
David Joseph Sales

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The Hague Evidence Convention:  
A Matter of Comity?  
An Unthinkable Cession of Jurisdiction?

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,¹ adopted in 1968 by the Hague Conference on Private International Law, was intended to foster international judicial cooperation² with respect to discovery matters in transnational litigation. The Convention prescribes procedures that are intended to produce evidence which is “utilizable” in the forum State, while avoiding offense to the sovereignty or judicial practices of the State in which the evidence is located.³

As more nations have adopted the treaty, U.S. courts have been called upon to interpret the Convention and rule upon its scope and application. The result has been disagreement on the relationship between the discovery mechanisms created by the Federal Rules of Civil Procedure and those prescribed by the Convention.

Some courts have held that a judge may choose between the Federal Rules and Convention procedures by applying the principle of international comity.⁴ Others interpret the text of the Convention to conclude that it provides merely an alternative set of procedures.⁵ The most recently developed approach, now approved by the Fifth, Eighth, and Ninth Circuits, virtually disregards the Convention. These courts argue that once a U.S. court has personal jurisdiction over a foreign litigant, that litigant is subject to the full range of that court’s powers—including the power to compel

² “International judicial cooperation” refers to mutual assistance which sovereign nations render in matters such as: (a) service abroad of process and other judicial documents; (b) taking of testimony abroad, and obtaining documentary and other evidence abroad for domestic litigation; (c) proof of foreign law and official foreign records; (d) recognition and enforcement of foreign judgments. Rudolf B. Schlesinger, Comparative Law 386 (4th ed. 1980).
⁴ See text at notes 37-58.
⁵ See text at notes 64-97.
discovery in ways contrary to the dictates of the Convention. These courts conclude that discovery requests do not offend foreign judicial sovereignty when such requests do not require the assistance of foreign judicial officers.⁶

After a review of the history of the Convention, its purposes, substantive provisions, and the case law which has construed it, this comment will argue that none of the three judicial approaches is correct. U.S. courts are not authorized to balance purported interests of the United States against those of a foreign sovereign in determining whether to require resort to Convention procedures. Furthermore, the Fifth, Eighth and Ninth Circuits' position is completely inconsistent with the drafting history of the Convention. These interpretations of the treaty frustrate one of its central goals—to prevent the courts of one signatory from offending the sovereignty of another. This comment will argue that the Convention provides a set of minimum procedural standards to which a signatory State must adhere when seeking evidence located in another signatory State. The comment will suggest that while certain objections to the Convention stem from a concern that employing Convention procedures will preclude extraterritorial discovery, this concern does not justify the unilateral abrogation of a treaty by U.S. courts.

I. THE HISTORY OF THE CONVENTION

European nations have traditionally fostered international judicial cooperation through the use of bilateral and multilateral treaties.⁷ In 1905 and 1954, for example, the Hague Conference, then composed only of civil law countries, promulgated conventions on civil procedure.⁸ When the United Kingdom, the United States, Ireland, and Canada joined the Conference, differences in discovery procedures between common law and civil law jurisdictions made revision of the 1954 agreement necessary.⁹

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* See text at notes 110-29.
* Schlesinger, Comparative Law at 386 (cited in note 2).
* Philip W. Amram, The Proposed Convention of the Taking of Evidence Abroad, 55
Anglo-American lawyers have long encountered difficulties in their efforts to obtain evidence in civil law countries. Differences between common law and civil law discovery practices have caused this difficulty. In most civil law countries, obtaining evidence is a matter "primarily for the courts," with the parties in the subordinate position of assisting the judicial authorities. As a result, some civil law countries regard it as an infringement of their sovereignty when these official judicial acts are carried out by anyone other than their own judicial officers. These concerns reflect the "basic principle" of international law that no nation may perform official acts within another's territory without consent.

When a civil law country does not consent to discovery within its territory, and when its judicial officials do not participate in the discovery process, the U.S. court which sanctions such activity violates the "judicial sovereignty" of the civil law country. When the Convention was drafted, concerns for judicial sovereignty were "constantly borne in mind." The importance of this concern is demonstrated by the questionnaire circulated among Conference nations in 1967. It asks: "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?"

Several nations responded that concepts of sovereignty are implicated when voluntary testimony is sought; others emphasized that while voluntary testimony could be authorized, measures of compulsion would serve to invalidate such authorization; the remaining nations stated that there was no prohibition. Because


Schlesinger, Comparative Law at 387 (cited in note 2).


The terms testimony and evidence should be liberally construed so as to include all the conventional forms of discovery. See text at note 141.


Acts and Documents at 4-46 (cited in note 16).
the question was asked in terms of voluntary testimony, there was no expression of the position of a number of delegations with regard to compulsory testimony. But where a State opposes the taking of voluntary testimony, it must also oppose compulsory measures. The Netherlands' response to the questionnaire demonstrates this amply: "It must be underlined, . . . that this attitude is limited to truly voluntary depositions and it is essential that any measure of compulsion, no matter how subtly exercised, even if only a false appearance of legal obligation, often created by the use of solemn formalities, must be avoided." 18

Even when foreign judicial sovereignty is duly recognized and foreign officials are included in the discovery process, there is no guarantee that a U.S. court will admit evidence rendered by the foreign officials. For example, in many civil law 'depositions' no oath is administered, there is no cross-examination and summaries rather than transcripts of testimony result. 19 In order to make evidence from abroad "utilizable" 20 in the litigation forum, the Convention requires a signatory's officials to use any special method or procedure requested by that forum. The requested State's officials must fulfill this obligation unless the requested procedures are "impossible to perform" or "incompatible" with the requested State's internal law. 21 According to the Convention's Rapporteur, 22 this imposes a duty to "take evidence 'common-law style'" unless it is "truly impossible." 23

II. THE PROVISIONS OF THE CONVENTION

The primary mechanism of discovery under the Convention is the "letter of request." 24 Evidence sought through letters of re-

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18 Id. at 39 (commentator's translation).
21 Convention at art. 9 (cited in note 1).
22 See Amram, 55 A.B.A.J. at 653 (cited in note 9.) Amram was a United States delegate to the Hague Conference in 1956, 1960, 1964, and 1968. He was also Chairman of the Advisory Committee to the United States Commission on International Rules and Judicial Procedure.
24 The Convention also provides for the taking of evidence by diplomatic or consular officers of the forum State and by "commissioners" nominated by the court in which the action is pending. These provisions are subject to reservation. Convention, at arts. 15-22 (cited in note 1). A signatory State agrees to permit these procedures unless it declares otherwise. In general, however, these procedures have been largely ignored. See Oxman, 37 U. Miami L. Rev. at 757 (cited in note 13); Comment, The Hague Convention on the Taking
quest must be limited to that intended for use in "judicial proceed-
ings, commenced or contemplated." Each signatory State must
designate a "Central Authority" to receive the letters sent by the
Central Authority of another signatory State. All letters must
conform to certain formal and linguistic requirements. A Central
Authority may reject a request if it "considers that the request
does not comply with the provisions" of the Convention, but it
must return the letter and specify its objections.

The requesting authority must be informed of the time and
place of the proceeding. A requested judicial authority applies its
own law "as to the methods and procedure to be followed" but as
mentioned above, it must honor a request to use a special method
or procedure, "unless this is incompatible with the internal law of
the requested State or is impossible to perform due to practical
difficulties." The requested judicial authority must execute let-
ters of request "expeditiously," and must apply appropriate
"measures of compulsion [to unwilling witnesses] . . . to the same
extent as are provided by its internal law" in the context of internal
litigation.

The Convention allows any person from whom evidence is
sought to refuse to give such evidence on the basis of any privilege
or duty which arises under the internal law of the executing

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of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Proce-
28 Convention at art. 1 (cited in note 1).
29 Id. at art. 2.
30 Each must "specify" the requested authority, the parties to the proceedings and
their representatives, the nature of the proceeding, and what evidence is sought. When ap-
propriate, the letter must also specify the names and addresses of those to be examined,
the questions to be asked or a statement of the subject about which they are to be examined,
the things to be inspected, whether an oath is to be administered, and whether any special
procedure is to be used. Id. at art. 3.
31 A requesting authority must execute its letter in either French, English, or in the
language of the requested State. Id. at art. 4. A State may reserve the right to refuse letters
in English or French and require that the letter be in that State's own language or accompa-
nied by a translation. Id.
32 Id. at art. 5.
33 "This information shall be sent directly to the parties or their representatives when
the authority of the State of origin so requests." Id. at art. 7.
34 Id at art. 9. This article should be narrowly construed: "It was the unanimous agree-
ment of the delegations that no general 'escape clause' should be introduced which would
nullify in practice the request for a special procedure." U.S. Delegation Report at 810 (cited
in note 3). "'[Incompatible] does not mean 'different' or 'strange' or unfamiliar. It means
that the 'law' of the state of execution interposes a barrier—some constitutional or statutory
35 Convention at art. 9 (cited in note 1).
36 Id. at art. 10.
Apart from these privileges, a Central Authority may refuse to execute a request only where the request "does not fall within the functions of the judiciary" or when the requested State "considers that its sovereignty or security would be prejudiced" by execution of the request. Article 27 provides that a State may permit the use of less restrictive procedures than those required by the Convention. And under Article 23, a State may also reserve the right to refuse overbroad letters of request for documents. These last two provisions form the basis of many disputes over the Convention.

III. Misinterpretation of the Convention in U.S. Courts

Cases involving the Convention first appeared in U.S. Courts in 1980. Since then, three interrelated interpretations of the Convention have emerged. Under the first of these, the "comity approach," courts ignore the mandatory nature of the treaty and instead, looking to a line of pre-Convention cases, apply the general principle of international comity. They balance the requested State's interest in judicial sovereignty against what they perceive as the United States' interests in order to determine whether they should require resort to Convention procedures.

A second approach, the "permissive approach," which results from a misinterpretation of the Convention's text, argues that adherence to the Convention is merely optional. Under this approach, U.S. courts are always entitled to enforce the full range of discovery rules and sanctions under the Federal Rules of Civil Procedure. Courts using this approach may allude to comity principles, but rarely give any real weight to the sovereignty concerns of the requested country.

The third approach, the "extraterritorial approach," adopted by the Fifth, Eighth and Ninth Circuits, suggests that personal jurisdiction over foreign parties carries with it the power to compel discovery from foreign parties without regard to Convention proce-
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dures. Courts following this approach claim to avoid an offense to foreign sovereignty by requiring that the foreign party complete discovery tasks outside the borders of the State in which the relevant evidence is located.

A. The Comity Approach

1. Development of the Comity Approach. The Supreme Court defined the term "comity" almost ninety years ago as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." This principle governed the resolution of a number of international discovery disputes which did not concern the Convention. The application of this approach, when applied to Convention disputes, requires a subjective balancing by the judge. Such a balancing may lead a court to require resort to the Convention in the first instance. But judges generally indicate that they retain the power to impose at any time the discovery mechanisms of the Federal Rules and apply sanctions should adherence to the Convention prove fruitless.

A California appellate court first applied the comity approach in Volkswagenwerke Aktiengesellschaft v. Superior Court. This case involved a product liability suit against a German automobile manufacturer. After a prolonged period of contested discovery, the plaintiff moved for an order to compel. The motion was granted, and defendant appealed. In an exercise of what it viewed as judicial restraint, the court ordered the plaintiff to proceed under the Convention. It explained that once a foreign party is properly subject to its jurisdiction, a court may, "with technical propriety," order that party to perform or refrain from performing certain acts outside the State. A court should not, however, "require acts or forebearances within the territory [which are] incon-

38 See cases cited in note 60.
40 The "bitterly contested" requests included such items as permission to inspect and photograph the defendant's premises, to inspect and copy technical records, and to conduct informal interviews with its personnel. 123 Cal. App. 3d at 847-48.
41 The order was extremely broad and granted a wide range of discretion to the plaintiff to decide how extensive its discovery would be once admitted onto the defendant's premises. Id.
42 Id. at 856.
sistent with the internal laws . . . unless a careful weighing of interests and alternative means makes clear that the order is justified." This benignly phrased caveat works a substantial expansion of the power of U.S. courts to compel discovery inconsistently with the Convention.

In a second California case, *Pierburg GmbH & Co. v. Superior Court of Los Angeles*, a trial court had ordered a German defendant to respond to the plaintiffs' interrogatories without requiring use of the Convention's procedures. On appeal, the court rejected the argument that the Convention was not implicated merely because interrogatories could be answered in California by the defendant's officers and counsel. The plaintiff argued that such a practice would not amount to discovery "abroad." The court disagreed:

The foundation of the Hague Convention is to honor West Germany's civil law jurisdiction over civil discovery of its nationals conducted within the territory of West Germany. Accordingly, the plaintiffs cannot avoid the clear applicability of the convention by arguing that [the defendant's] officers responsible for providing answers to the discovery could leave West Germany to perform the physical act of giving answers.

The court relied on the *Volkswagenwerke* decision to conclude somewhat vaguely that a plaintiff must first rely on the Convention and "thereafter proceed in accordance with the law."
One federal decision follows closely the California cases. In *Schroeder v. Lufthansa German Airlines*, Lufthansa moved for a protective order stating that the plaintiff could not propound interrogatories to a German national unless the interrogatories complied with the requirements of the Convention. The court rejected defendant's argument and concluded instead that a party "may be required to conform to the applicable local discovery procedures which are essential incidents of the Court's exercise of personal jurisdiction." It acknowledged, however, the "countervailing force of international comity" and expressed the belief that it is the duty of a U.S. court to exercise "judicial self-restraint" by adopting the procedures which are "least likely to offend the [foreign] State's sovereignty."

Like the California courts, the *Schroeder* court concluded that the use of the Convention is "preferable" and that it is reasonable to expect that a letter of request will be executed promptly and fully. The court also rejected plaintiff's contention that the Convention was inapplicable because certain discovery tasks could be completed in Illinois by defendant's agents who regularly travelled to the United States. Like the *Pierburg* court, the *Schroeder* court recognized that such a reading of the Convention would, for the most part, "automatically destroy" its applicability. The Court concluded that the plaintiff was "obligated to request the assistance of [the FRG's] government to obtain discovery" but reminded the defendant that it was still subject to the court's "rules and sanctions" in the event that it did not respond cooperatively and expeditiously, as the Convention requires.

*Philadelphia Gear Corp. v. American Pfauter Corp.*, also followed the California cases by requiring first resort to the Convention. Under the court's analysis, permitting "one sovereign to foist its legal procedures upon another . . . would run afoul of the

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* 18 Aviation Cases 17,222 (N.D. Ill. 1983).
* Id.
* Id. at 17,223.
* Id.
* Id.
* Id.
* Id. at 17,224.
* Id. See Convention at art. 9 (cited in note 1). The *Schroeder* court is also the only federal court to consider seriously the possibility that the Convention provides a "preemptive and exhaustive rule of evidence gathering." 18 Aviation Cases at 17,222 n. 1. But the court did not decide the issue. For a discussion of the question of exclusivity, see text at notes 98-108.
interest of sound international relations and comity.” The court anticipated good faith compliance by German authorities, but reminded the defendant that since it was a “corporation doing business in [the forum court’s] jurisdiction,” it remained subject to any discovery orders which “might issue.”

2. Assessing the Comity Approach. The application of existing principles of comity to Convention disputes is highly questionable. The courts have derived the comity approach from a distinct body of case law concerning conflicts between the discovery orders of U.S. courts and foreign non-disclosure laws, or blocking statutes. This body of case law is far from settled but the cases...

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67 Id. at 60.
68 Id. The comity approach was also recognized by implication in Boreri v. Fiat S.P.A., 763 F.2d 17 (1st Cir. 1985). The First Circuit determined that the Convention question was not ripe for appeal and declined to rule on it. Yet it stated that a resolution of the question would require attention to the “delicate balance of competing concerns which must eventually be struck in determining the [Convention's] force and effect...” Id. at 20. State courts following a comity approach include: Gebr. Eickhoff Maschinenfabrik und Eisenbeträger GmbH v. Starcher, 328 S.E.2d 492 (W.Va. 1985); Goldschmidt v. Smith, 676 S.W.2d 443 (Tex. Ct. App. 1984); Vincent v. Atelier de la Motobecane, S.A., 193 N.J. Super. 716 (1984). The Fifth Circuit, which has rejected a strict comity approach, has suggested that state courts may be more reluctant to bypass the Convention in the first instance because they are concerned about conflicts between their own state rules and the Convention as a Federal Treaty. See In re Anschuetz & Co., GmbH, 754 F.2d 602, 608 (5th Cir. 1985). For a discussion of the relationship between the Supremacy Clause and the Convention, see text at notes 98-108.

69 In the first of these cases, Societe Internationale v. Rogers, 357 U.S. 197 (1958), a Swiss holding company sued the United States to recover property seized during World War II under the Trading with the Enemy Act of 1917. The United States sought documents which it claimed were relevant to the litigation; the plaintiff contested the discovery because production would have resulted in a violation of the Swiss penal laws. The United States Supreme Court held that although the discovery order was valid, the dismissal of the complaint was an abuse of discretion. Id. at 208-13. The reason for the Court’s holding was somewhat vague. See Note, Extraterritorial Discovery: An Analysis Based on Good Faith, 83 Colum. L. Rev. 1320, 1324-29 (1983). It did not specify the conditions under which discovery orders that conflict with foreign laws could be implemented. One standard upon which the Court relied, however, was the apparent good faith of the plaintiff. Dismissal was inappropriate because non-disclosure was “due to inability, and not to willfulness, bad faith, or any fault of petitioner.” 357 U.S. at 212.

While the Supreme Court did not explicitly discuss or authorize a comity approach, the case has been read implicitly as doing so. See Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960). The Tenth Circuit has interpreted the Societe case as follows:

[T]hough a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions, ... still the fact of foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order. We also believe it to be implicit in Societe that foreign illegality does not necessarily prevent a local court from imposing sanctions when ... a party fails to comply with a valid discovery order. In other words, Societe calls for a ‘balancing approach’ on a case-by-case basis.

In re Westinghouse Elec. Corp. Uranium, Etc., 563 F.2d 992, 997 (10th Cir. 1977). Resolu-
composing it generally recognize two things: a court with personal jurisdiction has the power to compel extraterritorial discovery; and the interests of the foreign State require some degree of consideration before a discovery order issues.

None of these cases involved disputes over the Convention. The extension of their analyses to Convention cases has a limited logical appeal but continued use of such an approach will turn the Convention into a meaningless agreement. This is the anomaly of the first cases applying the comity approach. The courts deciding these cases display an understanding of the judicial sovereignty issue, but their reliance on comity is misplaced. They speak of the use of Convention procedures as a matter of judicial restraint when nothing about the Convention supports such a discretionary approach.

The reliance upon comity is particularly problematic where courts have a less developed understanding of the judicial sovereignty problem; these courts will rarely give adequate consideration the relevant foreign interests. Furthermore, courts and commentators have questioned the general competence of courts to balance competing interests of different nations. The “most damaging defect of the balancing process is the inevitable pro-forum bias” incorporated into a purportedly neutral balance. Domestic interests are likely to be emphasized and favored.


See Note, 83 Colum. L. Rev. at 1327-29 (cited in note 59).

See text at notes 81-89.


See Recent Development, Extraterritorial Discovery—Hague Evidence Convention, 25 Va. J. Int'l L. 249, 269 (1984). See also In re Uranium Antitrust Litigation, 480 F. Supp. at 1148. Even if a comity approach were warranted, there is some question as to whether the balancing tests advanced in the Convention cases are appropriate. The existence of a signifi-
Courts should recognize that the balancing process *ended* rather than began with the drafting and ratification of the treaty. In other words, the Convention already incorporates what is required by comity. Resort to it is mandatory precisely because those nations involved in the Hague Conference wished to adopt a set of procedures which did not leave foreign judges at liberty to decide what constitutes an infringement of another State's sovereignty.

B. The Permissive Approach

1. *Article 27.* Many courts have looked to the text of the Convention to support an even more permissive approach. Unlike the cases decided principally on comity grounds, the cases based on this textual approach rely on an erroneous reading of Article 27 to support the proposition that the Convention's provisions are optional. Article 27 states that the Convention

shall not prevent a Contracting State from—

b. permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c. permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.  

Article 27 reflects the intention of the Convention’s drafters to provide a flexible framework which might form the basis for further agreements among parties to the Convention. The Article subjects the entire Convention to the “general rule” that “any more liberal practice in any signatory State which permits any act to be performed upon less restrictive conditions, under law or practice, remains in full force and is in no way limited by the restrictions or limitations of the [C]onvention.” It unambiguously protects the right of a requested nation to allow any more liberal arrangement “effected by side agreement, side convention or internal law and

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* Convention at art. 27 (cited in note 1).

* See Amram, 55 A.B.A.J. at 655 (cited in note 9).

practice." It does not allow a requesting nation to unilaterally determine that it need not follow the procedures mandated by the Convention.

A number of commentators have recognized that Article 27 compels this single reading; but some U.S. courts have arrived at an interpretation of Article 27 which thoroughly undercuts this underlying purpose of the Convention. The confusion stems from the fact that the Article reflects both the mandatory nature of the Convention's "minimum standard" and the flexibility of the Convention.

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*Id. In other words, "[s]any country may unilaterally offer by internal law and practice, wider, broader, more liberal and less restrictive international assistance." Id. at 808 (emphasis supplied). This meant that the United States' existing judicial assistance statute, 28 U.S.C. § 1782, significantly less restrictive than the Convention, would remain in force. In discussing the reasons why the United States should ratify the Convention, Mr. Amram wrote that the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." Amram, 55 A.B.A.J. at 655 (cited in note 9).


Each time the term "internal law" is used in the Convention, it refers to the country where the evidence is located. See, e.g., Convention at art. 4 (cited in note 1) ("A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters [of Request] in one of these languages... shall... specify the language in which the Letter... shall be expressed for execution... "); id. at art. 10 ("In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion... provided by its internal law... "); id. at art. 12 ("Execution [of a letter of request] may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.").

*See U.S. Delegation Report at 808 (cited in note 3). This mixture of compulsory and flexible features was clearly intentional:

What the convention has done is to provide a set of minimum standards to which all countries may subscribe [by adopting and ratifying the Convention]. It also provides a flexible framework within which any future liberalizing changes in policy and tradition in any country, with respect to international judicial co-operation, may be translated into effective change in international procedures. At the same time it recognizes and preserves procedures of a country that now or hereafter may provide international co-operation in the taking of evidence on more liberal and less restrictive bases, whether this is effected by side agreement, side convention or internal law and practice.

Amram, 55 A.B.A.J. at 655 (cited in note 9). See also Note, 16 L. & Pol'y Int'l Bus. at 990-92.
vention outlined above. Yet only one federal judge has stated unequivocally that this reading of the Article is inconsistent with the Convention's underlying policies.\(^7\)

2. Cases Adopting a Permissive Approach. The first case to interpret the Convention as a completely discretionary set of procedures was *Lasky v. Continental Products Corp.*\(^7\) In *Lasky*, the defendant argued that because it was a foreign national, it was not subject to the Federal Rules. Therefore it could only be compelled to respond to requests for documents and interrogatories through Convention procedures. The defendant argued further that the Convention supersedes any inconsistent provision of the Federal Rules.\(^7\) The court avoided consideration of this argument by concluding that in this instance, the Convention and the Federal Rules did not in fact conflict.

The *Lasky* court read Article 27 as making the Convention "permissive and not mandatory."\(^7\) In other words, a court is not prohibited from requiring any procedures available in litigation involving only domestic parties. The court alluded to the comity principle, stating that it requires restraint where another nation's sovereignty is threatened, but determined that "it [was] not clear that compliance with the plaintiff's discovery request [would] require a violation of German law or impinge upon [its] sovereignty."\(^7\)

Some courts which have followed *Lasky* in holding that the Convention provides a non-mandatory and merely alternative set of procedures also purport to exercise restraint in an attempt to avoid offending a foreign sovereign. They suggest, however, that this need for restraint ends whenever application of the Convention might limit discovery otherwise available under the Federal Rules. For example, in *Compagnie Francaise d'Assurance Pour le
Commerce Exterieur v. Phillips Petroleum Co., the court was faced with the French party plaintiff's claim that French law prohibited discovery of the requested document. At the time, the French Ministry of Economy and Finance and the French Ministry of the Sea were in possession of the documents. Because the court did not find that the Convention was mandatory, it was not constrained to consider the possibility that discovery of the documents could not be compelled under Article 11 of the Convention.

The court nonetheless granted the defendant an opportunity to respond to the discovery request in a manner consistent with the Convention. Yet it made clear that the discovery sanctions applicable under the Federal Rules would be applied if defendants failed to produce the requested information. In light of the court's apparent intention to compel discovery regardless of whether agents of the French Government, not under the control of defendants, were willing to permit production of the document, one could argue that no real weight was given to the French interests in the case.

A similar result was reached in Laker Airways Ltd. v. Pan American World Airways. The court in this case ruled that the Convention was not mandatory but granted defendant Lufthansa and the German government an opportunity (during a thirty day delay) to comply with the requested discovery under the Convention. Still, the court's order was based on the assumption that the requested discovery must be somehow obtainable. The court left little room for the German government to disagree: "[t]his delay

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76 Id. at 26. The statute in question, French Law No. 80-538, [1980] Journal Officiel de la Republique Francaise 1799, prohibits disclosure to any foreign public authority of any economic, commercial, industrial, financial or technical documents or information which might infringe upon the sovereignty, security or essential economic interests of France. The statute also requires any French national who receives such a request to inform the French Government of the request. 105 F.R.D. at 24. In this case, plaintiffs had been granted permission by the French government to produce, in whole or in part, 1,056 of the 1,204 documents which the defendant had requested. The government had refused to waive the statute for the remaining documents. Id. One purpose of the French law is to force American litigants to comply with the terms of the Convention. See Current Developments, The 1980 French Law on Documents and Information, 75 Am. J. Int'l L. 382, 385 (1981). For further discussion of blocking statutes such as this French law and their relationship to the Convention, see text at notes 145-46.
77 Article 11 recognizes the internal privilege or duty of the requested individual not to comply with a discovery request.
78 The court reserved judgment on what sanctions would be imposed for failure to comply with the order. But the court left open the possibility of imposition of "the entire range" of sanctions under Rule 37 of the Federal Rules. 105 F.R.D. at 32.
should give the German authorities both the time and the opportunity to decide whether they wish to provide cooperation within the spirit both of the Hague Convention and comity between nations.80

Since the courts applying a "permissive approach" believe they are under no legal obligation to follow the Convention, they may never choose to require use of its procedures under any circumstances. Even if they do purport to consider foreign interests, they are likely to conclude, as did the court in Murphy v. Reifenhauser KG Machinenfabrik,81 that an alleged conflict between American discovery procedures and German sovereignty is "merely hypothetical.82

Similarly, in International Society for Krishna Consciousness, Inc. v. Lee,83 the court noted that the Convention was designed as a "broadening rather than a limiting vehicle for discovery."84 It reasoned that because far reaching procedures of the Federal Rules would be more "effective," their use is not only permitted but preferred under the Convention.85 It was not difficult for the court to conclude that the sovereignty interests of the FRG were "simply not very compelling,"86 and were outweighed by the interests of the American litigant. The court looked to three factors: first, the plaintiffs' claim involved their First Amendment rights and the "paramount importance of those rights;"87 second, the FRG's reservation under Article 23 meant that a document request by the plaintiffs might be "futile"; third, the Convention's procedures might further delay the resolution of the case.88 With the balance thus established, the Krishna court found that the conflict raised by the defendant was "somewhat hypothetical" and did not warrant further prolonging the case.89

3. **Erroneous Comparisons with the Hague Service Convention.** By comparing certain Convention language with language in

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80 Id. at 51.
82 Id. at 363. The court's decision appears grounded, in part, in a belief that document discovery would be "futile" under the Convention.
84 Id. at 449.
85 Id. at 450. For a similar argument, see Laker, 103 F.R.D. at 49.
87 105 F.R.D. at 450.
88 Id. The second and third factors relate to the United States' interest in seeing that cases in federal courts are actually resolved.
89 Id. (quoting Murphy, 101 F.R.D. at 363).
the Hague Service Convention (the "Service Convention"), a few courts and the Solicitor General have made an additional textual argument that the Convention is not mandatory. Article 1 of the Service Convention states that it "shall apply in all cases, to civil or commercial matters, where there is occasion to transmit a judicial or extraterritorial document abroad." By contrast, Article 1 of the Convention states that a "Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of Letters of Request, to obtain evidence, or to perform some other judicial act."

The conclusion purportedly compelled by comparing these fragments is that the Convention, if intended to be compulsory, would contain the same language found in the Service Convention. This conclusion ignores the Convention's structure and certain purposes which distinguish it from the Service Convention. The language quoted from the Convention introduces the chapter treating letters of request exclusively. Similar language exists in Article 15, which introduces the chapter on consular and diplomatic procedures. Furthermore, the Service Convention, unlike the Convention, was not intended to foster and protect separate, more liberal arrangements among its signatories. In other words, the proper conclusion is that the Convention permits only a choice among one of its sets of enumerated procedures or those found in distinct agreements between two States.


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92 Service Convention at art. 1 (cited in note 90) (emphasis added).

93 Convention at art. 1 (cited in note 1) (emphasis added).

94 The argument is most fully set forth by the West Virginia Supreme Court in Starcher, 328 S.E.2d at 500-01.

95 "Articles 1 to 14 deal exclusively with letters of request to obtain evidence." U.S. Delegation Report at 808 (cited in note 3).

96 For a description of Convention provisions concerning the taking of evidence by diplomatic and consular officers, see note 24.

97 For an argument that similarities between the two Conventions are sufficient to conclude that both were meant to be mandatory, see Note, 16 L & Pol'y Int'l Bus. at 996 (cited in note 68).
It also creates a surprising anomaly: courts can claim to apply the Convention faithfully as a federal treaty—the supreme law of the land—but yet deny it any force. Even those commentators who recognize that the Convention, by its terms, provides a set of "minimum requirements," disagree over the consequences of this conclusion when evaluating it as a federal treaty.

Only one writer has concluded that the Convention provides the "exclusive and mandatory procedures for discovery abroad." Because the Convention is a self-executing treaty and because it is inconsistent with the Federal Rules, the doctrine of "implied repeal" causes the Convention to "supersede" the Federal Rules as a constitutional matter.

Another writer declines to argue that the Convention supersedes state and federal procedural rules because this view detracts from the Convention's flexibility. He believes instead that the Supremacy Clause requires American parties to use Convention procedures when seeking evidence in another signatory State. He concludes, however, that a court may issue a discovery order which violates Convention procedures when "all attempts to obtain evidence in accordance with the Convention fail."

A third writer likewise contends that, through the Supremacy Clause, the Convention requires both federal and state courts to use its procedures. The writer also asserts that the "procedures and processes of the Convention, including any reservations by a Member State," are binding upon U.S. courts and litigants. He

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88 U.S. Const. art. VI. Certain courts try to avoid this apparent inconsistency by arguing that the Convention is mandatory only as applied to non-parties. This argument is inconsistent with the Convention's drafting history. See text at notes 137-41.


90 The comment argues as follows: (1) Article VI of the Constitution places self-executing treaties on an equal footing with statutes, see Whitney v. Robertson, 124 U.S. 190, 194 (1888); (2) the convention is a self-executing treaty because it did not require affirmative legislative action to make its provisions operative, see U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978); (3) when a self-executing treaty and a federal statute conflict, the doctrine of implied repeal asserts that the latter-enacted will prevail, see Whitney, 124 U.S. at 194; (4) since the Convention was ratified, no amendment to the Federal Rules has expressed an intent to modify the Convention. 132 U. Pa. L. Rev. at 1483-84 (cited in note 24).


93 Id. at 1052.

94 Note, 16 L. & Pol'y Int'l Bus. at 995 n. 178 (cited in note 68).

95 Id. at 995.
retreats from this position, however, in concluding that, if courts are unwilling to recognize the Convention as exclusive, comity demands that they require domestic parties to attempt in good faith to comply with its procedures. Only then should courts consider other ways to obtain the evidence. This "alternative" rule is preferable because it might ease the burden on lower courts asked to resolve Convention disputes on constitutional grounds.

Yet this concern cannot justify a retreat from the position that the Convention is exclusive. One can only properly say that the Convention is not exclusive as applied between two signatories which maintain some distinct side agreement.

C. The Extraterritorial Approach: Redefining Evidence Abroad

1. An End Run Around the Convention. Many of the Convention cases decided on comity or textual grounds stress the importance of personal jurisdiction over foreign parties. The Krishna court, for example, states that "[t]he authority of American courts to order discovery of information in the control of a party over whom the court has jurisdiction is so compelling as to override even an explicit prohibition of disclosure by the law of the country in which the information is located." This view of jurisdictional power influenced the Krishna court, though this was not the sole factor in its decision.

Other courts have argued that personal jurisdiction has further consequences when interpreting the Convention. Graco, Inc. v. Kremlin, Inc. involved motions to compel answers to interrogatories and production of documents by the French defendant. The defendant objected to the discovery on a number of grounds, including non-compliance with the Convention and the existence of the French blocking statute. With regard to the blocking statute, the court determined that such laws are not absolute barriers.

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106 Id. at 1003-04.
107 Id. at 1004.
108 At the most recent meeting of the Special Commission on the Operation of the Convention, the "experts" could not reach a consensus on whether the Convention is "exclusive." The principal source of this disagreement appears to have been the opposing positions of the United States and West German experts. As a result, "[t]he question of exclusivity of the Convention remains in issue." Permanent Bureau of the Hague Conference, Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 Int'l Legal Mat. 1668, 1678 (1985) ("1985 Commission Report").
109 Krishna, 105 F.R.D. at 445 (citations omitted).
to discovery by American litigants. The court sought to issue an order which would minimize offense to French law. While it concluded that such offense was not completely avoidable, it felt that the defendant could reduce the level of conflict by arranging to have depositions taken in the United States and by bringing the requested documents to the United States.

The court tailored its analysis of the Convention to complement its treatment of the blocking statute. It reasoned that if discovery tasks were completed in the United States, interference with French sovereignty could be avoided. Central to this view was the court's interpretation of the meaning of the term "taking evidence abroad." The court concluded that discovery does not take place abroad "merely because documents to be produced somewhere else are located [abroad]."

The reasoning of the Graco court rests on two premises: a Lasky-like reading of Article 27 of the Convention finding that the Convention "carries no explicit prohibition" against the use of alternative procedures; and a belief that American ratification of the Convention could not have been intended to "protect foreign parties," over whom jurisdiction has been properly gained, from the "normal range of pre-trial discovery available under the Fed-

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111 The court stressed that in analyzing the effect of such laws on American discovery, one of the most important factors to consider is the nature of the case and the importance of the policies underlying the United States statute which forms the basis of the plaintiff's claim. Graco involved a patent infringement suit; the court concluded that the United States interest in protecting American patents against potential foreign infringers was substantial. 101 F.R.D. at 512-15. See text at notes 59-63.

112 The court was reluctant to rule on the territorial reach of the French law and acknowledged the possibility that the defendant's communication outside France of the information requested would still violate the law. 101 F.R.D. at 510. See Bate C. Toms, The French Response to the Extraterritorial Application of United States Antitrust Laws, 15 Int'l Law. 585, 594 n. 36 (1981). It merely suggested that compliance with discovery orders in the United States would be the best alternative, given the fact that it had the authority to compel such compliance. 101 F.R.D. at 510.

113 Id. at 521. See also Adidas (Canada) v. Seatrain Bennington, 1984 Am. Maritime Cases 2629 (S.D.N.Y. 1984).

The court noted that its view was the same with respect to people residing in another country:

If they are subject to the court's jurisdiction, or if the court can compel a party to produce them under Fed.R.Civ.P. 37(d), then the court may order that they be produced for deposition; violation of the other country's judicial sovereignty is avoided by order that the deposition take place outside the country. 101 F.R.D. at 521.

eral Rules." The court felt that requiring discovery requests to be processed through foreign judiciary systems "would work a drastic and very costly change" in the handling of lawsuits. If the Convention preempted "routine interrogatories and document requests," the court argued, it would operate as a "major regulation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation is begun." Such a "cession of jurisdiction" was, the court believed, "unthinkable."

The Fifth, Eighth and Ninth Circuits have adopted most of the Graco analysis. As the Fifth Circuit has argued, any acts which would take place inside the foreign State are merely preparatory to compliance with discovery orders in the United States; this type of activity is not "addressed" by the Convention. No affront to foreign judicial sovereignty can occur, according to these courts, where there is no request for participation by the foreign judiciary. This conclusion is open to question. In In re Anschuetz & Co., GmbH, the German Government submitted an amicus brief which makes it clear that Germany understood the substance of the sovereignty issue quite differently: "'compliance in Germany with the order of the U.S. District Court . . . mandating . . . the production of documents located in Kiel, Germany, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Convention.' " Not surprisingly, the court scarcely addressed the FRG's position, remarking only that, in the final analysis, a federal court is final arbiter of U.S. treaty obligations.

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117 Id. at 522. To demonstrate the problems with a broad interpretation of the Convention, the court suggested that a signatory State's exercise of its right to refuse to execute document requests under Article 23 "would give foreign authorities . . . power over the conduct of litigation in the American courts." Id.
118 See In re Anschuetz & Co, GmbH, 754 F.2d 602, 611 (5th Cir. 1985); In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 125 (8th Cir. 1986), cert. granted, 106 S.Ct. 2888 (1986); Societe National Industrielle Aerospatiale v. U.S. Dist. Ct., 788 F.2d 1408, 1411 (9th Cir. 1986).
119 Anschuetz, 754 F.2d at 611.
121 Brief for the FRG, quoted in Anschuetz, 754 F.2d at 614.
122 754 F.2d at 614. While this proposition is true, see Restatement (Revised) of Foreign Relations Law of the United States § 333 (Tent. Draft 1980), it adds nothing to the discussion of what is considered to be a violation of sovereignty under the Convention.
The Fifth Circuit has also adopted the *Graco* court's view that the applicability of the Hague Convention depends upon whether the person from whom information is sought is a willing or unwilling witness, or a party to the litigation. As they see it, resort to the Convention is only *required* when the testimony of an unwilling non-party witness is sought.\(^{123}\)

Like the *Graco* court, these courts have argued that although it is a "mistake" to view the Convention as an agreement which protects foreign party nationals from discovery, there are two ways in which the application of the Convention to non-parties could be justified: first, the Convention makes it possible to avoid an offense to foreign judicial sovereignty when a non-party witness is willing to travel to the forum State; second, it permits a requested foreign authority to compel the cooperation of an unwilling non-party witness who otherwise "simply cannot be reached if outside the court's jurisdiction."\(^{124}\)

After these decisions, it is unclear what role comity concerns will continue to play in Convention disputes. Both the Fifth and Eighth Circuits have suggested, perhaps ironically, that requiring first resort to the Convention may "defeat rather than promote international comity" because rulings by foreign judges would be subject to review by an American judge. They argue that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure."\(^{125}\) In spite of this view, both courts have purported to evaluate what they perceived as the concrete comity concerns presented by the cases. In *In re Messerschmitt Bolkow Blohm GmbH*,\(^{126}\) the Fifth Circuit concluded that an order to produce documents which did not "directly involve German judicial officers... appear[ed] to balance appropriately the [comity] considerations" involved;\(^{127}\) it also held that no comity analysis was required with respect to deposition of a Ger-

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\(^{124}\) Anschuetz, 754 F.2d at 611 (quoting Graco, 101 F.R.D. at 520). See also Societe Nationale Industrielle, 782 F.2d at 125.

\(^{125}\) Anschuetz, 754 F.2d at 611 (quoting Graco, 101 F.R.D. at 520). See also Societe Nationale Industrielle, 782 F.2d at 125-26 (quoting Anschuetz).

\(^{126}\) 757 F.2d 729 (5th Cir. 1985).

\(^{127}\) Id. at 732.
man party’s expert witnesses because the deposition was not to be conducted on German soil.128

The Eighth Circuit, in In re Societe Nationale Industrielle Aerospatiale,129 similarly sustained a balancing test which led to the ordering of discovery in spite of a claim that the order would force a violation of French law.130 While these cases do not establish a clear precedent with regard to the role that consideration of foreign interests will continue to play, one might infer that a balancing test will be utilized only in those cases where discovery orders threaten to force a violation of foreign law.

2. Drafting History: A Rejection of the Circuit Courts’ Approach. Under both the permissive and extraterritorial approaches to the Convention, the courts have suggested that requiring resort to Convention procedures would be inconsistent with the intent of those who drafted the treaty, including the members of the U.S. delegation. Such a proposition rests on incorrect assumptions about the Convention. The first of these, of course, is that the Convention is a “permissive” document.131 Second, the courts argue that the United States could not have intended to enter an agreement which would confer upon foreign judicial authorities the power to determine the degree to which American litigants can engage in discovery. This attitude is best reflected by the Graco court’s conclusion that the Convention is not intended to protect foreign parties from “normal” discovery;132 nor was it intended to grant foreign litigants an unfair advantage since, under the Federal Rules, discovery in the United States is virtually unlimited. These concerns and expressions of the likely intent of the Convention’s drafters are not present in the language of the text of the Convention; nor are they present in the drafting history of the Convention.

The material relevant to the promulgation of the Convention is found in Volume IV of the Acts and Documents of the 11th Session of the Hague Conference.133 In the document entitled, “Mem-

128 Id. One Federal District judge has read Messerschmitt as holding that whenever discovery similarly “occurs” in the United States, no comity analysis is necessary. Lowrance v. Weinig, 107 F.R.D. 386, 389 (W.D. Tenn. 1985).
129 782 F.2d 120, 125 (8th Cir. 1986), cert. granted, 106 S.Ct. 2888 (1986).
132 See Graco, 101 F.R.D. at 520-21; Messerschmitt, 757 F.2d at 731.
133 Acts and Documents (cited in note 16).
orandum of the United States with Respect to the Revision [of the 1954 civil procedure agreement],” the U.S. delegation outlined its position with respect to the goals of the Conference: (1) letters rogatory are useful but imperfect; (2) the system of letters rogatory should not be abandoned but needs to be improved; (3) other techniques of obtaining evidence should be explored. In order to illustrate which procedures might be permitted the Memorandum offered the example of Public Law No. 88-619. This statute provides for the execution of letters rogatory, permits voluntary cooperation with discovery procedures initiated outside the United States and—like the Convention—prohibits compelled testimony in violation of any domestic legal privilege.

According to the memorandum, this law incorporated the following principles: (1) a distinction should be drawn between willing and unwilling parties or witnesses; (2) willing parties or witnesses should be free to furnish any evidence they wish, before any person they wish; and (3) “an ‘unwilling’ party or witness may be compelled to testify only by order of the local court, which will exercise complete control over the proceeding.”

The memorandum indicates that the United States did not in any way anticipate that the Convention would be modelled after this U.S. law: “The United States does not suggest that the provisions embodied in the 1964 law should be adopted in their entirety. It recognizes that other countries for historic and other reasons have different legal procedures for affording assistance to litigants before foreign and international tribunals.” Instead, the U.S. delegation believed that the Conference, in drafting the Convention, should move toward: (1) a relaxation of barriers against voluntary cooperation by willing parties or witnesses; (2) a willingness to permit examination techniques of the foreign forum; (3) a more efficient letter rogatory system; and (4) an expansion of the categories of people before whom testimony may be taken, so as to in-

137 Id. at 16-17 (emphasis supplied).
138 Id. at 17. Implicit in this statement is a recognition of the importance of judicial sovereignty. Compare the following statement by Amram: “It was not possible to ask the Continental countries to change their public policy and legal traditions overnight and to permit the same kind of free activity in their countries we have permitted here. Their concepts of ‘judicial sovereignty’ are fully respected [in the Convention].” Amram, 55 A.B.A.J. at 655 (cited in note 9).
clude commissioners and consuls.\textsuperscript{139}

Opinions might vary as to the extent to which the goals the United States thought important were incorporated into the Convention.\textsuperscript{140} Certainly, the Convention is not as liberally drafted as the United States might have wished. Nevertheless, this memorandum undercuts the assumptions made by U.S. courts in interpreting, or ignoring the Hague Convention.

First, neither the Convention nor its drafting history suggests the propriety of a distinction between parties and witnesses. Furthermore, the Hague Conference's Special Commission on the Operation of the Convention has explained that the term "evidence," as contemplated by the Convention, encompasses not only oral testimony but the "production of documents or other things" as described in the U.S. judicial assistance statute.\textsuperscript{141} These facts present conclusive evidence that the Convention applies indistinguishably to both parties and witnesses.

Second, the United States did not treat conflicts involving judicial sovereignty as merely "hypothetical." This is implicit in the recognition that the extensive liberality of the existing U.S. law could not and would not be followed by the other members of the Conference in their own States. More importantly, "principle 3" demonstrates that the United States recognized that compulsion to testify\textsuperscript{142} should be ordered only by "the local court which [would] exercise complete control over the proceeding." Indeed, the U.S. delegation believed that this principle was already embodied in U.S. law. In light of the United States' expression of this principle, one should conclude that the Fifth, Eighth and Ninth Circuits' approach constitutes an improper redefinition of what is meant by discovery abroad.

Implicit in "principle 3" is also the understanding that the

\textsuperscript{139} Acts and Documents at 17 (cited in note 16).

\textsuperscript{140} Objective (1) can be realized under the terms of the Convention only by an Article 27 supplemental agreement between two signatories such as the Exchange of Notes between the FRG and the United States. Objective (2) is fully realized by the obligation imposed by Article 9. A civil law authority bears the obligation to take evidence "common-law style" if requested to do so. The Convention incorporates objective (3) at least to the extent that its procedures provide a fixed framework for letters of request. Objective (4) was incorporated into the Convention but made subject to reservation. See Convention at arts. 15-19.


\textsuperscript{142} The lack of distinction between testimonial and other forms of evidence is also relevant here. See text at note 141.
proper way to avoid an affront to judicial sovereignty is to involve the foreign judicial system, rather than to attempt—even in good faith—to avoid calling upon its assistance. Thus, the Pierburg and Schroeder courts' instinct that the Circuit Courts' approach would "automatically destroy" the protection of judicial sovereignty was correct.

Finally, the United States did more than express recognition of the principle that the domestic privileges of a party or witness are protected; the principle was already incorporated into U.S. law. While the United States did not intend to "protect" foreign parties from discovery initiated in the United States it did intend to recognize the domestic privileges of both foreign parties and foreign litigants. Clearly, the United States was not opposed to good faith and documentable claims of a right or privilege not to testify under circumstances dictated by local law and customs.

IV. Article 23 Reservations and Document Discovery

Concern that the Convention will insulate foreign parties from discovery is due primarily to a misunderstanding of Article 23. Article 23 provides that: "A Contracting State may at the time of signature, ratification or accession, 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." This provision was not intended to provide a signatory State's litigants with blanket immunity from the discovery of documentary evidence. It was designed instead to counter overbroad requests or fishing expeditions which not only lack specificity, but are not

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143 There can be little doubt that the U.S. delegation which participated in drafting the Convention understood this. In discussing the judicial sovereignty problem, it described how the use of letters of request avoids an infringement of sovereignty: "The court of one State, through appropriate channels, asks the court of another State to secure designated evidence for use at a trial in the requesting State. Here no 'sovereignty' problem exists because the evidence is taken through the judicial process of the requested State." U.S. Delegation Report at 807 (cited in note 3).


145 Convention at art. 23 (cited in note 1). All signatories to the Convention except Barbados, Cyprus, Czechoslovakia, Israel and the United States have exercised this reservation in some form. See Selected International Conventions, 7 Martindale-Hubbell Law Directory 14 (1985); Oxman, 37 U. Miami L. Rev. at 771 (cited in note 13).

146 D.M. Edwards, Taking of Evidence Abroad in Civil or Commercial Matters, 18 Int'l & Comp. L.Q. 646, 650-51 (1969). Oxman provides an excellent review of Article 23 which shows how this interpretation is mandated by the Convention's language and history. He notes that the expression "pre-trial," as used in the discovery of documents could be under-
relevant to the pending litigation.\textsuperscript{147}

A narrow reading of this article is mandated by the Conference’s 1978 Special Commission Report.\textsuperscript{148} This report states that the intent of the United Kingdom, when it suggested the provision, was to counter “requests for evidence which lack specificity.”\textsuperscript{149} The Commission suggests that the Article was “poorly drafted” and that where it refers to “pre-trial discovery,” the “reservation could reasonably be applied only in those cases where the lack of specificity in the Letter of Request was such that it did not permit sufficient \textit{identification} of the documents to be produced or examined.”\textsuperscript{150} The Commission also urged that States tailor their reservations under Article 23 to reflect this reading.\textsuperscript{151} In 1985, the Commission reiterated its position; the Commission’s experts agreed that an unqualified reservation would be “excessive and detrimental to the proper operation of the Convention.”\textsuperscript{152}

Nevertheless, there is a great need to determine the extent to which U.S. courts can expect a foreign authority to execute document requests. The Convention makes clear that a validly assert-
able domestic privilege or duty to not give evidence is protected.\textsuperscript{153} This places the Convention at odds with the U.S. case law dealing with foreign blocking statutes. When a party from another signatory State has a verifiable duty or privilege not to testify, American judges violate United States obligations under the Convention by attempting to compel discovery in contravention of foreign law or custom. The way to guard against foreign party abuse of this protection is to use Convention procedures. There is no reason to assume that foreign judicial officials will interpose frivolous or nonexistent privileges.

Furthermore, there is no reason to assume that other signatory authorities will routinely employ their reservations to deny document discovery to American litigants. Under the Convention, U.S. courts are not powerless in the face of such conduct. When a request for documentary evidence conducted by Convention procedures is refused, an American judge must be immediately informed of the grounds for the refusal.\textsuperscript{154} If the refusal is grounded in a litigant’s right or duty under the State’s internal law, the executing authority is required to explain how the duty or privilege bears upon the request. A blanket claim of a right to refuse document requests under Article 23 will never be sufficient. In the event that such a claim were made by a foreign authority, it would be appropriate for an American judge to conclude that the foreign authority was not implementing the Convention in good faith.\textsuperscript{155} No balancing of interests would need to be made; sanctions against the foreign litigant would be appropriate.

There is no reason to assume, however, that foreign authorities will engage in this type of conduct.\textsuperscript{156} Those American courts

\textsuperscript{153} Convention at art. 11 (cited in note 1). See text at note 144.
\textsuperscript{154} See Convention at art. 5.
\textsuperscript{155} "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith." Restatement (Revised) of the Foreign Relations Laws of the United States § 324 (Tent. Draft 1980). It is a breach of the good faith obligation to "make use of an ambiguity in order to put forward an interpretation which was known to the negotiators of the treaty not to be the intention of the parties." Lord McNair, The Law of Treaties 465 (1961).
\textsuperscript{156} In the case of the FRG, the situation may be diametrically opposed to the view of some American courts. As one writer has pointed out, in that country, the reservation is currently viewed not as a device available to block documentary discovery, but one which serves to protects its “corporate citizens” from an information-gathering process whose scope exceeds by far that which would be permissible under German law. See Donald R. Shemanski, Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 Int’l Law. 465, 480 (1983). This interest is not one whose focus is frustrating litigation against German nationals. Instead the reservation provides a mechanism of "plausibility control"
which have been influenced by the fact that Article 23 might make
discovery futile or otherwise burdensome can no longer assert this
justification for not requiring litigants to use Convention
procedures.

CONCLUSION

Resort to the Convention may not be the most efficient way to
acquire evidence located within the borders of other signatory na-
tions. It imposes upon American judges the duty to engage in pro-
cedures with which they are not familiar. Often it would be much
simpler to compel foreign litigants to submit to the “normal range”
of discovery procedures\footnote{187} authorized by state and federal rules.
These litigants are willing to conform to the orders of American
courts not because they recognize the jurisdictional authority to
compel discovery acts, but because the threat of losing a lawsuit
becomes substantial when they oppose the discovery.

Discovery covered by the Convention must be acquired
through one of its prescribed procedures, unless some other sup-
plemental agreement between the two nations involved permits
otherwise. The question is not one of comity. The Convention can-
not be avoided by redefining it as a set of discretionary procedures;
nor can it be avoided by attempting to relocate the relevant evi-
dence, documents or persons by compelling them to appear or be
produced in the United States.

Each of these approaches fails to fully protect and insure the
interests that those who participated in the Convention’s drafting,
including the U.S. delegates, thought important. Foreign judicial
sovereignty was to be respected. Privileges of foreign citizens were
to be recognized. If appreciation of these principles means that
American courts might sometimes be required to perform new or
different procedures, this is not a “cost” imposed by the Conven-
tion, but by sound principles of international law.

David Joseph Sales

\footnote{\begin{itemize}
\item See Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 521 (N.D. Ill. 1984) (quoted in In
re Anschuetz & Co. GmbH, 754 F. 2d 602, 611 (5th Cir. 1985)).
\end{itemize}}