Discovery in Transnational Litigation: Procedures and Procedural Issues
ABA Business Law Section Spring Meeting
# Table of Contents

1. **Introduction**  
   2. **Obtaining Foreign Discovery in U.S. Litigation**  
      a. **Non-Treaty Based Discovery**  
         i. Foreign Discovery under the Federal Rules of Civil Procedure  
            1. Foreign Depositions under the FRCP  
               a. Methods  
                  i. Depositions Pursuant to a Treaty  
                  ii. Depositions Pursuant to Letters of Request  
                  iii. Depositions on Notice  
                  iv. Deposition Before a Commissioner  
            b. Party Depositions  
               i. Location of Party Depositions  
            c. Third-Party Depositions  
            d. Limitations Imposed by Law of Foreign Situs  
      b. Requests for the Production of Documents under the FRCP  
         a. Documents Possessed by a Party or its Affiliate  
         b. Documents Possessed by a Third Party  
      c. Requests for Interrogatories under the FRCP  
         ii. Discovery Pursuant to General Customary International Judicial Assistance  
      d. **Treaty-Based Discovery**  
         i. Hague Convention  
            1. Scope  
               a. Contracting Parties  
               b. Civil or Commercial Matters  
               c. Judicial Proceedings  
               d. Pretrial Discovery Exception  
            2. Methods of Collecting Evidence  
               a. Letters of Request  
                  i. Grounds for refusal  
                  ii. Timing  
               b. Diplomatic and Consular Officers and Appointed Commissioners  
            3. Use of the Hague Convention in U.S. Courts  
               ii. Inter-American Convention on Letters Rogatory  
      e. **Blocking Statutes as an Impediment to Discovery During U.S. Litigation**  
         i. Various Types of Blocking Statutes Exist  
         ii. The Responses of U.S. Courts to Blocking Statutes  
      f. **Obtaining U.S Discovery in Foreign Litigation**  
         a. **Non-Treaty Based Discovery**  
         b. **Treaty-Based Discovery**
4. **Discovery in International Arbitration**

a. **Internal Rules Governing Discovery Within the Arbitration**
   i. International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration
      1. Requests for Documents from a Party
      2. Requests for Documents from a Non-Party

b. **Outside Statutes**
   i. Arbitration Tribunals Located in U.S. Territory
      1. The Federal Arbitration Act
      2. Uniform Arbitration Act
   ii. Arbitration Tribunals Located Abroad
      1. 28 U.S.C. § 1782
      2. Other Statutes
1. **Introduction:**

   a. In the U.S. legal system, discovery largely is initiated and conducted by the litigants. The most frequently utilized methods of discovery are depositions via oral examination, requests for the production of documents, and written interrogatories. Interrogatories are available only with respect to parties to the litigation. FRCP 31, 34-36.

   b. Together these methods are intended to “make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

   c. In civil law countries, however, discovery is conducted by the trial judge, and “private” evidence-taking by the litigants is not permitted. The scope of discovery in most foreign countries is much more limited than pretrial U.S. discovery. Many outside the U.S. consequently view U.S. discovery as an unrestrained “fishing expedition,” and international discovery can give rise to significant tension.

   d. See Restatement (Third) of Foreign Relations Law § 442, Reporters’ Note 1 (1987), “[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents in investigation and litigation in the United States.”

2. **Obtaining Foreign Discovery in U.S. Litigation:**

   a. **Non-Treaty Based Discovery:**

   i. **Foreign Discovery under the Federal Rules of Civil Procedure:**

   1. In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 541 (1987), the U.S. Supreme Court upheld the application of the Federal Rules of Civil Procedure (“FRCP”) to collect evidence from foreign parties for use in U.S. litigation. Parties can also seek jurisdictional discovery under the FRCP, even before personal jurisdiction over a defendant is established. See *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 50 (D.D.C. 2000) (holding that *Aerospatiale* analysis, which allows foreign discovery under FRCP, applies to jurisdictional discovery).

   2. The FRCP provide for a broad range of discovery, and under FRCP 26(b)(i) parties may obtain discovery without leave of court for any non-privileged matter that is relevant to the claim or
defense of any party. Discovery requests can be enforced against another party by FRCP 37, which provides sanctions for a party’s failure to comply.

3. **Foreign Depositions under the FRCP:**

   a. **Methods:**

   i. Rule 28(b) states that depositions may be taken in a foreign country in any of the following manners:
      1. pursuant to an applicable treaty or convention;
      2. pursuant to a letter of request (whether or not a letter rogatory);
      3. on notice before a person authorized to administer oaths in the place where the examination is held, either by the law of that country or of the U.S.; or
      4. before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony.

   ii. **Depositions Pursuant to a Treaty:**

   1. *See infra* Part 2(b).

   iii. **Depositions Pursuant to Letters of Request:**

   1. Letters of request are sometimes referred to as letters rogatory.

   2. They are formal communications sent by the court in which an action is pending to a court of a foreign country, sometimes via the state department or consular office of a country, requesting that the foreign court take evidence from a witness within the court’s jurisdiction. In the case of depositions, the foreign court will transmit a transcript or summary of the testimony to the requesting court.

   3. The procedures that must be followed are specified in the State Department Circular and in federal regulations. *See* 22 C.F.R. pt.
4. If possible, letters rogatory should be avoided. As noted by the State Department, they are “a cumbersome, time consuming mechanism which should not be used unless there is no alternative.” U.S. Department of State Circular, Obtaining Evidence Abroad, available at http://travel.state.gov/law/info/judicial/judicial_688.html.

iv. **Depositions on Notice:**

1. This typically is the easiest method of conducting a foreign deposition, and the party seeking the deposition need only specify in writing and serve on the other parties the name and address of the deponent, the time and place of the deposition, and the method by which testimony will be recorded. FRCP 30(b).

2. As described below, this method is only available if the deponent voluntarily agrees to be deposed or if the requesting party has the power to compel the deponent to appear.

v. **Deposition before a Commissioner:**

1. This method is akin to depositions on notice but occurs before an appointed individual or consular office.

2. It requires an order from the relevant U.S. district court designating a particular individual as a “commissioner.”

b. **Party Depositions:**

i. Under FRCP 30, “a party may take the testimony of any person, including a party, by deposition upon
oral examination without leave of court . . . . ” FRCP 30 applies regardless whether the deponent is located in a foreign country. See Alcan Intern. Ltd. v. S.A. Day Mfg. Co., 176 F.R.D. 75, 78 (W.D.N.Y. 1996). Thus, any of the deposition methods specified by FRCP 28(b) are available for party deponents, and the foreign party must submit to the deposition or be subject to court sanctions pursuant to FRCP 37.

ii. FRCP 30 also applies to the “officers, directors, or managing agents” of the foreign party, and a requesting party therefore may seek to compel the depositions of such individuals. The law concerning who qualifies as a managing agent is not well-defined—the definition of managing agent has been referred to as “sketchy” and one which is determined “on an ad hoc basis.” Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 349 (N.D. Ohio 1999). The standard is distinct from the “control” test articulated under FRCP 34, which applies only to the production of documents. See Malletier v. Dooney & Bourke, Inc., 2006 WL 3476736, *14 (S.D.N.Y. 2006).

iii. Courts consider a variety of factors to determine who constitutes a “managing agent” of a party, such as: “1) whether the individual is invested with general powers allowing him to exercise judgment and discretion in corporate matters; 2) whether the individual can be relied upon to give testimony, at his employer's request, in response to the demand of the examining party; 3) whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which information is sought by the examination; 4) the general responsibilities of the individual respecting the matters involved in the litigation; and 5) whether the individual can be expected to identify with the interests of the corporation.” Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166
iv. An individual does not necessarily need to be an employee of the party to qualify as a “managing agent” of that party. See Alcan, 176 F.R.D. at 79 (compelling depositions of two former employees of plaintiff’s foreign affiliate).

v. Location of Party Depositions:

1. Courts have wide discretion to determine the time and place of the deposition.

2. Plaintiffs generally are required to submit to depositions in the district in which they brought suit, although exceptions are sometimes made if doing so would present significant physical, financial or other hardship. Similarly, foreign defendants can be required to appear for depositions in the U.S. to prevent the strategic use of foreign law, such as attempts to increase the cost of litigation for plaintiffs. See M&C Corp v. Erwin Behr GmbH & Co., KG, 165 F.R.D. 65 (E.D. Mich 1996).

c. Third-Party Depositions:

1. Similar to depositions of foreign party witnesses, any of FRCP 28(b)’s methods can be used for taking the deposition of a foreign, voluntary third party. In determining the location of such depositions, courts usually weigh the convenience of the third party heavily.

2. To obtain the deposition of an involuntary third party, however, a party largely must rely on the letters rogatory process pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial

3. That is because foreign third parties are not within the subpoena power of U.S. courts, as are third-party witnesses within the U.S., nor are they vulnerable to discovery sanctions, as are party witnesses. See Tulip Computers Int’l B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003) (finding use of Hague Convention appropriate where involuntary third party not subject to court’s jurisdiction).

4. The Walsh Act can be of use if the third party in question is a U.S. national or resident living abroad—the statute authorizes a federal court to subpoena such individuals for deposition if “the particular testimony . . . is necessary in the interest of justice” and “it is not possible to obtain the testimony in admissible form without [the third party’s] personal appearance.” 28 U.S.C. § 1783. Few courts have interpreted the meaning of these requirements.

d. Limitations Imposed by Law of Foreign Situs:

i. Despite the fact that a U.S. court will accept deposition testimony under any of FRCP 28(b)’s methods, the availability of these methods is nonetheless limited by and subject to the law of the foreign situs where the deposition is being conducted. Many foreign countries prohibit or restrict U.S. depositions on their territory.

ii. For example, in many civil law states the judge—not counsel—conducts the examination of witnesses. In some countries “counsel” refers only to local counsel, and U.S. lawyers may be unable to attend evidence-taking sessions. Moreover, witnesses may not be examined under oath, and the proceedings may be recorded by a court written summary, not a
verbatim transcript. Even foreign states that usually allow depositions on their territory may object to involuntary depositions.

iii. See e.g., Practicing Law Institute, Taking Depositions in Brazil, (2006) (stating that in Brazil, only Brazilian judicial authorities may take depositions, and foreign persons who take depositions may be subject to arrest and detention); James I. K. Knapp, Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy, 20 Case W. Res. J. Int’l L. 405, 409 n.10 (1988) (stating that in Switzerland, only officials of foreign country that is requesting evidence may take depositions).

iv. Information about foreign restrictions on U.S. depositions must be obtained on a country-by-country basis from the U.S. Department of State, the appropriate embassy abroad, or foreign local counsel.

v. If a deponent is willing to travel, a party could consider taking the deposition in a nearby country that does not restrict U.S. depositions, or conducting the deposition by telephone.

vi. As a general matter, counsel should pay close attention to a country’s particular restrictions because conducting depositions abroad in violation of foreign law may subject counsel to foreign criminal or civil penalties.

vii. Compliance with foreign law restrictions on deposition-taking cannot be obviated merely because a deposition is conducted by a U.S. consular official within a U.S. Embassy -- as a party to the Vienna Convention, the U.S. has agreed that its consular officials will only take evidence in a “manner compatible with the laws and regulations of the [foreign] state.” Vienna Convention on Consular Relations and Optional Protocol On Disputes, Apr. 24, 1963, 21 U.S.T. 77, art. 5(j).
4. Requests for the Production of Documents under the FRCP:

a. Documents Possessed by a Party or its Affiliate:
   
   i. Under FRCP 34, a party to U.S. litigation can request that another party produce any relevant documents that are in the possession, custody, or control of that party.

   ii. Since *Aerospatiale*, 482 U.S. at 522, parties routinely use FRCP 34 to request documents located abroad.

   iii. FRCP 34 also may be used to obtain documents in the possession of a foreign affiliate of a party if that affiliate is “controlled” by the party. To determine whether an affiliate is under a party’s control, courts examine factors such as whether: (1) the affiliate is an “alter ego” of the party resulting from the misuse of the corporate form; (2) the assignee of rights will benefit because of the litigation; (3) one party has contractually agreed to assist the other in litigation; (4) the parties’ history, association, assignments and transactions show sufficient mutuality; and (5) a non-party agrees to produce documents at the request of a party. See *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 n.7 (M.D.N.C. 1998) (citations omitted).

b. Documents Possessed by a Third Party:

   1. If a non-party voluntarily complies with a request for information, then discovery of that non-party’s documents located abroad can proceed under FRCP 34(c).

   2. If a non-party does not voluntarily comply, FRCP 45(a)(1)(C) permits a subpoena to produce “designated books, documents or tangible things in the possession, custody, or control of that person,” if the non-party is within the subpoena power of the court.
3. The Advisory Committee Notes clarify that “the person subject to the subpoena is required to produce materials in that person’s control whether or not the materials are located within the district or within the territory within which the subpoena can be served.” FRCP 45, 1980 Amendment, Subdivision (a).


5. **Requests for Interrogatories under the FRCP:**

   a. FRCP 33 authorizes written interrogatories to be served, expressly limiting their application to parties to the litigation. Interrogatories must be answered under oath based on information available to the party.

   ii. **Discovery Pursuant to General Customary International Judicial Assistance:**

   1. As noted, non-parties are not subject to the subpoena power of U.S. courts if they do not live in U.S. territory. In such circumstances, the FRCP are of limited value, and foreign judicial assistance is required.

   2. The customary method of obtaining foreign judicial assistance in taking evidence abroad is by letters rogatory. A letter rogatory is a formal request by the court of one nation to the courts of another for assistance in performing judicial acts. See supra Part 2(a)(3)(a)(iii).

   3. Letters rogatory typically will request that the foreign court receiving the letter compel a person within the court’s jurisdiction to provide testimony or documents to the foreign court, which in turn is forwarded to the requesting court.
4. The use of letters rogatory is frequently cumbersome and time-consuming. Courts are under no obligation to execute them, and their processing frequently is delayed by poor diplomatic relations, bureaucratic inertia, and conflicts with public policy.

b. Treaty-Based Discovery:

i. Several international conventions apply to the collection of evidence.

ii. The U.S. has ratified the Hague Convention and the Inter-American Convention on Letters Rogatory (“Inter-American Convention”) with its accompanying Additional Protocol. The U.S. has not ratified the Inter-American Convention on the Taking of Evidence Abroad or its Additional Protocol.

iii. Hague Convention:


2. The Hague Convention was intended to provide “methods to reconcile the differing legal philosophies of the Civil Law, Common Law, and other systems,” as well as “methods to satisfy doctrines of judicial sovereignty.” See Rapport de la Commission Speciale, 4 Conference de La Haye de droit international prive: Actes et documents de la Onzieme session 55 (1970).

3. Article 109 requires member states to obtain the requested evidence by applying the “appropriate measures of compulsion” available under internal law, which means the same degree of compulsion as is available in domestic actions. Thus, the Hague Convention enables U.S. litigants to obtain evidence from uncooperative, foreign witnesses.

4. Scope:

a. Contracting Parties:

i. The domiciliary state of both the requesting and requested parties must be parties to the Hague Convention. Art. 1.

ii. Currently 48 nations are contracting parties to the Hague Convention. Once a nation ratifies the
Hague Convention it remains a party for 5 years from the date of entry. Membership is renewed automatically for another 5 years unless the contracting state denounces the ratification.

b. **Civil or Commercial Matters:**

i. The Hague Convention applies only to “civil or commercial matters,” but these terms are not defined in the Hague Convention’s text, and there is little consensus as to their meaning. Art. 1.


iii. Other countries have been less willing to accept such a broad interpretation of the terms “civil and commercial.”

iv. After the highest courts of two signatory nations rendered decisions interpreting the term “civil or commercial matters,” the Special Commission issued a report summarizing the debate among signatory nations concerning the term. The report states that “it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept . . . [however,] other matters considered by most of the States to fall within public law, for example, tax matters, would not yet seem to be covered.”

vi. The application of the Hague Convention to antitrust investigations initiated by the Department of Justice remains unclear. It is more likely that the Hague Convention applies to privately instituted antitrust matters. See Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42 (D.D.C. 1984) (implicitly assuming application of Hague Convention by concluding that it is not exclusive means of discovery).

c. Judicial Proceedings:

i. The Hague Convention applies only to evidence sought for use in a “judicial proceeding.” Art. 1.


d. Pretrial Discovery Exception:

i. Hague-signatory nations have the right to “declare that [they] will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.” Art. 23.
ii. Although this exception is expressly limited to the pretrial discovery of documents, most foreign countries that have invoked the reservation apply it to oral testimony as well.

iii. As of 2005, 33 contracting states have filed a reservation under this provision of the Hague Convention. ABA Section of Antitrust Law, Obtaining Discovery Abroad 29-30 (2005).

iv. Of those countries that have filed reservations, the following countries have filed limited reservations: China, Cyprus, Estonia, Finland, France, Mexico, the Netherlands, Norway, Singapore, and the U.K. Id. at 30.

v. For example, China’s reservation states that China will accept letters of request for pretrial discovery “only [if] the request for obtaining discovery of the documents [is] clearly enumerated in the Letters of Request and of direct and close connection with the subject matter of the litigation.” Hague Conference on Private International Law, Status table: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (listing reservations filed by each signatory nation), available at http://www.hcch.net/index_en.php?act=conventions.status&cid=82.

vi. Mexico’s reservation requires that the judicial proceeding be commenced, that there is a “direct relationship” between the evidence sought and the proceeding, and that the request specifies those facts that led the requesting party to believe that the “requested documents are known to the person from whom they are requested.” Id.

vii. The U.K.’s reservation states that the U.K. will not execute requests for the pretrial discovery of documents (1) that require a person to disclose all documents in his or her possession, custody or power that are relevant to the proceedings or (2)
that require a person to produce documents, other than particular documents specified in the request, that do not appear likely to be in that person’s possession, custody or power. *Id.*

viii. Countries that have reservations that essentially disallow all pretrial discovery include Argentina, Australia, Denmark, Germany, Italy, Luxembourg, Monaco, Poland, Portugal, South Africa, Spain, and Sweden. *Id.* at 30-31.

5. **Methods of Collecting Evidence:**

a. The Hague Convention provides for the collection of evidence by letter of request, diplomatic or consular officer, or appointed commissioner.

b. If evidence must be compelled, letters of request generally are the most appropriate approach.

c. **Letters of Request:**

i. The requesting party must issue a letter of request to the “Central Authority” of the contracting state where the evidence sought is located. Art. 2.

ii. Article 9 states that “[t]he judicial authority which executes a Letter of Request shall apply its own law to the methods and procedures to be followed.”

iii. Discovery procedures in foreign countries can vary widely from those in the U.S., and this provision therefore can have a profound effect on the manner in which evidence is obtained. *See supra* Part 2(d) (describing foreign law restrictions on depositions).

iv. To reconcile these differences in evidence-taking methods, Article 9 requires states to apply special evidence-taking procedures if requested subject to two exceptions: states need not follow procedures that are (1) incompatible with their domestic law or are (2) impossible to perform because of practical difficulties. Generally speaking, foreign authorities are amenable to requests by U.S. counsel.
v. **Grounds for Refusal:**

1. There are only three circumstances under which a requested authority may refuse to implement a letter of request:

   a. If the central authority of the state considers that the request does not comply with the Hague Convention. Art. 5.

   b. In that case, the central authority must “inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.” *Id.*

   c. Examples of non-compliance include if the matter is not civil or commercial, as required by Article 1; if the request does not relate to judicial proceedings per Article 1; or if the request seeks the pretrial discovery of documents and an Article 23 reservation has been filed. *See* Bruno A. Ristau, *International Judicial Assistance: Civil and Commercial* 276 (2000).

   d. If, “in the state of execution the execution of the Letter does not fall within the functions of the judiciary.” Art. 12(a); *see also* Part 2(b)(iii)(4)(c) (explaining that some countries may not consider matters adjudicated in arbitral panels or administrative agencies to be judicial proceedings).
2. The Hague Convention expressly precludes states from refusing to implement requests on the grounds that that state’s domestic law would have exclusive subject matter jurisdiction over the action or that its domestic law would not recognize such a cause of action. Art. 12.

3. A person subject to a foreign discovery request may refuse to give evidence insofar as he or she must refuse under the law of the state of execution. Art. 11; see infra Part 2(c) (describing blocking statutes).

vi. Timing:

1. The Hague Convention does not require that states process letters of request within a specific timeframe. Rather, it provides that states must execute them “expeditiously.” Art. 9.

2. Within the context of European regulations, this term usually is understood to mean 90 days.

e. If “the State addressed considers that its sovereignty or security would be prejudiced thereby.” Art. 12(b).

i. There is little jurisprudence interpreting this exception. In 1978, the British House of Lords determined that this exception could be invoked to refuse execution of a U.S. request for information in a uranium antitrust litigation. See Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434.
3. However, the average time for processing letters of request is 6 months to a year. This frequently creates problems for U.S. litigants trying to comply with U.S. discovery schedules.

d. **Diplomatic and Consular Officers and Appointed Commissioners:**

i. These methods are not frequently used because of their limitations and requirements.

ii. They usually are appropriate only when a person is providing evidence voluntarily.

iii. Hague Convention, Article 15: authorizes consuls to take evidence from nationals of the consul’s home state with the following exceptions: 1) the consul cannot use compulsion; 2) member states may require that consuls take evidence only after obtaining permission to do so from local authorities; and 3) the consul may take evidence only for use in proceedings that have actually “commenced” (as opposed to those that are merely “contemplated”).

iv. Hague Convention, Article 16: authorizes consuls to take evidence from nationals of the state in which the consul is stationed. In addition to the requirements of Article 15, Article 16 states that prior approval by local authorities is necessary unless the state has filed a declaration permitting Article 16 evidence-taking without prior approval. Only the U.S. and Finland have done so. The U.K. and the Czech Republic permit evidence-taking under Article 16 without prior approval based on reciprocity.

v. Hague Convention, Article 17: authorizes “commissioners” to take evidence within a state subject to the same requirements as Article 16.

vi. Hague Convention, Article 18: allows a state to declare that foreign consuls and commissioners may
seek coercive orders from local authorities to compel evidence. Only the U.S. has filed such an unconditional declaration; the U.K. and the Czech Republic permit requests for compulsion based on reciprocity.

6. **Use of the Hague Convention in U.S. Courts:**

a. In *Aerospatiale*, 482 U.S. at 536, the Supreme Court held that the Hague Convention is “a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence abroad.”

b. The Court stated that in determining whether to apply the Hague Convention, courts should consider the following factors:

   i. “the importance to the . . . litigation of the documents or other information requested;”

   ii. “the degree of specificity of the request;”

   iii. “whether the information originated in the United States;”

   iv. “the availability of alternative means of securing the information; and”

   v. “the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”

   [*Id. at 544 n.28.*]

c. Courts also consider the likelihood that the Hague Convention would be effective. There is a general perception that the Hague Convention is ineffective and time-consuming. *See Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386 (D.N.J. 1987). As such, courts frequently order discovery under the FRCP. The fact that the Hague Convention remains unfamiliar to U.S. litigants furthers the perception of its ineffectiveness.
d. Courts are especially likely to apply the FRCP in antitrust cases because of the importance of the public function that they serve in protecting competition.

iv. Inter-American Convention on Letters Rogatory:


2. It regulates the procedure by which one member state issues letters rogatory to another, giving an additional means of obtaining evidence from countries that have not signed the Hague Convention.

3. Similar to the Hague Convention, the Inter-American Convention applies only to civil and commercial judicial proceedings.

4. The Inter-American Convention does not apply to compulsory evidence-taking, Art. 3, and it only involves evidence-taking via letters rogatory.

5. Both the requesting and requested state must be parties, and currently 17 states have ratified the Inter-American Convention and 13 states have signed the Additional Protocol.

6. The U.S. submitted a reservation stating that for U.S. litigants, the Inter-American Convention is only applicable to countries that have signed both the Inter-American Convention and the Additional Protocol. Other than the U.S., the nations that have signed both are Argentina, Ecuador, Mexico, Paraguay, and Venezuela.

7. U.S. courts have consistently held that the Inter-American Convention and its Additional Protocol do not preempt application of domestic law.

c. Blocking Statutes as an Impediment to Discovery During U.S. Litigation:

i. Approximately 15 countries have enacted blocking statutes or adopted measures to prevent the extraterritorial application of U.S. discovery procedures against foreign persons.

ii. Blocking statutes act to prohibit persons within the enacting state from supplying evidence pursuant to discovery requests. They usually carry
some form of penal sanction for those who violate the prohibitions against disclosure.

iii. Such statutes impede the ability of U.S. litigants to obtain evidence from abroad.

iv. **Various Types of Blocking Statutes Exist:**

1. *Procedural blocking statutes* prohibit compliance with foreign discovery requests unless certain procedures are followed.

2. *Discretionary blocking statutes* vest government agencies with discretion to prohibit compliance.

3. *Industrial blocking statutes* place limitations on the provision of evidence pertaining to specific industries.

4. Examples include the U.K. Protection of Trading Interests Act, which authorizes the Secretary of State to ban the furnishing of evidence that would infringe on the U.K.’s sovereignty or security, Protection of Trading Interests Act, 1980, 27 Eliz. 2, ch. 11, *reprinted in* 21 I.L.M. 834 (1982), and the French blocking statute, which, except for requests pursuant to “treaties or international agreements and applicable laws and regulations,” asserts a blanket prohibition against any person from requesting or complying with discovery requests for “economic, commercial, industrial, financial or technical documents or information” in connection with foreign judicial or administrative proceedings, see *Aerospatiale*, 107 S.Ct. at 526 n.6 (citing Article 1A of French Penal Code Law No. 80-538).

5. Statutes protecting privacy rights often protect large bodies of documents from foreign discovery.

v. **The Responses of U.S. Courts to Blocking Statutes:**

1. The Supreme Court has stated that noncompliance with a discovery order for fear of foreign prosecution still constitutes nonproduction and can subject a person to discovery sanctions, but that dismissal is an inappropriate sanction “when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the party].” *Societe Internationale v. Rogers pour Participations Industrielles et Commerciales*, S.A., 357 U.S. 197, 212 (1958).
2. In *Aerospatiale*, *supra*, 482 U.S. at 544 n.29, the Court espoused a comity analysis for evaluating the impact of blocking statutes on U.S. discovery proceedings, *id.*., which has evolved into Section 442 of the Restatement (Third) of Foreign Relations Law.

3. Specifically, § 442(1)(c) states that “[i]n deciding whether to issue an order directing production of information located abroad,” a court should consider:
   a. the importance to the investigation or litigation of the documents or other information requests;
   b. the degree of specificity of the request;
   c. whether the information originated in the United States;
   d. the availability of alternative means of securing the information; and
   e. the extent to which noncompliance with the request would undermine important interests of the U.S.; or
   f. the extent to which compliance with the request would undermine important interests of the state where the information is located.

4. Of these factors, courts give most attention to the balancing of national interests and have identified certain statutory interests as being particularly vital.

5. In assessing a party’s good faith, courts require at a minimum that the party did not collude with the foreign government to impede discovery. Courts also consider whether the party took meaningful efforts to obtain the evidence despite the foreign blocking statute.

6. With respect to the French blocking statute in particular, the reaction of U.S. courts has been mixed. Some courts have complied with the terms of the blocking statute, ordering discovery under the Hague Convention in matters with French litigants. *See In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 352-56 (stating that France has been “among the most emphatic” of civil-law countries to oppose extraterritorial use of FRCP). Other courts, however, have continued to order discovery under the FRCP without regard to any penalties imposed on persons who
comply with such orders by the French government. See Rich v. KIS California, Inc., 121 F.R.D. 254, 258 (M.D.N.C. 1988) (stating that French blocking statute “is overly broad and vague and need not be given the same deference as a substantive rule of law.”)

3. Obtaining U.S Discovery in Foreign Litigation:

   a. Non-Treaty Based Discovery:

      i. The U.S. has no general bans on the taking of evidence on U.S. territory for use in foreign court. Rather, Section 302(b) of the Uniform Interstate and International Procedure Act states that “[a] person within this state may voluntarily give his testimony or statement or produce documents or other things for use in a proceeding before a tribunal outside this state in any manner acceptable to him.”

      ii. Further, the letters rogatory statute, 28 U.S.C. § 1782(a), provides that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding or in a foreign or international tribunal . . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .”

   b. Treaty-Based Discovery:

      i. The U.S. is a signatory to the Hague and Inter-American Conventions. See supra Part 2(b). As opposed to requests for evidence under § 1782, with which district courts may comply on a discretionary basis, the U.S. must comply with letters of request received under the Hague Convention, absent one of the limited grounds for refusal. See Part 2(b)(iii)(5)(c)(v).

      ii. When letters of request are received in the U.S. from foreign nations, they are processed by Office of Foreign Litigation in the Civil Division of the U.S. Department of Justice, which serves as the “Central Authority” for the U.S. under the Hague Convention. 28 C.F.R. § 0.49.

      iii. The Office of Foreign Litigation forwards the letter of request to the appropriate U.S. Attorneys Office for the district in which the evidence or witness is located. Every six months the Civil Division asks for a status report concerning unfulfilled requests. See Edward C. Weiner, In Search of International Evidence: A Lawyer’s Guide Through the United States
Discovery in Transnational Litigation: Procedures and Procedural Issues
ABA Business Law Section Spring Meeting
March 16, 2007

Department of Justice, 58 Notre Dame L. Rev. 60, 65 (1982) (citing interview with James G. Hergen, attorney monitoring evidence requests at the Office of Foreign Litigation at the time).

iv. In keeping with American discovery practices in which the parties, not the judge, perform evidence-taking, the Assistant U.S. Attorney charged with executing the letter of request will contact the witness directly to ascertain whether the witness will voluntarily comply with the evidence request without court order. Id. Oral testimony is given in affidavit form. Id.

v. If, however, the witness does not voluntarily comply, the Assistant U.S. Attorney applies for a court order under 28 U.S.C. § 1782, and a subpoena is issued to compel the testimony. Id.

4. Discovery in International Arbitration:

a. International arbitration is more flexible with respect to procedure, evidence, and proof than is U.S. litigation. However, discovery in international arbitration is considerably more limited.

b. To the extent that discovery does occur in international arbitration, it primarily is focused on document production, and the other mainstays of U.S. style discovery—pre-trial depositions of witnesses, written interrogatories, and requests for admission—rarely occur in international arbitration.

c. Internal Rules Governing Discovery Within the Arbitration:

i. If the parties do not specify the applicable procedural law in the arbitration clause giving rise to the dispute or agree to a set of procedural rules before the arbitration begins, the arbitration tribunal is free to choose which procedural rules should apply, subject to the rules of the administering institution.

ii. The rules of most international arbitration institutions give broad power to the tribunal to decide what discovery will occur. For example, the rules of the International Chamber of Commerce allow tribunals to “establish the facts of the case by all appropriate means,” and tribunals “may summon any party to provide additional evidence.” ICC International Rules of Arbitration art 20(1), (5), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.
iii. **International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration:**

1. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”) were developed in 1999. They were intended to guide the evidence-taking process in commercial arbitrations and serve as a middle-ground between common and civil law expectations of discovery.

2. The IBA Rules allow only for document discovery and make no mention of pre-hearing depositions. They may be elected by the parties themselves in the arbitration clause of the underlying contract or during the organizing of the tribunal once a dispute occurs. They also may be adopted by the tribunal itself to solve discovery disputes while the arbitration is ongoing. Tribunals frequently select various IBA Rules à la carte.

3. **Requests for Documents from a Party:**
   
a. Per Article 3(1), a party must submit “all documents available to it on which it relies.”

b. Moreover, a party may submit to the tribunal a request for documents from the opposing party. Art. 3(3). The scope of such requests is significantly more narrow than requests for production under U.S. litigation because, among other things, they must contain either “a description of a requested document sufficient to identify it,” or “a description in sufficient detail (including subject matter) of a narrow and specified requested category of documents that are reasonably believed to exist.” *Id.* The request also must provide “a description of how the documents requested are relevant and material to the outcome of the case.” *Id.*

c. Thus, the IBA Rules help facilitate the discovery of specific documents that a party already suspects exists. However, as stated by the IBA Working Party, “[e]xpansive American or English style discovery is generally inappropriate in international arbitration.” IBA Working Party, *Commentary on IBA Rules of Evidence*, International Bar Association, at 5 (1999).
d. Under Article 9(2), parties may object to discovery on the following grounds:

i. lack of sufficient relevance or materiality;

ii. legal impediment or privilege under the legal or ethical rules;

iii. unreasonable burden to produce the requested evidence;

iv. loss or destruction of the document that has been reasonably shown to have occurred;

v. grounds of commercial or technical confidentiality;

vi. grounds of special political or institutional sensitivity; or

vii. considerations of fairness or equality of the Parties.

4. Requests for Documents from a Non-Party:

a. The IBA Rules state that parties may request that the tribunal take whatever steps are legally available to obtain requested documents from non-parties. Art. 8. The tribunal uses its discretion to determine whether the requested documents would be relevant and material. *Id.*

b. *See infra* Part 4(d) (discussing methods available to arbitral tribunals to compel discovery from non-parties).


1. The International Center for Settlement of Investment Disputes (“ICSID”) was created to adjudicate disputes between host States and foreign investors. *See* International Center for Settlement of Investment Disputes, About ICSID, *available at* http://www.worldbank.org/icsid/about/about.htm.

2. In addition to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which established the ICSID and sets forth the
institutional governance structure and rules of membership, Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), also exist. As opposed to the IAB Rules, the ICSID Arbitration Rules govern procedures within ICSID arbitrations generally and are not limited to evidence-taking.

3. The ICSID Arbitration Rules dictate the procedures in an ICSID arbitration unless the parties agree otherwise. See ICSID Convention Art. 44. Parties may agree to modify the ICSID Arbitration Rules either in a consent agreement in the underlying contract to the dispute or once a dispute arises. See Christoph H. Schreuer, The ICSID Convention: A Commentary 673 (2001).

4. With respect to document production, the ICSID Arbitration Rules provide that “each party shall . . . communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for.” ICSID Arbitration Rule 33. Moreover, the arbitration tribunal “may, if it deems it necessary at any stage of the proceeding [] call upon the parties to produce documents, witnesses and experts.” ICSID Arbitration Rule 34(2)(a).

5. ICSID Arbitration Rule 36 technically allows for the taking of prehearing depositions, stating that an arbitration tribunal “may: (a) admit evidence given by a witness or expert in a written deposition; and (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.”


d. **Outside Statutes:**

i. Various countries, the U.S. in particular, have domestic statutes that can aid arbitration tribunals and parties to arbitrations in seeking discovery. Such statutes are particularly useful with respect to obtaining evidence
from uncooperative non-parties over whom tribunals would otherwise have no ability to compel evidence.

ii. **Arbitration Tribunals Located in U.S. Territory:**

1. **The Federal Arbitration Act:**
   
   a. The Federal Arbitration Act (“FAA”) allows arbitration tribunals to summon third parties to produce documents and other records for the tribunal hearing.

   b. Tribunals implement this statutory right by appealing to the United States District Court in the district in which the tribunal sits. 9 U.S.C. § 7. As such, the tribunal must be located on U.S. territory, and the FAA does not apply to letters of request from foreign courts.

   c. Although the FAA potentially could allow for broad U.S.-style discovery, only the tribunal—not the parties to the arbitration—may apply to a district court for assistance in enforcing a discovery request. The Tribunal therefore may self-censor the scope of the request.

2. **Uniform Arbitration Act:**

   a. Some U.S. states have adopted the Uniform Arbitration Act (“UAA”). See Cal. Civ. Proc. Code § 1297.271. This Act, which is similar to the FAA, authorizes the courts of the relevant state to issue subpoenas and “assist” an arbitral tribunal in the evidence-taking process.

   b. Under the UAA a party to the arbitration, with the tribunal’s approval, may present its discovery request directly to the court.

iii. **Arbitration Tribunals Located Abroad:**

1. **28 U.S.C. § 1782:**

   a. As discussed in Part 3(b), § 1782 authorizes district courts to order discovery from persons within their jurisdiction “for use in a proceeding or in a foreign or international tribunal.”
b. Until the 1990s, this statute was used by district courts to assist discovery in international arbitration. However, decisions from the Fifth and Second Circuit largely closed the door to such use of § 1782 for a number of years by interpreting the term “tribunal” to be limited to government entities. See e.g., National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 156 F.3d 184 (2d. Cir. 1999).

c. Recent case law indicates that § 1782 may once again be used by arbitration tribunals for obtaining U.S. discovery. In Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), the Supreme Court stated in dicta that “the term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts.” (citation omitted).

d. Seizing on this language, a district court recently applied § 1782 to grant a discovery request from a party to an international arbitration for documents from a U.S. company. See In re Application of Roz Trading Ltd., case no. 1:06-cv-02305-WSD (N.D. Ga. 2006).

2. Other Statutes:

a. Certain other countries have enacted statutes to aid arbitration tribunals in obtaining evidence from persons subject to the subpoena power of their nations’ courts.

b. For example, in the U.K., a party to an arbitration may, with the tribunal’s permission, issue a subpoena to a non-party to produce documents for use in the arbitration. The party can seek enforcement of the subpoena within the U.K. courts. Arbitration Act, UK ST 1996 c. 23 pt. I § 43(1).

1) Introduction

   a) “No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.” Restatement (Third) of the Foreign Relations Law of the United States, Reporter’s Note 1.


2) Resolving Conflicts in International Discovery


      i) The Hague Convention Generally

         (1) Purpose is to facilitate the transmission and execution of Letters of Request, which are analogous to letters rogatory but do not involve transmission through diplomatic channels. In place of consular channels, signatory states designate a “Central Authority” to transmit the letters.

         (2) Applies in the following situations:

            (a) Requests made by “judicial authorities” for the taking of evidence or “other judicial acts” in “civil or commercial matters”;

            (b) Evidence must be for “commenced or contemplated” judicial proceedings.
(3) U.S. litigants should be aware of a significant exception:

(a) Article 23: “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.”

(b) Countries will not execute letters of request for pre-trial “fishing expeditions.”

(4) Letters of Request pursuant to the Hague Convention are generally faster than letters rogatory, but can still take between 6-12 months.

ii) Application in U.S. Litigation

(1) Scenario: plaintiff seeks the expansive discovery available under the Federal Rules from a foreign defendant whose country is a signatory to the Hague Convention; the foreign defendant moves for a protective order to prevent discovery or plaintiff moves to compel discovery and defendant opposes, arguing that the court must apply the narrower procedures under the Convention (and often arguing that a foreign “blocking statute” prevents it from complying with the discovery request, discussed further below).

(2) Aerospatiale: Supreme Court first addressed the conflict between the Federal Rules and the Hague Convention.¹

(a) The Supreme Court rejected the argument that the Hague Convention methods were exclusive or mandatory for discovering evidence abroad.

(b) The Convention “does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices. The text of the Evidence Convention itself

¹ In Aerospatiale, two corporations owned by the Republic of France designed, manufactured, and marketed aircraft. An airplane sold by the two corporations crashed in Iowa, and suits by three plaintiffs were consolidated in the United States District Court for the Southern District of Iowa. Plaintiffs served the corporations with discovery requests pursuant to the Federal Rules of Civil Procedure, and the defendants moved for a protective order, arguing that the Hague Convention provided the exclusive procedures for discovery of materials in France, and a French “blocking statute” provided that the corporations could not respond to discovery requests that did not comply with the Convention. The Magistrate Judge denied the motion and ordered compliance with the discovery requests. The defendants sought a writ of mandamus from the United States Court of Appeals for the Eighth Circuit, which denied the request. The Supreme Court vacated and remanded the case for further proceedings.
does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures."

(a) The Court rejected the argument that respect for the sovereignty of signatory countries required use of the Convention’s procedures. Instead, the Court held that the concept of international comity requires courts to consider each country’s interests on case by case basis, taking into account “the particular facts, sovereign interests, and the likelihood that resort to those procedures will prove effective.”

iii) Fed. R. Civ. P. 28

(1) Although Aerospatiale held that the Hague Convention methods are not mandatory or exclusive, a 1993 amendment to Federal Rules was intended “to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad.”

(2) The Rule contemplates departures from formalities observed in U.S. depositions: “Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.”

(3) The Notes caution that those examples are merely illustrative, and the question of “[w]hether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case.”

iv) Practical Approach Following Aerospatiale

(1) Plaintiffs
(a) Pursue discovery from foreign defendant under the Federal Rules; procedures under the Hague Convention will be narrower, possibly less useful in form and can substantially delay the process.

(b) Involve the Court early in the discovery process.

(i) Section 442 of the Restatement (Third), Foreign Relations Law of the United States, Comment (a), suggests that “except as specifically authorized by statute or rule of court…requests to produce documents or information located abroad should, as a matter of good practice, be issued as an order by the court, not merely in the form of a demand by a private party.”

(ii) Consistent with Aerospatiale, the Restatement suggests that “[b]efore issuing an order for production of documents, objects, or information located abroad, the court…should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States.”

(c) The Federal Rules will usually be applied when the discovery requested is not “intrusive, unnecessary, or unduly burdensome,” so conform requests accordingly.

(i) For example, in In re Aircraft Near Roselawn, 172 F.R.D. 295 (N.D. Ill. 1997), the court held that plaintiff’s pursuit of discovery under the Federal Rules was not only “not intrusive, unnecessary, or unduly burdensome,” but also efficient: use of the Federal Rules was consistent

---

2 In Roselawn, plaintiffs moved to compel discovery in a case arising out of an aircraft crash involving a plane designed and manufactured in France. Defendants objected, in part on the ground that the plaintiffs failed to apply the methods under the Hague Convention. According to defendants, pursuing discovery under the Federal Rules violated the French conception of sovereignty because the discovery would involve “individuals acting at the behest of a foreign court gathering evidence in France without the involvement of the French courts.” The Court disagreed, holding that none of the plaintiffs have “inappropriately initiated any unfair, inappropriate, or uncalled for discovery;” on the contrary, defendants refused to provide documents that are “highly relevant to the very core issues of the case, let alone to the subject matter of the litigation.”
with “the court’s expectations with respect to [the] set trial date,” whereas resort to the Convention would unreasonably delay the proceedings. Citing *Aerospatiale*, the court stressed that “[t]he overriding interest of our court system is the just, speedy and inexpensive determination of litigation,” and held that the use of the Convention procedures would thwart that interest.

(ii) The court was particularly concerned with bringing the case to a speedy resolution because of the tragic nature of the underlying facts, twice noting that the Convention’s procedures would result in “continuation of this litigation beyond the third anniversary of the instant tragedy.”

(d) Collaborate with defendants to the extent possible to narrow requests and confer in good faith in accordance with any applicable federal or local rules.

(i) For example, in *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348 (D. Conn. 1991), plaintiffs asserted RICO claims following an announcement that quantities of benzene, a possible carcinogen, had been identified in defendant’s water. Plaintiffs moved to compel discovery, which defendant opposed, and defendant moved for a protective order requiring use of the procedures under the Convention. Stressing the unreasonable quantity and scope of discovery sought by plaintiff, the court granted the protective order and required plaintiff to employ the procedures under the Convention. See also *Roselawn*, 172 F.R.D. 295; *In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45 (D.D.C. 2000); *Fishel v. BASF Group*, 175 F.R.D. 525 (S.D. Iowa 1997); *Doster v. Schenk*, 141 F.R.D. 50 (M.D.N.C. 1991).

(ii) Where a defendant disputes the court’s jurisdiction, most courts have rejected a categorical rule that the court must conduct jurisdictional discovery under the Hague Convention.

1. For example, in *In re Vitamins*, 120 F. Supp. 2d 45, plaintiffs moved to compel discovery from eight foreign defendants and the defendants moved for a protective order, arguing that jurisdictional discovery
should proceed under the Hague Convention. The Court rejected defendants’ argument that a rule of “first resort” is appropriate for jurisdictional discovery, notwithstanding Aerospatiale’s holding that such a rule was not required for merits discovery.

2. The Court reiterated the well-established principle that a trial court has jurisdiction to determine its own jurisdiction, and “found no legal barrier to exercising the discretion given to trial courts by Aerospatiale in cases of jurisdictional discovery.” Collecting cases that have addressed the issue of conflicts in jurisdictional discovery, the Court disagreed with defendants that the foreign nations’ sovereign interests were more threatened by potential application of the Federal Rules at the jurisdictional discovery stage than they would be with merits discovery. See also Fishel, 175 F.R.D. 525; Rich v. KIS California, Inc., 121 F.R.D. 254 (M.D.N.C. 1988).

3. At least one federal court has rejected that approach, Jenco v. Martech Int’l, Inc., No. Civ. A. 86-4229, 1988 WL 54733, at *1, but that decision has frequently been criticized. See, e.g., In re Automotive Refinishing Paint Antitrust Litigation, 358 F.3d 288 (3d Cir. 2004) (noting that the Jenco Court reached its decision “with almost no meaningful analysis,” and agreeing with the majority of trial courts addressing the issue that there should be no exception to the Aerospatiale holding for jurisdictional discovery).

(2) Defendants

(a) Courts will generally subject a foreign defendant to discovery under the Federal Rules unless the defendant can demonstrate that there are compelling reasons for court to apply the Hague Convention.

(b) Defendant must specifically state its objections to discovery requests served under the Federal Rules. See, e.g., Roselawn, 172 F.R.D. at 307 (internal citations omitted); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 390 (D.N.J. 1987) (granting plaintiff’s motion to compel discovery where
defendants argued that the discovery requests were overbroad and burdensome, but failed to identify specific objections to the discovery sought).

(c) Most courts place the burden on the party seeking to apply the Convention’s procedures to persuade the Court that use of the Convention is proper.

(i) In In re Vitamins, for example, the Court read Aerospatiale to indicate that the Supreme Court placed the burden on the proponent of using the Convention’s procedures to show why the Convention should be applied in a given case. The Court found the cases holding otherwise, such as Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 36 (N.D.N.Y. 1987), “far from convincing.” The court held that Hudson “relie[d] too heavily on Justice Blackmun’s concurring and dissenting opinion in Aerospatiale.”

(d) The party seeking to apply the Hague Convention procedures should strongly consider retaining an expert in foreign law in order to submit an affidavit setting forth:

(i) The effectiveness of the Hague Convention’s methods;\(^3\)

(ii) The important sovereign interests that will be furthered by applying the Convention.

1. The Convention’s procedures have been applied when the court determines that the Federal Rules will offend the sovereign interests of a foreign country that does not permit U.S. style discovery. See Motorola Credit Corp. v. Uzan, 2003 U.S. Dist. LEXIS 1215 (S.D.N.Y. 2003).

2. However, U.S. courts will often consider whether the foreign country’s laws would prohibit the conduct at issue, in which case the court might conclude that the foreign country would likely “welcome

---

\(^3\) At least one court has held that conducting document discovery indirectly through third party subpoenas “will not normally present a viable, alternative discovery arrangement which adequately compensates for deficient Hague Convention procedures.” Doster, 141 F.R.D. at 54.
investigation…to the fullest extent.” See, e.g., In re Automotive Refinishing, 358 F.3d at 304.

3. General resort to a foreign country’s interest in applying its own rules of judicial procedure, or the mere existence of a foreign blocking statute, almost universally will be insufficient to defeat use of the Federal Rules; defendant must point to specific sovereign interests that will be furthered by applying the Convention. See, e.g., Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344 (D. Conn. 1997); Doster, 141 F.R.D. 50; Rich, 121 F.R.D. at 257-258; Benton Graphics, 118 F.R.D. 386.

(e) A foreign plaintiff who avails itself of a U.S. forum cannot object to American-style discovery. See, e.g., Louis Vuitton Malletier v. Dooney & Bourke, Inc., 2006 U.S. Dist. LEXIS 87096, at *16 (S.D.N.Y. Nov. 30, 2006) (“The documents are within the control of an entity that has chosen to litigate here and that consequently has an obligation to produce responsive documents in its custody or control irrespective of where on the globe they are located.”)


(3) Non-Parties

(a) One Court has rejected the argument that the Convention’s procedures must be applied when a foreign non-party witness was served with discovery requests under the Federal Rules. However, non-party status is a consideration in the comity analysis. First American Corp. v. Price Waterhouse LLP, 154 F.3d 16 (2d Cir. 1998).

(b) The First American Court was satisfied that the foreign discovery sought was reasonable because there was no collision between the American discovery rules and the British confidentiality laws, the British courts had the
opportunity to determine the scope of their non-disclosure law and concluded that it posed no obstacle to discovery, and exclusive resort to the Convention’s procedures would unduly limit access to critical documents. It added that even if the countries’ laws were in conflict, the U.S.’s interest in the lawsuit outweighed the U.K.’s sovereign interest in enforcing its confidentiality rules.

b) 28 USC §1783 v. the Hague Convention

i) §1783 provides for subpoenas to take discovery from United States nationals living abroad.

ii) The court must make findings in order to issue subpoenas: the discovery sought must be in the interest of justice and it must not be possible to obtain the discovery in any other manner. As a result, the procedure is rarely used.

iii) However, SEC v. Sandifur, 2006 U.S. Dist. LEXIS 89428 (W.D. Wash. 2006), applied a broad definition of when obtaining discovery by other means is “impractical” for purposes of the statute.

(1) The Court held that “[i]mpracticality occurs…where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines,” and found use of the Convention’s procedures impractical given a discovery deadline only a few months away. The court noted that it can take up to one year to process letters of request under the Convention, and even then the foreign state might exercise its right under Article 23 of the Convention not to grant the request. Therefore, the court held that “[t]he issue here is not that the Hague Convention procedures are merely inconvenient because they would require more resources or expertise to implement, but rather that they are impractical in the context the looming discovery deadline and overall trial schedule.”

4 Sandifur involved a criminal action for securities fraud. During the investigation, an employee from defendants’ auditor was voluntarily deposed by the SEC. The employee declined defendant's request to voluntarily appear in the United States for a deposition, so defendants sought to subpoena the employee as a nonparty witness. After the initial SEC deposition, the employee moved to Luxembourg, and defendants moved to subpoena him under §1783.
(2) The court also examined the issue of where the deposition should occur. The court considered London, but decided that it would infringe upon the sovereignty of the U.K., and found that it was an excessive burden to force the foreign party to fly to New York. Therefore, the court held that the deposition should proceed in Luxembourg. It held that any potential infringement on Luxembourg’s sovereignty was outweighed by the imposition that the alternatives would impose on the nonparty witness. The Court added that “American courts are not required to adhere blindly to the directives” of countries who oppose American-style discovery even when they have gone so far as to enact blocking statutes. (citing Aerospatiale, 482 U.S. at 544 n. 29; Rich, 121 F.R.D at 258). The Court found that any potential sovereignty concerns were outweighed by the countervailing considerations regarding the significant burden that would otherwise be imposed on a nonparty witness.

c) Federal Rules of Civil Procedure v. Foreign Law

i) “Blocking Statutes”

(1) Some countries have adopted “blocking” or non-disclosure statutes in response to the use of U.S. discovery procedures against foreign defendants. The statutes prohibit or place restrictions on disclosing, copying, inspecting or removing documents in compliance with foreign discovery orders, and carry sanctions for violations of the restrictions. The result is that foreign party often cannot comply with U.S. discovery orders without potentially violating its own country’s laws.

(2) Blocking statutes generally fall into three categories:

(a) Statutes that prohibit compliance with foreign discovery orders that do not go through proper foreign governmental channels;

(b) Statutes that grant certain foreign governmental agencies discretion to prohibit compliance with specific foreign discovery orders; and

(c) Statutes that seek to limit disclosure of information about particular industries.

(1) The Court held that the foreign plaintiff’s complaint should not have been dismissed on ground that plaintiff failed to comply with an order compelling discovery of documents from its Swiss bank where compliance with the order would have exposed plaintiff to sanctions under Swiss bank secrecy laws. Significantly, plaintiff did not assert any privileges because of its foreign citizenship, or assert immunity from the Federal Rules of Procedure; it simply asserted its inability to comply with the rules because of foreign law.

(2) The Court remanded the case to the District Court, holding that plaintiff’s failure to comply with the discovery order was “due to inability, and not to willfulness, bad faith, or any fault.” 357 U.S. at 208-212.

iii) Cases Following Rogers

(1) Courts have addressed two issues:

(a) Should the court order discovery even if the order would conflict with foreign law?

(b) If discovery is ordered, should the court impose sanctions for a party’s failure to comply with the order?

(2) In *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), defendant appealed from sanctions imposed for noncompliance with discovery orders. Defendant first asserted that it was not required to comply because doing so would violate the law of Switzerland. Following Rogers, the Court held that it need not consider foreign law in deciding whether to issue a discovery order, but only in deciding whether to impose sanctions for noncompliance. When the

5 Plaintiff in Rogers, a Swiss holding corporation, sued in the United States District Court for the District of Columbia to recover assets seized by the United States under the Trading with the Enemy Act as enemy owned property. Upon the government’s motion, the district court ordered plaintiff to produce records of a Swiss banking firm. Swiss law prohibited their disclosure under penalty of criminal sanctions. Plaintiff managed to have some of the records released by the Swiss authorities for inspection, but still failed to fully comply with the court’s discovery order, and the court dismissed the action under Fed. R. Civ. P. 37.
district court imposed sanctions, the Tenth Circuit reached the second question. Citing Rogers, the Court held that the decision turns on whether the party’s noncompliance was due to inability or to willfulness or bad faith. In cases of bad faith and disregard of court orders, such as Andersen’s representation prior to its examination of any documents that it could not produce any documents because of Swiss law, sanctions are warranted. See also Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

(3) A party relying on a blocking statute must show that it presents a true obstacle to compliance. For example, in In re Air Crash at Taipei, 211 F.R.D. 374 (D.Cal. 2002), plaintiffs moved to compel discovery that defendant argued it could not produce on the ground that the Government of Taiwan prohibited release of all accident investigation documents. The Court held that although countries generally have a strong interest in enforcing their secrecy laws, there was no evidence that Singapore’s interest would be implicated or infringed. Defendant offered a letter arguing that foreign law prohibited disclosure, but failed to address the specific document requests at issue. In addition, defendant failed to provide “persuasive proof” that defendant or its officers would be criminally prosecuted for complying with an order of the court, or evidence regarding the manner and extent to which Singapore enforces its secrecy laws.

iv) Aerospatiale

(1) The Court discussed at length the difficulties encountered when discovery requests seek information located in jurisdictions whose laws prohibit their disclosure. The Court held that “[blocking] statutes do not deprive an American Court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” 482 U.S. at 544-45 n. 29.

---

6 At the outset, the Court noted that it lacked both the power and the expertise to determine foreign law, and therefore accepted defendant’s representation that foreign law would apply to the disputed discovery requests. See also Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).
(2) The Supreme Court refused to allow foreign statutes to “graft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts.”

(3) The Court stressed the importance of comity in dealing with such situations, citing with approval the Restatement of the Foreign Relations Law of the United States.

v) Section 442 of Restatement (Third) of the Foreign Relations Law of the United States:

(1) Section (c) outlines factors for courts to consider in deciding whether to issue an order directing production or information located abroad, and in framing such an order:

(a) The importance to the investigation or litigation of the documents or other information requested;

(b) The degree of specificity of the request;

(c) Whether the information originated in the United States;

(d) The availability of alternative means of securing the information; and

(e) The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.  

(i) For example, in United States v. Vetco, 691 F. 2d 1281 (9th Cir. 1981), the court held that the United States’ strong interest in collecting taxes and prosecuting tax fraud by U.S. nationals outweighed Switzerland’s interest in preserving business secrets of Swiss subsidiaries of American corporations.

---

7 For examples of courts’ application of the balancing of interests under this prong, see Richmark, 959 F.2d 1468; Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275 (7th Cir. 1990); In re Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992, 999 (10th Cir. 1977); Reino De Espana v. American Bureau of Shipping, 2005 WL 1813017 (S.D.N.Y. 2005); Madanes v. Madanes, 186 F.R.D. 279 (S.D.N.Y. 1999).
In Linde v. Arab Bank, --F. Supp.2d --, 2006 WL 3422227 (E.D.N.Y. Nov. 25, 2006), plaintiffs moved for an order compelling discovery and sanctioning defendants for their refusal to comply with their discovery obligations. Defendant declined to comply with the discovery request on the ground that doing so would violate the bank secrecy laws in Jordan, Lebanon, and the Palestinian Monetary Authority, violation of which involves criminal penalties of fines and incarceration. The Court initially directed defendant to obtain permission from the appropriate authorities to disclose the information, which defendant did for one bank account, but not others. Ultimately, the Court concluded that the U.S. interests in combating terrorism trumped the foreign state’s interest in bank secrecy.

1. The Court had previously held that “Congress has expressly made criminal the providing of financial and other services to terrorist organizations and expressly created a civil tort remedy for American victims of international terrorism,” Linde v. Arab Bank, 384 F.Supp.2d 571, 584 (E.D.N.Y. 2005). The discovery sought by plaintiffs fell squarely within the statute.

2. The Court acknowledged that maintaining bank secrecy is an important interest of the foreign jurisdictions, but held that the interest must yield to the interests of combating terrorism and compensating its victims. The Court directed defendant to make a good faith effort to

---

8 Linde involved consolidated tort actions arising from injuries and deaths of Israeli and American individuals caused by suicide bombings and attacks in Israel, the West Bank and Gaza. Plaintiffs sued Arab Bank for aiding and abetting murder, conspiracy to commit murder, provision of material support to terrorists, committing and financing terrorism and other related claims, alleging that defendant Arab Bank encouraged and promoted the violent acts by providing a financial system for collecting and paying funds as rewards to the families of those who carried out the attacks.

9 Specifically, the Court noted that “[b]oth Jordan and Lebanon…have recognized the supremacy of those interests over bank secrecy. As members of the Middle East and North Africa Financial Action Task Force, they have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing. Although the Palestinian Monetary Authority has apparently not expressly adopted any policies recognizing the subordination of bank secrecy to the interest of fighting terrorism, it is not a state, and its interests therefore need not be accorded the same level of deference accorded to ‘states’ in considering comity. In any event, as the Palestinian Monetary Authority operates in an area governed at least in part by other authorities that have themselves engaged in terrorist activity, it would be absurd for this court to exalt the bank secrecy interests of those under the jurisdiction of the Palestinian Monetary Authority over the anti-terrorism
secure permission from foreign authorities in Jordan and in the territories covered by the Palestinian Monetary Authority to provide the information, and deferred further action pending the outcome of the process.

(2) Subsection (2) of the Restatement applies a good faith requirement in cases where foreign law prohibits or restricts compliance with a U.S. discovery order.\textsuperscript{10}

(3) Decisions applying the factors under subsection (1)(c) on a motion to compel or a motion for a protective order are generally not final decisions and therefore are not subject to immediate appeal. However, decisions imposing sanctions for non-compliance with an order requiring production may be appealable orders. See, e.g., Arthur Andersen, 570 F.2d 1370.

(4) The Restatement suggests that particularly where defendants might apply a foreign “blocking statute,” the parties should resort to the court at the outset in order to “yield an accurate analysis of the statute and lead to efforts to meet the foreign state’s objections to release of the information.” Because the court will usually be called on to resolve objections to orders for production of information located abroad, the requirement of a court order “is unlikely to increase the burden on the court or delay the invocation of a blocking statute.”

vi) Earlier cases have applied the balancing test set forth in Section 40, Restatement (Second) of the Foreign Relations Law of the United States, to determine whether a foreign blocking statute precludes discovery in U.S. litigation. See Reinsurance Co.

\textsuperscript{10} “If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national, (a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available; (b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a); (c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.”
of America, 902 F.2d 1275 (collecting cases). Despite the different test under the Restatement (Third), the earlier analysis has been cited favorably by later courts.

vii) Specific Applications

(1) In United States v. Vetco Inc., 691 F.2d 1281 (9th Cir. 1981), the Court held that United States parent corporations generally must produce documents located abroad in the possession of their foreign subsidiaries unless a defense is applicable where the information is located.

(2) At least one court has upheld requests for discovery in a products liability action and imposed sanctions for noncompliance despite the U.S. defendant’s argument that the documents were in the custody of its foreign affiliate. Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918 (S.D.N.Y. 1984).

(3) In some cases, courts have facilitated discovery of information protected by bank secrecy laws by directing parties to execute consent forms for the release of foreign banking records.

(a) In Motorola, 2003 U.S. Dist. LEXIS 1215, plaintiffs served UBS in New York with a subpoena seeking documents relating to UBS accounts in Switzerland, the U.S., and elsewhere, that UBS maintained in the name of entities affiliated with the defendants. UBS provided the documents located in the U.S. but refused to produce the documents located abroad, in part based on Swiss bank secrecy laws. Plaintiffs moved to compel production, arguing that UBS should be treated as a single entity.

(b) The Magistrate Judge disagreed, finding that UBS’s New York branch did not have access in the ordinary course to documents abroad. In addition, the Swiss Ambassador to the United States provided a letter stating that there were serious issues of international comity, as UBS and its Swiss employees might face criminal sanctions if they responded to the plaintiffs’ subpoena without authorization from a Swiss court. However, the Court directed defendants to execute forms consenting to the release of their foreign banking records, indicating that they were executed pursuant to a court order. See 2003
3) Privileges Under Foreign Law


b) If the subject of a request is privileged under U.S. law, discovery cannot be compelled, even if the communication took place in a state where the communication was not privileged.

c) If a communication was made outside of the United States and was not privileged where made, it would ordinarily not be privileged in U.S. discovery.

d) The issue arises when a communication is privileged where made but not privileged under U.S. law.

i) Where the Hague Convention Applies

(1) The Convention provides that a person who is directed to provide information in response to a letter of request may refuse to give evidence to the extent that the person has a privilege or duty to refuse to give the evidence under:

(a) The law of the state executing the letter of request; or

(b) The law of the state issuing the letter of request.

(2) For example, some countries provide professional privileges that apply to confidential communications with bankers, accountants, financial advisers and patent agents. Some countries also afford a greater privilege against self incrimination than is provided in the Fifth Amendment.

ii) Where the Hague Convention Does Not Apply

(1) Section 442 of the Restatement (Third) of Foreign Relations Law also suggests that a “communication privileged where made…is not subject to discovery in a United States court, in the absence of waiver by those entitled to the privilege.”
(2) The law is not settled, but courts may also look to Section 139 of the Restatement (Second) of Conflict of Laws, which provides that the state with the “most significant relationship” with the communications at issue should dictate the law applicable to privilege matters.
DISCOVERY IN TRANSNATIONAL LITIGATION:
THE CANADIAN PERSPECTIVE

by

PETER LUKASIEWICZ
Toronto Managing Partner

GOWLING LAFLEUR HENDERSON LLP
1 First Canadian Place, Suite 1600
Toronto, Ontario
M5X 1G5
Tel. No.: (416) 862-4328
Fax No.: (416) 863-3428
Email: peter.lukasiewicz@gowlings.com

and by

DEBORAH TEMPLER
Associate

and

NED FOX
Articling Student
# TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................................. 1

II. A BRIEF INTRODUCTION TO THE CANADIAN JUDICIAL AND CONSTITUTIONAL STRUCTURE .................................................................................................................. 1

III. GENERAL RULES OF DISCOVERY IN CANADA ................................................................ 2

(a) Discovery of Documents in the Common Law Provinces, Territories and in Federal Court Litigation ........................................................................................................... 2
   (i) Scope of Discovery of Documents ............................................................................. 4
   (ii) Documents in the Possession of Non-Parties .......................................................... 7
   (iii) Affidavit of Documents .......................................................................................... 8
   (iv) Time and Place for Production .............................................................................. 10
   (v) Request to Inspect Documents ............................................................................... 11
   (vi) Use of Documents Produced ................................................................................ 12
   (vii) Claims of Privilege .............................................................................................. 13
   (viii) E-Discovery ......................................................................................................... 14

(b) Examinations for Discovery in the Common Law Provinces, Territories and in Federal Court Litigation ........................................................................................................... 15
   (i) Who May Examine and be Examined ...................................................................... 16
   (ii) Non-Parties ............................................................................................................ 17
   (iii) Form of Examination ........................................................................................... 19
   (iv) Scope of Examination .......................................................................................... 20
   (v) Use of Examination for Discovery at Trial ............................................................. 21

(c) The Rules of Discovery in Québec ................................................................................... 22

IV. ENFORCEMENT OF U.S. COURT ORDERS TO DISCOVER A PARTY IN CANADA ............................................................................................................................. 25

(a) Letters Rogatory and the Hague Conventions ................................................................ 25

(b) Enforcement of Letters Rogatory or of Letters of Request by Canadian Courts ................................................................................................................................. 27
   (i) The Required Evidentiary Foundation .................................................................... 29
   (ii) Relevance and Specificity ...................................................................................... 30
   (iii) Necessity ............................................................................................................... 31
   (iv) Obtainability ........................................................................................................... 31
   (v) Interests of Justice ................................................................................................. 32

V. EXAMINING FOR DISCOVERY A CANADIAN NON-PARTY TO U.S. LITIGATION ................................................................................................................................. 33

VI. ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA ............................................. 36

VII. GENERAL RULES OF DISCOVERY IN THE UNITED KINGDOM .................................. 38

VIII. CONCLUSION ................................................................................................................. 39
DISCOVERY IN TRANSNATIONAL LITIGATION: THE CANADIAN PERSPECTIVE

I. INTRODUCTION

The scope of discovery rights available to, and responsibilities imposed upon, litigants under the Federal Rules of Civil Practice in the United States is unparalleled, even in comparison with other common law jurisdictions such as Canada or the United Kingdom. As a result, counsel unfamiliar with the often complex and troublesome procedures involved in obtaining evidence in trans-border litigation may be in for a rude awakening.

Given the close proximity of, and increasingly fluid economic boundary between, Canada and the United States, American counsel who advise clients with interests in Canada, or having dealings with Canadian entities, would certainly benefit from a greater understanding of the discovery regime in Canadian jurisdictions.

II. A BRIEF INTRODUCTION TO THE CANADIAN JUDICIAL AND CONSTITUTIONAL STRUCTURE

Canada is a federal state made up of ten provinces and three territories, each of which has its own provincial or territorial government. The capital city of Canada is Ottawa, Ontario.

The Canadian legal system is based on the common law tradition of the United Kingdom. In this respect, common law principles in Canada are quite similar to those of the United States. Québec stands as an exception. The Québec legal system evolved from the French civil law system. As a general rule, the civil law system in Québec
applies to private law matters, while the common law system applies to public law situations, such as those involving the actions of government and public regulatory authorities. Thus, to the extent that Québec is empowered by the Canadian Constitution to make laws, it uses a civil code, the "Québec Civil Code."²

The division of jurisdictional powers between the federal and provincial levels of government in Canada is outlined in the Constitution Act, 1867.³ In summary, the federal government is empowered to deal with issues concerning the "peace, order and good government of Canada",⁴ which, for the most part, means matters of national importance that transcend provincial borders. These matters include national defence, foreign affairs, criminal law, immigration, banking and the national currency, international trade, and intellectual property.

The provinces, on the other hand, are empowered to deal with issues that are more regional in nature, such as direct taxation within the province, education, social programs, and matters relating to property and civil rights.⁵ There are also many areas of joint federal-provincial responsibility. While the territorial governments are subject to federal jurisdiction, they have authority over a range of local government programs and initiatives.

III. GENERAL RULES OF DISCOVERY IN CANADA

(a) Discovery of Documents in the Common Law Provinces, Territories and in Federal Court Litigation

Each party to an action commenced in a Canadian jurisdiction must disclose the existence of every document, whether privileged or not, "relating to any matter in issue in an action" which is or has been in the possession of the party.⁶ These documents
must be disclosed or “produced” to the other parties to the litigation, unless they are privileged.

The disclosure, inspection and production of documents in actions commenced in Canadian jurisdictions is governed by the Rules of Court of each province or territory or of the Federal Court. These rules generally tend to parallel each other, though the applicable set of provincial, territorial or federal Rules should be consulted in relation to a particular discovery matter.  

In the province of Ontario, the discovery and inspection of documents in civil litigation is governed by rule 30 of the Rules of Civil Procedure (“Ontario’s Rules”). The corresponding documentary discovery rules in other Canadian common law jurisdictions are:

- Alberta – rules 186-199 of the Alberta Rules of Court
- British Columbia – rule 26 of the Supreme Court Rules, which also applies in the Yukon Territory
- Manitoba – rule 30 of the Court of Queen’s Bench Rules
- New Brunswick – rule 31 of the Rules of Court
- Newfoundland – rule 32 of the Rules of the Supreme Court, 1986
- Northwest Territories and Nunavut – rules 218-233 of the Rules of the Supreme Court
The discovery and inspection of documents in federal courts is governed by rules 222-233 of the *Federal Court Rules*. For ease of reference, this paper will largely focus on Ontario’s Rules.

There are two stages to documentary discovery in Canada’s common law jurisdictions: (i) the service of an affidavit of documents by each party to an action upon all other parties to the action; and (ii) the inspection by a party of all non-privileged documents listed in another party’s affidavit of documents.

(i) Scope of Discovery of Documents

In Ontario, the fundamental disclosure obligation with respect to documents is found in rule 30.02, which states that:

30.02(1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

Rule 30.01(1)(a) specifically defines the term ‘document’ to include “a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information recorded or stored by means of any device.”
This definition has been interpreted expansively by the courts and has been deemed to include such things as medical slides containing tissue samples, an electronic database used to organize other (already produced) documents, and the envelope containing a previously-disclosed letter.

The test as to which documents a party will be required to produce is simply relevance. What is relevant is any document that might reasonably be supposed to contain information which may directly or indirectly relate to any matter in issue in an action.

The disclosure of insurance policies is dealt with independently, under rule 30.02(3), which provides that:

30.02(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

(a) to satisfy all or part of a judgment in the action; or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Finally, rule 30.02(4) provides that the court may order a party to disclose all relevant documents in the possession, control or power of the party’s subsidiary or affiliated corporation, or of a corporation controlled directly or indirectly by the party, and to produce for inspection all such documents that are not privileged.

Subsidiary and affiliated corporations are expansively defined in rule 30.01(2) by reference to a ‘control test’. A corporation is a subsidiary of another corporation where it is “controlled directly or indirectly by the other corporation.” A corporation is affiliated
with another corporation where: (i) one corporation is the subsidiary of another; (ii) both corporations are subsidiaries of the same corporation; or (iii) both corporations are controlled directly or indirectly by the same person or persons.

Rule 30.02(4) holds particular significance in trans-national litigation as it exposes the subsidiary and/or affiliate companies of a party to Canadian litigation to potentially significant disclosure obligations, whether these subsidiaries and affiliates are incorporated in Canada or elsewhere. In *Peters v. General Motors of Canada Ltd.*,\(^2^5\) for example, an Ontario court ordered that, pursuant to rule 30.02(4), General Motors of Canada disclose all relevant documents in the possession, control or power of its affiliated corporation, General Motors Corporation, an American corporation, and produce for inspection all such documents that were not privileged.

“Control” is not defined in the Rules. One Ontario court has found that in order to determine what is meant by “control” for the purposes of determining disclosure obligations, reference must be made to the definition of “control” in the Ontario *Business Corporations Act*.\(^2^6\) The extent to which any disclosure obligations will be placed on a foreign subsidiary or affiliate of a party to Canadian litigation will depend on the relevance of the documents in the possession, control or power of the subsidiaries and affiliates.

The Ontario case of *Daishowa Inc. v. Friends of Lubicon*\(^2^7\) is an example of the extensive reach that rule 30.02(4) can have. In this case, the plaintiff was a Canadian company (Canadian Co. 1), which was a subsidiary of another Canadian company (Canadian Co. 2), which was owned by a third Canadian company (Canadian Co. 3),
which in turn was owned by a Japanese corporation (Japanese Co. 1). The Japanese company also owned another Canadian subsidiary corporation (Canadian Co. 4). In 1992, Canadian Co. 4 transferred certain of its interests to a new Japanese company (Japanese Co. 2), which was partially owned by Japanese Co. 1 and partially owned by a third Japanese company (Japanese Co. 3). The defendant sought and was granted an order requiring certain documents held by four of these corporations (Canadian Co.’s 2, 3, and 4 and Japanese Co. 1) to be produced. Japanese Co. 2 was not required to disclose the documents in question as the court found that there was not enough evidence to infer that it was a subsidiary or affiliated company of the plaintiff.

(ii) Documents in the Possession of Non-Parties

The production of documents from non-parties is governed in Ontario by Rule 30.10, which provides for production of documents from non-parties with leave of the court. To obtain such an order the party seeking production from the non-party must demonstrate that:

1) the document is relevant to a material issue in the trial; and

2) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Where privilege is claimed for a document referred to in rule 30.10(1), or where the court is uncertain as to the relevance or necessity for discovery of the document, the court may inspect the document to determine the issue.\(^2\)
The courts will not allow this rule to be used for a “fishing expedition” and, accordingly, a party seeking discovery from a non-party must be specific as to the type of document(s) sought.\textsuperscript{29} That being said, rule 30.10(1) has been successfully used to compel production of the clinical notes and records of a non-party psychologist,\textsuperscript{30} financing documents in the possession of a non-party bank,\textsuperscript{31} the books of a bankrupt company in the possession of the non-party trustees in bankruptcy,\textsuperscript{32} and a party’s employment records,\textsuperscript{33} just to name a few.

Nevertheless, there is case law indicating that a more onerous test will be applied to a party seeking to obtain documents from a non-party than will be applied in the case of a party seeking production of documents in the possession, control or power of another party to an action.\textsuperscript{34}

(iii) Affidavit of Documents

All parties to a civil action commenced within a Canadian common law province or territory must prepare and deliver an affidavit of documents to all other parties to the action. This affidavit must disclose, to the full extent of the deponent’s knowledge, information and belief, all documents relating to any matter in issue in the action that are or have been in the party’s possession, control or power.\textsuperscript{35} Ontario rule 30.03(2) sets out the required content of an affidavit of documents:

30.02(2) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,

(a) that are in the party’s possession, control or power and that the party does not object to producing;

(b) that are or were in the party’s possession, control or power and for which the party claims privilege, and the grounds for the claim; and
(c) that were formally in the party’s possession, control or power, but are no longer in the party’s possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession, control or power over them and their present location.

The affidavit must also contain a statement that the party has never had in its possession, control or power any document relating to any matter at issue in the action other than those listed in the affidavit.\(^{36}\)

A party, who after serving an affidavit of documents, discovers that the affidavit is inaccurate or incomplete, must “forthwith” serve a supplementary affidavit disclosing any additional documents.\(^{37}\)

Ontario rule 30.06 provides several remedies to a party who believes that another party’s affidavit of documents is incomplete, or that privilege has been improperly claimed with respect to a particular document. Where the complaining party is able to provide sufficient evidence of either complaint, a court may:

1) order cross-examination on the affidavit of documents;

2) order service of a further and better affidavit of documents;

3) order the disclosure or production for inspection of the document, or a part of the document if it is not privileged; and/or

4) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.
Where a party entirely fails to disclose a document in the affidavit of documents or to produce a document for inspection in compliance with the Rules, the court may refuse to allow the document to be used at trial, may revoke or suspend the party’s right to initiate or continue an examination for discovery, or may dismiss the action or strike out the statement of defence entirely.  

(iv) Time and Place for Production

In Ontario, every party to an action must serve an affidavit of documents on every other party within ten days after the close of pleadings. Pleadings are deemed to be closed when the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired, and every defendant who is in default in delivering a defence has been noted in default.  

The rules of the various provinces differ in their provisions respecting time for documentary discovery, but generally it is after the delivery of the defence or after the close of pleadings. Although a strict reading of rule 30.04(3) contemplates that the production of documents be made at the solicitor’s office of the producing party (or at some other convenient place), as a practical matter, production is made by sending a paper or electronic copy of the documents to opposing counsel.

Ontario’s Rules also permit what is generally referred to as ‘divided disclosure’. Where a document becomes relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, a party may bring a motion to the court seeking leave to withhold disclosure or production until after the issue has been determined. There
is case law indicating, however, that barring circumstances such as oppression, irreparable harm, or other prejudice to the opposing party, the court should not postpone discovery or production to await determination of a preliminary question.\textsuperscript{43}

(v) Request to Inspect Documents

Parties may serve on another party a request to inspect any documents that are not privileged and that are referred to in the other party’s affidavit of documents as being in the party’s possession, control or power.\textsuperscript{44} In accordance with Ontario rule 30.04(2), a request to inspect documents may also be used to obtain the inspection of any document in another party’s possession, control or power that is referred to in the originating process, pleadings, or affidavit served by the other party.\textsuperscript{45} Case law has interpreted this rule to suggest that any privilege attaching to a document is waived when it is referred to in the pleadings or affidavit of another party.\textsuperscript{46}

Where a party has been served with a request to inspect documents, that party must “forthwith” inform the party making the request of a date and time when the documents may be inspected, within five days after the request to inspect has been served.\textsuperscript{47} In practice, a request to inspect documents is generally answered by providing the requesting counsel with a copy of the documents.

Where a party fails to adhere to these rules, the court may order the production of documents for inspection that are not privileged and that are within the possession, control or power of a party.\textsuperscript{48} However, the court will only order production and inspection of documents prior to the close of pleadings where the documents are essential to a pleading.\textsuperscript{49} Courts are also empowered under the Rules to inspect a
document to determine the validity of a party’s claim that a particular document is covered by privilege.  

(vi) Use of Documents Produced

All parties and their counsel are deemed to undertake not to use evidence or information obtained through the discovery process (being documentary discovery, an examination for discovery, or an inspection of property) for any purpose other than those of the proceeding in which the evidence was obtained. In other words, documents that are produced may not be used for a collateral or ulterior purpose. Any improper use of produced or disclosed documents amounts to contempt of court.

The Ontario Court of Appeal has held that there is an implied undertaking rule in Ontario that documents obtained on discovery are not to be made public or used for any purpose other than the proceeding in which they were obtained. This undertaking ceases to apply after the document has been read out or referred to in open court. The rationale for this general principle, noted the Court, is the general right of privacy of the person holding the document and the recognition that discovery is an intrusion on that right.

Ontario’s Rules provide that a court may order that this deemed undertaking does not apply to a particular document or to information obtained from it, if it is satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence. Furthermore, disclosure or production of a document for inspection is not to be taken as an admission of that document’s relevance or admissibility.
(vii) Claims of Privilege

In recent years, the scope of privilege has been significantly narrowed in Canada. Currently, the generally-recognized areas of privilege are:

1) confidential communications between a solicitor and client for the purpose of seeking or giving advice;

2) documents prepared in contemplation of litigation; and

3) without prejudice communications and documents.

Where an affidavit of documents claims privilege over a document, the party claiming privilege must set out the grounds for the claim in the affidavit with sufficient precision such that there is no doubt as to its being privileged. Failure to do so may be grounds for the court to inspect the document to determine the validity of the claim under rule 30.04(6), or to order its production under rule 30.06 if it determines that privilege was improperly claimed.

The leading Canadian case on privilege is Slavutych v. Baker, in which the Supreme Court of Canada adopted the four fundamental conditions cited in Wigmore on Evidence as being necessary to establish a claim of privilege over a communication. These four conditions are:

1) the communications must originate in a confidence that they will not be disclosed;
2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and

4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The onus to establish privilege is on the party asserting its existence.61

Privilege over a document may be lost if the other party obtains possession of the document (or copies thereof) or where there is a waiver of privilege.62 Waiver of privilege occurs when it is shown that the possessor of the privilege knows of the existence of the privilege and demonstrates a clear intention to forego the privilege.63 Waiver may also occur in the absence of an intention to waive, “where fairness and consistency so require.”64

(viii) E-Discovery

On December 1, 2006, new amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information took effect. These amendments attempt to provide a more efficient and coordinated approach to the search for and review of electronic discovery by requiring the parties agree on and/or to resolve e-discovery issues at the beginning of the proceedings. The new rules also act
to relieve parties of the obligation to produce electronic information from sources identified as being “not reasonably accessible because of undue burden or cost.”

Canadian rules of civil procedure have not gone this far in defining the scope or detail of electronic discovery. Accordingly, U.S. litigants will not benefit from the guidance of these new amendments when seeking documentary discovery in a Canadian jurisdiction.

(b) Examinations for Discovery in the Common Law Provinces, Territories and in Federal Court Litigation

It has been said that the most important step in the pre-trial process is the examination for discovery. Examinations for discovery in Ontario are governed by rule 31. The corresponding rules in other Canadian common law provinces and territories are:

- Alberta – rules 200-216.1 of the Alberta Rules of Court
- British Columbia – rule 27 of the Supreme Court Rules, which is also applicable in the Yukon Territory
- Manitoba – rule 31 of the Court of Queen’s Bench Rules
- New Brunswick – rule 32 of the Rules of Court
- Newfoundland – rule 30 of the Rules of the Supreme Court, 1986
- Northwest Territories and Nunavut – rules 234-270 of the Rules of the Supreme Court
- Nova Scotia – rule 18 of the Civil Procedure Rules
• Prince Edward Island – rule 31 of the *Rules of Civil Procedure*\textsuperscript{73}

• Saskatchewan – rules 222-240 of the *Queen's Bench Rules*\textsuperscript{74}

Examinations for discovery in actions conducted under the *Federal Court Rules* are governed by rules 234-248.\textsuperscript{75}

(i) **Who May Examine and be Examined**

Most Canadian jurisdictions provide only for the examination of a “party” to an action. Examination is to take place between parties who are adverse in interest. While the meaning of “adverse in interest” has evolved over time, one Ontario court has noted that a review of relevant case law reveals two important propositions:

1) parties that are opposite on the record are not necessarily adverse in interest; and

2) parties may be adverse in interest even though they are not opposite on the record.\textsuperscript{76}

Adverseness should be disclosed by the pleadings and any examination for discovery should be limited to matters where that adverse interest exists.\textsuperscript{77}

Ontario’s Rules contemplate only one examination for discovery of any party in the action.\textsuperscript{78} Accordingly, a party to an action may examine for discovery any other party adverse in interest only once unless leave of the court is obtained to conduct a further examination.\textsuperscript{79}
Where a corporation is a party to an action, the examining party may examine any officer, director or employee on behalf of the corporation. The right to select a representative of a corporate party for the purposes of examination for discovery is not uniform throughout Canada. Reference must be made to the particular provincial, territorial or federal rule. The most common approach is to allow the examining party to select the person it wishes to examine. Where an officer, director or employee of a corporation has been examined, no other officer, director or employee of the corporation may be examined without leave of the court. A corporate party is bound by the answers given by its representative, unless reservations are made. Furthermore, there is long standing authority that a person being examined on behalf of a corporate party has an obligation to inform him or herself with respect to the relevant facts.

Ontario’s Rules also direct who may be examined where a party to an action is a partnership or sole proprietorship, a party under disability, an assignee, or a trustee in bankruptcy.

Where a party is entitled to examine more than one person under rule 31 or multiple parties who have similar interests in the action, but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose limits on the right of discovery as it deems just.

(ii) Non-Parties
There are several rules in Ontario governing the right of parties to examine non-parties to an action. Rule 31.03(8) provides that where an action is brought or defended for the immediate benefit of a person who is not a party, that person may be examined in
addition to the party bringing or defending the action. Where a party wishes to examine a person who is not a party to an action and does not fit within rule 31.03(8), that party must seek leave of the court to do so under rule 31.10. Nonetheless, discovery of a non-party may not be used to gather information from an uncooperative prospective witness.\textsuperscript{90}

The court is permitted under rule 31.10 to grant leave to examine any person (other than an expert engaged in contemplation of litigation) where there is reason to believe that the person has information relevant to a material issue in the action. The test for granting leave under rule 31.10(1) is set out under rule 31.10(2). According to this rule, leave will not be granted unless the court is satisfied that:

1) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

2) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

3) the examination will not unduly delay the commencement of the trial of the action, or result in unreasonable expense for other parties, or result in unfairness to the person the moving party seeks to examine.

There is case law indicating that where one party is successful in obtaining leave to discover a non-party, other parties may attend the examination and are entitled to a transcript of the discovery, but may not examine the non-party themselves.\textsuperscript{91}
Furthermore, it is important to note that unlike the case with the examination of parties (as is discussed further below), the evidence of a person examined under rule 31.10 may not be read into evidence at trial.\(^92\)

Where a party wishes to examine a person who is not a party to the action but is a person residing in Ontario, the examining party must serve a summons to witness (Form 34B) personally on the person.\(^93\) Where a person to be examined resides outside of Ontario, rule 53.05 (summons to witness outside Ontario) applies to the securing of attendance of such person.\(^94\)

(iii) Form of Examination

An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers. A party is not entitled to subject a person to both forms of examination, except with leave of the court.\(^95\) Where more than one party is entitled to examine a person, the examination for discovery must take the form of an oral examination, unless all parties agree otherwise.\(^96\) Unless the court orders or the parties agree otherwise, where more than one party is entitled to examine a party or person for discovery, there can be only one oral examination, at which time all parties who wish to do so must examine that person.\(^97\)

Where a party wishes to examine another party to an action, a notice of examination (Form 34A) must be served on the party’s solicitor or, where the party is self-represented, on the party personally or by an alternative to personal service (defined in rules 16.02 and 16.03).\(^98\) Where the person to be examined resides in Ontario, the
examination must take place in the county in which the person resides, unless the court or the person to be examined and all the parties agree otherwise.\textsuperscript{99}

Questions on an oral examination for discovery must be answered by the person being examined. However, where there is no objection, the question may be answered by his or her counsel and the answer will be deemed to be the answer of the person being examined.\textsuperscript{100}

\textbf{(iv) Scope of Examination}

Ontario rule 31.06 is one of the most important rules for lawyers conducting examinations for discovery, as it sets out the permissible scope for such an examination. Rule 31.06(1) provides that a person who is examined for discovery must answer, to the best of their knowledge, information and belief, any proper question relating to any matter in issue in the action, or to any matter relating to potential witnesses, expert opinions or insurance policies relevant to the dispute.

Everything is relevant in an examination for discovery that may directly or indirectly aid the party seeking discovery to prove his or her case, or defend the case of his or her adversary.\textsuperscript{101} The standard of relevance will be determined by the court on a case-by-case basis.\textsuperscript{102}

Rule 31.06(1) further provides that no question may be objected to on the ground that the information sought is evidence, the question constitutes cross-examination (unless the question is directed solely to the credibility of the witness), or the question constitutes cross-examination on the affidavit of documents of the party being examined.
Persons being examined are obligated by way of rule 31.06(2) to disclose the names and addresses of any persons who “might reasonably be expected to have knowledge of transactions or occurrences in issue in the action.” Parties are also entitled to obtain on an examination for discovery disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined. The only exception to this mandatory disclosure rule is where the party being examined successfully demonstrates that the expert opinion was prepared for contemplated or pending litigation and the party undertakes not to call the expert as a witness at the trial.

Parties are also entitled to obtain disclosure during an examination for discovery of the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action, or to indemnify a party for money paid in satisfaction of all or part of a judgment.

Where a person examined for discovery refuses to answer a proper question, or has undertaken to answer a question, but fails to provide the information in writing not later than sixty days before the trial begins, that party may not introduce the information at trial without leave of the court.

(v) Use of Examination for Discovery at Trial

While the Rules provide that any party may use the discovery evidence of an opposite or adverse party in evidence at trial, there are significant restrictions imposed by the Rules on such use. In Ontario, rule 31.11 provides that at the trial of an action, a party may read into evidence as part of their own case against an adverse party any part of the transcript of the examination for discovery of the adverse party so long as the evidence is otherwise admissible. This evidence may also be used for the purpose of
impeaching the testimony of the deponent as a witness in the same manner as any
previous inconsistent statement by that witness.\textsuperscript{107}

Counsel wishing to read into evidence a portion of the transcript of an adverse party’s
examination for discovery must do so carefully, however, given the implication of rule
31.11(3). This rule provides that where only part of a transcript of an examination for
discovery is read into evidence by one party, the adverse party may request that the
trial judge review any other part of the transcript that qualifies or explains the portion
“read into” evidence. In other words, where an admission is read in, the opposing party
can refer the judge in argument to other evidence explaining the admission.\textsuperscript{108}

Finally, where an action has been discontinued or dismissed and another action
involving the same subject matter is subsequently brought between the same parties,
the evidence given on an examination for discovery taken in the first action may be read
into or used in evidence at the trial of the subsequent action.\textsuperscript{109}

\textbf{(c) The Rules of Discovery in Québec}

As the sole jurisdiction in Canada with a civil law tradition, pre-trial discovery practices
and procedures in Québec are somewhat distinct from those found in other Canadian
provinces and territories. In most civil law countries, the searching out of evidence for
use at trial is generally a function of the judge and not of the parties.\textsuperscript{110} It is the judge
who has the initial authority to determine which witnesses to examine, the questions to
be asked, and the documents to be produced. In other words, the judge has absolute
discretion to control the scope of oral examination and the extent of discovery.\textsuperscript{111}
In Québec, the situation is not dissimilar from other civil law jurisdictions. Chapter III of the *Québec Code of Civil Procedure*\(^\text{112}\) governs examinations for discovery and the production of documents in actions commenced in the province. Perhaps most significantly, a party to litigation commenced in Québec is only required to disclose “exhibits” (whether these be real evidence or documents) it intends to rely on at a hearing.\(^\text{113}\)

Under the rules of the *Code of Civil Procedure*, examinations for discovery conducted by a defendant to an action are dealt with separately and distinctly from those conducted by a plaintiff or other party to an action. Article 397 of the *Code of Civil Procedure* provides that prior to the filing of a defence, and after one day’s notice to counsel for all other parties, a defendant may summon the following parties to be examined before a judge or prothonotary:

1. the plaintiff, or the plaintiff’s representative, agent or employee;
2. in any civil liability action, the victim, and any person involved in the commission of the act that caused the injury;
3. the person that the plaintiff claims as a “tutor or curator”, or whose rights the plaintiff has acquired by transfer, subrogation or other similar title; or
4. with the permission of the court, any other person.

Such parties may be examined on all facts relating to the issues between the parties. The examination must take place within the time allowed for the filing of the defence, unless leave of the court is obtained.
Article 398 of the *Code of Civil Procedure* sets out the conditions under which any other party may conduct an examination for discovery. After the defence is filed and after one day's notice has been given to all parties, any party may summon the following persons to be examined before a judge or prothonotary:

1) any other party, or that party's representative, agent or employee;

2) any person mentioned in paragraphs 2 and 3 of article 397; or

3) with the permission of the court, any other person.

As is the case with an examination conducted under article 397, a witness examined under article 398 may be asked questions about all matters relating to the issues between the parties. The defendant may not, without leave of the judge or court, examine any person under article 398 who they have already examined under article 397.

Evidence obtained on an examination conducted under articles 397 or 398 may be introduced into evidence at trial, provided that such abstracts have been filed in the record in accordance with the requirements set out under the *Code of Civil Procedure*. Nevertheless, on the motion of any other party, the court may order any other abstract of the deposition to be added to the record.

The production of documents in a Québec action is governed by articles 402 – 403 of the *Code of Civil Procedure*. If, after the defence is filed, it appears that a document relating to the issues between the parties is in the possession of a third party, the court may issue a summons ordering the third party to produce the document to the
parties. The court may also, at any time after the defence is filed, order a party or a third party having in its possession any real evidence relating to the issues between the parties, to “exhibit it, preserve it or submit it to an expert’s appraisal.” Provision is also made under the Code of Civil Procedure for the disclosure of expert reports and for parties to admit the genuineness or correctness of an exhibit.

Given the unique nature of discovery under Québec law, parties contemplating litigation in this province would be wise to carefully examine the requirements set out under the Code of Civil Procedure.

IV. ENFORCEMENT OF U.S. COURT ORDERS TO DISCOVER A PARTY IN CANADA

(a) Letters Rogatory and the Hague Conventions

As the authority of a court is limited to the jurisdiction in which it is located, it has no power to serve documents on persons domiciled in other jurisdictions. Accordingly, a person seeking to bring an action against a person in another country must seek and obtain assistance from the judicial authorities in that other country.

Canada is no exception to this general proposition. Thus, where a party in the United States wishes to sue a party in Canada, the U.S. party must issue a summons in a U.S. court and then petition a court in Canada by means of a letter rogatory to serve the process on the Canadian party. The Hague Service Convention (discussed further below), to which both Canada and the United States are signatories, has significantly simplified this procedure.
A similar situation arises when a U.S. party, having served the process on a Canadian party, wishes to obtain evidence from that Canadian party, either through oral examination or disclosure of documents. Courts only have power to subpoena witnesses from within their own country, meaning, that a U.S. court cannot summon a Canadian party to U.S. soil to be discovered. The U.S. party must instead petition a court in the U.S. to issue a letter rogatory to a Canadian court, requesting it to facilitate the discovery of the Canadian party.

In the past, letters rogatory could not be transmitted directly between courts and instead had to be sent through consular or diplomatic channels. *The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*\(^{120}\) (otherwise known as the “Hague Service Convention”), ratified in 1965, has enabled designated authorities in signatory states to transmit documents for service to each other, bypassing the diplomatic route. This convention has been ratified by 52 countries, including the United Kingdom, the United States and Canada.

*The Convention on the Taking ofEvidence Abroad in Civil or Commercial Matters*\(^{121}\) (otherwise known as the “Hague Evidence Convention”), ratified in 1970, formalized procedures for the taking of evidence from parties residing in foreign countries. Canada is not a signatory to this convention, which has been ratified by 43 countries. Thus, letters rogatory must still be used by a U.S. party seeking to discover a Canadian party.
(b) **Enforcement of Letters Rogatory or of Letters of Request by Canadian Courts**

Notwithstanding that Canadian courts have discretion in determining whether or not to grant applications for the enforcement of letters rogatory, courts apply a well-defined set of criteria in making such decisions. The criteria are as follows:

1. the evidence sought is relevant;
2. the evidence sought is necessary for trial and will be adduced at trial, if admissible;
3. the evidence is not otherwise obtainable;
4. the order sought is not contrary to public policy;
5. the documents sought are identified with reasonable specificity; and
6. the order sought is not unduly burdensome.

At least one court has noted that “other factors may also be relevant to the determination in each particular case.”

In Ontario, section 60 of the *Evidence Act* authorizes a judge of the Superior Court of Justice to order the examination of a witness who is within the jurisdiction of the court and where a foreign court or tribunal has authorized, by commission, order, or other process, the obtaining of the testimony of that witness in relation to an action pending before it.
By authority of the same provision, a judge of the Superior Court of Justice may also order the production of a document or thing mentioned in the foreign court’s order. An order issued under section 60 of the *Evidence Act* may be enforced in the same manner as any other order issued by the court.

The case law indicates that there are four pre-conditions that must be met by an applicant before a court will grant a letter of request under section 60 of the *Evidence Act*. They are as follows:

1) it must appear that the foreign court is seeking the evidence;

2) the witness whose evidence is sought must be within the jurisdiction of the court which is asked to make the order;

3) the evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court or in relation to an action, suit or proceeding pending before the foreign court; and

4) the foreign court must be a court of competent jurisdiction.\(^{126}\)

Courts tend to approach such applications liberally, guided by principles such as mutual deference and respect for the foreign jurisdiction. One Ontario court has commented that these principles “have set the tone for the contemporary approach to honouring requests by letters rogatory of foreign courts.”\(^{127}\) As a result, deficiencies in the order’s text will not necessarily be fatal to an applicant’s case. For example, in *Pecarsky v. Lipton, Wiseman, Altbaum & Partners*,\(^ {128}\) Nordheimer J. granted an application for
production of two relevant documents despite the fact that Patterson J. of the United States District Court issued his letter of request without reasons.\textsuperscript{129}

Recent case law indicates that Canadian courts are entitled to enforce an otherwise problematic letter rogatory or letter of request by narrowing the order.\textsuperscript{130} In \textit{Triexe Management Group Inc. v. Fieldturf International Inc.}\textsuperscript{131} ("Triexe"), McMahon J. revised a letter of request in order to ensure it was specific and therefore not unduly burdensome. Similarly, in \textit{General Conference of Seventh-Day Adventists v. Tiffin},\textsuperscript{132} Swinton J. narrowed an overly-broad letter of request that had failed to specify the documents to be produced. The court narrowed the request based on orders issued previously by the California court, which made explicit reference to documents held by the Canadian residents.

Nevertheless, despite the tendency of Canadian courts to show deference to foreign courts in granting letters of request or letters rogatory, the Canadian court will examine the foreign order closely to determine if the request meets the requirements of relevancy, specificity, and obtainability, and if it is in the interests of justice to grant such an order.\textsuperscript{133}

\textbf{(i) The Required Evidentiary Foundation}

When considering an application to enforce letters rogatory, Canadian courts will refer to affidavit evidence provided by the applicants (and respondents, if opposed)\textsuperscript{134} and will examine the pleadings and any answers to written interrogatories to determine the relevance, necessity and obtainability of the evidence requested.\textsuperscript{135}
(ii) **Relevance and Specificity**

Evidence sought by way of letters rogatory or letters of request must be relevant to the issues to be determined in the action. A list of the relevant documents sought should be identified in the order. One court has found that documents are sufficiently identified where they are identified by topic.\(^{136}\)

Similarly, counsel seeking to discover a party in Canada would be wise to ensure that the letter rogatory delineates the proposed scope of questioning for the oral examination and the relevance of the anticipated evidence to the issues in dispute. Recent case law indicates that Canadian courts will be hesitant to enforce a letter rogatory that does not address these issues with appropriate detail so as to allow the court to determine that the evidence is sufficiently relevant.\(^{137}\) In determining whether or not to grant an application for the enforcement of a letter rogatory, courts may also look to the standard of relevancy applied by the foreign court in issuing its orders, though this will not be determinative.\(^{138}\)

In *Giaimo v. Canada Trust*\(^{139}\) ("Giaimo"), the Ontario Superior Court of Justice found that there was insufficient evidence before it pertaining to relevance. The only evidence provided by the applicant was a statement from an Argentine lawyer indicating that the judge presiding over the foreign action had found that the information was relevant to the action before him. No explanation as to how or why the information was relevant was provided. Importantly, the lawyer had not even provided a copy of the pleadings.
(iii) **Necessity**
Canadian courts will also examine an application to enforce a letter rogatory to determine whether the evidence sought to be obtained from the Canadian party is necessary. In *Pandjuris Inc. v. Liburdi Pulsweld Corp.*,\(^{140}\) the applicant had obtained judgment against the respondent in Missouri. A Missouri court granted the applicant a letter rogatory, authorizing a Canadian court to order examinations of certain parties for the purposes of enforcing the judgment. The applicant applied to the Ontario Superior Court of Justice to enforce the letter rogatory. One of the questions examined by the Ontario court was whether it was necessary for the applicant to examine all of the parties named in the letter rogatory, which included several employees and officers of the respondent company. The court allowed the application and granted an order enforcing the letter rogatory, but only with respect to the examination of the president of the respondent company. The court deferred a decision as to whether it was necessary to examine the other parties until after the examination of the president.

(iv) **Obtainability**
There is some indication that a letter rogatory is more likely to be enforced by a Canadian court where it contains a statement that the evidence sought could not be obtained through other means. Nevertheless, other authority indicates that a court may simply make this inference, though an express statement is preferable.\(^{141}\)

In *Triexe, supra*,\(^{142}\) the respondents challenged the application for enforcement of a letter rogatory on the basis that there were further legal remedies pursuable in the United States for seeking production of the relevant documents. They were ultimately
unsuccessful as the judge inferred that the granting of the letter rogatory meant that no other legal recourses were available.

Nevertheless, in *Giaimo, supra*¹⁴³ the court denied an application for enforcement of letters rogatory as the court determined that a statement by the issuing court that the information was relevant failed to establish that the information was not otherwise obtainable.

To avoid this result, counsel should provide evidence that demonstrates that the applicants have attempted to use procedural mechanisms available to them within the ‘home’ jurisdiction to obtain the evidence sought. In *King v. KPMG*,¹⁴⁴ for example, Ground J. determined that the evidence sought by the applicants could be obtained through other means as the applicants had provided no evidence of having sought the information from the U.S. corporate party involved in the litigation.

It may also be desirable to include a list of documents already obtained from individuals or corporate entities in the foreign jurisdiction. At least one Canadian court has held that Canadian parties should not be required to produce documents already in the possession of the applicant.¹⁴⁵

(v) **Interests of Justice**

When faced with an application to enforce a letter rogatory, courts will be guided by principles of fairness and what it deems to be in the interests of justice. In *O.P.S.E.U. Pension Trust Fund (Trustee of) v. Clark*,¹⁴⁶ Sanderson J. commented as follows:

Based on his reasons, it is clear that he [U.S. Magistrate Judge Dolinger] was of the view that justice requires the production of the Specified
Documents in all the circumstances here. This Court should “give full faith and credit” to the orders and judgment of a U.S. Court unless it is of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty.  

Sanderson J. went on to hold that “justice require[d] the production of the Specified Documents and Specified Evidence” and that “an order enforcing the letters rogatory in the form of Magistrate Judge Dolinger’s order … is in the interests of justice.”

Similarly, the Ontario Court of Appeal has found that two objectives should be considered by courts when deciding an application to enforce letters rogatory:

1) doing what justice requires; and

2) protecting Canadian sovereignty.

Case law indicates that orders issued by foreign courts are generally entitled to deference and respect. Canadian courts will strive to encourage international comity by giving full force and effect to foreign requests, unless such requests are contrary to public policy or are otherwise prejudicial to the sovereignty or the citizens of Canada.

V. EXAMINING FOR DISCOVERY A CANADIAN NON-PARTY TO U.S. LITIGATION

Parties to U.S. litigation who wish to examine for discovery a non-party residing in Canada must similarly bring an application to a court in the provincial, territorial or federal jurisdiction in which the non-party resides to enforce an order or letters rogatory issued by the appropriate U.S. court or tribunal. The granting of such an order is discretionary, as set out in section 60 of the Ontario Evidence Act. Nevertheless, Canadian courts may enforce a foreign order for the examination of non-parties in
Canada as a matter of deference and respect, even where those persons might not be eximimable under the applicable provincial Rules. Accordingly, it is not necessary that the applicant demonstrate that the Canadian non-party would have been subject to examination under rule 31.10 (or the parallel rule), although the requirements of this rule are a relevant consideration as to whether the proposed order creates an undue imposition on the witness.

In *D.G. Jewellery of Canada Ltd. v. Valentine*, the Ontario Superior Court of Justice commented that deciding whether to enforce foreign letters of request for pre-trial discovery is essentially an exercise that requires the balancing of interests. The court concluded that to order the respondents to undergo oral examination where they clearly had relevant evidence to provide was not so burdensome that it would outweigh the compelling reasons for permitting the examination to proceed. Nonetheless, the court narrowed the request issued by the New York Supreme Court to allow only for examination on subjects deemed to be relevant to the issues between the parties, and to exclude categories of questions that would expose witnesses to the type of “fishing expedition” that is not permitted under Ontario law.

One Ontario court has found that it is in the interests of international and domestic administration of justice to lend assistance to foreign courts in enforcing requests to examine non-parties residing in a Canadian jurisdiction, particularly where allegations of fraud are raised. Accordingly, the court ordered a Canadian corporation to produce certain documents and to attend for examination where certain customer lists in the corporation’s possession were the very evidence required by the U.S. court to adjudicate issues of fraudulent infringement of the plaintiff’s patent.
As is the case with applications to enforce letters rogatory for the discovery of parties to U.S. litigation, an application concerning non-parties will be dismissed where the request is so sweeping that portions of the evidence sought are irrelevant, where the record does not show that the evidence sought could not be otherwise obtained, and/or where the request constitutes an infringement upon the sovereignty of the Canadian jurisdiction to which the request is directed.\(^3\)

In *Fecht v. Deloitte & Touche*,\(^4\) the Ontario Court of Justice (General Division) dismissed an application to give effect to letters rogatory issued by the United States District Court. The letters rogatory requested the assistance of the Ontario court in enforcing documentary production from an accounting firm and the oral examination of one of the firm’s representatives on issues relating to a class action pending in the U.S. court against the corporate defendant. The accounting firm was the corporate defendant’s independent Canadian auditor. The Ontario court concluded that the scope of the documentary production sought by the applicants was unjustifiably broad and, accordingly, placed an unfair burden on the accounting firm. Furthermore, the court found that the record did not show that the evidence and information sought could not have been otherwise obtained. In particular, senior witnesses from the corporate defendant who had already been deposed were not even asked what information had been provided to, or received from, the accounting firm. Accordingly, the application was dismissed with costs awarded to the respondent.

What this and other case law suggests is that parties wishing to successfully obtain an enforcement order from a Canadian court to discover a non-party to U.S. litigation must ensure that the request is carefully crafted to demonstrate that the evidence sought is
relevant and necessary and that such an order would not be against the “interests of justice.”

VI. ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA

As is indicated in the language used in some of the letters rogatory case law discussed above, important developments have taken place in Canada over the past fifteen years concerning the enforcement of foreign judgments by Canadian courts. This phenomenon, which has been described as the “liberalization of foreign judgment enforcement”, began with the seminal decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* (“Morguard”). In *Morguard*, the Court held that courts in one Canadian province should give “full faith and credit” to judgments rendered by a court in another province or territory, so long as that court had properly exercised jurisdiction in the action. The test for whether jurisdiction has been properly exercised, as developed by the Court in *Morguard*, is whether there is a “real and substantial connection” between the petitioner and the country or territory exercising jurisdiction.

Thirteen years later, in *Beals v. Saldhana* (“Beals”), the Supreme Court of Canada held that judgments rendered by courts in foreign countries are to be given the same “full faith and credit” treatment as the *Morguard* decision gave to judgments rendered in courts in other Canadian provinces or territories.

A recent decision of the Ontario Court of Appeal upheld an order issued by a lower court recognizing and enforcing a judgment rendered in the Chancery Division of the High Court of Justice in the United Kingdom. The lower court found that the U.K.
judgment should be recognized in Ontario based on the provisions of the *Reciprocal Enforcement of Judgments (U.K.) Act (REJUKA)* and on the rules of private international law. In particular, the lower court determined that there was a real and substantial connection between the subject matter of the proceeding and the U.K. court and that it was, therefore, appropriate to recognize the judgment of the U.K. court.

While the Court of Appeal found that the lower court had erred in its application of *REJUKA*, it held that the lower court had not erred in enforcing the foreign order based on the principles outlined in *Morguard* and the “real and substantial connection” test.

Until recently, Canadian common law restricted the recognition and enforcement of foreign judgments to those for a debt or a definite sum of money. Consequently, a wide range of equitable remedies handed down by foreign courts, such as injunctions and orders for specific performance, were of no effect in Canada. However, in *Pro Swing v. Elita Golf. Inc.* ("*Pro Swing*"), the Supreme Court of Canada indicated its intention to relax this restriction. Accordingly, American equitable orders may now be enforced in Canada provided they meet the criteria outlined by the Court in the *Pro Swing* decision.

The significance of the *Morguard, Beals*, and *Pro Swing* decisions is that a defendant residing in Canada may no longer simply ignore a foreign claim as courts are increasingly likely to recognize and enforce judgments rendered by foreign courts.

This important trend in the area of private international law may prompt litigants residing in Canada to cooperate more readily with discovery requests made by parties to U.S. litigation.
VII. GENERAL RULES OF DISCOVERY IN THE UNITED KINGDOM

Given the significant differences between the discovery regimes in Canada and the United States, it is interesting to examine the rules of discovery of a third common law jurisdiction, the United Kingdom. In the U.K., pre-trial discovery rights are significantly curtailed as compared to those available to litigants in Canada or, especially, in the U.S.. These rights are outlined in Part 31 of the Civil Practice Rules,\textsuperscript{172} which were first introduced in 1999 to replace the Rules of the Supreme Court 1965 and the County Court Rules 1981.

The gathering of evidence in U.K. civil litigation consists of the production and inspection of all relevant documents, responses under oath to written interrogatories and the exchange before trial of proposed witness statements.\textsuperscript{173} Oral examinations for discovery are not available in the U.K. except with leave of the court.\textsuperscript{174}

A party discloses a document by stating that the document exists or has existed.\textsuperscript{175} A ‘document’ is anything onto which information contained or recorded in the document has been copied by whatever means, whether directly or indirectly.\textsuperscript{176} A party need not disclose more than one copy of a document.\textsuperscript{177} A party’s duty to disclose documents is limited to documents that are or have been in that party’s control.\textsuperscript{178} A party has a document in their control if it is or was in their physical possession or they have a right to possession of it or they have or have had a right to inspect or take certain copies of it.\textsuperscript{179} As is the case with documentary discovery in Canada, certain documents are privileged from disclosure.\textsuperscript{180}
Civil Practice Rule 31.17 deals specifically with orders for disclosure of documents in the possession of non-parties. Under this rule, an application may be made to the court for disclosure of documents by a person who is not a party to the proceeding. The application must be supported by evidence. The court may make an order under this rule only where the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, and disclosure is necessary in order to dispose fairly of the claim or to save costs.

VIII. CONCLUSION

Recent developments in Canadian private international law reveal an increasing appreciation by Canadian courts of the realities of large-scale, cross-border commerce and the cross-border litigation that this activity inevitably generates. Nevertheless, despite the evolution of Canadian jurisprudence towards a greater recognition and enforcement of U.S. court orders and judgements in Canada, American counsel may at some point be called upon to navigate the Canadian discovery regime on behalf of their clients. In such an event, a careful examination of the applicable Rules of Court of the Canadian jurisdiction in which the litigation was commenced is a necessary first step. It is hoped that this paper has provided a valuable overview of some of the issues likely to arise in subsequent steps of such cross-border litigation.

For further information and/or discussion about any of the issues raised herein, please don’t hesitate to contact the authors.

2 S.Q. 1991, c.64.
Ibid. at s.91.
Ibid. at s.92.
Gordon D. Cudmore, Choate on Discovery, 2nd ed., loose-leaf service (Toronto: Thompson Carswell, 2004) at 3-1 [Choate].
Ontario Rules, supra note 6 at rule 30.
Alta. Reg. 390/68.
B.C. Reg. 221/90.
N.B. Reg. 82/73.
Made under the Judicature Act, R.S.N.S. 1989, c. 240, s. 46.
Made under the Queen’s Bench Act, S.S. 1998, c. Q-1.01.
SOR/98-106.
Ontario Rules, supra note 6 at rule 30.03.
Ibid. at rule 30.04.
Ontario Rules, supra note 6 at rule 30.10(3).
Stockwood, supra note 6 at 69.
Meyers v. Combs (1930), 38 O.W.N. 309 at 310.
Ontario Rules, supra note 6 at rule 30.03.
Ibid. at rule 30.07.
Ibid. at rules 30.08(1) and 30.08(2).
Ibid. at rule 25.05.
Choate, supra note 7 at 3-11.
Ontario Rules, supra note 6 at rule 30.04(3).
Ibid. at rule 30.04(8).
Ontario Rules, supra note 6 at rule 30.04(1).
Ibid. at rule 30.04(2).
Ontario Rules, supra note 6 at rule 30.04(3).
Ibid. at rule 30.04(5).
Choate, supra note 7 at 3-8.5.
Ontario Rules, supra note 6 at rule 30.04(6).
Ibid. at rule 30.1(3).


Ontario Rules, supra note 6 at rule 30.1(8).

Ibid. at rule 30.05.

Stockwood, supra note 6 at 67.

Ibid.


Delap v. C.P.R. (1914), 5 O.W.N. 667 (Ont. H.C.).

Hartford Accident & Indemnity Co. v. Maritime Life Assurance Co. (1996), 9 C.P.C. (4th) 102 (N.S. S.C.); Choate, supra note 7 at 3-156.3.

Ibid.

Stockwood, supra note 6 at 71.

Supra note 9.

Supra note 10.

Supra note 11.

Supra note 12.

Supra note 13.

Supra note 14.

Supra note 15.

Supra note 16.

Supra note 17.

Supra note 18.

Domingo v. Location Gogo Inc. (1986), 55 O.R. (2d) 123 at 126 (Ont. Sup. Ct.).


Graydon v. Graydon (1921), 51 O.L.R. 301 at 303 (Ont. Sup. Ct.).

Ontario Rules, supra note 6 at rule 31.03(1).

Ibid. at rule 31.03(2).

Choate, supra note 7 at 2-47.

Ontario Rules, supra note 6 at rule 31.03(3).


Ontario Rules, supra note 6 at rule 31.03(4).

Ibid. at rule 31.03(5).

Ibid. at rule 31.03(6).

Ibid. at rule 31.03(7).

Ibid. at rule 31.03(9).


Ontario Rules, supra note 6 at rule 31.03(10).

Ibid. at rule 34.04(4).

Ibid. at rule 34.04(7).

Ibid. at rule 31.02(1).

Ibid. at rule 31.02(2).

Ibid. at rule 31.05.

Ibid. at rule 34.04(1).

Ibid. at rule 34.03.

Ibid. at rule 31.08.

Phillips v. Lawson (1912), 4 O.W.N. 390 at paras. 4-5 (Ont. H.C.J.).

Choate, supra note 7 at 2-76.3.

Ontario Rules, supra note 6 at rule 31.06(3).
Ibid.

Ibid. at rule 31.06(4).

Ibid. at rules 31.07(1) and 31.07(2).

Ibid. at rule 31.11(2).

Int. Corona Resources Ltd. v. Lac Minerals Ltd. (1986), 8 C.P.C. (2d) 39 (Ont. H.C.J.).

Ontario Rules, supra note 6 at rule 31.11(8).

Epstein et al., supra note 1 at 10-6.

Ibid.


Code of Civil Procedure, supra note 112 at article 398.1. See also Sections I and II of Chapter I.1 of the Code of Civil Procedure.

Epstein et al., supra note 1 at 10-6.


King v. KPMG (2003), 37 C.P.C. (5th) 333 at para. 6 (Ont. S.C.J.) [King].


Triexe, supra note 131.

See for example, Taft v. Siemens Electric Ltd. (1999), 45 C.P.C. (4th) 147 (Ont. S.C.J.) [Taft], where the court determined based on the affidavit evidence provided, which evidence a Canadian company would be required to produce in order to allow the issues in a U.S. product liability case to be resolved.

General Conference, supra note 132; O.P.S.E.U., supra note 122.

General Conference, ibid.


Taft, supra note 134.

Giaimo, supra note 137.

Giaimo, supra note 137.

Triexe, supra note 131.

Ibid.

Ibid.

Ibid.

Ibid.

King, supra note 126.

O.P.S.E.U., supra note 122.

Ibid. at paras. 64-65.

Ibid. at para. 94.

Fecht, supra note 123.

See, for example, O.P.S.E.U., supra note 122.


Valentine, ibid.

Ibid.

Ibid. at para. 2.

Ibid. at para. 3.


Ibid. at para. 17.

Fecht, supra note 123.

Ibid.


Ibid. at para. 41.

Ibid. at para. 45.


Cavell, supra note 166 at para. 15.


For a more thorough examination of the Pro Swing decision, see Todd J. Burke, “Enforcing Foreign Non-Monetary Awards in Canada”, featured in the Winter 2006-2007 ABA Business and Corporate Litigation Newsletter.

Ruby, supra note 161.

For more information about the Civil Practice Rules, see the website of the Department of Constitutional Affairs, online at: http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm [Civil Practice Rules].


Ibid. vol. 13 at para. 100.

Civil Practice Rules, supra note 172 at rule 31.2.

Ibid. at rule 31.4.

Ibid. at rule 31.9(1).

Ibid. at rule 31.8(1).

Ibid. at rule 31.8(2).

Ibid. at rule 31.20.
AMERICAN DISCOVERY FOR FOREIGN LITIGATION UNDER 28 USC § 1782

By
Stuart M. Riback

It is by now almost a cliché that the American legal system permits far more extensive pretrial discovery than most other countries’ legal systems. As a result, parties embroiled in litigation overseas may sometimes be tempted to try to use the United States legal system to obtain discovery that otherwise might be unavailable to them. Even apart from the more liberal American discovery rules, litigants in foreign countries sometimes may need or want to seek evidence in the United States to assist them in pursuing their cases in foreign courts. American law permits a person with an interest in a foreign litigation to seek discovery in the United States, even without the involvement of the foreign court. This article explores the procedure for doing so.

I. BACKGROUND: INTEL v. AMD AND 28 USC § 1782

It is a simple matter for a litigant in a foreign case to seek discovery in the United States without involvement of the foreign tribunal. Actually getting the discovery is less simple, but only somewhat. The governing statute is 28 USC § 1782. Under § 1782, an “interested person” may request that the district court authorize discovery in the United States “for use in” foreign litigation even without the foreign tribunal’s knowledge or involvement.1 As business has globalized over the

---

Stuart M. Riback is a member of the New York law firm Siller Wilk LLP. His practice focuses on financial, commercial, creditors’ rights and intellectual property litigation.

Section 1782 provides in relevant part as follows:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the
past several years, and more transnational disputes have arisen, the courts have been wrestling with
the question of how district courts should handle these requests. Section 1782 gained special
attention in 2004, when the United States Supreme Court decided Intel Corp. v. Advanced Micro Devices,
Inc., 542 U.S. 241, 124 S.Ct. 2466 (2004). In Intel, the Court held that § 1782 conferred broad
discretion on district judges to permit foreign litigants to obtain discovery in the United States,
though subject to certain statutory and prudential guidelines.

In Intel, AMD had filed a complaint in Europe with the European Commission’s Directo-
rate-General for Competition (“D-G”), claiming that Intel was engaging in various kinds of anti-
competitive activity. The D-G enforces the European antitrust laws; it investigates and provides a
recommendation to the European Commission (“EC”), whose decisions as to liability are then
reviewable in the European court system. In those proceedings, complainants like AMD have
certain rights, including the right to seek judicial review of certain decisions of the D-G. In the Intel
case, AMD suggested to the D-G that, in the course of its investigation, the D-G should seek certain
documents produced in litigation against Intel in the United States. The D-G declined to do so.

AMD decided that if the D-G wouldn’t ask for the documents, AMD would. AMD applied
for an order under § 1782, claiming it was an “interested person” entitled to seek discovery in the
United States in aid of the antitrust proceeding in Europe. The district court held that § 1782 did
not authorize the discovery and denied the application. The Ninth Circuit reversed, holding that the
statute did authorize the discovery. It instructed the district court on remand to exercise its
discretion as to whether to permit the discovery AMD was seeking. The Supreme Court granted
certiorari.
Before the Supreme Court were a number of issues. First, whether a person seeking discovery under § 1782 could seek only discovery that would be permitted in the foreign jurisdiction. The circuits had split on that issue. The Supreme Court also addressed whether there had to be an actual legal proceeding pending before § 1782 could be invoked (circuits had split on this issue as well), what kinds of foreign tribunal proceedings could be the subject of proper § 1782 applications, and whether a complainant in an administrative proceeding could be an “interested person” entitled to invoke § 1782. On each of these issues the Supreme Court came down in favor of permitting the district court discretion to allow discovery. It held that, under § 1782: (a) AMD was an “interested person” even though not a formal party litigant; (b) a D-G investigation is a “proceeding” in a “foreign or international tribunal” for which discovery can be sought under § 1782, even at the investigative, pre-decisional stage, so long as decisional proceedings are “within reasonable contemplation;” and (c) § 1782 does not require that the discovery materials sought in the United States also be discoverable in the foreign proceeding.

The Supreme Court’s reasoning was driven to a great extent by the statutory language. Thus, it noted that the 1964 amendments removed the requirement that the foreign proceeding be “judicial,” which meant that investigative or regulatory tribunals were covered as well. Similarly, in rejecting the contention that § 1782 permits production only of documents that would be discoverable in the foreign jurisdiction, the Supreme Court cited various circuit court decisions that supported its conclusion.

---

2 Compare Application of Gianoli Adulante, 3 F.3d 54 (2d Cir. 1993) (no foreign discoverability requirement); In re Bayer AG, 146 F.3d 188 (3d Cir. 1998) (same, with In re Asta Medica, 981 F.2d 1 (1st Cir. 1992) (evidence sought under § 1782 must be discoverable in forum of underlying dispute); Lo Ka Chun v. Lo TO, 858 F.2d 1564 (11th Cir. 1988); In re Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988) (same).

3 Compare In re Ishihara Chemical Co., 251 F.3d 120, 125 (2d Cir. 2001) (foreign case must be imminent) with In re Crown Prosecution Serv. of United Kingdom, 870 F.2d 686, 691 (D.C. Cir. 1989) (foreign case must be “within reasonable contemplation”).

4 See Intel, 542 U.S. at 255.

5 Intel, 542 U.S. at 248, 257-58.
able in the foreign forum, the Court stressed that Congress had liberalized the statute in 1964, so that if it meant to impose a restriction on the scope of discovery, it would have so provided. In the Court’s view, any concerns about public policy or fairness between litigants could be addressed by the district courts on a case by case basis in the exercise of their discretion.

Intel thus clarified that the statutory limits on discovery under § 1782 are actually quite narrow. As a result, much of the litigation about whether to permit discovery under § 1782 necessarily focuses on the discretionary factors. The Court in Intel identified several factors to guide the district courts’ discretion:

First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .

Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . . . Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.

[Third], unduly intrusive or burdensome requests may be rejected or trimmed.

---

6 Intel, 542 U.S. at 260.
7 See Intel, 542 U.S. at 262-63.
8 Intel, 542 U.S. at 264-65.
These factors should be applied in support of § 1782’s “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.’”

This article examines in detail the issues that must be addressed on a § 1782 application, both the statutory requirements and the discretionary factors.

II. STATUTORY PREREQUISITES

A district court has power to order § 1782 discovery:

where “(1) ⋅⋅⋅ the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) ⋅⋅⋅ the discovery [is] for use in a proceeding before a foreign tribunal, and (3) ⋅⋅⋅ the application [is] made by a foreign or international tribunal or ‘any interested person.’”

Each of these elements must be shown in a § 1782 application. Each raises unique issues.

A. District where a “person resides or is found”

The statutory language provides that a § 1782 discovery order may be issued by “[t]he district court of the district in which a person resides or is found.” The movant has the burden of establishing that the witness-to-be resides or is found in the district. Being “found” in the district is a lower level of contact than residence, and can be satisfied even if the person from whom the

---


discovery is to be taken (the “target”) is served with the subpoena while he is traveling through the district.\textsuperscript{13}

It is important to identify carefully the “person” from whom the discovery is sought, particularly in the case of related corporations of which only some might be “found” in the district. On the one hand, a parent corporation cannot be compelled to produce documents from a subsidiary merely because of their ownership affiliation.\textsuperscript{14} Similarly, an applicant under § 1782 cannot obtain discovery from a parent corporation simply by serving a demand on the subsidiary.\textsuperscript{15} On the other hand, the Federal Rules of Civil Procedure do apply in § 1782 cases by default, which means that the recipient of a subpoena must produce documents within its “possession, custody or control.”\textsuperscript{16} “Control” includes the “legal right to obtain documents on demand,”\textsuperscript{17} which means that, depending on the particular relationships and arrangements among corporate affiliates, it might be possible to obtain discovery from one by serving another. The burden of proving “control” in § 1782 cases, as in any discovery dispute, is on the person seeking discovery.\textsuperscript{18}

The requirement that the target of a § 1782 subpoena be a “person” precludes using § 1782 to obtain discovery from the United States or other sovereign government.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002).
\item Kestrel Coal Pty. Ltd. v. Joy Global Inc., 362 F.3d 401, 404-05 (7th Cir. 2004) (corporate entities must be considered separate for purposes of § 1782 discovery absent some reason to pierce the corporate veil).
\item Fed. R. Civ. P. 45(a)(1)(C).
\item Norex, supra, 284 F.Supp. 2d at 56, quoting Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984).
\item Norex, supra, 384 F.Supp. 2d at 56.
\item al-Fayed v. Central Intelligence Agency, 229 F.3d 272, 275 (D.C. Cir. 2000).
\end{enumerate}
\end{footnotesize}
B. Court may order target to “give his testimony or statement or to produce a document or other thing”

Nothing in the language of § 1782 suggests that the evidence obtained using that statute must be located in this country. The statute says only that a person who is found in the district can be required to give testimony or produce documents.

There is no dispute that a person who resides abroad can be served with a subpoena under § 1782. The court must acquire jurisdiction over him in accordance with due process – and mere service within the district suffices for this purpose.\(^{20}\) Any concerns about whether such a deposition would be unduly burdensome for the target can be addressed under the normal provisions the Federal Rules of Civil Procedure. Under Rule 45 and Rule 26(c), the district court may quash or modify the subpoena, or issue such orders as are necessary to protect the interests of the non-party, which is sufficient protection against abuse.\(^{21}\) Indeed, the Second Circuit has observed that, even if a witness resident abroad has been served properly with a subpoena under § 1782, actually taking the deposition might not be possible because of Rule 45’s strictures against inconveniencing witnesses by forcing them to travel far from their homes.\(^{22}\)

Whether § 1782 authorizes discovery of documents located outside the United States, however, remains an open question. The lower courts have split on the issue of whether a person served with a § 1782 subpoena can be required to produced documents maintained abroad. Although all the circuit courts that have considered the issue have expressed doubt as to whether a target can be compelled to produce documents located in other countries,\(^{23}\) none of those courts has

\(^{20}\) *Edelman*, supra, 295 F.3d at 175.

\(^{21}\) *Id.* at 179.

\(^{22}\) *Id.* at 181.

\(^{23}\) See, e.g., *Keerel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004); *Four Pillars Enters. Co., Ltd. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079-80 (9th Cir. 2002); *Edelman, supra*, 295 F.3d at 176-77; *In re Sarrio*, 119 F.3d 143, 147 (2d Cir. 1997).
squarely so held, and indeed several have taken pains to make clear that their decisions denying such
discovery were based on other grounds.24 Some of the legislative history for the 1964 amendments
to § 1782 indicates that the statute was aimed at obtaining evidence in the United States.25 One of
the main drafters of the statutory language, Professor Hans Smit of Columbia Law School, has
suggested that § 1782 should be limited to evidence in the United States, so that the American court
system will not become an alternative discovery forum for litigation in other countries.26 The courts
that have questioned whether § 1782 can reach documents kept in other countries have relied on
this legislative history and on Professor Smit’s statements.27 Nevertheless, the fact remains that
§ 1782 on its face does not require that the documents to be produced be located in the United
States; it requires only that the person from whom the testimony or documents are sought must
reside or be found in the United States.

The district courts have been wrestling with the issue inconclusively. Thus, for example, the
district court in Application of Gemeinschaftspraxis R. Med. Schottdorf,28 refused to quash a § 1782
subpoena served on the American consulting firm McKinsey. McKinsey had created an economic
report in Germany for the Bavarian Physicians Association. A medical laboratory that had sued the
Bavarian Physicians Association in Germany brought on a § 1782 application to compel McKinsey
to produce the report. The court refused to quash the subpoena served on McKinsey, and rejected

24 See, e.g., Kestrel, supra, 362 F.3d at 404; Four Pillars, supra, 308 F.3d at 1080; Sarrio, supra, 119 F.3d at

25 See S. Rep. No. 88-1580 (1964), reprinted in 1964 USCCAN 3782, 3788. See also the discussion in In re
Sarrio, 119 F.3d 143, 146 (2d Cir. 1997); Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 384 F.

26 Smit, American Assistance to Litigation in Foreign and International Tribunals: § 1782 of Title 28 of the U.S.C.

27 See cases cited supra, note 23.

McKinsey’s argument that § 1782 does not permit the district court to order production of material located overseas. The court reasoned that § 1782 on its face requires only that the person served with the subpoena be found in the United States, not that the items to be discovered also be located here.29

A different judge in the Southern District of New York had held in In re Sarrio30 in 1995 that § 1782 could not reach documents kept abroad. Although the Second Circuit disposed of the appeal in Sarrio on other grounds, its opinion expressed doubt that § 1782 could require production of documents located outside the United States.31 The district court in the District of Columbia in Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada32 discussed the issue at length and seemed to express agreement with the district court in Sarrio, but ultimately denied the § 1782 application before it on other grounds. Yet another judge in the Southern District of New York denied on discretionary grounds § 1782 discovery of overseas documents, but noted in a conclusory footnote his belief that “§ 1782 does not authorize discovery of documents held abroad.”33

But Intel may have changed things. The reasoning of Intel about the scope of the district court’s power relies almost entirely on the language of § 1782.34 The Court refused to infer limitations on the district court’s power that were not required by the statute. Instead it left most questions about the proper scope of discovery in any particular case to the district courts’ discretion.

31 In re Sarrio, 19 F.3d 143, 147 (2d Cir. 1997).
34 “The language of § 1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion” that the statute permits but does not require the discovery at issue in that case. Intel, 542 U.S. at 257.
This suggests that, because § 1782 on its face does not prohibit district courts from ordering targets to produce documents kept abroad, no such limitation can be inferred. Instead, the district court in any particular case may limit or prohibit such discovery consistent with the applicable discretionary factors. Of course, the answer will ultimately become clear as case law continues to develop.

As noted, § 1782 says that the Federal Rules of Civil Procedure provide the default rules for § 1782 discovery. But not all the discovery tools of the Federal Rules of Civil Procedure can be used. The express terms of § 1782 permit the district court only to require a person to “give his testimony or statement or to produce a document or other thing.” As a result, one court has held that § 1782 does not permit service of interrogatories. By the same logic, § 1782 should not authorize requests for admissions, either.

C. Discovery should be “for use in a proceeding in a foreign or international tribunal”

1. “Proceeding in a foreign or international tribunal”

Intel established that § 1782 permits discovery in the United States not only in connection with court cases but also in connection with regulatory and administrative proceedings. Before Intel, the Second Circuit held in National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc. that § 1782 did not permit discovery in aid of proceedings in a privately sponsored arbitral tribunal. According to the Second Circuit, § 1782 was designed to aid only governmentally sponsored tribunals, irrespective of whether they were courts, agencies, government-sponsored arbitration forums or arbitral forums created by intergovernmental agreement. Intel, however, cited with approval Professor Smit’s

36 Intel, 542 U.S. at 257-58.
statement that “[t]he term ‘tribunal’ … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”\textsuperscript{38} Does this reference to “arbitral tribunals” include privately-created arbitration panels?

It is not clear. In \textit{In re Oxus Gold PLC},\textsuperscript{39} a post-\textit{Intel} case, the District of New Jersey granted a § 1782 application seeking to obtain evidence for use in an arbitration pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”). In granting the application, the court held that because the arbitration was pursuant to UNCITRAL – that is, an intergovernmental agreement – an order under § 1782 could issue under the rule of \textit{National Broadcasting}. The Northern District of Georgia, however, rejected this reasoning in its December 2006 decision in \textit{In re Roz Trading Ltd}.\textsuperscript{40} In that court’s view, \textit{Intel} fatally undermined \textit{National Broadcasting}. According to the \textit{Roz} court, the issue under § 1782 is whether the proceeding in question is before a “tribunal,” not whether the tribunal has government sponsorship. Thus, “[w]here a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of ‘tribunal,’ the reasoning of \textit{Intel}, and the scope of § 1782(a), regardless of whether the body is governmental or private.”\textsuperscript{41}

Before the Second Circuit decision in \textit{National Broadcasting, supra}, one case in the Southern District of New York had held that § 1782 requests could be made in support of private arbitration overseas, but only with the approval of the arbitrators.\textsuperscript{42} This is also Professor Smit’s position.\textsuperscript{43}


\textsuperscript{41} \textit{Id.}, slip op. at 6.

A foreign insolvency proceeding can be a “proceeding” for § 1782 purposes if it serves an adjudicative function such as ruling on allowance of claims. But if adjudication is finished already and the insolvency proceeding merely is enforcing a judgment, there is no “proceeding” for § 1782 purposes.

2. “For use in” foreign tribunal

*Intel* established that discovery under § 1782 is permissible even if a dispute is not pending or imminent, so long as it is within “reasonable contemplation.” *Intel* established as well that evidence is discoverable under § 1782 even if it would not be discoverable in the foreign tribunal. But *Intel* did not address the degree to which the evidence sought must be connected to the foreign proceeding. At what point is evidence sought too remote to be deemed “for use in” the foreign tribunal?

---


46 *Intel*, 542 U.S. at 259.

47 *Id.* at 259-62.

48 Before *Intel*, the Second Circuit rule was that § 1782 discovery could be taken only for a proceeding that was pending or imminent. In 1998, the Second Circuit held in *Euromepa, S.A. v. R. Esmerian*, 154 F.3d 24 (2d Cir. 1998) that § 1782 discovery could not be authorized where the movant was seeking the discovery to obtain evidence for a motion to reopen a foreign case based on newly discovered evidence. It is unclear whether this remains good law after *Intel*, or whether the courts would instead hold that a motion to reopen a case based on newly discovered evidence is a proceeding “within reasonable contemplation” under *Intel*. 
The key is not admissibility: evidence may be sought “for use in” a foreign proceeding whether or not the evidence would ultimately be admissible in the foreign tribunal.\(^{49}\) Admissibility and “use” are not coterminous concepts for purposes of § 1782.

Although “for use in” does not require that the evidence sought be either discoverable or admissible in the foreign tribunal, it is not precisely clear how to tell when discovery is “for use in” a foreign legal dispute under § 1782. One recent case looked to § 1782’s incorporation of the Federal Rules of Civil Procedure to supply the definition: “[T]he reference to the Federal Rules signals to the courts that discovery may be as broad and liberal as the Federal Rules allow. . . . ‘[F]or use in’ mirrors the requirements in Federal Rule of Civil Procedure 26(b)(1) and means discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action.”\(^{50}\)

Some cases have held that discovery is for use in the foreign proceeding if the requesting party intends to offer it, whether or not the foreign tribunal ultimately accepts it into evidence.\(^{51}\) In one case that sought evidence for use in France, the target expressed concern that the movant would examine documents it might not offer into evidence, which would be contrary to French discovery rules. The Second Circuit held that this concern was no reason to deny § 1782 discovery, because any problems with § 1782 discovery could be addressed by tailoring the discovery to the particular


\(^50\) *Fleischmann v. McDonald’s Corp.*, __ F. Supp. 2d __, 2006 WL 3530582, slip op. at 7 (N.D. Ill. Dec. 6, 2006). *See also In re Bayer AG*, 146 F.3d 188, 195 (3d Cir.1998) (“Consistent with the statute’s modest prima facie elements and Congress’s goal of providing equitable and efficacious discovery procedures, district courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.”).

situation. In that case, the Second Circuit observed that the district court retained the power to order the movant to submit to the French court all the evidence it obtained in the United States, whether it helped the movant’s case or hindered it. 52

The thrust of § 1782 thus is strongly in favor of granting discovery. As the Third Circuit put it in In re Bayer AG: 53

The reference in § 1782 to the Federal Rules suggests that under ordinary circumstances the standards for discovery under those rules should also apply when discovery is sought under the statute. Consistent with the statute's modest prima facie elements and Congress's goal of providing equitable and efficacious discovery procedures, district courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.

The foreign tribunal remains free, of course, to decline any evidence it deems inappropriate, so § 1782 discovery is unlikely to cause serious disruption to foreign legal proceedings. 54 For that reason, § 1782 discoverability standards are not overly restrictive. To the extent there may be comity concerns involving public policies of jurisdictions, those would be addressed in the case by case exercise of the district court’s discretion rather than by reading restrictions into the statute.

D. Request made by foreign tribunal pursuant to a letter rogatory, “or upon the application of any interested person”

52 Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101-02 (2d Cir. 1995).

53 146 F.3d 188, 195 (3d Cir.1998).

54 See Euromepa, supra, 51 F.3d at 1101 (“France can quite easily protect itself from the effects of any discovery order by the district court that inadvertently offended French practice.”).
Section 1782 gives standing to foreign tribunals and to “any interested person” to seek discovery in the United States. When a foreign tribunal seeks discovery by letters rogatory, there isn’t much dispute about their standing to seek the assistance of the federal court. “Interested persons” are a different story.

There is no dispute that a party to a foreign litigation is an “interested person.” And Intel clarified that an “interested person” entitled to apply for § 1782 discovery need not be a formal party to the foreign case. But if a § 1782 applicant need not be a party, what relationship must the applicant have to the foreign dispute in order to have standing under § 1782? The criterion suggested by Professor Smit -- a person with “a reasonable interest in obtaining the assistance” -- is too vague to be useful.

In Intel, AMD was held to have standing because it had the ability under EC law to submit evidence to the D-G and to seek judicial review if the EC dismissed the complaint against Intel or dropped the investigation. In certain countries, relatives of accident or crime victims have the ability to appeal certain court decisions concerning their family members and to offer new evidence on the appeal. That is enough to confer standing on the relative. A person seeking to be appointed administrator of an estate overseas is an “interested person.” Prosecutor’s offices

---

55 Intel, supra, 542 U.S. at 255-57.
56 See Intel, supra, 542 U.S. at 256-57 (quoting Smit, supra note 26, at 1027).
57 Intel, 542 U.S. at 256.
58 See, e.g., al-Fayed v. Central Intelligence Agency, 229 F.3d 272 (D.C. Cir. 2000) and al-Fayed v. United States, 210 F.3d 421 (4th Cir. 2000), both of which assumed without discussion that Mohammed al-Fayed had standing to seek § 1782 discovery to assist in his appeal from the French investigation of his son’s death in the Paris car accident in which Diana, former Princess of Wales, was also killed.
59 Application of Esses, 101 F.3d 873, 875-76 (2d Cir. 1996).
conducting criminal investigations are “interested persons” under § 1782.\textsuperscript{60} It appears, therefore, that a person who has some right to participate in submitting evidence to the overseas tribunal is an “interested person” with standing to apply for § 1782 discovery.

Interestingly, one recent case held that, because the parent company of a party to an international arbitration had an economic interest in the outcome of the arbitration, the parent company was an “interested person” with standing to seek discovery under § 1782.\textsuperscript{61}

III. DISCRETIONARY CONSIDERATIONS

If the statutory prerequisites for a § 1782 application are met, then the district court “may” order discovery. The Supreme Court in \textit{Intel} identified several factors to guide a district court’s discretion in deciding whether to authorize the discovery. Many were already in wide currency in the lower courts even before \textit{Intel}.

A. Whether the target is before the foreign tribunal

The first \textit{Intel} factor is whether the person from whom discovery is sought is already before the overseas tribunal. In such a case, \textit{Intel} reasoned, the overseas tribunal is able to compel the target to produce evidence in accordance with the tribunal’s own discoverability and evidentiary rules, so there is less need for § 1782 discovery.\textsuperscript{62}

\textsuperscript{60} \textit{In re Letters Rogatory from Tokyo Dist. Prosecutor’s Office, Tokyo, Japan}, 16 F.3d 1016 (9th Cir. 1994); \textit{In re Letter of Request from Crown Prosecution Service of United Kingdom}, 870 F.2d 686 (D.C. Cir. 1989)

\textsuperscript{61} \textit{In re Oxus Gold PLC}, 2006 WL 2927615, slip op. at 7 (D.N.J. Oct. 11, 2006).

\textsuperscript{62} As \textit{Intel} put it:

First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .
1. **Who is the “real” target?**

To apply this factor it is necessary to identify carefully which person is before the foreign forum and from which person discovery is sought. One court seems to have reformulated this factor in a recent case: “[t]he relevant issue is whether the evidence is available to the foreign tribunal” rather than whether the person from whom it was sought is before the foreign tribunal.\(^{63}\) Strictly speaking this is **not** accurate: as noted, *Intel* focused specifically on whether the **target** was before the foreign court, not whether the foreign court had the ability to obtain the evidence.\(^{64}\) (It appears that this court was peeved at what it perceived as overreaching by the applicant, Microsoft Corporation. This opinion is discussed in further detail below.) This is not to say that the foreign tribunal’s ability to obtain evidence is not relevant. Part of the district court’s role in supervising discovery under Rules 26(b) and 26(c) is to fashion procedures for reducing duplication, expenses and annoyance. In issuing such supervisory orders, the court may consider whether the evidence is available in the overseas forum.\(^{65}\)

Other case law that applies the first *Intel* factor holds that discovery of a party’s bank records from the bank is not the same as discovery of the party.\(^{66}\) Although a party presumably is in possession of its own bank records, so that the records are available to the foreign tribunal, that does not trigger the first *Intel* factor. Similarly, where a subsidiary is a party to the foreign proceeding, the parent corporation is deemed a separate person for purposes of the discretionary

---

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

\(^{63}\) *In re Microsoft Corp.*, 428 F. Supp.2d 188, 194 (S.D.N.Y. 2006).

\(^{64}\) See footnote 61, supra.

\(^{65}\) See, e.g., *Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992).

analysis under the first *Intel* factor. On the other hand, seeking § 1782 discovery from a party’s American lawyers can be tantamount to seeking the discovery from the party itself.

2. **Flexible application of the first factor**

A number of appellate decisions before *Intel* permitted § 1782 discovery of a party to the foreign dispute. Some of these cases were not concerned about the fact that discovery would also be proceeding in the foreign courts. Instead, they relied on the district courts to supervise the § 1782 discovery to prevent abuses.

Even in the time since *Intel*, the first *Intel* factor has not been applied as an inflexible rule. There may be good reasons to permit § 1782 discovery even if the person from whom the evidence is sought is participating in the foreign litigation. Two recent cases illustrate the point. In *Application of the Procter & Gamble Company* (“P&G”), Kimberly-Clark (“KC”) sued P&G in five countries to redress alleged infringement of KC’s disposable diaper patent. P&G’s defense was based on res judicata in one country and invalidity of KC’s patent in all five. P&G sought § 1782 discovery from KC in the United States to help establish its defenses in the UK, France, Netherlands, Germany and Japan.

---


68 *Schmitz v. Bernstein Liebhard & Lifshitz*, 376 F.3d 79, 85 (2d Cir. 2004) (although § 1782 discovery was sought from law firm, “for all intents and purposes petitioner are seeking discovery from . . . their opponent in the German litigation.”)

69 E.g., *Application of Metallgesellschaft AG*, 121 F.3d 77 (2d Cir. 1997); *Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985).

70 See *Metallgesellschaft*, supra, 121 F.3d at 79-80; *Malev*, supra, 964 F.2d at 102.

71 334 F. Supp.2d 1112 (E.D. Wis. 2004)
Relying on *Intel*, KC argued that because it and P&G were parties in each of the five foreign actions, there is no reason to use § 1782 discovery. Instead, KC said, discovery in each of the five cases should be supervised by the five courts in accordance with each country’s respective procedures and laws. The district court granted the discovery even though KC was a party to each of the foreign litigations, primarily so that discovery could be done once rather than five times. The court was confident that relevance, discoverability and public policy issues could be adequately addressed in each of the foreign courts as necessary. The court was also confident that it could adequately protect KC’s confidential material even in the face of doubts as to whether French or German courts would respect confidentiality agreements. The court believed it had adequate tools available under Rule 26 of the Federal Rules of Civil Procedure to provide whatever protection was necessary. So *P&G* shows that efficiency considerations may counsel in favor of a § 1782 order even when sought against a party to the overseas dispute.

In *Application of Servicio Pan Americano de Proteccion*,72 HSBC Bank sued Pan Americano in Venezuela for the loss of $5.6 million in American funds that Pan Americano was hired to transport from HSBC to several banks in Venezuela. Under Venezuelan law, HSBC could not sue for its loss to the extent it recovered for the loss from its insurance. But Venezuelan civil procedure rules did not allow Pan Americano to obtain the insurance documents unless it had evidence that specific documents existed. That meant Pan Americano could not establish its defense in Venezuela under Venezuelan procedural rules. So Pan Americano sought a § 1782 order in the United States to discover HSBC’s insurance claims in connection with the loss.

Even though both Pan Americano and HSBC were before the Venezuelan courts, the district court viewed the very unavailability of the insurance-related documents under Venezuelan procedural rules as a factor in favor of allowing the § 1782 discovery. The court seemed to apply a

---

“need” standard: since Pan Americano said it needs the HSBC insurance documents to establish its defense and cannot get those documents elsewhere, the discovery is appropriate. The court did not view this as a circumvention of the Venezuelan courts. In the court’s view, the evidence would be helpful to the Venezuelan courts, and it was only “for purely technical reasons” that the discovery could not be ordered there. This case seems to imply that “need plus unavailability in the primary forum” suffices to warrant § 1782 discovery even though the target is subject to foreign court supervision. If that were so, the first Intel factor would have little force.

B. Nature of foreign tribunal and proceedings; receptivity to US help

The Supreme Court explained the second discretionary factor as follows:

Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. Further, the grounds Intel urged for categorical limitations on § 1782(a)’s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.73

This factor breaks into two sets of considerations. The first – “nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance” -- speaks to the institutional and policy concerns of the foreign court. The second – “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States” – speaks to the specific case.

73 Intel, 542 U.S. at 264-65.
a. **Institutional and policy considerations**

Gauging the foreign court’s receptivity to evidence gathered in an American court under § 1782 does not require an analysis of foreign law. To the contrary, the Second Circuit decried “battle-by-affidavit of international legal experts,” and has cautioned, “it is unwise – as well as in tension with the aim of § 1782 – for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law.”

Instead, courts should err on the side of allowing discovery, and refuse to order § 1782 discovery only where there is “authoritative proof” that § 1782 assistance will be unwelcome. Such proof should be “embodied in a forum country’s judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures.” It should be obvious that this sort of proof -- such as “explicit pronouncements by courts allowing or enjoining discovery in foreign jurisdictions” -- will usually not be forthcoming. Indeed, a foreign country’s receptiveness to U.S. assistance in obtaining evidence can be inferred from its having entered into “treaties facilitating such cooperation.”

This rule makes some sense because the parties to the foreign dispute remain subject to the foreign tribunal’s supervision. That forum may make such orders as it deems necessary to protect

---


76 Euromepa, supra, 51 F.3d at 1100.

77 In re Esse, supra, 101 F.3d at 377, citing Euromepa, supra, 51 F.3d at 1100 n.3.

its interests and policies. If it wishes to exclude evidence it can do so, and if it wishes to discipline a party for seeking evidence abroad, it can do that, too. On the other hand, as Intel noted, even if the evidence produced in the United States would not be discoverable in the foreign forum, that forum might nonetheless welcome the evidence. As an example, Intel cited to a decision of the House of Lords that accepted evidence gathered under § 1782 that would not have been discoverable in the United Kingdom. The Supreme Court observed:

>A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts. A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a).\(^79\)

Thus, any questions about whether § 1782 discovery may be inappropriate due to foreign institutional or policy concerns should generally be resolved in favor of allowing the discovery, subject to district court supervision.\(^80\)

Presuming that a foreign court is receptive to federal court help relieves the federal court of having to immerse itself in foreign law and procedure. This is further consistent with the rule that materials can be discovered under § 1782 whether or not they would be admissible or discoverable in the foreign tribunal. Basically, the federal court in applying § 1782 only facilitates getting the evidence; it defers to the foreign tribunal to decide on whether and how the evidence can be used.

b. **Factors relevant to the particular case**

---

\(^79\) *Intel*, 542 U.S. at 261-62. *Accord Bayer*, supra, 146 F.3d at 194 (“[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use.”); Smit, supra note 26, 235-236. *See also Eurompea*, supra, 51 F.3d at 1100 n.3.

\(^80\) *See, e.g., Metallgesellschaft*, supra, 121 F.3d at 80.
Although the presumption is that the foreign court will be receptive to American court assistance, that presumption can be overcome in any particular case. A court presented with a § 1782 application can and should consider the context in which the request is being made. A person who tries to use § 1782 to circumvent the foreign court or engage in some form of sharp practice may find his application rejected. The court also should consider what the foreign court or government has to say about the particular § 1782 application.

i. Foreign tribunal or governmental input. In *Intel* itself, after remand the district court denied the discovery AMD was seeking for use in the antitrust investigation of Intel. The EC’s position was that it neither wanted nor needed the evidence AMD was seeking and, moreover, that “granting the AMD’s § 1782(a) request would jeopardize ‘vital Commission interests.”’

The Second Circuit upheld denial of a § 1782 application in *Schmitz v. Bernstein Liebhard & Lifshitz*. In that case, allegations of securities fraud had led to class actions against Deutsche Telekom (“DT”) in both Germany and the United States, as well as to a criminal investigation by the public prosecutor in Bonn, Germany. The German plaintiffs then applied to the district court in the United States for an order under § 1782, to compel the attorneys in the American class action to turn over the DT documents that had been produced subject to a protective order in the American class action.

DT’s attorneys had filed with the district court letters from the German prosecutors and the German federal government, which advised the district court that in their view, making the documents available to the German plaintiffs would interfere with German rules on access to evidence in criminal cases and would jeopardize German sovereign rights. Moreover, the German plaintiffs had already once asked the German court for access to the documents and been denied (though the

---


82 376 F.3d 79 (2d Cir. 2004)
German authorities did say that access might be granted at some future date). Therefore, in the Second Circuit’s view, the “twin aims” of the statute -- to assist courts and litigants, and to encourage other countries to provide similar assistance to American courts and litigants – would not have been promoted by granting the § 1782 motion, because the German justice system considered the discovery request to be neither helpful nor conducive to comity. The evidence presented as to the German authorities’ position was the sort of “authoritative proof” that would overcome the presumption that foreign courts would be receptive to the evidence being sought.

ii. **Conduct of applicant.** Courts also deny § 1782 applications where it is clear that the applicant is trying to circumvent actual or potential adverse rulings of the foreign tribunal. That was certainly the case in *Intel*. It was also true in *Schmitz*. In another example, three different courts denied § 1782 applications by Microsoft Corporation that sought to discover evidence that the European antitrust authorities had obtained or were seeking from IBM, Novell, Sun Microsystems, Oracle and others. Microsoft’s requests to the antitrust authorities for much of those materials were still pending in Europe. In one of the cases, the EC had specifically advised the district court that it was not receptive to § 1782 assistance and that such “assistance” would interfere with Commission policy and confidentiality rules. All three § 1782 applications were denied.

Asking the foreign court for discovery and being refused can be fatal to a subsequent § 1782 application. Thus, in *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, the Australian judge before whom the

---

83 Id. at 384-85.


86 362 F.3d 401 (7th Cir. 2004).
underlying case was pending had ruled that, on the state of the record then before him, Kestrel did not need certain documents to establish its case. When Kestrel’s subsequent § 1782 application for discovery of the same documents came before the Seventh Circuit, the court denied it: “If, as Justice Muir concluded, Kestrel does not need these documents to make out its claim, then no purpose would be served by their production in the United States under § 1782. If, however, the documents become important later, the most sensible recourse is a renewed application to the Australian court, just as Justice Muir contemplated.” 87 Successive § 1782 applications in different US courts fare no better. 88

A prior denial has less force if the reason the foreign court declined to order the requested discovery was doubts about its power to do so. Thus, in John Deere Ltd. v. Sperry Corp. 89, the Third Circuit permitted § 1782 depositions of two witnesses for use in a Canadian lawsuit. The Canadian court had actually permitted the deposition of one and declined to order the deposition of the second because he was not high enough in the corporate hierarchy to warrant a deposition under Canadian discovery rules. Nevertheless, the Third Circuit held a § 1782 deposition was appropriate.

Interestingly, there had been litigation before Intel in which targets argued that the § 1782 applicant should be required first to seek the discovery in the forum before seeking discovery under § 1782. This “exhaustion” requirement was rejected. 90 As matters turn out, an applicant for § 1782 relief is actually better off asking for § 1782 assistance before seeking the evidence in discovery in the forum court: were it to make such a request or, worse, make such a request and be denied, a

87 Id. at 406.
88 Four Pillars Enters. Co., Ltd. v. Avery Dennison Corp., 308 F.3d 1075 (9th Cir. 2002)
89 754 F.2d 132, 138 (2d Cir. 1985)
90 See, e.g., Bayer, supra, 143 F.3d at 196; Euromepa, supra, 51 F.3d at 1098; Application of Metallgesellschaft AG, 121 F.3d 77, 79 (2nd Cir. 1997) Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (2nd Cir. 1992).
subsequent § 1782 application would be vulnerable to attack on the grounds that it was an attempt to circumvent proceedings abroad, as in *Kestrel* and *Microsoft*.

Although *Intel* rejected any requirement that discovery sought under § 1782 must be permissible under the law of the foreign forum, discoverability in the foreign forum is not irrelevant to § 1782. One of the factors a district court may consider in tailoring a § 1782 order is the extent to which the § 1782 discovery would otherwise be permissible in the foreign tribunal. The district court may craft an order that will prevent duplication or harassment. Similarly, the district court can limit or deny discovery if the court concludes that the applicant is on a fishing expedition or otherwise is behaving vexatiously.\textsuperscript{91}

\section*{C. Overbreadth and burden}

Because discovery under § 1782 is governed by the Federal Rules of Civil Procedure unless the court orders otherwise, the district court retains all of its power under Rules 26 and 37 to control the scope of discovery and to prevent abuse. Thus, courts will scrutinize § 1782 subpoenas for relevance by applying the normal Rule 26 relevance standards, and will narrow them if need be.\textsuperscript{92} Courts also may impose confidentiality on documents produced,\textsuperscript{93} or may require papers (including the § 1782 petition) to be filed under seal.\textsuperscript{94} By the same token, the court may reject proposed limits on the scope of discovery where such limits are not called for.\textsuperscript{95}

\begin{footnotesize}
\begin{enumerate}
\item See *Metallgesellschaft*, supra, 121 F.3d at 79; *Trinidad and Tobago*, supra, 848 F.2d at 1156.
\item See, e.g., *Bayer*, supra, 146 F.3d at 196 (district court on remand should consider “appropriate measures, if needed, to protect the confidentiality of materials”); *Application of Gemeinschaftspraxis R. Med. Schottdorf*, 2006 WL 3844464, no. M19-88, slip op. at 8 (S.D.N.Y. Dec. 29, 2006); *Application of the Procter & Gamble Company*, 334 F. Supp.2d 1112, 1117 (E.D. Wis. 2004).
\end{enumerate}
\end{footnotesize}
In one case, a target requested that the district court prohibit the applicant from using the proposed § 1782 discovery as a basis for making claims against the target unless there was independent evidence of wrongdoing. The district court refused to impose such a limitation. In other cases, § 1782 motions were opposed on the theory that the § 1782 applicant would be able to obtain broader discovery than the other party to the foreign litigation. Of course, if the other party could seek discovery under § 1782 as well, this is not an issue. But even where it is an issue, if the district court is concerned about a discovery imbalance between the litigants in the foreign dispute, it has the ability, if need be, to condition its grant of § 1782 discovery on a reciprocal exchange of information. The court need not insist on reciprocal discovery, though -- the case law is quite clear that § 1782 is a one-way street, in which American federal courts assist foreign tribunals while asking nothing in return -- and it is quite legitimate for the district court to decline the burden of supervising reciprocal discovery.

IV. OTHER ISSUES

By the express terms of § 1782, “[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.” Thus, privilege is a legitimate basis for objecting to § 1782 discovery. Because § 1782 proceedings

---

96 Id.
97 Procter & Gamble, supra, 334 F. Supp.2d at 1117.
98 Intel, supra, 542 U.S. at 262; Bayer, supra, 146 F.3d at 193; Metallogesellschaft, supra, 121 F.3d at 80; In re Esses, supra, 101 F.3d at 876; Euromepa, supra, 51 F.3d at 1102.
99 See, e.g., Euromepa, supra, 51 F.3d at 1097; Application of Gianoli Aldunate, 3 F.3d 54, 59 (2nd Cir. 1993).
100 Gianoli Aldunate, supra, 3 F.3d at 59.
are federal question cases, a “legally applicable privilege” is one protected by federal law.\textsuperscript{101} That means state statutes such as “reporter’s shield laws” do not apply, though related First Amendment considerations might come into play.\textsuperscript{102} Attorney-client privilege does apply.\textsuperscript{103}

Where the applicant previously sought the same documents under the Freedom of Information Act and production was denied, a district court may reasonably refuse a later § 1782 application.\textsuperscript{104} National security also may be a legitimate basis for denying § 1782 discovery.\textsuperscript{105}

An order granting or denying a § 1782 application is final for purposes of appeal.\textsuperscript{106}

\*\*\*

\textsuperscript{101} See, e.g., \textit{McKevitt v. Pallasch}, 339 F.3d 530, 533 (7th Cir. 2003).

\textsuperscript{102} \textit{Id.} at 533; \textit{In re Oric}, 2004 WL 2980648 (N.D. Ill. Dec. 23, 2004).

\textsuperscript{103} See, e.g., \textit{In re Sarrio}, 119 F.3d 143 (2d Cir. 1997).

\textsuperscript{104} \textit{al-Fayed v. United States}, 210 F.3d 421, 424-25 (4th Cir. 2000).

\textsuperscript{105} \textit{Id.} at 425.

\textsuperscript{106} \textit{Kestrel Coal}, supra, 362 F.3d at 403.
# Table of Contents

I. **Background: Intel v. AMD and 28 USC § 1782** ................................................................. 1

II. **Statutory Prerequisites** ........................................................................................................ 5
   A. District where a “person resides or is found” ........................................................................ 5
   B. Court may order target to “give his testimony or statement or to produce a document or other thing” ........................................................................................................... 7
   C. Discovery should be “for use in a proceeding in a foreign or international tribunal” 10
      1. “Proceeding in a foreign or international tribunal” ............................................................ 10
      2. “For use in” foreign tribunal ............................................................................................ 12
   D. Request made by foreign tribunal pursuant to a letter rogatory, “or upon the application of any interested person” .................................................................................. 14

III. **Discretionary Considerations** ............................................................................................ 16
   A. Whether the target is before the foreign tribunal ................................................................. 16
      1. Who is the “real” target? ...................................................................................................... 17
      2. Flexible application of the first factor ............................................................................... 18
   B. Nature of foreign tribunal and proceedings; receptivity to US help ................................. 20
      a. Institutional and policy considerations .............................................................................. 21
      b. Factors relevant to the particular case ............................................................................... 22
         i. Foreign tribunal or governmental input ........................................................................... 23
         ii. Conduct of applicant ...................................................................................................... 24
   C. Overbreadth and burden ....................................................................................................... 26

IV. **Other Issues** ...................................................................................................................... 27
Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters
(In the relations between the Contracting States, this Convention replaces Articles 8 to 16 of the Conventions on civil procedure of 1905 and 1954)

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

(Concluded 18 March 1970)
(Entered into force 7 October 1972)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I – LETTERS OF REQUEST

Article 1
In civil or commercial matters a judicial authority of 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 a Letter of Request, to obtain evidence, or to perform some other judicial act.
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.

Article 2
A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.
Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3
A Letter of Request shall specify-
\( a) \) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
\( b) \) the names and addresses of the parties to the proceedings and their representatives, if any;
\( c) \) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
\( d) \) the evidence to be obtained or other judicial act to be performed.
Where appropriate, the Letter shall specify, \textit{inter alia} –
\( e) \) the names and addresses of the persons to be examined;
\( f) \) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are
to be examined;
g) the documents or other property, real or personal, to be inspected;
h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
i) any special method or procedure to be followed under Article 9.
A Letter may also mention any information necessary for the application of Article 11.
No legalization or other like formality may be required.

Article 4
A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.
Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.
A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.
A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.
Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5
If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6
If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7
The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8
A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9
The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.
However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.
A Letter of Request shall be executed expeditiously.

**Article 10**
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.

**Article 11**
In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

**Article 12**
The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution 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.

**Article 13**
The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

**Article 14**
The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature. Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

**CHAPTER II – TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS**

**Article 15**
In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if
permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16
A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17
In civil or commercial matters, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State, if –

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18
A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19
The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, inter alia, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20
In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21
Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence –

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22
The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES
Article 23
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.

Article 24
A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority. Federal States shall be free to designate more than one Central Authority.

Article 25
A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26
A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27
The provisions of the present Convention shall not prevent a Contracting State from –
a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
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 28
The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –
a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
b) the provisions of Article 4 with respect to the languages which may be used;
c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
f) the provisions of Article 14 with respect to fees and costs;
g) the provisions of Chapter II.

Article 29
Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30
The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31
Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32
Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33
A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted. Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal. When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34
A State may at any time withdraw or modify a declaration.

Article 35
A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25. A Contracting State shall likewise inform the Ministry, where appropriate, of the following –
a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.
Article 36
Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37
The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law. It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38
The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37. The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39
Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession. The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40
Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned. At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands. The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41
The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently. If there has been no denunciation, it shall be renewed tacitly every five years. Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period. It may be limited to certain of the territories to which the Convention applies. The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.
Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.
Relevant Provisions from the Code of Federal Regulations
§ 92.42 Certification of copies of foreign records relating to land titles.

In certifying documents of the kind described in title 28, section 1742, of the United States Code, diplomatic and consular officers of the United States will conform to the Federal procedures for authenticating foreign public documents (§92.39), unless otherwise instructed in a specific case.

§ 92.43 Fees for notarial services and authentications.

The fees for administering an oath or affirmation and making a certificate thereof, for the taking of an acknowledgment of the execution of a document and executing a certificate thereof, for certifying to the correctness of a copy of or an extract from a document, official or private, for authenticating a foreign document, or for the noting of a bill of exchange, certifying to protest, etc., are as prescribed under the caption Documentary services in the Schedule of Fees (§22.1 of this chapter), unless the service is performed under a “no fee” item of the same caption of the Schedule. If an oath or affirmation is administered concurrently to several persons and only one consular certificate (jurat) is executed, only one fee is collectible. If more than one person joins in making an acknowledgment but only one certificate is executed, only one fee shall be charged.

[22 FR 10858, Dec. 27, 1957, as amended at 63 FR 6480, Feb. 9, 1998]

DEPOSITIONS AND LETTERS ROGATORY

§ 92.49 “Deposition” defined.

A deposition is the testimony of a witness taken in writing under oath or affirmation, before some designated or appointed person or officer, in answer to interrogatories, oral or written. (For the distinction between a deposition and an affidavit see §92.22.)

§ 92.50 Use of depositions in court actions.

Generally depositions may be taken and used in all civil actions or suits. In criminal cases in the United States, a deposition cannot be used, unless a statute has been enacted which permits a defendant in a criminal case to have a deposition taken in his own behalf, or unless the defendant consents to the taking of a deposition by the State for use by the prosecution. (For exception in connection with the proving of foreign documents for use in criminal actions, see §92.65.)

§ 92.51 Methods of taking depositions in foreign countries.

Rule 28(b) of the Rules of Civil Procedure for the District Courts of the United States provides that depositions may be taken in foreign countries by any of the following four methods:

(a) Pursuant to any applicable treaty or convention, or

(b) Pursuant to a letter of request (whether or not captioned a letter rogatory), or

(c) On notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, Notarizing officials as defined by 22 CFR 92.1 are so authorized by the law of the United States, or
(d) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony.

[60 FR 51722, Oct. 3, 1995]

§ 92.52 “Deposition on notice” defined.

A deposition on notice is a deposition taken before a competent official after reasonable notice has been given in writing by the party or attorney proposing to take such deposition to the opposing party or attorney of record. Notarizing officers, as defined by 22 CFR 92.1, are competent officials for taking depositions on notice in foreign countries (see §92.51). This method of taking a deposition does not necessarily involve the issuance of a commission or other court order.

[60 FR 51722, Oct. 3, 1995]

§ 92.53 “Commission to take depositions” defined.

A commission to take depositions is a written authority issued by a court of justice, or by a quasi-judicial body, or a body acting in such capacity, giving power to take the testimony of witnesses who cannot appear personally to be examined in the court or before the body issuing the commission. In Federal practice, a commission to take depositions is issued only when necessary or convenient, on application and notice. The commission indicates the action or hearing in which the depositions are intended to be used, and the person or persons required to take the depositions, usually by name or descriptive title (see §92.55 for manner of designating notarizing officers). Normally a commission is accompanied by detailed instructions for its execution.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.54 “Letters rogatory” defined.

In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act. Examples are requests for the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment. In United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining evidence. Requests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity. The legal sufficiency of documents executed in foreign countries for use in judicial proceedings in the United States, and the validity of the execution, are matters for determination by the competent judicial authorities of the American jurisdiction where the proceedings are held, subject to the applicable laws of that jurisdiction. See §92.66 for procedures in the use of letters rogatory requesting the taking of depositions in foreign jurisdictions.

§ 92.55 Consular authority and responsibility for taking depositions.

(a) Requests to take depositions or designations to execute commissions to take depositions. Any United States notarizing officer may be requested to take a deposition on notice, or designated to execute a commission to take depositions. A commission or notice should, if possible, identify the officer who is to take depositions by his official title only in the following manner: “Any notarizing officer of the United States of America at (name of locality)”. The notarizing officer responsible for the performance of notarial acts at a post should act on a request to take a deposition on notice, or should execute the commission, when the documents are drawn in this manner, provided local law does not preclude such action. However, when the officer (or officers) is designated by name as well as by title, only the officer (or officers) so designated may take the depositions. In either instance, the officer must be a disinterested party. Rule 28(c) of the Rules of Civil Procedure for the district courts of the United States prohibits the taking of a deposition before a person who is a relative, employee, attorney or counsel of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.

(b) Authority in Federal law. The authority for the taking of depositions,
§ 92.56 Summary of procedure for taking depositions.

In taking a deposition on notice or executing a commission to take depositions, a notarizing officer should conform to any statutory enactments on the subject in the jurisdiction in which the depositions will be used. He should also comply with any special instructions which accompany the request for a deposition on notice or a commission. Unless otherwise directed by statutory enactments or special instructions, the officer should proceed as follows in taking depositions:

(a) Request the witnesses, whose testimony is needed, to appear before him; or, at the request of any party to the action or proceeding, request designated persons to supply him or the requesting party with needed records or documents in their possession, or copies thereof;

(b) When necessary, act as interpreter or translator, or see that arrangements are made for some qualified person to act in this capacity;

(c) Before the testimony is taken, administer oaths (or affirmations in lieu thereof) to the interpreter or translator (if there is one), to the stenographer taking down the testimony, and to each witness;

(d) Have the witnesses examined in accordance with the procedure described in §§ 92.57 to 92.60;

(e) Either record, or have recorded in his presence and under his direction, the testimony of the witnesses;

(f) Take the testimony, or have it taken, stenographically in question-and-answer form and transcribed (see § 92.58) unless the parties to the action agree otherwise (rules 30(c) and 31(b), Rules of Civil Procedure for the District Courts of the United States);

(g) Be actually present throughout the examination of the witnesses, but recess the examination for reasonable periods of time and for sufficient reasons;

(h) Mark or cause to be marked, by identifying exhibit numbers or letters, all documents identified by a witness or counsel and submitted for the record.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]
oral examination of a witness, the parties notified of the taking of a deposition may transmit written interrogatories to the notarizing officer. The notarizing officer should then question the witness on the basis of the written interrogatories and should record the answers verbatim. (Rules 30 (c) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

§ 92.58 Examination on basis of written interrogatories.

Written interrogatories are usually divided into three parts:
(a) The direct interrogatories or interrogatories in chief;
(b) The cross-interrogatories; and
(c) The redirect interrogatories.

Recross-interrogatories sometimes follow redirect interrogatories. The notarizing officer should not furnish the witness with a copy of the interrogatories in advance of the questioning, nor should he allow the witness to examine the interrogatories in advance of the questioning. Although it may be necessary for the officer, when communicating with the witness for the purpose of asking him to appear to testify, to indicate in general terms the nature of the evidence which is being sought, this information should not be given in such detail as to permit the witness to formulate his answers prior to his appearance before the notarizing officer. The officer taking the deposition should put the interrogatories to the witness separately and in order. The written interrogatories should not be repeated in the record (unless special instructions to that effect are given), but an appropriate reference should be made there to. These references should, of course, be followed by the witness’ answers. All of the written interrogatories must be put to the witness, even though at some point during the examination the witness discloses further knowledge of the subject. When counsel for all of the parties attend an examination conducted on written interrogatories, the notarizing officer may, all counsel having consented thereto, permit oral examination of the witness following the close of the examination upon written interrogatories. The oral examination should be conducted in the same manner and order as if not preceded by an examination upon written interrogatories.

§ 92.59 Recording of objections.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings must be noted in the deposition. Evidence objected to will be taken subject to the objections. (Rules 30 (c) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

§ 92.60 Examination procedures.

(a) Explaining interrogatory to witness. If the witness does not understand what an interrogatory means, the notarizing officer should explain it to him, if possible, but only so as to get an answer strictly responsive to the interrogatory.

(b) Refreshing memory by reference to written records. A witness may be permitted to refresh his memory by referring to notes, papers or other documents. The notarizing officer should have such occurrence noted in the record of the testimony together with a statement of his opinion as to whether the witness was using the notes, papers or other documents to refresh his memory or for the sake of testifying to matters not then of his personal knowledge.

(c) Conferring with counsel. When the witness confers with counsel before answering any interrogatory, the notarizing officer should have that fact noted in the record of the testimony.

(d) Examining witness as to personal knowledge. The notarizing officer may at any time during the examination of a witness propound such inquiries as may be necessary to satisfy himself whether the witness is testifying from his personal knowledge of the subject matter of the examination.
(e) Witness not to leave officer’s presence. The notarizing officer should request the witness not to leave his presence during the examination, except during the recesses for meals, rest, etc., authorized in §92.56 (g). Failure of the witness to comply with this request must be noted in the record.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.61 Transcription and signing of record of examination.

After the examination of a witness is completed, the stenographic record of the examination must be fully transcribed and the transcription attached securely to any document or documents to which the testimony in the record pertains. (See §92.63 regarding the arrangement of papers.) The transcribed deposition must then be submitted to the witness for examination and read to or by him, unless such examination and reading are waived by the witness and by the parties to the action. Any changes in form or substance desired by the witness should be entered upon the deposition by the notarizing officer with a statement of the reasons given by the witness for making the changes. The witness should then sign the transcript of his deposition and should initial in the margin each correction made at his request. However, the signature and initials of the witness may be omitted if the parties to the action by stipulation waive the signing or cannot be found. If the deposition is not signed by the witness, the notarizing officer should sign it and should state on the record the reason for his action, i.e., the waiver of the parties, the illness or absence of the witness, or the refusal of the witness to sign, giving the reasons for such refusal. The deposition may then be used as though signed by the witness except when, on the motion to suppress, the court holds that the reasons given for the refusal to sign require the rejection of the deposition in whole or in part. (Rules 30 (e) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.62 Captioning and certifying depositions.

The notarizing officer should prepare a caption for every deposition; should certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness; and should sign and seal the certification in the manner prescribed in §§92.15 and 92.16. (Rules 30 (f) (1) and 31 (b), Rules of Civil Procedure for the District Courts of the United States.)

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.63 Arrangement of papers.

Unless special instructions to the contrary are received, the various papers comprising the completed record of the depositions should usually be arranged in the following order from bottom to top:

(a) Commission to take depositions (or notice of taking depositions), with interrogatories, exhibits, and other supporting documents fastened thereto.

(b) Statement of fees charged, if one is prepared on a separate sheet.

(c) Record of the responses of the various witnesses, including any exhibits the witnesses may submit.

(d) Closing certificate.

All of these papers should be fastened together with ribbon, the ends of which should be secured beneath the notarizing officer’s seal affixed to the closing certificate.

[22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§92.64 Filing depositions.

(a) Preparation and transmission of envelope. The notice or commission, the interrogatories, the record of the witnesses’ answers, the exhibits, and all other documents and papers pertaining to the depositions should be fastened together (see §92.63 regarding the arrangement of papers) and should be enclosed in an envelope sealed with the wax engraving seal of the post. The envelope should be endorsed with the title of the action and should be marked and addressed. The sealed envelope should then be transmitted to
the court in which the action is pending.

(b) Furnishing copies. The original completed depositions should not be sent to any of the parties to the action or to their counsel. However, the notarizing officer may furnish a copy of a deposition to the deponent or to any party to the action upon the payment of the copying fee and if certification is desired under official seal that the copy is a true copy, the certification fee prescribed in the Tariff of Fees, Foreign Service of the United States of America (§ 22.1 of this chapter). [22 FR 10858, Dec. 27, 1957, as amended at 60 FR 51723, Oct. 3, 1995]

§ 92.65 Depositions to prove genuineness of foreign documents.

(a) Authority to execute commission. Under the provisions of section 1 of the act of June 25, 1948, as amended (sec. 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492), a diplomatic or consular officer may be commissioned by an United States court to take the testimony of a witness in a foreign country either on oral or written interrogatories, or partly on oral and partly on written interrogatories, for the purpose of determining the genuineness of any foreign document (any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States) which it is desired to introduce in evidence in any criminal action or proceeding in any United States court under the provisions of section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 945; 18 U.S.C. 3493, 3494), and in accordance with any special instructions which may accompany the commission. For details not covered by such section or by special instructions, officers of the Foreign Service should be guided by such instructions as may be issued by the Department of State in connection with the taking of depositions generally. (See §§92.55 to 92.64.)

(b) Disqualification to execute commission. Any diplomatic or consular officer to whom a commission is addressed to take testimony, who is interested in the outcome of the criminal action or proceeding in which the foreign documents in question are intended to be used or who has participated in the prosecution of such action or proceeding, whether by investigations, preparation of evidence, or otherwise, may be disqualified on his own motion or on that of the United States or any other party to such criminal action or proceeding made to the court from which the commission issued at any time prior to the execution thereof. If, after notice and hearing, the court grants the motion, it will instruct the diplomatic or consular officer thus disqualified to send the commission to any other diplomatic or consular officer of the United States named by the court, and such other officer should execute the commission according to its terms and will for all purposes be deemed the officer to whom the commission is addressed. (Section 1, 62 Stat. 834, sec. 53, 63 Stat. 96; 18 U.S.C. 3492.)

(c) Execution and return of commission.

(1) Commissions issued in criminal cases under the authority of the act of June 25, 1948, as amended, to take testimony in connection with foreign documents should be executed and returned by officers of the Foreign Service in accordance with section 1 of that act, as amended (sec. 1, 62 Stat. 935; 18 U.S.C. 3493). Section 1 of the act of June 25, 1948 (sec. 1, 62 Stat. 835; 18 U.S.C. 3493, 3494) provides that every person whose testimony is taken should be cautioned and sworn to testify the whole truth and should be carefully examined. The testimony should be reduced to writing or typewriting by the consular officer, or by some person under his personal supervision, or by the witness himself in the presence of the consular officer, and by no other person. After it has been reduced to writing or typewriting, the testimony must be signed by the witness. Every foreign document with respect to which testimony is taken...
§ 92.66 Depositions taken before foreign officials or other persons in a foreign country.

(a) Customary practice. Under Federal law (Rule 28(b), Rules of Civil Procedure for the District Courts of the United States) and under the laws of some of the States, a commission to take depositions can be issued to a foreign official or to a private person in a foreign country. However, this method is rarely used; commissions are generally issued to U.S. notarizing officers. In those countries where U.S. notarizing officers are not permitted to take testimony (see §92.55(c)) and where depositions must be taken before a foreign authority, letters rogatory are usually issued to a foreign court.

(b) Transmission of letters rogatory to foreign officials. Letters rogatory may often be sent direct from court to court. However, some foreign governments require that these requests for judicial aid be submitted through the diplomatic channel (i.e., that they be submitted to the Ministry for Foreign Affairs by the American diplomatic representative). A usual requirement is that the letters rogatory as well as the interrogatories and other papers included with them be accompanied by a complete translation into the language (or into one of the languages) of the country of execution. Another requirement is that provision be made for the payment of fees and expenses. Inquiries from interested parties or their attorneys, or from American courts, as to customary procedural requirements in given countries, may be addressed direct to the respective American embassies and legations in foreign capitals, or to the Department of State, Washington, DC 20520.

(c) Return of letters rogatory executed by foreign officials. (1) Letters rogatory executed by foreign officials are returned through the same channel by which they were initially transmitted. When such documents are returned to a United States diplomatic mission, the responsible officer should endorse thereon a certificate stating the date and place of their receipt. This certificate should be appended to the documents as a separate sheet. The officer should then enclose the documents in an envelope sealed with the wax engraving seal of the post and bearing an endorsement indicating the title of the action to which the letters rogatory pertain. The name and address of the American judicial body from which the
letters rogatory issued should also be placed on the envelope.

(2) If the executed letters rogatory are returned to the diplomatic mission from the Foreign Office in an envelope bearing the seals of the foreign judicial authority who took the testimony, that sealed envelope should not be opened at the mission. The responsible officer should place a certificate on the envelope showing the date it was received at his office and indicating that it is being forwarded in the same condition as received from the foreign authorities. He should then place that sealed envelope in a second envelope, sealed with the wax engraving seal of the post, and bearing the title of the action and the name and address of the American judicial body from which the letters rogatory issued.

(3) Charges should be made for executing either of the certificates mentioned in paragraphs (c) (1) and (2) of this section, as prescribed by item 67 of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter), unless the service is classifiable in a no-fee category under the exemption for Federal agencies and corporations (item 83 of the same Tariff).

(4) The sealed letters rogatory should be transmitted by appropriate means to the court in which the action is pending. See title 28, section 1781, of the United States Code concerning the manner of making return to a court of the United States (Federal court).

(d) Transmissions of commissions to foreign officials or other persons. A commission to take depositions which is addressed to an official or person in a foreign country other than a United States notarizing officer may be sent directly to the person designated. However, if such a commission is sent to the United States diplomatic mission in the country where the depositions are intended to be taken, it should be forwarded to the Foreign Office for transmission to the person appointed in the commission. If sent to a United States consular office, the commission may be forwarded by that office directly to the person designated, or, if the notarial officer deems it more advisable to do so, he may send the commission to the United States diplo-

matic mission for transmission through the medium of the foreign office.


§92.67 Taking of depositions in United States pursuant to foreign letters rogatory.

(a) Authority and procedure. The taking of depositions by authority of State courts for use in the courts of foreign countries is governed by the laws of the individual States. As respects Federal practice, the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. This does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person or in any manner acceptable to him (28 U.S.C. 1782).
Formulation of letters rogatory. A letter rogatory customarily states the nature of the judicial assistance sought by the originating court, prays that this assistance be extended, incorporates an undertaking of future reciprocit y in like circumstances, and makes some provision for payment of fees and costs entailed in its execution. As respects Federal practice, it is not required that a letter rogatory emanating from a foreign court be authenticated by a diplomatic or consular officer of the United States or that it be submitted through the diplomatic channel; the seal of the originating court suffices. When testimony is desired, the letter rogatory should state whether it is intended to be taken upon oral or written interrogatories. If the party on whose behalf the testimony is intended to be taken will not be represented by counsel, written interrogatories should be attached. Except where manifestly unneeded (e.g. a Spanish-language letter rogatory intended for execution in Puerto Rico) or dispensed with by arrangement with the court, letters rogatory and interrogatories in a foreign language should be accompanied by English translations.

Addressing letters rogatory. To avert uncertainties and minimize possibilities for refusal of courts to comply with requests contained in letters rogatory in the form in which they are presented, it is advisable that counsel for the parties in whose behalf testimony is sought ascertain in advance if possible, with the assistance of correspondent counsel in the United States or that of a consular representative or agent of his nation in the United States, the exact title of the court, Federal or State as the case may be, which will be prepared to entertain the letter rogatory. In Federal practice the following form of address is acceptable:

The U.S. District Court for the (e.g. Northern, Southern) District of (State) (City) , (State)

In instances where it is not feasible to ascertain the correct form of address at the time of preparation of the letter rogatory, and it will be left for counsel in the United States, or a consul or agent in the United States of the nation of origin of the letter rogatory to effect its transmission to an appropriate court, the following form may be used: “To the Appropriate Judicial Authority at (name of locality).”

Submitting letters rogatory to courts in the United States. A letter rogatory may be submitted to the clerk of the court of which assistance is sought, either in person or by mail. This may be direct by international mail from the originating foreign court. Alternatively, submission to the clerk of court may be effected in person or by mail by any party to the action at law or his attorney or agent, or by a consular officer or agent in the United States of the foreign national concerned. Finally, the Department of State has been authorized (62 Stat. 949; 28 U.S.C. 1781) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution. This authorization does not preclude—

(1) The transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) The transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

Foreign Service fees and incidental costs in the taking of evidence.

The fees for the taking of evidence by officers of the Foreign Service are as prescribed by the Tariff or Fees, Foreign Service of the United States of America (§22.1 of this chapter), under the caption “Services Relating to the Taking of Evidence,” unless the service is performed for official use, which comes under the caption “Exemption for Federal Agencies and Corporations” of the same Tariff. See §22.6 of this chapter concerning the requirement for
advance deposit of estimated fees. When the party on whose behalf the evidence is sought or his local representative is not present to effect direct payment of such incidental costs as postage or travel of witnesses, the advance deposit required by the officer shall be in an amount estimated as sufficient to cover these in addition to the fees proper. The same rule shall apply to charges for interpreting or for the taking and transcribing of a stenographic record when performed commercially rather than by staff members at Tariff of Fee rates.

§ 92.69 Charges payable to foreign officials, witnesses, foreign counsel, and interpreters.

(a) Execution of letters rogatory by foreign officials. Procedures for payment of foreign costs will be by arrangement with the foreign authorities.

(b) Execution of commissions by foreign officials or other persons abroad. Procedure for the payment of foreign costs will be as arranged, by the tribunal requiring the evidence, with its commissioner.

(c) Witness fees and allowances when depositions are taken pursuant to commission from a Federal court. A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day’s attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance (28 U.S.C. 1821, Supp. IV). Witnesses giving depositions before consular officers pursuant to a commission issued by the Federal Court are entitled to these fees and allowances, and the officer shall make payment thereof in the same manner as payment is made of other expenses involved in the execution of the commission, charging the advance deposit provided by the party at whose request the depositions are taken (see §92.68). In any case to which the Government of the United States, or an officer or agency thereof, is a party, the United States marshal for the district will pay all fees of witnesses on the certificate of the United States Attorney or Assistant United States Attorney, and in the proceedings before a United States Commissioner, on the certificate of such commissioner (28 U.S.C. 1825).

§ 92.7 Special fees for depositions in connection with foreign documents.

(a) Fees payable to witnesses. Each witness whose testimony is obtained under a commission to take testimony in connection with foreign documents for use in criminal cases shall be entitled to receive compensation at the rate of $15 a day for each day of attendance, plus 8 cents a mile for going from his place of residence or business to the place of examination, and returning, by the shortest feasible route (18 U.S.C. 3495 and 3496, and E.O. 10307, 3 CFR, 1949–1953 Comp.). When, however it is necessary to procure the attendance of a witness on behalf of the United States or an indigent party, an officer or agent of the United States may negotiate with the witness to pay compensation at such higher rate as may be approved by the Attorney General, plus the mileage allowance stated above (5 U.S.C. 341). The expense of the compensation and mileage of each witness will be borne by the party, or parties, applying for the commission unless the commission is accompanied by an order of court (18 U.S.C. 3495(b) that all fees, compensations, and other expenses authorized by these regulations are chargeable to the United States (18 U.S.C. 3495).

(b) Fee payable to counsel. Each counsel who represents a party to the action or proceeding in the examination before the commissioner will receive compensation for each day of attendance at a rate of not less than $15 a day and not more than $50 a day, as agreed between him and the party whom he
§ 92.71 Fees for letters rogatory executed by officials in the United States.

Arrangements for the payment of fees should be made directly with the court in the United States by the party in the foreign country at whose request the depositions are taken, either through his legal representative in the United States or through the appropriate diplomatic or consular officer of his country in the United States. (See §92.67 regarding the execution of letters rogatory in the United States.)

§ 92.72 Services in connection with patents and patent applications.

(a) Affidavit of applicant. The form of the affidavit of an applicant for a United States patent depends on who is making the application, the type of invention, and the circumstances of the case. Officers of the Foreign Service are not responsible for the correctness of form of such affidavits, and should not endeavor to advise in their preparation. Persons who inquire at a Foreign Service post regarding the filing of patent applications may be referred to the pamphlet entitled “General Information Concerning Patents,” if copies thereof are available at the post.
(b) Oath or affirmation of applicant—
(1) Authority to administer oath or affirmation. When an applicant for a patent resides in a foreign country, his oath or affirmation may be made before any diplomatic or consular officer of the United States authorized to administer oaths, or before any officer having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by certificate of a diplomatic or consular officer of the United States (35 U.S.C. 115). See paragraph (c) of this section regarding authentication of the authority of a foreign official. A notary or other official in a foreign country who is not authorized to administer oaths is not qualified to notarize an application for a United States patent.

(2) Form of oath or affirmation. See §§92.19 and 92.20 for usual forms of oaths and affirmations.

(3) Execution of jurat. In executing the jurat, the officer should carefully observe the following direction with regard to ribboning and sealing: When the oath is taken before an officer in a country foreign to the United States, all the application papers, except the drawings, must be attached together and a ribbon passed one or more times through all the sheets of the application, except the drawings, and the ends of said ribbon brought together under the seal before the latter is affixed and impressed, or each sheet must be impressed with the official seal of the officer before whom the oath is taken. If the papers as filed are not properly ribboned or each sheet impressed with the seal, the case will be accepted for examination but before it is allowed, duplicate papers, prepared in compliance with the foregoing sentence, must be filed. (Rule 66, Rules of Practice of the United States Patent Office.)

(c) Authentication of authority of foreign official—(1) Necessity for authentication. When the affidavit required in connection with a patent application been sworn to or affirmed before an official in a foreign country other than a diplomatic or consular officer of the United States, an officer of the Foreign Service authenticate the authority of the official administering the oath or affirmation (35 U.S.C. 115). If the officer of the Foreign Service cannot authenticate the oath or affirmation, the document should be authenticated by a superior foreign official, or by a series of superior foreign officials if necessary. The seal and signature of the foreign official who affixes the last foreign authentication to the document should then be authenticated by the officer of the Foreign Service.

(2) Use of permanent ink. All papers which will become a part of a patent application filed in the United States Patent Office must be legibly written or printed in permanent ink. (Rule 52, Rules of Practice of the United States Patent Office.) Consular certificates of authentication executed in connection with patent applications should preferably be prepared on a typewriter; they should not be prepared on a hectograph machine.

(d) Authority of a foreign executor or administrator acting for deceased inventor. Legal representatives of deceased inventors and of those under legal incapacity may make application for patent upon compliance with the requirements and on the same terms and conditions applicable to the inventor (35 U.S.C. 117). The rules of the Patent Office require proof of the power or authority of the legal representative. See paragraph (c) of this section for procedure for authenticating the authority of a foreign official.

(e) Assignments of patents and applications for patents. An application for a patent, or a patent, or any interest therein, may be assigned in law by an instrument in writing. The applicant, or the patentee, or his assigns or legal representatives, may grant and convey an exclusive right under the application for patent, or under the patent, to the whole or any specified part of the United States. Any such assignment, grant, or conveyance of any application for patent, or of any patent, may be acknowledged, in a foreign country, before “a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States” (35 U.S.C. 261). See §92.37 regarding authentication of the authority of a foreign official.
§ 92.73 Fees. The fee for administering an oath, taking an acknowledgment, or supplying an authentication, in connection with patent applications is as prescribed in item 49 of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter).

§ 92.73 Services in connection with trademark registrations.

(a) Authority and responsibility. Acknowledgments and oaths required in connection with applications for registration of trademarks may be made, in a foreign country, before any diplomatic or consular officer of the United States or before any official authorized to administer oaths in the foreign country whose authority must be proved by a certificate of a diplomatic or consular officer of the United States (15 U.S.C. 1061). The responsibility of officers of the Foreign Service in this connection is the same as that where notarial services in connection with patent applications are involved (see §92.72(a)). (See §92.72(c) regarding the authentication of the authority of a foreign official who performs a notarial service in connection with a patent application.)

(b) Fees. The fee for administering an oath, taking an acknowledgment, or supplying an authentication, in connection with an application for registration of a trademark, or with the assignment or transfer of rights thereunder, is as prescribed in item 49 of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter).

§ 92.74 Services in connection with United States securities or interests therein.

(a) Authority and responsibility. Assignments or requests for payment of United States securities, or securities for which the Treasury Department acts as transfer agent, or powers of attorney in connection therewith where authorized by the Treasury Department, should, in a foreign country, be executed before a United States consular or diplomatic officer. However, if they are executed before a foreign official having power to administer oaths, the Treasury Department requires that the official character and jurisdiction on the foreign official be certified by a United States diplomatic or consular officer. (See §§92.36 to 92.41 on authentications.)

(b) Fees. Officers of the Foreign Service should charge no fees for notarial services they perform in connection with the execution of documents, including the certification or authentication of documents where necessary, which affect United States securities or securities for which the Treasury Department acts as transfer agent, or which may be required in the collection of interest thereon. Item 58(b) of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter) applies in cases of this nature.

§ 92.75 Services in connection with income tax returns.

(a) Responsibility. Officers of the Foreign Service are authorized to perform any and all notarial services which may be required in connection with the execution of Federal, state, territorial, municipal, or insular income tax returns. Officers should not give advice on the preparation of tax returns.

(b) Fees. No charge under the caption “Notarial Services and Authentications” should be made for services performed in connection with the execution of tax returns for filing with the Federal or State Governments or political subdivisions thereof. When requested, see item 58(d) of the Tariff of Fees, Foreign Service of the United States of America (§22.1 of this chapter).

COPYING, RECORDING, TRANSLATING AND PROCURING DOCUMENTS

§ 92.76 Copying documents.

(a) Consular authority. The consular officer is authorized to have documents, or abstracts therefrom, copied at a Foreign Service post, if he deems it advisable and it is practicable to do so. This service frequently is necessary in connection with the performance of certain notarial acts, such as the certification of copies of documents.

(b) Fees. The charges for making copies of documents are as prescribed by the Tariff of Fees, Foreign Service of
§ 0.48 International trade litigation.

The Attorney-in-Charge, International Trade Field Office, at 26 Federal Plaza, New York, New York 10007, in the Office of the Assistant Attorney General, Civil Division, is designated to accept service of notices of appeals to the Court of Customs and Patent Appeals and all other papers filed in the Court of International Trade, when the United States is an adverse party. (28 U.S.C. 2633(c); 28 U.S.C. 2601(b)).

[Order No. 960–81, 46 FR 52345, Oct. 27, 1981]

§ 0.49 International judicial assistance.

The Assistant Attorney General in charge of the Civil Division shall direct and supervise the following functions:

(a) The functions of the “Central Authority” under the Convention between the United States and other Governments on the Taking of Evidence Abroad in Civil and Commercial Matters, TIAS 7444, which entered into force on October 7, 1972.

(b) The functions of the “Central Authority” under the Convention between the United States and other Governments on the Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, which entered into force on February 10, 1969.

(c) To receive letters of requests issued by foreign and international judicial authorities which are referred to the Department of Justice through diplomatic or other governmental channels, and to transmit them to the appropriate courts or officers in the United States for execution.

(d) To receive and transmit through proper channels letters of request addressed by courts in the United States to foreign tribunals in connection with litigation to which the United States is a party.

[Order No. 555–73, 38 FR 32805, Nov. 28, 1973]

Subpart J—Civil Rights Division

§ 0.50 General functions.

The following functions are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Rights Division:

(a) Enforcement of all Federal statutes affecting civil rights, including those pertaining to elections and voting, public accommodations, public facilities, school desegregation, employment (including 42 U.S.C. 2000e–(6)), housing, abortion, sterilization, credit, and constitutional and civil rights of Indians arising under 25 U.S.C. 1301 et seq., and of institutionalized persons, and authorization of litigation in such enforcement, including criminal prosecutions and civil actions and proceedings on behalf of the Government and appellate proceedings in all such cases. Notwithstanding the provisions
ICSID Rules of Procedure
For
Arbitration Proceedings
# RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

## Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Rule</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I</strong></td>
<td>Establishment of the Tribunal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 General Obligations</td>
<td>103</td>
</tr>
<tr>
<td></td>
<td>2 Method of Constituting the Tribunal in the Absence of Previous Agreement</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>3 Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>4 Appointment of Arbitrators by the Chairman of the Administrative Council</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>5 Acceptance of Appointments</td>
<td>106</td>
</tr>
<tr>
<td></td>
<td>6 Constitution of the Tribunal</td>
<td>106</td>
</tr>
<tr>
<td></td>
<td>7 Replacement of Arbitrators</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>8 Incapacity or Resignation of Arbitrators</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>9 Disqualification of Arbitrators</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>10 Procedure during a Vacancy on the Tribunal</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>11 Filling Vacancies on the Tribunal</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>12 Resumption of Proceeding after Filling a Vacancy</td>
<td>109</td>
</tr>
<tr>
<td><strong>II</strong></td>
<td>Working of the Tribunal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>13 Sessions of the Tribunal</td>
<td>109</td>
</tr>
<tr>
<td></td>
<td>14 Sittings of the Tribunal</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>15 Deliberations of the Tribunal</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>16 Decisions of the Tribunal</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>17 Incapacity of the President</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>18 Representation of the Parties</td>
<td>110</td>
</tr>
<tr>
<td><strong>III</strong></td>
<td>General Procedural Provisions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>19 Procedural Orders</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>20 Preliminary Procedural Consultation</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>21 Pre-Hearing Conference</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>22 Procedural Languages</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>23 Copies of Instruments</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>24 Supporting Documentation</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>25 Correction of Errors</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>26 Time Limits</td>
<td>113</td>
</tr>
</tbody>
</table>
Arbitration Rules of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14-16, 22-31 and 34(1).

The Arbitration Rules cover the period of time from the dispatch of the notice of registration of a request for arbitration until an award is rendered and all challenges possible to it under the Convention have been exhausted. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Chapter I
Establishment of the Tribunal

Rule 1
General Obligations

(1) Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

(3) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

(4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.
Rule 2
Method of Constituting the Tribunal in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:
   (i) accept such proposals; or
   (ii) make other proposals regarding the number of arbitrators and the method of their appointment;

(c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 3
Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:

(a) either party shall in a communication to the other party:
   (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
   (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:
   (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
   (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4
Appointment of Arbitrators by the Chairman of the Administrative Council

(1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

(2) The provision of paragraph (1) shall apply mutatis mutandis in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.
“Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7
Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Arbitrators

(1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.

(2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
(b) notify the other party of the proposal.

(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10
Procedure during a Vacancy on the Tribunal

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Tribunal

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:

(a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or

(b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, mutatis mutandis, 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

Chapter II
Working of the Tribunal

Rule 13
Sessions of the Tribunal

(1) The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.

(2) The dates of subsequent sessions shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.

(3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.
Rule 14
Sittings of the Tribunal

(1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.

(3) The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15
Deliberations of the Tribunal

(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Rule 16
Decisions of the Tribunal

(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

Rule 17
Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

Rule 18
Representation of the Parties

(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III
General Procedural Provisions

Rule 19
Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;
(b) the language or languages to be used in the proceeding;
(c) the number and sequence of the pleadings and the time limits within which they are to be filed;
(d) the number of copies desired by each party of instruments filed by the other;
(e) dispensing with the written or the oral procedure;
(f) the manner in which the cost of the proceeding is to be apportioned; and
(g) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Pre-Hearing Conference

(1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tri-
Rule 22  
**Procedural Languages**

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23  
**Copies of Instruments**

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

(a) before the number of members of the Tribunal has been determined: five;

(b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24  
**Supporting Documentation**

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25  
**Correction of Errors**

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

Rule 26  
**Time Limits**

(1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

(2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27  
**Waiver**

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

Rule 28  
**Cost of Proceeding**

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

Chapter IV
Written and Oral Procedures

Rule 29
Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Rule 30
Transmission of the Request

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31
The Written Procedure

(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

(a) a memorial by the requesting party;
(b) a counter-memorial by the other party;
and, if the parties so agree or the Tribunal deems it necessary:
(c) a reply by the requesting party; and
(d) a rejoinder by the other party.

(2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however, the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting party.

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Rule 32
The Oral Procedure

(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 33
Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Rule 34
Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts; and
(b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 37
Visits and Inquiries; Submissions of Non-disputing Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 38
Closure of the Proceeding

(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.

(2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.
Chapter V
Particular Procedures

Rule 39
Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40
Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41
Preliminary Objections

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.
Rule 42
Default

(1) If a party (in this Rule called the “defaulting party”) fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

(2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace to this end:

(a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or

(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

(3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

(4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

Rule 43
Settlement and Discontinuance

(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Rule 44
Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Rule 45
Discontinuance for Failure of Parties to Act

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

Chapter VI
The Award

Rule 46
Preparation of the Award

The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

Rule 47
The Award

(1) The award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
Rule 49
Supplementary Decisions and Rectification

(1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
   (a) identify the award to which it relates;
   (b) indicate the date of the request;
   (c) state in detail:
      (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
      (ii) any error in the award which the requesting party seeks to have rectified; and
   (d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
   (a) register the request;
   (b) notify the parties of the registration;
   (c) transmit to the other party a copy of the request and of any accompanying documentation; and
   (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rules 46-48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.
Chapter VII
Interpretation, Revision and Annulment of the Award

Rule 50
The Application

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;
(b) indicate the date of the application;
(c) state in detail:
   (i) in an application for interpretation, the precise points in dispute;
   (ii) in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant’s ignorance of that fact was not due to negligence;
   (iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:
      – that the Tribunal was not properly constituted;
      – that the Tribunal has manifestly exceeded its powers;
      – that there was corruption on the part of a member of the Tribunal;
      – that there has been a serious departure from a fundamental rule of procedure;
      – that the award has failed to state the reasons on which it is based;
(d) be accompanied by the payment of a fee for lodging the application.

(2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:

(a) register the application;
(b) notify the parties of the registration; and
(c) transmit to the other party a copy of the application and of any accompanying documentation.

(3) The Secretary-General shall refuse to register an application for:

(a) revision, if, in accordance with Article 51(2) of the Convention, it is not made within 90 days after the discovery of the new fact and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction);
(b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:
   (i) within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:
      – the Tribunal was not properly constituted;
      – the Tribunal has manifestly exceeded its powers;
      – there has been a serious departure from a fundamental rule of procedure;
      – the award has failed to state the reasons on which it is based;
   (ii) in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

(4) If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

Rule 51
Interpretation or Revision: Further Procedures

(1) Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:

(a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and
(b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.
(2) If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

Rule 52
Annulment: Further Procedures

(1) Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

Rule 53
Rules of Procedure

The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

Rule 54
Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

Rule 55
Resubmission of Dispute after an Annulment

(1) If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;

(b) indicate the date of the request;

(c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and

(d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

(a) register it in the Arbitration Register;

(b) notify both parties of the registration;

(c) transmit to the other party a copy of the request and of any accompanying documentation; and

(d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbi-
trators, and appointed by the same method, as the original one.

(3) If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

(4) Except as otherwise provided in paragraphs (1)–(3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

Chapter VIII
General Provisions

Rule 56
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the “Arbitration Rules” of the Centre.
Inter-American Convention on
Letters Rogatory and Additional Protocol
INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:

I. USE OF TERMS

Article 1

For the purposes of this Convention the terms "exhortos" and "cartas rogatorias" are synonymous in the Spanish text. The terms "letters rogatory", "commissions rogatoires", and "cartas rogatórias" used in the English, French and Portuguese texts, respectively, cover both "exhortos" and "cartas rogatorias".

II. SCOPE OF THE CONVENTION

Article 2

This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate authority of one of the States Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad;

b. The taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect.

Article 3

This Convention shall not apply to letters rogatory relating to procedural acts other than those specified in the preceding article; and in particular it shall not apply to acts involving measures of compulsion.

III. TRANSMISSION OF LETTERS ROGATORY

Article 4

Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be.

Each State Party shall inform the General Secretariat of the Organization of American States of the Central Authority competent to receive and distribute letters.
IV. REQUIREMENTS FOR EXECUTION

Article 5

Letters rogatory shall be executed in the States Parties provided they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to be duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination.

Article 6

Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required.

Article 7

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

Article 8

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

c. Where appropriate, information on the existence and address of the court-appointed defense counsel or of competent legal-aid societies in the State of origin.

Article 9

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it.

V. EXECUTION

Article 10

Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.
At the request of the authority issuing the letter rogatory, the authority of the State of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested, provided this procedure or the observance of those formalities is not contrary to the law of the State of destination.

Article 11

The authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory. Should such authority find that it lacks jurisdiction to execute the letter rogatory, it shall ex officio forward the documents and antecedents of the case to the authority of the State which has jurisdiction.

Article 12

The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties.

The State of destination may, in its discretion, execute a letter rogatory that does not indicate the person to be held responsible for costs and other expenses when incurred. The identity of the person empowered to represent the applicant for legal purposes may be indicated in the letter rogatory or in the documents relating to its execution.

The effects of a declaration in forma pauperis shall be regulated by the law of the State of destination.

Article 13

Consular or diplomatic agents of the States Parties to this Convention may perform the acts referred to in Article 2 in the State in which they are accredited, provided the performance of such acts is not contrary to the laws of that State. In so doing, they shall not perform any acts involving measures of compulsion.

VI. GENERAL PROVISIONS

Article 14

States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.

Article 16

The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and "contentious-administrative" cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.

Article 17
The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public").

Article 18

The States Parties shall inform the General Secretariat of the Organization of American States of the requirements stipulated in their laws for the legalization and the translation of letters rogatory.

VII. FINAL PROVISIONS

Article 19

This Convention shall be open for signature by the Member of the Organization of American States.

Article 20

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 21

This Convention shall remain open for accession by any other State. The instrument of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 22

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 23

If a State Party has two or more territorial units in which different systems' of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States and shall become effective thirty days after the . This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the
Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the information mentioned in the second paragraph of Article 4 and in Article 18 and the declarations referred to in Articles 16 and 23 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatories and Ratifications]
ADDITIONAL PROTOCOL TO THE INTER AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of strengthening and facilitating international cooperation in judicial procedures as provided for in the Inter-American Convention on Letters Rogatory done in Panama on January 30, 1975, have agreed as follows:

I. SCOPE OF PROTOCOL

Article 1

This Protocol shall apply only to those procedural acts set forth in Article 2 (a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as "the Convention". For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or administrative authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination.

II. CENTRAL AUTHORITY

Article 2

Each State Party shall designate a central authority that shall perform the functions assigned to it in the Convention and in this Protocol. At the time of deposit of their instruments of ratification or accession to this Protocol, the States Parties shall communicate the designations to the General Secretariat of the Organization of American States, which shall distribute to the States Parties to the Convention a list containing the designations received. The Central Authority designated by a State Party in accordance with Article 4 of the Convention may be changed at any time. The State Party shall inform the above-mentioned Secretariat of such change as promptly as possible.

III. PREPARATION OF LETTERS ROGATORY

Article 3

Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.

Letters rogatory shall be accompanied by the following:

- a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination;

- b. Untranslated copy of the documents attached to the complaint or pleading;

- c. Untranslated copy of any rulings ordering issuance of the letter rogatory;
d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and

e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory.

The copies shall be regarded as authenticated for the purposes of Article 8(a) of the Convention if they bear the seal of the judicial or administrative authority that issued the letter rogatory.

A copy of the letter rogatory together with Form B and the copies referred to in items a, b, and c of this Article shall be delivered to the person notified or to the authority to which the request is addressed. One of the copies of the letter rogatory and the documents attached to it shall remain in the possession of the State of destination; the untranslated original, the certificate of execution and the documents attached to them shall be returned to the Central Authority of the State of origin through appropriate channels.

If a State Party has more than one official language, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages shall be considered official for the purposes of the Convention and of this Protocol. If a State Party comprises territorial units that have different official languages, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages in each territorial unit shall be considered official for the purposes of the Convention and of this Protocol. The General Secretariat of the Organization of American States shall distribute to the States Parties to this Protocol the information contained in such declarations.

IV. TRANSMISSION AND PROCESSING OF LETTERS ROGATORY

Article 4

Upon receipt of a letter rogatory from the Central Authority in another State Party, the Central Authority in the State of destination shall transmit the letter rogatory to the appropriate judicial or administrative authority for processing in accordance with the applicable local law.

Upon execution of the letter rogatory, the judicial or administrative authority or authorities that processed it shall attest to the execution thereof in the manner prescribed in their local law, and shall transmit it with the relevant documents to the Central Authority. The Central Authority of the State Party of destination shall certify execution of the letter rogatory to the Central Authority of the State Party of origin on a form conforming to Form C of the Annex, which shall not require legalization. In addition, the Central Authority of the State of destination shall return the letter rogatory and attached documents to the Central Authority of the State of origin for delivery to the judicial or administrative authority that issued it.

V. COSTS AND EXPENSES

Article 5

The processing of letters rogatory by the Central Authority of the State Party of destination and its judicial or administrative authorities shall be free of charge. However, this State Party may seek payment by parties requesting execution of letters rogatory for those services which, in accordance with its local law, are required to be paid for directly by those parties.

The party requesting the execution of a letter rogatory shall, at its election, either select and indicate in the letter rogatory the person who is responsible in the State of destination for the cost of such services or, alternatively, shall attach to the letter rogatory a check for the fixed amount that is specified in Article 6 of this Protocol for its processing by the State of destination and will cover the cost of such services or a document proving that such amount has been transferred by some other means to the Central Authority of the State of destination.

The fact that the cost of such services ultimately exceeds the fixed amount shall not delay or prevent the processing or execution of the letter rogatory by the Central Authority or the judicial or administrative authorities of the State of destination. Should the cost exceed that amount, the Central Authority of the State of destination may, when returning the executed letter rogatory, seek payment of the outstanding amount due from the party requesting execution of the
Article 6

At the time of deposit of its instrument of ratification or accession to this Protocol with the General Secretariat of the Organization of American States, each State Party shall attach a schedule of the services and the costs and other expenses that, in accordance with its local law, shall be paid directly by the party requesting execution of the letter rogatory. In addition, each State Party shall specify in the above-mentioned schedule the single amount which it considers will reasonably cover the cost of such services, regardless of the number or nature thereof. This amount shall be paid when the person requesting execution of the letter rogatory has not designated a person responsible for the payment of such services in the State of destination but has decided to pay for them directly in the manner provided for in Article 5 of this Protocol.

The General Secretariat of the Organization of American States shall distribute the information received to the States Parties to this Protocol. A State Party may at any time notify the General Secretariat of the Organization of American States of changes in the above-mentioned schedules, which shall be communicated by the General Secretariat to the other States Parties to this Protocol.

Article 7

States Parties may declare in the schedules mentioned in the foregoing articles that, provided there is reciprocity, they will not charge parties requesting execution of letters rogatory for the services necessary for executing them, or will accept in complete satisfaction of the cost of such services either the single fixed amount specified in Article 6 or another specified amount.

Article 8

This Protocol shall be open for signature and subject to ratification or accession by those Member States of the Organization of American States that have signed, ratified, or acceded to the Inter-American Convention on Letters Rogatory signed in Panama on January 30, 1975.

This Protocol shall remain open for accession by any other State that accedes or has acceded to the Inter-American Convention on Letters Rogatory, under the conditions set forth in this article.

The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Protocol shall enter into force on the thirtieth day following the date on which two States Parties to the Convention have deposited their instruments of ratification or accession to this Protocol.

For each State ratifying or acceding to the Protocol after its entry into force, the Protocol shall enter into force on the thirtieth day following deposit by such State of its instrument of ratification or accession, provided that such State is a Party to the Convention.

Article 10

If a State Party has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Protocol, it may, at the time of signature, ratification or accession, declare that this Protocol shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations that shall expressly indicate the territorial unit or units to which this Protocol applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 11
This Protocol shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Protocol shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 12

The original instrument of this Protocol and its Annex (Forms A, B and C), the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which will forward an authenticated copy of the text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of that Organization and the States that have acceded to the Protocol of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any. It shall also transmit to them the information mentioned in Article 2, the last paragraph of Article 3, and Article 6 and the declarations referred to in Article 10 of this Protocol.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE AT MONTEVIDEO, Republic of Uruguay, this eighth day of May, one thousand nine hundred and seventy-nine.

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM A

LETTER ROGATORY

<table>
<thead>
<tr>
<th>1</th>
<th>REQUESTING JUDICIAL OR ADMINISTRATIVE AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Name</td>
</tr>
<tr>
<td></td>
<td>Address</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2</th>
<th>CASE:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Docket No.:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3</th>
<th>CENTRAL AUTHORITY OF THE STATE OF ORIGIN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Name</td>
</tr>
<tr>
<td></td>
<td>Address</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4</th>
<th>CENTRAL AUTHORITY OF THE STATE OF DESTINATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Name</td>
</tr>
<tr>
<td></td>
<td>Address</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5</th>
<th>REQUESTING PARTY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Name</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6</th>
<th>COUNSEL TO THE REQUESTING PARTY</th>
</tr>
</thead>
</table>
PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY

Name Is this person responsible for costs and expenses?

Address YES / NO /

* If not, check in the amount of __________ is attached
* Or proof of payment is attached

* Delete if inapplicable.

The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

* A. Requests their prompt service on:

The undersigned authority requests that service be carried out in the following manner:

* (1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

* (2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

* (3) If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

* B. Requests the delivery of the documents listed below to the following judicial or administrative authority:
* C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached Form C.

Done at __________________ this _____ date of ______________, 19 ___.

__________________________________________________________
Signature and stamp of the judicial or administrative authority of the State of origin

__________________________________________________________
Signature and stamp of the Central Authority of the State of origin

Title or other identification of each document to be delivered:

(Attach additional pages, if necessary.

* Delete if inapplicable.

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM B

ESSENTIAL INFORMATION FOR THE ADDRESSEE

To (Name and address of the person being served)

You are hereby informed that (Brief statement of nature of service)

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered
the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I*

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

B. The remedies sought or the amount in dispute is as follows:

C. By this service, you are requested:

D. *In case of service on you as a defendant you can answer the complaint before the judicial or administrative authority specified in Form A, Box 1 (State place, date and hour):

* You are being summoned to appear as:

* Delete if inapplicable.

* If some other action is being requested of the person served, please describe:

E. If you fail to comply, the consequences might be:

F. You are hereby informed that a defense counsel appointed by the Court or the following legal
aid societies are available to you at the place where the proceeding is pending:

Name:

Address:

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II*

FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE AUTHORITY

To:

(Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned judicial or administrative authority with the following information:

The documents listed in Part III are being furnished to you to facilitate your reply.

* Delete if inapplicable

III

LIST OF ATTACHED DOCUMENTS
(Attach additional pages if necessary.)

Done at ________________ this __________ day of __________ 19

Signature and stamp of the judicial or administrative authority of the State of origin

Signature and stamp of the Central Authority of the State of Origin

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM C
CERTIFICATE OF EXECUTION

To:

(Name and address of judicial or administrative authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

*A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date:

At (address)

By one of the following methods authorized by the Convention.

*(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention, or

*(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent, or

*(3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination: (Specify method used)

* Delete if inapplicable.

*B. That the documents referred to in the letter rogatory have been delivered

Identity of person

Relationship to the addressee

(Family, business or other)

*C. That the documents attached to the Certificate have not been served or delivered for the
following reason(s):

*D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement.

Done at ___________ the __________ day of ___________ 19__

Signature and stamp of Central Authority of the State of destination

Where appropriate, attach originals or copies of any additional documents proving service or delivery, and identify them.

* Delete if inapplicable.

Signatories and Ratifications
IBA Rules on the Taking of Evidence in International Commercial Arbitration

Adopted by a resolution of the IBA Council
1 June 1999

International Bar Association
Contents

Members of the Working Party  iv

About the Arbitration and ADR Committee  v

Foreword  1

THE RULES  2
Members of the Working Party

David W Rivkin  
Chair, SBL Committee D  
(Arbitration and ADR);  
Debevoise & Plimpton,  
New York, USA

Wolfgang Kühn  
Former Chair,  
SBL Committee D;  
Heuking Kühn Lüer Heussen Wojtek,  
Düsseldorf, Germany

Giovanni M Ughi  
Chair, SBL Committee D Working Party;  
Studio Legale Ughi e Nunziante, Milan, Italy

Hans Bagner  
Vinge, Stockholm, Sweden

John Beechey  
Clifford Chance, London, England

Jacques Buhart  
Coudert Frères, Paris, France

Peter S Caldwell  
Hong Kong

Bernardo M Cremades  
B Cremades y Asociados,  
Madrid, Spain

Emmanuel Gaillard  
Shearman & Sterling,  
Paris, France

Paul A Gelinas  
Paris, France

Hans van Houtte  
Stibbe Simont Monahan Duhot, Brussels, Belgium

Pierre A Karrer  
Pestalozzi Gmuer & Patry,  
Zürich, Switzerland

Jan Paulsson  
Freshfields, Paris, France

Hilmar Raeschke-Kessler  
Rechtsanwaelte Beim Bundesgerichtshof,  
Karlsruhe-Ettlingen, Germany

Van Vechten Veeder QC  
Essex Court Chambers, London, England

O L O de Witt Wijnen  
Nauta Dutilh, Rotterdam, Netherlands
About the Arbitration and ADR Committee (D)

Established as the Committee in the International Bar Association's Section on Business Law (SBL) which contributes to the development of the law and practice of international arbitration and other forms of dispute resolution, the Committee currently has over 1,500 members in 115 countries, and membership is increasing steadily.

Links

Relations are maintained with all of the prominent international Arbitration institutions worldwide.

Activities

• The Committee provides programmes at IBA and SBL Conferences. Conference programmes are discussed in advance with members, who are encouraged to suggest topics for discussion and debate.
• Members may be appointed to attend law-making sessions such as those which led to the UNCITRAL Model Law on International Commercial Arbitration.
• The Committee produces regular newsletters giving news of members and updates on topics in this field of law. Contributions from members are essential for the continuing success of these newsletters.
• Any member of the Committee who wishes to pursue a line of private enquiry, or to encourage public debate of an issue within the Committee’s remit, should ask the Committee Officers to circulate enquiries amongst the membership and to encourage co-operative endeavour.
Subcommittee on Recognition and Enforcement of Arbitral Awards (D1)

The Convention on the Recognition and Enforcement of Foreign Arbitration Awards made in New York in 1958 to which more than 100 countries have acceded has demanded the establishment of a special Subcommittee. Practitioners attend the annual workshop of this Subcommittee in order to learn of the experience of various countries with this Convention.

Subcommittee on Alternative Dispute Resolution Systems (D2)

This Subcommittee is devoted to the procedures and development of ADR. The subject has demanded far more attention from lawyers in recent years, and the Subcommittee provides a forum for studying and sharing experience of practitioners in various jurisdictions.
Foreword

These IBA Rules on the Taking of Evidence in International Commercial Arbitration (‘IBA Rules of Evidence’) have been prepared by a Working Party of Committee D (Arbitration and ADR) of the Section on Business Law of the International Bar Association. The IBA has issued these Rules as a resource to parties and to arbitrators in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner. The Rules provide mechanisms for the presentation of documents, witnesses of fact, expert witnesses and inspections, as well as for the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional or ad hoc rules or procedures governing international commercial arbitrations.

These IBA Rules of Evidence replace the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, originally issued in 1983. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

If the parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following additional language to the clause:

‘In addition to the [institutional or ad hoc rules chosen by the parties], the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence.’

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the time in conduct of the arbitration, or they may vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by the resolution of the IBA Council on 1 June 1999.

David W Rivkin
Chair, Committee on Arbitration and ADR
Section on Business Law
August 1999
The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules of Evidence”) are intended to govern in an efficient and economical manner the taking of evidence in international commercial arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional or ad hoc rules according to which the Parties are conducting their arbitration.

2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3. Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.

4. The taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely.
The Rules

Article 1  Definitions

In the IBA Rules of Evidence:

“Arbitral Tribunal” means a sole arbitrator or a panel of arbitrators validly deciding by majority or otherwise;

“Claimant” means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

“Document” means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information;

“Evidentiary Hearing” means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal receives oral evidence;

“Expert Report” means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert submitted pursuant to the IBA Rules of Evidence;

“General Rules” mean the institutional or ad hoc rules according to which the Parties are conducting their arbitration;

“Party” means a party to the arbitration;

“Party-Appointed Expert” means an expert witness presented by a Party;

“Request to Produce” means a request by a Party for a procedural order by which the Arbitral Tribunal would direct another Party to produce documents;

“Respondent” means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

“Tribunal-Appointed Expert” means a person or organization appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal.
**Article 2  Scope of Application**

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.

2. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

3. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.

4. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal may conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

**Article 3  Documents**

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce.
3. A Request to Produce shall contain:
   (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
   (b) a description of how the documents requested are relevant and material to the outcome of the case; and
   (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the Arbitral Tribunal and to the other Parties all the documents requested in its possession, custody or control as to which no objection is made.

5. If the Party to whom the Request to Produce is addressed has objections to some or all of the documents requested, it shall state them in writing to the Arbitral Tribunal within the time ordered by the Arbitral Tribunal. The reasons for such objections shall be any of those set forth in Article 9.2.

6. The Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objections. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce to the Arbitral Tribunal and to the other Parties those requested documents in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case, and (ii) none of the reasons for objection set forth in Article 9.2 apply.

7. In exceptional circumstances, if the propriety of an objection can only be determined by review of the document, the Arbitral Tribunal may determine
that it should not review the document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the document reviewed.

8. If a Party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents. The Party shall identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the documents would be relevant and material.

9. The Arbitral Tribunal, at any time before the arbitration is concluded, may request a Party to produce to the Arbitral Tribunal and to the other Parties any documents that it believes to be relevant and material to the outcome of the case. A Party may object to such a request based on any of the reasons set forth in Article 9.2. If a Party raises such an objection, the Arbitral Tribunal shall decide whether to order the production of such documents based upon the considerations set forth in Article 3.6 and, if the Arbitral Tribunal considers it appropriate, through the use of the procedures set forth in Article 3.7.

10. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional documents which they believe have become relevant and material as a consequence of the issues raised in documents, Witness Statements or Expert Reports submitted or produced by another Party or in other submissions of the Parties.
11. If copies are submitted or produced, they must conform fully to the originals. At the request of the Arbitral Tribunal, any original must be presented for inspection.

12. All documents produced by a Party pursuant to the IBA Rules of Evidence (or by a non-Party pursuant to Article 3.8) shall be kept confidential by the Arbitral Tribunal and by the other Parties, and they shall be used only in connection with the arbitration. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement is without prejudice to all other obligations of confidentiality in arbitration.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it relies and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties a written statement by each witness on whose testimony it relies, except for those witnesses whose testimony is sought pursuant to Article 4.10 (the “Witness Statement”). If Evidentiary Hearings are organized on separate issues (such as liability and damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each Evidentiary Hearing.

5. Each Witness Statement shall contain:
   (a) the full name and address of the witness, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be
relevant and material to the dispute or to the contents of the statement;
(b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute;
(c) an affirmation of the truth of the statement; and
(d) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions only respond to matters contained in another Party's Witness Statement or Expert Report and such matters have not been previously presented in the arbitration.

7. Each witness who has submitted a Witness Statement shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise.

8. If a witness who has submitted a Witness Statement does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties, the Arbitral Tribunal shall disregard that Witness Statement unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

9. If the Parties agree that a witness who has submitted a Witness Statement does not need to appear for testimony at an Evidentiary Hearing, such an agreement shall not be considered to reflect an agreement as to the correctness of the content of the Witness Statement.

10. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person. The Party shall identify the intended witness, shall describe the subjects on which the witness's testimony
is sought and shall state why such subjects are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the testimony of that witness would be relevant and material.

11. The Arbitral Tribunal may, at any time before the arbitration is concluded, order any Party to provide, or to use its best efforts to provide, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered.

Article 5 Party-Appointed Experts


2. The Expert Report shall contain:
   (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;
   (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;
   (d) an affirmation of the truth of the Expert Report; and
   (e) the signature of the Party-Appointed Expert and its date and place.

3. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.
4. Each Party-Appointed Expert shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise and the Arbitral Tribunal accepts this agreement.

5. If a Party-Appointed Expert does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties accepted by the Arbitral Tribunal, the Arbitral Tribunal shall disregard his or her Expert Report unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

6. If the Parties agree that a Party-Appointed Expert does not need to appear for testimony at an Evidentiary Hearing, such an agreement shall not be considered to reflect an agreement as to the correctness of the content of the Expert Report.

Article 6  Tribunal-Appointed Experts

1. The Arbitral Tribunal, after having consulted with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert report after having consulted with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a statement of his or her independence from the Parties and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections to the Tribunal-Appointed Expert’s independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any relevant and material information or to provide access to any relevant documents, goods, samples, property or site for inspection.
The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.7. The Tribunal-Appointed Expert shall record in the report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal. The Tribunal-Appointed Expert shall describe in the report the method, evidence and information used in arriving at the conclusions.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any document that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the report in a submission by the Party or through an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission or Expert Report to the Tribunal-Appointed Expert and to the other Parties.

6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.

7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 On Site Inspection
Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert of any site, property, machinery or any other goods or process, or documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing
1. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness (which term includes, for the purposes of this Article, witnesses of fact and any Experts), if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

2. The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning. The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner
that witnesses presented by different Parties be questioned at the same time and in confrontation with each other. The Arbitral Tribunal may ask questions to a witness at any time.

3. Any witness providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she is telling the truth. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.

4. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant and material. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

**Article 9  Admissibility and Assessment of Evidence**

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:
   (a) lack of sufficient relevance or materiality;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
   (c) unreasonable burden to produce the requested evidence;
   (d) loss or destruction of the document that has been reasonably shown to have occurred;
   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
   (f) grounds of special political or institutional sensitivity (including evidence that has been
classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be considered subject to suitable confidentiality protection.

4. If a Party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected in due time or fails to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

5. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.