Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview

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The practice of maritime law, perhaps more than most fields, involves parties resident throughout the world. The majority of shipowners maintain offices outside the United States in diverse locales such as Greece, Turkey, Japan, Hong Kong, and Singapore. Charterers and commercial interests can be found almost anywhere a ship may call. Because most U.S. companies rely upon some type of imported products, U.S. trading partners run the gamut from Europe to South America to East Asia. Parties and witnesses are disbursed throughout the world, particularly with most non-U.S. registered vessel crewmen hailing from the Middle East, Latin America, India, the Far East, and the Philippines. Since 1990, more ship officers have come from the countries of the former Soviet Bloc. It is unusual to find owners and managers, much less crewmen, resident in Western Europe or the United States.

The nature of the maritime business makes it inevitable that much litigation, usually taking place in federal court, involves issues of service of process for the summons and complaint on foreign entities, and that discovery involves efforts to depose witnesses overseas and to collect documents, materials, and information from foreign jurisdictions. This Article is not intended to be an exhaustive treatment of the subject of transnational service of process and discovery. Many articles, in fact whole books, have been written on various aspects of these issues. However, none seem to cover the entire subject. Voluminous case law addresses various aspects of this subject. This Article provides an introduction and overview for practitioners. In addition to identifying the principal sources of law governing these matters, this Article also seeks to identify particular issues that may prove particularly troubling when navigating the treacherous channels of the service and discovery processes.
This review is necessarily based in federal litigation, which encompasses most admiralty practice. It therefore involves interpretation of the Federal Rules of Civil Procedure and case law; however, a number of issues, particularly those pertaining to service of process under state long-arm statutes, implicate practice in the state courts as well. Page limitations prevent a detailed treatment from that perspective.

I. SERVICE OF PROCESS OF THE SUMMONS AND COMPLAINT

A. Review of Applicable Law

The legal materials necessary for an understanding of transnational service of process are deceptively few in category, although not in volume. The starting point is Rule 4 of the Federal Rules of Civil Procedure. This Rule, governing the summons, contains a number of important provisions applicable to foreign service, and is discussed below. Each subdivision is addressed, sometimes extensively, in the federal jurisprudence.

Furthermore, service of process between the United States and a number of nations is governed by treaty. Rule 4(f)(1) references the most important of those treaties, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention). The Hague Service Convention entered into force in the United States on February 10, 1969, and as of the date of this writing, forty-nine nations have ratified the Convention. The Hague Service Convention was developed to modernize and revise the 1954 Hague Convention Relating to Civil Procedure, and the 1905 Hague Convention Relating to Civil Procedure. The 1965 Hague Service Convention supersedes the prior Hague Conventions, except as to certain provisions of the earlier conventions that are essentially irrelevant to our topic.


The provisions of Rule 4 are rather all-encompassing, and the Hague Service Convention has been held (prior to the 1993 amendments to Rule 4) to be a self-executing treaty without the necessity of domestic federal legislation to enact its provisions. Therefore, there is very little federal statutory law to supplement the above sources. This statutory law principally includes a section of the Foreign Sovereign Immunities Act pertaining to service on foreign sovereigns and a provision authorizing district courts to issue service upon a person in the district "in connection with a proceeding in a foreign or international tribunal."

The other multilateral convention is the Inter-American Convention on Letters Rogatory (Inter-American Convention), which entered into force on January 16, 1976. An Additional Protocol was signed in 1979. The United States ratified the Inter-American Convention and Additional Protocol in 1986, and it went into force in the United States for service of process between member states in 1988. Currently, seventeen nations have ratified or acceded to the Inter-American Convention, and fourteen have ratified or acceded to both the Inter-American Convention and the Additional Protocol.

There appear to be no bilateral treaties between the United States and other nations pertaining to transnational service of process, although one should always check for the existence of such a bilateral treaty if the target forum is not a signatory to the Hague Service Convention or Inter-American Convention. The case law and Rule 4 imply that, absent application of the Hague Service Convention, the parties must look to the procedures of the Federal Rules and the law of the forum to which the

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8. Id. § 1608.
9. Id. § 1696.
12. The United States has opted out of the application of this Convention to discovery procedures. See 28 U.S.C.A. § 1781 (U.S. reservations to Inter-American Convention).
process will be sent. For the latter, the best source is certainly local counsel in the target forum.

The volume of case law, almost exclusively federal, interpreting the application of Rule 4 and the Hague Service Convention is discussed below. With regard to service under the Hague Service Convention itself, there exists a number of learned articles, albeit some now rather aged. Most importantly, the Hague Conference on Private International Law, made up of representatives of the nations signatory to the Hague Service Convention, has published the *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. This provides not only an overview of the terms and conditions of the Hague Service Convention but also details the requirements of each signatory nation and the reservations that each nation has by right applied to its accession to the Convention. This handbook should be consulted for any service under the Hague Service Convention.

**B. The Starting Point—Rule 4: Is It “Foreign Service”?**

Rule 4 of the Federal Rules of Civil Procedure governs the various aspects of domestic and foreign service of process. The Rule was substantially amended in 1993, which particularly affected the provisions pertaining to foreign service of process and waiver of service. A number of subparts to Rule 4 apply to foreign service of process. These include: subdivision (d) pertaining to waiver of service, subdivision (f) pertaining to service upon individuals in a foreign country, subdivision (h) pertaining to service upon corporations and associations, and subdivision (j) pertaining to service upon foreign governments. Procedural subdivisions apply to the above-referenced subdivisions, including proof of service (subdivision (f)), time limit for service

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17. Do not be confused by cases decided before the 1993 amendments, which addressed whether service in compliance with the Hague Service Convention was valid if not in compliance with Rule 4. *See, e.g., Icel Container Int’l Corp. v. Atlanttrafik Express Serv., 686 F. Supp. 438 (S.D.N.Y. 1988).* This issue was resolved by the specific reference to the Hague Service Convention incorporated into the amended Rule. *See Fed. R. Civ. P. 4(f)(1).*
(subdivision (m)), and one provision which may have particular effect upon admiralty practice, seizure of property under subdivision (n).

The threshold issue, however, is basic: is it “foreign service” to which the provisions of Rule 4 and perhaps an international convention would apply? The United States Supreme Court addressed this issue in *Volkswagenwerk Aktiengesellschaft v. Schlunk.* In that case, a plaintiff sought to serve the subsidiary of a German corporation in the United States, but not pursuant to the Hague Service Convention. The defendant moved to quash service, but the motion was denied. The Supreme Court affirmed the district and circuit courts, holding that “service abroad” for purposes of application of the Hague Service Convention means transmittal of documents abroad as a necessary part of the service. Therefore, if service did not require transmittal of documents overseas (either as the only method of service or, presumably, as adjunct to substitute service under a long-arm statute), the requirements mandating international service under the Hague Service Convention or otherwise were not met. The Court based its findings in part on an analysis that the due process requirements of the Fourteenth Amendment had been met.

The question arises as to whether the 1993 amendments to Rule 4 eliminated the option of domestic service on a foreign corporation’s subsidiary or agent, as occurred in *Schlunk.* The United States Court of Appeals for the Eleventh Circuit has held that the amendments “did not abolish the practice of effecting service” on the agent of a foreign individual or corporation where that agent is “authorized by appointment or by law to receive service.” However, one must be careful to assure that the agent has the power and authority, by operation of law or in fact, to accept service for a foreign individual.

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19. *Id.* at 696-97.
20. *Id.* at 697.
21. *Id.* at 707-08.
22. Interestingly, this case involved service under the Illinois Long-Arm Statute, which did not require transmittal of the documents abroad. *Id.* at 706 (citing ILL. REV. STAT. ch. 110, ¶2-209(a)(1) (1985)).
23. *Id.* at 707; see also Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95, 96-97 (S.D. Fla. 1985) (finding the Hague Service Convention inapplicable to service on a U.S. agent).
26. See Klinghoffer v. S.N.C. Achille Lauro ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 54, 1991 AMC 2751, 2765 (2d Cir. 1991); Saez Rivera v. Nissan Mfg. Co., 788 F.2d 819, 821 (1st Cir. 1986) (finding that service on a Japanese corporation’s liaison office in Puerto Rico was invalid because no evidence existed that any officers or managing or authorized agents for the corporation were present).
Rules for service on foreign defendants apply when the defendant is actually located overseas. Therefore, the Rules are “not triggered [merely] by the citizenship of the individual being served but rather [by] the place in which service is effected.” Some courts have also indicated that good faith defects in the methods of service under the Hague Service Convention do not “supercede the general and flexible scheme” for foreign service under Rule 4. One should be very cautious when relying on such expressed policy. As discussed below, most courts require strict compliance when foreign service is mandated.

The 1993 amendments completely revised the commentaries annotated to the Rule. The Advisory Committee’s Notes contain a good overview. The 1993 revisions to the Rule may bring into question some of the case law pertaining to international service of process, most of which, oddly enough, pre-dates the 1993 amendments. Perhaps due to the clarification of the language of the Rule in light of the increasing importance of transnational litigation, there are relatively few reported decisions subsequent to the 1993 amendments. Despite these amendments, however, there are still issues and stumbling blocks for the unwary, and it is worth touching upon the applicable provisions of Rule 4 in sequence to address these matters.

C. Waiver of Service

The waiver of service provision of Rule 4 was not a new concept with the 1993 amendments, although the text was substantially revised. Subdivision (d)(2) provides in pertinent part: “If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown” (emphasis added). Subdivision (d)(3) also provides: “A defendant who, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States”

31. Id.
(emphasis added). There seems to be a contradiction between these provisions. Subdivision (d)(2) implies that no sanctions exist for a defendant that fails to comply with the plaintiff’s request for waiver if the defendant or plaintiff is located outside the United States (or that the rule does not apply to such parties), and yet subdivision (d)(3) allows a defendant addressed outside the United States additional time for serving an answer. Rather oddly, there appear to be no reported post-1993 cases addressing the waiver issue as applied to foreign defendants. Recognizing this, the commentaries to Rule 4 submit that this may have been designed as a “carrot and stick,” giving the foreign defendant the advantage of extra time to answer in exchange for its agreement to waive service, while not imposing costs for its failure to do so.\textsuperscript{32} The author of the commentaries theorizes that there may have been concern that a request for waiver of service could have been construed as a type of formal service on a defendant in a foreign country requiring, in some cases, formal procedures under Rule 4 and/or the Hague Service Convention.\textsuperscript{33} The commentaries also note that a plaintiff might ultimately be able to recover the significant expense of formal service abroad if the defendant fails to waive that service and the plaintiff prevails in the litigation and recovers his costs.\textsuperscript{34} The Advisory Committee’s Notes emphasize this concern that the waiver provisions might be misconstrued as a type of service by mail offensive to some foreign jurisdictions, and also emphasize the advantages of waiver to both the plaintiff and defendant, thereby justifying the “carrot and stick” theory of the commentaries.\textsuperscript{35} Therefore, this provision could not contain formal sanctions against a foreign defendant who refused to agree to a waiver request sent by mail.

One case reported prior to the 1993 Rule revisions addressed a foreign defendant’s failure to waive formal service of process under the Hague Service Convention. In \textit{Sheets v. Yamaha Motors Corp.},\textsuperscript{36} the United States Court of Appeals for the Fifth Circuit reversed an award of Rule 11 sanctions against a defendant for failing to waive service of process under the Hague Service Convention, holding that the defendant’s insistence on formal Hague service was “interposed for a


\textsuperscript{33} \textit{Id.} at 447-48.

\textsuperscript{34} \textit{Id.} at 453-54.

\textsuperscript{35} See \textit{FED. R. CIV. P. 4} advisory committee’s notes on the 1993 amendments to subdivision (d).

\textsuperscript{36} 891 F.2d 533 (5th Cir. 1990).
legitimate purpose;" inasmuch as such service was mandated under the law of the foreign forum and was reasonably necessary to assure that the proper parties had received adequate notice. In this case service under the Louisiana Long-Arm Statute triggered foreign service because copies of the pleadings had to be sent to the defendant in Japan.

D. Overview of Service on Individuals in a Foreign Country

The core provision for international service under Rule 4 is subdivision (f). This subdivision provides for service upon an individual outside any judicial district in the United States:

1. The Hague Service Convention

The Hague Service Convention applies only when the state where service is attempted is a party to the Convention, otherwise the applicant should look to other provisions under Rule 4(f). Conversely, the balance of Rule 4 applies only to non-Hague jurisdictions. While the full text of the Hague Convention is made part of the annotations to Rule 4, there are some important provisions to note.

Article 2 provides that "[e]ach contracting State shall designate a Central Authority" to receive requests for service of process. In the submissions and reservations appended to the Hague Service Convention, each party state sets out its designated Central Authority (the

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37. Id. at 538.
38. See id. at 537.
39. See Int'l Controls Corp. v. Vesco, 593 F.2d 166, 178 (2d Cir. 1979).
United States has designated the Department of Justice to receive Hague service requests. Requests must be submitted to the Central Authority when service is performed other than by mail (see below), or as otherwise mandated by the state through its submissions and reservations which are made part of the Treaty.

Articles 3 through 7 describe the procedures for sending service through the Central Authority. The Hague Service Convention contains an Annex which provides model forms to request service through the Central Authority, and these model forms should be closely followed. The Central Authority, unless it considers that the request does not comply with the provisions of the Hague Service Convention, shall then arrange to serve the process pursuant to its internal law or by a method requested by the applicant unless the requested method is incompatible with the state’s internal law. The Central Authority must then complete a certificate of service to be forwarded directly to the applicant, although this is not always necessary for valid service. One should also note that the forms for requesting service are required to be written in either French or English, and they may also be required to be written in the official language of the state addressed. In some cases, the state, by specific reservation, mandates the forms to be drafted in its official language. Failure to provide properly translated documents may invalidate service. The applicant should be careful to confirm the requirements of the state addressed by, in part, reviewing the submissions and reservations appended to the Hague Service Convention.

Article 8 provides for service directly through diplomatic or consular agents, although any state may object to this form of service in its territory, except for service upon the nationals of the state where the documents originate. Coincidentally, this could also be considered an alternative form of service as specified under Rule 4(f)(2). Transmission of documents directly between consular offices is still

44. Id. art. 4, 20 U.S.T. at 362, 658 U.N.T.S. at 167.
permissible without reservation where the target state has designated its consular authorities as the Central Authority.\textsuperscript{53}

Article 10 is the most troublesome and confusing portion of the Hague Service Convention, as subparagraph (a) pertains to service through postal channels. The article specifies that this method of service, and those under subparagraphs (b) and (c), are permitted "[p]rovided the State of destination does not object."\textsuperscript{54} The issue of mailing process also comes up as a provision in Federal Rule of Civil Procedure 4(f)(2)(C)(ii), and is separately addressed below. Article 10(b) provides for judicial officers and officials to serve documents directly through the judicial officers and officials of the state of destination, and article 10(c) is a more all-encompassing provision that allows "any person interested in a judicial proceeding to effect service."\textsuperscript{55} This latter provision encompasses private process servers and others who might normally serve process, including attorneys.\textsuperscript{56} One court has even gone so far as to hold that even in a Hague Service Convention jurisdiction service may be perfected "by other means" under Rule 4(f) so long as the country does not object, thereby not requiring service through the Central Authority.\textsuperscript{57} This post-1993 decision raises the question of how much leeway the Hague Service Convention actually provides for getting around service through the Central Authority under articles 2 through 7. Be mindful, however, that pursuant to the preamble of article 10, all of these methods are subject to the consent of the receiving state, and once again one must look to the reservations annexed to the Hague Service Convention and the state's internal laws to determine whether a state would object to any of these methods.

Article 15 governs when a default may be entered against a party which has been served under the Hague Service Convention but has failed to appear.\textsuperscript{58} A number of cases cited in this Article stem from situations where the plaintiff has moved for a default judgment against a foreign defendant which has failed to appear after purportedly being

\begin{thebibliography}{9}
\bibitem{53} Hague Service Convention, supra note 1, art. 9, 20 U.S.T. at 363, 658 U.N.T.S. at 169.
\bibitem{54} Id. art. 10, 20 U.S.T. at 363, 658 U.N.T.S. at 169.
\bibitem{55} Id., 20 U.S.T. at 363, 658 U.N.T.S. at 171.
\bibitem{58} Hague Service Convention, supra note 1, art. 15, 20 U.S.T. at 364, 658 U.N.T.S. at 171, 173.
\end{thebibliography}
served under the Hague Service Convention. U.S. courts are reluctant to enter a default judgment unless the specific terms of article 15 are met, and even then, they tend to give every benefit of the doubt to the nonappearing defendant. Article 15 provides that a default judgment should not be entered against the party until it is established that either “(a) the document was served by a method prescribed by the internal law of the State,” or “(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,” and that service “was effected in sufficient time to enable the defendant to defend.” Notably, however, a default judgment may be entered even if there is no certificate of service or delivery (pursuant to article 6) if “(a) the document was transmitted by one of the methods provided for in this Convention,” (b) at least six months have “elapsed since the date of the transmission of the document,” and (c) there is no certificate of service even after “every reasonable effort has been made to obtain it.” One can clearly see the due process and sufficient notice issues in the Hague Service Convention, which comport with U.S. law. In one Florida state court case, the appellate court reversed a default judgment, holding that article 15 could not be used “to default a defendant who is known not to have been served” despite repeated efforts by Spanish authorities and private process servers. The trial court’s reason for entering the default judgment was that the Spanish government had not timely filed a certificate of service as required under article 15.

Article 16 provides additional protections for defaulted defendants, permitting a judge “to relieve the defendant from the effects of the expiration of the time for appeal from the judgment” if (a) the defendant did not have sufficient knowledge of the document in time to defend, and “(b) the defendant has disclosed a prima facia defence.” Application for relief must be within “a reasonable time.”

The general clauses of Chapter III of the Convention (articles 18 through 31) permit alternative methods of service pursuant to the internal

59. See, e.g., Koehler, 152 F.3d at 305-06; Straub v. A P Green, Inc., 38 F.3d 448, 450 (9th Cir. 1994).
62. Id.
63. Id., 611 So. 2d at 20.
64. Id. at 18.
law of the contracting state, which is also provided for in Rule 4(f)(2).
Also note that articles 22 through 24 provide that while the Hague
Service Convention replaced the Hague Conventions of 1954 and
1905, certain articles of those prior Conventions, particularly pertaining
to legal aid and costs for service, are unaffected by the new Convention.
While the surviving articles of the prior Conventions do not apply to the
provisions of the current Convention discussed above, the reader should
carefully review the surviving articles of the 1954 and 1905 Conventions
for matters that might affect his particular situation. Again, the applicant
should carefully consult the reservations and conditions submitted by
party states to the Hague Service Convention (pursuant to article 21) for
particular requirements and restrictions in that state. These are admirably
addressed in the Practical Handbook on the Operation of the Hague
Convention of 15 November 1965, published by the Hague Conference
on Private International Law. Inasmuch as this handbook was drafted
by representatives of the party states who were closely associated with
the drafting of the Convention, this is perhaps the most reliable reference
to study particular state terms and conditions.

2. Inter-American Convention on Letters Rogatory

The other multilateral convention on service of process to which the
United States is a party is the Inter-American Convention on Letters
Rogatory. While the Inter-American Convention was signed in 1975
and entered into force in 1976, with an Additional Protocol of May 8,
1979 (1979 Protocol), the Inter-American Convention was finally
ratified and signed into law in the United States only in 1986, entering
into force in 1988. Currently, seventeen states are party to the Inter-
American Convention. The Inter-American Convention provides for the
preparation and transmission of letters rogatory, while the 1979 Protocol,
drafted to strengthen the Convention, provides more detail concerning

70. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, supra note 16.
71. Inter-American Convention, supra note 10.
72. Additional Protocol, supra note 11.
73. These seventeen states are Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador,
El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Spain, United States,
Uruguay, and Venezuela. Organization of American States, Inter-American Treaties, Signatories
and Ratifications, at http://www.oas.org/juridico/English/Sigs/b-36.html (last visited Sept. 22,
2002).
the preparation of letters rogatory and the costs and expenses of transmission.

The Inter-American Convention is similar to the Hague Service Convention in that it requires each party state to designate a Central Authority for transmission of the letters rogatory (article 4), sets forth requirements for the contents of letters rogatory (articles 5 through 8, including such matters as form and translation), and provides for execution (service) in the state (articles 10 through 13). The 1979 Protocol provides details for performance of functions under article 2(a) of the Inter-American Convention pertaining to formal procedural acts such as service of process and summonses.74 Most importantly, the United States has, by declaration and reservation, opted out of application of article 2(b),75 which applies to the taking of evidence and obtaining information abroad and only recognizes application of the Inter-American Convention to those states party to both the Convention and the 1979 Protocol.76

While seldom addressed in reported cases or articles,77 the Inter-American Convention has appeared in a few reported decisions. The United States Court of Appeals for the Fifth Circuit has held that the Inter-American Convention “does not preempt other methods of service” provided they otherwise comport with both international law and the domestic law of the receiving nation.78 The issue of mailing service of process to a defendant corporation resident in a state party to the Inter-American Convention (Peru) was addressed in Marine Trading Ltd. v. Naviera Comercial Naylamp S.A., where a petitioner moved to confirm an arbitration award.79 While not addressing the Inter-American Convention specifically, the court held that mailing the petition to the corporation’s headquarters in Peru was insufficient service of process.80

74. Additional Protocol, supra note 11, art. 1, 18 I.L.M. at 1238.
76. Id.
78. Kreimerman v. Casa Veerkamp S.A., 22 F.3d 634, 644 (5th Cir. 1994).
80. Id. at 391-92, 1995 AMC 2059-60; see also SEC v. Int’l Swiss Insvs. Corp., 895 F.2d 1272, 1275-76 (9th Cir. 1990) (upholding personal service of a summons and complaint in Mexico pursuant to a district court order, which was held not to violate international law, and was a method not superceded by the then unratified Inter-American Convention).
3. Service “If There Is No Internationally Agreed Means”

Rule 4(f)(2) provides that “if there is no internationally agreed means of service or the applicable international agreement allows other means of service ... reasonably calculated to give notice,” then service may be made pursuant to one of the enumerated subparagraphs. Rule 4(f)(2) applies to all non-Hague and non-Inter-American jurisdictions where service is sought. Subparagraph (A) permits service “in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction.” Subparagraph (B) permits service “as directed by the foreign authority in response to a letter rogatory or letter of request.” Both of these provisions are self-explanatory, and appear to have generated few reported court interpretations. The United States has enacted a specific statute (before entry of the Hague Service Convention and the modern Rule 4) giving authority to district courts to order service of any document issued in connection with a proceeding in a foreign tribunal upon anyone found within the district. The order may be made pursuant to a letter rogatory, letter of request, “or upon application of any interested person.”

Rule 4(f)(2)(C) is the difficult one. This rule states that “unless prohibited by the law of the foreign country,” service may be made (i) by personal delivery to the individual, or (ii) “by any form of mail requiring a signed receipt.” Subparagraph (C)(ii) has generated so much controversy that it is addressed separately in the next Part of this Article. Rule 4(f)(3) is also a difficult “catch-all,” permitting service “by other means not prohibited by international agreement as may be directed by the court.” This may permit the plaintiff to petition a court for an order specifying the type of service acceptable. The court must still adhere to the requirements and limitations of the targeted foreign state, however. Under both the Hague Service Convention and Rule 4, service of process will likely be held invalid if a foreign country objects to the method.


84. Id.; see Sprague & Rhodes Commodity Corp. v. Instituto Mexicano del Cafe, 566 F.2d 861, 862-63 (2d Cir. 1977) (per curiam).
used. One court has noted that, as a practical consideration, even if the service objected to in the defendant's country were held valid by the U.S. court, it is unlikely the defendant's country would enforce any judgment obtained in the United States. What is "permitted" or "not prohibited" in a country is an issue in the service by mail problem, and further complicates service under Rule 4(f)(2)(C)(ii).

4. **Bankston** or **Ackermann**—The Mail Controversy

The most oft litigated and troubling issue of transnational service under Rule 4(f) and the Hague Service Convention is service by mail. In 1986 the United States Court of Appeals for the Second Circuit issued its opinion in *Ackermann v. Levine*. The court held that service of a summons and complaint in a German lawsuit against a New York defendant by registered mail satisfied the Hague Convention and constitutional due process. This appears to be the first circuit court opinion dealing with transnational service by mail. However, three years later the United States Court of Appeals for the Eighth Circuit issued its contrary opinion in *Bankston v. Toyota Motor Corp.* In *Bankston*, a plaintiff's attempt to serve a Japanese corporation by sending the summons and complaint by registered mail to its headquarters in Japan was held insufficient. The *Bankston* court interpreted the word "send" in article 10(a) of the Hague Service Convention not to be the equivalent of "service of process" because the word "service" was specifically used in other sections of the Convention. Therefore, the court held that the article 10 provision for "sending" judicial documents by postal channels did not include "service" of a summons and complaint.

Very recently, the United States Court of Appeals for the Fifth Circuit issued an opinion which follows the *Bankston* reasoning in holding that service of process by mail does not comport with the requirements of the Hague Service Convention. In *Nuovo Pignone, SPA v. M/V Storman Asia*, the Fifth Circuit addressed the service of a copy of the complaint via Federal Express to the defendant's president in Italy.

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86. *Id.* (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 706 (1988)).
87. 788 F.2d 830 (2d Cir. 1986).
88. *Id.* at 834.
89. 889 F.2d 172 (8th Cir. 1989).
90. *Id.* at 174.
91. *Id.* at 173-74.
92. *Id.* at 174.
The court rejected the Plaintiff's contention that article 10(a) of the Hague Service Convention permits mailed service by the use of the word "send."\(^4\) Since other sections of the Hague Service Convention use the terms "serve" and "service," the court held that using "the canons of statutory construction" one could not presume that the use of the term "send" in article 10(c) was a mere drafting oversight.\(^5\) Instead, it contemplated sending documents other than process.\(^6\) Further, the court held that the stated purpose of the Hague Service Convention is to assure timely notice to a defendant and calls for the use of more reliable methods enumerated in the Convention.\(^7\)

The split between these circuits has led to a voluminous amount of district court opinions addressing this issue. District courts are split on the issue, particularly those districts outside the Second and Eighth Circuits.\(^8\) The majority seems to be leaning towards recognizing service by mail as acceptable under the Hague Service Convention and Rule 4 provided it is not specifically precluded by the law of the receiving

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\(^4\) Id. at *7.

\(^5\) Id.

\(^6\) Id.

\(^7\) Id.


nation. However, the practitioner is strongly cautioned to research the law of his particular district to determine how the courts are viewing such service of process.

One of the best recent summaries of the service by mail controversy and analysis of the Ackermann and Bankston opinions is contained in Eli Lilly & Co. v. Roussel Corp. That court's detailed analysis, after reviewing the extensive volume of case law, looks to two other sources for analyzing the intent of article 10 of the Hague Service Convention. The court cites the Practical Handbook on the Operation of the Hague Convention of 15 November 1965, which "specifically lists service by mail as valid under the Hague Convention." The court found this persuasive, inasmuch as the handbook was drafted by the parties closely associated with the drafting of the Convention. The court also looked to a letter issued by the U.S. State Department Legal Advisor's Office, which also interpreted the Hague Service Convention as permitting service by mail. This issue is ripe for Supreme Court review.

As you can see, courts have issued contrary opinions concerning service in the same country (notably Japan), and even courts from the same circuit are at odds on this issue. Courts have expounded different reasons for approving or disapproving service by mail. Some note the distinction in the Hague Service Convention between the word "send" used in article 10(a) versus the word "service" used elsewhere. Clearly Rule 4(f)(2)(C)(ii) permits "service" by mail under certain circumstances, when not prohibited by the foreign state. However, this has forced some courts to analyze when a foreign state has "prohibited" this type of service, and service in Japan has caused extensive judicial analysis of the issue of when a nation's silence is equivalent to

100. Id. at 472 (citing HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, supra note 16, at v).
101. Id.
prohibition.\textsuperscript{106} Due to the continuing confusion, service by mail has been the topic of numerous law review articles.\textsuperscript{107}

With regard to service by mail to non-Hague jurisdictions, the matter is somewhat less complex. This falls back to Rule 4(f)(2)'s other provisions that generally permit service "reasonably calculated to give notice" to the defendant when that service is prescribed by the defendant's country, or to Rule 4(f)(3) under a method not prohibited by that nation. One court objected to the latter rule, holding service by mail valid only "if sanctioned by the forum state's rules."\textsuperscript{108} Another court held service by DHL to non-Hague countries (Indonesia and Malaysia) was valid so long as it was not specifically prohibited by the country's laws, even though the method was not prescribed by the law.\textsuperscript{109} Yet another held that service by international registered mail dispatched by the clerk of court to Indonesian defendants was valid.\textsuperscript{110} In this latter case, the court found that the term "prohibited" as used in Rule 4(f)(2)(C)(ii) referred to a violation of the local law, not to a form of service that is merely not a part of (prescribed by) that law.\textsuperscript{111}

Do not overlook the second clause of Rule 4(f)(2)(C)(ii), which mandates mail "be addressed and dispatched by the clerk of the court to the party to be served" (emphasis added). Courts have held service under the Rule invalid where the plaintiff's attorney, rather than the clerk, dispatches the mail.\textsuperscript{112} However, in one case, a court clerk refused to serve process by mail on a Swiss defendant due to objections raised by the Swiss Government and the U.S. State Department.\textsuperscript{113} The appellate court held that the clerk's refusal was not justified, and therefore the district court's dismissal of plaintiff's complaint was an abuse of discretion because Rule 4 permitted service in this method, and the Rule "neither explicitly nor implicitly requires any deference to foreign governments or to the U.S. Department of State in the manner by which

\begin{itemize}
\item \textsuperscript{106} See Golub, 924 F. Supp. at 327; Wilson, 776 F. Supp. at 342.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Lampe v. Xouth, Inc., 952 F.2d 697, 702 (3d Cir. 1991).
\item \textsuperscript{113} Umbehauer v. Woog, 969 F.2d 25, 27-28 (3d Cir. 1992).
\end{itemize}
service of process shall be made.” While this case was decided under the old version of the Rule, the court noted the proposed revisions which were ultimately adopted in 1993, finding that the proposed revisions “would generally not authorize service by methods that violate the law of the country in which the defendant is located.”

The service by mail issue also implicates other technology. At least one court has held service by telex permissible. Several recent articles have even addressed service by email (but not in a strictly international setting). As service by email is still in its formative stages even in domestic litigation, this is best left to another discussion.

E. Service upon Foreign Corporations and Associations—Issues of Service Under Long-Arm Statutes

Rule 4(h)(2) provides for service upon corporations and associations “in a place not within any judicial district of the United States.” The Rule provides that service may be made in the same manner as that prescribed against individuals under subdivision (f) except for personal delivery as provided in subdivision (f)(2)(C)(i). Therefore, with this exception the procedures and issues identified for service above apply equally to corporations and associations.

The case law regarding service upon foreign corporations principally addresses attempts to circumvent foreign service requirements by serving agents or subsidiaries of corporations that can be found in the United States. This particularly implicates substitute service under state long-arm statutes, where a foreign corporation may be deemed to be “doing business” and is therefore held as a matter of state law to have appointed a state agency as agent for service of process, if the company does not in fact have a designated private agent, affiliate, or presence in the state. This issue is discussed above with regard to the threshold application of “foreign service” under Rule 4. The advantage of serving the domestic agent recalls Volkswagenwerk Aktiengesellschaft

114. Id. at 34.
115. Id. at 32.
v. Schlunk. Service on the domestic agent would not constitute "foreign service" pursuant to Schlunk. Therefore, the Hague Service Convention or other provisions for foreign service would not come into play, and the associated requirements and restrictions (and costs) would have no impact upon service otherwise properly performed under either state or federal law.

The problem with this form of service is that due process requirements mandate that there be a sufficiently close relationship between the agent or subsidiary and the foreign corporation such that notice requirements are satisfied. Courts tend to disfavor service on a domestic agent, particularly where service is made under a state long-arm statute which still requires copies of the process be mailed to the foreign defendant as well. As earlier noted, if the long-arm statute requires mailing a copy of the documents to the defendant overseas this could implicate "foreign service" and the requirements for such service. One recent decision, however, held that where the Texas Secretary of State forwarded a copy of the substituted service to the defendant in Japan, this was sufficient. However, if the plaintiff can bear the burden of proving that the subsidiary was truly part of the defendant foreign corporation where service would logically give notice to the foreign corporation, courts have held service on the domestic agent to be valid. The same considerations apply to service upon a domestic subsidiary, and an officer of the foreign company.

The core problem lies in the diverse requirements of the particular long-arm statute. Each state's long-arm statute may be different, and therefore the plaintiff should carefully review the statute applicable in his situation. Generally any long-arm statute requiring transmittal of

120. 486 U.S. 694 (1988).
121. Id. at 707.
123. See Schlunk, 486 U.S. at 705.
125. See supra text accompanying notes 21-23.
129. Cosmetech Int'l, LLC v. Der Kwei Enter. & Co., 943 F. Supp. 311, 316 (S.D.N.Y. 1996) (approving service on a domestic manager of a Taiwanese corporation because Taiwan was not a Hague party and Taiwan law expressly permitted such service).
130. For example, Florida has several long-arm statutes, including a general statute, Fla. Stat. Ann. § 48.193 (1994), one for service on nonresidents operating watercraft in the state, id.
process by mail to a foreign defendant, in addition to service on the agent in state, is considered “foreign service” and subject to all of the above requirements and restrictions for mailing service.\textsuperscript{131} Courts strictly construe these requirements, and one circuit has held that documents sent by Federal Express did not constitute valid service even though service would have been valid by first class mail and the defendant had actual knowledge of the lawsuit.\textsuperscript{132} The court explained that “Federal Express is not first class mail,”\textsuperscript{133} and that “actual knowledge of the existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process.”\textsuperscript{134}

Some courts have raised the issue of whether state or federal rules apply to particular service, and where state law applies and does not provide for foreign service whether the plaintiff has any avenue to obtain service on a foreign corporation.\textsuperscript{135} At least one court has responded by holding that a plaintiff may resort to either state or federal law when serving a foreign defendant under Rule 4.\textsuperscript{136} On the other hand, we are reminded that if service fails to meet the requirements of either the state or foreign law, it is invalid.\textsuperscript{137} Therefore, service on foreign corporations, as with individuals, should fully comply with the Hague Service Convention or other applicable law where doubt exists as to the status of the domestic subsidiary or agent.

\section*{F. Service on Foreign Sovereigns and Instrumentalities}

Rule 4(j)(1) provides that service upon a foreign state or political subdivision, agency or instrumentality shall be effected pursuant to the provisions of 28 U.S.C. § 1608. This is the service provision of the Foreign Sovereign Immunities Act (FSIA),\textsuperscript{138} and is the exclusive means

\begin{thebibliography}{138}
\bibitem{131} Fleming, 774 F. Supp. at 994 (finding transmittal by mail under a long-arm statute to a parent company in Japan invalid); \textit{cf.} DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 289, 1981 AMC 2105, 2116-17 (3d Cir. 1981) (stating that a longshoreman suing a Japanese shipyard must rely, through Rule 4, on a state long-arm statute that permits extraterritorial service of process).

\bibitem{132} Audio Enters., Inc. v. B & W Loudspeakers of Am., 957 F.2d 406, 408-09 (7th Cir. 1992).

\bibitem{133} \textit{Id.} at 409.

\bibitem{134} \textit{Id.} at 408 n.2 (quoting Mid-Continent Wood Prods., Inc. v. Harris, 936 F.2d 297, 301 (7th Cir. 1991)).

\bibitem{135} Arrogar Dists., Inc. v. Kis Corp., 151 F.R.D. 221, 224-25 (D.P.R. 1993).


\bibitem{137} Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 478 (3d Cir. 1993).

\end{thebibliography}
of service on foreign sovereigns and their subdivisions and instrumentalities. The statute distinguishes between service on a foreign state or political subdivision, governed by subsection (a), and service on an agency or instrumentality of a foreign state, governed by subsection (b). Service on an agency or instrumentality is essentially similar to foreign service under Rule 4(f). Service on the state or political subdivision under subsection (a) is similar for service by special arrangement or under international convention, but subsections (a)(3) and (4) are a departure, and should be read closely. One must determine whether the foreign entity is a state or political subdivision, or in fact an agency or instrumentality (usually a commercial enterprise).

With regard to service on agencies and instrumentalities, the courts hold plaintiffs to a standard less strict than that for service on private entities. A number of cases address a controversy between "substantial" and "strict" compliance with the statutory provisions. A good policy summary is found in Sherer v. Construcciones Aeronauticas, S.A. The principal requirement for service is that the defendant receive "actual notice." For service that must be performed exclusively under the FSIA, the courts generally recognize a "flexible" policy. Still, one must comply with the methods of service outlined in the statute, and technical requirements for translations and service on the correct
agency. Specific notice of a default motion against a sovereign may not be required if the sovereign has flagrantly refused to appear in the case despite proof of adequate notice and service. Otherwise, litigation centers around the same procedural pitfalls encountered with service upon private entities, with a few issues unique to sovereigns.

G. Territorial Limits of Effective Service

Rule 4(k)(2) provides that service may be effective to establish jurisdiction over a person who is not subject to the jurisdiction of the courts of general jurisdiction of any state. This is the appropriate time to raise (again) the issue concerning the applicable domestic law governing service of process. Where a diversity action is brought in federal court, the appropriate long-arm statute of the forum state governs service of process, and its provisions must be followed in order to obtain proper service of process. This implicates, among other matters, mailing service overseas, when a long-arm statute requires the mailing of a copy of the process even though an agency of the state is deemed by law to serve as the agent of the foreign national for service of process in the state. However, if the matter falls under federal question jurisdiction then federal law must be followed. This issue is addressed with regard to service on foreign corporations in Part I.E of this Article.

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152. See, e.g., Dehmlow v. Austin Fireworks, 963 F.2d 941, 945 (7th Cir. 1992).

153. See, e.g., Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1209-10 (10th Cir. 2000).
H. Proof of Service

Rule 4(l) provides that "[p]roof of service in a place not within any judicial district of the United States shall," if perfected under an international convention or by other recognized means, "be made pursuant to the applicable treaty or convention," or if made pursuant to the laws of the country of destination or by mail, shall "include a receipt . . . or other evidence of delivery." The Hague Service Convention provides in article 6 that the Central Authority of the state addressed shall complete a certificate of service and deliver it to the plaintiff.\footnote{154} Rule 4(l) provides that "[f]ailure to make proof of service does not affect the validity of the service." Article 15 of the Hague Service Convention permits contracting states to enter a default judgment even where no certificate of service or delivery has been received, but only after a showing that the document was transmitted through a permissible method, at least six months have elapsed, and every reasonable effort has been made to obtain the certificate of service.\footnote{155}

I. Time Limit for Service

Rule 4(m), which provides a 120-day time limit for domestic service of process, specifies that this time limit "does not apply to service in a foreign country pursuant to subdivisions (f) or (j)(1)." The principal point to remember here is that for the 120-day rule to be inapplicable, service must be made "in a foreign country." If substituted service is made on a domestic agent or affiliate, then this is not foreign but domestic service for which the 120-day rule \textit{would} apply.\footnote{156} Some defendants have attempted to twist the relationship between Rule 4 and the Hague Service Convention by arguing that service under the Convention "is not pursuant to the federal rules and therefore is not within the foreign service exception to the 120-day time limit."\footnote{157} Courts rejected this rather novel argument, even prior to the 1993 amendments clarifying the foreign service rules.\footnote{158} Because the Hague Service

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{Rule} & \textbf{Description} \\
\hline
4(l) & \textit{Proof of Service} \\
\hline
4(m) & \textit{Time Limit for Service} \\
\hline
\end{tabular}
\end{table}

Convention was specifically included in the 1993 amendments to Rule 4 this issue should be resolved.

Some courts preclude application of the 120-day rule only where a plaintiff strictly complies with foreign service provisions of Rule 4(f).\textsuperscript{159} However, courts appear flexible in both providing for sufficient time for foreign service and in excusing failure to meet the 120-day limit where technical problems caused the delay.\textsuperscript{160}

\textbf{J. Seizure of Property and Ramifications for Admiralty Rules B and C}

Rule 4(n)(1) provides that a court may assert jurisdiction over property if provided for by a U.S. statute, and that “[n]otice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.” This has interesting implications for the Rule B attachment procedure or Rule C arrest under the Supplemental Admiralty Rules, where a default judgment may be entered only after the defendant has been served under Rule 4, or the plaintiff has either sent process to the defendant via return-receipt mail or “tried diligently to give notice of the action to the defendant” but failed.\textsuperscript{161} No notice other than the arrest is required under a Rule C in rem action.\textsuperscript{162} By analogizing to case law pertaining to substitute service of process under state long-arm statutes, discussed above, the mere mailing of this notice, while sufficient to satisfy notice domestically under the Rule B attachment, may not be sufficient on a foreign national. The question arises as to whether mailing the notice is part of the “service” or merely a supplemental notice. Oddly, there appear to be no reported cases dealing with this issue, and if the property itself is the only defendant, perhaps this is because the property is considered to be located domestically and therefore not subject to provisions of foreign service under Rule 4. However, if one were to bring an action under Rule C and also name a vessel owner as a defendant in personam, certainly the full provisions of foreign service under Rule 4 would apply.

\textbf{K. A Word on Professional International Process Servers}

With all of the technical concerns raised in this discussion, the practitioner should know that there are a number of professional services

\textsuperscript{161} FED. R. CIV. P. Supp. B(2).
\textsuperscript{162} FED. R. CIV. P. Supp. C(3)(d).
which provide international service of process for all types of U.S. litigation. The author has successfully employed such services, and if in doubt this may be the way to go, particularly if Hague service is warranted. These companies have experience with service in a host of countries and have contacts in the countries and with the U.S. State Department to determine the latest requirements for service in a given jurisdiction. Courts have even recognized the benefits of utilizing such services.\(^{163}\) The costs for such services should be recoverable as costs of service to a prevailing plaintiff; but no reported decision could be found addressing that issue.

II. DISCOVERY IN TRANSNATIONAL LITIGATION

A. Review of Applicable Law

Unlike the law of service of process, there is surprisingly little in the Federal Rules of Civil Procedure governing transnational discovery. The general discovery rule, Federal Rule of Civil Procedure 26, is silent on foreign discovery, and case law on the matter does not seem to address Rule 26 at all. We can generally exclude discovery addressed to foreign parties who have entered an appearance and come under the jurisdiction of a U.S. court, who will be governed by the breadth of the discovery rules, and can be ordered to give discovery in the United States.\(^{164}\) Older cases holding that discovery addressed to foreign nationals, even when they are party defendants, must be made pursuant to foreign discovery rules and/or international convention\(^ {165}\) seem to have been supplanted by the United States Supreme Court's decision in Socité Nationale Industrielle Aérospatiale v. United States District Court,\(^ {166}\) addressed infra Part II.B. Therefore, discovery from nonparties or former employees and personnel of corporate parties, particularly depositions and requests for documents from nonparties, is of principal concern. However, only Federal Rule of Civil Procedure 28(b) addresses depositions in foreign countries.

There are two multilateral conventions concerning transnational discovery. The important one is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Discovery


\(^{166}\) 482 U.S. 522 (1987).
Convention). The United States ratified this Convention in 1972, and at the date of this writing thirty-eight other nations are parties to it.

The only other multilateral discovery convention in effect is the Inter-American Convention, with the 1979 Protocol. The Inter-American Convention by its terms applies to both service of process and discovery matters, but the United States has specifically opted out of the discovery provisions of the Inter-American Convention as set forth in the accession and reservation submitted by the United States at the time of signing. Therefore, the Inter-American Convention seems to have no application to transnational discovery involving U.S. litigation.

Apart from the Hague Discovery Convention, a bilateral treaty may exist between the United States and the country of destination. The United States Treaties and Other International Agreements series contains, in its index, a listing of treaties with individual countries by subject matter, and the practitioner intending to conduct discovery in a country which is not a party to the Hague Discovery Convention should search this source and/or the State Department Web site to determine whether a bilateral treaty might govern discovery. A review of the current state of such bilateral treaties and their conditions is beyond the scope of this Article.

The Vienna Convention on Consular Relations (Vienna Consular Convention) contains, at article 5(f), provisions for the limited assistance of consular officers in transnational discovery in the capacity of notaries and civil registrars. This authority is reflected in domestic U.S. legislation and is discussed infra Part II.G.

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169. Inter-American Convention, supra note 10.

170. Additional Protocol, supra note 11.

171. Inter-American Convention, supra note 10, art. 2, 14 I.L.M. at 339.


175. Id. art. 5(f), 21 U.S.T. at 83, 596 U.N.T.S. at 268.

Statutory authority is limited to provisions found at 28 U.S.C. §§ 1781-1784. These provisions give authority to the U.S. State Department to transmit and receive letters rogatory,177 recognize the inherent powers of U.S. courts to issue and enforce letters rogatory in the United States,178 and support application of the Hague Discovery Convention and traditional letters rogatory served in the United States.179 Section 1783 also governs the limited issuance of subpoenas to U.S. nationals in foreign countries. Finally, sections of the Code of Federal Regulations found at 22 C.F.R. §§ 92.55-92.65 govern the use of U.S. consular officers to conduct depositions and collect evidence, as authorized by the Vienna Consular Convention.

As with the law on transnational service of process, there is significant case law pertaining to transnational discovery. However, unlike service of summonses and other process, transnational discovery is left principally to the law of the nation where the discovery will take place, and U.S. laws provide less strictures on discovery than on service of process. The ancient international law principle of “comity” is the over-arching concern in U.S. court review of discovery procedures. It is the reaction of the target state to the conduct of discovery within its borders for which the practitioner must be concerned. In that regard, perhaps the most useful source for the law and procedures governing these matters is the U.S. State Department. The State Department Web site offers a lengthy bulletin as a “how to” guide to transnational discovery.180 This extremely useful bulletin includes citations to statutes, rules, case law, and internal procedures for the many aspects of transnational discovery. The author finds that consultation with both the State Department and the U.S. embassy, and perhaps local counsel, in the country of destination is critical to determine the requirements of the individual country where discovery is sought.

B. The One General Rule—Rule 28(b)

The only Federal Rule of Civil Procedure which directly addresses transnational discovery is Rule 28(b).181 This Rule provides in pertinent part that “[d]epositions may be taken in a foreign country”:

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178. Id. § 1782(a).
179. See id. §§ 1781-1782.
(1) pursuant to any applicable treaty or convention, or
(2) pursuant to a letter of request (whether or not captioned a letter rogatory), or
(3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or
(4) before a person commissioned by the court . . . [who has] the power by virtue of the commission to administer any necessary oath and take testimony.

In essence, the Rule sets forth that depositions may be taken pursuant to an applicable treaty or by any other method not prohibited by the laws of the United States and the country in question.182 According to the Advisory Committee Notes, the Rule as amended in 1993 is designed to make effective use of the Hague Discovery Convention and also follows the principles of comity with countries not signatories to the Convention as expressed in Société Nationale Industrielle Aérospatiale v. United States District Court.183

There is a critical distinction between the procedures for transnational discovery and the procedures for service of process as set forth in Rule 4. While resort to the Hague Service Convention is mandatory where that Convention applies, any of the four methods set forth in Rule 28(b) are, at least pursuant to the Rule, equally acceptable for the taking of foreign evidence. The only U.S. Supreme Court case pertaining to transnational discovery precisely addresses this issue. In Société Nationale Industrielle Aérospatiale v. United States District Court, the Court held that the Hague Discovery Convention, as applied to production of documentary evidence, is not the mandatory and exclusive procedure for obtaining documents and information located within the territory of a foreign signatory.184 Instead, the Hague Discovery Convention is “a permissive supplement” and “not a preemptive replacement” for other methods of obtaining evidence abroad under Rule 28(b) or otherwise.185 This application of the Hague Discovery Convention differs distinctly from the Hague Service Convention, discussed supra Part I.D.1.

Courts continue to recognize that the Hague Discovery Convention “is not the exclusive means for obtaining discovery” from foreign entities, nor “necessarily the means of first resort.”186 Courts have held

184. Id. at 529.
185. Id. at 536.
that even when discovery is sought in a member state, procedures for obtaining discovery are not limited to those in the Hague Discovery Convention.\textsuperscript{187} Other courts, pursuant to motions for protective order, have ordered that discovery should be obtained through provisions of the Federal Rules rather than through the Hague Discovery Convention.\textsuperscript{188} In a recent decision, one district court held that jurisdictional discovery would be more efficient and effective under the Federal Rules than under the Hague Discovery Convention.\textsuperscript{189} Another held that a defendant was not limited to responding to discovery pursuant to the Hague Discovery Convention where there was no sovereign interest in limiting defendant’s responses to procedures under the Hague Convention.\textsuperscript{190} In the case of a responding defendant, one court ordered the defendant to either appear in person in the United States for a deposition or voluntarily appear before a U.S. consul overseas.\textsuperscript{191} Where discovery is sought from a foreign sovereign or its instrumentality, the courts are sensitive to issues of comity, and will try to find the least inconvenient method for a foreign party to meet discovery requests.\textsuperscript{192}

Rule 28(b) also provides in part: “Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.” Therefore, Rule 28 clearly mandates an expansive and flexible reading of the procedures required for the taking of foreign evidence. Again, the practitioner’s concern should be directed as much towards complying with laws of the foreign state where the deposition or evidence will be collected as concentrating on meeting technical requirements under U.S. law. This issue is again addressed below with regard to discovery stipulations pursuant to Federal Rule of Civil Procedure 29.

\textsuperscript{187} Aérospatiale, 482 U.S. at 529; Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa 1997); cf. Roberts v. Heim, 130 F.R.D. 430, 437-38 (N.D. Cal. 1990) (allowing plaintiffs to take discovery from a Swiss defendant pursuant to the Federal Rules where Switzerland had signed but not yet ratified the Convention).


\textsuperscript{192} See, e.g., Compagnie Francaise D’Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 28-32 (S.D.N.Y. 1984). Interestingly, at least two courts have granted motions to dismiss on forum non conveniens grounds where a substantial amount of nonparty discovery was required under the Hague Discovery Convention, finding this would have impeded the parties if they could not pursue discovery through litigation in the home forum. Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992); see Pain v. United Techs. Corp., 637 F.2d 775, 788-90 (D.C. Cir. 1980) (a DOHSA case).
C. The Hague Discovery Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The first but not primary or exclusive method to obtain depositions and document production, both from parties and nonparties, is contained in the Hague Discovery Convention, which entered into force for the United States in 1972.¹⁹³ There are currently thirty-nine states party to this Convention.¹⁹⁴ As noted, the full text of the Hague Discovery Convention plus member state accessions and reservations are contained in the annotations to 28 U.S.C.A. § 1781. Such reservations are more restricted than in other conventions pursuant to article 33 of the Hague Discovery Convention, which permits only limited reservations to article 4 and Chapter II.¹⁹⁵ Nevertheless, as with other international conventions, the practitioner should carefully check these reservations and accessions. To assist in an understanding of the Hague Discovery Convention, the Hague Conference on Private International Law has published the Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.¹⁹⁶ This handbook has the same pedigree as that published on the Hague Service Convention.

The basic tenet of the Hague Discovery Convention is to formulate uniform procedures for the issuance and acceptance of letters of request, formerly known as letters rogatory. Article 1 provides that the letters of request may be used "to obtain evidence, or to perform some other judicial act," although it specifically provides that the "other judicial act" does not cover service of judicial documents (to which the Hague Service Convention applies).¹⁹⁷ Furthermore, article 1 mandates that


¹⁹⁴. These thirty-nine states are Argentina, Australia, Barbados, Belarus, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Italy, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, and Venezuela. Hague Conference on Private International Law, Full Status Report Convention #20, at http://www.hcch.net/el/status/stat20e.html (last modified Aug. 26, 2002).


¹⁹⁶. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS (1984). There are a number of articles which have been published concerning discovery in particular countries, especially Hague signatories. A review of such articles is beyond the scope of this Article.

“[a] Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.”\textsuperscript{198} Courts have interpreted this to mean that the Hague Discovery Convention may not be used for investigative, as opposed to discovery proceedings, and the proceeding must be “imminent.”\textsuperscript{199}

Article 2 provides for the appointment of a Central Authority to receive letters of request. As with the traditional method for letters rogatory, letters of request are drafted and sent between judicial authorities of the various states (sometimes through diplomatic channels, as discussed below). Articles 3 through 14 govern the preparation, issuance, transmittal and execution of letters of request for discovery. Article 3 specifies the contents of a letter of request. Model forms are appended to the Convention.\textsuperscript{200} Other articles concerning the translation of the letter into the language of the recipient nation if required,\textsuperscript{201} the handling of improperly drafted letters of request,\textsuperscript{202} and the persons who may attend and procedures for the actual execution of a letter of request,\textsuperscript{203} are similar to those contained in the Hague Service Convention.

Article 9 requires that a letter of request be executed in the designated state by applying that state’s law and procedures, except where the requesting authority requests a special method not incompatible with the law of the designated state. Article 10 also mandates that the requested authority shall apply “appropriate measures of compulsion” available by its internal law.\textsuperscript{204} This is critical, as transnational discovery may be compelled only through the Hague Discovery Convention or traditional letters rogatory. This is the advantage of formal discovery processes over informal stipulated discovery proceedings, as discussed below.

Article 11 provides for a witness’s assertion of privilege pursuant to the law of either the state where the litigation takes place or the state where the deposition is undertaken. Proof of execution of a letter of request is mandated by article 13, similar to that required under the Hague Service Convention.

\begin{itemize}
\item \textsuperscript{198} Id.
\item \textsuperscript{199} See Gen. Universal Trading Corp. v. Morgan Guar. Trust Co. of N.Y., 936 F.2d 702, 707 (2d Cir. 1991).
\item \textsuperscript{201} Hague Discovery Convention, supra note 167, art. 4, 23 U.S.T. at 2559-60, 847 U.N.T.S. at 242.
\item \textsuperscript{202} Id. arts. 5-6, 23 U.S.T. at 2560.
\item \textsuperscript{203} Id. arts. 7-10, 23 U.S.T. at 2560-62, 847 U.N.T.S. at 242-43.
\item \textsuperscript{204} Id. art. 10, 23 U.S.T. at 2561-62, 847 U.N.T.S. at 243.
\end{itemize}
Chapter II of the Hague Discovery Convention, articles 15 through 22, provides for the taking of evidence by diplomatic officers, consular agents and commissioners. This is also generally covered by the provisions of Rule 28(b), 22 C.F.R. §§ 92.55-92.65, and the Vienna Consular Convention.\(^\text{205}\) Essentially, diplomatic and consular officers administer oaths and take depositions and evidence in the place where they normally perform their functions (i.e., embassies and consulates) subject to compatibility with local law, and approval of the foreign state. Distinction is also made between taking the deposition of nationals of the foreign state and nationals of the requesting state (the state represented by the diplomatic or consular officer) who reside in the foreign state.\(^\text{206}\) Article 16 allows the consular officer to take noncompulsory depositions of both categories of witnesses. Article 18, however, provides that the diplomatic officer or commissioner “may apply to the competent authority” of the foreign state “for appropriate assistance to obtain the evidence by compulsion.”\(^\text{207}\)

Also, pursuant to article 21, the taking of depositions and other evidence by diplomatic officers or commissioners may be limited if the kind of evidence they are taking is not compatible with the law of the foreign state or contrary to any permission granted by the foreign state.\(^\text{208}\) The manner in which the evidence is taken must be pursuant to the law of the requesting state, unless that is a manner forbidden by the law of the foreign state. Essentially, discovery under Chapter II of the Hague Discovery Convention may be taken as long as it does not violate the law of the foreign state and is also subject to either general or specific permission granted by the foreign state for such activities.

Article 29 provides that the Hague Discovery Convention replaces articles 8 through 16 of the Hague Convention on Civil Procedure of 1905\(^\text{209}\) and the Hague Convention on Civil Procedure of 1954.\(^\text{210}\) However, articles 30 through 32 preserve certain aspects of the prior Conventions which are not derogated by the Hague Discovery Convention or other agreements between the parties. Also, bilateral treaties may exist between the United States and other countries which

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207. Id. art. 18, 23 U.S.T. at 2566, 847 U.N.T.S. at 245.
208. Id. art. 21(d), 23 U.S.T. at 2567.
are not signatories to the Hague Discovery Convention. Such treaties should be consulted before pursuing discovery in those forums.

D. Obtaining Evidence Through Traditional Letters of Request (Letters Rogatory)

While the Hague Discovery Convention essentially codifies a method for obtaining evidence through letters of request (formerly known as letters rogatory), Rule 28(b) provides this as a separate category, which would apply to discovery in states not party to the Hague Discovery Convention. This is based upon the inherent authority of courts to issue letters rogatory (now known as letters of request). However, according to case law which generally follows traditional methods for handling letters rogatory, and pursuant to procedures recognized by the U.S. State Department, the traditional forms of letters of request may be far more restrictive than the type of evidence that can be obtained under Rule 28. The situation usually involves the transmittal of questions or requests for specific documents and information to the non-party witness in the foreign forum. The federal courts have inherent power to transmit a properly drafted letter of request directly to the foreign judicial authority, or alternatively to transmit the request via State Department channels, for which there is statutory authorization.

Depending upon the law of the forum where the discovery is to take place, discovery authorized under the letter of request may be limited to a deposition on written questions or similar restricted information. This may be much less satisfactory than taking a full deposition. If the law of the jurisdiction permits, and a nonwilling witness can be compelled by the local authority, discovery through a letter of request may be as broad and complete as that permitted in the United States under the Federal Rules. However, the disadvantage of the letter of request method is the time and expense involved in having the letter of request transmitted and executed. Also, U.S. courts have complete discretion in the scope of such a letter of request, and the courts may order discovery under certain

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conditions or even broaden those conditions, consistent with foreign law. The U.S. State Department discourages this method if the parties can stipulate to discovery methods without violating the laws of the forum state.

Again, limits to discovery through letters of request depend upon the law of the targeted forum, as there appears to be no restriction in U.S. case law on the precise extent of discovery under a traditional letter rogatory. U.S. courts have broad discretion to issue letters rogatory, and usually balance party and state interests to determine whether any discovery request might violate a foreign state's laws or a party's privileges under those laws. The practitioner should consult with the State Department and perhaps local counsel in the target country to determine the extent of discovery permissible. If the foreign state permits, the letter would probably be transmitted and executed in similar fashion to that outlined in the Hague Discovery Convention.

E. Subpoena of U.S. Citizens and Residents Abroad

Perhaps it goes without saying that the subpoena power of U.S. courts does not extend to foreign nationals in foreign countries. This means that a foreign nonparty witness cannot be compelled by U.S. authorities to respond to discovery requests. However, the same does not hold true for U.S. citizens and residents living abroad. Under 28 U.S.C. § 1783, a U.S. court may order the appearance of, or production of documents by, a national or resident of the United States in a foreign country by issuance of a subpoena. The court need only find that it is impossible to obtain the witness's testimony or production of documents in admissible form without the witness's personal appearance.

216. See Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446-47 (W.D. Mich. 1993) (permitting a telephone deposition); Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1365-66 (7th Cir. 1985) (balancing the conveniences and affirming the trial court's order that a Greek witness be brought to the United States for deposition).


218. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1474-79 (9th Cir. 1992); Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1279-83 (7th Cir. 1990); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997-99 (10th Cir. 1977).


221. This appears to be the exclusive provision for service of any subpoena overseas, as other statutes do not authorize such service. See generally Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980).

subpoena must be served on the witness, "in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country." 223 This implicates the formal service of process addressed in Part I.D of this Article.

This statutory authority for service of subpoenas on U.S. nationals resident abroad is part of Federal Rule of Civil Procedure 45(b)(2). The Supreme Court long ago held that U.S. citizens residing in foreign countries continue to owe allegiance to the United States and are bound to return to the United States to attend court proceedings when summoned. 224 The Court held that the power to compel the return of citizens is inherent in the nation's sovereignty. 225 Title 28 U.S.C. § 1784 confirms the contempt power of U.S. courts over U.S. citizens/residents abroad who fail to comply with a subpoena issued pursuant to 28 U.S.C. § 1783. Since actual service of the subpoena must be made pursuant to the Hague Service Convention or otherwise under international law, 226 the law of the forum in which the U.S. citizen/resident is residing would of course come into play with regard to technical service.

F. Enforcement of Foreign Letters of Request in the United States

Inasmuch as the enforcement of formal requests for discovery in foreign jurisdictions is subject to the law of the discovery forum, not much further can be said about the use of letters or requests for foreign discovery in U.S. litigation. However, some of the issues that might arise are illustrated by the U.S. recognition and enforcement of foreign courts’ letters of request.

Title 28 U.S.C. § 1781 authorizes the State Department, and recognizes the inherent power of the federal courts, to receive letters of request from foreign tribunals. Title 28 U.S.C. § 1782 gives specific authority to the district courts to assist foreign tribunals and execute letters of request. The federal courts have broad discretion to order discovery pursuant to a foreign letter of request, and their orders will only be overturned for an abuse of discretion. 227 Enforcement often comes in the form of a subpoena issued by the U.S. court. 228 There is no need to exhaust foreign discovery processes before resorting to the

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223. Id. § 1783(b).
225. Id. at 437-38.
228. See Lancaster Factoring Co. v. Mangone, 90 F.3d 38, 40 (2d Cir. 1996).
request for U.S. assistance. Oddly, even though applicable conventions and traditional practice refer to civil discovery, a number of reported decisions apply these statutory provisions to requests by foreign entities for criminal discovery.

Two issues of particular note apply to this procedure. First, there is some dispute over which foreign entities’ requests will be honored. Some courts apply a strict interpretation of the language of the statute and traditional practice that a request must come from a “foreign or international tribunal.” On the other hand, some courts will assist “any interested person” in the foreign proceedings.

Second, courts are split on whether a U.S. court, before assisting with a letter of request for discovery, must determine whether the foreign law would permit the extent of the discovery requested. Several circuits have held that a determination of admissibility under the foreign law must be made before the U.S. discovery is ordered. Other circuits have held that no showing of the permissibility of the discovery in the foreign forum is necessary. In many cases the courts, highly sensitive to issues of comity with the foreign state and desiring not to “step on the toes” of the foreign tribunal, will grant requests without inquiry.

233. See Okubo v. Reynolds, 16 F.3d 1016, 1019 (9th Cir. 1994); Malev, 964 F.2d at 101.
234. In re Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992); Lo Ka Chun v. Lo To, 858 F.2d 1564, 1566 (11th Cir. 1988).
G. Discovery on Notice Before a Person Authorized to Administer Oaths in the Targeted Forum

This procedure is also subject to the law of the targeted forum. Assuming this provision applies principally to depositions or to production of documents by "records custodians," where the person authorized to administer oaths and take depositions is a consular officer, the conditions set forth in the State Department's Bulletin on Obtaining Evidence Abroad should be followed. The technical requirements are governed by 22 C.F.R. §§ 92.55-92.65. This method may also include the promulgation of discovery by a local attorney, notary, counselor, or other official with such authority under the law of the targeted forum. Once again, this depends upon the law of the forum as there is no restriction on the type of "person authorized" under the Federal Rules.

H. Discovery Before a Person Commissioned by the Court

The same observations made with regard to discovery before persons authorized to administer oaths in the target forum apply to this method. Following the language in the Hague Discovery Convention, permission must be obtained from the targeted forum before a person commissioned by a U.S. court would be permitted to conduct discovery in that forum.237

This is an appropriate time to emphasize the importance of permission. As noted earlier, Rule 28(b) does not provide for exclusion of evidence where the evidence was obtained by a method not in compliance with U.S. law. The statutory language indicates quite the opposite. The State Department advises that many countries conduct discovery, if at all, differently than in common law countries.238 Many do not take verbatim transcripts of depositions or perform other discovery as in the United States. Some nations forbid depositions under any circumstances. Only a thorough review of a nation's laws through referral to State Department bulletins, U.S. embassies, and local counsel in the discovery forum will provide this critical information.

Rule 28(b) is silent on the effect of violating foreign law in the taking of depositions or evidence. No case law could be found addressing that issue, and apparently there are no reported decisions wherein evidence was excluded from trial because it was obtained in

violation of the law of a foreign forum. The more immediate concern for the practitioner is the displeasure of the foreign forum for violation of its local laws, perhaps even leading to the arrest and criminal prosecution of the practitioner if he is caught in the foreign forum taking discovery in violation of local law. The State Department warns against this, and there are numerous practical examples of this type of risk. 239

I. Stipulations Regarding Transnational Discovery Under Rule 29

In light of what has been set forth above, the general and flexible provisions for discovery stipulations under Rule 29 are a bit troubling. In fact, most practitioners seem to conduct transnational depositions and other evidence production by stipulation, without the trouble of following the Hague Discovery Convention or formal letters of request. This certainly works provided that nothing done during the course of discovery violates the law of the targeted forum. As discussed above, the Hague Discovery Convention and the provisions of Rule 28(b), unlike the strict interpretation of the Hague Service Convention, do not mandate that one must follow to the letter the terms of the Convention or alternative methods. The case law makes clear that transnational discovery methods are to be as flexible and broad as possible. Therefore, it would seem that broad stipulations under Rule 29 are acceptable provided they do not violate the forum nation’s local law, and even then such discovery might survive receipt by the U.S. court, provided counsel survived a return from the country where discovery took place. As no reported case law has been found on this point, counsel should exercise caution and discretion.

J. Practicalities

In preparing to take evidence abroad, particularly depositions, one should always consult with the State Department and perhaps the embassy or local counsel in the intended forum. In addition to

239. Practical experience in the author’s firm gives some examples. One of the author’s partners had to request special permission from authorities in Bahrain before undertaking depositions on a vessel located there. A special letter of introduction from a relative of the ruling sheik had to be obtained to permit the partner to enter the country, and failure to do so may have led to criminal prosecution for undertaking judicial proceedings in the country without permission. The author likewise has experience taking depositions in Japan. There, in addition to a requirement that depositions be taken exclusively before a United States consular officer in the United States Embassy, Japan requires that all attorneys entering Japan for purposes of deposition obtain a special visa. If they violate any of the terms and conditions for taking discovery in Japan, their visa can be revoked and they would be immediately extradited from the country. It is certain that there are countless other examples like this.
compliance with local law and U.S. consular procedures (if applicable) to the actual taking of discovery, do not forget logistical practicalities. Depending upon the local rules of a district or state court, a U.S. court reporter may be necessary to take a deposition. The court reporter should likewise be familiar with procedures necessary for taking depositions overseas, including special permits and visa requirements, etc. Likewise, in many circumstances translation services will be necessary. Experience has shown that courts will usually accept a certified or approved translator from the country of the deposition. Often the U.S. embassy can help in locating such an individual. Again, counsel should make all proper arrangements for permission of all involved to enter the country and meet procedures for their attendance in a legal capacity (visas, etc.), separate and distinct from meeting the requirements to take the deposition itself under applicable convention, procedure and/or local law. The State Department and U.S. embassies are the primary sources of assistance. In many jurisdictions local counsel may also be worth consulting, particularly if problems arise with the local authorities after arrival, when the parties have already undertaken the significant time and expense associated with transnational discovery.

Finally, the author has found it helpful to sometimes obtain a specific order from the U.S. court (distinct from any letter of request or letter rogatory) confirming that the foreign deposition may go forward, and stating its terms and conditions. This should help to prevent any procedural objections or attempts to exclude evidence by an opposing party, particularly in absence of clear conformance with procedures if the parties are unable to stipulate under Rule 29. This may help to assure acceptance of the evidence obtained in court, although it certainly would have no bearing upon compliance with the local law of the target forum.

III. CONCLUSION

If there is any general principle to be gleaned from this discussion, it is that parties should pay close attention to the procedural requirements for transnational litigation. A great number of cases reviewed concerning transnational service of process involved circumstances where a plaintiff failed to comply with provisions of an international convention or Rule 4 when attempting to serve foreign entities. Because courts (and practitioners) do not deal with transnational litigation on a regular basis, some courts are not wholly familiar with the correct procedures. There are also, particularly with regard to transnational service of process, a number of unsettled issues despite international conventions, detailed federal rules and statutes, and voluminous case law. Transnational
discovery may similarly hold some pitfalls for precisely the opposite reason, due to the lack of extensive binding authority. Hopefully the general policy considerations of flexibility and broad interpretation in transnational discovery will resolve those issues. Nevertheless, the practitioner should not hesitate to consult the many authorities discussed in this Article if in any doubt about the procedures upon which he enters.