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International Discovery: Mining the Depths of the Hague Evidence Convention

by Michael P. Waxman

Societe Nationale Industrielle Aerospatiale
v.
United States District Court, Southern District of Iowa
(Docket No. 85-1695)
Argued January 14, 1987

Recent confrontations over the power of American courts to adjudicate transnational disputes has escalated intergovernmental conflicts to dangerous levels. Foreign governments are acting to defend their businesses and legal systems from what they perceive as the overextended power of American courts and litigiousness of American plaintiffs. Barraged with these transnational conflicts, the United States Supreme Court has attempted to resolve them with one eye on international relations and the other on the security of the United States legal system.

ISSUE

In *Aerospatiale*, the Court must determine whether a United States court may order parties, over which it has personal jurisdiction, to produce evidence located in a foreign country under the Federal Rules of Civil Procedure or must instead follow the procedures set forth in the Hague Evidence Convention. Whatever the Court decides, a careful balance must be maintained to prevent unfairly benefiting foreign parties in United States litigation while respecting the sovereignty of other nations and the culture within which their legal systems operate.

FACTS

At its factual foundation, *Aerospatiale* is a standard products liability action. On August 19, 1980, the real parties in interest in this case (Dennis Jones and John and Rosa George) were injured when their French-made helicopter crashed near New Virginia, Iowa. They alleged that their injuries were incurred due to the negligence and faulty manufacture of the helicopter by *Aerospatiale*. A dispute over the appropriate procedure to discover potentially relevant foreign-located evidence

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in the defendant's possession has thrust this case under an international and domestic legal spotlight.

Subsequent to filing suit, a discovery request to produce documents and a set of interrogatories were submitted to *Aerospatiale*. After complying with the first request, *Aerospatiale* indicated that because the documents in the second request were located in France, it could not comply. The defense was asserted on three grounds: the Hague Evidence Convention sets out the only acceptable method to discover these foreign documents; France has a statute which "blocks" the transfer of French-located documents in response to requests by foreign courts, and comity requires the preeminence of the Hague Evidence Convention in this case.

The United States District Court, noting its personal jurisdiction over both parties, concluded that the Federal Rules of Civil Procedure required production of the French documents. The court determined that the Hague Evidence Convention was neither exclusive nor preferential. Further, the court reasoned that the French government had often waived its blocking statute and, since *Aerospatiale* was owned by the French government, waiver would be likely again here.

The Eighth Circuit concurred in the district court's assessment that "the Hague Convention does not apply to the production of evidence in a (foreign) litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention" (782 F.2d 120 (1986)). It specifically adopted the Fifth Circuit's view in *In re Anschuetz & Co., GMBH* (754 F.2d 602, 611 (1985)) that "matters preparatory to compliance with the discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." Because many of the same issues are raised in both cases, the United States Supreme Court is awaiting the *Aerospatiale* argument to determine whether *Anschuetz* should be heard.

BACKGROUND AND SIGNIFICANCE

There are three principal documents at issue here: the Hague Evidence Convention, the (U.S.) Federal Rules of Civil Procedure and the French "Blocking" Statute.

The Hague Evidence Convention is a multilateral treaty which provides methods for litigants in civil and

commercial disputes to obtain evidence from abroad. It is intended to help lessen the procedural obstacles in collecting and presenting evidence, and yet protect sovereignty when litigants seek evidence located in a signatory foreign country. It attempts to bridge the significant differences between the common law and civil law approaches to gathering evidence. There are at present seventeen parties to the Convention, including the United States and France.

The Convention provides three alternative methods for taking evidence abroad for use in civil or commercial litigation. The first is the letter of request, by which a court of one nation through appropriate channels asks the courts of another to secure designated evidence. Second, evidence may be taken before a diplomatic or consular officer of the requesting state. Third, evidence may be taken before any person duly appointed as a commissioner for that purpose.

Unfortunately, the Hague Evidence Convention is vague or silent about three of the most important factors in this case. First, the exclusivity or even pre-eminence of the Convention over domestic methods for discovery of foreign-located evidence from parties under the *in personam* jurisdiction of a court of a signatory sovereign is not addressed.

Second, there is no discussion about a distinction between discovery as an act preparatory to trial and as part of the trial. This procedural distinction represents part of the core debate between the United States and many foreign countries—the timing and breadth of discovery. The United States through its legal system, considers the open and wideranging collection of potential evidence as the key to an honorable adversarial process. This mechanism is thought to ensure the fairest trial. Conversely, many foreign countries perceive this as nothing more than a “fishing expedition.” Judicial relief is considered a distasteful alternative to be discouraged unless absolutely necessary. Wideranging discovery is viewed as a violent arrow in the quiver of the litigious American attorney.

Finally, the Convention is silent about its relationship to parties to an action versus nonparties. How broad is its coverage? Does it become the only tunnel to effective litigation with foreign parties no matter how much business they do here?

The second document involved here is the Federal Rules of Civil Procedure. Rules 26 through 37 permit courts of the United States which have personal jurisdiction over a party to command the production of documents and evidence relevant to the litigation through the means of discovery.

And last, there is the French “Blocking” Statute, which prohibits disclosing economic, commercial, industrial, financial or technical documents or information leading to evidence with a view to foreign judicial or administrative proceedings unless such disclosure is

made in accordance with international agreements (such as the Hague Convention) binding on France.

Two clear issues arise in this case:

1. Where a United States court has personal jurisdiction over a party possessing possibly “relevant” documents in a foreign country, is the Hague Evidence Convention or the Federal Rules of Civil Procedure the primary mechanism for obtaining that material?
2. If the precedence of either code cannot be established, does comity (an international law standard somewhere between courtesy and obligation which requires a respect for the laws and cultures of foreign sovereigns) require that the American judiciary choose to follow the Hague Convention?

A judicial resolution that the Hague Evidence Convention takes precedence may create a serious imbalance in the obligations of the parties. The party with documents in the United States must produce everything as ordered. A party with foreign-located documents in countries which are signatories to the Hague Evidence Convention may, subject to the command of their sovereign and its judicial system, shelter them. This may lead to the international sheltering of documents to delay or prevent their production. An American party may be unable to proceed effectively against parties properly before United States courts. Ultimately, this may force United States parties to proceed in less amenable courts overseas or forego the redress of their grievances.

Of course, if the Hague Evidence Convention does not take precedence and comity does not command that it supersede, foreign sovereigns cannot rely on the Convention. They will interpret the Convention as breached. Mutually established systems of transnational legal resolution may lie in a shambles with “blocking” statutes strictly enforced.

Because the Convention is unclear, the Court may very well turn to comity to resolve this issue. Respect for comity in transnational litigation has been the focus of recent United States Supreme Court action. In *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth*, (105 S. Ct. 3346 (1985); *Preview*, 1984-85 term, pp. 335-36), the Court commanded enforcement of an international arbitration clause in a transnational contract among parties of diverse nationality. The Court permitted the Japan Commercial Arbitration Association to assess the application of antitrust issues peculiar to the United States in a transnational context. The Court, citing *Scherk v. Alberto Culver Co.* (417 U.S. 506 (1974)), asserted that the consensus of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes all required that the arbitration clause be honored.

Many sovereigns are now attempting to prevent what they perceive as the circumvention of their cultural values through use of foreign legal systems (especially that

of the United States). Therefore, the decision in *Aerospatiale* may have a great significance as it determines the opportunity for effective litigation in the United States. If the Court finds for *Aerospatiale*, foreign parties may have a decided advantage in dealing with United States-based jurisdictional claims and discovery. Conversely, if United States courts may order discovery pursuant to the Federal Rules of Civil Procedure, foreign governments will be extremely hostile and may make foreign discovery efforts through United States courts futile. Foreign government and judicial reactions to enforcement of United States antitrust-based discovery and decisions clearly signal that a finding against *Aerospatiale* would likely escalate hostilities.

ARGUMENTS

For Societe Nationale Industrielle Aerospatiale (Counsel of Record, John W. Ford, Two Embarcadero Center, San Francisco, CA 94111; telephone (415) 985-8200)

1. The Hague Evidence Convention applies whenever a United States litigant seeks discovery of evidence located in the territory of another signatory.
2. The Convention should be used for gathering evidence abroad.
3. Considerations of international comity support the use of the Convention.

For the United States District Court for the Southern District of Iowa (Counsel of Record, Roland D. Peddicord, 300 Flemming Building, Des Moines, IA 50309; telephone (515) 243-2100 and Verne Lawyer, 427 Flemming Building, Des Moines, IA 50309; telephone (515) 288-2213)

1. The Hague Evidence Convention has no application to the limited discovery sought in this case.
2. The Hague Evidence Convention does not supplant the application of the discovery provisions of the

Federal Rules of Civil Procedure to foreign nationals subject to *in personam* jurisdiction in United States courts.

3. Applying the principles of international comity do not require the Hague Evidence Convention to be the avenue of first choice in this case.

AMICUS ARGUMENTS

In Support of Societe Nationale Industrielle Aerospatiale

The United States filed a brief arguing that the Hague Evidence Convention was neither exclusive nor mandatory. It urged a remand to assess whether comity required applying the Hague Evidence Convention.

The United Kingdom presented an important issue not raised by the parties. While conceding that the Hague Evidence Convention was neither exclusive nor mandatory, the United Kingdom challenged the Court to address the difficulties which will be faced by parties caught between a United States discovery order pursuant to the Federal Rules of Civil Procedure and the blocking order of a foreign sovereign.

Additional briefs were filed by the Republic of France, Federal Republic of Germany and Switzerland; Italy-America Chamber of Commerce; Anschuetz & Co. GMBH; Motor Vehicle Manufacturers Association, Product Liability Advisory Counsel and Volkswagen, A.G.

In Support of the United States District Court, Iowa

Compania Gijonesa de Navigation, S.A. filed a brief. This party is the principal respondent in *Anschuetz & Co., GMBH v. Mississippi River Bridge Authority* (Docket No. 85-98) now pending on the Court's docket. A decision about whether to grant *certiorari* in this case has been placed in limbo pending the decision in *Aerospatiale*.