’s inventions, and now an official of Z, who was at the meeting, declines in B to answer questions about the meeting, the duty to testify versus the right not to testify might well be governed by the law of A. The decision should be made, in the first instance, by the court in B, but that court should consider the matter as raising a choice of law question, and should not inevitably apply the law of B.

Could the United States – typically state A – do something to earn the changes I have suggested? Of course, to the extent I am advocating a change in attitude, one need not look for precise bargains or a quid pro quo. But remember that the change of attitude in favor of a conflict of laws approach depends on the law of A not being fundamentally unacceptable. I would hope that more modest, more focused discovery, screened by judges sensitive to the perceptions and additudes of others, would be a step in the right direction. Requests for discovery reflecting genuine search and preparation by the proponent, not just a desire to let one’s adversary do the work or run up charges, would not, after all, be un-American. Indeed, a rule focused on transnational discovery might well serve as a testing ground for reforms in

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domestic litigation as well, even as transnational cases have served to introduce and consolidate improvements in other aspects of American law on the borderline between substance and procedure, such as the validity of choice of forum clauses [80], arbitration of securities and antitrust issues [81], and the relation between choice of law and forum non conveniens [82].

5. Conclusion

One need not agree with either the definition or the condemnation of "fishing" that we saw in the English cases to conclude that sometimes American lawyers' nets are cast too wide, or that the form reproduced at note 6 above can be considerably improved. We certainly need not wait with reforms such as I suggest until the Hague Evidence Convention can be renegotiated (though that may come sooner rather than later if the use of the Convention as a shield fails in the Supreme Court).

Perceptions are probably harder to change than practice, and we can look forward to mutual distrust in this area for quite some time. I think it is not unreasonable, however, to look for changes along these lines: (1) more focused and restrained discovery requests by American counsel; (2) more attentive control of transnational discovery by courts in the United States, including, as appropriate, opinions accompanying discovery ordered or requests, explaining the reasons for the order or request in ways that may be weighed by courts and parties abroad; (3) less rejection of the "modified" American way by courts and governments of other states, with more attention to the goals of litigation and less to governmental or sovereign interests; and (4) a restructuring of the Hague Evidence Convention to a more private- and less public-law orientation, possibly trading exclusivity or something like it for more accommodation, and less resistance, to uncovering the facts necessary to resolution of legal disputes.

Notes


[2] See, for example, the following statement in the House of Lords by Lord Diplock, given in the course of the speech which reverse the order issued by the Court of Appeal enjoining the receiver of Laker Airways from pursuing an antitrust claim in the United States:

My Lords, one of the characteristics of the rules of civil procedure in the federal courts of the United States (as well as in most state courts), which seems to any English lawyer strange and, indeed, oppressive upon defendants, is that e "complaint," the document by which an action is begun, while it alleges that the complainant has a cause of action against the defendant or defendants, does not disclose, or discloses only in a most exiguous
form, the facts which the plaintiff will eventually rely upon at the trial as giving rise to that cause of action. Instead, the complaint is accompanied, or immediately followed, by a request to the defendants for pre-trial discovery which bears little resemblance to the kind of discovery that is available in English civil actions. Its breadth, the variety of methods, oral and written, that it makes available for a wide-roving search for any information that might be helpful to the case of the party seeking discovery, the enormous expense, irrecoverable in any award of costs to a successful defendant, in which it may involve parties from whom discovery is sought, and its potentiality for oppressive use by plaintiffs, particularly in antitrust actions, receive sufficient mention in the various speeches in this House in In re Westinghouse Electric Corporation Uranium Contract Litigation ...[1978] A.C. 547. What for present purposes is important particularly as respects the civil action by B.C. is that if the American action ever reaches the stage of trial, what evidence in support of its complaint Laker will by that time have unearthed by the process of pre-trial discovery it is as yet impossible to fortell;...

British Airways Bd. v. Laker Airways Ltd., 1985 A.C. 58, 78.

Actually the critique by English courts of “fishing expeditions” did not originate with comments on litigation originating in the U.S. For example, in a 1936 case, seller sued buyer for the balance of the purchase price of some Indian miniatures, and buyer defended on the ground that the miniatures were fakes. Rofe v. Kevorkian, [1936] 2 All E.R. 1334 (C.A.). Buyer proposed an interrogatory to seller asking “whence and from whom and upon what date” seller had obtained the objects. Id. at 1337. The interrogatory was disallowed as “in the nature of a fishing interrogatory, trying to get, for the purpose of the defendant's case, evidence which he has not already got.” Id. For this and similar examples, see P. Langan and L. Henderson, Civil Procedure 181 (3d ed. 1983).

[6] See, e.g., the following request for production of documents taken from 2B Bender's Federal Practice Form 3055.1. Such a request for documents would surely be regarded as fishing in most countries.

UNITED STATES DISTRICT COURT

>Title of Action) Civil Action No. ...
Request for Production of Documents

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff, ......., requests that Defendant, ......., produce and permit Plaintiff to inspect and copy the following documents:

(1) All books, records, memoranda, ledger sheets, accounts, journals, invoices and all other documents showing the following:

(a) The Defendant's total dollar volume of monthly sales for each month beginning with the first month of the Defendant's fiscal year which ended in 19..., up to and including the data of the depositions, and indicating the respective dollar volume of such monthly sales for each of the Defendant's sales territories.

(b) The Defendant's total dollar volume of monthly sales for each month beginning with the first month of the Defendant's fiscal year which ended in 19..., up to and including the date of
the depositions, with respect to the Defendant's sales territory in which lies the State of . . . . . . , and indicating the respective dollar volume of such monthly sales for each of the Defendant's customers, itemized as to products purchased by each customer.

(2) All books, records, memoranda, invoices and all other documents showing a list of the persons or firms who have made purchases from the Defendant during the period beginning with the first month of the Defendant's fiscal year ending in 19.., up to and including the date of depositions, with respect to the Defendant's sales territory in which lies the State of . . . . . . , and the date on which the initial purchase of each person or firm was made.

(3) All records, memoranda, correspondence, and all other documents generated during the effective period of Plaintiffs contract with the Defendant, and the period of negotiations leading up to such contract:

(a) directed to or from the Plaintiff, and
(b) relating to or about the Plaintiff, and specifically including complaints received about the Plaintiff.

(4) All records, memoranda, notations, statements, summaries and all other documents relating to the matter in controversy which Defendant obtained from, or as a result of interviewing, all persons whomsoever purporting to have knowledge of the matter in controversy.

........................................................
Attorney for Plaintiff
Office and P.O. Address
........................................................

[7] Compare the Note by the Advisory Committee on the Federal Rules of Civil Procedure concerning the Amendment to Rule 26(f), 85 F.R.D. 521, 526 (1980) (stating that "[t]he Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases") with Justice Powell's dissent from the promulgation of the 1980 rule changes, 446 U.S. 997, 999 arguing that "[d]elay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules").


[10] It is interesting that Professor Peter Schlosser of Munich, in a paper generally sympathetic to the jurisdictional claims of U.S. courts, attributes much of the conflict over discovery between the United States and Europe to the energy generated by the excessive number of lawyers in the United States reaching for new markets. P. Schlosser, Der Justizkonflikt Zwischen den USA und Europa 42 & passim (Schriftenreihe der Juristischen Gesellschaft zu Berlin, #97, 1985).

[11] The jury, so central to the development of the common law of procedure and evidence, has essentially been eliminated in England in civil cases, except for certain actions for fraud, defamation, false imprisonment and the like. See Supreme Court Act, 1981, ch. 54, § 69, reprinted

[12] Failure to comply with such a requirement can lead to penalties, and in the case of parties, findings of fact contrary to the contentions of the non-producing party. See, e.g., Nouveau Code de Procédure Civile [N.C. Pr. Civ.] art. 11 (Fr.); Zivilprozessordnung [ZPO] §§ 427–429 (W. Ger.). It seems, incidentally, that the power to order production of evidence is not limited to information situated within the forum state. See generally cases cited by Schlosser, supra note 10, at 17–21, including, for example, a direction to defendant in a paternity action to undergo a blood test, as required by German law, though defendant resided in Italy and that country's law does not provide for mandatory blood testing.


[14] This discussion, of course, masks differences between different provinces or cantons. For a recent, detailed account of the practice in one important country, see Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985).


[16] To be precise, the solicitors will prepare two lists, one with documents which the party has in his possession, the other with documents which have been but are no longer in his possession, with an indication of where they are now; the first list is further divided into documents that the party does not object to producing, and documents as to which a claim of privilege is made, together with a “sufficient statement of the grounds of the privilege.” R.S.C., order 24, rule 5 (1985).

[17] Id. at order 24, rule 16 (1985).


[21] Written interrogatories are also permitted, by leave of court, but they seem not to be widely used. See R.S.C., order 26.


[23] See, e.g., 1983 amendments to Fed. R. Civ. P. 16, 26(b), (f). For the recommendation that the judge be involved from the beginning in discovery involving information located abroad, see Restatement of Foreign Relations Law (Revised) § 437, Comment a (Tent. Draft No. 7, 1986).


[25] See id. at 32.

[26] See id. at 26(b)(1), (6).


[31] Among these were the investigations concerning shipping conferences, the alleged oil cartel, and the uranium cartel. See, for discussion of these and other investigations. Onkelinx, Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law


33 See Langbein, supra note 14.

34 It is interesting, for instance, that many of the techniques for discovery in the U.S. most criticized in England have recently been adopted for personal injury and death actions in that country, including discovery before commencement of an action, discovery against non-parties, and medical examination of the plaintiff by a doctor nominated by defendant. See Supreme Court Act, 1981, ch. 54 §§ 33(2), 34, reprinted in 11 Halsbury's Statutes of England and Wales 756, 786-88 (4th ed. 1985); R.S.C., order 24, rule 7A.


36 See, e.g., Restatement (First) of Conflict of Laws § 585 (1934).

37 See, e.g., Sampson v. Channell, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

38 Compare Restatement (Second) of Conflict of Laws § 142 (1971) with id. 1986 Revisions.

39 See, e.g., N.C. Pr. Civ. arts. 194-195 (statements of parties), arts. 219-220 (statements of witnesses); ZPO §§ 159-165.


41 See 28 U.S.C. § 1782(a) (1982), which expressly provides that for purposes of assistance to foreign and international tribunals a U.S. district court may prescribe the practice and procedure for examining a person in the district “which may be in whole or part the practice and procedure of the foreign country or the international tribunal . . .”

42 Actually, the U.S. Federal Rules of Civil Procedure contain such a provision, in the last sentence of Rule 28(b), adopted pursuant to the recommendations of the Commission on International Rules of Judicial Procedure created by Congress in 1958 (72 Stat. 1743 (1958)).

43 Rauland, [1956] 1 Q. B. at 635.

44 Cf. Westinghouse, 1978 A.C. at 612-17, 626-32, 636-40 (The individual English witnesses claimed the privilege under the Fifth Amendment to the U.S. Constitution, while the corporation itself, which would have no such privilege under U.S. law claimed the privilege on the basis that its answers might subject itself to penalties akin to criminal penalties under the competition articles of the European Common Market treaty).


47 Professor Epstein, in his 1982 article cited at supra note 46, reports that as of that time 16,500 claims had been filed against Johns-Manville alone, with 500 new claims being brought every month and potential liability in excess of two billion dollars. By spring 1986, the number of claims seems to have reached 20,000. See Rosenberg, The Dusting of America: A Story of Asbestos – Carnage, Cover-up, and Litigation, 99 Harv. L. Rev. 1693 (1986).


49 1978 A.C. 547.

[51] Id. at 337-38.

[52] I hasten to add (1) that Lloyd's underwriters are about 50% non-U.K. residents; and (2) that there is no evidence in these or other cases that the English courts favor English parties. If there is "hometown justice," it takes the form expressed by the judge in Rauland, quoted at note 43, i.e., a preference for doing things "our own way."


[54] Essentially, this is the rule which the U.S. applies when asked to render assistance in connection with litigation pending in a foreign state. See 28 U.S.C. § 1782 (1982); Restatement of the Foreign Relations Law of the United States (Revised) § 474 (Tent. Draft No. 6, 1985) and sources there cited.


[56] R.S.C., order 39, the English provision for examinations outside the jurisdiction, was recently amended to include production of documents, as well as testimony, thus, apparently narrowing the gap between the U.K. and other states in this area as well. See R.S.C., order 39, rule 1, amended by S.I. 1051 (1984). 1 Supreme Court Practice at 602 (3d Cum. Supp. 1985).

[57] See especially U.S. Const. amend. IV prohibits not all searches, but only unreasonable searches and seizures. Terms such as due process, excessive fines, unusual punishments, necessary and proper laws, and general welfare are other examples of a style of drafting sometimes disparaged in the age of the Internal Revenue Code and Regulations, but not without merit. After some hesitation, the concept of reasonableness has been adopted by the American Law Institute as the dominant principle concerning jurisdiction with regard to foreign relations law. See Restatement of Foreign Relations Law of the United States (Revised) §§ 402-403, 421. 431 & Introductory Note to pt. IV (Tent. Draft No. 6, 1985).


[60] Earlier state cases, in large part, answered yes. See, e.g., Volkswagenwerk Aktiengesellschaft v. Superior Court (Volkswagen I), 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973); Volkswagenwerk Aktiengesellschaft v. Superior Court (Volkswagen II), 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). Later cases, particularly in the federal courts, were split, but tended to sustain discovery orders to parties over whom the court had jurisdiction without prior resort to the Convention. See, e.g., In re Anschuetz & Co. GmbH, 754 F.2d 602 (5th Cir. 1985); In re Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729 (5th Cir. 1985), cert. granted, 106 S. Ct. 1633, cert. dismissed, 106 S. Ct. 2887; In re Societe Nationale Industrielle Aérospatiale, 782 F.2d 120 (8th Cir. 1986), cert. granted, 106 S. Ct. 2888 (1986).

[61] Or, as in several of the cases cited in the preceding notes, third party defendants in product liability or industrial accident cases brought in by the primary defendant.

[62] For instance, in both Volkswagen II, 123 Cal. App. 3d 840, and Pierburg, 137 Cal. App. 3d 238, which were product liability cases arising out of automobile accidents, plaintiffs abandoned the discovery efforts and entered into settlements following the decisions for the Courts of Appeal.

[63] For a strong argument that the Convention should always be resorted to first, see Radvan, The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes

[64] Section 437 of the Restatement of Foreign Relations Law of the United States (Revised) argues screening for all discovery orders directed abroad, whether or not the state where the witness or document are located is a party to the convention, See id. Comment a, Reporters' Note 2 (1986).

[65] Discovery through consults or commissions and without compulsion under Chapter II is often practiced with respect to states, such as France, that have blocking statutes not applicable "when international agreements provide otherwise." See, e.g., France: Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, Law No. 80-538, [1980] J.O. 1799, reprinted in 75 Am. J. Int'l L. 382 (1981).


[67] The sequence is, of course, made up, but the substance, I think, is not.

[68] Corning Glass, Judgment of Oct. 31, 1980, Oberlandesgericht, Munich, was similar in outline to Rauland, [1956] 1 Q.B. 618, discussed earlier. In both cases, plaintiff brought suit for patent infringement, and was met with a defense and counterclaim based on allegations of unlawful combinations with foreign parties, whose evidence was sought through international judicial assistance. For a sequel to the decisions reported at supra note 66, see Judgment of June 9, 1981, Amtsgericht, Munich, and Judgment of June 10, 1980, Landgericht, Munich, Reich der Internationalen Wirtschaft [RIW/AWD] at 850 (Dec. 1981), upholding refusal by the witness, an officer of Siemens, to give testimony on questions such as "with whom other than with plaintiff did your company conduct negotiations concerning a joint venture agreement?"

[69] See Declaration of United Kingdom, Singapore, Denmark, Finland, the Netherlands, Norway and Sweden pursuant to Article 23, reproduced in 28 U.S.C.A. following § 1781 (Supp. 1986).

[70] In Corning Glass, Judgment of Oct. 31, 1980, Oberlandesgericht, Munich, the Letter of Request, reprinted in 20 I.L.M. at 1044–46, asked for three agreements specified with dates and parties, which would presumably have passed muster under the English declaration if separated from other parts of the request, plus "all drafts, revisions or amendments thereof," which would have probably been rejected. It also asked, inter alia, for "documents, whether described as minutes, or notes or otherwise" forming a record of 34 meetings, described by dates and parties represented, as well as of 21 telephone conversations. Id. at 1045. Evidently, the occurrence of these meetings had been learned by JTT, the proponent, in discovery in the U.S., but it probably could not be certain, in Lord Fraser's terms, that a record existed of each meeting. One may doubt whether such a request would survive scrutiny by the English courts. Of course, in the actual case the issue did not arise, since the documentary request was rejected in toto.

[71] It is well known that the effect of Article 23 and the declarations thereunder threaten the usefulness of the Convention. See Special Commission on the Operation of the Hague Convention of Mar. 18, 1970, Report on Second Meeting (1985), reprinted in 24 I.L.M. at 1675–77, 1678–79 (1985). Thus far, however, the only suggested remedy has been to move toward the English version of declaration under Article 23, as discussed at supra note 68.


[73] I repeat that the discussion here concerns only civil litigation; administrative proceedings, grand jury investigations, and criminal proceedings raise considerations — cutting both ways — that go well beyond this brief essay.

[74] Convention, supra note 48, at 2562.

[75] One recent case comes to mind in the latter category, but there the court in state A (the U.K.) rejected the application for a Letter of Request, because it thought the desired information...
improperly sought to explore the motives for a foreign government decree relied on by defendant as a basis for not making good on a guarantee. Settebello Ltd. v. Banco Totta & Acores, [1985] 2 All E. R. 1025 (C.A.).

[76] I have elsewhere expressed my negative views about the British Protection of Trading Interests Act. Lowenfeld, Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V. Lowe, 75 Am. J. Int'l L. 629 (1981). It is important to note, however, that that act and similar blocking legislation in other states, was a response to U.S. government investigations in connection with shipping conferences, the uranium cartel, and the like. See supra note 30. One may believe that defensive measures by sovereigns against other sovereigns are justified, but still agree with the statement in the text concerning civil litigation of interest neither to State A nor State B.

[77] Convention, supra note 48, at 2561.


[79] ZPO § 384; see supra note 68.

