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Obtaining documents abroad: A primer for Illinois attorneys

By Timothy J. Chorvat and Matthew A. Wlodarczyk

How can an Illinois attorney obtain documents that are relevant to a lawsuit pending here from an entity or individual located in another country? It can be quite difficult, depending on the location of the materials and the presence or absence of connections between the custodian of the records at issue and parties to the Illinois litigation.

This article examines the law relating to obtaining documents from sources abroad and suggests some approaches that Illinois attorneys can use to maximize their likelihood of obtaining useful information.

American pre-trial procedures permit broad discovery of documents relevant to the litigation. By contrast, most other countries practice significantly more limited discovery and regard American-style document production as overly burdensome and intrusive. As a result, many foreign states limit their cooperation with efforts to obtain documents located within their borders in connection with pretrial discovery in the United States.

An international treaty, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention on Evidence"), provides a legal framework for seeking materials from entities and individuals located in signatory states. *See* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <http://www.hcch.net/index_en.php?act=conventions.text&cid=82> (last visited Apr. 26, 2011). However, most countries have implemented a procedure available under Article 23 of the Hague Convention on Evidence that greatly limits the ability of parties in the United States to use that framework to obtain materials from their nationals. Accordingly, litigants seeking access to documents located abroad, especially documents in the possession of nonparties, may encounter obstacles beyond those they would face if the documents were located in this country.

In light of the restrictions that most foreign states place on pre-trial document discovery, an Illinois litigant seeking documents located abroad should consider first whether ordinary discovery procedures provide a means to obtain the desired information, which can be the case if a party to the litigation, or a non-party subject to a subpoena, controls the documents. If that is not possible, then the party can turn to the procedures that the Hague Convention on Evidence provides.

I. Using Standard Discovery Tools.

Because many foreign jurisdictions impose barriers on the ability of a party to litigation in the United States to obtain documents from their nationals, a logical first step is to apply the standard discovery tools available here, to the extent possible. That is, if a party to the litigation has access to the materials that are located abroad, such as in the case of documents held by a foreign subsidiary of an American corporation, ordinary discovery techniques permit another party to request those materials from the party.

The Supreme Court of the United States has held that a trial court may order a party subject to its jurisdiction to produce documents it controls in a foreign jurisdiction. Federal district courts and state trial courts have, in turn, applied broad pre-trial document discovery procedures to obtain documents that parties control abroad. Similarly, if a non-party in the United States has copies of or access to the materials, then proceeding through a subpoena to that non-party may be easier and more productive than proceeding directly to seek the materials from an

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individual or entity in another country.

A. Obtaining Documents From Parties.

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District Court of Iowa*, the Supreme Court of the United States addressed the tension between the Hague Convention on Evidence and traditional, broad document production permitted in the United States. *See generally* 482 U.S. 522 (1987). In *Aérospatiale*, a French party claimed that the district court was required to comply with the Hague Convention on Evidence procedures, and hence the limitations of Article 23, to block a request for documents abroad that were within the party's control. *See id*. at 524-26. The Supreme Court rejected that claim and held that the Convention procedures for obtaining documents located in a signatory's jurisdiction are neither mandatory nor exclusive. *See id*. at 538-39.

The Court held that the Hague Convention on Evidence did not strip "the District Court of the jurisdiction it otherwise possesses to order a foreign national party before it to produce evidence physically located within a signatory nation." *See id*. at 539-540. The Supreme Court refused to require "first resort" to the procedures provided by the Hague Convention on Evidence when seeking documents from foreign litigants. *See id*. at 542. The Court noted that a French "blocking statute," which criminalized document disclosure to American courts, did not affect its conclusion because blocking statutes do not divest "an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute." *See id*. at 544 n. 29.

Although the Supreme Court did not require first resort to the Hague Convention on Evidence, the Court did not eliminate those procedures as a tool in cross-border discovery. Rather, the Court decided that a court deciding whether to require resort to procedures under the Hague Convention on Evidence must consider "the particular facts, sovereign interests, and likelihood that such resort will prove effective." *Id*. at 544. As discussed below, however, a substantial majority of signatories limit discovery pursuant to Article 23 of the Hague Convention on Evidence, meaning that the likelihood that Hague Convention procedures will prove effective in document production may be remote.

In *Aérospatiale*, the Supreme Court noted that comity is relevant to decisions involving the discovery of documents abroad. As a result, parties and courts seeking documents abroad should consider the materiality of the documents requested to the litigation, the specificity of the document request, where the documents originated, alternative means of securing the documents, and the "extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." *See id*. at 544 n. 28 (citing Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986)). Recognizing that many foreign nations oppose American-style discovery, the Supreme Court directed American courts to "exercise special vigilance" to prevent discovery abuses and unnecessarily burdensome discovery requests. *See id*. at 546.

In addition to *Aérospatiale*, the Federal Rules of Civil Procedure provide a basis for discovering documents abroad. Federal district courts have authority under Rule 34, which permits discovery of relevant documents in a party's control, to compel parties to produce documents abroad. *See* Fed. R. Civ. P. 34, 26(b); *Camden Iron and Metal, Inc. v. Marubeni American Corporation*, 138 F.R.D. 438, 441 (D. N.J. 1991). In order to exercise that authority, a court must have personal jurisdiction over the party and the party must have control over the documents. *See In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979) (citation omitted). The location of the requested documents is irrelevant. *Id*. at 1144 (citation omitted).

Control may be apparent, such as when a party itself possesses documents that are located abroad. When a party's affiliate abroad possesses documents in other countries, courts look to the nature of the relationship between the party and the affiliate and the party's ability to obtain the documents. If that relationship gives the party the right, ability, or authority to obtain the requested documents from the non-party abroad, control exists. *See Camden Iron*, 138 F.R.D. at 441; *In re Uranium*, 480 F. Supp. at 1145 (concluding that control is a question of fact and depends on practical control over a corporate affiliate). Such a situation may arise where a parent company or subsidiary of the party located abroad has physical possession of the requested documents. *See Camden Iron*, 138 F.R.D. at 441; *In re Uranium*, 480 F. Supp. at 1144-45.

Although it does not appear that the Illinois Supreme Court or the Illinois Appellate Courts have addressed the issue, in *John Crane, Inc. v. Admiral Insurance Company*, an Illinois trial court concluded that it had authority to compel a party controlling documents abroad to produce the documents in pre-trial discovery. *See* 2006 WL 5866550 at 7 (Ill. Cir. Cook County). In *John Crane*, a party's parent company was incorporated in the United Kingdom, and the opposing party sought to compel the plaintiff to produce documents in the parent company's possession. *See id*. at 1-2. Relying on *Aérospatiale*, the court concluded that implementing the Hague Convention on Evidence procedures to obtain the documents was unnecessary. *See id*. at 5. The court also found that Illinois Supreme Court Rule 214, which grants Illinois litigants broad power to discover documents controlled by an adversary that are "relevant to the subject matter of the action," provided authority to compel discovery abroad. *See* Ill. Sup. Ct. Rule 214, Committee Comments (1995); *John Crane*, 2006 WL 5866550 at 7.

To determine whether to compel production, the *John Crane* court analyzed: (1) the likelihood a Letter of Request to obtain the documents would be successful; and (2) whether the party being directed to disclose documents had sufficient control over the documents abroad. *See* 2006 WL 5866550 at 5. The likelihood of a successful Letter of Request is country-specific and depends on the signatory's Article 23 declaration and other laws, and possibly the specificity of the document request. In *John Crane*, the court found that based on the United Kingdom's case law, statutes, and the Hague Convention on Evidence, a U.K. court would reject a Letter of Request for documents related to the subject of the litigation as impermissibly broad. *See id*. at 6.

The court then found that the party before it had control of documents that its parent company, a non-party, possessed abroad. *See id*. at 2, 7. The court reasoned that the parent company had involved itself with the party's litigation, the parent company stood to benefit from the litigation, and that the party would have likely had access to the documents in the ordinary course of business. *Id*. at 7. Accordingly, the court compelled the party to produce the documents, relying on federal law and Illinois Supreme Court Rule 214. *See id*.

In light of the Supreme Court's decision in *Aérospatiale*, other case law, and the broad document discovery permitted under Illinois

Supreme Court Rule 214, litigants in Illinois courts should attempt to obtain documents abroad through those mechanisms, if a party to the litigation controls the materials.

B. Subpoenas Duces Tecum.

Subpoenas duces tecum provide another method for obtaining documents located abroad, so long as those materials are within the control of a non-party that is subject to the service of a subpoena. Illinois Supreme Court Rule 214 provides that "[d]iscovery of documents . . . in the custody or control of a person not a party may be obtained by serving him with a subpoena *duces tecum* . . . . " Ill. Sup. Ct. Rule 214, Committee Comments (1995). If the nonparty that possesses the documents abroad has a corporate affiliate in the United States, an Illinois court may compel that affiliate to produce documents pursuant to a subpoena. *Cf. John Crane, Inc. v. Admiral Insurance Company*, 2006 WL 5866550 at 7 (Ill. Cir. Cook County) (finding authority to compel a party to produce documents held by its foreign parent company).

II. Obtaining Documents Held by Nonparties.

If no entity or individual in the United States has control over the materials that a party seeks to obtain, then the party can employ the technique specified by the Hague Convention—the issuance of Letters of Request to a court in the nation where the documents are. Letters of Request are issued by a domestic court to a foreign court, requesting that the foreign court direct the production of specified evidence.

Even in the absence of a treaty, a litigant acting in collaboration with a court may issue a Letter of Request to a foreign court, seeking assistance obtaining documents. Many countries, however, have policies that oppose pretrial document production and accordingly may refuse to cooperate with Letters of Request seeking relevant documents. Litigants must research document discovery policies and practices on a country-by-country basis prior to initiating the Letter of Request process, which can be complex. *See* 1 Bruno A. Ristau, *International Judicial Assistance* § 3-3-2 (2000 Revision) (discussing requirements for Letters of Request absent a treaty).

The Hague Convention on Evidence, of which the United States is a signatory, provides a legal framework for using Letters of Request to obtain documents located within another signatory's jurisdiction. *See generally* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <http://www.hcch.net/index_en.php?act=conventions.text&cid=82> (last visited Apr. 26, 2011) (providing full text of the Hague Convention on Evidence and listing 47 signatory states).

Under the Hague Convention on Evidence, a court may issue a Letter of Request to a court in another signatory nation. Letters of Request must be sent to the signatory's designated "Central Authority." *See id.* at Articles 1, 2; *id*. at Authorities, <http://www.hcch.net/index_en.php?act=conventions.authorities&cid=82> (listing Central Authorities) (last visited Apr. 26, 2011). Because a court must issue a Letter of Request, a party seeking discovery must work in cooperation with the Illinois or federal court before which the action is pending. Typically, that means that the party must file a motion asking the court to issue a Letter of Request, specifying the materials being sought and attaching the proposed form for the Letter of Request. *See generally* 1 Bruno A. Ristau, *International Judicial Assistance* § 5-2 (2000 Revision).

The Letter of Request process provides litigants an effective method to procure known documents in other countries for use at trial. However, depending on the national policy of the requested authority, the receiving court may limit, resist, or reject Letters of Request seeking production of documents, particularly if the request is broad or unfocused. Such a policy often will be set forth in a formal reservation under Article 23 of the Hague Convention on Evidence.

A. Article 23

Article 23 of the Hague Convention on Evidence authorizes signatories to reserve a right under the treaty, by issuing a declaration, to refuse to execute Letters of Request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." *See* Hague Convention on Evidence, Article 23. A substantial majority of the Hague Convention on Evidence's signatories have made declarations under Article 23, often in anticipation of Letters of Request from United States courts seeking broad access to documents. Only the Czech Republic, Israel, the Slovak Republic, and the United States declined to make declarations objecting to the pre-trial discovery of documents. *See* U.S. Department of State Bureau of Consular Affairs, Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, <http://travel.state.gov/law/judicial/judicial_689.html> (last visited Apr.

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26, 2011). Countries with Article 23 declarations typically adopt Article 23 verbatim, stating that their courts "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries." *See generally* Status Table, Hague Convention on Evidence, <http://www.hcch.net/index_en.php?act=conventions.status&cid=82> (listing, by signatory, declarations and reservations) (last visited Apr. 26, 2011). In other words, many countries have reserved a right to refuse, for example, a pre-trial discovery request under Illinois Supreme Court Rule 214 for any documents "relevant to the subject matter of the action."

Fortunately, an Article 23 declaration is not necessarily fatal to a litigant's effort to obtain documents abroad from a nonparty. To begin with, Article 27 permits signatories to "permit, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions." *See* Hague Convention on Evidence, Article 27. Accordingly, signatories may permit pre-trial document discovery on broader terms than their Article 23 declarations allow. To determine whether such permission might be granted, litigants should analyze the scope of the materials they would like to obtain, and then tailor their document requests to the receiving country's policies regarding pre-trial document discovery.

Litigants are most likely to obtain documents from nations with Article 23 limitations by issuing narrowly tailored Letters of Request seeking specifically defined documents. A foreign court is more likely to cooperate with a Letter of Request seeking documents if the court finds the Letter of Request is not "for the purpose of obtaining pre-trial discovery of documents," which is far more probable if the request specifically names the author, title of the document, and any other relevant, specific information. Litigants should utilize available information sources and discovery methods to obtain specific information about relevant documents. For example, discovery of domestic documents may lead to the identification of specific, evidentiary documents abroad. Letters of Request that include interrogatories asking about the existence of documents also may help to identify particular documents. Cross-border depositions, which many foreign judicial systems regard more favorably than document discovery, may produce testimony that describes specific documents.[1]

Once specific documents are identified, a Letter of Request outside the Article 23 limitations may prove more successful, particularly if the foreign court concludes that the requested materials are evidentiary rather than simply pre-trial document discovery.

A few signatories have drafted their Article 23 declarations to bar litigants from using Letters of Request to locate specific documents. The United Kingdom, for example, defines Letters of Request requiring a person to identify documents as Letters of Request "issued for the purpose of obtaining pre-trial discovery of documents," which are subject to rejection under Article 23. *See* United Kingdom of Great Britain and Northern Ireland Declarations and Reservations, Hague Convention on Evidence, <http://www.hcch.net/index_en.php?act=status.comment&csid=564&disp=resdn> (last visited Apr. 26, 2011).

B. Blocking Statutes

In addition to Article 23 declarations, some countries have blocking statutes that preclude pre-trial document production. Blocking statutes criminalize or sanction persons who produce documents to foreign litigants. Blocking statutes may thwart efforts to obtain documents from non-parties in those countries.

On the other hand, courts in the United States that possess personal jurisdiction over a party may compel that party to produce documents, irrespective of a blocking statute potentially subjecting the party to punishment abroad. *See Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n. 29 (1987) (citation omitted). In the same manner that an American court cannot reach into a foreign jurisdiction to demand disclosure by a nonparty, a blocking statute cannot strip an American court of its power to order a party over which it has jurisdiction to produce documents. *See id*.

At the same time, American courts will consider blocking statutes in moderating their application of American-style discovery abroad, in line with the principle of exercising jurisdiction reasonably. *See id*. In particular, courts consider blocking statutes when determining whether to sanction a party refusing to comply with an order to produce documents. Nevertheless, sanctions are still possible, particularly if a court finds that a party did not act in good faith in efforts to comply with a court order to produce documents. *See Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 526 (N.D. Ill. 1984).

Conclusion

An Illinois attorney seeking to obtain documents or materials that are located in other countries may draw upon several distinct tools. As an initial matter, seeking documents that are located abroad, but within the control of a party to litigation, can be as straightforward as issuing a document request to the party with access to the materials. A court may order a party subject to its jurisdiction to produce documents abroad, regardless of restrictions imposed by the foreign jurisdiction, so long as the court has jurisdiction over the party and the party controls the documents. Similarly, if documents are within the control of a non-party that is subject to service of a subpoena duces tecum, then the party seeking that information can proceed in the ordinary fashion.

If no individual or entity subject to the jurisdiction of the court here controls the materials being sought, then Letters of Request provide an avenue for obtaining evidence and other materials, but litigants should be alert to the fact that many countries have policies opposed to broad pre-trial discovery, as it is practiced in the United States, and thus may refuse to cooperate with such a request. Depending on the specific nation involved, more tailored and specific requests are more likely to be successful than broader fishing expeditions. ■

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1. For a discussion on using Letters of Request to obtain deposition testimony from witnesses abroad, see Timothy J. Chorvat and Jill M. Hutchison, *Obtaining Deposition Testimony from Witnesses Abroad: A Primer for Illinois Lawyers*, 54 Trial Briefs No. 10, June 2009, at 1.

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Tuesday, 6/7/11-Teleseminar—Inter-Species Mergers: Combining and Converting Different Types of Business Entities, Part 1. 12-1.

Wednesday, 6/8/11- Teleseminar—Inter-Species Mergers: Combining and Converting Different Types of Business Entities, Part 2. 12-1.

Wednesday, 6/8/11- Chicago, ISBA Chicago Regional Office—Issues Facing Municipalities in a Difficult Economic Climate. Presented by the ISBA Local Government Section. 12:30-5:00.

Thursday, 6/9/11- Rock Island, Stoney Creek Inn—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. 8:30-12:45.

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Friday, 6/10/11- Bloomington, Holiday Inn and Suites—Legal Ethics in Corporate Law- 2011. Presented by the ISBA Corporate Law Department Section. 12:30-4:45. Max 90.

Friday, 6/10/11- Chicago, ISBA Regional Office—Third Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 9-5.

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