

Matthew Bender® Practice Guide: California E-Discovery and Evidence

Chapter 14 Discovery of Electronically Stored Information Residing in Foreign Jurisdictions

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Chapter 14

Discovery of Electronically Stored Information Residing in Foreign Jurisdictions

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I. STRATEGY

14.01 Scope. This chapter discusses the basic process for obtaining discovery of ESI residing in foreign jurisdictions, and practical considerations when dealing with foreign-language ESI.

- Practical and technical considerations in foreign discovery [see 14.03–14.07].
- Foreign discovery using the Code of Civil Procedure [see 14.05, 14.06].
- Foreign discovery using the Hague Convention [see 14.08–14.13].
- Foreign discovery using letters rogatory [see 14.14–14.19].
- Foreign barriers to U.S.-style discovery [see 14.20–14.24].
- Practical and Technical Considerations in conducting foreign e-discovery [see 14X.25–14.29].

Core Statutes: CCP § 413.10 (service of process outside of California); CCP §§ 2016–2036 (Civil Discovery Act); The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters; Inter-American Convention on Letters Rogatory; EU Directive 95/46/EC (protection regarding the processing or movement of personal data).

14.02 Objective and Strategy. Information stored on computers located in jurisdictions outside United States is common in today's business environment. These issues are not confined to federal court; they can and do arise in California civil litigation. Obtaining discovery of electronically stored information located outside the United States presents special problems for the California litigator, and can be a difficult process. Attorneys involved in e-discovery should be familiar with the basic issues and processes involved in conducting such discovery when ESI is stored outside the United States, and to counsel their clients on the difficulties and expense involved.

In addition to the legal framework for acquiring ESI located outside the United States, litigants must consider the practical requirements of dealing with foreign language ESI. Counsel should review Part VI of this chapter [14.25–14.29], regarding the practical considerations of dealing with foreign language ESI, before commencing what may be a lengthy and expensive legal process to obtain it.

II. ANALYZING APPLICABLE CALIFORNIA LAW REGARDING DISCOVERY OF ESI RESIDING ABROAD

14.03 CHECKLIST: Analyzing Applicable California Law Regarding Discovery of ESI Residing Abroad.

- ☐ Is ESI physically located outside United States?
- ☐ If ESI is owned or controlled by a foreign person (individual or corporate), does foreign person (individual or corporate) have a residence or place of business in California?

Authority: Volkswagenwerk Aktiengesellschaft v. Schlunk (1988) 486 US 694, 706–708, 108 S Ct 2104, 100 L Ed2d 722

Discussion: See 14.07[2].

- ☐ If the ESI is owned or controlled by a foreign person (individual or corporate), does foreign person have sufficient minimum contacts with State of California to support California jurisdiction?

Authority: Arnesen v. Raymond Lee Org., Inc. (1973) 31 CA3d 991, 996, 107 CR 744

Discussion: See 14.07[1], 14.07[3]

- ☐ Is nation where ESI is physically located a civil law nation or a common law nation?

Authority: Am. Home Assur. Co. v. Societe Commerciale Toutelectric (2002) 104 CA4th 406, 128 CR2d 430

Discussion: See 14.11[1]

Forms: See 14.30–14.36

- ☐ Is ESI physically located in a nation that is signatory to Hague Convention for Service, or Hague Convention for Taking of Evidence?

Authority: Hague Convention for the Service Abroad of Judicial and Extrajudicial Documents [20 U.S.T. 361; 1969 U.S.T. LEXIS 152]; Hague Convention for the Taking of Evidence in Civil or Commercial Matters [23 U.S.T. 2555; 1970 U.S.T. LEXIS 497]

Discussion: See 14.11[3]

Forms: See 14.32–14.33

- ☐ Can other parties obtain sufficient pre-trial discovery under Hague Convention for Evidence rather than California Code of Civil Procedure, or will compliance with Hague Convention put them at a disadvantage?

Authority: Societe Nationale Industrielle Aerospatiale v. United States

Dist. Court (1987) 482 US 522, 542, 107 S Ct 2542, 96 L Ed2d 461

Discussion: See 14.11[4]

Forms: See 14.32–14.33

- ☐ Is foreign party willing to pay additional expenses that would be imposed through compliance with Hague Convention for Evidence rather than California Code of Civil Procedure?

Authority: See *Cottle v. Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882 (court's general power to control litigation); see also *Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 542, 107 S Ct 2542, 96 L Ed2d 461

Discussion: See 14.11[5]

- ☐ Will foreign government impose fines or other legal penalties on foreign resident if foreign resident complies with discovery required by California Code of Civil Procedure?

Authority: Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law (discussion of problems of sovereign infringement caused by common law discovery practices in civil law nations); see *Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 426, 128 CR2d 430

Discussion: See 14.05[1]

Forms: See 14.30–14.36

14.04 Objective and Strategy. Attorneys faced with a situation involving ESI located in a foreign jurisdiction should first review the relevant California statutes and case law governing discovery of evidence, including ESI evidence, residing in foreign jurisdictions. This will give them a basic understanding of the framework of international discovery, and help them decide if it is appropriate to pursue the process.

The initial question is whether it is possible to use California discovery procedures to obtain the ESI. These procedures, if available, are preferable. They provide the broadest scope of discovery as well as the most efficient enforcement procedures. In addition, they are familiar to both counsel and the court. The strongest case for using California's discovery statutes is for those matters in which the desired ESI is located abroad, but is controlled by a party who has been validly served. This approach becomes less certain when the ESI resides abroad but is owned or controlled by non-parties. In either case, the party in possession of the ESI will have potential arguments against the use of the California discovery statutes [*see* 14.06[1]].

✖ **Strategic Points:**

- The tension in this area of California law pertains to whether a party must, in the first instance, use the Hague Convention for the Taking

of Evidence in Civil or Commercial Matters to request production of evidence from a foreign litigant, or whether the party can conduct ordinary discovery under the Code of Civil Procedure. The most recent case law from the California Courts of Appeal states that pursuant to U.S. Supreme Court precedent, the Code of Civil Procedure should be the first resort [*Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430; *see Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 107 S Ct 2542, 96 L Ed2d 461]. Older appellate district precedent says the Hague Convention should be used first. There is no ruling available on this point from the California Supreme Court [*Volkswagenwerk v. Sup. Ct* (1981) 123 CA3d 840, 176 CR 874; *Pierburg GmbH & Co. KG v. Sup. Ct.* (1982) 137 CA3d 238, 186 CR 876; *Volkswagenwerk v. Sup. Ct.* (1973) 33 CA3d 503, 109 CR 219; *see* 14.07 for discussion].

- The most desirable position is to be able to use the Code of Civil Procedure. The other available methods all cost more in both time and money, have a more limited scope, and have less direct enforcement methods. Demanding parties should take the position that discovery pursuant to the Code of Civil Procedure is the method of first resort according to U.S. Supreme Court and California precedent, and that as necessary, a California court can tailor the Code of Civil Procedure procedures to accommodate foreign comity and sovereignty concerns.

Judge's Perspective—Availability of Sanctions: Many issues relating to foreign discovery are mooted by the availability of monetary, evidentiary, issue, and terminating sanctions when seeking ESI in the possession or control of a party to a California action. For discussion of sanctions in e-discovery matters, see Ch. 13, Seeking or Opposing Sanctions for Noncompliance.

14.05 Discovery of Foreign Persons May Be Available Under California Code of Civil Procedure.

14.05[1] Counsel Should First Try to Obtain ESI Under California Code of Civil Procedure. If the foreign resident is a party to the matter, and the court has properly exercised jurisdiction over the foreign party, inspection requests for production of ESI should be issued pursuant to the ordinary provisions of the Code of Civil Procedure [CCP § 2031.010; *Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430 (Code of Civil Procedure should be first resort for discovery)]. Although there are potential pitfalls in this area, this approach should be tried first with foreign parties to the litigation.

☒ Strategic Points—Foreign Defendants Can Be More Resistant to Discovery Under Code of Civil Procedure Than Under International Law:

- Even if they have no objection to producing the evidence in question, foreign citizens often prefer to supply ESI located in another country under a Hague Convention on Taking of Evidence letter of request, if the foreign country is a signatory to that Convention, or via letters rogatory. This is true even if e-discovery is available under California law and the parties in

(Text continued on page 14-11)

question can be properly served. Their concern is that foreign governments are less likely to object to a Hague Convention letter of request (or letters rogatory) than to a discovery request under United States law, and therefore less likelihood exists that the responding party will run afoul of the foreign country's privacy and disclosure laws in attempting to comply with the e-discovery request. The worst-case situation dreaded by responding parties is the possibility of conflicting official orders: a foreign government ministry orders non-production, under penalty of monetary sanctions or jail, while a California court orders production of the ESI, under threat of monetary or litigation-ending sanctions in the case of noncompliance. Foreign parties often believe that there is less likelihood of this situation arising if they proceed under the Hague Convention. Thus, it is not unusual for a foreign responding party to resist discovery under California law, but offer to comply if discovery is taken under the Hague Convention (or via letters rogatory, if the nation in question is not a signatory to the Hague Convention for Evidence).

- These matters can be, and typically are, the subject of informal negotiations among the parties. The requesting party may have considerable negotiating leverage by agreeing to proceed under the Hague Convention rather than the Code of Civil Procedure, in return for full cooperation by the responding party.

♦ **Cross References:** Hague convention procedures, see 14.08–14.13.

Letters rogatory, see 14.14–14.19.

Foreign privacy and disclosure laws, see 14.22–14.23.

Discussion of blocking statutes and recognition issues in United States courts, see 14.24.

14.05[2] Recent Case Law Supports Availability of Discovery Against Foreign Residents Under California Law. The weight of current authority appears to support the position that discovery against foreign persons is available under the California Code of Civil Procedure [see discussion below].

The Hague Convention for the Taking of Evidence Abroad in Civil and Commercial Matters ("Hague Convention for Evidence") was formally ratified by the United States Senate, signed by the President, and is part of the laws of the United States. It became effective in the United States as of October 7, 1972 [23 UST 2555]. Between 1973 and 1983, California's First, Second and Third Appellate Districts decided that comity concerns and respect for the sovereignty of foreign nations required that California parties use the Hague Convention for Evidence rather than the Code of Civil Procedure when seeking evidence located abroad [Volkswagenwerk

v. Sup. Ct (1981) 123 CA3d 840, 176 CR 874; Pierburg GmbH & Co. KG v. Sup. Ct. (1982) 137 CA3d 238, 186 CR 876; Volkswagenwerk v. Sup. Ct. (1973) 33 CA3d 503, 109 CR 219].

In 1987, the United States Supreme Court decided *Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 107 S Ct 2542, 96 L Ed2d 461. In *Aerospatiale*, the Supreme Court held that by its very terms, the Hague Convention for Evidence was an optional method rather than a compulsory one. Therefore, courts should employ their own rules of civil procedure, and address comity concerns as they actually arose. American courts were instructed to be respectful of any “special problems” that confronted a foreign litigant “on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state” [*Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 546, 107 S Ct 2542, 96 L Ed2d 461].

Thereafter, California’s First District Appellate Division held that *Aerospatiale* overruled the earlier California precedent, and that the Code of Civil Procedure should be used in the first instance, rather than the Hague Convention for Evidence. California judges can take the difficulties facing foreign litigants into account, but need not use the Hague Convention for Evidence as the mandatory vehicle for discovery in the first instance. Rehearing was denied, and the California Supreme Court refused review [*Am. Home Assur. Co. v. Societe Commerciale Toutelec-tric* (2002) 104 CA4th 406, 128 CR2d 430 (Hague Convention discovery procedures are not the exclusive means of obtaining evidence from a foreign litigant, and it is not necessary to use these procedures as a matter of first resort)].

♦ **Cross References:** The full text of the Hague Convention for Evidence is available on lexis.com at 23 UST 2555; 1970 UST LEXIS 497.

Discovery procedures under Hague Convention for Evidence, see 14.08–14.13.

Examples—Hague Convention for Evidence Rules Are Permissive:

- In *Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 107 S Ct 2542 96 L Ed2d 461, two French corporations designed, manufactured and marketed their aircraft in the United States. After a crash, citizens of Iowa sued the French corporations. When served with requests for production under the Federal Rules of Civil Procedure, the French corporations filed a motion for a protective order on the grounds that the Hague Convention for Evidence was the exclusive vehicle for discovery against them. They also provided proof that a French blocking statute prohibited them from responding to discovery requests other than those pro-pounded under the Hague Convention. The U.S. Supreme

Court held that compliance with the Hague Convention for Evidence was not required for taking evidence abroad. The treaty was permissive rather than mandatory. When discovery abroad is required, the District Court ought to scrutinize the particular facts, sovereign interests, and likelihood that resort to the Convention procedures will prove effective. Parties could proceed under the Federal Rules of Civil Procedure, and the federal district court could adjust discovery options if the comity analysis required.

- In *Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430, a French corporation wholly owned a Florida corporation that reneged on a construction contract. Initial discovery was conducted under the Code of Civil Procedure. After a fair amount of poor discovery conduct, the French corporation took the position that all further discovery should be conducted through the Hague Convention for Evidence, as that treaty provided the exclusive means for obtaining evidence abroad. In addition, the French Ministry of Justice barred the French corporation from providing the requested discovery, but stated that it might change its decision if the requests were issued pursuant to the Hague Convention for Evidence. When the requested discovery was not produced, the plaintiff successfully moved for terminating sanctions. The appellate court held that *Aerospatiale* governed, and that therefore, a California court was not required to resort to the Hague Convention for Evidence in the first instance. It further held that defendant had waived its right to request resort to the Hague Convention for Evidence by participating in Code of Civil Procedure discovery earlier in the matter. The terminating sanction was upheld.

14.06 Foreign Nationals Can Request Use of Hague Convention for Evidence.

14.06[1] Foreign Party Can Object to Discovery Under California Law. A foreign party presented with a demand for discovery (including e-discovery) under California law can request that discovery be conducted under the Hague Convention for Evidence. Such a request may be presented either formally or informally. It can arise informally during the meet and confer process and has been known to take the form of the responding party indicating a willingness to proceed under the Hague Convention process but not under California law. If the parties are unable to resolve the issue informally, a formal objection may be raised with the court [*see Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 107 S Ct 2542, 96 L Ed2d 461; *Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 128 CR2d 430].

14.06[2] Burden of Persuasion Is on Party Desiring to Invoke Hague Convention. The party wishing to invoke the Hague Convention for Evidence bears the burden of persuasion to show that comity interests favor its application [Am. Home Assur. Co. v. Societe Commerciale Toutelectric (2002) 104 CA4th 406, 427, 128 CR2d 430].

14.06[3] Court Must Undertake Comity Analysis to Determine Applicable Rules. “Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states” [Societe Nationale Industrielle Aerospatiale v. US Dist Ct (1987) 482 US 522, 544 n 27, 107 S Ct 2542, 96 L Ed2d 461]. Under both *Aerospatiale* and *American Home Assurance*, California courts are required to undertake a comity analysis, and consider the sovereign and important interests of the foreign state and the difficulties these interests impose on a foreign party. Adjustments to the local rules of procedure can be made at the discretion of the court [Am. Home Assur. Co. v. Societe Commerciale Toutelectric (2002) 104 CA4th 406, 426, 128 CR2d 430].

14.06[4] Comity Analysis Must Consider Specified Factors. The court’s comity analysis should consider at least the following factors [Societe Nationale Industrielle Aerospatiale v. US Dist Ct (1987) 482 US 522, 544 n 28, 107 S Ct 2542, 96 L Ed2d 461; *see* Richmark Corp. v. Timber Falling Consultants (9th Cir. 1992) 959 F2d 1468 (making an *Aerospatiale* comity analysis in matter of sanctions against a mainland Chinese corporation.); *Minpeco, S.A. v. ContiCommodity Services, Inc.* (SDNY 1987) 116 FRD 517, 527–528 (comity analysis found that cost in international comity of requiring Swiss bank to violate Swiss law and reveal customer information was greater than benefit to litigation of receiving the discovery)]:

- The importance to the litigation of the ESI, documents or other information requested.
- The specificity of the request.
- Whether the requested information originated in the United States.
- Whether the information is available through alternative means.
- The extent to which noncompliance with the request would undermine important interests of the United States or the State of California.
- The extent to which compliance with the request would undermine important interests of the nation where the information is located.

14.06[5] Existence of Blocking Statutes in Foreign Nation Does Not Necessarily Bar Use of California Code of Civil Procedure. Civil law nations view the taking of evidence and testimony as a solely judicial function [*see* 14.11[1]]. Judges and other official court officers take evidence. Private citizens do not. Common law nations view civil litigation as a primarily

private matter. The individual parties and their counsel should arrange for the exchange of materials and testimony, and the court should be involved as little as possible. Civil law nations view this practice of permitting private citizens to issue broad-based discovery requests as an infringement on the power and authority of the courts and the state. Many civil law nations have passed blocking statutes, the purpose of which is to prevent their citizens from complying with foreign common law-style discovery requests [see 14.24].

The Hague Convention for Evidence was intended to help bridge the gap between these two legal systems, and create methods that both could tolerate [*Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.* (1987) 482 US 522, 529, 107 S Ct 2542, 2548, 96 L Ed2d 461; Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law (discussion of problems of sovereign infringement caused by common law discovery practices in civil law nations)].

However, in *Aerospatiale* and *American Home Assurance*, neither the U.S. Supreme Court nor the California appellate court considered a foreign blocking statute as sufficient cause to require use of the Hague Convention for Evidence over the domestic rules of civil procedure, if the court appropriately considered how to make any required comity adjustments [*Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.* (1987) 482 US 522, 545, 107 S Ct 2542, 96 L Ed 2d 461; *Am. Home Assur. Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 426, 128 CR2d 430].

♦ **Cross Reference:** Discussion of blocking statutes, see 14.24.

14.06[6] If California Court Orders Production Under Code of Civil Procedure, Foreign Party Must Comply or Face Sanctions. If a California court orders production of the ESI over the objections of the foreign party, the foreign party must choose. Either it must comply with the California court's order, and the litigation proceeds, or it must choose to comply with its foreign obligations, and refuse to produce the ESI. A party that refuses to produce discovery in a U.S. court when ordered to do so faces the likelihood of sanctions [see *Richmark Corp. v. Timber Falling Consultants* (9th Cir 1992) 959 F2d 1468 (making an *Aerospatiale* comity analysis in matter of sanctions against a mainland Chinese corporation)]. The court should take into account the importance of the missing discovery, and the likelihood of actual enforcement by the foreign government when considering the level of sanctions to impose [see, e.g., *Societe Internationale Pour Participations Industrielles v. Rogers* (1958) 357 US 197, 78 S Ct 1087, 2 L Ed 2d 1255 (lower court's order for terminating sanctions reversed and case remanded on the grounds that threatened foreign criminal prosecution should have been given greater consideration as an

excuse for non-production); *US v. Vetco* (9th Cir 1981) 691 F2d 1281 (monetary sanctions upheld as Swiss government had not moved to order compliance with local law; complying with IRS summons even though its attorneys argued that to fulfill its obligations under U.S. law would violate Swiss law)].

✖ **Strategic Point—Other Federal or State Law May Provide a Basis to Prevent Production:** If there is a basis to oppose production under applicable United States or state law, counsel should argue that the law in question prevents production. In *Suzlon Energy Ltd. v. Microsoft Corp.* (9th Cir Oct 3, 2011) 2011 US App LEXIS 20018, at *1–*2, a company engaged in civil litigation in Australia against an Indian citizen imprisoned abroad sought to obtain e-mails in his hotmail account from Microsoft. The Microsoft servers that stored the emails were located in the United States. The Ninth Circuit affirmed a district court decision denying production of the information. The court noted that 28 USC § 1872, governing assistance to foreign and international tribunals and to litigants before such tribunals, allowed a United States court to order production of evidence that would not be discoverable in the foreign proceeding. The Ninth Circuit nonetheless affirmed the district court’s granting of Microsoft’s motion to quash the subpoena for the e-mails, on the ground that the plain text of the Electronic Communications Privacy Act [18 USC §§ 2510–2522] protects the stored electronic communications of “any person” without qualification [18 USC § 2510(13)]. “Any person” includes foreign citizens [*Suzlon Energy Ltd. v. Microsoft Corp.* (9th Cir Oct 3, 2011) 2011 US App LEXIS 20018, at *6].

The United States Court of Appeals for the Second Circuit has held that the Stored Communications Act [18 USC §§ 2701 et seq.] does not authorize a United States court to issue and enforce a search warrant against a United States-based service provider for the contents of a customer’s electronic communications stored on servers located outside the United States [*Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.)* (2d Cir July 14, 2016) 2016 US App LEXIS 12926].

14.07 Jurisdiction Must Be Obtained.

14.07[1] Jurisdiction Over Foreign Person in California Court Requires Appropriate Service of Process and Sufficient Minimum Contacts. In order to obtain jurisdiction over a foreign person or corporation, the person must be served using one of the methods approved of in the Code of Civil Procedure, and they must have sufficient minimum contacts with the State of California. There must be both minimum contacts and proper service.

If the foreign person or corporation resides abroad, jurisdiction may exist

in California, but it will be necessary to serve the party abroad as well. This must be done using a method that both meets the requirements of the California Code of Civil Procedure, and is permissible in the foreign jurisdiction. The Hague Convention for Service [see 14.07[2][d]] and the Inter-American Convention for Letters Rogatory [see 14.07[2][c], 14.17[3]] both provide acceptable methods for service in the signatory countries.

Even if the foreign person can be served in California, it is often desirable to serve them abroad in a manner acceptable in the relevant foreign jurisdiction. If counsel needs to obtain ESI or other evidence located in the foreign nation, or if counsel wishes to enforce a judgment there, if the party was served in a manner that is acceptable to the foreign jurisdiction there will be fewer questions or hesitations about providing later requested judicial assistance.

14.07[2] Party Seeking Discovery Must Obtain Service of Process on a Foreign Person or Corporation.

14.07[2][a] Usual Methods Apply for Service Within California. If service can be made inside the State of California, any of the usual methods of service authorized in the CCP can be used [CCP §§ 413.10(a) (service outside state or country); 415.10 (personal service); 416.90 (substituted service)].

✠ **Strategic Point—Hague Convention May Be Bypassed by Serving Foreign Company's Domestic Subsidiary:** If a foreign corporation has a regular place of business in the State of California, or a substantially owned subsidiary with a regular place of business in the State of California, service can be made in the State of California rather than at the foreign offices of the corporation [see *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 US 694, 706–708, 108 S Ct 2104, 100 L Ed 2d 722 (upholding jurisdiction of Illinois court over foreign corporation when service was made in Illinois on a domestic subsidiary of the foreign corporation); *Yamaha Motor Co v. Sup. Ct.* (2009) 174 CA4th 264, 94 CR3d 494 (foreign corporation

(Text continued on page 14-17)

could be served through its California subsidiary pursuant to the Code of Civil Procedure rather than abroad pursuant to the Hague Convention for Service), *relying on* Cospers v. Smith & Wesson Arms Co. (1959) 53 C2d 77, 83–85, 346 P2d 409 (out of state corporation could be served by service on its manufacturer’s representative in California)].

♦ **Cross References:** California Forms of Pleading & Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

General Discussion of Service of Process, Matthew Bender® Practice Guide: California Pretrial Civil Procedure, Chapter 8, Service of Summons.

14.07[2][b] Service Outside California but Inside United States Can Be Made Under Law of California or Other State. An individual or corporate person located outside of California, but still inside the United States, can be served either in accordance with the sections regarding service of process in the Code of Civil Procedure or as authorized by the laws of the state where the person is served [CCP § 413.10(b)].

14.07[2][c] Choices Exist for Service Outside of the United States. The Code of Civil Procedure authorizes various choices for how to serve a person located outside of the United States. Under the terms of the Code of Civil Procedure, use of the Hague Convention for the Service Abroad of Judicial and Extrajudicial Documents (“Hague Convention for Service”) is permissive rather than required [CCP § 413.10(c)]. Case law, however, holds that the Hague Convention for Service preempts state laws regarding service of process outside of the United States, and is binding on the states. The Hague Convention for Service is a treaty ratified by the United States, and therefore is part of the law of this country. Under the Supremacy Clause of the U.S. Constitution, the Hague Convention for Service therefore preempts inconsistent methods of service prescribed by state law in all cases to which it applies [US Const art VI, cl 2; Volkswagenwerk Aktiengesellschaft v. Schlunk (1988) 486 US 694, 699, 108 S Ct 2104, 100 L Ed2d 722; Kott v. Superior Court (1996) 45 CA4th 1126, 1133, 53 CR2d 215]. In addition, CCP § 413.10 specifically states that it is subject to the Hague Convention [CCP § 413.10(c)].

Compliance with the Hague Convention for the Service is mandatory only when service is being made in a signatory country. A current list of signatories is available through the official Hague Convention website, located at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17. A list with helpful notes is also maintained by the U.S. Marshals Service at http://www.usmarshals.gov/process/hague_service.htm.

Failure to comply with the Hague Convention for Service when it is

applicable renders service null and void, even if the defendant had actual notice of the lawsuit [Floveyor Int'l, Ltd. v. Superior Court (1997) 59 CA4th 789, 69 CR2d 457].

♦ **Cross Reference:** The full text of the Hague Convention for Service is available on lexis.com at 20 U.S.T. 361; 1969 U.S.T. LEXIS 152, or the International Agreements volume of the United States Code Service.

✂ **Strategic Points:**

- The Hague Convention for Service should be used when serving a foreign corporation, even if there are options for service of process under the Code of Civil Procedure inside California or the United States.
- Unlike the discovery-related agreements of the Hague Convention, addressed in Sections 14.08–14.13, the rules for service of process are not difficult to comply with, as long as there is a known address where the foreign party can be served (service by mail is not acceptable in many foreign jurisdictions).
- If counsel needs to take discovery outside of the United States, or enforce a judgment outside of the United States, no other signatory country can quibble that service on the discovery target or judgment debtor was not properly performed [see Inter-American Judicial Committee, Report on Uniformity of Legislation on International Cooperation in Judicial Procedures (1952), 30].
- Service in compliance with the Hague Convention is acceptable almost everywhere.
- Like ordinary service of process, there are companies that specialize in Hague Convention compliant service of process.

14.07[2][d] Procedure for Service of Process Under Hague Convention.

Every signatory nation is required to designate a Central Authority to process service requests [Hague Convention on Service Abroad, art 2]. The court with jurisdiction over the case must order the service to be made pursuant to the Hague Convention, and issue an official request for service using the forms required under the Convention for service [Hague Convention on Service Abroad, art 2]. Service documents then must be provided to an official Central Authority of the receiving nation, which, in turn, sees to it that the papers are served in accordance with local requirements. If the requesting nation has a need for use of a particular method, it can request that that method be used. The receiving Central Authority will use requested methods unless domestic law prohibits [Hague Convention on Service Abroad, art 5].

If there are problems preventing service, the Central Authority is required to “promptly” inform the applicant and specify the problems [Hague Convention on Service Abroad, art 4]. Once service has been accomplished, the Central Authority of the receiving nation sends back a certificate of service using forms designated by the Convention [Hague Convention on Service Abroad, art 6].

Forms can be presented in French or English, the default acceptable languages of the Hague Convention, unless local law requires translation into the national language of the receiving nation.

✘ **Strategic Points:**

- Although the Hague Convention permits default use of English or French, it is good practice to have the papers translated into the language of the receiving nation. Local courts and authorities are more likely to process more quickly if the papers are understandable. Furthermore, if there is ever a question of whether or not the papers provided or were intended to provide actual notice, there will be fewer arguments if the papers were sent in the local language. The expenses of hiring a certified court translator are much less than the costs of defending a law and motion challenge to the papers later on.
- A list of Central Authorities is maintained at the official website for the Hague Convention at http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=17.

◆ **Cross References:** Forms that must be issued by the court to request service abroad under the Hague Convention for Service, see 14.32–14.33.

Discussion of requirements for service under the Hague Convention for the Service of Abroad of Judicial and Extrajudicial Documents, Matthew Bender® Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons § 8.14.

Example—Hague Convention for Service: *Balcom v. Hiller* (1996) 46 CA4th 1758, 54 CR2d 536 involved a suit in California state court for misappropriation of funds. The defendant was served in Great Britain in accordance with the Hague Convention for Service. The plaintiff successfully moved for a default judgment. The defendant attacked the judgment for lack of personal jurisdiction, and for failure to serve the complaint in accordance with the requirements of the Hague Convention for Service. The appellate court upheld the default judgment, holding that service had been valid under the requirements of the Hague Convention, as service had been made

in accordance with the law of Great Britain, the receiving nation.

14.07[3] Jurisdiction in California Court Requires Minimum Contacts Analysis. A California court can only exercise personal jurisdiction over a foreign defendant if the defendant has certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [International Shoe Co. v. Washington (1945) 326 US 310, 316, 66 S Ct 154, 90 L Ed 95; Pavlovich v. Superior Court (2002) 29 C4th 262, 268, 127 CR2d 329, 58 P3d 2]. The California long-arm statute provides: “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States” [CCP § 410.10]. When addressing the question of whether a particular exercise of personal jurisdiction comports with constitutional due process, the central inquiry is whether the defendant purposefully established minimum contacts in the forum state [Burger King Corp. v. Rudzewicz (1985) 471 US 462, 474, 105 S Ct 2174, 85 L Ed2d 528; *see also* World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 291, 100 S Ct 559, 62 L Ed2d 490]. The rule applies to individual defendants as well as to corporate defendants [Arnesen v. Raymond Lee Org., Inc. (1973) 31 CA3d 991, 996, 107 CR 744].

Example—Proper Hague Convention Service but No Minimum Contacts:

In *Floveyor International v. Sup Ct* (1997) 59 CA 4th 789, 69 CR2d 457, a California corporation sued a British corporation and properly arranged service in accordance with the Hague Convention for Service. The British corporation moved to quash, on grounds of lack of personal jurisdiction in California. The motion was granted as the record was “devoid of any evidence” that the British corporation had contacts with California.

♦ **Cross Reference:** General discussion of minimum contacts analysis, see Matthew Bender® Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction

14.07[4] Failure to Comply with Hague Convention Is Waived by General Appearance. If service is made on a foreign national without observing the Hague Convention’s requirements, the court nevertheless obtains jurisdiction over persons who make a general appearance after inadequate service [In re Vanessa Q. (2010) 187 CA4th 128, 135, 114 CR3d 294].

♦ **Cross Reference:** Requirements for service under the Hague Convention, see 14.08 et seq.

(Text continued on page 14-21)

III. CONDUCTING FOREIGN E-DISCOVERY USING THE HAGUE CONVENTION

14.08 CHECKLIST: Conducting Foreign E-Discovery Using the Hague Convention.

- ☐ Is target ESI physically located outside of United States, its territories, and insular possessions?

Authority: The Hague Convention for Evidence (requests are from one contracting state to another contracting state, to request testimony or materials located in the receiving state)

Discussion: See 14.11

- ☐ Is nation where target ESI is physically located a signatory to Hague Convention on taking of Evidence Abroad in Civil or Commercial Matters?

Authority: The Hague Convention for Evidence, Article 1 (requests are only authorized between contracting states), Article 38 (Convention enters into effect after ratification by the signatory state), Article 39 (additional nations may adopt/accede to the Convention at a later date.)]

Discussion: See 14.11

Forms: See 14.32–14.33

- ☐ Does counsel know address where custodian of ESI is located in Hague Convention contracting state?

Authority: The Hague Convention for Evidence, Article 1 (requests are only authorized between contracting states), Article 3 (information to be specified in a Letter of request)

Discussion: See 14.18[2] (letters rogatory)

Forms: See 14.32–14.33

- ☐ Has nation where target ESI is physically located stated an exception to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters that would impede production of desired ESI?

Authority: The Hague Convention for Evidence, Article 12 (contracting states may refuse to execute a letter of request if it considers that its sovereignty or security would be prejudiced); Article 23 (contracting states may, at the time of signing or acceding, declare that they will not support the use of letter of request for pre-trial discovery as that term is used in common law countries)

Discussion: See 14.11[4], 14.13[1]

Forms: See 14.32–14.33

- ☐ Does nation where desired ESI is physically located have a blocking statute or other legal impediment to U.S.-style pre-trial discovery that can be overcome by use of letters of request issued pursuant to Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters?

Authority: The Hague Convention for Evidence, Article 12 (contracting states may refuse to execute a letter of request if it considers that its sovereignty or security would be prejudiced), Article 23 (contracting state may file reservation refusing to execute letter of request that seeks pre-trial discovery); *Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 107 S Ct 2542, 96 L Ed2d 461 (French ministry offered to withdraw opposition to depositions if they were noticed via letter of request)

Discussion: See 14.24

Forms: See 14.32–14.33

14.09 Objective and Strategy. The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention for Evidence”) provides vehicles for taking both documentary and testimonial evidence. Attorneys who find it necessary to obtain ESI located in a nation subject to the Convention may use the procedures described in this part to obtain that evidence.

✎ **Strategic Point:** Foreign parties often prefer to supply ESI under a Hague Convention on Taking of Evidence letter of request rather than a California discovery request. This preference sometimes can be used as a negotiating point among the parties [see 14.05[1]].

Consider: Each Hague Convention (for service, for taking of evidence, and so on) has a separate list of signatories—those nations that are officially willing to abide by that particular Hague Convention. The signatories differ from convention to convention. Although most of the EU nations are signatories to the Hague Convention for the Taking of Evidence, many nations outside the EU also have ratified the treaty. For example, Venezuela, the Ukraine, and Australia are all signatories to the Hague Convention on Taking of Evidence. In addition, each signatory nation is permitted to file exceptions and explanations, and most do. For the most current and complete information on whether the nation where the ESI is physically located is indeed a signatory to the Hague Convention for the Taking of Evidence, counsel should check the current list of signatories, and the status table showing any reservations they may have filed. The official website for the Hague Conventions keeps a current list of the nations signatory to each of the various Hague treaties. The current list of the Contracting States for the Hague Convention for the Taking of Evidence,

and all filed reservations and explanations, is located at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=82 (see the “status table” for the convention).

14.10 Treaties and Other Agreements Set Scope of International Discovery.

14.10[1] Treaties Define Scope of International Discovery. When foreign nationals are parties to California litigation, they are subject in California to California’s authority and California’s rules [*see* 14.07, 14.05]. However, when ESI is located outside California, or further, outside of the reach of the government of the United States, attempts to obtain it confront the sovereign authority of another nation, which rightfully seeks to protect its own citizens against foreign intrusion, and to regulate the interaction of its citizens with any foreign judicial process.

Essentially, one sovereign cannot order the subjects of another sovereign to perform any act within the latter’s territory. The sovereign seeking performance of the act must “ask nicely” of the foreign sovereign, and if the request is acceptable to the foreign sovereign, the sovereign seeking performance may proceed. In practice, this means that the United States diplomatic corps works to set up international agreements to assist litigants in obtaining the evidentiary materials they need. Agreements can be formal, as in a treaty or convention, or they can be informal, such as those available by communications through diplomatic channels.

Treaties are pre-existing agreements between sovereigns. Treaties that are ratified by the United States Senate and signed by our President enter the laws of the United States [U.S. Const., Article VI, cl. 2; Article III, § 2, cl. 1]. United States citizens are bound by them, and can make use of them.

Distinguish—Letters Rogatory: If there is no such pre-existing treaty or agreement, there can still be agreement in the international community on how to “ask nicely” for evidence, and how to address a nation that has no pre-existing obligation to heed a request originating in the United States. Letters rogatory may be used for this purpose.

♦ **Cross Reference:** Detailed discussion of use of letters rogatory, *see* 14.14–14.19.

14.10[2] Hague Convention for Evidence Can Be Used to Obtain ESI. The Hague Convention for Evidence is a treaty that permits litigants to obtain ESI, paper documents, and the testimony of witnesses, which reside abroad. This is accomplished through permissive use of the judicial and sovereign authority of the hosting foreign nation [Hague Convention for Evidence, Preamble and Article 1]. The Hague Convention for Evidence is binding upon all signatory nations [*see* 14.11]. Signatories agree to provide each other with the listed kinds of assistance in obtaining cross-border evidence for use in civil and commercial disputes, provided it is asked for in the agreed upon ways.

♦ **Cross References:** Issuance and execution of letters of request, Hague Convention for Evidence, Articles 1–14.

Circumstances under which receiving contracting state may refuse to execute a particular letter of request, Hague Convention for Evidence, Articles 15, 12.

Authority for contracting states to file general refusal to execute any letter of request that seeks common law style pre-trial discovery, Hague Convention for Evidence, Article 23.

Contracting state required to compel appearance and testimony of witnesses and production of documents, Hague Convention for Evidence, Article 10.

Authority for contracting state to excuse the testimony of witness if such testimony would be considered privileged either under domestic laws of receiving state or under laws of requesting state, Hague Convention for Evidence, Article 11.

14.11 Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters—General Principles and Structure.

14.11[1] Hague Convention Was Intended to Assist Transfer of Evidence Materials Between Civil Law and Common Law Nations. Diplomatic and political differences aside, one of the most difficult points of obtaining evidence abroad stems from the differing legal philosophies regarding the taking of evidence which exist between civil law and common law states.

In common law states, the taking of evidence in civil litigation generally is a private matter. Requests are issued by private citizens—party litigants and their counsel. ESI, documents, and testimony are all taken and exchanged privately, usually outside of the presence of a judge or other government official.

In civil law nations, in contrast, the taking of evidence is a judicial and government prerogative. Judges take testimony. Private citizens do not. Therefore, civil law nations view common law discovery requests as an infringement on sovereign functions [discussion on Civil Law and Common Law issues, Report of the U.S. Delegation to the Hague Convention]. The Hague Convention on Evidence was intended to create methods that both systems could tolerate [*Societe Nationale Industrielle Aerospatiale v. US Dist Ct* (1987) 482 US 522, 529, 107 S Ct 2542, 96 L Ed2d 461; Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law (discussion of problems of sovereign infringement caused by common law discovery practices in civil law nations)].

14.11[2] Letters of Request Under Hague Convention for Evidence Are Preferable to Letters Rogatory If Discovery Under California Code of Civil

Procedure Is Not Available. The Code of Civil Procedure is preferable for conducting outright pre-trial discovery [see 14.05[1]]. The access to ESI, documents and witnesses authorized by the Code of Civil Procedure is much broader than that available either under the Hague Convention for Evidence or through letters rogatory.

♦ **Cross Reference:** Advantages and use of Code of Civil Procedure for e-discovery, see 14.05, 14.11[4]

However, as between the Hague Convention for Evidence and letters rogatory, the Hague Convention is preferable. The Hague Convention's letters of request are considerably broader in function than letters rogatory and have stronger enforcement provisions [Hague Convention for Evidence, Articles Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 CA3d 840, 853, 176 CR 874 (citing Report of the U.S. Delegation to the Hague Convention, p. 807)].

♦ **Cross Reference:** Use of letters rogatory, see 14.14–14.19.

14.11[3] Application Limited to Hague Convention Signers. The Hague Convention treaty refers to signatory nations as “contracting states.” The agreement under the treaty is that requests can be made by a contracting state, to a contracting state [Hague Convention for Evidence, Article 1; approved forms for letters of request for documents or depositions under the Hague Convention].

♦ **Cross Reference:** Hague Convention signatories, see 14.11[3]; http://www.hcch.net/index_en.php?act=conventions.text&cid=82.

14.11[4] Availability of Pre-Trial Discovery Is Limited in Many Hague Convention Nations.

14.11[4][a] Hague Convention for Evidence Permits Contracting States to File Reservations Limiting Pre-Trial Discovery. Article 23 of the Hague Convention for Evidence specifically authorizes contracting states to file reservations against accepting letters of request which seek pre-trial discovery [Hague Convention for Evidence, Article 23]. Most signatory states have filed reservations or explanatory declarations or both. A list of the countries that have filed reservations and declarations can be found in the Hague Convention for Evidence Status Table maintained by the official Hague Convention website [http://www.hcch.net/index_en.php?act=conventions.status&cid=82].

Examples—Hague Convention for Evidence Reservations and Declarations:

- France, Germany, India, Italy, and the United Kingdom have all filed reservations refusing to recognize letters of request that seek pre-trial discovery, as authorized by Hague Convention for Evidence, Article 23.
- The United States has filed a declaration explaining that it

will accept a letter of request in Spanish, but only for service in Puerto Rico, and that a letter of request filed in French will be accepted, but will take longer to process than those filed in English.

Example—Foreign Court Restrictions on U.S.-Style Pre-Trial Discovery:

In *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* (1978) AC 547, suit was filed in United States courts for breach of contract based on failure to construct two nuclear power stations. Letters rogatory, which were converted to letters of request under the Hague Convention for Evidence, were issued for both testimony and documents. The document request went up through the British courts to the House of Lords. The House of Lords upheld severely limited documentary discovery, noting “a strict attitude is to be taken by English courts in giving effect to foreign requests for the production of documents by a non-party witness.” It was also noted that the lower court had properly limited the documentary discovery to those allowed by English law, and that the court should only require production of “[p]articular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.”

14.11[4][b] Letter of Request Must Relate to Pending or Contemplated Judicial Proceeding. Letters of request can be used to obtain evidence only for a judicial proceeding, either one already commenced, or one contemplated [Hague Convention for Evidence, Art. 1].

14.11[5] Costs of Letter of Request Procedure Should Be Evaluated. Most nations do not charge for execution of letters of request. However, if the executing country incurs expenses for fees paid to “experts and interpreters,” the executing country may seek reimbursement.

Examples:

- If the papers were supposed to be filed in a particular language, and they were not [see 14.12[3][d]], the executing country can either send them back as non-compliant, or may choose instead to pay to have them translated and charge back a translation fee [Hague Convention for Evidence, Article 14].
- The Convention also concedes that some nations may be constitutionally required to charge for the judicial costs of the services provided [Hague Convention for Evidence, Art. 16].

The United States Department of State publishes information on the usual practices in the various nations signatory to the Hague Convention.

14.12 Letter of Request Must Be Sent to Foreign Nation.

14.12[1] Party Seeking Discovery Must Have California Court Issue Letter of

Request. Letters of request must be issued by a judicial authority [Hague Convention for Evidence, Art. 1]. Thus, a letter of request in a California judicial proceeding must originate with the court, not the litigants as in California. In practice, however, the litigant seeking the discovery prepares the necessary papers for the California court's signature and issuance. [see 14.12[3]].

14.12[2] Party Seeking Discovery Must Prepare and File Motion to Issue Letter of Request in California Court. A letter of request to obtain ESI must be issued by the court in California to the proper receiving authority in the nation where the ESI is physically located. The requesting party must make a motion requesting that the California court issue the letter of request. If the matter has been discussed with opposing counsel first, and agreement on this point reached, the motion can be made as an oral motion in open court during a hearing or discovery conference. All counsel can agree on the record. If no agreement has been reached on this point beforehand, a written motion can be filed either ex parte or under the ordinary law and motion rules for noticed motions.

◆ **Cross Reference:** General discussion of law and motion procedure, see Matthew Bender® Practice Guide: Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

✂ **Strategic Points:**

- If the judge is not familiar with the Hague Convention or the general requirements for foreign discovery, it may be best to file a written motion giving some explanation of these points. If there is no disagreement among counsel, the papers can be filed with a stipulation to shorten time and a statement of non-opposition.
- In some cases, counsel for the custodian of the foreign ESI will agree to respond to the discovery if it is issued in the form of a Hague Convention letter of request rather than as a U.S. discovery [see 14.05[1]]. In such cases, the motion requesting the issuance of the letter of request often is not contested. The heated contentions in this area most frequently occur beforehand, when the discovery target has asked the requesting counsel to use the Hague Convention rather than the Code of Civil Procedure to effectuate the discovery. Once agreement has been reached to use letters of request, the actual issuance can be much less contentious.
- If counsel have not reached an agreement, counsel for the discovery target should consider using an opposition to the motion to issue letters of request as a place to begin presenting objections to the scope of the request. For example, an opposition brief can object to the issuance on the grounds that

responding to such a request will be monetarily burdensome, that the proposed letter of request is in actuality a pre-trial “fishing expedition” that is not authorized by the Hague Convention, and/or that the letters request items that cannot be produced without violation of foreign law. This can assist in negotiations with foreign ministries: such an opposition shows that the ESI custodian is putting up a vigorous defense of its foreign obligations. It also can provide the California court with a preview of problems to come [see 14.23, 14.24].

- Even if the initial motion to issue the letter of request is unopposed, it may still bog down later in the process. Objections to the scope of the letter of request often arise in the foreign jurisdiction rather than in the California court. See Part V of this chapter [see 14.20–14.24], dealing with foreign barriers to discovery. Briefly, the central authority that receives the letter of request can examine the letter for compliance with the Hague Convention for Taking of Evidence. If the letter of request violates the convention, the local ministry can refuse to enforce it, or can unilaterally decide to narrow the scope to the bounds it considers legal. The foreign discovery target can also make objections to the scope after receiving the letter of request on the basis that compliance with the request will require them to violate local law. The objections of the discovery target can be made either in California court, or in a court of the nation where the letter of request was served, or both.

14.12[3] Party Seeking Discovery Must Prepare Form for Letter of Request.

14.12[3][a] Party Should Prepare Letter of Request Form for Court's Signature. The moving party also should fill out the form for the letter of request for document, and attach it to the motion so that it can be issued by the court or court clerk. The Hague Convention for Evidence has issued forms that must be used for letters of request.

◆ **Cross References:** Language requirements for letters of request, see 14.12[3][d].

Form, sample motion for issuance of letters of request, see 14.30.

Official forms for letters of request, see Forms 14.32, 14.33.

⚠ **Warning:** The forms should not be altered, except as permitted in the instructions. Some paragraphs are alternatives, and the unused items can be removed.

14.12[3][b] ESI Should Be Described As Specifically As Possible to Maximize Possibility of Success. Most of the Hague Convention for Evidence signatory states have filed reservations under Article 23 stating that they will not execute letters of request that seek U.S.-style pre-trial

discovery [see 14.11[4]]. Even without an Article 23 reservation, most civil law nations will not comply with a letter of request that seeks to find out whether or not particular categories of documents exist and are in the possession of the letter recipient. Their own laws do not support this kind of demand and indeed, often block compliance with such demands [see 14.24 (blocking statutes)].

This means that letters of request are weakest, and the most likely to meet refusal, when they seek to find out if particular documents exist at all, or to get a general roadmap of what kind of documents are in the recipient's possession. They are strongest when the letter of request can specify either individual documents, or categories of documents that are likely to be in the possession of the letter recipient [see *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* (1978) AC 547 (House of Lords case in which U.S. letters of request were severely limited in scope to avoid pre-trial discovery under the laws of the United Kingdom)].

14.12[3][c] Letter of Request May Ask That Particular Procedures Be Followed. The letter of request can ask that particular procedures be followed. Such procedural requests are not binding on the foreign nation [Hague Convention for Evidence, Art. 9; see 14.13[3]]. In practice, this section is used to request U.S.-style procedures when they are desirable, and not in contravention of local law.

In the case of ESI, if particular procedures are needed so that the evidence will be usable in the recipient court system, they should be specified. For example, it is advisable to request a forensically sound collection method by a specialized technician having certain types of certifications or qualifications (EnCe, CCE, CISSP, etc.). The technician should be instructed to provide chain-of-custody documentation so that the evidence can be entered into evidence [see *Lorraine v. Markel* (D MD 2007) 241 FRD 534]. Counsel should consider locating local technicians or companies who can provide the services, and offering them for use, at the parties' expense. If the particular matter has other requirements as to delivery format or otherwise, they should be specified in the letter.

⚠ Warning: If the requirements are too onerous, the local authority can ignore them completely. The requirements should be simple and easy to understand and comply with. Counsel may need to make do with less than the usual items obtained by U.S.-based technicians. Such a procedure should be discussed with opposing counsel and the court before spending time and money on such an ESI production. It is best to have a stipulation or court order stating that the ESI obtained under the letter of request will be deemed admissible.

14.12[3][d] Letter of Request Must Meet Hague Convention Language

Requirements. A letter of request may be filed in accordance with either of the following language requirements [Hague Convention for Evidence, Art. 4.]:

- It is always acceptable to file letters of request in the official language of the nation to which letters of request are being sent, or to send an accompanying translation into that language. If a translation is sent, it must be certified as correct either by a diplomatic officer, a consular agent, or a sworn translator.
- Alternatively, all documents may be submitted in French or English, unless the receiving nation has specifically filed a reservation on this point.

✕ **Strategic Point:** A list of the countries that have filed reservations can be found in the Hague Convention for Evidence Status Table maintained by the official Hague Convention website: http://www.hcch.net/index_en.php?act=conventions.status&cid=82. Counsel should consult this list before preparing a letter of request for signature by a California court.

14.12[4] California Court Forwards Letter of Request to Designated Central Authority of Foreign Nation. After the California court has issued the letter of request, the court will forward it to the central authority for the nation where the ESI resides.

The letters must be sent from the California court to the Central Authority of the receiving nation. Counsel cannot mail them or otherwise convey them. However, it is frequently the practice for counsel to prepare the mailing materials for the court clerk, which may help expedite processing and avoid transmission errors. Counsel should contact the clerk of the California court to determine the clerk's usual practice and preferences.

Consider: Any response or correspondence from the other country's courts will be sent to the California court or court clerk, not to counsel.

✕ **Strategic Point:** Each Hague Convention contracting state designates a central authority where letters of request should be filed [Hague Convention for Evidence, Art. 2]. A current list of Hague Convention central authorities is maintained on the official website for the Convention [see http://www.hcch.net/index_en.php?act=conventions.authorities&cid=82]. The U.S. Department of State also maintains a list of central authority offices, together with helpful notes [see http://travel.state.gov/law/info/judicial/judicial_689.html].

14.13 Foreign Nation Will Act on Letter of Request.

14.13[1] Central Authority May Raise Objections to Letter and Must Notify California Authority of Objections. The central authority can refuse to serve the letter of request if it violates the Hague Convention generally, or if it

violates an exception to the Convention filed by the receiving nation [Hague Convention on Taking Evidence, Arts. 12, 23]. In extreme cases, it can refuse if it considers that the letter of request infringes upon its “sovereignty or security” [Hague Convention on Taking Evidence, Arts. 12, 23].

If the receiving Central Authority believes that the letter of request does not comply with the Hague Convention or one of the reservations filed by the receiving nation, the central authority must “promptly” inform the judicial authority that sent the request, stating the nature of the objections [Hague Convention for Evidence, Art. 5]. A contracting state can refuse to execute a properly executed and delivered letter of request only if the receiving state believes that its “sovereignty or security” would be prejudiced by enforcement [Hague Convention for Evidence, Art. 5].

✘ **Strategic Points—Responding to Objections from Central Authority:**

- If the objections are purely technical, they can be dealt with by revising the letter. The most difficult problem to overcome is an objection that the letter of request is demanding pre-trial discovery. Most Hague Convention signatory nations have filed exceptions to this use of the Hague Convention [see 14.11[1],[4]]. The more extensive the letter of request is, the more likely this is to happen. It may be necessary to provide the central authority with an explanation of why the materials sought are known to be, or are reasonably likely to be, in the possession of the custodian named in the letter. If the ESI custodian has agreed to the discovery, the custodian can also let the authority know that it understands what ESI is being requested and stands ready to comply once the letter of request is served (this is easiest to negotiate with parties).
- Local counsel in the foreign jurisdiction can be of tremendous assistance in negotiating such items with a foreign central or local enforcing authority and finding out what would allay local hostility to the letter of request.
- It may also be necessary to accept a central authority’s decision to limit the scope of the letter of request, and to attempt to obtain the ESI from other sources or through other means.

14.13[2] Central Authority Will Forward Letters of Request to Appropriate Local Authority in Foreign Nation for Execution. The central authority, after determining that the letter of request meets Hague Convention requirements, will then forward the letter of request to the local authority within the foreign nation that is competent to carry out the particular commission (taking testimony, receiving production of ESI or documents, etc.) [Hague Convention for Evidence, Art. 2].

⌚ **Timing:** The letter of request must be executed “expeditiously,”

and if it is sent to the wrong domestic authority for execution, the letter of request must be re-routed “forthwith” to an authority that can execute it [Hague Convention for Evidence, Arts. 6, 9]. In practice, the timing can differ greatly across jurisdictions. If the nation enforcing the letter of request is one that regularly receives and processes international requests, the timing is likely to be faster—a few months. If the enforcing nation or local authority has less experience in such matters, or if there is strong local hostility to the kind of request, the process can stretch out much longer.

✖ **Strategic Point:** The enforcing local authority may not be willing to discuss the letter of request with U.S. counsel. The letter of request is from one government to another government, and the local authority therefore may be unwilling to provide status reports to any requestor other than the local California court that issued the request. If the response is dragging on, counsel can try sending a polite request for an update. If it is ignored, counsel should ask the California court to make a polite request for an update. If it is ignored, or if the response is not sufficiently informative, counsel should then consider trying foreign informal measures. If the amount in controversy and the importance of the ESI merits, it can be worth the expense of working with counsel local to the foreign jurisdiction, who speaks the official language and is in touch with the local sensitivities and legal culture. Local counsel can speak informally with the local foreign authority and ask about the request. For example, the wording might need to be adjusted, or a technical resource paid for and set at their disposal. Local counsel can be better at discussing such items with a foreign ministry.

14.13[3] Receiving Nation Will Use Its Own Procedures, but Will Consider Procedural Requests. The executing judicial authority will use its own law, methods, and procedures [Hague Convention for Evidence, Art. 9]. However, other or additional procedures can be requested in the letter of request. If the requested procedures are not contrary to local law, and are not a practical barrier to execution, the local judicial authority will follow the procedures requested [Hague Convention for Evidence, Art. 9; *see* 14.12[3][c]].

14.13[4] Receiving Nation Must Enforce Letter of Request As It Would Similar Domestic Requests. The local authority is required to apply “appropriate measures of compulsion” and to the same extent used by local proceedings to obtain compliance with the letter of request [Hague Convention for Evidence, Art. 10]. In practice, the court will order a reluctant entity to comply, and can use such means as they have at their disposal to enforce their own orders. Local privileges will apply. For example, if there is a local privilege such as the Swiss banking secrecy acts, or local blocking statutes, the local court cannot require that the local entity break the local

law to comply with the foreign letter of request. Local entities can object on this basis.

14.13[5] Requesting Authority Must Be Informed If Letter of Request Cannot Be Executed. If the local authority is not able to execute the request (for example, if the desired documents does not exist, or if the production is barred by local privilege or other legal barrier), the requesting authority will be informed immediately, and informed of the reasons why execution was not possible [Hague Convention for Evidence, Art. 13].

Consider: Any response or correspondence from the other country's courts will be sent to the California court or court clerk, not to counsel.

14.13[6] Local Authority Will Enforce or Refuse to Comply With Letter of Request.

14.13[6][a] Local Authority Serves Letter of Request on ESI Custodian.

After the central authority forwards the letter of request to the appropriate local authority, the local authority serves the letter of request on the custodian of the ESI under local procedures, and collects the response. If the custodian resists or ignores the letter of request, the local authority uses whatever coercive measures it usually uses for document requests to enforce the letter.

14.13[6][b] Custodian of ESI Can Object Under Local Law. Once served, the ESI custodian who receives the letter of request can object to it on the grounds that responding would require them to waive a valid privilege, or to otherwise violate local law. These objections can be raised in the foreign jurisdiction or in California, or both.

The foreign ESI custodian may be legally required to object to the discovery on the grounds that it would require them to violate local law [see 14.20–14.24]. A local ministry or other local foreign authority can also issue an order demanding that the ESI custodian not comply with the letter of request.

✂ **Strategic Point—Preferable for Requesting Party to Handle Objections in California Court:** Although the Hague Convention requires that a local authority use its coercive powers to enforce the letter of request, it need only do so to the extent that local law would apply coercion to enforce its own similar requests [Hague Convention on the Taking of Evidence, Art. 10]. A foreign authority is not likely to authorize coercion for an ESI production that violates its own laws. The best place to handle such objections is in the California court that issued the letter of request. If the ESI custodian is a party, and refuses to comply with the letter of request, the California court can issue local sanctions [see 14.03–14.07; 14.20–14.24].

IV. CONDUCTING FOREIGN E-DISCOVERY USING LETTERS ROGATORY

14.14 CHECKLIST: Conducting Foreign E-Discovery Using Letters Rogatory.

- ☐ Is it necessary to use letters rogatory to obtain production of ESI?
 - ☐ Is desired ESI physically located outside United States, its territories, and insular possessions?

Authority: CCP §§ 2026.010, 2027.010

Discussion: See 14.10
 - ☐ Is nation where desired ESI is physically located a Hague Convention for Evidence signatory?

Authority: CCP §§ 2026.010, 2027.010; 23 UST 2555

Discussion: See 14.11[3]
 - ☐ Is nation where desired ESI is physically located a signatory to Inter-American Convention on Letters Rogatory?

Authority: CCP §§ 2026.010, 2027.010; 14 ILM 339

Discussion: See 14.17[3]
 - ☐ Is a current address available for location where desired ESI is physically located, or for custodian of desired ESI?

Authority: Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979; 18 ILM 1238, Forms A & B

Discussion: See 14.18[2]

Form: See 14.35
 - ☐ Would production of ESI breach any domestic laws or cultural norms of nation where ESI is physically located?

Authority: 14 ILM 339, Art. 17

Discussion: See 14.19[4]
- ☐ Consider obtaining assistance of counsel local to foreign jurisdiction to assist with drafting and foreign negotiations regarding letter rogatory.

Authority: 14 ILM 339, Arts. 13 and 17

Discussion: See 14.16[1]
- ☐ Contact foreign ESI custodian or counsel to negotiate a voluntary ESI production, if ESI custodian is willing to comply with a properly presented letter rogatory.

Authority: 14 ILM 339, Art. 3

Discussion: See 14.19[5]

- ☐ Contact U.S. State Department and discuss delivering letter rogatory to State Department for processing.

Authority: 14 ILM 339, Art. 4; 28 USC §1781(a), (b)

Discussion: See 14.19[2]

- ☐ If letter rogatory will not be delivered to U.S. State Department, identify proper foreign authority to whom letter rogatory should be delivered.

Authority: 14 ILM 339, Art. 4

Discussion: See 14.19[2]

- ☐ Identify any specialized procedures that may be required for collection and delivery of desired ESI in order for it to be usable in California proceeding.

Authority: 14 ILM 339, Art. 10

Discussion: See 14.18[5]

Form: See 14.30

- ☐ Prepare letter rogatory.

Authority: Additional Protocol to the Inter-American Convention on Letters Rogatory, 18 ILM 1238 (1979), Art. 3

Discussion: See 14.18

Form: See 14.30

- ☐ Have letter rogatory and accompanying documentation translated by certified translator into official language of receiving nation.

Authority: 14 ILM 339, Art. 3(b); Additional Protocol to the Inter-American Convention on Letters Rogatory, 18 ILM 1238 (1979), Art. 3

Discussion: See 14.18[3][a]

- ☐ Prepare and file notice of motion, motion, and proposed order, requesting court to issue letters rogatory.

Authority: 14 ILM 339, Art. 4

Discussion: See 14.18[6]–[7], 14.19

Form: See 14.30

14.15 Objective and Strategy. Letters rogatory provide a vehicle to obtain production of ESI and other evidence when there is no treaty or other agreements between the United States and the nation where the evidence or witness resides. Letters rogatory request official assistance with various legal functions that, if performed without permission, would constitute an affront to

or infringement of the receiving nation's sovereignty.

A letter rogatory is a formal request from a U.S. court to a court of a foreign jurisdiction requesting its judicial assistance in obtaining evidence for use in a matter before the U.S. court [22 CFR § 92.54 (letters rogatory defined); *see Volkswagenwerk v. Sup. Ct.* (1973) 33 CA3d 503, 507, 109 CR 219]. Letters rogatory can request almost any kind of judicial act, including service of process, taking of evidence, serving subpoenas, serving other legal notices, and the execution of a civil judgment [22 CFR § 92.54]. Letters rogatory usually require a statement of reciprocity—that the California court or the United States is willing to provide the same kind of assistance [*see* 22 CFR § 92.54 (letters rogatory defined)].

Consider: Letters rogatory are a vehicle for comity among nations. One sovereign can use them to respectfully request assistance from another sovereign. The focus with a letter rogatory is that the nature of this transaction is a *request*. There are historical and treaty agreements as to the proper procedures for drafting and presenting a letter rogatory. However, unlike the Hague Convention, there is not necessarily any agreement by the receiving nation to speedily execute them, or to apply strong efforts or compulsion to obtain the items requested. The ability of U.S. litigants to obtain production of evidence through letters rogatory can depend on the current state of diplomatic relations with the receiving nation.

✂ Strategic Points:

- For California litigants, letters rogatory should be the international production vehicle of last resort. They will not support a request anywhere near the scope of discovery under the Code of Civil Procedure, and they lack the reliability and enforcement strength found in letters of request under the Hague Convention. If there are other routes to the materials needed, those routes should be considered first.
- Letters rogatory may need to be a choice if the nation where the ESI, documents or witness resides was once a Hague Convention signatory, but revolution or other similar change in government has occurred. The Convention requests that new governments confirm their intention to continue as a contracting state. During the pendency between the institution of such a new government and the filing of such a statement with the Convention, the state's willingness to execute Hague Convention requests can be in question. Letters rogatory are always available as an option in the place of a Hague Convention letter of request or request for service. However, because letters rogatory lack reliable structures for execution and enforcement, parties should try letters of request first, and see if they are honored. The U.S. Marshals Service maintains a list on its website showing the status of countries regarding the Hague

Convention for Service [http://www.usmarshals.gov/process/hague_service.htm]. For example any country that has “achieved independence” and has not yet filed a declaration that it will continue to support to the Hague Convention for Service is in question.

14.16 Counsel Should Research Judicial Resources Available to Assist With Letters Rogatory in Recipient Country.

14.16[1] Counsel Should Research Local Law and Judicial Attitudes. Counsel should research issues in the relevant country before requesting issuance of letters rogatory. Inquiry should include the following topics:

- Is the foreign country a signatory to an international treaty or convention relating to letters rogatory?
- What are the cultural and judicial attitudes towards the evidence being sought?
- What are the cultural and judicial attitudes towards various ways of gaining access?
- To whom should the letter rogatory be addressed, and how will it be delivered?

✖ **Strategic Points:** The first places to look are the website for the U.S. State Department, and, if relevant, the website for the Inter-American Convention on Letters Rogatory:

- The U.S. Department of State maintains a website describing the assistance available and local pitfalls in the listed nations [see http://www.travel.state.gov/law/info/judicial/judicial_2510.html].
- The Organization of American States (OAS) maintains a website with information on which nations are signatories to the Inter-American Convention on Letters Rogatory, and whether there is a Central Authority where letters rogatory can be filed in the first instance [see <http://www.oas.org/juridico/english/sigs/b-46.html>].

Example—Research on Receiving Nation’s Resources and Attitudes: Brazil is not a contracting nation under the Hague Convention for Evidence, but does accept and process letters rogatory. If the judicial act desired is service of process, the Inter-American Convention on Letters Rogatory can be used, and Brazil has identified a central authority to receive them. Although the United States has filed reservations against using the Inter-American Convention for purposes other than service of process, Brazil has not. Therefore, Brazil is apparently not adverse, in principle, to receiving letters rogatory for the purpose of obtaining ESI.

14.16[2] Counsel Should Consider Obtaining Assistance of Foreign Counsel.

Letters rogatory are non-coercive. The nation must be willing to receive and process it; the recipient must be willing to respond. Local counsel can provide invaluable assistance in several ways.

- Local counsel can assist with the wording of the letter rogatory to avoid local sensitivities or illegalities.
- Local counsel can negotiate more easily with local authorities to gain acceptance of the letter rogatory, and to shepherd it through the process.
- Local counsel can negotiate compliance with the recipient of the letter rogatory.
- The involvement of local counsel manifests the parties' willingness to abide by local law and judicial process.

14.17 Letters Rogatory May Be Issued Pursuant to a Treaty or in Absence of Treaty.

14.17[1] Letters Rogatory Issued Under Treaty Generally Are Preferable.

Various treaties among groups of nations formalize the practices of issuing, receiving, and executing letters rogatory. As issuance pursuant to a treaty provides more reliable process and results, that approach should be tried first if it is an available option.

14.17[2] Ordinary Letters Rogatory Can Be Issued If No Treaty or Convention Applies.

Letters rogatory can always be issued as a polite request to any nation, even in the absence of any specific agreement. These are referred to as "ordinary letters rogatory." Ordinary letters rogatory, issued without any treaty or other agreement, are always an available choice. However, there are no agreements as to forms, execution, enforcement, response time, and so on. Although ordinary letters are always an available choice, they ought to be the final resort when all else has failed.

14.17[3] Party May Request ESI Under Inter-American Convention on Letters Rogatory If Foreign Nation Is a Signatory.

The Inter-American Convention on Letters Rogatory ("IACLR") is a treaty among various nations in North, Central, and South America relating to the issuance, use, and recognition of letters rogatory among the signatory nations. The United States is a signatory to the convention, but has opted out of the portions of the IACLR that pertain to the taking of evidence [see IACLR, 14 ILM 339]. (However, the United States has not opted out of other judicial acts, such as service of process and recognition of judgments.)

✎ **Strategic Point—Lack of Reciprocity Does Not Necessarily Preclude Use of IACLR:** The U.S. decision to opt out of the IACLR sections for the taking of evidence casts some doubt on the ability of U.S. practitioners to use the convention to obtain ESI and other types of evidence under the treaty provisions. Ordinary letters rogatory practice requires that execution be reciprocal—"we'll execute yours if you

promise to execute ours” [see 22 CFR § 92.54 (letters rogatory defined)]. However, the IACLR does not specifically require reciprocity among signatory nations. Therefore, counsel may wish to have letters rogatory issued under the IACLR first, and move to issuance of letters outside of the Convention if rebuffed by the foreign nation in question.

The official website to the Inter-American Convention on Letters Rogatory lists the signatory countries, reservations, and for each signatory nation identifies the central authority where letters rogatory can be filed [<http://www.oas.org/juridico/english/sigs/b-46.html>].

♦ **Cross Reference:** Text of IACLR, see 14 ILM 339 (available on [lexis.com](http://www.lexis.com))

14.18 Preparation and Issuance of Letters Rogatory.

14.18[1] Letters Rogatory Must Be Issued by California Court. Like letters of request under the Hague Convention, letters rogatory must be issued from the California court with jurisdiction over the matter, to a government or judicial authority in the nation where the ESI, documents, or witness are located.

The letters rogatory must be sent from the California court to the appropriate authority of the receiving nation. Counsel cannot mail them. However, it is frequently the practice for counsel to prepare the mailing materials for the court clerk, which may help expedite processing and avoid transmission errors. Counsel should contact the clerk of the California court to determine the clerk’s usual practice and preferences.

14.18[2] Counsel Should Consult Official Forms in Drafting Letters Rogatory. Before preparing letters rogatory, counsel should check the State Department’s website, and the website of the relevant international organization, if any, to see if the receiving nation has posted or otherwise published its own form. If the request is being made under the IACLR, official forms have been adopted and must be used [see Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238].

♦ **Cross Reference:** Discussion of IACLR, see 14.17[3].

If there is no required form, the forms created by the Inter-American Convention on Letters Rogatory are a good place for counsel to start in drafting letters rogatory, even if the country in question is not a signatory to the IACLR.

♦ **Cross Reference:** Discussion of IACLR, see 14.17[3].

Forms: See 14.34–14.36.

If counsel wishes to modify those forms, or draft an entirely new form, a

letter rogatory must include at least the following items:

- **Request for International Judicial Assistance.** The letter rogatory should be addressed to “The Appropriate Judicial Authority of _____ [*name of nation*].” It should next state that this is a request for international judicial assistance and is being made in the interests of justice.
- **Statement Regarding Reciprocity and Costs.** Letters rogatory should include a statement from the requesting court expressing a willingness to provide similar assistance to judicial authorities of the receiving nation [*see* 22 CFR § 92.54 (letters rogatory defined)]. They should identify the person who will pay any necessary fees and costs associated with the judicial acts requested, and how the receiving judicial authority can contact that person.
- **Case Description.** Letters rogatory should include a brief description of the case, including that it is a civil matter (not criminal or administrative), identification of the parties, the nature of the claim, and relief being sought. The purpose is to enable the foreign court to understand the issues involved and the case basics.
- **Assistance Solicited.** The letter should state what kind of judicial assistance is being requested; for example, service of notices or other process; production of ESI; and/or other assistance.
- **Identity of Person Who Has Evidence Being Requested.** Letters rogatory should provide as much information as possible regarding the custodian of the evidence being requested. This should include the name, address, and any other identifiers, such as corporate title, of the person who is to be served, or who has the ESI or other evidence. Note that it is very important to provide a current address. If there is no address, the court will not know where to serve its domestic papers requesting/demanding that the witness or custodian appear and produce evidence. If adequate information is not provided, counsel is most likely to get either a response that states that the witness or custodian could not be found, or that service attempts were not successful.

✎ **Strategic Point:** It is preferable to contact the ESI custodian well before issuance to negotiate compliance with a letter rogatory. Local custodians appreciate hearing about a letter rogatory first before it simply arrives from the local judicial authority. In addition, the local ESI custodian knows that the local authority will not compel compliance. If the custodian is annoyed by the request or finds it burdensome, the letter rogatory will languish. Thus, counsel should ask the custodian what would assist him or her in sending the ESI requested. As part of the discussion with the custodian, it can be settled where to address the letter rogatory so that it is expected. If this is not

possible, and the ESI custodian has a legal department, the letter rogatory should be addressed there.

14.18[3] Counsel Should Use Appropriate Language.

14.18[3][a] Letter Should Be Drafted in Language of the Receiving Nation.

An ordinary letter rogatory, one issued not pursuant to a convention or other treaty agreement, is not a strong request. It is asking nicely of someone who is under no obligation whatsoever to provide the assistance requested. The foreign authority is not even obliged to provide information on how the request is or is not proceeding. In such a case, it is always best to send the letter rogatory in the official language of the nation where it is being presented. It is friendlier, and practically speaking, a letter that requires no translation is more likely to receive prompt and courteous attention. Letters rogatory issued under the IACLR *must* be translated into the language of the receiving nation [IACLR Art 3(b)].

✂ **Strategic Point:** If counsel wishes to be able to use the letters in a California court proceeding, it is advisable to have them translated by a certified translator.

14.18[3][b] Letter Should Use Non-Technical Language and No Idioms.

Words should be chosen carefully. A letter rogatory should be written in simple and non-technical language and avoid using U.S. idioms that will not translate well.

14.18[3][c] Letter Should Request Production, Not “Discovery.” Because most civil law nations will not honor requests for U.S.-style pre-trial discovery, letters rogatory should avoid using the term “discovery” to describe what is being requested. Rather, the letter should request production of computer-based evidentiary materials, or some similar phrase indicating that the request is in compliance with the cultural and judicial norms of the receiving country.

♦ **Cross Reference:** Restrictions on common-law style discovery in civil law countries, see 14.06[5].

14.18[4] Requests for ESI or Documentary Evidence Should Be As Specific As Possible. As with letters of request under the Hague Convention, letters rogatory are at their weakest when asking for documents that counsel are not sure the receiving person actually has. Conversely, they are at their strongest when listing specific documents, or categories of documents, which a person (or foreign judicial authority) might reasonably understand that the target person has or is very likely to have.

⚠ **Warning:** Counsel should not ask for “any and all” documents. A specific list of individual documents should be provided if available.

14.18[5] Counsel Should Request Specific Procedures If Needed. If particu-

lar procedures are required for the evidence to be used in California, they should be requested. In the case ESI, particular procedures are needed so that the evidence will be usable in a California court. For example, it is advisable to request a forensically sound collection method by a specialized technician having certain types of certifications or qualifications (EnCe, CCE, CISSP, etc.). The technician should be instructed to provide chain-of-custody type documentation so that the evidence can be entered into evidence [see *Lorraine v. Markel* (D Md 2007) 241 FRD 534]. Counsel should consider locating local technicians or companies that can provide the services, and offering them for use at the parties' expense. If the particular matter has other requirements as to format or otherwise, they should be specified in the letter.

⚠ Warning: If the requirements are too onerous, the local authority can ignore them, or even ignore the letter rogatory completely. The requirements should be simple and easy to understand and comply with. Counsel may need to make do with less than the usual items obtained by U.S.-based technicians. Such a procedure should be discussed with opposing counsel and the court prior to spending time and money on such an ESI production. It is best to have a stipulation that the ESI obtained under the letter rogatory will be deemed admissible.

14.18[6] Counsel Should Prepare a Motion and Order for California Court to Issue Letters Rogatory. Counsel should also prepare a motion and order requesting the California court to issue the letters rogatory. The motion, proposed order, letters, and supporting documentation should be filed in the California court.

Judge's Perspective: Letters rogatory are a "respectful request for assistance," not an "order of court." In preparing such pleadings counsel should always keep in mind the issuing court has no authority to require any act of a foreign jurisdiction, and should avoid any language that would indicate otherwise.

14.18[7] Appropriate Documents Should Accompany Letters. For requests under the IACLR [see 14.17[3]], the following specific documents must accompany the letters rogatory [see Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238]:

- A copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation into the language of the state of destination.
- An untranslated copy of any documents attached to the complaint or pleading.
- An untranslated copy of any rulings ordering issuance of the letter

rogatory (such as a California court order).

- A form, in the officially specified format, containing essential information for the person to be served or the authority to receive the documents.

▶ **Cross Reference:** Form, see 14.35.

(Text continued on page 14-43)

- A certificate, in the officially specified form, on which the Central Authority of the country of destination will attest to execution or nonexecution of the letter rogatory.
- ◆ **Cross Reference:** Form, see 14.36.
- Under the IACLR, copies will be regarded as authenticated for the purposes of the Convention if they bear the seal of the judicial or administrative authority that issued the letter rogatory [see Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238].

For ordinary letters rogatory, counsel should consult the website of the foreign nation to determine what documents must accompany the letters. If no specific requirements apply, counsel should consider attaching the documents listed above.

14.19 Court Will Forward Letters Rogatory to Foreign Nation.

14.19[1] Letters Rogatory Are Forwarded by Court. The court will forward the letters rogatory to the foreign nation. The letters rogatory must be sent from the California court to the appropriate authority of the receiving nation. Counsel cannot mail them. However, it is frequently the practice for counsel to prepare the mailing materials for the court clerk, which may help expedite processing and avoid transmission errors. Counsel should contact the clerk of the California court to determine the clerk's usual practice and preferences.

Consider: Any response or correspondence from the other country's courts will be sent to the California court or court clerk, not to counsel.

For letters rogatory submitted under the IACLR, counsel must send two copies to the foreign receiving authority. One is retained by the local authority (often the receiving authority), and one will be served on the actual ESI custodian [see Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238].

14.19[2] Letters Rogatory Issued Through IACLR May Be Presented Through U.S. State Department or Directly to Executing Nation. Letters rogatory issued under the IACLR may be sent through the U.S. State Department, or presented directly to the appointed central authority of the nation with jurisdiction over the person, ESI, or documents [IACLR Art. 4; 28 USC § 1781(a) (U.S. State Department authorized to receive and forward letters rogatory), (b) (U.S. courts can present letters rogatory directly to foreign nation or court)].

For ordinary letters rogatory, counsel may contact the State Department to see if they are willing to take the letters, or can help counsel decide

where to send them. The degree of assistance available may depend on the current relationship with the nation in question.

✖ **Strategic Point:** Although it may seem like adding a step, there are advantages to presenting documents through the State Department. Documents presented under the IACLR must be legalized—presented with the court seal [IACLR, Art. 5(a); *see* 14.18[7]]. However, if they are presented through the State Department, the receiving nation will assume that they are properly legalized [IACLR, Art. 6].

14.19[3] Law and Procedures of Executing Nation Will Be Applied. The letters rogatory will be executed in accordance with the law and usual procedures of the receiving nation [IACLR, Art. 10].

14.19[4] Letters Rogatory Will Not Be Executed If Contrary to Public Policy. Signatory nations are authorized to refuse to execute letters rogatory offered under the Convention that are contrary to its public policy [IATLR, Art. 17]. Most civil law states consider that broad-based pre-trial discovery is contrary to their public policy [*see* 14.11[4]].

♦ **Cross Reference:** Limiting scope of discovery in civil law states, *see* 14.12[3][b], 14.18[3][c],[4]; *see also* 14.06[5], 14.11[1].

14.19[5] Production of ESI Under Letters Rogatory. Once a letter rogatory has been issued to the appropriate foreign receiving authority, the process of receiving a response and overcoming any objections is much the same as that for a Hague Convention letter of request [*see* 14.13].

The important difference between Hague Convention letters of request and letters rogatory is *enforcement*: The Hague Convention ensures that local authorities will use whatever methods they would use to compel a response to a similar local request. Government authorities receiving and processing letters rogatory make no such promise. In fact, the Inter-American Convention on Letters Rogatory states specifically that compulsion will not be used regarding a letter rogatory [14 ILM 339, Art. 3]. This means that if the recipient refuses to comply with the letter rogatory, the court will not sanction them or otherwise coerce compliance.

V. DEALING WITH FOREIGN BARRIERS TO PRE-TRIAL DISCOVERY

14.20 CHECKLIST: Dealing With Foreign Barriers to Pre-Trial Discovery.

- ☐ Is desired ESI physically located in nation that belongs to European Union?

Authority: European Union Directive on Privacy 95 46 EC

Discussion: See 14.23

- ☐ Was desired ESI originally controlled by a corporation residing in an EU member nation, and then moved for processing or storage to a place outside the EU?

Authority: European Union Directive on Privacy 95 46 EC

Discussion: See 14.23

- ☐ Does proponent of discovery seek production of information that can identify individuals?

Authority: European Union Directive on Privacy 95 46 EC

Discussion: See 14.23[4]

- ☐ Is desired ESI, document, or witness physically located in a civil law nation?

Authority: CCP §§ 2026.010, 2027.010

- ☐ Has nation where ESI is physically located passed laws that specifically block compliance with U.S. legal production obligations?

Authority: See, e.g., Ontario Business Records Protection Act. R.S.O. 1990, c. B.19, s. 1; French Law No. 80-538, Art. 1

Discussion: See 14.24

- ☐ If nation where ESI is physically located has blocking statutes, does counsel have access to local counsel or other local resources in that nation who can negotiate with local ministries regarding desired productions?

Authority: See, e.g., Ontario Business Records Protection Act. R.S.O. 1990, c. B.19, s. 1; French Law No. 80-538, Art. 1

Discussion: See 14.16[2]

14.21 Objective and Strategy. Counsel seeking production of ESI located in another country frequently encounter legal and cultural barriers that exist in foreign nations to block compliance with pre-trial discovery in U.S. litigation matters, including e-discovery. Even if counsel asks for the information correctly, and the producing party acknowledges a duty imposed by California law to produce the e-discovery items, the party seeking discovery still may not

be able to obtain production. There are often legal barriers in the foreign nation where the ESI resides that block or impede the producing party's ability to move data from that nation to California. Two major categories of laws in this area are:

- The European Data Privacy Directive [see 14.23].
- Blocking statutes in civil law nations [see 14.24].

This chapter does not provide a comprehensive discussion of the overall legal framework set out in these statutes, which can have considerable applications outside of ESI production for California litigation. This chapter discusses only aspects that impact California e-discovery participants.

✘ **Strategic Point—Keep a Low Profile in Foreign Country:** The first basic strategy in these areas is to *fly low on the legal radar screen*. Be as locally invisible in the foreign nation as possible. If a matter has high visibility (such as being reported in the newspapers or broadcast media), the local nation is more likely to intervene to prevent or hinder productions or to make judgment calls that bar discovery. Visibility usually brings high scrutiny as such a case becomes a public example.

Example: In a matter that had recently settled as of the date this chapter was written, the United States Government demanded that a Swiss financial institution produce names associated with Swiss bank accounts. The Swiss government absolutely forbade the institution from complying, and threatened to seize the information to prevent the institution from breaching the Swiss banking privacy laws [see *U.S. v. UBS AG* (SD FI 2009) No. 09-20423, 2009 US Dist. LEXIS 66739 (court's order denying UBS motion to compel the government to disclose which accounts it has identified through other means; can be used as a starting point for tracking this litigation)].

✘ **Strategic Point—Be Flexible:** The second strategy is to be flexible. Keep in mind that discovery concerning foreign nationals will always be a diplomatic dance between their national interests and those of our country and state. It will not be all or nothing. It is unlikely to be all our way or all theirs. This is an area that rewards comity among counsel as well as comity among nations. What can be worked out with opposing counsel? Ultimately, counsel should take what can be obtained without argument, and then fight about the rest.

✘ **Strategic Point—Consider Informal Channels First:** Finally, counsel should find out what can be obtained informally without breaching foreign legal requirements. With an open mind and creative negotiating, counsel can often get access to some of the things that he or she would like to see, when formal discovery would attract too much notice. It may not be the channel counsel is used to, but it can ease international tensions. As with all informal negotiations, the opposing counsel's willingness to participate

matters. If opposing counsel is not as amenable to these discussions as counsel would like, counsel can bring them in front of a California discovery referee or judge who can encourage them to take a better attitude. As a local participant in a California state court matter, local counsel has an edge. The foreign participant can easily end up as the subject of a California court discovery order that demands production, while simultaneously dealing with an irate foreign ministry at home that demands non-production. Both authorities can threaten large fines or even jail time. The opposing party does not want to be in this position, and the proponent of discovery does not want to be without the discovery needed to prove the case. Both parties should have an incentive to negotiate.

14.22 Different Types of Foreign Laws Can Block Flow of E-Discovery Materials to United States.

14.22[1] Foreign Laws Governing Citizens' Rights and Privileges Can Conflict With California Discovery Statutes. It is common for foreign nations to have their own rights and privileges, which they view as more important than a California court's need for litigation materials. Foreign laws often bar or hinder the transfer of ESI outside their borders when the transfer would infringe on important domestic rights and privileges.

Examples: The European Union Data Privacy Directive and the Swiss banking privacy laws are prime examples of this category of legal barrier.

14.22[2] Foreign "Blocking Statutes" Can Expressly Target Discovery of Citizens. As a second and distinct category, many nations view U.S. discovery practices as harassment of their citizens, as well as an infringement on domestic government authority. Many nations have passed laws that protect their citizens from the burden of responding to this kind of intrusion. These types of laws are known as "blocking statutes."

▶ **Cross Reference:** Blocking statutes, see 14.24.

14.22[3] Judicial Respect Accorded to Foreign Laws Varies According to Nature and Purpose of Statute. Laws that protect essential rights and freedoms of foreign nationals, such as the EU Data Privacy Directive, receive a significant amount of judicial respect in the United States. It is likely that counsel will not be able to simply ignore them. Discovery requests may need to be curtailed, and more limited compliance negotiated with care and flexibility.

Example—Foreign Banking Law Protects Substantial Interest: In *Minpeco, S.A. v. Conticommodity Servs., Inc.* (SDNY 1987) 116 FRD 517, 527–528, the court held that the Swiss Bank Secrecy Law protected a substantial interest in bank client account information.

Blocking statutes, in contrast, have no real purpose other than to thwart litigation demands, and need not be afforded the same respect as laws

that protect significant foreign rights and interests [Restatement (Third) of The Foreign Relations Law § 442 (1987) (“adjudication should take place on the basis of the best information available [and] . . . statutes that frustrate this goal need not be given the same deference by courts of the United States as differences in substantive rules of law”)].

14.23 The EU Data Privacy Directive and Member Enforcement Laws.

14.23[1] Right to Privacy Is Recognized by European Union. The right to privacy is acknowledged in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the laws of the individual member nations, and is implemented by the EU Data Privacy Directive. The official name of this directive is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data. It is referred to in this chapter as the EU Data Privacy Directive. The legal citation is EU Directive 95 46 EC.

The purpose of the EU Data Privacy Directive is to remove obstacles to the flow of personal data, often required for use commerce, while still protecting the privacy of the individuals whose data is involved. The directive accomplishes this by creating a standard set of protections for personal data that must be offered in each EU member nation. Thus, wherever it goes in the EU, personal information is protected [EU Directive 95 46 EC, 1995 OJ L 281, Preamble, sections (8), (9)]. The directive is intended to implement the conclusions of the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data [EU Directive 95 46 EC, 1995 OJ L 281, Preamble, section (11)].

♦ **Cross Reference:** Full text of EU Data Privacy Directive on lexis.com, see 1995 OJ L 281.

14.23[2] EU Data Privacy Directive Binds All EU Member States. The European Union’s legislative body issues directives, which are then to be implemented through domestic legislation by each EU member nation. Domestic legislation implementing a directive is usually referred to as a “member enforcement law.” EU member states are required to protect the personal data of EU citizens in accordance with the provisions of the EU Data Privacy Directive [EU Directive 95 46 EC, 1995 OJ L 281, Art. 1].

⚠ **Warning:** The EU directives are binding upon the member nations whether they create member enforcement laws or not. Member enforcement laws merely set out the local methods the member nation will use to comply with the EU directive.

As of mid-2009, the member states of the European Union are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania,

Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. For a current list, see the official EU website: http://europa.eu/abc/european_countries/index_en.htm.

14.23[3] Directive Applies to Any Entity Subject to EU Community Law. The Directive applies to any entity subject to EU community law, whether the entity is physically located inside the EU or not [EU Directive 95 46 EC, 1995 OJ L 281, Art. 4].

Exceptions: The use of personal data by natural persons for purely personal or household purposes (such as correspondence) is excluded [EU Directive 95 46 EC, 1995 OJ L 281, Art. 3]. Various government uses are also excluded [EU Directive 95 46 EC, 1995 OJ L 281, Art. 3 (criminal and state security matters)].

14.23[4] Directive Presents Significant Obstacle for Litigation in U.S. Courts. The EU Data Protection Directive presents a tremendous challenge in U.S. litigation matters when the production includes information that can uniquely identify individual persons:

- First, the EU standards for what is considered private personal information are very different from anything applied by even stringent U.S. venues such as California. The considerations are very foreign to our legal ways of thinking, and most of the EU concerns would not present a barrier to U.S. legal productions.
- In addition, this directive is a legal requirement on the entity in possession of the data. Compliance is not negotiable and cannot be eased by something as simple as a confidentiality agreement or stipulation. If the information is personal data under EU definitions, the hosting entity's ability to move or process the information is severely limited. Obtaining discovery of EU personal data requires planning, cultural sensitivity, cooperation, and perseverance.

14.23[5] Directive Regulates Activities of “Controllers” of Regulated Personal Data. The EU Data Privacy Directive seeks to regulate the activities of “controllers,” the persons or entities that decide what the data is to be used for, and who control the “processing” of the data [EU Directive 95 46 EC, 1995 OJ L 281, Art. 2(d)]. For the purposes of this practice guide, a party attempting to produce personal data in its custody or control comes within the definition of a “controller” of the information. The EU Privacy Directive Controllers regulates what “processing” they can perform on personal data in their possession or control, and where they can move it.

14.23[6] Directive Regulates Processing or Movement of “Personal Data.” The EU Data Privacy Directive applies to [EU Directive 95 46 EC, 1995 OJ L 281, Arts. 1 and 2]:

- “processing”
- or cross border movement
- of “personal data”
- stored in an automated structured filing system that permits easy access to personal data.
- by any entity subject to EU community law.

“Personal data” is any information about any “identified or identifiable natural person” [EU Directive 95 46 EC, 1995 OJ L 281, Art. 2(a)]. A natural person is “identified or identifiable” if that person can be uniquely identified, directly or indirectly, by reference to the stored information. Such persons are referred to in the Directive as “data subjects.” Examples are identification numbers, or combinations of stored factors regarding a natural person’s physical, physiological, mental, economic, cultural, or social identity [EU Directive 95 46 EC, 1995 OJ L 281, Art. 2(a)]. The identification factors require that practitioners consider the data set as a whole. What is actually in the data set? Just because the information pertains to natural persons does not mean that it would permit the unique identification of any of the individuals. Conversely, even if individual entries do not identify a unique individual, if the dataset is considered as a whole, it might do so. The more data points there are in the target dataset, and the more particular the data points are, the more likely it is that a unique person can be identified.

Examples—Unique Identification Examples.

- The facts that someone is a Sudanese citizen and is living in France might not be enough to identify a unique individual. However, if the database also holds information on body scars and childhood medical background, the dataset, taken as a whole, probably could identify a unique individual.
- It might not be enough to know that the data pertains to a citizen of the Czech Republic who likes jazz music, but what if it also shows that his or her mother taught at the University of Lancaster?

⚡ Strategic Points:

- Production of a complete database or other structured dataset is not required in all cases. Counsel should assess what information is actually needed. If the necessary materials contain an identification number, such as a passport number or a social security number equivalent, or a credit card number or bank account number, then it will still identify a unique individual. But it is possible that the information counsel actually needs would not implicate the Data Privacy Directive. If counsel can make do with a subset, would the subset, looked

at as a whole, uniquely identify natural persons? It is worth considering and negotiating with opposing counsel.

- A good way to find out about the information source and what counsel actually need from it is to take the deposition of a person knowledgeable about what it contains. A deposition should not itself implicate the data directive, although counsel may need to comply with Hague Convention or letters rogatory regarding the taking of evidence from witnesses who are located abroad. Counsel should ask for description manuals and a data dictionary (description of the information that ought to be in the specific fields of the database) and question the person most knowledgeable about the data.

♦ **Cross Reference:** For further discussion on taking a deposition in a foreign nation, see Matthew Bender® Practice Guide: California Civil Discovery, Ch. 7, Taking Oral Depositions Outside of California, 7.10–7.16.

14.23[7] Directive Regulates Personal Data Collections and Forbids Later Processing for Different Purposes. Personal data may only be gathered for a specified legitimate purpose [EU Directive 95 46 EC, 1995 OJ L 281, Art. 6]. Once in the possession of a “controller,” it cannot be processed again later for some purpose that is incompatible with the originally specified purpose [EU Directive 95 46 EC, 1995 OJ L 281, Art. 6]. Later processing is permitted only if it meets one of the specific exemptions set out in the directive [EU Directive 95 46 EC, 1995 OJ L 281, Arts. 6–8].

14.23[8] Litigation Production Preparation Steps Are “Processing” Within Meaning of Directive. “Processing” refers to almost any action that can be performed on ESI, including collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure, or destruction [EU Directive 95 46 EC, 1995 OJ L 281, Art. 2(b)]. Every step a producing party would need to take in order to prepare an ESI production in California litigation meets the definition of “processing.” Typically, the responding party would need to search, identify, retrieve, collect, manipulate, and produce the target ESI in a reasonable litigation format. Privilege review would require “consultation” of the data. Each of those steps is described in the Directive’s definition of “processing” [EU Directive 95 46 EC, 1995 OJ L 281, Art. 2(b)].

Therefore, if the target ESI contains personal data, the Directive bars *the entire process of responding to discovery requests*, unless this process can be fitted into one of the permissible exemptions.

14.23[9] Exemptions May Apply to Permit Litigation Processing in Some Situations.

14.23[9][a] Data Subjects Can Consent to Later Processing. A data subject can consent to later processing of personal data for different purposes. The consent must be specific and unambiguous [EU Directive 95 46 EC, 1995 OJ L 281, Art. 6(a)]. Compliance with this section usually would require special notice to each data subject, and subsequent consent [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, pp. 8–9].

14.23[9][b] Later Processing Permitted to Comply With Legal Obligations. Later processing may be permitted if necessary to comply with a legal obligation to which the controller is subject [EU Directive 95 46 EC, 1995 OJ L 281, Art. 6(c)].

Although this exemption looks promising, the EU's Article 29 Data Protection Working Party has opined that this section would not apply if the legal obligation were only a foreign statute or regulation. However, it further states that this section might apply if the domestic laws of the controller's nation required compliance with foreign orders [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, p. 9]. The Working Document also states that this obligation could exist even if the nation had filed an exemption from pre-trial discovery under the Hague Convention Article 23, as long as the controller was required to make a pre-trial disclosure [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, p. 9].

The author has been unable to locate case law that interprets or applies this section.

14.23[9][c] Processing May Be Permitted If Necessary for Controller's Legitimate Interests. Processing for the pursuit of the legitimate interests of the controller is permitted, unless such interests are overridden by the rights set out in Article 1 of the EU Data Privacy Directive [EU Directive 95 46 EC, 1995 OJ L 281, Art. 6(f)]. This section has been construed to authorize limited litigation production. Litigation can be a legitimate interest of the controller [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, pp. 9–10].

The exemption sets out a balancing test, permitting an examination of the litigation need for the information versus the depth of the infringement and the importance of the right being infringed. This "balance of interest test" should consider the relevance of the personal data to the litigation and the consequences for the data subject of exposure [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, p. 10].

Consider: The controller should consider whether there are ways to produce only information that is directly relevant. Perhaps certain pieces of sensitive data can be redacted, or replaced with a pseudonym [EU Article 29 Data Protection Working Party, EU Working Document 1/2009 on pre-trial discovery for cross border civil litigation, p. 11].

14.23[9][d] Processing May Be Permitted If Necessary for Defense of Legal Claims Within EU. The EU Data Privacy Directive specifically authorizes the processing of personal data when the publication is “necessary for the establishment, exercise or defense of legal claims” [EU Directive 95 46 EC, 1995 OJ L 281, Art. 8, § 2(e)]. However, this section applies only to the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life [EU Directive 95 46 EC, 1995 OJ L 281, Art. 8, § 1]. It is generally construed to apply only to EU court or regulatory matters. For example, it is not addressed at all in the Article 29 Working Group’s Working Document 1/2009 on pre-trial discovery for cross-border civil litigation.

14.23[10] Directive Also Regulates Cross-Border Movement of Personal Data.

14.23[10][a] Directive Imposes Limitations on Movement of Information. In addition to “processing,” the EU Data Privacy Directive regulates where the information can be moved; that is, whether or not it can be moved to California after processing [EU Directive 95 46 EC, 1995 OJ L 281, Arts. 25, 26 (transfer of personal data to third countries)]. If counsel is able to overcome the “processing” hurdles, the restrictions on movement of personal data still must be overcome.

14.23[10][b] Data May Be Transferred If “Adequate Level of Protection” Exists. A controller may transfer personal data freely to a third country (that is, a non-EU member state), if the third country ensures “an adequate level of protection” [EU Directive 95 46 EC, 1995 OJ L 281, Art. 25, subsection 1]. Essentially, to be an approved destination, the third country must provide much the same data protections as are imposed on EU nations by the Directive. As of mid-2009, the EU has formally designated only Argentina, Canada, Guernsey, Isle of Man, and Switzerland as approved third countries for movement of personal data.

14.23[10][c] United States Is Not an Approved Destination for Personal Data, but Individuals Can Apply for Approval Under Safe Harbor in Directive. The United States does not qualify as an approved destination, because U.S. laws do not provide the desired level of protection for personal data. However, *individuals* within the United States can apply for approval as a destination under Safe Harbor provisions

authorized by the EU [*see* 2000/520/EC, Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the U.S. Department of Commerce], and implemented in the United States by the U.S. Department of Commerce. Essentially, the company must implement data security protocols equal to those used in the EU and register with the U.S. Department of Commerce.

The criteria required to claim the safe harbor certification are published by the Department of Commerce [*see* http://www.export.gov/safeharbor/eu/eg_main_018365.asp]. The Department of Commerce also maintains a list of those entities that have certified themselves as compliant with the safe harbor provisions, and are therefore presumably approved destinations for receipt of EU personal data [*see* <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>].

⚡ Strategic Point—Negotiate Production to Safe Harbor Company in United States: If counsel can successfully negotiate a data production that meets the Directive's processing exemptions [*see* 14.23[9][b], [c], [d]], counsel then can request production to a safe harbor company located in the United States, which can host the ESI for litigation use. This would constitute approved processing and movement to an approved destination [*see* 2000/520/EC, Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the US Department of Commerce].

14.23[11] Data Subjects Have Personal Right to Sue for Infringement. The EU Data Privacy directive gives each data subject a personal right to sue the controller for failure to protect their rights as required by the Directive [EU Directive 95 46 EC, 1995 OJ L 281, Arts 22—24].

Consider: One of the problems in negotiating productions of personal data is that foreign government or ministry blessing may not be sufficient to shield a controller from adverse effects.

14.24 Blocking Statutes May Pose Barrier to ESI Production.

14.24[1] Blocking Statutes Specifically Address Foreign Litigation. A “blocking statute” is a foreign law enacted “for the express purpose of frustrating the jurisdiction of the United States courts” [*see* *In re Uranium Antitrust Litigation* (ND Ill 1979) 480 F Supp 1138, 1143].

Examples:

- The Ontario Business Records Protection Act [RSO 1990, c.

B.19, s. 1] generally forbids the movement of business records from Ontario to any place outside of Ontario unless that movement is part of the regular business of the company. Litigation in the United States is not construed as being part of the regular business of a company. The act authorizes the Attorney General to take steps to ensure compliance. If the Attorney General or any other interested person has reason to believe that a regulated business is, or is about to become, the subject to an order, direction, or summons that might require it to breach this provision, the business can be ordered to furnish an undertaking to ensure compliance with the Act.

- French Law No. 80-538 forbids requesting or furnishing “documents or information of an economic, commercial, industrial, financial, or technical nature directed toward establishing evidence in view of legal or administrative proceedings abroad or in relation thereto” [French Law No. 80-538, Art. 1]. Breach is punishable by imprisonment for up to six months, and/or fines.

14.24[2] Blocking Statutes Are Not Always Enforced by Foreign Nation.

More than one federal court has noted that blocking statutes are often a paper tiger—threat and no enforcement [*see Adidas Ltd. v. SS Seatrain Bennington* (SDNY 1984) 1984 US Dist. LEXIS 16300 (“[t]he legislative history of the [French blocking] statute gives strong indications that it was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts”)]. The sole reported case enforcing the French blocking statute that was found at the time this chapter was written fined the counsel in question the lowest fine permissible under the statute [*see Cour de Cassation Chambre Criminelle [Cass Crim], Paris, Dec 12, 2007, Juris-Data no. 2007-332254*].

Example—Counsel Fined for Requesting Document Regulated by French Law No. 80-538: In 2007, a French mutual insurance company was a defendant in litigation brought in federal court in Los Angeles. A French lawyer working with a U.S. firm representing the California Insurance Department phoned the French firm attempting to obtain some information informally. He was charged under French Law No. 80-538, and fined 10,000 euros. The fine was upheld on appeal [*Cour de Cassation Chambre Criminelle [Cass. Crim.], Paris, Dec 12, 2007, Juris-Data no. 2007-332254*].

14.24[3] United States Courts Accord Lesser Judicial Respect to Blocking Statutes. Even if blocking statutes are enforced, they are not entitled to the same kind of judicial respect as those laws that protect substantial foreign rights and privileges [*see, e.g., Minpeco, S.A. v. Conticommodity Servs.,*

Inc. (SDNY 1987) 116 FRD 517, 527–528 (Swiss Bank Secrecy Law protected the substantial interest in the protection of bank client account information); Restatement (Third) of the Foreign Relations Law § 442 (1987) (“adjudication should take place on the basis of the best information available [and] . . . statutes that frustrate this goal need not be given the same deference by courts of the United States as differences in substantive rules of law”)].

VI. EVALUATING PRACTICAL AND TECHNICAL CONSIDERATIONS IN FOREIGN E-DISCOVERY

14.25 CHECKLIST: Evaluating Practical and Technical Considerations in Foreign E-Discovery

- ☐ Review State Department website for information on current judicial and legal resources available for country where foreign ESI is located.

Discussion: See 14.16

- ☐ Consider associating counsel located in target foreign nation.

Discussion: See 14.16[1]

- ☐ Does counsel have a relationship with a collection vendor who can handle collections in country where ESI is located?

- ☐ If so, is vendor prepared to provide a local witness who can answer court questions regarding collection?

Discussion: See 14.28[1]

- ☐ When production is obtained, what language or languages will be shown?

Discussion: See 14.29

- ☐ Will counsel's current computerized review tools do the following:

- ☐ Load and show characters from that language?
 - ☐ Search in that foreign language?

- ☐ Does counsel need to arrange for a different tool to handle ESI for this matter?

Discussion: See 14.29[4]–14.29[6]

- ☐ Will ESI review be conducted in original language, or will it need to be translated?

Discussion: See 14.29[1]

14.26 Objective and Strategy. The practical aspects of dealing with foreign ESI need to be considered by anyone involved with it—plaintiffs, defendants, experts, and even third parties producing evidence to the matter.

Example: If counsel needs to produce e-mail and databases from the Ukraine (Cyrillic alphabet), must anything special be done to collect it? What if it was created using a local Ukrainian e-mail program, and not Microsoft Exchange or Lotus Notes? Once it has been collected, how will it be reviewed? What if the Ukrainians were corresponding with sales departments in Nigeria and South Korea?

✖ **Strategic Point:** The best time to consider these issues is early in the litigation. From identification through production, dealing with foreign

language materials requires planning and use of different tools and methods than can be used for entirely English programs and materials. Early planning saves money, as work will not need to be redone and data will not need to be moved from one kind of tool to another in order to perform all of the tasks required.

14.27 Practical Considerations Must Be Considered in Any Cost-Benefit Analysis.

Obtaining discovery of ESI from foreign jurisdictions is more time consuming and difficult than obtaining ESI located in California or even elsewhere in the United States. Technical support costs also can be significantly higher for foreign ESI than domestic ESI. For example, foreign language ESI must be collected properly in a foreign nation, and tools to deal with foreign language ESI cost more

♦ **Cross Reference:** Authentication of evidence at trial, see Ch. 15, Admissibility of Electronic Evidence, 15.12–15.17.

Before conducting e-discovery in a foreign jurisdiction, counsel should ask whether the matter itself, and the desired ESI evidence in particular, are worth the time and expense of going after it. If the same or substantially similar information can be obtained anywhere within the boundaries of the United States, the answer to this question should be an emphatic “no.”

14.28 Counsel Must Decide How to Address Technical Collection Issues in Foreign E-Discovery.

14.28[1] Counsel Must Decide Whether to Hire Foreign or U.S. Vendors for ESI Collection. If counsel is representing the ESI data source, counsel will need to work with the client to arrange for data collection in accordance with U.S. standards.

A local foreign vendor has the advantages of language and often parochial preference—for example, a Japanese discovery target might prefer to have its ESI collected by a Japanese e-discovery vendor. A local vendor will be aware of local cultural sensitivities and use locally-designed software or hardware. A local vendor also can be less expensive—no travel expenses and lower local prices.

Conversely, there are distinct problems associated with using a foreign vendor. First is the question of whether or not its personnel are knowledgeable about U.S. evidence collection standards. If not, it may be difficult to get the evidence authenticated once collected.

Second, if there are questions about the collection, and the court wants to talk to someone involved in the actual collection, or the opponent wants to take a PMK deposition, it may be difficult to figure out whom to put on the stand. There may be issues with the person’s English skills and comfort level with a California court proceeding. If the person does not want to appear personally, it may be difficult to compel appearance. Even if he or she is willing to come, there is the expense of preparing a foreign witness—travel and translation expense can be significant.

⊠ Strategic Points:

- For the reasons discussed above, it is usually better to hire a U.S. collection company with offices abroad in or near the place where the data is located. Counsel can get a U.S.-based project manager, often one who can testify if necessary. If counsel needs to subpoena the vendor for some reason, the U.S. office can be subpoenaed.
- If counsel decides to work with a local foreign vendor for collections, consider sending a U.S. project manager to oversee the work. This project manager can be from counsel's own firm (if the person's credentials are appropriate) or can be hired from an outside collections vendor. This project manager must be bilingual, or counsel will need to arrange for a translator.
- A U.S.-based project manager can provide most, if not all, the testimony that might be required to address discovery process questions, and will be locally available and have good English skills. Such a person also is better able to provide assurance that the end work product conforms to U.S. evidentiary standards.

14.28[2] Collection Must Be Unicode Compliant. In order to transfer data reliably from foreign systems into a document review and analysis program, Unicode compliant collection is a necessity.

Unicode is a data encoding standard that maps the characters and symbols used in various writing systems to a common definition, so that a given character will always have the same binary representation. Prior to Unicode, different encoding standards, e.g. Latin 1 or Windows Code Page 1251, each used the same binary codes to represent different characters. What this means, in practical terms, is that without Unicode, it is not possible to reliably transfer the same foreign language characters from one system to another. The code for a character will differ from system to system.

Consider: Microsoft Outlook systems that are newer than Outlook 97 store data by default as Unicode.

14.29 Counsel Must Decide How to Address Issue of Foreign Language Document Review.

14.29[1] Review Must Be Conducted in English, Foreign Language, or a Combination of the Two. Counsel must decide how to read the documents that need to be read. The basic choices are:

- Hire foreign language speaking attorneys to conduct the review.
- Have the documents translated into English.
- Some combination of the above.

In addition, the computer tools that will be needed must be able to support the review staff selected for the task.

Example: Counsel will need different tools to conduct a review in Arabic than if the documents are translated into English first.

14.29[2] Bilingual Staffing May Make Review Much Easier. One solution to the language issue is for counsel's firm to have staff attorneys who can read and write in the target language. If the firm is located in a multicultural area, hiring bilingual review staff is also an option. This option means that most of the ESI that is collected will not need to be translated. Only those items that will actually be presented to a witness or in court will need to be translated. Original language review also provides the advantage of cultural sensitivity: many nuances of language do not translate well, and can be picked up by original language review.

⚠ Warning: Make certain that any bilingual review staff have sufficient reading and writing skills in the language in question, as opposed to just spoken language skills, to be able to analyze written materials for legal review purposes.

14.29[3] Translation Is Required If Documents Are Reviewed in English. If review will be conducted by English-speaking attorneys, the documents must be translated. Documents that will be presented in court must be translated by a court-certified translator. This is an expensive endeavor and can cost thousands of dollars per banker's box of materials.

A better strategy is to employ machine translation for the bulk of the documents, conduct a review, and then have selected documents translated by the more expensive method. Machine translation costs a few hundred dollars a box, rather than tens of thousands. If a document is "hot" or will be presented to a witness or to the court, the additional cost of a court-certified translator is then justified.

14.29[4] Search Tools Must Be Selected Carefully. Counsel must decide what tools will be used to review the ESI once it has been successfully obtained. The following questions should be considered:

- Is counsel's usual review tool capable of taking foreign language ESI data?
- Can it load Unicode ESI data?
- Will it show Cyrillic, Arabic, kanji, or other characters?
- Can it search ESI using those character sets?

⚠ Strategic Points: If counsel's usual in-house tool cannot handle the foreign language ESI, consider using an online tool hosted by a vendor. If this is counsel's only case that requires this capacity, it is not necessary to switch in-house tools. Counsel simply needs additional assets for this one matter. An online tool is "pay as you go"—counsel

can pay for it for this one case only, and the law firm does not need to acquire capacity it doesn't need for other matters. Furthermore, in such a case the costs are case specific and can be passed along to the client.

14.29[5] Cross-Lingual Search Tools Are Available. Counsel should consider whether it is worth investing in a cross-lingual search tool. A cross-lingual tool translates searches into each language used in the ESI. For example, counsel can search using English terms, and the program will return all appropriate documents, whether in English or Cyrillic, Arabic, kanji, or whatever language is designated. Searches can also be conducted in the foreign language by entering search terms in that language. A good cross-lingual tool works even in multilingual data sets; for example, one containing e-mail in Korean, Japanese, Cantonese, and English.

✎ Strategic Points:

- A cross-lingual tool is useful for ESI that either has not yet been translated, or will not be translated. It permits English-speaking attorneys to see if certain concepts or key terms are present in the data.
- A cross-lingual tool is useful for mixed language review teams. It also enables both English speakers and foreign language speakers to work with the same data. They can search in English or a foreign language.

14.29[6] Conceptual Search Tools Allow Concept-Based Searching. Conceptual searching is much more precise than simple term searching. A conceptual search tool will return records that are related to a concept, as opposed to those where a specific term or set of terms appear. Conceptual tools allow the user to enter terms or document text and then search for records in the ESI dataset that are strongly correlated to the target concept. This is useful when the concept is called different things in different cultures or legal systems. It can also be useful when different departments of a company refer to the same projects in different ways.

Example: Consider how many different interpretations of the word "bill" there are. Is counsel interested in invoices, or William, or California legislature bill AB5? A conceptual search tool can focus on the desired significance of a term and weed out the numerous false positives when the word is right but not the concept. This provides costs savings by reducing expensive review time. It also pulls in documents in which the terms did not appear, but which are indeed related to the concept. Counsel gets less "noise" and more relevant material.

VII. FORMS

14.30 Notice of Motion and Motion for Issuance of Letters Rogatory or Letter of Request.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff, John Smith

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith, Plaintiff,
vs.
Mary Jones Enterprises, Inc., Defendant.

No. _____
NOTICE OF MOTION
AND MOTION FOR
ISSUANCE OF
_____ [LETTERS
ROGATORY *or* LETTERS
OF REQUEST] TO OBTAIN
PRODUCTION OF
ELECTRONICALLY
STORED INFORMATION
LOCATED OUTSIDE OF
THE UNITED STATES
DECLARATION OF
_____ (*name*)
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To DEFENDANT MARY JONES and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [Department or Division] of this court, located at _____ [*street address*], _____ [*city*], [*identify moving party, e.g., Plaintiff John Smith*] will, and hereby does, move the court for issuance, out of and under its seal, of _____ [Letters Rogatory *or* a Letter of Request] requesting the appropriate judicial authority in _____ [*name of foreign nation*] to obtain

production of specified electronically stored information.

This motion will be made on the grounds that:

1. The electronically stored information described in the _____ [letters rogatory or letter of request] is located outside the boundaries of the United States; and
2. Within the boundaries of _____ [country], a nation _____ [for a letter of request: which is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or, for letters rogatory: where issuance of letters rogatory are necessary to obtain production of the ESI required]; and
3. That _____ [identify moving party, e.g., Plaintiff John Smith] is entitled to obtain production of this information, and
4. That it is _____ [necessary and/or convenient] that the _____ [Letters Rogatory or Letter of Request] issue.

The motion will be based on this notice of motion, on the declaration of _____ [name] filed in support thereof, and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

By: _____ [firm name]

[signature]

[typed name]
Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above]. I am over the age of 18, and if called as a witness, I could and would competently testify to facts set out in this declaration.
2. _____ [Name of moving party, e.g., Plaintiff John Smith] is seeking an order of this court for issuance of _____ [Letters Rogatory or a Letter of Request] requesting the appropriate judicial authority in _____ [name of foreign nation] to take the necessary steps to obtain production of the electronically stored information ("ESI") described in the _____ [Letters Rogatory or Letter of Request] filed with this motion.
3. The desired ESI is _____ [located/owned/controlled by] _____ [name of entity or person] located at _____ [foreign address]. _____ [Name of foreign nation,

e.g., Brazil] is _____ [*for letters of request: a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or, for letters rogatory: a nation for which letters rogatory are necessary to request judicial assistance to obtain production of ESI within its territorial boundaries*].

4. [*If there are any agreements with the ESI custodian regarding acceptance of a request made via letters rogatory or letter of request, provide particulars of those agreements here. Attach any documentation as exhibits to this declaration.*]
5. [*If the ESI custodian is a party to the litigation: This motion and issuance of _____ (the letter of request or letters rogatory) does not waive the requesting party's right to proceed under the California Code of Civil Procedure at a later date*].
6. It is _____ [*necessary and/or convenient*] that this court issue _____ [*Letters Rogatory or a Letter of Request*], in that _____ [*specify, in accordance with requirements of foreign jurisdiction*]. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*firm name*]
 _____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Set out memorandum here*]

NOTES:

Authority: Hague Convention for Evidence, Art. 1; CCP §§ 2026.010, 2027.010; 14 ILM 339; 14 ILM 1238; 23 UST 2555

Discussion: See 14.12, 14.18

Related Form for Order: See 14.31

14.31 Proposed Order for Commission, Letters Rogatory, or Letter of Request for Deposition in Foreign Nation.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith, Plaintiff,
vs.
Mary Jones Enterprises, Inc., Defendant.

No. _____

ORDER FOR ISSUANCE
OF _____ [LETTERS
ROGATORY or LETTER
OF REQUEST TO OBTAIN
PRODUCTION OF
ELECTRONICALLY
STORED INFORMATION
LOCATED OUTSIDE THE
UNITED STATES]

Date: _____

Time: _____

Location: _____

Judge: _____

Date Action Filed: _____

Trial Date: _____

Application having been made by PLAINTIFF JOHN SMITH for an order that _____ [letters rogatory *or* a letter of request] issue to request foreign judicial assistance in obtaining production of specified electronically stored information located in _____ [*name of nation*], proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that _____ [Letters Rogatory *or* Letters of Request] issue out of and under the seal of this court and directed to the judicial authorities of _____ [*name of nation*], requesting assistance in obtaining production of the specified electronically stored information.

Dated: _____

_____ [*Typed name of Judge*]
Judge of the Superior Court

NOTES:

Authority: 14 ILM 339 Art. 4

Discussion: See 14.12, 14.18.

Related Form for Motion and Notice of Motion: See 14.30

14.32 Letter of Request for Service Abroad, With Certification of Service—Hague Convention Form (U.S. Marshals Service Form USM94).

U.S. Department of Justice
United States Marshals Service



REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

DEMANDE
AUX FINS DE SIGNIFICATION OU DE NOTIFICATION À L'ÉTRANGER
D'UN ACTE JUDICIAIRE OU EXTRAJUDICIAIRE

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 novembre 1965.

Identity and address of the applicant
Identité et adresse du requérant

Address of receiving authority
Adresse de l'autorité destinataire

The undersigned applicant has the honour to transmit – in duplicate – the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e., (identity and address)

Le requérant soussigné a l'honneur de faire parvenir – en double exemplaire – à l'autorité destinataire les documents ci-dessous énumérés, en la priant, conformément à l'article 5 de la Convention précitée, d'en faire remettre sans retard un exemplaire au destinataire, à savoir:
(identité et adresse)

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention.*
a) selon les formes légales (article 5 alinéa premier, lettre a).

☐ (b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5)*:
b) selon la forme particulière suivante (article 5, alinéa premier, lettre b) :

☐ (c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)*:
c) le cas échéant, par remise simple (article 5, alinéa 2).

The authority is requested to return or to have returned to the applicant a copy of the documents and of the annexes with a certificate as provided on the reverse side.

Cette autorité est priée de renvoyer ou de faire renvoyer au requérant un exemplaire de l'acte - et de ses annexes - avec l'attestation figurant au verso.

List of documents
Énumération des pièces

Done at _____, the _____
Fait à _____, le _____

Signature and/or stamp
Signature et/ou cachet

*Delete if inappropriate
Rayer les mentions inutiles.

Form USM-94
Est. 11/77

(Formerly OBD-116, which was formerly LAA-116, both of which may still be used)

CERTIFICATE
ATTESTATION

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,
L'autorité soussignée a l'honneur d'attester conformément à l'article 6 de ladite Convention,

1) that the document has been served *

1) que la demande a été exécutée

-- the (date) -- *le (date)*

-- at (place, street, number) - *à (localité, rue, numéro)*

-- in one of the following methods authorized by article 5:

-- dans une des formes suivantes prévues à l'article 5:

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention*.
a) selon les formes légales (article 5, alinéa premier, lettre a)

☐ (b) in accordance with the following particular method:

b) selon la forme particulière suivante:

☐ (c) by delivery to the addressee, who accepted it voluntarily.*

c) par remise simple.

The documents referred to in the request have been delivered to:

Les documents mentionnés dans la demande ont été remis à:

- *(identity and description of person)*

- *(Identité et qualité de la personne)*

- relationship to the addressee family, business or other

- *liens de parenté de subordination ou autres avec le destinataire de l'acte:*

2) that the document has not been served, by reason of the following facts*:

2) que la demande n'a pas été exécutée, en raison des faits suivants:

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*

Conformément à l'article 12, alinéa 2, de ladite Convention, le requérant est prié de payer ou de rembourser les frais dont le détail figure au mémoire ci-joint.

ANNEXES

Annexes

Documents returned:

Pièces renvoyées

In appropriate cases, documents establishing the service:

Le cas échéant, les documents justificatifs de l'exécution:

Done at _____, the _____
Fait à _____, le _____

Signature and/or stamp

Signature et/ou cachet

SUMMARY OF THE DOCUMENT TO BE SERVED
ÉLÉMENTS ESSENTIELS DE L'ACTE

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 novembre 1965.

(article 5, fourth paragraph)
(article 5, alinéa quatre)

Name and address of the requesting authority:
Nom et adresse de l'autorité requérante:

Particulars of the parties:
Identité des parties:

JUDICIAL DOCUMENT
ACTE JUDICIAIRE

Nature and purpose of the document:
Nature et objet de l'acte:

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:
Nature et objet de l'instance, le cas échéant, le montant du litige:

Date and place for entering appearance:
Date et lieu de la comparution:

Court which has given judgment:**
Jurisdiction qui a rendu la décision:

Date of judgment:**
Date de la décision:

Time limits stated in the document:**
Indication des délais figurant dans l'acte:

EXTRAJUDICIAL DOCUMENT
ACTE EXTRAJUDICIAIRE

Nature and purpose of the document:
Nature et objet de l'acte:

Time limits stated in the document:**
Indication des délais figurant dans l'acte:

NOTES:

Source of Form: U.S. Department of Justice, U.S. Marshals Service, Form USM-94, <http://www.usmarshals.gov/forms/usm94.pdf>

Authority: Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Use of Form: Use of this official form is not required, but is recommended to assure that the form complies with Hague Convention requirements

Discussion: See 14.10–14.13

14.33 Model for Letters of Request Recommended for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Request for International Judicial Assistance pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of English, French or another language.

In order to avoid confusion, please spell out the name of the month in each date.

Please fill out an original and one copy of this form (use additional space if required).

1. Sender _____
(identity and address)
2. Central Authority of the Requested State _____
(identity and address)
3. Person to whom the executed request is to be returned _____
(identity and address)
4. Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request
Date _____
Reason for urgency* _____
* Omit if not applicable.

IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOUR TO SUBMIT THE FOLLOWING REQUEST:

5. *a* Requesting judicial authority (article 3,a) _____
(identity and address)
- b* To the competent authority of (article 3,a) _____
(the requested State)
- c* Name of the case and any identifying number _____
6. Names and addresses of the parties and their representatives (including representatives in the requested State*) (article 3,b)
 - a* Plaintiff _____
Representatives _____
 - b* Defendant _____
Representatives _____
 - c* Other parties _____
Representatives _____
7. *a* Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (article 3,c) _____

- b* Summary of complaint _____
- c* Summary of defence and counter-claim* _____
- d* Other necessary information or documents* _____
- * Omit if not applicable.
8. *a* Evidence to be obtained or other judicial act to be performed (article 3,*d*) _____
- b* Purpose of the evidence or judicial act sought _____
9. Identity and address of any person to be examined (article 3,*e*)* _____
10. Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined (article 3,*f*)* _____
(or see attached list)
11. Documents or other property to be inspected (article 3,*g*)* _____
12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3,*h*)* _____
(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be requested, specify whether it is to be law for the formal taking of evidence.)
13. Special methods or procedure to be followed (e.g. oral or in writing, verbatim, transcript or summary, cross-examination, etc.) (articles 3,*i* and 9)* _____
(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law)
14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)* _____
15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (article 8)* _____
16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, *b*)* _____
(attach copies of relevant laws or regulations)
* Omit if not applicable.
17. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by* _____
(identity and address)
* Omit if not applicable.

DATE OF REQUEST	_____
SIGNATURE AND SEAL OF THE REQUESTING AUTHORITY	_____

NOTES:

Use of Form: This form is an official form; the format and wording were created and approved under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The wording and format should not be altered.

Authority: Hague Convention for Evidence, Art. 1

Discussion: See 14.12

Related Form for Motion and Notice of Motion: See 14.30

14.34 Letters Rogatory—Form A Under Additional Protocol to the Inter-American Commission on Letters Rogatory.

Letter Rogatory¹

1	2
REQUESTING JUDICIAL OR ADMINISTRATIVE AUTHORITY Name: Address	CASE: DOCKET No.:
3	4
CENTRAL AUTHORITY OF THE STATE OF ORIGIN Name: Address	CENTRAL AUTHORITY OF THE STATE OF DESTINATION Name: Address
5	6
REQUESTING PARTY Name: Address	COUNSEL TO THE REQUESTING PARTY Name: Address
Name: Address	
Is this person responsible for costs and expenses? <input type="checkbox"/> YES <input type="checkbox"/> NO * If not, <input type="checkbox"/> check in the amount of _____ is attached. <input type="checkbox"/> Proof of payment is attached.	

* Delete if inapplicable

The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

* A. Requests their prompt service on:

The undersigned authority requests that service be carried out in the following manner:

* (1) In accordance with the special procedure or additional formalities that are

¹ Complete the original and two copies of this form. If A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

* (2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

* (3) If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

* B. Requests the delivery of the documents listed below to the following judicial or administrative authority:

Authority: _____

* C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached Form C. *

Done at _____ this _____ date of _____, 20____.

1	2
_____ Signature and stamp of the judicial or administrative authority of the State of origin	_____ Signature and stamp of the Central Au- thority of the State of origin

Title or other identification of each document to be delivered:

NOTES:

Use of Form: This form is an official form created and approved under the Inter-American Convention on Letters Rogatory. The wording and format should not be altered.

Authority: Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters

Rogatory, May 8, 1979, 18 ILM 1238; <http://www.oas.org/juridico/english/treaties/b-46.html>.

Discussion: See 14.17[3]

Related Form B for Essential Information for Addressee: See 14.35

Related Form C for Certificate of Execution: See 14.36

Related Form for Notice of Motion in California Court: See 14.30

14.35 Essential Information for the Addressee—Form B Under Additional Protocol to the Inter-American Commission on Letters Rogatory.

ESSENTIAL INFORMATION FOR THE ADDRESSEE

To

(Name and address of the person being served):

You are hereby informed that

(Brief statement of nature of service):

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I *

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

B. The remedies sought or the amount in dispute is as follows:

C. By this service, you are requested:

* D. In case of service on you as a defendant you can answer the complaint before the judicial or administrative authority specified in Form A, Box 1 (State place, date and hour):

* You are being summoned to appear as: _____

* If some other action is being requested of the person served, please describe: _____

E. If you fail to comply, the consequences might be: _____

F. You are hereby informed that a defense counsel appointed by the Court or the following legal aid societies are available to you at the place where the proceeding is pending.

Name:

Address:

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II *

FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE AUTHORITY

To: (Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned judicial or administrative authority with the following information: _____

The documents listed in Part III are being furnished to you to facilitate your reply.

* *Delete if inapplicable*

III

LIST OF ATTACHED DOCUMENTS

(Attach additional pages if necessary.)

(Attach additional pages if necessary.)

Done at _____ this _____ date of _____, 20____.

1	2
Signature and stamp of the judicial or administrative authority of the State of origin	Signature and stamp of the Central Au- thority of the State of origin

NOTES:

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Authority: Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238; <http://www.oas.org/juridico/english/treaties/b-46.html>

Discussion: See 14.17[3]

Related Form A for Letters Rogatory: See 14.34

Related Form C for Certificate of Execution: See 14.36

Related Form for Notice of Motion in California Court: See 14.30

14.36 Certificate of Execution—Form C Pursuant to Additional Protocol to the Inter-American Convention on Letters Rogatory

CERTIFICATE OF EXECUTION

To: _____

(Name and address of judicial or administrative authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

* A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date: _____

At (Address): _____

By one of the following methods authorized by the Convention.

* (1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention, or

* (2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent, or

* (3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination: (Specify method used)

* B. That the documents referred to in the letter rogatory have been delivered to:

Identity of person: _____

Relationship to the addressee: (family, business or other)

* C. That the documents attached to the Certificate have not been served or delivered for the following reason(s): _____

* D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement. *

Done at _____ this _____ date of _____, 20____.

_____. Signature and stamp of Central Authority of the State of destination

Where appropriate, attach originals or copies of any additional documents proving service or delivery, and identify them.

* *Delete if inapplicable*

NOTES:

Use of Form: This form is an official form created and approved under the Inter-American Convention on Letters Rogatory. The wording and format should not be altered.

Authority: Second Inter-American Specialized Conference on Private International Law: Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 ILM 1238; <http://www.oas.org/juridico/english/treaties/b-46.html>.

Discussion: See 14.17[3]

Related Form A for Letters Rogatory: See 14.34

Related Form B for Essential Information for Addressee: See 14.35

Related Form for Notice of Motion in California Court: See 14.30