Obtaining International Discovery in Family Law Matters

by
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Introduction

This article is intended to provide practical assistance to family lawyers in the various U.S. jurisdictions who either need to obtain discovery from non-U.S. sources for use in pending U.S. jurisdiction cases or who are assisting practitioners in non-U.S. jurisdictions to obtain discovery from U.S. sources for use in foreign cases.

There exists a striking difference between what assistance U.S. courts are able give to foreign litigants and what assistance non-U.S. courts will give to U.S. litigants in furtherance of discovery requests. In both cases, the availability of international treaties, federal statutes, state and interstate statutes, and in some cases available rules of domestic relations procedure will be examined and discussed. Part I of this article addresses discovery requests from foreign jurisdictions. Part II explores the reverse: discovery requests from cases originating in the United States directed to entities in foreign jurisdictions.

I. Incoming Discovery Requests from Non-U.S. Jurisdictions

There are three possible avenues to assist the parties litigating in foreign jurisdictions to obtain discovery from

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persons and entities located in the United States and its Territories and Possessions:

1. Use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention")[1];
2. Application of 28 U.S.C. § 1782[2]; and
3. Application of various state statutes where they exist.

A. *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*

On March 18, 1970 at the Hague, Netherlands, the Eleventh Session of the Hague Conference on Private International Law adopted a new convention which replaced portions of two earlier Conventions on civil procedure.[3] The "new" convention allows a judicial authority (judge or court or administrative agency) to send a letter of request to the authority of a responding State to facilitate the procurement of evidence or to facilitate the performance of a judicial act for a proceeding taking place in the requesting jurisdiction.[4]

Parties to a judicial action in any of the countries signatory to the Convention may ask the judicial authority (tribunal) handling their case to send the letter of request, specifying what documents or evidence it wants to adjudicate the matter before it. Every signatory has to designate a Central Authority to emit and to receive letters of request and all outgoing and incoming Letters of Request may only go through and between those two Central Authorities.[5]

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1 Hague Conf. on Private Int'l L., Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, ch. 1, art. 1, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

2 28 U.S.C. § 1782 (2022).

3 Hague Conf. on Private Int'l L., Convention on Civil Procedure arts. 8-16, Mar. 1, 1954, 286 U.N.T.S. 265, http:// www.hcch.net/upload/conventions/txt02en.pdf.

4 However, "[a] Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures." Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, ch. 1, art. 1.

5 *Id.* art 2.

B. *U.S. Federal Statutes*

Under 28 U.S.C § 1782 litigants with a matter pending in a non-U.S. jurisdiction may pursue discovery from a witness located in the United States by petitioning the federal district court where a witness located in the United States resides through a letter of request for issuance of an appointment to take testimony and obtain documents for use in a proceeding in a foreign country.[6]

Section 1782 is the product of congressional efforts, over the span of nearly one hundred and fifty years, to provide federal court assistance to gathering evidence for use in foreign tribunals.[7]

> The goals of the statute, which dates back to 1855, are to provide equitable and efficacious discovery procedures in United States Courts for the benefit of tribunals and litigants involved in litigation with international aspects and to encourage foreign countries by example to provide similar means of assistance to our courts.[8]

The general trend over many years has been to increasingly broaden the application of the statute. A 1996 amendment, for example, added "criminal investigations conducted before formal accusations" to the large range of civil actions and proceedings previously covered.[9]

The determination whether to grant a request under § 1782 requires an examination of four discretionary factors:

1. Whether the material sought is within the foreign tribunal's jurisdictional reach;
2. The nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign court to U.S. federal-court jurisdictional assistance;
3. Whether the § 1782 (a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies; and
4. Whether the request is unduly intrusive or burdensome.[10]

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6 28 U.S.C. § 1782 (2023).

7 See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), and its progeny. *See also In re* Syngenta Crop Protection AG, C.A. No. 21-mc-375 CFC, 2022 WL 1690832, at *1 (D. Del. May 26, 2022).

8 Tony Abdollahi, *The Hague Convention: A Medium for International Discovery*, 40 N.C.J. Int'l L. 771 (2015).

9 28 U.S.C. § 1782.

10 *Intel Corp.*, 542 U.S. at 264-65.

Moreover, a foreign litigant may proceed under § 1782, or the Hague Convention, or both.[11] The decision of how to seek discovery lies with the party seeking the discovery and § 1782 has no exhaustion requirement.[12]

The procedure employed in federal district courts is the filing of an Ex Parte Application for an Order to Conduct Discovery for Use in a Foreign Proceeding Pursuant to U.S.C. § 1782. Once the court enters an order, the applicant may then serve subpoenas and notice depositions as in domestic litigation and the Federal Rules of Civil Procedure apply. If a subpoena is served, either for the production of documents or for testimony at a deposition or hearing, Federal Rule 45(d)(2)(B) requires a party objecting to a subpoena to serve objections "before the earlier of the time specified for compliance or 14 days after the subpoena is served."[13] If no objection is served, any objection is generally deemed waived.

The evidence sought through § 1782 discovery need not necessarily be admissible in the foreign proceeding.[14] And it need not necessarily have to be discoverable under the foreign law of the jurisdiction in which the case is pending.[15] In a Norwegian paternity case, for example, the court determined that it would not inquire into whether Norwegian laws would permit the ordering of blood samples in order to enter a U.S. order for discovery.[16] Moreover, federal discovery rules and precepts will generally preempt individual state rules regarding issues such as the right to privacy set forth in state constitutions.[17]

Since alternative dispute resolution, which takes many forms, has become ubiquitous in family law cases, and is often actively

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11 Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny, 115 F. Supp. 2d 1243 (D. Colo. 2000).

12 *See In re* Martin & Harris, Civil Action No. 20-17070, 2021 WL 2434069, at *5 (D. N.J. June 14, 2021).

13 Fed. R. Civ. P. 45(d)(2)(B).

14 *In re* Barnwell Enter. Ltd., 265 F. Supp. 3d 1, 10-11(D.D.C. 2017). The burden appears to be on the party resisting discovery to point to authoritative proof that the foreign tribunal would reject the evidence sought. *In re* Veiga, 746 F. Supp. 2d 8, 23-24 (D.D.C. 2010).

15 *Intel Corp*., 542 U.S. at 264.

16 *In re* Letter Rogatory from Nedones Dist. Ct. of Norway, 216 F.R.D. 277 (S.D.N.Y. 2003).

17 *In re* Letter of Request for Judicial Assistance from Tribunal Civil de Port au Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987).

encouraged by family law courts, two recent consolidated Supreme Court cases should be noted as a caution: *ZF Automotive US, Inc. v. Luxshare Ltd.*, and *Alixpartners, LLP v. Fund for the Protection of Investors' Rights in Foreign States*.[18] In these two consolidated cases decided in 2022, a unanimous Supreme Court held that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782.[19] Both cases involved forms of arbitration and the petitioners argued that the language of § 1782 permitting a district court to order discovery "for use in a proceeding in a foreign or international tribunal" allowed a definition of "tribunal" to include administrative and quasi-judicial proceedings.[20] The court disagreed and adopted a firm definition of tribunal to mean only "an adjudicative body that exercises governmental authority."[21] So § 1782 may only be used if there is an actual proceeding in a court or in a governmental administrative proceeding.

Older cases had permitted the inclusion of arbitration proceedings, such as one involving the Canadian Government under NAFTA (the North Atlantic Treaty Organization)[22] and one involving the Republic of Kazakhstan.[23] However, those discovery requests were upheld on the bases that Canada is a governmental entity and Kazakhstan is a sovereign nation and thus these cases involved non-private (governmental) applicants exercising governmental authority. It should be noted that notwithstanding *ZF Automotive,*[24] where a court proceeding is actually pending and the parties also agree to private arbitration while the action in court is still pending, the statute can be employed.[25]

There are limitations on the use of § 1782, and district courts have discretion to permit or deny requests for judicial assistance

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18 142 S. Ct. 2078 (2022).

19 *Id.* at 2089.

20 *Id.* at 2083.

21 *Id.* at 2086.

22 *In re* Application of Mesa Power Group, LLC, 878 F. Supp. 2d 1296 (S.D. Fla. 2012).

23 *In re* Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP, 110 F. Supp. 3d 512 (S.D.N.Y. 2015).

24 142 S. Ct. 2078.

25 *In re* Atvo Agroindustrial Investimentos S.A., 481 F. Supp. 3d 166 (S.D.N.Y. 2020).

even if the statutory requirements have been met.[26] The Second Circuit Court of Appeals determined it was an abuse of discretion to grant a subpoena for documents from a law firm that the firm had obtained under a confidentiality order, because allowing such discovery would undermine confidence in protective orders generally. [27] And a U.S. court also refused to allow discovery that would have circumvented protective orders to access confidential corporate documents in an Israeli case.[28]

In a case where both German and Irish courts had previously rejected the petitioner's claims, the court determined that the petitioner was trying to circumvent foreign proof-gathering restrictions and denied relief.[29] In a French case, the court, although concerned that the documents produced might not be used in a court in France and might be barred by French evidence rules, held that the trial court could order as a condition that the applicant turn over all of the documents obtained to the French court, whether or not they were helpful or harmful to the applicant's case, and could also order reciprocal discovery for the respondent.[30]

A court proceeding does not actually have to be pending for discovery to be requested; however the contemplated court action has to be more than speculative to satisfy the statutory language "for use in a foreign proceeding or tribunal."[31] In other words, there must be a concrete basis for a contemplated civil proceeding.[32] And the filing itself must be "within reasonable contemplation."[33]

Where a litigant has deliberately failed, refused, or neglected to disclose assets or has concealed assets, the court can order relief even though a foreign court has denied a request to re-open discovery. In *Pons v. AMKE Registered Agents, LLC*, the Eleventh Circuit Court of Appeals granted an ex-wife's application for the discovery of foreign marital assets that she claimed her ex-husband

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26 Republic of Ecuador v. Bjorkman, 801 F. Supp. 2d 1121 (D. Colo. 2011); *In re* Application of Thai-Lao Lignite Co. Ltd., 821 F. Supp. 2d 289 (D.D.C. 2011).

27 Kiobel v. Cravath, Swaine & Moore LLP, 895 F. 3d 238 (2d Cir. 2018).

28 *In re* Discovery from Glasstech, Inc., 539 F. Supp. 3d 330 (D. Del. 2021).

29 Financialright GmbH v. Robert Bosch LLC, 294 F. Supp. 3d 721 (E.D. Mich. 2018).

30 Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).

31 *In re* Newbrook Shipping Corp., 498 F. Supp. 3d 807, 808 (D. Md. 2020).

32 *In re* Application of Shervin Pishevar, 439 F. Supp. 3d 290, 302 (S.D.N.Y. 2020).

33 *Mesa Power Group*, 878 F. Supp. 2d at 1303.

had concealed on the grounds that those U.S. assets were previously not known to her.[34]

The definition of "participant" in a pending proceeding is quite liberal. In the case of *In re Request for Judicial Assistance from the District Court in Svitavy, Czech Republic,* the federal district court for the Eastern District of Virginia held that a putative father was a "participant" in a paternity action even though he had absolutely no connection to the Czech Republic other than the paternity dispute.[35] Thus, the court allowed discovery to proceed.

C. *U.S. State Statutes and Rules*

In 1962 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Interstate and International Procedure Act.[36] Versions of the uniform act were initially adopted by six jurisdictions: Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the U.S. Virgin Islands. The Massachusetts version of the Act is representative and is still in full force and effect. It was amended to exempt only the discovery of protected health care information. Massachusetts General Laws chapter 223A states, in part:

> A court of this commonwealth may order a person who is domiciled or is found within this commonwealth to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this commonwealth. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this commonwealth, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this commonwealth issuing the order.[37]

Protected health information is excluded from discovery.

But by 1977, the Uniform Interstate and International Procedure Act was withdrawn by the Commissioners as "obsolete."[38]

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34 835 Fed. Appx. 465 (11th Cir. 2020).

35 748 F. Supp. 2d 522 (E.D. Va. 2010).

36 Unif. Interstate & Int'l. Procedure Act (Unif. L. Comm'n 1962).

37 Mass. Gen. L. ch. 223A § 11 (2022).

38 Preamble to the adoption of the Unif. Interstate Depositions & Discovery Act preamble (Unif. L. Comm'n 1977).

The only United States jurisdictions that have not[39] either adopted versions of the Uniform Interstate Depositions and Discovery Act (UIDDA) or do not have legislation pending to adopt it are New Hampshire and Puerto Rico.[40] But that act does not directly address the ability of a state to order discovery for cases in foreign (non-U.S.) jurisdictions. One of the 1997 UIDDA's core requirements is that the "foreign state" issue a subpoena that the U.S. state court is then asked to enforce. And all of that receiving state's rules of practice and procedure then apply.[41] Therefore, optimally, use of either the Hague Convention or 28 U.S.C. § 1782 is safest and provides the broadest remedies in all but the few jurisdictions that have retained the earlier (1962) version.

II. Outgoing Discovery Requests from U.S. Jurisdictions to Non-U.S. Jurisdictions

Conducting discovery abroad in a matrimonial matter can be a complex, time-consuming, and costly proposition. Yet, when

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39 Enactment of versions of the UIDDA are currently pending in the legislatures of Massachusetts (MA H. 4327 and MA S. 939) and Missouri (MO H.B. 1886 and MO S.B. 897). Texas. On May 26, 2023 the Texas legislature enacted H.B. 3929 which took effect on September 1, 2023 allowing the Texas Supreme Court to implement a version of the UIDDA within the next 2 years. Unif. Interstate Depositions & Discovery Act (Unif. L. Comm'n 2007), https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35.

40 *Id*.

41 In the older UIIPA the procedure may be "wholly or in part the practice and procedure of the tribunal outside this commonwealth" at the discretion of the U.S. court. UIIPA Section 3.02(a) of the act provides: [A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath. 1962 UIIPA promulgated by the National Council of Commissioners on Uniform State Laws.

evidence critical to a client's matter lies abroad, practitioners must understand and navigate the labyrinth of treaties and local rules that govern seeking evidence in a foreign country. In a typical domestic relations matter, state and local rules prescribe the form and content of permissible discovery, the required manner of service, and the timing of discovery. When discovery is sought in a foreign country, however, the law governing such discovery depends on the facts and circumstances of the case and involves considerations of international comity.[42] Family law practitioners are challenged with the task of determining whether familiar state discovery procedures or the Hague Evidence Convention apply and the extent to which the law of the foreign jurisdiction will impede or facilitate the discovery process.[43]

As a practical matter, evidence that is readily discoverable within the United States might be impossible or impractical to obtain abroad, and practitioners are advised to weigh the importance of the evidence sought against the time and costs involved. The time necessary to conduct international discovery varies, but generally, practitioners should expect the process to take much longer than the typical timeline for intra-state discovery. The U.S. State Department's foreign affairs manual estimates that processing and service of letters rogatory for obtaining evidence abroad may take six months to a year or more.[44] Family law practitioners must account for this additional time when conducting discovery involving a person or entity in a foreign country and should manage the scheduling of the case accordingly. When the need for foreign discovery becomes known, practitioners should consider promptly filing a motion or other request that discovery deadlines be extended to accommodate the time necessary to prepare, serve, and effectuate gathering evidence abroad. Many states' rules afford the trial court discretion to extend discovery deadlines for "good cause."[45]

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42 Comity is the concept that "the courts of one sovereign state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified." Volkswagenwerk Aktiengesellschaft v. Super. Ct., 176 Cal. Rptr. 874, 884 (Cal. Ct. App. 1981).

43 *See, e.g.,* Abdollahi, *supra* note 8.

44 U.S. Dep't. of State, 7 Foreign Affairs Manual § 931.1c (2021).

45 *E.g.*, Colo. R. Civ. P. 6; Ill. R. S. Ct. r. 183; N.Y. Civ. Prac. Law & R. (McKinney 2023).

Arguably, the inherent and unavoidable delay resulting from the complex procedural requirements for conducting discovery abroad constitutes good cause for an extension of applicable deadlines.[46]

A. *International Discovery and the Hague Evidence Convention*

The Hague Evidence Convention[47] is a bilateral treaty based on the principle of comity. It was designed to reconcile the substantially different discovery procedures in common law countries and civil law countries[48] and to provide a uniform procedure for obtaining evidence located in a foreign country.[49] As discussed above in Part I, the Convention may be used by a civil litigant in a foreign country to obtain evidence located in the United States. Similarly, the Convention is an available method by which a divorce litigant in the United States may conduct discovery in a foreign signatory country.[50] Sixty-six countries are signatories to the Hague Evidence Convention.[51] When discovery is sought in a country that is not a signatory to the Convention, or when discovery under the procedures of the Convention is deemed inappropriate, discovery will normally proceed via letters rogatory, as discussed below in Part II.B.2.

Societe Nationale Industrielle Aerospatiale v. U.S. District Court[52] is the seminal U.S. Supreme Court opinion interpreting

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46 *Cf.* Arison v. Offer et al., 669 So.2d 1128, 1129 (Fla. Dist. Ct. App. 1996) (finding that dismissal was not required because the plaintiff showed good cause for failure to serve the defendant within the standard deadline because the defendant was served in a foreign country under a service treaty).

47 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

48 See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017 (1998), for an in-depth discussion of the differences between common law and civil law systems in the conduct of discovery.

49 Philadelphia Gear Corp. v. Am. Pfauter Corp., 100 F.R.D. 58, 59 (E.D. Pa. 1983).

50 See Ved P. Nanda et al., 3 Litigation of International Disputes in U.S. Courts § 17:18 (2d ed. 2023), for a discussion of the mechanics of the Convention.

51 Hague Conference on Private International Law ("HCCH"), Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Nov. 4, 2023). Notably, Canada, Japan, and many countries of Central and South America are not signatories to the Hague Evidence Convention.

52 482 U.S. 522 (1987).

the Hague Evidence Convention and its application in domestic litigation involving international discovery. In *Aerospatiale*, the Supreme Court held that the Hague Evidence Convention is a permissible, but not exclusive or mandatory, mechanism for discovery abroad[53] in domestic litigation and that litigants need not first resort to the Convention before pursuing other methods of discovery.[54] The optional Hague Evidence Convention procedures are available when the foreign country in question is a signatory and use of the Convention "will facilitate the gathering of evidence by means authorized by the Convention."[55]

State and federal appellate courts have repeatedly recognized that the Hague Evidence Convention does not deprive the presiding court of its authority to permit and enforce discovery pursuant to domestic civil procedure rules when such discovery is propounded to a party over whom the court has personal jurisdiction.[56] Thus, when a trial court in a divorce matter has personal jurisdiction over a spouse located in a foreign country, the spouse who wishes

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53 *Id.* at 538.

54 *Id.* at 542.

55 *Id.* at 541.

56 *Id.* at 539-40 (noting that the Convention did not deprive a district court of jurisdiction to order a foreign national party to produce evidence physically located within the signatory nation); Daimler-Benz Aktiengesellschaft v. U.S. Dist. Ct. W. Dist. Okla., 805 F.2d 340, 341 (10th Cir. 1986) (stating that the Convention has no application to the production of evidence in the United States by a party subject to the court's jurisdiction); Belmont Textile Mach. Co. v. Superba, S.A., 48 F. Supp. 2d 521, 524 (W.D.N.C. 1999) (finding that the Convention does not deprive a trial court of jurisdiction to order a foreign party to produce evidence under the federal rules); Lowrance v. Michael Weinig, GmbH & Co., 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985) (providing that the Convention does not apply to discovery directed to a foreign national party over whom the court has personal jurisdiction); *In re* Activision Blizzard, Inc., 86 A.3d 531, 543 (Del. Ch. 2014), citing *Aerospatiale*, 482 U.S. at 543–46 (stating that a state court has power to require foreign litigants to respond to discovery conducted under state court rules); American Home Assurance Co. v. Societe Commerciale Toutelectric, 128 Cal. Rptr. 2d 430, 446-47 (Cal. Ct. App. 2002) (noting that corporate defendants under a court's jurisdiction are subject to the same legal constraints and burdens of American judicial procedures as American competitors); Bank of Tokyo-Mitsubishi Ltd., N.Y. Branch v. Kvaerner, a.s., 671 N.Y.S.2d 902, 904-05 (N.Y. Sup. Ct. 1998) (holding that a party subject to the court's *in personam* jurisdiction is obligated to produce all appropriate discovery documents under control of its agent, wherever located, without resort to Convention procedures); *See also* Restatement (Third) of Foreign Relations Law of the United States § 442(1)(a)(1987).

to conduct discovery of the abroad spouse is generally free to proceed under traditional state discovery rules.[57] However, if the abroad spouse fails to cooperate in discovery, then the discovering party may choose to proceed under the Convention to obtain judicial assistance in the foreign country.[58]

While *Aerospatiale* makes clear that discovery under the Hague Evidence Convention is neither mandatory nor the default method of discovery when a signatory country is involved, trial courts must exercise "special vigilance" to protect foreign litigants from discovery abuses and must also, as comity demands, "demonstrate due respect" for sovereign interests and the special problems that foreign litigants might face in the discovery process because of their nationality.[59] In practice, this means that when a party in a family law matter propounds discovery on a foreign opposing party located in a signatory country using discovery methods provided by state law, and the foreign party objects to discovery by means other than the Convention, the trial court must consider: 1) the particular facts of the case, 2) the sovereign interests involved, and 3) the likelihood that procedures under the

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57 *See, e.g.,* Sandsend Fin. Consultants, Ltd. v. Wood, 743 S.W.2d 364 (Tex. Ct. App. 1988); *But see* Knight v. Ford Motor Co., 615 A.2d 297 (N.J. Super. Ct. Law Div. 1992) (requiring first the use of the Hague Evidence Convention for discovery of the defendant party); *see also* David Westin & Gary Born, *Applying the* Aerospatiale *Decision in State Court Proceedings*, 26 Colum. J. Transnat'l L. 297, 306-11 (1988) (opining that under *Aerospatiale*, states are not prohibited from imposing a first use of the Convention rule for reasons of judicial administration).

58 Article 10 of the Convention provides that: "In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings." Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, ch. 1, art. 10.

59 *Aerospatiale*, 482 U.S. at 545. For a discussion of a particular "special problem" that foreign litigants might face, see Vivian Grosswald Curran, *United States Discovery and Foreign Blocking Statutes*, 76 La. L. Rev. 1141 (2016), and Gary B. Born & Scott Hoin, *Comity and the Lower Courts: Post-*Aerospatiale *Applications of the Hague Evidence Convention*, 24 Int'l Law. 393, 395-96 n.12 (1990). Specifically, some countries have enacted "blocking statutes" which forbid compliance with United States style discovery and subject the foreign resident who complies with such discovery to penal sanctions. *See* M.J. Hoda, *The* Aérospatiale *Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 Cal. L. Rev. 231, 239 (2018).

Convention will be effective[60] to determine the reasonableness of various methods of discovery and whether Convention procedures should be followed.[61] Factors to be considered in the presiding court's analysis include, but are not limited to, the importance of the evidence sought to the litigation, the availability of alternative means of securing the information, and whether compliance with the request would undermine important interests of the United States or the foreign country.[62] The court undertakes the same analysis when determining, in the exercise of its authority to manage discovery, whether a party who wishes to conduct discovery pursuant to the Convention may do so, or if state discovery procedures are superior and should be utilized.[63] The burden of demonstrating the applicability of the Convention is on the party seeking discovery under the Convention or on the party seeking protection under the Convention, as the case may be.[64]

At least one state court has held that a party can waive its right to insist on discovery under the Hague Evidence Convention. In *American Home Assurance Co. v. Societe Commerciale Toutelectic*,[65] the California Court of Appeals held that a French defendant company waived its right to insist on adherence to Convention procedures, finding that its tactics in prior responses to discovery were inconsistent with Hague Convention procedures.[66] A party's neglect of its right to request application of the Convention must be substantial to support a finding of waiver as described in *American Home Assurance*.[67]

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60 When considering the likely effectiveness of the Convention as a discovery tool, practitioners must consider whether the country in question has issued a declaration under Article 23 of the Convention, which 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 pretrial discovery of documents as known in Common Law countries." Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, art. 23.

61 *Aerospatiale*, 482 U.S. at 544-45.

62 *Id.* at 544, n.28 (citing Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986)).

63 *See* Abdollahi, *supra* note 8, at 782-83.

64 *Id.* at 782.

65 128 Cal. Rptr. 2d 430 (Cal. Ct. App. 2002).

66 *Id.* at 434-35.

67 *Id.* at 430.

A limited number of state court appellate opinions have addressed the *Aerospatiale* factors and whether discovery may proceed under traditional state discovery rules or must proceed under the Hague Evidence Convention, and they do not involve evidence gathering in domestic relations. Rather, these cases primarily involve commercial litigation and efforts to obtain evidence abroad from a non-party.[68] Subject matter differences aside, these opinions recognize the fundamental distinction between discovery directed to a party in the case over whom the court has personal jurisdiction and discovery directed to a third party over whom the court lacks jurisdiction. Discovery of a party typically need not proceed under the Convention, while use of Convention procedures is "virtually compulsory" when discovery is sought from a foreign third party over whom the court does not have personal jurisdiction.[69]

Several countries have exercised the right, under Article 23 of the Convention, to refuse to execute Letters of Request for pre-trial discovery of documents,[70] which makes obtaining documentary evidence from a non-party witness in a Convention country nearly impossible. A party involved in a family law matter in the United States who resides in a foreign country might hope to benefit unfairly from that country's restrictive policy on pre-trial discovery from third parties such as employers or financial institutions. However, as courts of equity, divorce courts have broad authority to enter orders and grant remedies designed to prevent injustice to the aggrieved spouse.

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68 *See In re* Cote d'Azur Est. Corp., 286 A.3d 504 (Del. Ch. 2022) (discovery sought from a non-party); Matter of Est. of Agusta, 567 N.Y.S.2d 664 (N.Y. App. Div. 1991) (discovery sought from a non-party); Orlich v. Helm Bros., Inc., 560 N.Y.S.2d 10 (N.Y. App. Div. 1990) (discovery sought from a non-party); Ayyash v. Koleilat, 957 N.Y.S.2d 574 (N.Y. Sup. Ct. 2012) (discovery sought from a non-party); Intercontinental Credit Corp., Div. of Pan Am. Trade Dev. Corp. v. Roth, 595 N.Y.S.2d 602 (N.Y. Sup. Ct. 1991) (discovery sought from a non-party); *But see Activision Blizzard, Inc.*, 86 A.3d 531 (discovery sought from a party); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188 (N.Y. Sup. Ct. 1988) (discovery sought from a party).

69 *Orlich*, 560 N.Y.S.2d at 14.

70 Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

B. *Beyond the Hague Evidence Convention*

1. *State Discovery Rules*

Some domestic relations matters involving discovery of a foreign party or witness do not implicate the Hague Evidence Convention, such as when the foreign country is not a signatory to the Convention or when the court has determined that discovery may proceed outside of the Convention. In that event, when requests for production of documents or interrogatories are sought from a party in a foreign country over whom the court has personal jurisdiction, then state rules govern discovery as they would domestically, and the discovery may be propounded in the customary manner. Similarly, when the Convention does not apply, and a divorcing party wishes to depose the other spouse, state law often provides for taking the deposition on notice, without requiring personal service of a subpoena.[71]

2. *Letters Rogatory*

Many states have specific rules addressing depositions in a foreign country. They are often modeled on the federal rules and commonly provide that a deposition may be conducted on notice before an authorized person, by commission, or pursuant to letters rogatory.[72] Letters rogatory are the usual method for obtaining judicial assistance with discovery abroad when an international treaty does not apply. Letters rogatory are requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty.[73] The letters rogatory process is complex and time-consuming, in part because letters

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71 *See, e.g.*, Colo. R. Civ. P. 30.

72 *E.g.*, Ga. Code Ann. § 9-11-28(b) (2023); La. Rev. Stat. Ann. § 13:3823 (2023); Ala. R. Civ. P. 28(b); Cal. C. Civ. P. § 2027.010; Colo. R. Civ. P. 28; Fla. R. Civ. P. 1.300(b); Mass. R. Civ. P. 28(b); Pa. R. Civ. P. 4015(b); Tex. R. Civ. P. 201.1; Vt. R. Civ. P. 28(b).

73 U.S. Dep't of State., Legal Resources, *Obtaining Evidence, Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Sept. 26, 2023).

rogatory must be transmitted through diplomatic channels in most circumstances.[74]

When a party wishes to depose someone over whom the court does not have personal jurisdiction, and the witness is located in a country that is not a signatory to the Hague Evidence Convention, then the deposition must be sought via letters rogatory, unless the witness voluntarily submits to the deposition. Even if a witness seems cooperative, it is prudent to utilize letters rogatory to secure the deposition if there is a chance that the witness might later become uncooperative, necessitating judicial assistance in the foreign country.

The U.S. Department of State offers useful guidance on the preparation and transmission of letters rogatory, including sample letters rogatory and information about fees associated with the letters rogatory process.[75] Importantly, the State Department also maintains country-specific information detailing whether a particular country is party to the Hague Evidence Convention and, if not, whether certain types of discovery are possible in that country via letters rogatory or whether discovery may not be had at all, even via letters rogatory.[76]

When a country is not party to the Hague Evidence Convention, before proceeding with letters rogatory, practitioners should thoroughly research that country and consult with local counsel as necessary to determine whether the anticipated letters rogatory are likely to be honored, and, if not, whether there are any other means by which desired evidence might be discoverable within that country. For example, Chile is not party to the Convention and reportedly will not execute on letters rogatory for a deposition, even if the witness to be deposed is willing to submit

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74 *See, e.g.,* T. Andrew Keating, *Transmitting Rule 4(d)(2)'s Cost-Shifting Provisions Abroad*, 67 Wayne L. Rev. 401, 410 (2022) ("The U.S. State Department also advises against using letters rogatory, describing the procedure as a 'time consuming, cumbersome process' that 'need not be utilized unless there are no other options available.'").

75 *Id.*

76 U.S. Dep't of State, Legal Resources, *Judicial Assistance Country Information*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information.html (last visited Sept. 26, 2023). The State Department cautions that the country information that it provides might not be entirely accurate and encourages counsel to consult with an attorney who practices in the foreign country.

to the deposition voluntarily.[77] In contrast, Canada is not party to the Convention, yet parties in a private civil case in the United States may arrange to depose a willing witness in Canada without prior consultation with or permission from Canadian authorities and may seek assistance from a Canadian court with compelling deposition testimony or the production of documents.[78]

3. *28 U.S.C. § 1783(a)*

In certain circumstances, domestic relations litigants may be able to conduct discovery of a U.S. citizen or permanent resident located in a foreign country utilizing 28 U.S.C. § 1783(a). The statute provides as follows:

> A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.[79]

To pursue issuance of a subpoena under 28 U.S.C. § 1783(a), a state court litigant must commence a miscellaneous action in federal court. [80] This is a costly and daunting proposition, particularly for domestic relations practitioners who do not practice in federal court. Nonetheless, in high stakes divorce litigation, it might be necessary to pursue evidence abroad using all available means. If a state court litigant obtains a subpoena from a federal court, and the country in which the deponent resides is party to a service treaty to which the United States is also a party, then service of the subpoena must be perfected in accordance with that treaty.

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77 U.S. Dep't of State—Bureau of Consular Affairs, *Chile*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Chile.html (last visited Sept. 26, 2023).

78 U.S. Dep't of State—Bureau of Consular Affairs, *Canada*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Canada.html (last visited Sept. 26, 2023).

79 28 U.S.C. § 1783(a).

80 Peter M. Lauriat et al., 49A Mass. Prac. Discovery § 8:6 (2023).

A person who fails to comply with a subpoena issued under 28 U.S.C. § 1783(a) is punishable for contempt.[81] Sanctions for non-compliance include financial penalties and levy upon property located in the United States.[82] Nonetheless, these sanctions are unlikely to be effective in forcing compliance with the subpoena unless the person to whom the subpoena was directed has property in the United States.

C. *Service Considerations*

State law often requires that a subpoena to produce documents or to appear for a deposition be personally served. When service is made on a foreign person or entity and an international service treaty to which the United States is party applies, by virtue of the Supremacy Clause of the U.S. Constitution,[83] service must be made as provided by the treaty, state service rules notwithstanding.[84] The two international service treaties to which the United States is a party are the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention")[85] and the Inter-American Convention on Letters Rogatory ("IACLR") and Additional Protocol to the Inter-American Convention on Letters Rogatory ("Additional Protocol").[86]

This does not mean, however, that state methods for service of discovery are never permitted in family law cases involving a foreign party, witness, or entity in possession of critical evidence. For example, when the address of the person or entity to be served is unknown and cannot reasonably be ascertained, the Hague Service Convention is not implicated, and service may

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81 28 U.S.C. § 1784.

82 *Id.*

83 U.S. Const. art. VI, cl. 2.

84 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988).

85 *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 5, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (entered into force Feb. 10, 1969), https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

86 *See* Inter-American Convention on Letters Rogatory, Jan. 30, 1975, O.A.S.T.S. No. 43, https://www.oas.org/juridico/english/treaties/b-36.html; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56, http://www.oas.org/juridico/english/treaties/b-46.html.

proceed as provided by state law.[87] Similarly, when the foreign country is not a party to an international treaty, then service may be accomplished in any manner that comports with state law for service abroad and the law of the country in which service is made.[88] Prudence warrants consulting with local counsel in the country where service is sought to confirm whether a contemplated manner of service is acceptable in the foreign country. If the foreign country where service is sought is not party to a service treaty, and a form of service permissible under state law, such as personal service by a private citizen, is not available because it does not constitute valid service under the laws of the foreign country, then service must be accomplished by issuance of letters rogatory.[89]

III. Conclusion

Family law practitioners in the United States who are accustomed to transparency, voluntary financial disclosure, and broad access to records and information through pre-trial discovery, must accept the limits of international discovery and devise a path forward to an equitable outcome for the client despite these limitations. For outgoing requests, careful, closely tailored, specific requests for discovery to foreign courts are essential to the success of the discovery process. Vague and/or overbroad requests are usually doomed to failure.

As this article demonstrates by contrast, the very liberal discovery philosophy and approach of U.S. courts, even when

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87 Hague Service Convention, art. 1.; *See, e.g.*, People v. Mendocino County Assessor's Parcel No. 056-500-09, 68 Cal. Rptr. 2d 51, 53 (Cal. Ct. App. 1997); *See also* Willhite v. Rodriguez-Cera, 274 P.3d 1233, 1237 (Colo. 2012) (ruling that substituted service within Colorado under Colorado service rules constituted valid service on a Mexico defendant because service did not require the transmittal of documents abroad to effectuate service; thus, the Hague Service Convention was not implicated).

88 U.S. Dep't of State—Bureau of Consular Affairs, *Service of Process*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html (last visited Sept. 26, 2023).

89 U.S. Dep't of State—Bureau of Consular Affairs, *Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Sept. 26, 2023).

dealing with non-U.S. discovery requests, is an almost exclusively American concept which does not have foreign counterparts. As a result, we are able to assist our non-U.S. counterparts a great deal more than they are able to assist us.