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Fishing for the Smoking Gun

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NOTES

Fishing for the Smoking Gun: The Need for British Courts to Grant American Style Extraterritorial Discovery Requests in U.S. Industry-Wide Tort Actions

ABSTRACT

Industry-wide tort litigation, such as tobacco and gun litigation, poses a new problem for extraterritorial discovery. These suits allege conspiracies on the part of the tobacco and gun industries to conceal the dangers of their products from the public. Much of the evidence needed to prove the industries' knowledge is in their possession. These industries are international with companies located in the United Kingdom. Under U.S. discovery law the evidence is discoverable, but such is not the case under British discovery law. Therefore, the evidence and witnesses located in the United Kingdom are outside the grasp of U.S. plaintiffs. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters establishes procedures for obtaining evidence abroad but does not offer any relief to U.S. plaintiffs seeking evidence in the United Kingdom in industry-wide tort litigation.

This note explores the problems faced by U.S. litigants seeking evidence in the United Kingdom for use in industry-wide tort litigation in the United States. It includes an examination of U.S. and British discovery procedures and compares and contrasts them. It also examines the applicable provisions of the Convention and the Evidence Act of 1975 in the United Kingdom which implemented the Convention in that country. This note identifies the problems experienced by U.S. plaintiffs in tobacco and gun litigation. It suggests a solution to extraterritorial discovery disputes between the United States and the United Kingdom in the form of an amendment to the Evidence Act of 1975 to allow British courts greater discretion in granting U.S. discovery requests in industry-wide tort litigation.

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I. INTRODUCTION

Imagine that you are a U.S. litigant suing a British gun manufacturer for the negligent manufacture of a gun that resulted in the death of your child.¹ Your claim alleges that the gun manufacturer was aware of a safety mechanism that could be installed in the gun at the time of manufacture that would reduce the chances of accidentally discharging the gun. In fact, the manufacturer of the specific gun involved was not the only gun manufacturer aware of this safety mechanism. You suspect that the entire gun industry decided to conceal the information about the safety mechanism because it would be too costly to install,

1. This hypothetical is drawn from the facts of cases facing gun manufacturers today in U.S. courts. See discussion *infra* Part V.B.

would raise gun prices, and would result in reduced gun sale profits.

In order to prove your claim, you must gain access to documents held by the manufacturer in the United Kingdom. The manufacturer is physically in possession of all the documents you need to prove your claim. You have one problem. You will be unable to obtain these documents because the British courts will not grant requests for discovery that lack specificity, and you do not know exactly which documents you need. Thus, you will have no case without these industry documents and research files. By contrast, most of the documents would be available under the Federal Rules of Civil Procedure (Federal Rules); however, because the manufacturer is not located in the United States, the Federal Rules do not apply.

This note addresses the problem of extraterritorial discovery disputes between the United States and the United Kingdom in the new wave of industry-wide tort litigation. Differing conceptions of, and approaches to, discovery by the United States and the United Kingdom have resulted in disputes when litigants in the United States seek evidence located in the United Kingdom. In an age of globalization, the advent of tobacco litigation and the rising threat of gun litigation have opened the door to more conflict as corporations manipulate the international system to strategically avoid disclosure of damaging documents.

Part II of this Note lays out the basic procedural principles of discovery in the United States as prescribed by the Federal Rules and contrasts them to the discovery procedures utilized in the United Kingdom. Part III explores the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, the most significant current international convention on extraterritorial discovery. In particular, this section examines the key provisions of the Convention, as well as the international policies behind the Convention, to better understand its role in extraterritorial discovery disputes. Part IV will focus on the problem of obtaining evidence in the United Kingdom for use in litigation in the United States. Particular attention is given to the U.S. approach to extraterritorial discovery and its implementation of the Convention, as well as the United Kingdom's approach in response to discovery requests from the United States. Part V will explore the new challenges presented as industry-wide tort litigation explodes and goes international. This section will focus primarily on the experience, and outcomes of tobacco litigation as an example of what could be expected in future litigation. It will also explore the lessons learned from tobacco litigation and the methods corporate defendants have used to manipulate the system to avoid disclosure. Finally, Part VI will examine the problems associated with employing existing mechanisms for

extraterritorial discovery and will suggest a possible solution to resolve the discovery conflict: an amendment to the United Kingdom's Evidence Act of 1975 to allow courts greater discretion in executing discovery requests from the United States.

II. DIFFERING CONCEPTS OF DISCOVERY IN LITIGATION IN THE UNITED STATES AND THE UNITED KINGDOM

The United States and the United Kingdom have different views on the limits of discovery in litigation. These differences range from what information is discoverable and when, if at all, it is discoverable. Although discovery in the United States is derived from procedure in the United Kingdom, the Federal Rules have greatly expanded upon common law notions of discovery.² In fact, the liberal U.S. system of discovery has come under attack from both common law and civil law countries.³ Though the same word, "discovery," is used to describe both the U.S. and British systems of trial disclosure, the meanings are very different.

A. *Liberal Discovery in the United States*

The United States has the most liberal discovery procedures in the world.⁴ Rule 1 of the Federal Rules establishes that the rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action."⁵ Therefore, the Federal Rules are read liberally to allow the litigants to engage in a "fair" procedure, with limited surprise.

Most of the information sought by litigants is easily discoverable in the United States. Most discovery occurs pretrial.⁶ Rule 26(b)(1) allows parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" ⁷ It is

2. See Collins, *infra* note 140, at 27.

3. See discussion *infra* Part III.B.

4. See generally FED. R. CIV. P.

5. FED. R. CIV. P. 1. In its entirety, the rule reads: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.*

6. See FED. R. CIV. P. 26.

7. FED. R. CIV. P. 26(b)(1). The full text of Rule 26(b)(1) reads:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or

important to recognize that the relevance requirement during discovery is more broad than the relevance requirement at trial.⁸ Relevance at the discovery stage focuses on the general subject matter, whereas at trial relevance is limited to the specific issues of the particular case.⁹ Most information a party seeks in discovery will conform to the lenient relevance standard of Rule 26(b)(1).

Rule 26(b)(1) does not require that the information sought during discovery be admissible at trial, but only that it appear "reasonably calculated to lead to the discovery of admissible evidence."¹⁰ The fact that the discoverable evidence need not be admissible at trial makes the discovery process in the United States quite broad. What British and other European courts refer to as "fishing" expeditions is an accepted component of American civil procedure.¹¹ It is commonplace for parties to use discovery to formulate the issues of the action and to uncover leads on additional evidence for their case.¹² In fact, the Federal Rules are designed to achieve such goals.

Discovery in the United States is obtained by way of five different categories of disclosure: automatic disclosure, depositions, interrogatories, production and inspection of documents and property, and requests for admissions.¹³ With the exception of automatic disclosure, these modes of discovery are also found in common law judicial systems.¹⁴ Because of

to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

8. See *id.*; see also FED. R. EVID. 104.
9. See *id.*; see also FED. R. EVID. 104.
10. FED. R. CIV. P. 26(b)(1).
11. See *infra* note 44.
12. See FED. R. CIV. P. 26(a) advisory committee's note.
13. See FED. R. CIV. P. 26(a)(5).

Parties may obtain discovery by one or more of the following methods: depositions upon oral examinations or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

Id.

14. See NEWMAN & ZASLOWSKY, *infra* note 55, § 1.2.1 at 7-8 (discussing procedures in England and Commonwealth countries).

Rule 26(b)(1), however, their application is far more liberal in the United States than in any other common law jurisdiction.¹⁵

Automatic disclosure is a distinctly American creation.¹⁶ It is a formulation of what has been called "court-ordered interrogatories."¹⁷ Rule 26(a)(1) mandates the disclosure of four categories of information before any discovery requests are made: the names of individuals likely to have discoverable information and means of contacting them, if known; a copy of or description and location of all documents in possession of the party; a computation of any category of damages; and any insurance agreement which may satisfy a judgment.¹⁸ The names and documents disclosed depend on the specificity of the pleadings or the particularity with which the facts are pled.¹⁹ Therefore, very specific pleadings can result in a great deal of automatic disclosure.

There has been a great deal of debate over the adoption of Rule 26(a)(1).²⁰ Proponents of the rule focus primarily on its

15. *Id.* at 6-7.

16. *See Collins, infra* note 140, at 27-28.

17. FED. R. CIV. P. 26(a)(1) advisory committee's note.

18. FED. R. CIV. P. 26(a)(1). The Rule reads in relevant part:

(1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Id.

19. *See* FED. R. CIV. P. 26(a)(1)(A)-(B) (both sections of the rule stating that the disclosure shall be made if "relevant to disputed facts alleged with particularity in the pleadings . . .").

20. *See generally* Griffin Terry, Comment, *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure*, 63 U. CIN. L. REV. 869 (1995). *See generally* Amendments to the

ability to move cases forward more quickly.²¹ They find support in Rule 1, which sets out the goal of the Federal Rules: the "speedy, and inexpensive determination of every action."²² The second argument proponents of Rule 26(a)(1) make is that it will reduce the expense of litigation.²³ A primary aim of automatic disclosure is to help parties avoid costly, expansive disclosure for the purpose of "fishing" for information, because the parties will have essential information disclosed to them at the onset of the litigation.²⁴ As a result, issues will be narrowed more swiftly.²⁵ Furthermore, proponents assert that automatic disclosure does not expand discovery, but merely expedites the discovery process.²⁶

Critics of automatic disclosure do not believe that its benefits outweigh its costs.²⁷ These critics fear the burden unnecessary disclosure creates.²⁸ Justice Scalia observed in his dissent to the amendments to Rule 26 that irrelevant information would likely be disclosed as a result of mandatory disclosure.²⁹ Automatic disclosure is particularly unnecessary in cases that would have settled or been terminated before any disclosure would otherwise have taken place.³⁰ Furthermore, it is burdensome to require an attorney to decide what information needs to be disclosed before any requests have been made.³¹ This is never more apparent than in the attorney-client relationship context.³²

The amendments, despite the controversy surrounding them, are based on the principle of reducing unfair surprise in litigation.³³ The Federal Rules are constructed to avoid the surprises which other legal systems occasionally produce.³⁴ By reducing unfair surprise, the Federal Rules aim for the parties to

Federal Rules of Civil Procedure, 61 U.S.L.W. 4365, (U.S. Apr. 22, 1993) (Scalia, J. J., dissenting).

21. See Terry, *supra* note 20, at 927.

22. See FED. R. CIV. P. 1, *supra* note 5 and accompanying text.

23. FED. R. CIV. P. 26 advisory committee's note.

24. See Terry, *supra* note 20, at 927.

25. *Id.*

26. *Id.* at 929-30.

27. See Amendments to the Federal Rules of Civil Procedure, 61 U.S.L.W. 4365, (U.S. Apr. 22, 1993) (Scalia, J., dissenting).

28. *Id.* at 4392.

29. *Id.*

30. *Id.*

31. See *id.* (observing that attorneys must exercise a great deal of judgment, putting strain on their ethical obligations to their clients).

32. See *id.* Particularly, attorneys must balance their obligation to represent their clients with the requirement to disclose information to the opposing side prior to any requests for information. *Id.*

33. See generally Fed. R. Civ. P. advisory committee's notes (amended 1993).

34. See *id.*

arrive at the truth and achieve justice with the least cost and in the quickest time.³⁵

B. *A More Conservative Approach to Discovery
in the United Kingdom*

Discovery in the United Kingdom is far more limited than discovery in the United States.³⁶ The concepts the two nations have of discovery are quite different, despite using the same word to describe the process.³⁷ Order 24 of the Rules of the Supreme Court governs discovery in the United Kingdom.³⁸ Unlike Rules 26 through 37 of the Federal Rules in the United States, Order 26 takes a far more conservative approach to discovery.³⁹ Pretrial discovery, as it is known in the United States, does not exist in the United Kingdom.⁴⁰ Parties make discovery at the close of the pleadings by exchanging lists of relevant documents to be produced.⁴¹ Therefore, because the pleadings have been closed, the issues have already been identified.⁴² This is in contrast to the role discovery plays in formulating the issues in the United States.⁴³ In the United Kingdom, allowing discovery to take place before the issues have been formulated would allow "fishing expeditions" to take place, a practice the English explicitly reject.⁴⁴

Another difference is that discovery in the United Kingdom is limited to the parties to the litigation.⁴⁵ The protection of witnesses and third parties from pretrial disclosure of evidence and documents has long been a concern in the United Kingdom.⁴⁶ Third parties are protected from pretrial disclosure of documents and oral and written testimony,⁴⁷ which is quite different from the United States procedure of compelling all forms of discovery upon third party witnesses of non-privileged

35. See FED. R. CIV. P. 1, *supra* note 5 and accompanying text.

36. See NEWMAN & ZASLOWSKY, *infra* note 55, § 1.2.1 at 7-8; Collins, *infra* note 140, at 27-28.

37. MCCLEAN, *infra* note 39, at 60.

38. See R.S.C. Order 24, r. 1(1).

39. See DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 59-62 (1992).

40. *Id.* at 60.

41. See MCCLEAN, *supra* note 39.

42. MCCLEAN, *supra* note 39, at 60.

43. See discussion *supra* Part II.A.

44. MCCLEAN, *supra* note 39, at 60.

45. *Id.*

46. See *id.* at 60-61 for a discussion and account of the English hostility towards discovery from third parties. Particular attention is given to statements of various Lords expressing their disapproval. *Id.*

47. *Id.* at 60.

information.⁴⁸ Furthermore, the "mere witness" rule prohibits making a witness a party to an action for the purpose of compelling discovery.⁴⁹ One exception to this rule in the United Kingdom is that a witness who has liability to the plaintiff for the wrong must disclose information pertaining to that wrong if the plaintiff has no intention of pursuing a claim against that witness.⁵⁰ Other exceptions involve personal injury or death actions.⁵¹ There are strict limitations, however, placed on disclosure in such actions.⁵²

In the United Kingdom all discovery is limited to the discovery of documents.⁵³ This is made manifest by the rules in Order 24, which make reference only to the documents to be disclosed.⁵⁴ A party may serve written interrogatories on the opposing party; however, this practice is distinct from the practice in the United States.⁵⁵ The interrogatories pertain only to documents, which will only be explained by witnesses at trial.⁵⁶ Therefore, the discovery procedure in the United Kingdom is quite limited.

III. THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS

The most important international agreement on extraterritorial discovery is the Hague Evidence Convention (the Convention).⁵⁷ The Convention has serious implications on the way extraterritorial discovery is conducted between signatory

48. See FED. R. CIV. P. 26(b)(1), *supra* note 7 and accompanying text. See also FED. R. CIV. P. 26(a)(5), *supra* note 13 and accompanying text.

49. MCCLEAN, *supra* note 39, at 60-61 (discussing the "mere witness" rule and objections to it).

50. *Id.* at 60.

51. *Id.*

52. *Id.* at 61. Specifically, in such actions discovery can take place against individuals who may be a party to the action before the start of the proceedings and then after such time against third parties as long as there is no injury to the public interest. *Id.*

53. R.S.C. Order 24, r. 1-6 (making reference only to documents to be disclosed).

54. *Id.*

55. See LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, *LITIGATING INTERNATIONAL COMMERCIAL DISPUTES* § 1.2.1. at 7 (1996).

56. *Id.* In fact, witnesses may never have the opportunity to explain documents obtained through interrogatories if they are not questioned on them at trial. *Id.* This is in stark contrast to U.S. procedure, which permits depositions of witnesses prior to trial, during which documents obtained through discovery may be explained. See FED. R. CIV. P. 27.

57. Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 754 (1983).

states.⁵⁸ The Convention, though not the only international agreement on extraterritorial discovery, is the most significant because of its impact on international litigation.⁵⁹ This multilateral treaty is greatly needed because of differing methods among countries for conducting discovery. It establishes a set of guidelines and procedures for signatory countries regarding obtaining evidence abroad.⁶⁰ Interpretation of the Convention, particularly regarding whether it is binding authority on all discovery disputes, however, has varied among nations.⁶¹ Therefore, questions still surround the role of the Convention in the international community.

A. *The Central Provisions of the Hague Convention on the Taking of Evidence Abroad*

The Convention established important common procedures for conducting extraterritorial discovery.⁶² The scope of the Convention is "civil and commercial matters."⁶³ The Convention establishes three procedures for obtaining evidence from a foreign state: letters of request, use of a diplomatic officer or consular agent, and use of an appointed commissioner.⁶⁴

1. Letters of Request

Chapter 1 of the Convention governs letters of request.⁶⁵ Letters of request are made by a trial court of the requesting state to a competent authority of the state in which the evidence is located.⁶⁶ The letter of request may be made for the purpose of obtaining evidence or for the performance of some other judicial

58. See *id.* at 754-58. The signatory states now include Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxemburg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States. *Id.* at 54.

59. See *id.* at 754-58.

60. *Id.* at 754.

61. See *id.* at 758-61.

62. See *id.* at 754-56.

63. The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, art. 1, 23 U.S.T. 2555 [hereinafter Convention]. It is important to note, however, that the terms "commercial" and "civil" are not defined anywhere in the treaty. James S. McLean, *The Hague Evidence Convention: Its Impact on American Civil Procedure*, 9 *LOJ. L.A. INT'L & COMP. L. REV.* 17, 26 (1986). This has led to a great deal of confusion among U.S. courts and foreign courts over whether the Convention applies to administrative proceedings. *Id.* at 26-27.

64. Oxman, *supra* note 57, at 754-56.

65. Convention, *supra* note 63, Ch. I, at 2557.

66. *Id.* Ch. I, art. 1, at 2557.

act.⁶⁷ Litigants may use this method to examine or question persons⁶⁸ and to inspect documents and real or personal property.⁶⁹ Article 3 specifies the information that must be included in the letter of request, including: (1) the authority making the request and the authority requested to execute it, if known;⁷⁰ (2) the names of the parties and their representatives;⁷¹ (3) the type of proceeding for which the evidence is needed and any other necessary information;⁷² and (4) the requested evidence or judicial act to be performed.⁷³ Concerns about letters of request not containing enough information prompted the creation of a model letter of request in 1985.⁷⁴ The model letter of request provides a "check list" of information that is needed for proper execution of a request.⁷⁵ Use of the model letter of request is not mandatory, although it is strongly recommended.⁷⁶

Articles 4 through 6 lay out other requirements for letters of request.⁷⁷ Article 4 establishes that letters of request are to be written in the language of the executing state or be accompanied by an appropriate translation.⁷⁸ The Convention, however, also allows for letters of request to be made in English or French as long as the executing state has made no reservation on the matter.⁷⁹ States may specify languages in which letters of request may be made.⁸⁰ If a letter of request does not comply with the requirements set forth by the Convention, Article 5 requires the executing state to notify the requesting state of any objection.⁸¹ Article 6 provides that if an authority receiving a

67. *Id.*

68. *Id.* Ch. I, art. 3, at 2558. The subsection reads: The letter shall specify "the names and addresses of the persons to be examined." *Id.* Ch. I, art. 3(f), at 2558. The subsection reads: The letter shall specify "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." *Id.*

69. *Id.* Ch. I, art. 3(g), at 2558. The subsection reads: The letter shall specify "the documents or other property, real or personal, to be inspected." *Id.*

70. *Id.* Ch. I, art. 3(a), at 2558.

71. *Id.* Ch. I, art. 3(b), at 2558.

72. *Id.* Ch. I, art. 3(c), at 2558.

73. *Id.* Ch. I, art. 3(d), at 2558.

74. MCCLEAN, *supra* note 39, at 92. The need for a model form was considered by the Special Commissions of 1978 and 1985. *Id.* They were particularly concerned with making sure letters of request identified the specific nature of the requested evidence. *Id.* Another concern prompting a model letter of request was that different legal systems lead to interpretive problems with legal terms. *Id.*

75. *Id.*

76. *Id.*

77. Convention, *supra* note 63, Ch. I, arts. 4-6, at 2559-60.

78. Convention, *supra* note 63, Ch. I, art. 4, at 2559.

79. *Id.*

80. *Id.*

81. *Id.* Ch. I, art. 5, at 2560.

letter of request is not competent to execute it, it should transfer the request to the competent authority.⁸²

The Convention also requires that the laws of the authority making the request and the authority from which the evidence is requested must be taken into account.⁸³ For example, if an oath is required by the laws of the requesting state, it must be specified in the request.⁸⁴ Article 9 mandates that the methods and procedures of the executing authority be followed.⁸⁵ Article 9 also allows the requesting state to specify any procedures it wishes to have applied, which are not incompatible with the laws of the executing authority or impossible of performance as a matter of practicality.⁸⁶ The Convention has encouraged executing states to conform their procedures to meet the needs of the requesting state.⁸⁷ Furthermore, Article 9 mandates that a "Letter of Request shall be executed expeditiously."⁸⁸

The execution of letters of request is addressed in articles 10 through 12.⁸⁹ Article 10 requires the executing state to apply the appropriate measures of its internal law in executing letters of request.⁹⁰ The privilege of a witness to refuse to give evidence is addressed by Article 11.⁹¹ Generally, the privilege may arise from the law of the executing state or the law of the requesting state, if specified in the letter of request.⁹² The requesting authority may

82. *Id.* Ch.I, art. 6, at 2560.

83. *See* MCCLEAN, *supra* note 39, at 91-92.

84. *Id.*

85. Convention, *supra* note 63, at Ch. I, art. 9, at 2551. "The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed." *Id.*

86. *Id.* Notably, one commentator has observed that "incompatible" should not be interpreted to mean "different," but rather that the procedure is constitutionally or statutorily prohibited by the executing state. *See* MCCLEAN, *supra* note 39, at 94. Furthermore, McClean observed that the inconvenience of the executing state is not an acceptable ground for refusing to execute a special procedure. *Id.* The Convention rejects inconvenience in the interest of the requesting state, which may only be able to accept evidence obtained by special procedures. *Id.*

87. *See* MCCLEAN, *supra* note 39, at 95. McClean points out, for example, that a civil law state may appoint a commissioner from the requesting common law state to carry out the special procedure unfamiliar to civil law courts. *Id.*

88. Convention, *supra* note 63, Ch. I, art. 9, at 2561. The 1985 Special Commission obtained estimates on the time it took to execute a letter of request. MCCLEAN, *supra* note 39, at 95. A common response was three months. *Id.* To shorten the response time, a response date and explanation are questions included in the model letter of request. *Id.*

89. Convention, *supra* note 63, Ch. I, arts. 10-12, at 2561-63.

90. *Id.* Ch. I, art. 10, at 2561-62.

91. *Id.* Ch. I, art. 11, at 2562.

92. *Id.*

be asked to confirm a privilege taken under its law.⁹³ Article 11 allows a state to recognize privileges and duties of a third state.⁹⁴ Notably, the United Kingdom has not made such a declaration.⁹⁵ Article 12 specifically lays out the circumstances under which a state may refuse a letter of request.⁹⁶ The two acceptable reasons are if the request is not within the judiciary's functions⁹⁷ or if the state fears that its sovereignty or security may be prejudiced.⁹⁸ An executing state, however, cannot deny a request by claiming exclusive subject-matter jurisdiction or by asserting that its laws do not permit such a claim.⁹⁹

2. Taking of Evidence by Diplomatic Officers, Consular Agents, and Commissioners

Diplomatic officers, consular agents, and commissioners may take evidence according to the procedures set out in Chapter II of the Convention.¹⁰⁰ One limit on the power of these officials to take evidence is that a contracting state may require prior permission.¹⁰¹ Articles 15 and 16 distinguish between taking evidence from a witness who is a national of the consular agent's state and a witness who is a national of another state.¹⁰² Both articles allow consular agents to take evidence without compulsion, although Article 16 adds two additional

93. *Id.* This practice is used in the interest of protecting the witness. MCCLEAN, *supra* note 39, at 96. McClean suggests a requesting state anticipate any claims of privilege that may be made under its own law. *Id.*

94. Convention, *supra* note 63, Ch. I, art. 11, at 2562.

95. See MCCLEAN, *supra* note 39, at 96. This is likely due to the United Kingdom's conservative approach to discovery within its own territory and extraterritorial discovery. See discussion *supra* Part II.B.

96. Convention, *supra* note 63, Ch. I, art. 12, at 2562-63.

97. MCCLEAN, *supra* note 39, at 93. McClean points out that requests for public records are not within some states' judicial functions. *Id.*

98. *Id.* McClean cites *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] A.C. 547 (H.L.) as an example of a request being denied because it infringed on the sovereignty of a state. *Id.*

99. Convention, *supra* note 63, Ch. I, art. 12, at 2562-63.

100. MCCLEAN, *supra* note 39, at 101. McClean notes that this section of the Convention identifies the significant difference between common law, for which the taking of evidence by consuls and commissioners is accepted, and civil law countries, in which evidence is taken by the judge. *Id.* Private parties taking evidence may be seen as invading judicial sovereignty. *Id.* Chapter II of the Convention, drawing from United Kingdom bilateral agreements, successfully reconciles these differences. *Id.*

101. Convention, *supra* note 63, Ch. II, arts. 15-17, at 2564-65.

102. *Id.* Ch. II, arts. 15-16, at 2564-65. Article 15 applies to a consular agent taking evidence from nationals of the state he represents for use in proceedings in the state he represents. *Id.* Ch. II, art. 15, at 2564-65. Article 16 applies to a consular agent taking evidence from a national of the state in which he is exercising his functions or if a third state for use in proceedings in the state he represents. *Id.* Chapter II, art. 16, at 2564-65.

requirements because it deals with nationals of a state other than the consular agent.¹⁰³ Essentially, when a consular agent takes evidence in the territory of another contracting state from a national of a state other than the one he represents, a competent authority named by the state in which he exercises his functions must give permission and the consular agent must comply with the conditions set by the authority.¹⁰⁴ States may waive the prior permission requirement.¹⁰⁵

Article 18 permits a state to declare that an authorized diplomatic office, consular agent, or commissioner may apply to a competent authority for help in compelling evidence.¹⁰⁶ It is unlikely, however, that an unwilling witness will be compelled to testify in any state other than one of the four, including the United States and the United Kingdom, which have made such a declaration under Article 18.¹⁰⁷ In addition, a state making such a declaration may specify any additional conditions it deems necessary.¹⁰⁸

3. General Provisions

Chapter III of the Convention consists of several general clauses. One such clause has proven to be one of the more significant and controversial clauses in the Convention.¹⁰⁹ Article 23, which addresses pre-trial discovery, provides that a signatory state may declare that it will not accept letters of request for "the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."¹¹⁰ Only documents, however, are within the purview of Article 23, and oral depositions are not.¹¹¹ The differences between U.S. and British discovery practices

103. *Id.* Ch. II, art. 16, at 2564-65.

104. *Id.* Ch. II, art. 16(a)-(b), at 2564-65.

105. *Id.* Ch. II, art. 16, at 2564-65.

106. *Id.* Ch. II, art. 18, at 2566.

107. MCCLEAN, *supra* note 39, at 103. Besides the United States and the United Kingdom, only Czechoslovakia and Italy have made such declarations. *Id.* See also Comment, *The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461, 1467 (1984).

108. Convention, *supra* note 63, Ch. II, art. 19, at 2566. These additional conditions may regard the time and place in which evidence will be obtained. *Id.*

109. See MCCLEAN, *supra* note 39, at 97-101 (discussing concerns and reservations about Article 28).

110. *Id.* at Ch. III, art. 23, at 2568. See also Comment, *supra* note 83, at 1468-69.

111. Convention, *supra* note 63, Ch. III, art. 23, at 2568. See also MCCLEAN, *supra* note 39, at 98. One commentator has noted that reservations made under Article 23 cannot extend the scope of the Convention past Article 1. See *id.*

motivated the pre-trial discovery exclusion of the Convention.¹¹² A greater understanding of the purpose of Article 23 comes from a close examination of the policy arguments behind the drafting of the Convention.¹¹³

B. *The Policy Behind the Hague Convention: Shedding
Light on the Intended Role of the Convention
in Extraterritorial Discovery*

Great differences exist between the way discovery is conducted around the world. These differences, quite expectedly, lead to disputes. As disputes arose in the international community when states sought to give effect to their discovery procedure on foreign litigants, it was clear that an international solution was needed. The result was the Convention, which took effect in 1972.¹¹⁴ A significant factor in the Convention was the policy concerns of the signatory nations.¹¹⁵ Nations are primarily concerned with their sovereignty and the preservation of their methods of discovery.¹¹⁶ The most pressing concern shared by European common law jurisdictions and civil law jurisdictions was the liberal nature of U.S. discovery procedure, and more specifically the U.S. practice of pretrial discovery.¹¹⁷

To understand the policy concerns behind the Convention, it is important to first examine the purpose and intent of the Convention. The purpose of the Convention, as seen by Phillip W. Amram, a U.S. representative involved with drafting the Convention, was to

improve the existing system of Letters of Request; (2) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissions; and (3) preserve all the more favorable and less restrictive practices arising from internal law, internal rules of procedure, and bilateral or multilateral conventions.¹¹⁸

112. See Oxman, *supra* note 57, at 771 (explaining that Article 23 was drafted in response to diverging American and British discovery practices).

113. See discussion *infra* Part III.B.

114. McClean, *supra* note 63, at 22.

115. See *id.* at 23-25 (discussing the history and purpose of the Convention).

116. See *id.* at 25 (stating that "[t]he Convention attempted to accommodate discovery "American style" to a limited extent, and at the same time preserve civil law, judicial sovereignty and evidence gathering").

117. Guy Miller Struve, *Discovery from Foreign Parties in Civil Cases Before U.S. Courts*, 16 INT'L L. & POLY 1101, 1107 (1984).

118. See McClean, *supra*, note 63, at 23 (citing Amram, *the Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 652 (1969)).

The signatory states sought to reach a compromise over the conflicting discovery systems in negotiating the Convention.¹¹⁹ The most serious conflict in legal systems was clearly between the United States and civil law systems in Europe.¹²⁰

1. Did the Parties Intend for the Hague Convention to be the Exclusive Means for Obtaining Evidence Abroad?

The Convention caused the least disruption to the U.S. legal system.¹²¹ The Convention adhered to the principles of the United States' international judicial assistance policy.¹²² Civil law countries, in contrast, experienced a divergence from their accepted practices with the adoption of the Convention.¹²³ The concessions made by civil law countries and other states did not seem to be met by reciprocal concession on the part of the United States.¹²⁴ The intentions of the parties to the Convention raises questions regarding the role it was designed to play in extraterritorial discovery. The issue as to whether the Convention is the exclusive means for obtaining evidence abroad requires some examination of how it was drafted.¹²⁵ The Convention does not have an express exclusivity provision.¹²⁶ The Hague Service Convention, on the other hand, does include such a provision.¹²⁷ Therefore, one may conclude that if the parties to the Convention intended such an interpretation they would have included an express provision.¹²⁸ Some argue that the United States clearly never intended to prohibit extraterritorial discovery not conforming to Convention procedures.¹²⁹

119. See *id.* at 24.

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.* Although most countries experienced change in their international judicial assistance policy, it was civil law countries that experienced the most change. See *id.*

124. See Oxman, *supra* note 57, at 760. Bernard Oxman points out that "if the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful *quid pro quo* for their concessions to the United States under the convention." *Id.* Oxman further explains that "consideration" is not required in international treaty law. *Id.*

125. See *id.*

126. *Id.*

127. *Id.* See also MCCLEAN, *supra* note 39, at 47-50 (discussing the Hague Service Convention). The Hague Service Convention sought to establish a system for service of process abroad. *Id.*

128. See *id.* Though the Convention does not expressly prohibit the taking of evidence abroad outside convention procedures, some countries will only permit the taking of evidence according to the convention as a matter of international law. See *id.*

129. *Id.* Oxman argues that the intent of the United States is made manifest by the history of extraterritorial discovery commonly practiced by U.S.

Concerns about the United States' lack of concessions feed the debate over the exclusivity of the Convention.¹³⁰ If the Convention was not intended to be exclusive, then it appears that the United States got all the advantages.¹³¹ Foreigners seeking evidence located in the United States were not likely to see a change in U.S. policy because it was not conditioned on reciprocity.¹³² Foreign countries, though not agreeing to reciprocity in the Convention, did agree to more liberal procedures for extraterritorial discovery.¹³³ The different discovery procedures of the international community demanded compromise to establish uniform procedures.¹³⁴ The broad discovery procedures of the United States were viewed as threatening by other nations with more conservative approaches.¹³⁵ The Convention is understood as representing that compromise.¹³⁶

2. Article 23: The Problem of Pre-Trial Discovery

In establishing an acceptable compromise, provisions were included in the Convention to protect the sovereignty of signatory states and preserve their procedures.¹³⁷ One such provision was the Article 23 exclusion of pre-trial discovery of documents.¹³⁸ The United Kingdom was the force behind the inclusion of Article 23 in the Hague Evidence Convention.¹³⁹ The British were very concerned about the United States' liberal discovery practices.¹⁴⁰ The United Kingdom's own practice of limiting discovery to documents clearly influenced their position on Article 23 of the Convention.¹⁴¹

courts. *Id.* Furthermore, Oxman states that he is unaware of any intent to prohibit the practice by American negotiators, the Department of State, or Congress. *Id.*

130. *See id.*

131. *See id.*

132. *Id.* at 761.

133. *Id.* The liberal procedures of U.S. discovery clearly would never have been adopted by foreign countries. Efforts were made, however, on the part of civil law countries to adopt common law procedures. *Id.*

134. *See id.*

135. *See Comment, supra* note 107, at 1465.

136. *Id.*

137. *See Oxman, supra* note 57, at 770-71.

138. *See id.* at 771.

139. *Id.* *See also* Collins, *infra* note 140, at 29.

140. Lawrence Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 INT'L LAW. 27, 27 (1979). Collins observed that the divergence of U.S. discovery procedure from its English origins is appalling to the English. *Id.*

141. *See id.* at 27-28.

The United Kingdom was particularly concerned with the U.S. practice of obtaining information not necessarily relevant to the case but that might lead to the discovery of relevant information to be admitted at trial.¹⁴² The English are hostile to this "fishing expedition" practice, which they view as an excessive expansion of the discovery process.¹⁴³ In the United States, Federal Rule 26(b)(1) only requires that information sought during discovery appear "reasonably calculated to lead to the discovery of admissible evidence."¹⁴⁴

The United Kingdom, in contrast, will only permit the discovery of evidence that will actually be admissible at trial.¹⁴⁵ Therefore, the United Kingdom registered a reservation that it would not execute letters of request for pre-trial discovery of documents.¹⁴⁶ The United Kingdom explained in its reservation that such letters of request include any which require

a person: a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or b) to produce any documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.¹⁴⁷

The reservation does not prohibit courts from executing letters of request for pre-trial discovery of specific documents.¹⁴⁸ As a result of the U.K. declaration, at least one commentator has concluded that the negotiators of the provision misunderstood the true objection to U.S. pre-trial discovery.¹⁴⁹ Forms of discovery other than documents are outside the scope of Article 23.¹⁵⁰ Therefore, it is arguable that those other forms of discovery, such as oral depositions, were the true source of British discontent,

142. *Id.* at 31.

143. See Oxman, *supra* note 57, at 773 (describing the British courts' objections to U.S. discovery procedures). As well, a concern about the United States' use of extraterritorial jurisdiction for the enforcement of its anti-trust and anti-Communist trade policies influenced Britain's stance. *Id.* at 771.

144. See FED. R. CIV. P. 26(b)(1), *supra* note 7. See also discussion *supra* pp. 5-6.

145. See MCCLEAN, *supra* note 39, at 99 (discussing Lord Diplock's interpretation of the Evidence Act of 1975 to permit only the discovery of evidence that would be admissible at trial).

146. Collins, *supra* note 140, at 29 (noting the United Kingdom's reservation to Article 23 that it would not execute letters of request for the purpose of obtaining pre-trial discovery).

147. *Id.*

148. See Comment, *supra* note 107, at 1468, n. 35.

149. Collins, *supra* note 141, at 30. Collins commented that "the negotiators of Article 23 did not clearly understand what the real objection to American pre-trial discovery was, since they were clearly influenced by the modern English use of the expression discovery, namely the discovery of documents." *Id.*

150. MCCLEAN, *supra* note 39, at 98.

and the reason for the United Kingdom's including a definition of pre-trial discovery of documents in its reservation.¹⁵¹

The different meaning and approaches to discovery was a source of disagreement.¹⁵² The term "pre-trial discovery" was also problematic because it was misunderstood by civil law states to mean that evidence was collected prior to bringing a cause of action.¹⁵³

IV. EXTRATERRITORIAL DISCOVERY REQUESTS AND THE PROBLEMS OF OBTAINING EVIDENCE IN THE UNITED KINGDOM FOR USE IN LITIGATION IN THE UNITED STATES

Conflicts can arise when American based litigation requires evidence from the United Kingdom. This is primarily due to the different concepts of discovery in the two nations.¹⁵⁴ As previously noted, there was hostility on the part of the United Kingdom towards the U.S. approach to discovery.¹⁵⁵ Litigators may encounter great difficulty in obtaining evidence in the United Kingdom for use in the United States.¹⁵⁶ U.S. methods of discovery are not well-received abroad and quite often are rejected by foreign jurisdictions.¹⁵⁷ It is not well settled as to what methods a U.S. court should employ when dealing with the problem of obtaining evidence from abroad.

Some argue that the discovery methods of the state from which the evidence is sought should be applied, rather than the requesting state's methods.¹⁵⁸ U.S. courts, however, are partial to their own methods of discovery and wish to enforce them whenever possible in extraterritorial requests.¹⁵⁹ There are different international guides to resolving extraterritorial discovery disputes, such as the Convention and the Restatement (Third) of Foreign Relations Law; however, none are binding.¹⁶⁰

151. *See id.* at 61.

152. Oxman, *supra* note 57, at 772-73.

153. *Id.* at 773-74. It is clear that such an interpretation would lead a civil law jurisdiction to believe that evidence could be obtained for the purpose of trying to decide whether one could bring litigation. *See id.* Undoubtedly such confusion could lead to great conflict.

154. *See* discussion *supra* Part II.

155. *Id.*

156. *Id.*

157. *See* NEWMAN & ZASLOWSKY, *supra* note 55, at 138.

158. *See* generally Oxman, *supra* note 57, at 733 for a discussion of which method of discovery should be employed when evidence is sought abroad for use in litigation in the United States.

159. *Id.* at 734-35.

160. *See* Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial*

No tribunal exists for resolving extraterritorial discovery disputes.¹⁶¹

The United States often practices broad extraterritorial discovery in keeping with the Federal Rules.¹⁶² In addition to the Federal Rules, courts in the United States often rely on the Restatement.¹⁶³ Courts also consider good faith and comity, while balancing the need for disclosure with confidentiality concerns of foreign states.¹⁶⁴ All of these approaches aid U.S. courts in their endeavor to formulate an approach to extraterritorial discovery that satisfies both U.S. discovery procedure and the interests and concerns of foreign sovereignties.¹⁶⁵

Once the Convention was in place, the next step was for each country to implement it.¹⁶⁶ The differences between the U.S. and British attitudes toward extraterritorial discovery became even more pronounced.¹⁶⁷

A. *The U.S. Approach to Extraterritorial Discovery and Implementing the Hague Convention*

The U.S. approach to extraterritorial discovery incorporates a combination of international legal doctrines and guides, including the Convention, the Federal Rules, comity, and the Restatement.¹⁶⁸ The United States' extraterritorial discovery jurisprudence has changed over time. Whether the United States should exercise greater power over extraterritorial discovery or greater deference to foreign sovereignty is an often debated topic.¹⁶⁹

1. The U.S. Approach to Extraterritorial Discovery Employing Comity and the Restatement (Third) of Foreign Relations Law of the United States

The Restatement, though not binding, is a valuable source of guidance for U.S. courts with regard to extraterritorial discovery

Discovery, 18 *FORDHAM INT'L L.J.* 1340, 1357 (1995). Levarda proposes for a multinational review panel be established to resolve extraterritorial discovery disputes. *See generally id.*

161. *See id.* at 1340-43.

162. *Id.* at 1353.

163. *Id.*

164. *Id.* at 1354.

165. *See id.*

166. *See id.* at 1373.

167. *See id.* at 1377.

168. *Id.* at 1353-54.

169. *See id.* at 1356.

disputes.¹⁷⁰ The Restatement takes the position that it is within a U.S. court's jurisdiction to apply and enforce U.S. procedure upon foreign litigants.¹⁷¹ Specifically, Section 402 addresses the jurisdiction a state has to prescribe law with respect to foreign nationals outside its territory.¹⁷² When the conduct of foreign nationals has effect in the United States, then U.S. courts have jurisdiction over that person.¹⁷³

Section 402 is subject to Section 403, which imposes a reasonableness requirement on extraterritorial discovery conducted by U.S. courts.¹⁷⁴ Determining reasonableness is a matter of examining several factors listed in Section 403, including: the effect an activity has upon the territory; nationality, residence, or economic connections; character of the activity and the importance and general acceptance of the regulation; the regulation's impact on justified expectations; international political, legal or economic significance of the regulation; international traditions; the interests of another state; and potential conflict with foreign regulation.¹⁷⁵ These factors guide a court in determining the extent to which U.S. procedure and jurisdiction will be extended in extraterritorial disputes.¹⁷⁶

170. *Id.* at 1357.

171. *Id.* at 1357-58.

172. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

173. *Id.*

174. *Id.* § 403(1).

Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

Id.

175. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1997).

176. See COLLINS, *supra* note 140, at 18-19 for a discussion of § 403(2).

Nonetheless, the Restatement still permits U.S. courts to exercise their jurisdiction and power expansively.¹⁷⁷ In the interest of comity, Section 442(c) urges the consideration of several factors in ordering discovery abroad.¹⁷⁸ These factors are:

the importance to . . . the litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which non-compliance 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.¹⁷⁹

The U.S. Supreme Court in *Societe Nationale Industrielle Aérospatiale v. United States District Court*,¹⁸⁰ articulated the concerns behind a comity approach and referred to the Restatement.¹⁸¹ Though the Restatement supports broad power in U.S. courts in extraterritorial discovery, it also recognizes the need for balance.¹⁸² The interest of another state's sovereignty must be weighed against the U.S. interest in seeking evidence.¹⁸³ The factors set out in Section 442 take account of this need for balance against the backdrop of the United States' own interests.¹⁸⁴ Such interests include U.S. methods of discovery and trial procedure.¹⁸⁵ For example, the Federal Rules allow for the discovery of evidence that is not admissible at trial.¹⁸⁶ Although the practice is strongly criticized by foreign states, Section 442 of the Restatement does not restrict a U.S. court from ordering the disclosure of evidence not admissible at trial.¹⁸⁷ The overall approach of the Restatement takes into account the need for comity, while still focusing on its primary goal of allowing for the application of U.S. procedural rules on foreign litigants.¹⁸⁸

177. See RESTATEMENT, *supra* note 175, § 442.

178. *Id.* § 442(1)(c).

179. *Id.* § 442(1)(c).

180. *Societe Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

181. *Id.* at 544.

182. See *id.* at 544 n.28 (discussing comity analysis and § 431 of the tentative draft of the Restatement which later became § 442).

183. *Id.* at 543-44.

184. COLLINS, *supra* note 140, at 193-94.

185. See *id.* at 193-96 (discussing § 442 of the Restatement).

186. See FED. R. CIV. P., *supra* note 7. See also discussion *supra* pp. 9-10.

187. See Convention, *supra* note 137, § 442 cmt. a.

188. *Id.*

2. The California Cases: The U.S. Approach to Extraterritorial Discovery Before *Aérospatiale*

U.S. courts applied the principles of the Convention as a first resort in international discovery disputes. Prior to the Supreme Court's opinion in *Aérospatiale*, this approach was deeply rooted in international comity.¹⁸⁹ This section of the note will examine some notable California cases¹⁹⁰ from the 1970s and early 1980s which applied the comity approach. These cases are good examples of the U.S. approach to extraterritorial discovery prior to the *Aérospatiale* decision.¹⁹¹ Specifically, they examine the competing interests of the United States and foreign nations, as well as the competing interests of domestic and foreign litigants.¹⁹²

In 1973, the California Court of Appeals, in *Volkswagenwerk A. G. v. Superior Court of Sacramento County*, considered the issue of whether a California court had jurisdiction over persons in Germany.¹⁹³ The court determined that such jurisdiction did not follow simply because the court had jurisdiction over the German defendant.¹⁹⁴ The court asserted that courts "ordering discovery abroad must conform to the channels and procedures established by the host nation."¹⁹⁵ As the court recognized, support for this assertion can be found in comity.¹⁹⁶ The court was aware that there may be times when a defendant will attempt to "hide behind diplomatic walls;" however, the present case did not evidence "evasiveness and recalcitrance" on the part of the defendant.¹⁹⁷ The plaintiffs were ordered to employ letters rogatory as a first resort to obtaining evidence, as the court saw no reason to produce "friction" between the United States and Germany with invasive discovery orders.¹⁹⁸

189. See McCLEAN, *supra* note 39, at 108 (explaining that the comity approach advocates judicial self-restraint).

190. See *Volkswagenwerk A.G. v. Superior Court of Sacramento County*, 109 Cal. Rptr. 219 (Cal. Ct. App. 1973); *Volkswagenwerk A.G. v. Superior Court of Alameda County*, 176 Cal. Rptr. 874 (Cal. Ct. App. 1981); *Pierburg GmbH & Co. Superior Court of Los Angeles*, 186 Cal. Rptr. 876 (Cal. Ct. App. 1982).

191. *See id.*

192. *See id.*

193. *See* 109 Cal. Rptr. at 219.

194. *Id.* at 221.

195. *Id.*

196. *Id.* (stating that the "limitation may rest on any one of several theories—comity, curtailed discretion or implied statutory qualification").

197. *Id.* at 222.

198. *Id.* The court observed that the case was one of first impression in California and that the decision expressed "a policy of avoiding international discovery methods productive of friction with the procedures of host nations." *Id.*

The next significant case decided by the California Court of Appeals was *Volkswagenwerk A. G. v. Superior Court of Alameda County*¹⁹⁹ in 1981. The case concerned whether, in light of the Convention, a California court could order discovery of evidence in Germany.²⁰⁰ The German defendant asserted that the order infringed upon German sovereignty and that the discovery requests did not meet German specificity requirements designed to protect defendants from "abuse, oppression, or other injustice."²⁰¹ Understanding the need to balance German interests with the interests of U.S. litigants, the court concluded that first resort should be to the procedures of the Convention.²⁰² The court observed that the Convention procedure of letters of request was broader than the previously available letters rogatory.²⁰³ The court was careful to protect German sovereignty and rejected the claimants proposed mechanism for obtaining evidence.²⁰⁴ Therefore, the Convention provided the guiding principles for answering international discovery questions presented to the California courts.

Another California case, *Pierburg GmbH & Co. v. Superior Court of Los Angeles*,²⁰⁵ also required first resort to the Convention procedures.²⁰⁶ The court stated that "California's interest in avoiding violations of international treaties [was] clearly a rational basis for requiring California litigants to comply with the Convention."²⁰⁷ The court refused to accept the plaintiffs' argument that the interrogatories could be answered in the United States.²⁰⁸ Rather, the court determined that the interrogatories sought information located and known to persons in West Germany.²⁰⁹ As the Court saw it, the plaintiffs' request would undermine and destroy the intent of the Convention.²¹⁰ Therefore, the *Pierburg* court followed and applied precedent,

199. 176 Cal. Rptr. 874 (Cal. Ct. App. 1981).

200. *Id.*

201. *Id.* at 880-81.

202. *Id.* at 858.

203. *Id.* at 880.

204. *Id.* at 884-85. The court rejected the claimants' argument that the investigative "Noted Verbales" were consistent with the Convention. *Id.* at 882. In fact, the court declared that the method rooted in postwar allied occupation of Germany "would violate West German judicial sovereignty." *Id.* at 883.

205. 186 Cal. Rptr. 876 (Cal. Ct. App. 1982).

206. *Id.* This case concerned a West German corporation involved in a personal injury products liability action in the United States. *Id.*

207. *Id.* at 882.

208. *Id.* at 881.

209. *Id.*

210. *Id.*

holding that the plaintiffs must first resort to the Convention procedures to obtain discovery.²¹¹

3. Extraterritorial Discovery After *Societe Nationale Industrielle Aérospatiale v. United States District Court for Iowa*

In *Societe Nationale Industrielle Aérospatiale v. United States District Court for Iowa*,²¹² the U.S. Supreme Court rejected the comity approach of first resort to the Convention.²¹³ The decision significantly changed the U.S. approach to extraterritorial discovery and sparked international debate.²¹⁴ In support for the holding, the Court explained that requiring first resort to the Convention could be very time consuming and expensive for litigants.²¹⁵ The Court expressed concern that Convention procedures may not provide all needed evidence, whereas the Federal Rules could.²¹⁶

The petitioners argued that the Convention procedures were the only means by which discovery could be conducted in France, and that any other means would violate French sovereignty.²¹⁷ The Court stated that such an intention, if true, would have been explicitly stated in the Convention, which it was not.²¹⁸ Rather, the Court advocated a case-by-case approach for determining whether certain procedures may be intrusive, considering the reasonableness of the request and the interests of the parties.²¹⁹ The Court, however, recognized the need for fairness to foreign litigants and urged that U.S. courts should "exercise special vigilance to protect foreign litigants."²²⁰

211. *Id.* at 883.

212. 488 U.S. 522 (1987).

213. *Id.* at 512, 544. The Court rejected the Court of Appeals' argument that if a foreign court denies discovery after first resort to the Convention, a discovery order from a U.S. court would be viewed as "the greatest insult" to the foreign court's sovereignty. *Id.* at 542.

214. See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1492 (1991) (discussing the implication of the *Aérospatiale* case on extraterritorial discovery).

215. *Aérospatiale*, 488 U.S. at 542.

216. *Id.*

217. *Id.* at 543.

218. *Id.*

219. *Id.* at 545-546. The court believed that the trial court would possess the knowledge to determine what was the most reasonable approach considering all the facts and factors of the case. *Id.* at 546.

220. *Id.* The Court did continue to urge that U.S. courts carefully supervise extraterritorial discovery to prevent abuses. *Id.* In addition, the Court recognized that an interest in comity requires courts to consider any particular burdens foreign litigants may face as well as the sovereign interests of their state. *Id.*

Conversely, the dissent, led by Justice Blackmun, concluded that comity required first resort to the Convention.²²¹ The dissent believed that conflicts between U.S. discovery procedures and foreign discovery procedures could be avoided by using the Convention procedures.²²² Justice Blackmun criticized the majority opinion for ignoring the “policies established by the political branches when they negotiated and ratified” the Convention.²²³ Furthermore, Justice Blackmun argued that international comity demands more “definite rules” rather than the case-by-case approach adopted by the majority.²²⁴

The *Aérospatiale* case resulted in debate and confusion regarding the role of the Convention in the United States approach to extraterritorial discovery.²²⁵ The decision did not resolve the debate over comity analysis.²²⁶ Since the decision, there has been concern in developing an analytical framework for U.S. courts to apply when dealing with international discovery issues.²²⁷

B. *The British Approach to Extraterritorial Discovery Requests and Implementing the Hague Convention*

The United Kingdom’s distaste for the United States’ methods of discovery is no where more apparent than in its implementation of the Convention and its response to U.S. discovery request in the United Kingdom.

221. *Id.* at 548-49 (Blackmun, J., dissenting).

222. *Id.* at 548.

223. *Id.* at 551.

224. *Id.* at 554. Justice Blackmun stressed that comity is “a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill.” *Id.* at 555 (citing Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and International Law*, 76 AM. J. INT’L L. 280, 281-85 (1982)).

225. See Burbank, *supra* note 214, at 1492-96 (discussing and critiquing the *Aérospatiale* case).

226. McCLEAN, *supra* note 39, at 117 (observing that although the Court rejected first resort to the Hague Evidence Convention, the decision did not determine the nature of comity analysis).

227. For a complete discussion of *Aérospatiale* and a suggestion for an analytical framework see David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT’L L. 521 (1988).

1. The Evidence Act of 1975

It was necessary for the United Kingdom to pass legislation in order to implement the Convention.²²⁸ The Evidence (Proceedings in Other Jurisdictions) Act of 1975 (Evidence Act) is the legislation that regulates the United Kingdom's application of the Convention to extraterritorial discovery requests.²²⁹ Despite the fact that the Convention is never mentioned in the Evidence Act, it allowed the United Kingdom to ratify the Convention.²³⁰ As one commentator noted, the Evidence Act bears a resemblance to the Convention.²³¹

The Evidence Act governs the power of a court in the United Kingdom to execute a foreign request for discovery in the United Kingdom.²³² Section 2 allows the court to grant requests for the examination of witnesses, the production of documents, the inspection of property, the taking of samples of or conducting experiments on property, and the medical examination of any person.²³³ The Section, however, prohibits the court from granting requests for a person "to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power," or to produce any such documents.²³⁴ Section 2(4) is almost indistinguishable from the language of the United Kingdom's reservation to Article 3 of the Convention.²³⁵

2. The Specificity Requirement and the *Westinghouse* Case: A significant Barrier to Obtaining Evidence in the United Kingdom

The most significant interpretation of the Evidence Act occurred in 1978 in the case of *Rio Tinto Zinc v. Westinghouse Electric Corp.*²³⁶ In this case the House of Lords considered whether certain letters rogatory ought to be given effect under the

228. See Collins, *supra* note 140, at 30 (explaining that legislation was needed to implement the Convention since international conventions do not directly have effect in English law.)

229. *Id.*

230. McCLEAN, *supra* note 39, at 105.

231. Levarda, *supra* note 160, at 1380. The resemblance is particularly noticeable with respect to measures available to compel disclosure. *Id.*

232. Evidence (Proceedings in Other Jurisdictions) Act 1975, Sec. 2 (1975) (Eng.).

233. *Id.* at Sec. 2(2).

234. *Id.* at Sec. 2(4).

235. See LAWRENCE COLLINS, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, in *ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS* 289, 305 (1994).

236. [1978] A.C. 547.

Evidence Act.²³⁷ In the decision the court criticized the U.S. discovery procedures.²³⁸ Particularly, the court commented on how U.S. discovery had diverged from that of the United Kingdom, and been expanded greatly in the United States.²³⁹

The court was most concerned with the lack of specificity required in U.S. extraterritorial discovery.²⁴⁰ The U.S. practice of allowing discovery of any information that might lead to admissible evidence stands in severe contrast to the English requirement that evidence can only be discovered if it is in fact admissible at trial.²⁴¹ The court stated that the Evidence Act was drafted with a distinction between immediate relevant material, "direct" material, and "indirect" material.²⁴² The court found support in the Article 23 of the Convention, which provided that a signatory state could reject a letter of request for pre-trial discovery.²⁴³ The Evidence Act contained such a reservation on the part of the United Kingdom.²⁴⁴ The court asserted that the sovereignty of the United Kingdom is paramount.²⁴⁵ The court, however, observed that the interests of the United States must be weighed in a decision regarding whether to give effect to a letter rogatory.²⁴⁶

V. OBTAINING EVIDENCE IN THE UNITED KINGDOM FOR
USE IN INDUSTRY-WIDE TORT LITIGATION IN THE UNITED STATES:
A NEW CHALLENGE

A new kind of litigation is on the rise in the United States. When Congress fails to act in areas such as tobacco regulation, the people increasingly look to the judiciary to accomplish the task.²⁴⁷ Tobacco litigation is the type of industry-wide tort

237. *Id.* at 606.

238. *Id.* at 616 (drawing specific attention to U.S. policy in anti-trust legislation).

239. *Id.* at 608 (quoting *Radio Corp. of America v. Rauland Corp.* [1956] 1 Q.B. 618, 643-44).

240. *Id.* at 610.

241. See discussion *supra* Parts II.A., II.B.

242. *Rio Tinto Zinc Corp.*, *supra* note 98, at 608.

243. *Id.*

244. See *Collins*, *supra* note 140, at 29-30 (discussing the United Kingdom's reservations).

245. *Rio Tinto Zinc Corp.*, *supra* note 98, at 616.

246. *Id.*

247. See Graham E. Kelder & Richard A. Daynard, Symposium: *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 63-64 (1997). The authors focus on the failure of other conventional means of regulation, such as legislation and administrative regulation, and the role litigation has come to fill in the regulation of tobacco products. *Id.* One reason offered by the authors for the failure of traditional regulatory measures is

litigation based on a theory of an industry wide conspiracy to conceal information from the public about the dangers of a product.²⁴⁸ When litigation is based on the theory that an industry concealed information, obtaining key industry information is central to proving one's case.²⁴⁹ Unfortunately, without whistle-blowers it can be difficult to know what to look for. Sorting through vast amounts of industry files may be the only option. Therein lies the problem.

A. *Learning a Lesson from Tobacco Litigation*

1. The Role of Discovery in U.S. Tobacco Litigation

Discovery played an important role in the success of tobacco litigation in the United States.²⁵⁰ Without the expansive disclosure of damaging industry documents, the battle against the tobacco industry may never have been won.²⁵¹ The theory that the tobacco industry conspired to conceal information from the public about the health hazards of smoking depended heavily upon uncovering industry documents that revealed such a "smoking gun."²⁵² Fortunately, industry insiders turned whistle-blowers made many documents available and aided in the process of uncovering industry documents.²⁵³ These documents through the discovery process showed that the tobacco companies knew about the addictive qualities of nicotine and the cancer causing properties of smoking, yet decided to conceal that information from the public.²⁵⁴

the significant political power the tobacco industry exercises on the legislature. *Id.* at 63.

248. *See id.* at 72 (discussing the theory behind the third wave of tobacco litigation).

249. The role of full discovery in industry-wide tort litigation is made manifest in a discussion of tobacco litigation. *See discussion infra* Part V.A.1.

250. *See* Ron Scherer, *A Second Wind in Tobacco Fight*, CHRISTIAN SCI. MONITOR, July 2, 1997, at 7 (stating that "[t]he discovery process was critical to getting the tobacco industry to the bargaining table in the US").

251. *Id.*

252. Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L.J. 497, 509-10 (1997) (explaining that plaintiffs sought discovery of industry documents that would reveal that the tobacco industry concealed that nicotine was addictive to promote addiction).

253. *See* Ingrid L. Dietsch Field, Comment, *No Ifs, Ands or Butts: Big Tobacco is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99, 120 (1997). One anonymous source who disclosed thousands of pages of information was known as "Mr. Butts." *Id.*

254. *Id.* at 120-21.

The state of Minnesota's lawsuit against the tobacco industry provides the best forum for looking at the critical role discovery played.²⁵⁵ Minnesota's tobacco litigation provided the greatest number of industry documents in the United States by successfully piercing the tobacco industry's barriers to obtaining information.²⁵⁶ The result of Minnesota's discovery process was the discovery of tens of millions of pages of industry documents.²⁵⁷ Minnesota experienced a great deal of resistance on the part of the tobacco industry in obtaining the documents.²⁵⁸

One examination of document discovery in Minnesota tobacco litigation looks at the strategies used by the tobacco industry to avoid disclosure.²⁵⁹ The tobacco industry claimed it did not understand the meanings of certain words in the discovery requests.²⁶⁰ The tobacco industry lawyers indexed industry documents and tried to avoid disclosure of the indices by claiming work product.²⁶¹ The Minnesota attorneys spent sixteen months in litigation in order to obtain these indices which were an important guide to obtaining and finding industry documents.²⁶² Eventually the court ordered the tobacco industry to produce the indices which proved to be invaluable to Minnesota's case.²⁶³ The industry waged such a vigorous battle in an attempt to avoid discovery because the plaintiff's case required proving that a conspiracy existed. The damaging industry documents demonstrated this conspiracy by showing the industry's knowledge of the health hazards of smoking.²⁶⁴

255. For an examination of Minnesota tobacco litigation and discovery, see Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999); see generally Symposium, *Tobacco Regulation: The Convergence of Law, Medicine & Public Health*, 25 WM. MITCHELL L. REV. 373 (1999); see also Field, *supra* note 253, at 119-20.

256. See Ciresi, *supra* note 255, at 479.

257. *Id.* at 489. In fact, Brown & Williamson produced more than four million pages of documents, as opposed to the 1,350 pages disclosed prior to 1994; Philip Morris produced six million pages compared with 140,000; and BAT produced several million pages when it had disclosed nothing prior to the Minnesota case. *Id.* The documents are now housed in document depositories in Minnesota and England. *Id.*

258. *Id.*

259. See generally *id.*

260. *Id.* at 490.

261. *Id.* at 490-91.

262. *Id.* at 490.

263. *Id.* at 493-94.

264. *Id.* at 500.

a. In an Age of Globalization, Big Tobacco Finds a New Trick

The most startling tactic used by the tobacco industry to avoid discovery of damaging industry documents in the tobacco litigation was to send those documents overseas and deny they existed.²⁶⁵ This tactic had great implications for extraterritorial discovery. It made obvious a loophole in the extraterritorial discovery process.²⁶⁶ The intent of any nation's extraterritorial discovery policy may be to protect its nationals from unfair discovery that is inconsistent with its own procedures, but it surely is not to provide international corporations with a way to hide evidence. By shipping evidence to branches abroad, a corporation can considerably frustrate the discovery process. When evidence is located abroad it becomes more costly and timely to obtain. Extreme cost and time can discourage a plaintiff from bringing suit, a result any potential defendant would like.

The tobacco industry discovered and preemptively implemented this technique.²⁶⁷ Philip Morris conducted its research on the health effects of smoking in Europe.²⁶⁸ Brown & Williamson also conducted its research overseas.²⁶⁹ Furthermore, the company sent its domestic research documents abroad and kept no records of them in an attempt to keep the documents hidden.²⁷⁰ Evidence that the industry sent documents abroad surfaced in the Minnesota litigation.²⁷¹ The

265. See Cirese, *supra* note 255, at 493-94.

266. *Id.* at 490.

267. See *infra* notes 270 and 271 and accompanying text.

268. *Id.* at 551-552. The tobacco industry had agreed not to conduct in-house research. *Id.* at 551. Philip Morris was dissatisfied with the agreement, however, and located a facility in Europe that it purchased to conduct research. *Id.* at 552. According to at least one article, records and interviews show that tobacco lawyers prepared for lawsuits by terminating research projects or moving them abroad where it would be more difficult to reach their details with a subpoena. Myron Levin, *Years of Immunity and Arrogance Up In Smoke*, L.A. TIMES, May 10, 1998 at D1, LEXIS, Nexis Library, L.A. TIMES File.

269. See Field, Comment, *supra* note 253, at 121 n. 238.

270. See *id.* at 121-22. The company had maintained that the hidden documents did not exist. *Id.*

271. See Kristen Gartman Rogers, Note, "Mad Plaintiff Disease?" Tobacco Litigation and the British Debate Over Adoption of U.S.-Style Tort Litigation Methods, 27 GA. J. INT'L & COMP. L. 199, 214 (citing Barry Meier, *Minnesota Official Invites Congressional Scrutiny of Tobacco Industry Files*, N.Y. TIMES, July 28, 1997, at A10). At a symposium on the Florida tobacco litigation, one attorney agreed that the tobacco companies sent documents to England because they could not be reached with a subpoena there. Symposium, *Transcript of the Florida Tobacco Litigation Symposium-Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737, 786 (1998). Professor Sternlight, a civil procedure and alternative dispute resolution expert at Florida State University College of Law, said regarding the tobacco industry's sending documents abroad, "[t]hat's basically because you

tobacco companies appear to have been aware of the benefits of sending evidence that plaintiffs would want abroad.²⁷² Rather than destroy the evidence, they sent documents abroad and denied their existence.²⁷³

b. Problems with the United Kingdom's Specificity Requirement: *Minnesota v. Philip Morris Inc.*

The tobacco litigation in Minnesota encountered the British justice system and the specificity requirement when plaintiffs sought testimony from witnesses located in England.²⁷⁴ The Honorable Kenneth J. Fitzpatrick, the Minnesota District Court judge for the trial, sent a letter of request to the English court to conduct videotaped testimony of four witnesses located in England.²⁷⁵ The Court of Appeals denied the request because the questions were topics of "unlimited generality."²⁷⁶ In his opinion, Lord Wolf emphasized the differences between U.S. and British discovery, including the American tradition of oral discovery which does not exist in the United Kingdom.²⁷⁷ The Lord also pointed out that much wider "non party" discovery is allowed in the United States, which is impermissible in the United Kingdom.²⁷⁸

Importantly, the Lord emphasized the United Kingdom's aversion to "fishing expeditions."²⁷⁹ The opinion cites to a history of cases in the United Kingdom where the court expressed it would not grant letters of request that appear to be of a "fishing" nature.²⁸⁰ Although the Lord determined that the testimony was sought for trial, within the scope of the Evidence Act, he concluded that there was also an alternative purpose for the

couldn't reach them with a subpoena over in England?" *Id.* To that Mr. Berly, an attorney involved with suing the tobacco industry, responded, "[e]xactly, exactly." *Id.* Furthermore, the transcript of the symposium contained an even more intriguing exchange. Professor Sternlight asked Mr. Berly, "[w]hy would they rather send them over there instead of burn them or shred them or whatever?" *Id.* Mr. Berly responded, "[w]hy did Nixon keep his tapes? I don't know." *Id.* Perhaps the reason the tobacco industry did not destroy the documents was the threat of penalties for doing so. Sending them abroad is not against the law.

272. *Id.*

273. *Id.*

274. *Minnesota v. Philip Morris Inc.*, 1997 WL 1105492 (Eng. C.A.).

275. *Id.*

276. *Id.*

277. *Id.* Particularly the Lord noted that the United Kingdom regards oral discovery as unnecessarily costly and complex. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* The opinion more notably cites to *In Re States of Norway's Application* (No. 1), [1987] QB 433, the *Westinghouse* case, and *Radio Corp. v. Rauland Corp.*, [1956] 1 QB 618. *Id.*

testimony: to indirectly obtain information that would lead to further evidence, ultimately "fishing."²⁸¹ The Lord ordered that the questions be redrafted so that they could meet the British court's requirements.²⁸² The Lord declined to undertake the task of redrafting the questions.²⁸³ This decision came down three months after the requested testimony was desired.²⁸⁴

2. The United Kingdom Imports the Tobacco Lawsuit: What Happened?

After witnessing the success of tobacco litigation in the United States, plaintiffs in the United Kingdom decided to bring suit there.²⁸⁵ The first lawsuit against the tobacco industry in the United Kingdom was filed in 1996.²⁸⁶ Changes in the British legal system, such as the institution of the conditional fee in 1995, finally made tobacco litigation possible in the United Kingdom.²⁸⁷ According to one commentator, the *Cipollone v. Liggett Group*²⁸⁸ decision in the U.S. Supreme Court gave rise to British tobacco litigation for at least two reasons.²⁸⁹ The Third Circuit decision, which held that plaintiffs in related cases could use internal tobacco documents, gave British solicitors a hope for success when bringing their case before a court in the United Kingdom.²⁹⁰ Furthermore, the U.S. Supreme Court's decision gave even more hope to litigants that as in the United States, the tobacco industry could be held liable in the United Kingdom.²⁹¹

Clearly, the British system would not have allowed for the extensive discovery that took place in the United States. Therefore, success in obtaining discovery in the United States meant that litigants in the United Kingdom would have access to those documents. U.S. discovery likely allowed litigants in the

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* The court observed this fact in the opinion. *Id.*

285. Audra A. Albright, Comment, *Could This be the Last Gasp? England's First Case Against the British Tobacco Industry*, 11 TEMP. INT'L & COMP. L.J. 363, 363-64 (1997). The comment notes that tobacco litigation in the United Kingdom came after the *Cipollone v. Liggett Group* decision by the U.S. Supreme Court. *Id.* The suit was a landmark case in the United States, which allowed plaintiffs to sue the tobacco industry for its deceptive practices. *Id.* at 364.

286. *Id.* at 363. The suit was filed by forty-seven former smokers in the United Kingdom. *Id.*

287. *Id.* at 372-375 (discussing the history of the conditional fee in the United Kingdom and its impact on tobacco litigation).

288. 505 U.S. 504 (1992).

289. Albright, *supra* note 285, at 384.

290. *Id.*

291. *Id.*

United Kingdom to circumvent strict English discovery procedures.

B. *Are Guns the Next Tobacco?*

Following the success of tobacco litigation in the United States, United States cities are filing suits against gun manufacturers.²⁹² The same health and safety concerns that fueled the waves of tobacco litigation are fueling gun litigation.²⁹³ Guns are lethal and pose a serious health and safety hazard, particularly where children are concerned. Similarly, the dangers of smoking and youth were a primary concern in tobacco litigation and regulation. The failure of Congress to successfully regulate guns has again resulted in the people turning to the judiciary to remedy a societal wrong.²⁹⁴ Litigation worked with tobacco when Congress failed, so logically it might work with guns.

Gun lawsuits are being brought on the same types of theories behind tobacco litigation.²⁹⁵ For example, in California, plaintiffs' attorneys are turning to the Unfair Business Practices Act, which was used against the tobacco industry.²⁹⁶ Gunmakers are accused of the negligent design and distribution of guns.²⁹⁷ Specifically the suits focus on the gun manufacturers' responsibility for the misuse of guns because the guns are missing adequate safety features.²⁹⁸ Reckless marketing claims rely on the notion that gunmakers were aware of the missing safety features and continued to market guns as being safe, when, in fact, they were not.²⁹⁹

292. See Rinat Fried, *Gunmakers Face High-Caliber Law*, RECORDER, May 26, 1999, at 1, LEXIS, Nexis Library, RECORDER File; see also Adam Jones, *U.S. Cities Take British Gunmakers to Court*, TIMES (London), May 27, 1999, LEXIS, News Library, TIMES (London) File. Both articles discuss the lawsuits filed in U.S. courts against gun manufacturers.

293. Fried, *supra* note 292.

294. Jones, *supra* note 292. San Francisco city attorney, Louise Renne, is cited in the article as asserting that the goal of the lawsuits is to restrict sales policies and require manufacturers to install safety mechanism in guns to prevent accidental discharge. *Id.*

295. Fried, *supra* note 292.

296. Fried, *supra* note 292. According to the article, the Unfair Business Practices Act, which prohibits businesses from engaging in "unfair, unlawful or deceptive trade practices," was behind the R.J. Reynolds Tobacco Co.'s decision to abandon the Joe Camel advertising campaign. *Id.*

297. Jones, *supra* note 292.

298. See Jones, *supra* note 292.

299. Fried, *supra* note 292 (explaining that the San Francisco suit claims that gun manufacturers sold unsafe guns and illegally marketed them as safe).

The allegations will require extensive discovery.³⁰⁰ To prove their claims, plaintiffs' attorneys will have to obtain industry documents that demonstrate gun manufacturers had knowledge of the safety hazards of guns and failed to correct the problems by installing appropriate safety features in guns.³⁰¹ Similarly, plaintiffs' attorneys in tobacco litigation relied on industry documents to prove their case that cigarette manufacturers were aware of the health hazards of smoking and failed to warn the public.³⁰²

The problems that the plaintiffs' attorneys faced in obtaining discovery from the tobacco industry may await the plaintiffs' attorney in gun litigation.³⁰³ In fact, gun manufacturing is not an exclusively domestic industry.³⁰⁴ Many of the gun manufacturers facing suits are actually British corporations.³⁰⁵ Therefore, extraterritorial discovery will undoubtedly play a role in gun lawsuits. In light of the United Kingdom's extraterritorial discovery policy and considering the involvement of British defendants, despite the negative British opinion about American gun culture, discovery may prove to be difficult.³⁰⁶

The impact of British discovery procedures on gun litigation in the United States may never be made manifest, however. In March of 2000, Smith & Wesson, the British-owned, largest gun manufacturer in the United States, agreed to a deal with the U.S. government regarding gun control measures.³⁰⁷ As a result of the agreement, Smith & Wesson was dropped from pending litigation against many gun manufacturers in the United States.³⁰⁸ The deal was made specifically with the Department of Housing and

300. *Id.* (noting that the San Francisco city attorney must conduct "extensive discovery into the business practices of gun companies" to prove the claims).

301. *Id.*

302. Ciresi, *supra* note 255, at 479.

303. Fried, *supra* note 292.

304. Tom Diaz, *Gun Industry Marketing of Lethality*, BRIEF, Fall 1999, at 20. Between 1899 and 1945, 4.6% of all guns in the U.S. market were imported compared with the 1990s during which imported guns comprised one third to one half of the market. *Id.*

305. Jones, *supra* note 292. Gun manufacturers facing lawsuits include Heckler & Koch, and the largest gun manufacturer Smith & Wesson, both of which are owned by British companies. *Id.* British Aerospace, through its subsidiary Royal Ordnance, owns Heckler & Koch, while United Kingdom conglomerate Tomkins owns Smith & Wesson. *Id.* As well, the Italian company Beretta and the Austrian company Glock also manufacture guns. *Id.*

306. Fried, *supra* note 292. The article points out that "no such treasure trove" as the damaging records uncovered in the Minnesota tobacco case has been found yet in gun litigation. *Id.*

307. Ben Macintyre, *Shooting from the lip over right to bear arms*, TIMES (London), Mar. 25, 2000, LEXIS, Nexis Library, TIMES (London) File.

308. Carla Crowder Scripps, *Backlash Hits S&W Deal on Gun Safety*, COMMERCIAL APPEAL, Mar. 24, 2000, LEXIS, Nexis Library, COMMERCIAL APPEAL File.

Urban Development along with 29 U.S. cities and states.³⁰⁹ In the deal, Smith & Wesson agreed to include locking devices on guns, restrict multiple sales, and manufacture new "smart guns"³¹⁰ which can only be fired by their owners through the use of personalized, coded signals.³¹¹ Smith & Wesson seemed to have no choice but to make an agreement because, unlike tobacco, it lacks the resources to finance a legal battle.³¹² Although Smith & Wesson settled, possibly putting an end to gun litigation as other manufacturers follow their move,³¹³ similar litigation against another industry in the future may not end so easily.

VI. THE SEARCH FOR A SOLUTION: PROPOSING AN AMENDMENT TO THE EVIDENCE ACT OF 1975

The Evidence Act does not allow English judges much room in granting extraterritorial discovery requests.³¹⁴ Strict adherence to the specificity requirement means that some evidence may never be obtained for use at trial. By the time a request is rewritten to meet the British specificity requirement, it will likely be too late for a plaintiff. Tobacco litigation and the new gun litigation present serious policy concerns. The health and safety of the public is at the heart of this litigation. It is in the interest of the entire international community to aid litigants in bringing these suits so that governments will be forced to reform their policies regarding these industries.

In formulating a solution, however, it is important to keep in the forefront the interests and sovereignty of the states involved. Therefore, a reasonable option would be an amendment to the Evidence Act which would allow English courts great discretion in applying the specificity requirement. In the narrow line of industry-wide tort cases such as tobacco and gun litigation, British courts should be permitted to expand the specificity requirement to allow the more liberal discovery of evidence. Such

309. *Id.* The Department of Housing and Urban Development's argument for relief from gun manufacturers on behalf of public housing residents is based on allegations that gun manufacturers produced and distributed unsafe guns. Macintyre, *supra* note 307.

310. Macintyre, *supra* note 307.

311. Scripps, *supra* note 308.

312. *Id.* This article describes gun control advocates as "taking a leaf from the book of tobacco litigation" in their suits against gun manufacturers. *Id.*

313. Philip Delves Broughton, *International: Smith & Wesson Fits Child Locks to Stay Out of Court*, THE DAILY TELEGRAPH (London), Mar. 18, 2000, LEXIS, Nexis Library, THE DAILY TELEGRAPH File.

314. See discussion *supra* Part IV.B.A.

an amendment is needed because in industry-wide tort litigation all the evidence is often in the possession of the defendant in the form of industry documents. Therefore, it is unlikely that plaintiffs will know exactly what documents they are searching for without the aid of whistle-blowers. The "smoking gun" they need to make their case is hidden in extensive reserves of industry documents. Furthermore, in an age of globalization, companies, such as tobacco companies, can manipulate the international legal system to hide documents in their U.K. offices or subsidiaries, making it almost impossible for American litigants to satisfy the British specificity requirement and get the documents.

Such an amendment would not interfere with the British reservation regarding pretrial discovery. The amendment need only deal with evidence required for trial. It would, therefore, prevent the harm done by decisions such as the one in the Minnesota case.³¹⁵ Rather than the lengthy process of the British court sending an otherwise acceptable letter of request back because the questions are too broad, it may grant the request if it sees fit.³¹⁶ If there is no penalty a foreign party or witness may face for disclosing the requested document or giving the requested testimony, then an amendment granting greater discretion to the British court would only benefit the process. In addition, the litigation will likely occur in the United States, where a liberal process already exists. No harm would come to the British courts as they would not be responsible for the litigation.

An amendment leaving the decision to execute a request under a more liberal specificity requirement would respect the sovereignty of the United Kingdom. The court could ultimately determine that such a decision is not in the interest of the United Kingdom, or greatly conflicts with its laws. The opportunity, however, would exist for U.S. litigants to present the policy arguments and case-specific reasons why such a decision is necessary. In cases, such as tobacco and gun litigation, a strict rule obstructs U.S. procedure and deprives an American litigant of his fair day in court by denying him much needed evidence.

VII. CONCLUSION

The differences between U.S. and British methods of discovery create international disputes when extraterritorial

315. See discussion *supra* Part V.A.1.b (discussing the impact of the specificity requirement on a Minnesota letter of request for testimony in England).

316. See *id.*

discovery is requested. The Convention sought to resolve extraterritorial discovery disputes by establishing a uniform procedure for obtaining evidence abroad. Although great compromise was achieved through the Convention, not all problems were resolved. The negative attitude towards American style civil procedure on the part of the United Kingdom continues to exist. The United Kingdom voiced its disapproval of the American methods of discovery at the Convention, and that opinion is embodied in the Evidence Act.

The British hostility toward American discovery causes its courts to reject many American requests for discovery in the United Kingdom for fear of fishing expeditions. The judicial system in the United States is frustrated when vital discovery requests are denied by a foreign court. The system appears most frustrated in industry-wide tort litigation such as tobacco and gun litigation. The purpose of these types of suits is to protect the public and urge the legislature to regulate harmful products to make them safer. It is in the interest of the international community to support these lawsuits with liberal discovery because promoting disclosure will benefit public health and safety.

Keeping in mind the interests of the United States and the United Kingdom, the best solution appears to be an amendment to the Evidence Act. An amendment allowing the British courts discretion in expanding the specificity requirement, when confronted with a letter of request in an industry-wide tort case, would serve the international public interest. More importantly, however, the discretion would be left to the British court to protect the interests and sovereignty of the United Kingdom. Such an amendment will reflect both comity and sovereignty. Without an amendment, corporate defendants will continue to hold all the evidence, and letters of request that would otherwise be granted will be denied for lack of specificity. Consequently, it is imperative that a solution be achieved to deal with the new extraterritorial discovery challenges presented when an industry conspires to hide information from the public at the expense of their health and safety. It remains to be seen how the international community will address this new challenge.

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