

Legislative History for Connecticut Act

HB 7364	PA 324	1991
House 7351-7358		(8)
Senate 3302-3303, 3342-3343		(4)
Judiciary 977-978, 1158-1160, 1161-1162, 1299A-1299PP		(49)
(See) More testimony in bill file		61P.

Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate
and House of Representatives Proceedings

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JOINT
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HEARINGS

JUDICIARY
PART 4
961-1299PP

1991

S-323

CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
1991
TRAILER SESSION

VOL. 34
PART 10
3281-3627

H-604

CONNECTICUT
GEN. ASSEMBLY
HOUSE

PROCEEDINGS
1991

VOL. 34
PART 19
7068-7429

tcc

House of Representatives

Tuesday, May 28, 1991

Thank you, Madam Speaker. The Planning and Development Committee will meet tomorrow one half hour before the start of the session to consider a bill referred from the floor.

DEPUTY SPEAKER POLINSKY:

Thank you, sir. Further announcements or Points of Personal Privilege? If not, the Clerk please return to the Call of the Calendar.

CLERK:

Page 3, Calendar 478, House Bill 7364, AN ACT CONCERNING INTERNATIONAL OBLIGATIONS AND PROCEDURES.

Favorable Report of the Committee on Judiciary.
DEPUTY SPEAKER POLINSKY:

Representative Tulisano of the 29th.

REP. TULISANO: (29th)

Madam Speaker; I move for acceptance of the Joint Committee's Favorable Report and passage of the bill:

DEPUTY SPEAKER POLINSKY: In legal consultants' re

The question is on acceptance and passage. Will you remark, sir?

REP. TULISANO: (29th)

Yes, Madam Speaker. The Clerk has an amendment, LCO6711. I ask it to be called and permission to summarize the courts and the courts.

DEPUTY SPEAKER POLINSKY:

tcc

House of Representatives

Tuesday, May 28, 1991

Will the Clerk please call LC06711, which shall be designated House Amendment "A".

CLERK:

LC06711, House "A", offered by Representative
Tulisano.

DEPUTY SPEAKER POLINSKY: *

The gentleman has asked leave of the Chamber to summarize. Without objection, please proceed, sir.

REP. TULISANO: (29th)

Yes, Madam Speaker. The amendment deletes the section of the bill that requires Superior Court instead of Supreme Court judges to make rules regarding discovery and codifies existing Practice Book rules with regard to that area.

It reinstates current law regarding the court's authority to order any party to disclose on disclosure and production which may have been modified by the file copy and it deletes foreign legal consultants from listed exceptions and nonlawyers who may practice law and deletes the amount -- that section allowing individuals admitted to the Bar of the United States to practice before the court.

The amendment requires courts of this state to enforce judgments of foreign courts in accordance with a law that we had passed a couple of years ago, the

tcc

House of Representatives

Tuesday, May 28, 1991

Foreign Judgements Act and also establishes a new procedure by which one may begin to perpetuate testimony before an action is brought by bringing a petition to court seeking to get information much like is done under the federal rules and it modifies Section 2 of the bill making it clear that treaty or convention supersedes state statute which is obviously the law. We're putting in statutory language.

I move passage of the -- adoption of the amendment.

DEPUTY SPEAKER POLINSKY:

The question is on adoption of House "A". Will you remark? Will you remark further? If not, let's try your minds. All those in favor please indicate by saying aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER POLINSKY:

Opposed nay.

REPRESENTATIVES:

The ayes have it.

The amendment is adopted and ruled technical.

House Amendment Schedule "A":

After line 15, insert the following and renumber the remaining sections accordingly:

"Sec. 2. (NEW) (a) If any applicable treaty or convention including, but not limited to, the Hague

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House of Representatives

Tuesday, May 28, 1991

Convention on the Taking of Evidence Abroad, provides for discovery outside the United States of America, the discovery methods agreed to in such treaty or convention shall be employed.

(b) If any applicable treaty or convention renders discovery inadequate or inequitable but does not prohibit additional discovery, the superior court may, upon application, order additional discovery under such terms and conditions as the court deems just and equitable."

In line 19, delete the opening bracket.

In line 28, delete the closing bracket.

Delete lines 29 to 72, inclusive, in their entirety.

In line 115, after the semi-colon insert "OR"

In line 118, insert a period after "50a-101" and delete "; (4) ANY"

Delete lines 119 to 124, inclusive, in their entirety.

In line 127, delete "Such rules shall not make it"

Delete lines 128 to 130, inclusive, in their entirety.

After line 130, add the following and renumber the remaining sections accordingly:

"Section 6. Section 33-182a of the general statutes is repealed and the following is substituted in lieu thereof:

As used in this chapter the following words shall have the meaning indicated:

(1) "Professional service" means any type of service to the public which requires that members of a profession rendering such service obtain a license or other legal authorization as a condition precedent to the rendition thereof, limited to the professional services rendered by dentists, naturopaths, osteopaths, chiropractors, physicians and surgeons, doctors of dentistry, physical therapists, occupational therapists, podiatrists, optometrists, nurses, veterinarians, pharmacists, architects, professional engineers, or jointly by architects and professional engineers, landscaper-architects, certified public accountants and public accountants, land surveyors, psychologist and attorneys-at-law.

(2) "Professional corporation" means a corporation which is organized under this chapter for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who or themselves are licensed or otherwise legally authorized [within this state] to render the same professional service as the corporation.

(3) "Shareholder" means the holder of any shares of

tcc

House of Representatives

Tuesday, May 28, 1991

the capital stock of a professional corporation. The shareholders of a professional corporation may be designated as "members" in its certificate of incorporation; bylaws and other corporate documents and may be referred to, for all purposes, as "members", whether or not so designated; and, the term "shareholder" or "shareholders", when used in the general statutes in reference to the shareholders of a professional corporation, shall include such "members".

In lines 162 and 172, delete "5" and insert in lieu thereof "7"

In line 192, delete "10 to 13" and insert in lieu thereof "12 to 14"

Delete lines 195 to 202, inclusive, in their entirety

In line 206, after "enforce" insert "in accordance with the provisions of chapter 861 of the general statutes"

In line 224, delete "pursuant to" and insert in lieu thereof "in accordance with the provisions of chapter 861 of the general statutes."

Delete line 225 in its entirety

In line 230, delete "12" and insert in lieu thereof "13"

In line 234, delete "12 and 13" and insert in lieu thereof "13 and 14"

After line 304, add the following:

"Sec. 15. (NEW) (a) (1) A person who desires to perpetuate testimony regarding any matter that may be cognizable in the superior court may file a verified petition in the superior court for the judicial district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (A) That the petitioner expects to be a party to an action cognizable in the superior court but is presently unable to bring it or cause it to be brought, (B) the subject matter of the expected action and the petitioner's interest therein, (C) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (D) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (E) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

House of Representatives

Tuesday, May 28, 1991

(2) The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the manner provided by section 52-57 of the general statutes; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by section 52-57 of the general statutes, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

(3) If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose examinations and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this section; and the court may make orders for the production of documents and things and the entry upon land for inspection and other purposes, and for the physical or mental examination of persons. For the purpose of applying this section to depositions for perpetuating testimony, each reference in this section to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) If a deposition to perpetuate testimony is taken under this section, it may be used in any action involving the same subject matter subsequently brought in the superior court.

(b) If an appeal has been taken from a judgment of the superior court or before the taking of an appeal if the time therefore has not expired, the superior court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the appellate or supreme court. In such case the party who desires to perpetuate the testimony may make a motion in the superior court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the superior court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; and (2) the reasons for perpetuating their testimony.

tcc

House of Representatives

Tuesday, May 28, 1991

If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders for the production of documents and things, and the entry upon land for inspection and other purposes, and for the physical or mental examination of persons, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in this section for depositions taken in actions pending in the superior court."

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DEPUTY SPEAKER POLINSKY:

Will you remark further on this bill as amended?
Will you remark further? If not, will all members please take their seats. Staff and guests to the well of the House. The machine will be opened.

CLERK:

The House of Representatives is voting by roll.

Members to the Chamber. Members to the Chamber please.
The House is voting by roll.

DEPUTY SPEAKER POLINSKY:

Have all members voted? Have all members voted and is your vote properly recorded? If all members have voted, the machine will be locked and the Clerk will take a tally.

The Clerk will announce the tally.

CLERK:

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House of Representatives

Tuesday, May 28, 1991

House Bill 7364, as amended by House Amendment
Schedule "A".

Total Number Voting	147
Necessary for Passage	74
Those voting Yea	147
Those voting Nay	0
Those absent and not Voting	4

DEPUTY SPEAKER POLINSKY:

The bill as amended is passed.

Are there any announcements or Points of Personal Privilege? Representative Ritter, for what purpose do you rise?

REP. RITTER: (2nd)

Thank you very much, Madam Speaker, for the purpose of introduction please.

DEPUTY SPEAKER POLINSKY:

Please proceed, sir.

REP. RITTER: (2nd)

Thank you, Madam Speaker. I'm very honored today to introduce one of my constituents who happens to be a Phi Beta graduate of Harvard, currently second year of Yale Law School and she also happens to be the daughter of Representative Edna Negrón. If the Chamber could welcome Toni Mercadita Smith and give her a welcome.

APPLAUSE

TUESDAY
June 4, 1991

003302
119
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other remarks? If not.

SENATOR AVALLONE:

I would move it to Consent, with your permission.

THE CHAIR:

Thank you very much, Senator. In view of the fact that we're acting in concurrence with the action of the House, is there any objection in placing #584, Substitute HB7165 on Consent? Is there any objection? Hearing none, it is so ordered.

Mr. Clerk.

THE CLERK:

Calendar Page 6, Calendar #586, File #556 and #896. HB7364, AN ACT CONCERNING INTERNATIONAL OBLIGATIONS AND PROCEDURES. As amended by House Amendment Schedule "A". Favorable Report of the Committee on Judiciary.

THE CHAIR:

Thank you very much, Mr. Clerk. The Chair would recognize Senator Avallone.

SENATOR AVALLONE:

Yes, Madam President, I would move the Joint Committee's Favorable Report and adoption of the bill in accordance with the action taken by the House.

THE CHAIR:

Thank you very much, Senator. Would you care to remark further?

TUESDAY
June 4, 1991

003303

120
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SENATOR AVALONE:

Yes. This is another bill in a series of bills that's we've been dealing with over the last four or five years concerning international obligations and procedures. The bill sets forth provisions of the conflict of jurisdiction model law into Connecticut law. It sets forth additional requirements for the ability to be licensed in this particular area. It makes clear that anyone acting as an agent or representative for a party in any international commercial arbitration is not practicing law without a license and then it goes along with the model law.

THE CHAIR:

Thank you very much, Senator. Would anyone else wish to remark on Senate Calendar #586? Are there any further remarks? If not, Senator, do you wish to have this placed on Consent?

SENATOR AVALONE?

If I may, please.

THE CHAIR:

In view of the fact that we're acting in concurrence with the action of the House, is there any objection in placing Senate Calendar #586, HB7364 on Consent? Is there any objection? Hearing none, so ordered.

TUESDAY
June 4, 1991

003342
159
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read the items that have been placed on the Second
Consent Calendar:

THE CLERK:

The Second Calendar begins on Calendar Page 5,
Calendar #584, Substitute HB7165,

Calendar Page 6, Calendar #586, HB7364, Calendar
#590, Substitute HB5461.

Calendar Page 9, Calendar #605, Substitute HB5095.

Calendar Page 13, Calendar #629, Substitute HB6391,
Calendar #630, Substitute HB6886, Calendar #631,
Substitute HB5665.

Calendar Page 16, Calendar #484, HB6459.

Calendar Page 22, Calendar #293, Substitute HB6379.

Madam President, that completes the Second Consent
Calendar.

THE CHAIR:

Thank you very much, Mr. Clerk. As you heard the
items that have been placed on Consent Calendar #2 for
June 4, 1991. The machine is open. You may record
your vote.

Thank you very much. The machine is closed.

The result of the vote.

36	Yea
0	Nay
0	Absent

TUESDAY
June 4, 1991

160
aak

The Consent Calendar is adopted.

Mr. Clerk, do you have any further business?

THE CLERK:

Madam President, I believe that that completes the items that were marked Go on the Calendar.

THE CHAIR:

Thank you very much, Mr. Clerk. Senator Avallone.

SENATOR AVALLONE:

Yes, Madam President, I was out of the Chamber on Calendar #394. I would like to be recorded in the affirmative.

THE CHAIR:

Thank you very much, Senator. The Journal will so note.

Senator Larson.

SENATOR LARSON:

Thank you, Madam President. I rise on a Point of Personal Privilege and clearly would like to welcome Representative Sid Holbrook to the Circle. Would you please rise?

Madam President, I just want to remind the Members of the Circle that the House has indicated that they hope to be out by 9 o'clock tomorrow evening, which will be a miracle in and of itself. However, they have continuing resolutions developed at 9, 9:30, 10, 10:30,

17
pat

JUDICIARY

April 12, 1991

FAITH MANDELL: I'm not sure what the Commission's responsibility --

REP. TULISANO: What would they do at that point? Play games. If we change it the way they suggested, they're going to play this thing out and never see them again, or what?

FAITH MANDELL: I don't know what, Representative Tulisano, what the guidelines are.

REP. TULISANO: We'll just make them do it again, unless there aren't any.

FAITH MANDELL: I was going to say, and then they can be submitted to you.

REP. TULISANO: Okay.

FAITH MANDELL: HB7364, AN ACT CONCERNING INTERNATIONAL OBLIGATIONS AND PROCEDURES. I'd just like to refer to my written testimony and ask the Legislature to consider the separation of powers issues concerning action on this bill.

REP. TULISANO: What? Say that again.

FAITH MANDELL: Separation powers issues. HB7364.

REP. TULISANO: Tell me what that is. Let's put it on the record, the separation of powers issue.

FAITH MANDELL: Okay. It questions whether discovery, in the bill there are sections dealing with discovery and admission to the bar and our legal services has raised the question whether these issues are inherent powers of the court --

REP. TULISANO: I've got a question for you then. If this is in fact a treaty obligation, and these parallel treaty operations, and they may, I'm not sure whether they do yet or not, but they're based on pending treaty obligations. In fact, the United States government enters into a binding treaty, and we write a statute which reflects the treaty provision, the United States government into international affairs, will you have your lawyer

respond then whether we can or can't do it? I mean, I think that's what this whole issue's based on, international treaty obligations.

FAITH MANDELL: I did not realize that that was tied to it.

REP. TULESANO: I think it is.

FAITH MANDELL: A bill on its face.

REP. TULESANO: A bill on a face, puts into our statutes reflective of what I think we are, or are pending to be.

FAITH MANDELL: I will definitely ask (inaudible)

REP. TULESANO: Thanks.

FAITH MANDELL: And the last bill, HB7381, the Thomas Commission bill.

REP. TULISANO: You're against it. Thank you.

FAITH MANDELL: Rather than --

REP. TULISANO: Everybody's against it.

FAITH MANDELL: I know. There are many provisions impacting the department and rather than go through those that we've already testified on previous issues, we would just like to highlight some of the other sections we've never testified on that are of concern to us.

First, section 2, which transfers the responsibility of courthouse security system from the sheriffs' to the Judicial Department, we'd like to say for the record, this is something that the Department has not been seeking. We have been working well with the sheriffs. However, though, if this were to go forward, we'd have problems with the bill as it's currently drafted.

First, we cannot do this effective the day of the bill. We would need at least a minimum of a year. Second, there are provisions in the section, line 110 through 119 dealing with personnel matters which we don't believe need to be in the statute,

198
pat

JUDICIARY

April 12, 1991

REP. TULISANO: Faith Mandell from the Judicial Department who thought that perhaps in the -- and I suspect you're here on the international law bill, HB 7364 that would violate -- oh, the separation of powers issue she raised.

ATTY. HOUSTON LOWRY: I don't believe -- that must have been when I took a step out for lunch.

REP. TULISANO: Oh, well. Okay.

ATTY. HOUSTON LOWRY: But I don't believe it does create a separation of powers problem, depending on which part she wishes -- what she was talking about.

REP. TULISANO: Lawyers and --.

ATTY. HOUSTON LOWRY: Foreign legal consultants. I don't believe that that creates a separation of powers issue, first of all, because these people don't practice before the Judiciary. I believe that -- I know there is a statute on the unauthorized practice of law. That statute has been construed as prohibiting foreign lawyers from practicing in Connecticut.

If you want to say that the Judicial Department is entitled to overrule the Legislature in enacting rules --.

REP. TULISANO: Let's not open that --.

ATTY. HOUSTON LOWRY: I don't want to start that one, so therefore, I moved within the constraints of what you already had and you had an unauthorized practice of law statute and I think that in order to make it clear that they have rule-making authority to handle that, it would be nice if it was given to them just so it's clear.

I know that they're considering making such rules which the Section of International Law and World Peace is pushing as is the Commerce Department of the United States and a number of other people and entities.

REP. TULISANO: Assume that discovery was the issue.

ATTY. HOUSTON LOWRY: Discovery.

REP. TULISANO: She considered that under the rules and I suggested that this follows, possibly followed treaty obligations which may or may not overrule constitutional ramifications we have under the Connecticut Constitution.

ATTY. HOUSTON LOWRY: The argument is that this is a treaty obligation and therefore overruled inconsistent in state legislation. The other argument is --

REP. TULISANO: How about state constitutional provisions?

ATTY. HOUSTON LOWRY: Yes, it would override an inconsistent state constitutional provision. That you already have a statute on that subject and what this is doing is merely clarifying it and just so the committee knows, we've managed to convince, I know it's dreadfully shocking that the feds can be convinced of anything --

REP. TULISANO: It is hard for us to convince them of anything.

ATTY. HOUSTON LOWRY: But we've convinced them to make virtually identifiable amendments to the federal rules of civil procedure which absent objection should come into force at the end of 1991. So that it reverses what we think are a bad line of Supreme Court cases where they didn't understand what was going on and the changes have been made federally and I think the states should make similar kinds of changes, and as you know, people watch Connecticut because we tend to lead in this area.

That basically takes care, I think, of most of the comments on -- what we've been talking about, HB7364, just so the record is clear. It also incorporates the model Conflict of Jurisdiction Act, which I think is an interesting act which talks about the rates to judgments problems. If you have two courts adjudicating the same problem, it gives standards to determine which court should actually adjudicate it rather than the Connecticut Court enjoining one party from pursuing in France

in the French Court enjoining the Connecticut Courts and all you get is a fight and cheapening of the respect for law.

The other bill that I'm here on is HB7341, provisions to Uniform Commercial Code Articles 3 and 4. I've submitted written testimony which I believe is hopefully adequate. The only thing I wish to -- two comments I wish to make is, one, to let all those people know who have been introducing over the years variable interest rate amendments to say that variable interest rate notes are negotiable within the Uniform Commercial Code who have dropped those at my request and urging that at long last we have the product which does what I promised to a number of legislators three and four years ago to say that variable interest rates notes are non-negotiable which means you can have a holder in due course. That is not presently the law in Connecticut.

The other comment is not in my written testimony. It appears on Page 83. I always shudder when I think that there's a bill that's 83 pages long. Lines 2793 and lines 2797 through 2802 should be deleted. We've recommended that Alternative A be enacted concerning items payable at a bank, that it should be construed as a draft when you say payable at on an instrument.

At the moment, the bill lists both alternatives and I think that -- I just know that you'll have to make a decision on which alternative you want.

REP. TULISANO: Okay, remind me.

ATTY. HOUSTON LOWRY: I will. The last things are two comments --

SEN. AVALLONE: This is a decade's worth of work.

ATTY. HOUSTON LOWRY: Well, I started getting involved in 1985 on the ABA's Advisory Committee and then I was --

SEN. AVALLONE: Yes, but your problem is I just got involved in it.

201
pat

JUDICIARY

April 12, 1991

ATTY. HOUSTON LOWRY: I'd be happy to answer any questions you have.

REP. TULISANO: No, it's okay. Anything that long is okay.

SEN. AVALONE: It better be after I finish reading it.

ATTY. HOUSTON LOWRY: The two personal comments that I have that are outside of my various hats as I wear as a Bar Association member, on HB5085, you reference on line 27 that you can get a judgment -- a deficiency judgment if an action -- a foreclosure action was commenced more than 12 months under the last uncured default.

I just want to let you know the last uncured default if someone stops paying and they never start paying again, there is no last uncured default that's more than 12 months out. If you mean the oldest uncured default, and I kind of guess that's what you mean, you might want to change that language to reflect that.

REP. MINTZ: Thank you.

ATTY. HOUSTON LOWRY: The other one was just a brief comment on HB7373. We testified in support of the Hague Conference on -- a convention on the recognition of trusts that's implemented in Connecticut and I just wanted to say that we approve of the bill and urge your support and I'm sorry I've taken so much time.

REP. TULISANO: No, you didn't the last time. We've got to learn all this stuff.

ATTY. HOUSTON LOWRY: I will be happy if any committee members has questions or if I can meet with anyone individually, I'd be happy to go over anything that needs going over.

REP. TULISANO: And the brief you've submitted deals with just the international obligations and --

ATTY. HOUSTON LOWRY: I've submitted a separate bit of testimony on Articles 3 and 4 that I trimmed down to five pages that talked about 29 changes in

HB 7364

HB 7341

202
pat

JUDICIARY

April 12, 1991

current law and Attorney Tim Fisher is also here who will be talking about some clarification to make regarding the law of check fraud.

REP. TULISANO: Okay, thank you.

ATTY. HOUSTON LOWRY: Thank you.

REP. TULISANO: Any questions anybody, international law or whatever?

ATTY. HOUSTON LOWRY: Just one comment, if I could. In case you think that people pay attention to what you're doing here, the State Department has been particularly interested in your work on child support. They expect that they will be putting out a request in the Federal Register for comment that the State of Hawaii and I understand the State of New Jersey is also going to be enacting --

HB 7364

REP. TULISANO: Apparently an international bill?

ATTY. HOUSTON LOWRY: They've modeled on your international resolution on child support as did the Oregon Legislature and there's been California and Arizona also considering it. So I want to let you know what happens on international issues goes beyond the four walls of this room and beyond --

(cass 6) (cassettes 5 and 6 don't connect, small gap)

REP. TULISANO: -- I think -- we had hoped that would be -- I guess we do about one a year at least now.

SEN. AVALLONE: I thought you said you were putting out a contract on Richard.

REP. TULISANO: Oh, no. We're getting a whole section of the statutes now devoted to this. The books are being printed. Thank you. Tom Cooper. Tom, my glasses are broken. I see two of you. Who are you? Are you Mr. Cooper? Who is Mr. Cooper?

THOMAS COOPER: Good evening, Representative Tulisano.

REP. TULISANO: Really, who are you? Your name.



001299A

Connecticut Bar Association

April 12, 1991

Chairmen
Judiciary Committee
General Assembly
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TESTIMONY ON HB-7364
AAC INTERNATIONAL OBLIGATIONS & PROCEDURE

I write to you as Legislative Chair of the Connecticut Bar Association's Section of International Law and World Peace ("Section"). The Section supports this bill pending before the Connecticut General Assembly.

Section 1 concerns the ~~service of process~~ abroad. The United States is a party to the Hague Convention on the Service of Process Abroad ("Service Convention").¹ Several statutes regulate the service of process in Connecticut.² For instance, Connecticut General Statutes Section 33-411 governs service of process on foreign corporations³ and provides service of process shall be made on the Connecticut Secretary of State *and* by mailing a copy to the corporation at its last known address.⁴ The Service Convention was intended to eliminate service of process on a local governmental official as adequate service of process outside the United States, see Volkswagenwerk v. Schlunk, 486 US 694 (1988). Therefore, Connecticut should not allow process to be served on the Connecticut Secretary of State for a party located in another country.⁵

Connecticut General Statutes Section 52-57(c) provides service of process may be made on the Connecticut Secretary of State if none of the partners of a partnership are residents of Connecticut, which constitutes an even more obvious violation of the Service Convention.

¹ The Service Convention preempts Connecticut law under the supremacy clause of the United States Constitution because the Service Convention is a treaty.

² Collectively sometimes referred to as "long arm" service of process statutes.

³ In this context, foreign means corporations from another state of the United States of America as well as corporations from other countries.

⁴ If there is no statutory agent for service of process or the agent for service of process cannot be found at the address located in the Secretary of State's records.

⁵ It is still acceptable to allow the Connecticut Secretary of State to be served if the recipient resides in another state of the United States.

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- 1 -

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SECTION

Connecticut General Statutes Section 52-59b(c) goes even further. This section provides a party within the "long arm" jurisdiction of Connecticut is deemed to have appointed the Connecticut Secretary of State as his agent for service of process. Connecticut General Statutes Section 52-62(a) provides any non-resident of the State of Connecticut is deemed to have appointed the Connecticut Commissioner of Motor Vehicles as his agent for service of process when the non-resident causes a motor vehicle to be used or operated on any public highway or elsewhere in Connecticut. If a Connecticut corporation is involved in a quo warranto case and neither its secretary nor treasurer⁶ are Connecticut residents, Connecticut General Statutes Section 52-65 provides service may be made on the Connecticut Attorney General. As you can see, serving process in violation of the Service Convention is a fairly common problem within the Connecticut General Statutes.

Simply changing the reference to service on a particular official to service by mail will not solve the problem. Regrettably, a number of civil law countries⁷ have legislation making it a criminal act to serve foreign legal process by mail. Needless to say, it is not prudent policy to require Connecticut officials⁸ to commit crimes to carry out their statutory duties.

The supremacy clause of the United States Constitution already overrides the portions of the Connecticut General Statutes which are inconsistent with Hague Convention on the Service of Process Abroad. This proposed section merely codifies existing law and alerts practitioners to this problem. A similar amendment is being considered to the Federal Rules of Civil Procedure to bring them into compliance with the Service Convention (attached as Exhibit 1).

Section 2 codifies existing law concerning ~~discovery~~ under the Connecticut Practice Book and the Hague Convention on the Taking of Evidence Abroad ("Evidence Convention"). This proposed section provides for the four existing methods of discovery, namely requests for admission, requests for production, interrogatories and depositions. If a foreign country is involved concerning discovery and that country is a party to the Evidence Convention, then the Evidence Convention shall prevail over any inconsistent provisions of Connecticut law.

A similar amendment to the Federal Rules of Civil Procedure is under consideration (attached as Exhibit 2). Both this section and the proposed amendments correct the much criticized holding in Societe Nationale v. United States District Court, 482 US 522 (1987). This case held a litigant did not need to resort to the Evidence Convention before using standard discovery techniques in the Federal Rules of Civil Procedure. This decision was almost unanimously criticized, particularly by governments which are parties to the Evidence Convention. A copy of a report on this issue by the Hague Conference on Private International Law is attached as Exhibit 3 for your reference.

Section 3 modifies the ~~practice of law statute~~ statute in Connecticut. This statute should regulate the practice of Connecticut law. Connecticut courts have a particular interest in regulating the practice of law to help dispose of court business more efficiently.⁹ This proposed section clarifies existing

⁶ Service may also be made on a resident assistant treasurer, although service may not be made on a resident assistant secretary.

⁷ Such as France and Switzerland.

⁸ Such as the Connecticut Secretary of State, a sheriff or indifferent person.

⁹ Although the unauthorized practice of law used to be strictly construed as actually appearing before a court, that definition was greatly expanded over the years.

law by providing agents in international commercial arbitrations are not practicing law. This means a party's agent does not have to be a member of the bar of the place of arbitration.

For example, if a Hong Kong corporation and a German corporation agree to arbitrate in Connecticut,¹⁰ they may use their customary legal representatives even though their representatives are not members of the Connecticut bar. This position was recently endorsed by the American Bar Association Section of International Law and Practice (see the report attached as Exhibit 4 from the summer 1990 issue of *International Lawyer* published by the Section).

A minor correction is made to existing Section 51-88(d). This statute presently provides a town clerk may prepare legal documents for filing in the town clerk's office in the town where the town clerk resides without these actions constituting an unauthorized practice of law. While the town clerk usually holds office in the town where he resides, this is not necessarily the case. Therefore, the statute should be modified to clarify a town clerk is not conducting an unauthorized practice of law by fulfilling his duties as town clerk.

Some United States Courts, such as the United States Tax Court, sit in Connecticut. These courts regulate who may practice before them. For instance, the United States Tax Court allows qualified individuals who are not attorneys to practice before the Court under Tax Court Rule 200. Likewise, the United States District Court allows attorneys who are not admitted to practice law in Connecticut to practice before the United States District Court.

Section 3 also makes it clear that persons practicing the law of a foreign jurisdiction in Connecticut are not engaging in an unauthorized practice of law within the meaning of this statute. This creates a category of "foreign legal consultants." Section 4 authorizes the judges of the Superior Court to make rules regulating foreign legal consultants, provided the rules do not make it unreasonably difficult for a person to qualify as a foreign legal consultant. The position of foreign legal consultant already exists in several states, including Alaska, California, District of Columbia, Hawaii, Illinois, Michigan, New Jersey, New York, Ohio, Oregon and Texas.

Sections 5 through 7 amend the ~~Professional Service Corporation Act~~ **Professional Service Corporation Act**. These amendments are intended to put professional corporations on equal footing in Connecticut. A partnership practicing law in Connecticut may have non-Connecticut attorneys as partners. Yet, existing law for professional service corporations denies this benefit when the same firm is organized as a professional service corporation. I cannot see a reason to reach a different result simply because the legal structure of the organization in one case is a partnership and a professional service corporation in the other case. These sections are not intended to modify any professional obligations which restrict or limit a multi-jurisdiction professional practice.

Similarly, a foreign professional service corporation should be entitled to transact business in Connecticut as long as the relevant professional services are being rendered by professionals licensed by the State of Connecticut.

Section 8 amends the ~~UNCITRAL Model Law on International Commercial Arbitration~~ **UNCITRAL Model Law on International Commercial Arbitration** to provide it will apply to all arbitrations regardless of when the agreement to arbitrate was executed.

¹⁰ The legislature hoped to encourage such arbitrations by enacting P.A. 89-179, the UNCITRAL Model Law on International Commercial Arbitration. This act is now codified at Connecticut General Statutes Section 50a-101 *et seq.*

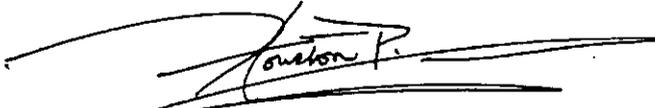
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This balance of this bill incorporates the provisions of the ~~Committee on Jurisdiction Model Law~~. The model law provides judgments rendered in other jurisdictions will not be enforced in Connecticut unless certain conditions are met. These conditions are designed to reduce the awkwardness of "parallel proceedings," where courts having jurisdiction over the same dispute "race" to judgment. It also reduces the chance of competing injunctions as courts jockey for position.¹¹

This model law provides the adjudicating forum must determine it is the most convenient forum by considering certain specified guidelines. A judgment rendered by a forum which has not considered these factors will not be enforced in Connecticut.¹² This prevents one party from finding a forum which has jurisdiction over the controversy, and can adjudicate the controversy more quickly than other fora, from obtaining a tactical advantage.

I will be happy to provide further information on request.

Sincerely,



Houston Putnam Lowry

¹¹ For example, a Connecticut court may enjoin a party from proceeding in a foreign court. Very often, the foreign court responds by enjoining the other party from proceeding in Connecticut. If both injunctions were obeyed, the parties would be without a forum.

¹² Forum means a foreign forum in this context. It does not include a sister state because the full faith and credit provisions of the United States Constitution would control.

COMMENCEMENT OF ACTION, ETC.

Rule 4

Proposed Amendment

Amendment of this rule transmitted by the Judicial Conference of the United States to the Supreme Court of the United States on Nov. 19, 1990. Amendment is to be approved by the Supreme Court and transmitted to Congress no later than May 1, 1991, to become effective Dec. 1, 1991, absent Congressional action to the contrary. As so amended, this rule reads as follows:

Rule 4. Summons

(a) **FORM.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) **ISSUANCE.** Upon the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If in proper form, the clerk shall sign and seal the summons and issue it to the plaintiff for service on the defendant. A summons or a copy of the summons if it is addressed to multiple defendants shall be issued for each defendant to be served.

(c) SERVICE WITH COMPLAINT; BY WHOM MADE.

(1) A summons shall be served together with a copy of the complaint. The plaintiff shall be responsible for service of a summons and complaint within the time allowed under subdivision (m) of this rule and shall furnish the person effecting service with such copies of the summons and complaint as are necessary.

(2) Service may be effected by any person who is not a party and is not less than 18 years of age, provided that the court may at the request of the plaintiff direct that service be effected by a person or officer (who may be a United States marshal or deputy United States marshal) specially appointed by the court for that purpose. A special appointment shall be made when the plaintiff is authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or a seaman authorized to proceed under Title 28, U.S.C. § 1916.

(d) WAIVER OF SERVICE; DUTY TO SAVE COSTS OF SERVICE; REQUEST TO WAIVE.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association subject to service under subdivisions (e), (f), or (h) of this rule, who receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of service of a summons. To avoid costs, the plaintiff may notify the defendant of the commencement of the action and request that the defendant waive service of a summons. If the notice and request

(A) is in writing and addressed to an individual who is the defendant or who could be served pursuant to subdivision (h) of this rule as representative of an entity that is the defendant; and

(B) is dispatched through first-class mail or other reliable means; and

(C) is accompanied by a copy of the complaint and identifies the court in which it has been filed; and

(D) informs the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request; and

(E) sets forth the date on which the request is sent; and

(F) allows the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from such date if the defendant is addressed outside any judicial district of the United States; and

(G) provides the defendant with an extra copy of the notice and request and a prepaid means of compliance in writing; and the defendant fails to comply with the request, the court shall impose the costs of effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant timely returning a waiver so requested shall not be required to serve an answer to the complaint until 60 days from the date on which the request of waiver of service was sent, or 90 days from such date if the defendant was addressed outside any judicial district of the United States.

(4) When a waiver of service is filed by the plaintiff with the court, the action shall proceed as if a summons and complaint had been served at the time of filing of the waiver and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request for a waiver of service of a summons shall include the costs of service under subdivision (e), (f) or (h) of this rule and the costs, including a reasonable attorney's fee, of any motion required to collect such costs of service.

(e) **SERVICE UPON INDIVIDUALS WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES.** Unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in any judicial district of the United States:

(1) pursuant to the law of the State in which the district court is held, or in which service is effected, for the service of a summons upon such defendant in an action brought in the courts of general jurisdiction of such State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) ~~SERVICE UPON INDIVIDUALS RESIDING IN A FOREIGN COUNTRY.~~ Unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in a foreign country:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) 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; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of copies of the summons and of the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(iii) diplomatic or consular officers when authorized by the United States Department of State; or

(3) by whatever means may be directed by the court, including service by means not authorized by international agreement or not consistent with the law of a foreign country, if the court finds that internationally agreed means or the law of the foreign country (A) will not provide a lawful means by which service can be effected, or (B) in cases of urgency, will not permit service of process within the time required by the circumstances.

(g) **SERVICE UPON INFANTS AND INCOMPETENT PERSONS.** Service upon an infant or an incompetent person shall be effected in a judicial district of the United States in the manner prescribed by the law of the state in which the service is made for the service of summons or like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person shall be effected in a foreign country in the manner prescribed by subparagraphs (2)(A) or (2)(B) of subdivision (f) of this rule or by such means as the court may direct.

(h) **SERVICE UPON CORPORATIONS AND ASSOCIATIONS.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, and from whom a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by paragraph (e)(1) of this rule or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a foreign country in any manner prescribed for individuals by subdivision (f) of this rule, except personal delivery as provided in clause (f)(2)(C)(i).

COMMENCEMENT OF ACTION, ETC.

Rule 4

(i) SERVICE UPON THE UNITED STATES, AND ITS AGENCIES, CORPORATIONS OR OFFICERS.

(1) Service upon the United States, shall be effected by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by sending a copy of the summons and of the complaint by registered or certified mail to such officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers of the United States, its agencies and corporations, if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j) SERVICE UPON FOREIGN, STATE OR LOCAL GOVERNMENTS.

(1) Service upon a foreign state or political subdivision thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service upon a state or municipal corporation or other governmental organization thereof subject to suit shall be effected by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons upon any such defendant.

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant.

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held, or

(B) who is a party joined under Rule 14 or Rule 19 and served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing a waiver of service is also effective to establish jurisdiction with respect to claims arising under federal law over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(l) **PROOF OF SERVICE.** If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made outside any judicial district of the United States, proof may be made pursuant to any applicable treaty or convention, or if service is made pursuant to paragraphs (2) or (3) of subdivision (f) of this rule, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(m) **TIME LIMIT FOR SERVICE.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court shall upon its own initiative after notice to the plaintiff dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time, provided however that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision shall not apply to service in a foreign country pursuant to subdivision (f) of this rule.

(n) **SEIZURE OF PROPERTY; SERVICE OF SUMMONS NOT FEASIBLE.**

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice 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.

(2) Upon a showing that the plaintiff cannot with reasonable efforts serve the defendant with a summons in any manner authorized by this rule, the court may assert jurisdiction over any assets of the defendant found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court sits.

[Judicial Conference Special Note: If paragraph (k)(2) of the proposed revision of Rule 4 is disapproved by the Congress, it is nevertheless recommended that the rule be approved with the deletion of the paragraph, which is separable from the revised rule, and the numerical designation (l) from the preceding paragraph of subdivision (k).]

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Purposes of Revision. The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the means of service so authorized always provides appropriate notice to persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.

First, the revised rule authorizes the use of any means of service provided not only by the law of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

Second, the revised rule clarifies and extends the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants magnifying costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects of service.

Fourth, the revision calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service. In some respects, such treaties have facilitated service in foreign countries but are not fully known to the bar.

Fifth, the revision corrects a hiatus in the enforcement of federal law by providing nationwide territorial jurisdiction over defendants who are subject to the jurisdictional reach of no state.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made who can be constitutionally subject to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. But a new provision makes those limits inapplicable to cases in which there is no state in which the defendant can be sued.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

The Caption of the Rule. Rule 4 was entitled "Service of Process" and applied to the service not only of summons, but also other process as well, although these are not specified by the present rule. The service of process in eminent domain proceedings is governed by Rule 71A. The service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived as provided in subdivision (d), a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the present rule which bear specifically on the service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

Subdivision (a). The revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be in all cases the same. Few states now employ distinctive requirements of form for a summons and the applicability of such requirements in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1131 (2d ed. 1987).

Subdivision (b). The revised subdivision (b) replaces the former subdivision (a). The revised text makes

clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original bearing the names of multiple defendants, so long as the addressee of the summons is effectively identified.

Subdivision (c). Paragraph (1) of the revised subdivision retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit on service set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving summons. Subdivision (c) now extends that reduced dependence on the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, would be permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to provide through special appointment of a marshal, a deputy, or some other person, for the service of a summons in two classes of cases specified by statute, actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to provide for official service on motion of a party. Where a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subparagraph (c)(2)(C) and (D) added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. This device should be useful in dealing with furtive defendants or those who are outside the United States and can be actually served only at substantial and unnecessary expense.

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., *Gulley v. The Mayo Foundation*, 886 F.2d 161 (8th cir.1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

An individual or corporate defendant may be requested to waive service of a summons wherever or however that defendant might be served. The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments subject to service under subdivision (j). Infants or incompetent persons are likewise not required to waive service because they are not presumed to understand the request

and its consequences and must generally be served through fiduciaries.

The former rule was held to limit the acknowledgment procedure to cases in which the defendant could have been served within the forum state. *CASAD, JURISDICTION IN CIVIL CASES* (1986 Supp.), S5-13 and cases cited. But see *United States v. Union Indemnity Ins. Co.*, 4 F.R.Serv.3d 578 (E.D.N.Y.1986). As Professor Casad observed, there was no reason not to use this form of service outside the state, and there are many instances in which it has in fact been so used.

Paragraph (d)(1) is explicit that a timely waiver of service of a summons and complaint does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert any other defense that may be available. All that is eliminated are issues of the sufficiency of the summons and the sufficiency of the method by which it is served.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. It would, however, be sufficient cause not to shift the cost of service if the defendant did not receive the request or was insufficiently literate in English to understand it.

Because the transmission of the waiver does not purport to effect service except by consent, the transmission of a request for consent sent to a foreign country gives no reasonable offense to foreign sovereignty, even to foreign governments that have withheld their assent to service by mail. See Heidenberg, *Service of Process and Gathering Information Relative to a Lawsuit Brought in West Germany*, 9 INT'L LAW 725, 78-29 (1975). Because of the unreliability of some foreign mail services, the longer period of 60 days is provided for a return of a notice and request for waiver sent to a foreign country. The time limit of subdivision (m) is not applicable to such service.

Paragraph (d)(2) states what the present rule implies, that there is a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18A.

Subparagraph (d)(2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service. The general mail rooms of large organizations cannot be required to identify the appropriate individual recipient for an institutional summons.

Subparagraph (d)(2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications are not likely to be as inexpensive as the mail, they may be equally reliable and on occasion more convenient to the plaintiff. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some

countries, facsimile transmission is the most efficient means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

Paragraph (d)(3) extends the time for answer to assure that a defendant will not gain any delay by failing to waive service of the summons. Absent this extension, the defendant would be rewarded with additional time for answer under Rule 12(a) if the waiver is not returned, or if its return is postponed as long as the Notice and Request allows.

Paragraph (d)(4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. *E.g.*, *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir.1984). *Cf.* *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). It is also important to clarify the effective date for the purposes of Rules 12(a), 30(a), and 33(a).

The former provision set forth in subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs not reading the rule carefully supposed that service of the summons by ordinary mail was effective on receipt by the defendant, not only to establish the jurisdiction of the court over the defendant's person, but to toll the statute of limitations in actions in which service of the summons was required to toll the limitations period. The revised rule is clear that no tolling effect results from the dispatch of a Notice and Request that is not returned and filed, nor can the action proceed as it could if a summons had actually been served.

State limitations law may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable to circumstances in which the statute of limitations is about to run. Unless there is ample time, the plaintiff should proceed directly to the formal methods of service identified in subdivisions (e), (f) or (h).

Requested waiver should also be avoided when the time for service under subdivision (m) will expire before the ate [sic] on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, *e.g.*, *Prather v. Raymond Constr. Co.*, 570 F.Supp. 278 (N.D.Ga., 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h).

Paragraph (d)(5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, costs of translation or the cost of the time of a process server required to make contact with a defendant residing in guarded apartment houses or residential developments. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves re-

coverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Subdivision (e). This subdivision displaced the former paragraph (d)(1) and clause (c)(2)(C)(i). It provides means for the service of summons on individuals in any judicial district. Together with subdivision (f), it provides for service on persons anywhere.

Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may invoke the territorial limits of the court's reach set forth in subdivision (k), including of course constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment.

Paragraph (e)(1) authorizes service in any judicial district in conformity with state law. This paragraph sets forth the language of former clause (c)(2)(C)(i) which authorized the use of the law of the state in which the district court sits, but adds as an alternative the use of the law of the state in which the service is effected.

Paragraph (e)(2) retains the text of the former paragraph (d)(1) and authorizes the use of the familiar methods of personal or abode service or service on an authorized agent in any judicial district.

To conform to these provisions, the former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f) restricting the authority of the federal process server to the state in which the district court sits.

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state-law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which such extra-territorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of such statutory authority. *E.g.* *Martens v. Winder*, 341 F.2d 197 (9th Cir.), cert. denied 382 U.S. 937 (1965). Such authority was, however, found to exist by implication. *E.g.*, *SEC v. VTR, Inc.*, 39 F.R.D. 19 (S.D.N.Y.1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

A secondary effect of this provision for service of a federal summons in any judicial district is to facilitate the use of federal long-arm law applicable to actions brought to enforce the national law against defendants who cannot be served under local state law. Such a provision is set forth in paragraph (2) of subdivision (k) of this rule applicable only to persons not subject to the territorial jurisdiction of any state.

in the Service of the United States on February 10, 1969. See 28 U.S.C.A., F.R. Cir.P. 4 (1986 Supp.). This Convention is an important means of dealing with problems of service in a foreign country. See generally RISTAU 1 INTERNATIONAL JUDICIAL ASSISTANCE 118-176 (1984). The use of the Convention is mandatory when available. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S.Ct. 722 (1988); Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U.PITT.L.REV. 903 (1989). Therefore, this paragraph provides that the methods of service appropriate under an applicable treaty shall be employed if available when service is to be effected outside a judicial district of the United States, and if the applicable treaty so requires.

The Hague Service Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows either a lack of adequate notice to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

The Hague Convention does not provide a time within which a Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in paragraph (f)(3).

Two minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subparagraph (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

Paragraph (f)(2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule.

Service by methods that are violations of foreign law are not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods of conforming to local practice or using a local authority.

Subparagraph (f)(2)(C) prescribes other methods authorized by the former rule, and a new one set forth in

clause (iii). This clause allows American consular and diplomatic officers to serve process in a foreign country pursuant to State Department rules. There is a statutory provision for this in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a)(4).

Paragraph (f)(3) authorizes the court to approve additional methods of service to be employed when circumstances justify. In approving exceptional service in urgent circumstances, the paragraph tracks the text of the Hague Convention. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court shall direct the method of service and may approve means that are not authorized by international agreement or that are contrary to foreign law. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. *Levin v. Ruby Trading Corporation*, 248 F.Supp. 537 (S.D.N.Y.1965).

Subdivision (g). This subdivision retains the text of the former paragraph (d)(2). Provision is made for service upon an infant or incompetent person in a foreign country.

Subdivision (h). This provision retains the text of the present paragraph (d)(3), with changes reflecting those made in subdivision (e). Provision is also explicitly made for service on a corporation or association in a foreign country as formerly provided in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

Subdivision (i). This subdivision retains much of the text of former paragraphs (d)(4) and (5). Paragraph (i)(1) provides for service of a summons on the United States; it amends former paragraph (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the Department of Justice, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States Attorney.

Paragraph (i)(2) replaces the former paragraph (d)(5). Paragraph (i)(3) saves the plaintiff from the hazard of losing a substantive right because of failure to comply with the complex requirements of service under this subdivision. That risk has proved to be more than nominal. E.g., *Whale v. United States*, 792 F.2d 951 (9th Cir.1986). This provision may be read in connection with the provisions of subdivision (c) of

Rule 15 to preclude loss of substantive rights by a plaintiff against the United States or its agencies, corporations, or officers resulting from a failure correctly to identify and serve all the persons who should be named or served in order to assert such rights.

Subdivision (j). This subdivision retains the text of the former paragraph (d)(6) without material change. The waiver-of-service provision is also inapplicable to actions against governments served pursuant to this subdivision.

The revision adds a new paragraph (j)(1) referring to the statute governing service of a summons on a foreign state or political subdivision, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608. The caption of the subdivision reflects that change.

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (k)(1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who could be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Subparagraph (k)(1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See *CASAD, JURISDICTION IN CIVIL ACTIONS*, chap. 5 (1983).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f) that provide for service of a summons and complaint anywhere in the world.

This paragraph corrects a hiatus in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni Capital Intern. v. Rudolf Wolff & Co., Ltd.*, 108 S.Ct. 404, 411 (1987). This paragraph provides a federal reach in actions not subject to such nationwide service provisions if it is needed to enable the federal courts to enforce the national law.

There remain Constitutional limitations on the exercise of territorial jurisdiction of federal courts over persons outside the United States. These arise from the Fifth Amendment rather than from the Fourteenth

Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir.1977). There may also be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of the "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286 n. 3 (3d Cir.1981). Compare *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-294 (1980); *Insurance Corp. of Ireland v. Compagnie des Bauxites des Guinee*, 456 U.S. 692, 702-703 (1982); *Asahi Metal Indus. v. Superior Court of Cal., Solano County*, 107 S.Ct. 1026, 1033-1035 (1987). See generally *Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 *VILL.L.REV.* 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of § 1404 providing for transfer for fairness and convenience precludes any conflict between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Ind. v. Superior Court of Cal., Solano County*, 107 S.Ct. 1026, 1035 (1987), quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach is inapplicable to cases in which federal jurisdiction rests on the diversity of citizenship of the parties. This is perhaps a necessary application of the principle of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Cf. *Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir.1963). The extension of the federal reach under this rule is also applicable only to defendants against whom a federal claim is made.

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A *WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE* § 1132 (2d ed. 1987).

Subdivision (m). This subdivision retains much of the language of the present subdivision (j).

The new subdivision explicitly provides that the court shall allow additional time for service if there is good

COMMENCEMENT OF ACTION, ETC.

Rule 4

cause for the plaintiff's failure to effect it in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief was formerly available in some cases, partly in reliance on Rule 6(b), and it was not the purpose of the former rule to be rigorous in the imposition of a dismissal for slowness in effecting service. Relief may be justified, for example, in a case in which the applicable statute of limitations would bar the refiled action, or the defendant was evading service or concealing a defect in attempted service. E.g., *Ditkof v. Owens-Illinois, Inc.*, 114 F.R.D. 104 (E.D.Mich.1987). A specific instance of good cause is set forth in paragraph (i)(3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. *Robinson v. America's Best Contacts and Eyeglasses*, 876 F.2d 596 (7th cir. 1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to "the plaintiff" even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (n)(1) saves the rule from superseding 28 U.S.C. § 1655 or any similar provisions bearing on seizures or liens.

Paragraph (n)(2) provides for other uses of quasi-in-rem jurisdiction, but limits its use to necessitous circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing such seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become an anachronism. Circumstances too sparse to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

NOTES OF ADVISORY COMMITTEE ON RULES 1937 ADOPTION

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff, com-

pare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena—Time for Answer).

Note to Subdivision (b). This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

U.S.C., Title 28, § 1691, formerly § 721 (Sealing and testing of writs) is substantially continued in so far as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, former § 722 (Teste of Process, day of) is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to subdivision (c). This rule does not affect U.S.C., Title 28, § 547, formerly § 503, as amended June 15, 1935 (Marshals; duties) and such statutes as the following in so far as they provide for service of process by a marshal, but modifies them in so far as they may imply service by a marshal only:

U.S.C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25 (Restraining violations; procedure)

U.S.C., Title 28, former:

§ 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, §§ 1400, 1694, formerly § 109, (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists*, D.C.Ky.1925, 7 F.2d 481 and *Singleton v. Order of Railway Conductors of America*, D.C.Ill. 1935, 9 F.Supp. 417. Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case*, App.D.C.1937, 93 F.2d 56.

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U.S.C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7, §§ 217 (Proceedings for suspension of orders) 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, § 3679 (Bill in chan-

the discovery conference with a pretrial conference authorized by Rule 16.

(g) **Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

Proposed Amendment

Amendment of subdivisions (a) and (b)(5) of this rule transmitted by the Judicial Conference of the United States to the Supreme Court of the United States on Nov. 19, 1990. Amendment is to be approved by the Supreme Court and transmitted to Congress no later than May 1, 1991, to become effective Dec. 1, 1991, absent Congressional action to the contrary. As so amended, subdivisions (a) and (b)(5) read as follows:

Rule 26. General Provisions Governing Discovery

(a) **DISCOVERY METHODS.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. ~~Discovery at a place within a country having a treaty with the United States shall be conducted by methods authorized by the treaty unless the court determines that those methods are unavailable and, in the interest of justice, other discovery methods not prohibited by the treaty.~~

(b) **DISCOVERY SCOPE AND LIMITS.**

(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When information is withheld from discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Language is added to this subdivision to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. *Societe Nationale v. U.S. Dist. Ct., S.D. Iowa, 107 S.Ct. 2542, 2557-2568 (1987)*. Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally *Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U.PITT.L.REV. 903 (1989)*; *Alley & Prescott, Recent Developments in the United States Under the Hague Evidence Convention, 2 LEIDEN J. INT'L LAW 19 (1989)*. If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The rule of comity stated in this rule does not apply to discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the

place of trial. *E.g. Insurance Corp. of Ireland v. Campagnie des Bauxites*, 456 U.S. 694 (1982). The rule also does not apply to the taking of depositions of parties or persons controlled by parties who may be deposed within the United States. However, comity may be employed in matters to which the requirement of the rule does not apply. *Cf. Societe Nationale v. U.S. Dist.Ct., S.D.Iowa*, 107 S.Ct. 2542 (1987).

Nor does the rule require comity where the discovery methods available by treaty are "inadequate or inequitable." This provision allows the court to make a discreet judgment on the facts as to the sufficiency of the internationally agreed discovery methods. Illustratively, a party should be required to make first resort under the Hague Convention despite a partial Article 23 reservation by the country in which discovery is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery.

The rule also directs the court to authorize the use of other discovery methods as may be needed to assure that discovery is not "inequitable." International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule 26-37 should not be permitted to use the Hague Convention or a similar international agreement or even the law of the party's own country to create obstacles to equivalent discovery by an adversary.

Indeed, the court is not precluded by the rule from authorizing, to assure that discovery is adequate and equitable, the use of discovery methods that may violate the laws of another country. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197 (1958). Where the impediment to discovery is imposed by public authority not at the request of the international litigant or the non-party from whom information is sought, accommodation may be necessary to reconcile the requirement of this rule that discovery be equitable to foreign law. But in no circumstance can the court authorize discovery methods that violate the mandate of a treaty that is the law of the United States.

Subdivision (b). A new paragraph (b)(5) is added. Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The party claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who claims a privilege or protection but fails to disclose the claim is at risk of waiving the privilege or protection and may be subject to sanctions under Rule 37(b)(2). A party claiming a privilege or protection who fails to provide adequate information about the claim to the party seeking the information may be compelled to do so by motion made pursuant to Rule 37(a). Such motions and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A party receiving a discovery request that is too broad may be faced with a burdensome task to provide

full information regarding all that party's claims to privilege or work product protection. Such a party is entitled to a protective order under subdivision (c) of this rule. The issue of the sufficiency of a disclosure is appropriate for resolution at a pretrial conference conducted under Rule 16(b), and may require an examination of documents *in camera*.

NOTES OF ADVISORY COMMITTEE ON RULES 1937 ADOPTION

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606-607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat. Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889-7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ. Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat. Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare former Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, former §§ 639 (Depositions *de bene esse*; when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuum*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C., Title 28, § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606-607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932)

001299 P

Meeting of Hague Conference Special Commission

The Hague, April 17-20, 1989

Agreed Conclusions on Scope of Hague Service and Evidence Conventions and Documents Relating to Discussion of Aerospatale Case

- (1) Agreed Conclusions on Most Important Points Considered by Special Commission
- (2) Extract from Checklist (Agenda) prepared by Permanent Bureau (Dyer)

Question L: what is the appropriate relationship between the provisions contained in the Hague Evidence Convention and the provisions relating to the "discovery" or the obtaining of evidence in civil or commercial matters contained in the domestic procedural rules of a Contracting State?

and its discussion in the Checklist

- (3) Minutes No. 3 (18 April 1989, afternoon) and No. 4 (19 April 1989, morning) summarizing discussion on Question L
- (4) Pfund Statement, April 19, 1989
- (5) Swiss Working Document (No. 1) - on table at beginning of Special Commission Meeting

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CONCLUSIONS ON THE MOST IMPOR. PT POINTS
CONSIDERED BY THE SPECIAL COMMISSION

001299 Q

I Scope of the Two Conventions as to their Subject-matter

- a The Commission considered it desirable that the words "civil or commercial matters" should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.
- b In the "grey area" between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept.
- c In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.
- d However, nothing prevents Contracting States from applying the Conventions in their mutual relations to matters of public law, though not necessarily in an identical manner for both Conventions.

II Convention on the Taking of Evidence Abroad

- a The Special Commission stressed that one of the principal objects of the authors of the Convention was to create a link between the system of taking of evidence of the civil law and that of the common law.
- b The Special Commission took note of the fact that opinions remain divided as to whether or not the Convention is of exclusive application.

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- c However, having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.
- d With a view to facilitating the resort to the Convention as a matter of priority, the Commission encouraged any States which have made or contemplate making the reservation under Article 23 to limit the scope of such reservation.
- e Where nonetheless the judicial authorities of a Contracting State resort to measures of compulsion under their domestic rules of procedure for the purpose of obtaining documentary evidence located in another Contracting State, the Commission expressed the wish that such judicial authorities respect the spirit of a limited Article 23 reservation made by such other State.

CHECKLIST FOR THE DISCUSSIONS OF THE SPECIAL COMMISSION
OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS
ON THE SERVICE OF PROCESS ABROAD AND ON THE TAKING OF EVIDENCE ABROAD

drawn up by Adair Dyer
First Secretary at the Permanent Bureau

o o o EXTRACT

RÉCAPITULATION DES POINTS À DISCUTER PAR LA COMMISSION SPÉCIALE D'AVRIL 1989 SUR
LE FONCTIONNEMENT DES CONVENTIONS DE LA HAYE RELATIVE À LA SIGNIFICATION ET LA
NOTIFICATION À L'ÉTRANGER ET SUR L'OBTENTION DES PREUVES À L'ÉTRANGER

établie par Adair Dyer
Premier secrétaire au Bureau Permanent

*Document préliminaire No 1 de mars 1989
à l'intention de la Commission spéciale d'avril 1989*

*Preliminary Document No 1 of March 1989
for the attention of the Special Commission of April 1989*

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blood tests, the difficulty may not be so much a question of whether the results of such tests constitute "evidence" as whether the human material needed to carry out such tests may properly be "obtained". See generally Scottish Law Commission Discussion Paper No 80 *Evidence. Blood Group Tests, DNA Tests and Related Matters*, December 1988. This problem may, however, properly fall within the subsequent part of this checklist which deals with Article 11 of the Convention under the title "Protective Provisions for Witnesses".

II Procedural scope of the Convention

→ Question L What is the appropriate relationship between the provisions contained in the Hague Evidence Convention and the provisions relating to the "discovery" or the obtaining of evidence in civil or commercial matters contained in the domestic procedural rules of a Contracting State?

31 Commentary: This issue has been involved in a large number of civil proceedings in the United States of America in recent years. The issue was sharply delineated in the *Anschuetz* case decided by a panel of the United States Court of Appeals for the Fifth Circuit several months before the May 1985 Special Commission meeting which was held to review the operation of the Hague Evidence Convention. That case and a similar decision by the United States Court of Appeals for the Fifth Circuit in *Messerschmitt* were at that time pending on application for further appellate review by the United States Supreme Court. Both of those decisions, as well as the subsequent decision of the United States Court of Appeal for the Eighth Circuit in the *Aérospatiale* case, held that the Convention did not apply to a request for documentary materials directed to a party over whom the court had jurisdiction and that therefore once a United States District Court determined that it had jurisdiction over a party, even one domiciled abroad, only the Federal Rules of Civil Procedure applied to questions involving the obtaining of evidence from that party.

32 The report of the Special Commission of May 1985, taking this development in the case law concerning the Convention while it was still fresh and considering it in conjunction with the evolution of reservations taken by Contracting States under Article 23 of the Convention as well as "blocking statutes" adopted by a certain number of countries, reached agreement on the following conclusions concerning the "most controversial points" raised by the operation of the Convention:

"1 The discussions have clearly shown the necessity for a substantial number of States of a reservation in order to avoid abuses which can arise in connection with pre-trial discovery of documents. However, the adoption of an unqualified reservation as permitted by article 23 would seem to be excessive and detrimental to the proper operation of the Convention.

2 The tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame - or, to the extent that they have not yet done so, to limit - their reservation

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along the lines of the reservation formulated by the United Kingdom or the reservation contained in the Protocol drawn up under the auspices of the Organization of American States.

3 The question of exclusivity of the Convention remains in issue. Under the interpretation of certain States, the Convention is not by its terms an exclusive channel for obtaining evidence located abroad. However certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention on their territory will take on an exclusive character.

4 Statutes which prohibit the production of evidence abroad, commonly known as "blocking statutes", many of which have been adopted since the 1978 meeting of the Special Commission, are in part a response to what are perceived in some countries as exorbitant assertions of jurisdiction by the courts of other countries. Such statutes however constitute a complicating factor and emphasize the need for long-term solutions through international understanding.

5 The combined effect of a blocking statute and an unqualified reservation under article 23, when both are adopted by a State, may be to discourage use by other States of the Hague Convention.

6 The Special Commission was unanimously of the opinion that the use of the Convention should be encouraged, since its use can help to avoid conflicts." (Practical Handbook, pp. 42(I)-42(J))

33 The case law exemplified by the *Anschuetz*, *Messerschmitt* and *Aérospatiale* cases before the United States Courts of Appeal reached its climax in the decision of the United States Supreme Court on 15 June 1987 in the *Aérospatiale*⁷ case published in *International Legal Materials*, volume 26, No 4, July 1987, p. 1021. That decision taken by a five to four majority of the nine justices of the court, in summary:

1 Rejected the conclusion of the Court of Appeal that the Convention did not "apply" to efforts to obtain documents or other evidence from a party over whom the court had jurisdiction;

2 Concluded that the Convention, however, was not "exclusive" in application and therefore did not preclude efforts to obtain evidence from a party domiciled abroad through the mechanisms of the Federal Rules of Civil Procedure;

3 Found that the Convention's channels for obtaining evidence abroad should not be given formal priority over the mechanisms provided in the Federal Rules of Civil Procedure; and

7 *Société Nationale Industrielle Aérospatiale et al. v. United States District Court for the Southern District of Iowa*, 107 S.Ct. 2542, 96 L.Ed. 2d 461, 26 Int'l L.J. 1021 (1987).

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4 Directed that a trial court therefore should consider each request for documents or other evidence located abroad directed to a party to the proceeding and determine whether the channels of the Hague Convention or the mechanisms of the Federal Rules of Civil Procedure are the most appropriate to be used in the particular case.

The Supreme Court of the United States thus reversed the decision of the Court of Appeals for the Eighth Circuit, which had found that the Convention did not apply, and directed further consideration as to whether the channels of the Hague Evidence Convention should be used for the particular request.

34 The minority of four judges of the United States Supreme Court would have directed trial courts normally to give priority to the channels of the Hague Evidence Convention in seeking documents or other evidence located abroad, utilizing the mechanisms of the Federal Rules of Civil Procedure only if the use of the Convention did not meet the needs of the litigation before the trial court.

35 The Supreme Court of the United States, while rejecting "exclusive or formal priority for the channels of the Hague Evidence Convention" indicated that trial courts dealing with discovery requests should "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." The court stated in part:

"American courts, in supervising pre-trial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pre-trial proceedings particularly closely to prevent discovery abuses." (26 *ILM* at 1033).

36 This approach, taken by the United States Supreme Court, leaves it to the trial courts to decide between the Convention's channels and the domestic procedural rules' mechanisms on a case-by-case basis. The practical results of the decision therefore can only be discerned through analysis of the subsequent cases applying the court's approach in *Aérospatiale*. In the first year and a half the results have been somewhat mixed: in the *Anschuetz* case the Court of Appeals for the Fifth Circuit on remand (*In re Anschuetz and Company*, 838 F.2d 1362, 7 March 1988) issued an opinion which appears to encourage the trial court broadly towards favorable consideration of use of the Convention's channels. The first reported trial court decision in the United States District Court for the Northern District of New York (*Hudson v. Hermann Pfauter GmbH & Co.* 117 F.R.D. 33, 9 September 1987) some three months after the *Aérospatiale* decision, directed use of the Convention's channels for the obtaining of documentary discovery from a German defendant, the

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court relying heavily on the analysis of the minority of the Supreme Court. In certain other cases the trial courts have ordered the use of domestic rules of civil procedure (federal or state) rather than the Hague Evidence Convention (*In re Benton Graphics v. Uddeholm Corp.* 118 F.R.D. 386, D.N.J. 30 November 1987; *Sandsend Financial Consultants v. Wood*, 743 SW2d 364, Tex. Civ. App., 1st Dist. Houston, 7 January 1988; *Scarminach v. Goldwell GmbH*, 531 N.Y.S. 2d 188, Sup., Monroe County, 22 June 1988).

- 37 One interesting question on which trial courts remain divided has to do with the first phase of a law suit when the defendant contests the court's personal jurisdiction over it. Under the principle that a court has jurisdiction to determine its own jurisdiction, trial courts will first limit discovery of evidence, including documents, to that evidence which bears on the elements of proof necessary for determining the jurisdictional issue. The trial courts which have been asked to employ solely the Hague Convention's channels for obtaining evidence located abroad which bears on the jurisdictional issue, have thus far been divided (Cf. *Rich v. KIS California, Inc.*, 121 F.R.D. 254, M.D.N.C., 22 June 1988; *John Jenco v. Martech International, Inc.*, 1988 U.S. Dist. LEXIS 4727, E.D. La., 20 May 1988 reversing 1988 U.S. Dist. LEXIS 3991).
- 38 A great many articles and case notes have been written on this issue since the *Anschuetz* case was decided in early 1985 and the range of positions taken has been very wide. In the bibliography attached to this document references are given to a selection of the literature which has been published in this respect.
- 39 The practical results of the *Aérospatiale* decision remain to be definitively assessed since the developing case law in trial courts in the United States of America shows a mixed outcome as to the percentage of use of the Hague Evidence Convention. As was already foreseen by the May 1985 Special Commission, there is a close linkage between the application of reservations made under Article 23 of the Hague Evidence Convention, the problematical application of "blocking statutes" adopted by various countries and the ways in which courts ordering "discovery" as known in certain common law countries, will perceive the appropriate application of the Hague Evidence Convention.
- 40 Since the first Special Commission meeting was held to discuss the operation of this Convention in June 1978, a number of countries have followed the recommendation made by that Special Commission that reservations under Article 23 be limited in their scope. The list of countries which have done so includes: Sweden (1980), Norway (1980), Denmark (1980), Finland (1980), the Netherlands (1981) and France (1981).
- 41 A domestic development in the United States of America which corresponds in a certain way to this effort towards permitting specific and relevant discovery requests to pass through the screen of Article 23 reservations under the Hague Evidence Convention has been the rising consciousness of the legal profession in the United States of America of the abuses to which the discovery system can lead. Although the inspiration for this rise in consciousness has come primarily from

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identification of discovery abuses at the domestic level, the result is that trial courts are more aware generally of the need to limit discovery of evidence to what is specific and relevant and to crack down hard on abuses of the discovery process. Not only are judges endeavouring to limit discovery, practicing lawyers are becoming more aware that the abuse of the system contributes to the escalating costs of lawsuits in the United States of America. The literature on discovery and its abuse is voluminous and no effort will be made to include a bibliography with this Preliminary Document. However, as an example of the increasing preoccupation of litigating attorneys in the United States with the problems of civil discovery, we are attaching a reproduction of p. 7 of the Journal of the Section of Litigation, American Bar Association *Litigation*, Vol. 15, No 1, Fall 1988, which introduces a 40-page symposium on discovery.

III *Methods of taking of evidence*

Question M Have any issues arisen from requests for special methods or procedures for the taking of evidence?

42 Commentary: Article 9, second paragraph, of the Hague Evidence Convention provides that if the requesting authority specifies a particular procedure for the taking of evidence, that procedure must be followed unless incompatible with the domestic laws of the State of execution, or impossible of performance due to practical difficulties. Discussions at the 1985 Special Commission meeting showed that a great latitude was allowed by requested authorities in carrying out such special requests, notably those calling for the use of "common law style" procedures such as the cross-examination of witnesses by the opposing party's attorneys and the recording of testimony verbatim. (See Report on the work of the Special Commission of May 1985, in Practical Handbook/Hague Evidence Convention, pp. 42(E)-42(F).) Specific articles to facilitate such procedures were included in the amendments to the French Code of Civil Procedure (Articles 739 and 740), adopted in 1975.

Question N Have any issues arisen concerning the costs of carrying out requests for evidence made under the Hague Evidence Convention?

43 Commentary: This point was discussed by the Special Commission of June 1978. (See Practical Handbook/Hague Evidence Convention, p. 38, No 6.)

IV *Protective provisions for witnesses*

Question P Have any issues arisen in respect of privileges or duties to refuse to give evidence asserted under Article 11 of the Hague Evidence Convention?

44 Commentary: This matter was discussed briefly at the 1985 Special Commission. (See Practical Handbook/Hague Evidence Convention, p. 42(F).) Two cases on privilege were digested in the volume published by the TMC Asser Institute, *Les Nouvelles Conventions de La Haye. Le Application par Les juges nationaux*, Tome III at pp. 176-177. An

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MINUTES N° 3

SPECIAL COMMISSION OF APRIL 1989

JUDICIAL CO-OPERATION

Distribution : 20-4-1989 - an
meetingMeeting of Tuesday, 13 April 1989 - afternoon

The meeting was opened at 3.10 pm under the Chairmanship of Mr Möller (Finland).

The Chairman gave the floor to the UK delegation which wished to indicate that in view of the explanations of the American delegate the attitude of the UK to serving documents submitted to the Senior Master by American attorneys would foreseeably be more liberal. However, the UK delegation expressed the hope that diplomatic and judicial channels would be used in preference to forwarding documents to the Senior Master.

QUESTION K - Mr Dyer considered that the following were the essential questions:

- Could a person be compelled to submit to a blood test or other test to establish paternity?
- Did recent technological developments have implications for the operation of the Convention?

The American delegation noted that the US Central Authority frequently received such requests from the Federal Republic of Germany. As far as was known, in most cases, submission to a test under compulsion had been permitted.

More rarely, the requesting authority has been asked to support its request with prima facie evidence of a kind that would enable the American court concerned to assess the request in full possession of the facts.

II Procedural scope of the Convention

→ QUESTION L - On the request of the Chairman, Mr Dyer summarized the developments mentioned in Preliminary Document No I.

The Secretary General felt that in order to facilitate discussion, it would be advisable if it was explained to the Commission how the Federal Rules of Civil Procedure could be applied extra-territorially.

Mr Dyer replied that these rules provided that a foreign party could be required to appear before an American court and/or to produce documents located abroad. Failure to comply was heavily penalized.

According to the Dutch delegation, proof taking, whether in one's own country or abroad, did not need to be by judicial means.

Moreover, the divergent attitudes presently discussed were mainly the consequence of differences in the various procedural laws of Member States.

In view of the French delegation, the use of compulsion necessarily presupposed the exclusive nature of the Convention.

Mr Dyer noted that American case law was made much more flexible as a result of the decision of the Fifth Circuit Court of Appeal in Anschuetz, the tenor of which had recently been confirmed in a further decision to the same court.

The Swiss delegation then expressed its fierce opposition to the Aérospatiale decision and regretted that France had not taken the opportunity to refer the matter to the International Court of Justice as had been done in the Boll case. It then undertook a detailed analysis of the reasoning used by the United States Supreme Court to support its decision. In the view of the Swiss delegation, the argument based on the non-mandatory language of the Preamble was false and jeopardized the future of the Convention.

The Chinese delegation fully supported the Swiss position as expressed in Preliminary Document No 1.

The Irish delegation noted that paragraph 1 of that document presented by the Swiss delegation was hard for a common law country to accept because it amounted to casting doubts on the decision of a superior court, which was incompatible with a system of separation of powers.

The American delegation was astonished that the work of the Conference was providing the opportunity to criticize a decision of the American Court of Final Appeal. It would be more worthwhile to discuss the scope of the Aérospatiale decision, than to undertake a pointless review of a decision which could not be quashed.

The majority of delegations were of the opinion that it was necessary to explain the basis of the decision, if only to clarify matters for the countries which had not yet become parties to the Convention.

On a query by the Argentinian delegate, the American delegation explained the ratio of the Aérospatiale decision which was based mainly on the principle that parties to an action should be treated equally whatever their state of provenance. Seen from this angle, the reasonable view that the court could use the Convention procedures rather than the procedures prescribed by his domestic law as a matter of discretion was the real contribution made by the decision, regardless of the question of the exclusive or non-exclusive nature of the Convention.

The Swiss delegation was not convinced by this explanation. It was concerned to know whether the French and German delegations maintained the positions taken up as amici curiae in the Anschuetz case.

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The German and French delegations confirmed that their Governments regarded the Evidence Convention as of exclusive application. The German delegation noted that regulations were in preparation by which the German declaration under Article 23 would be modified in line with the UK declaration.

Aspects of the reasoning of the US Supreme Court in Aérospatiale were noted by various delegations.

The Swiss delegation suggested that arguments taken from the Preamble to the Convention, the use of the word "may" rather than "must" at the beginning of each chapter, and the arguments from Articles 23 and 27 of the Convention were unsatisfactory. Moreover, arguments based on the history of the negotiations concentrated on American sources and were thus incomplete.

A further argument of the US Supreme Court was however felt by many delegates to be substantial, namely that the US would not have agreed to Article 23 if it had considered that it was thereby deprived of the facility to order pre-trial discovery.

Article 23 was introduced at a late stage of negotiations. Its implications were not fully appreciated by delegates at the time. Only later did its importance emerge. Many civil law countries had methods of obtaining evidence other than by letter of request, but the indirect compulsion exercised by the US procedure was of a degree unknown in other jurisdictions. The Convention therefore failed to take sufficient account of the question of indirect compulsion.

Mr Epstein (United States) emphasized that the decision in Aérospatiale could be regarded as the result of the principle in American procedural law that foreign and domestic parties should be treated equally.

The German and Swiss delegations considered this argument to be misguided. The application of the Convention depended on the location of the evidence and not the nationality of the parties.

The meeting was closed at 6.00 pm.

Statement of the U.S. Delegate (Pfund) at the Beginning of the April 19, 1989 Meeting of the Hague Conference's Special Commission on the operation of the Hague Service and Evidence Conventions

Mr. Chairman:

My delegation has sat here for half a full working day while the Aerospatiale decision of the United States Supreme Court and its merits, or demerits in the eyes of some here, have been discussed at some length.

So far we have heard only complaints about the decision, which is the law of the land in my country, and which will probably remain so for some time.

The Contracting States to the Hague Evidence Convention directly affected by the Aerospatiale decision and related cases have summarized for the record and with restraint their major disagreements with the decision and their sense of regret. The Swiss delegate, disappointed that the decision has made Swiss ratification of the Hague Evidence Convention more difficult or even doubtful, has gone beyond regret and seems close to suggesting that the decision and the United States Government arguments to the Court were manifestly misguided and inept and seems to imply that the U.S. participants in the preparation and negotiation of the Convention, either at the negotiation of the Convention and/or in their statements on the Convention cited in the Supreme Court's decision, were not acting in good faith. My delegation cannot but reject these suggestions and implications which, I repeat, were not claimed outright.

I would like to suggest, Mr. Chairman, the possibility-- perhaps already long ago recognized by many -- that the U.S. institution of pre-trial discovery, although it was explained and discussed at the Hague Conference's deliberations on this Convention, may at the time of the negotiations either not have been fully explained or fully understood by all participants, and that, in any event, the relationship of the Hague Evidence Convention procedures and discovery abroad under the U.S. Federal Rules of Civil Procedure and State rules of procedure was not discussed during the negotiations and the problems recently experienced were not anticipated by the negotiators and thus not resolved in the Convention -- at least not so that all participants and Contracting States consider them resolved in the same way. The Netherlands delegate in particular, in a very thoughtful and carefully worded way, has suggested an explanation for the difficulties that underlie the Aerospatiale case and decision and the reactions to it. We believe that his views could be truly helpful to all that are puzzled and troubled by this problem, because his comments offered a likely explanation without allocating blame. We believe that his remarks should be carefully reflected in the minutes of the session yesterday afternoon.

We wonder whether the line of inquiry or debate could not now take a different turn and focus on the question: "What now?" After all, even if the Swiss delegate had personally convinced Mr. Epstein and me of the merits of his views, that would not and could not change the decision of the Supreme Court or its legal effect in the United States -- a country that is foremost in permitting evidence gathering in its jurisdiction by courts and parties in other countries. However, it might be useful to focus on what defendants can do in U.S. proceedings when they invoke the Hague Evidence Convention and want courts in the United States to order any discovery of documents or testimony of witnesses located in another Contracting State pursuant to the Hague Evidence Convention, i.e., how they can best enhance resort to the Hague Convention and take advantage of the Supreme Court's admonitions for special sensitivity when evidence is located abroad, which are an important part of the Court's decision.

Before that, might we not be reminded by some of the legal practitioners and other experts here of the benefits actually provided by the Hague Evidence Convention, i.e., not discuss only what's wrong with the Convention and its application but hear something about what's right and how it is beneficial to legal proceedings in Contracting States? Such a discussion might balance our deliberations and give us a useful perspective, and perhaps would also be helpful to the Swiss Government in its further review of the Convention.

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MINUTES N° 4

SPECIAL COMMISSION OF APRIL 1989
JUDICIAL CO-OPERATION

Distribution : 20-4-1989 - at
meeting

Meeting of Wednesday, 19 April 1989 - morning

The meeting was opened at 10.15 am under the Chairmanship of Mr Höller (Finland).

The American delegation noted that criticism of the Aérospatiale decision would not now alter the law in America.

The truth of the situation was that the problems relating to pre-trial discovery were insufficiently understood in 1970, and that fact explained the current concern with the topic.

It was hoped that this realisation would permit a more constructive discussion of the problem henceforth. Particularly useful would be a consideration of the ways in which litigants could take maximum advantage of the US Supreme Court's admonitions to respect the sensitivities of other States.

Several helpful considerations were raised by those familiar with American procedure:

- Pre-trial discovery was not limited to American procedural law, but American law had received great attention because important cases had arisen in practice, and American law was wider in scope and as to methods of compulsion than the law of other States.
- Nevertheless pre-trial discovery played an important role in achieving out of court settlements, and other States should not permit unfamiliarity with a foreign system to become hostility.
- The wide scope of American discovery procedures was increasingly appreciated by US lawyers as a source of abuse. Recent changes in US law reflected this recognition. Lawyers of other jurisdictions should note that:
 - a by taking part in the proceedings early, such as at the pre-trial conference envisaged by the Federal Rules of Civil Procedure they could more effectively advocate the use of the Evidence Convention and have its use incorporated into a planned timetable for discovery.

- b Use of the Convention was largely dependent on the efforts of the Parties, but foreign governments could assist by making their position clear in an amicus curiae brief.
- c A protective order procedure was available if an attorney made discovery requests that were overboard, harassing or required confidential information to be disclosed.
- d The 1983 amendments to the Federal Rules made provision for fines and other sanctions under Articles 11 and 26(g) where attorneys acted in bad faith or otherwise abused discovery procedures. These sanctions had not made their presence felt prior to the 1985 Special Commission meeting but were beginning to have a considerable effect.
- e Although some decisions since Aérospatiale did not lead to the application of the Convention, courts in the US were undergoing a process of education, and many reported and also unreported instances of its use should be emphasized. Several courts had been most impressed by alterations made in the laws of civil law countries to accommodate American procedural methods.
- f It was arguable that since the Evidence Convention was seen by the US Supreme Court as operating alongside the Federal Rules, the burden of proof should be on the party wishing to resist application of the Convention.

- Courts were unlikely to use the Convention when it would obviously prove unproductive because of an Article 23 reservation made by the State requested.

The American delegation stated that it was still the view of the US Government (see 1985 Special Commission meeting) that countries which made an Article 23 declaration should make a limited declaration.

The Secretary General, while agreeing with the request of the American delegation, considered that the success of such a request depended on persuading the American authorities to be more restrained in their use of discovery in international proceedings.

In order to achieve success there must be efforts made by both sides to accommodate the other's point of view.

This balanced view was welcomed, particularly by the American and Swiss delegations, and the Permanent Bureau undertook to formulate a recommendation which was acceptable to delegations from States which used pre-trial discovery procedures and from those which did not. The American delegation recorded that the US Government would do its best to circulate a suitable recommendation to attorneys in the US.

The Canadian delegation noted that accession to the Evidence Convention by Canada is under consideration and raised several points for information and discussion. Practitioners in Canada favoured the non-exclusive application of the Convention, and thought that requests

for pre-trial discovery could be accommodated if sufficiently connected to the judicial proceedings and if relevant and precise and not asking for more information than was necessary. Queries were raised about:

- (1) the extension of the Convention to arbitration,
- (2) its use in connection with witnesses who were not parties to the action, and
- (3) the experience of other jurisdictions in interpreting the expression "other judicial act" in Article 1.

As to (1), the matter had been discussed in 1985 and it was felt there was no demand for making such an extension. The laws of some countries did however provide for judicial assistance in obtaining evidence for arbitration, and the Convention could then probably be used to obtain evidence located abroad. Although the wording of the English text of Article 1, paragraph 2 of the Convention seemed to exclude this possibility, the French text was more general.

As to (2), the Convention was certainly applicable in respect of witnesses who were not parties to the action.

As to (3), "other judicial act" referred to any act which had legal effect. An example might be the need to obtain an official consent to a marriage from a party residing abroad.

QUESTION M - Particular methods of procedures for taking evidence which had been requested included video evidence, and the opportunity for cross-examination of witnesses. Most delegations did not envisage problems with requests for video recordings, but Luxemburg, Denmark and Sweden considered that there would be difficulties with such requests under their laws.

Cross-examination was not felt to raise any legal problems. Several States Parties to the Convention had changed their domestic law to allow for it. Practical problems were foreseen, however, owing to the inexperience of lawyers of civil law countries in such matters. Because of this it was important that all Parties should be clearly informed of the relevant rules of procedure prior to cross-examination.

QUESTION N - The question of reimbursing costs had caused few problems. The restrictive interpretation of Article 14 by the UK was questioned, and it was noted that the US Central Authority charged for use of letters of request, but not for taking of evidence by commissioners.

QUESTION P - The Dutch delegation clarified the position under Dutch law regarding privileges or duties to refuse to give evidence. The declaration of the Dutch Government reported in the Practical Handbook was too general. It was possible for persons in receipt of confidential information, such as doctors, lawyers and government officials, to invoke the defence of privilege.

The American delegation noted that often provisions of foreign law concerning privilege were attached to requests for evidence. Since they were frequently not translated into English this created difficulties for American attorneys.

QUESTION Q - It was felt that requests for evidence arose in many types of cases and that products liability could not be singled out for special attention.

PRACTICAL HANDBOOK

There was overwhelming support for the work undertaken by Mr van Loon (First Secretary at the Permanent Bureau) in preparing the Practical Handbook. It was often difficult for lawyers to obtain the relevant information elsewhere. Delegates hoped that it would prove possible to circulate the Handbook more widely in the future and eagerly awaited the completion of a new edition.

The meeting was closed at 1.10 pm.

SPECIAL COMMISSION
OF APRIL 1989

JUDICIAL CO-OPERATION

Distribution: 17-4-1988 - pm
meeting

WORKING DOCUMENT SUBMITTED BY THE SWISS DELEGATION

The Swiss delegation took cognizance with great interest but also a certain anxiety of several decisions rendered by the tribunals of the United States with respect to the application of the Hague Convention on the taking of evidence abroad in civil or commercial matters.

The judgment delivered by the Supreme Court of the United States of America on 15 June 1987 and the decrees rendered subsequently by various district courts were of particular relevance in this connection.

Indeed, these decisions reveal a trend which deviates from one of the main objectives aimed at by the authors of the Convention, namely to further accommodation of different methods of taking evidence abroad and to increase the efficiency of international judicial assistance in civil or commercial matters.

In the hope of ensuring the success and satisfactory implementation of the Convention, as well as to avoid the risk that the silence of the States concerned could be construed as signifying approval of the evolution in this field of American case-law, the authors of the present document take the liberty of making the following observations:

- 1 Any State ratifying this Convention pledges itself to apply that legal instrument when desiring to take evidence in another Contracting State;
- 2 The fact that the commitments mentioned in Articles 1, 15, 16, 17 and 21 are not compulsory can on no account be interpreted as meaning that the application of the Convention is optional. These articles must be read in relation to the rest of the Convention, which foresees three different forms of taking of evidence: by a letter of request (Article 1), by diplomatic officers or consular agents (Articles 15, 16) and by commissioners (Article 17). The reason why the authors of the Convention used the expression "may" was precisely in order to point out these three options, but in no way to give the Contracting States the power of deciding, in each particular case, whether or not the Convention should be applied.

Indeed, by virtue of provisions 27 and 28 of the Convention it is the State of execution (and not the requesting State) that must decide, at the time of ratification, which channel(s) of judicial assistance should be resorted to within the scope of the Convention.

- 3 The "Aérospatiale" case, as well as the great majority of other cases judged in accordance with that decree, practically result in a great part of the Convention no longer being applied and therefore in depriving it of interest for the Contracting States in their relations with the United States.
- 4 This case-law is in opposition with the fundamental principle of public international law "pacta sunt servanda" (cf. Article 26 of the Vienna Convention of 23 May 1969 on the law of treaties) and the conclusions drawn from the above-mentioned jurisprudence could possibly violate the law and sovereignty of the States concerned.

This evolution is also inconsistent with the wishes of the authors of the Convention, who desired to overcome the difference between the system of taking evidence of the countries of civil law and those of common law and thus to prevent conflicts from arising between the States.

But these objectives can only be attained if the States ratifying the Convention implement it literally, according to its philosophy and the spirit which presided over its creation and respect the mechanisms of judicial assistance by interpreting it in such a way as not to deprive it of a major part of its substance.

With respect to that which precedes, the Swiss delegation requests the Special Commission to express its opinion on the application of the Convention by working out a resolution which takes the present document into account.

II. International Commercial Arbitration*

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association favors recognition of freedom of parties to international commercial arbitration proceedings to choose as their representatives in those proceedings lawyers who need not be admitted to practice law in the jurisdiction where the arbitration proceedings take place.

REPORT

International commercial arbitration is a popular dispute resolution mechanism in business transactions involving parties from different nations. Such transactions typically involve elements of the law of more than one national jurisdiction, and international arbitration allows the parties in large measure to control and predict the place where any problems will be resolved, the law or laws to be applied, the procedures to be followed and the identity of the decision makers.

This system of international arbitration also permits each party to rely largely on the legal advisers with whom the party is most comfortable. Lawyers regularly participate in the negotiation of agreements that may be governed by foreign law. To the extent that the law governing the transaction is that of a jurisdiction in which those lawyers are not admitted to practice, American

lawyers are expected to familiarize themselves with it and consult counsel expert in that law to the extent appropriate.¹

If a dispute arises and an arbitration claim is made, it generally is assumed by international arbitration practitioners that each party may continue to rely on its regular legal advisers to the extent it wishes. However, the initiation of formal arbitration proceedings necessarily invokes to some degree the law of the place of arbitration, which must at the least permit the arbitration to occur. If arbitration proceedings lead to hearings, non-local lawyers may take an active role, although they of course may not appear before a court in litigation related to the arbitration without appropriate judicial permission.

Such activities raise the question whether non-local lawyers might be said to be engaging in the practice of law in any jurisdiction in which some or all of the arbitration is to take place. A view that such arbitration activity not in the local courts nevertheless constitutes the practice of law would require compliance by each party's representatives with local rules admitting lawyers to practice, which in many cases would be impossible and would preclude formal participation by the nonlocal lawyers.

International Commercial Arbitration Practice

Although facts which could raise this issue often are present in international arbitration proceedings, legal authorities addressing it are sparse. Problems over conduct of an arbitration by non-admitted lawyers seldom arise in practice. The world's major international arbitration organizations raise no objection to a party's representation based on local practice of law rules, and it is rare for a party to object to another party's choice of lawyers on this basis. Foreign lawyers regularly represent parties in arbitration proceedings in major international arbitration jurisdictions such as England,² France, Sweden, Switzerland and the United States.

*This Report was approved by the House of Delegates at the Honolulu meeting in August 1989. The Report emanated from the Section's Committee on International Commercial Arbitration. The Committee's Chair, James H. Carter, was principally responsible.

1. See, e.g., *ABA Report on Japanese Law Practice*, 21 INT'L L. 278, 282-83 (1987).

2. When the subject of participation by non-English lawyers in London arbitrations was raised by a Swedish lawyer at a 1985 "Forum London" program, the program's Chairman, Lord Justice Kerr, responded:

"But, as the speaker knows, there is absolutely nothing in this country, as there is I think in some other countries, which prevents parties who wish to arbitrate to do so in London, before whatever tribunal they choose, selecting their own legal advisers. We have no Rules of etiquette or law which preclude this in any way." *Conference on Contemporary Problem in International Arbitration* at 156.

A Canadian international arbitration administering agency lists freedom of choice of counsel as one of its jurisdiction's selling points: "Our foreign clients can retain their own legal counsel or advocates whether or not they are licensed to practice in British Columbia." British Columbia International Commercial Arbitration Centre, *International Commercial Arbitration: The Canadian Advantage* at 2.

In addition, in many instances parties retain lawyers in the arbitration jurisdiction either to represent them as the sole counsel appearing of record in the matter or to appear with the parties' non-local counsel. This may be done as a matter of prudence in case an application for judicial intervention in the arbitration is made or if an award is to be reviewed or enforced at the place of arbitration, in which cases the assistance of lawyers admitted to appear in the local courts will be necessary. Sometimes the nature of the issues, the general quality or special expertise of local lawyers or other factors also may suggest to a party that locally-admitted lawyers should take a role in an international arbitration. So long as local lawyers form part of a party's legal team, the status of the non-local lawyers is seldom questioned.³

U.S. DOMESTIC JURISPRUDENCE

The basis on which this international arbitration custom rests has not been widely discussed. In the United States, there is limited jurisprudence involving participation by a lawyer admitted in one or more U.S. states in an arbitration occurring in a state in which the lawyer is not admitted. The three most widely known instances occurred in the 1970s and involved labor arbitration. The Unauthorized Practice of Law Committee of the Florida Bar found in 1973 that such representation constituted the unauthorized practice of law if it involved the presentation of evidence, examination of witnesses, or consideration and presentation of questions of law. Similar committees in New Jersey and Connecticut considered cases also raising this issue but declined to render merits opinions.⁴

Arbitration spokesmen thereafter argued⁵ that the Florida result was unsupported because U.S. labor arbitration, and commercial arbitration generally, differ in important ways from litigation. They involve fewer formalities and, at

3. In contrast, some laws or arbitration organization rules occasionally require that all arbitrators be of local nationality. For example, Russian and Chinese Maritime Arbitration Commissions effectively require that arbitrators be of local nationality. See § 4 of the U.S.S.R. Statute on the Maritime Arbitration Commission, reprinted in 6 Benedict on Admiralty 7-142.15 (1988), as well as §§ 4(c) and 9 of the Provisional Rules of the Chinese Maritime Arbitration Commission, reprinted in 6 Benedict 7-153 and in 3 Y.B. Comm. Arb. 249 (1978). However, the same Russian and Chinese organizations also provide that attorneys representing the parties may be of any nationality. See U.S.S.R. Statute § 11; Chinese Rule 20.

The issue of arbitrator nationality has been recognized by the drafters of the UNCITRAL Model Law on International Commercial Arbitration. 24 I.L.M. 1302 (1985), 11 Y.B. Comm. Arb. 350 (1986). Article 11(1) of the Model Law specifies that unless it is otherwise agreed by the parties, no person will be excluded from service as an arbitrator on the basis of nationality.

4. See Aksen, *Arbitration and the Unauthorized Practice of Law*, 172 N.Y.L.J. 112 (Dec. 11, 1974, p. 1); Association of the Bar of the City of New York Committee Report, *Labor Arbitration and the Unauthorized Practice of Law*, 30 The Record 422 (1975); but see *American Automobile Ass'n v. Merrick*, 117 F.2d 23 (D.C. App. 1940) (automobile club's lay representation of members in arbitration did not involve practice of law); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 171-21 (1967); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967).

5. E.g., Aksen, *supra* n.4.

least in the case of labor arbitration, may rely more heavily on factual presentations which can be and often are made by non-lawyers.

Whether as a result of these arguments or otherwise, practical acceptance of unrestricted interstate practice in arbitrations in the United States—both labor and commercial—has since become universal. In 1982 the U.S. District Court for the Southern District of New York, in a decision by Judge Edward Weinfeld, held that a New Jersey lawyer who participated in a construction industry arbitration in New York was not engaged in the practice of law and that his firm therefore could recover a fee for his services.⁶ Citing an absence of any authority to the contrary, the court noted procedural distinctions between litigation and arbitration and relied in large part on the commentary on the three earlier labor cases. Today representation of parties in arbitrations in New York by non-New York lawyers is common.

No American state has yet codified the status of non-local lawyers participating in arbitrations. However, California's 1988 international commercial arbitration and conciliation statute,⁷ which closely resembles portions of the UNCITRAL Model Law, does address the issue of representation in *conciliation* proceedings, as follows:

The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.⁸

Recent International Decisions

With the growth of international arbitration and the multiplication of centers in various cities which seek to host arbitration proceedings, the issue of representation in an international arbitration has become a subject of heightened discussion and occasional litigation. There are two recent judicial precedents. In the first, a 1983 decision,⁹ the High Court of Barbados held that as a general matter an attorney admitted to practice in New York could represent a party in international arbitration proceedings involving the construction industry in Barbados without conditions; but the court also sustained the arbitrator's requirement that the American lawyer associate local counsel in the matter who would act with respect to issues of Barbados law. The Barbados court reasoned that appointment of an arbitral tribunal commits the parties to its rulings on procedural matters, including rulings on who may appear and speak.¹⁰

6. *Donald J. Williamson, P.A. v. John D. Quinn Construction Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982).

7. Cal. Civ. Pro. Code §§ 1297.11–1297.432 (West 1989).

8. Cal. Civ. Pro. Code § 1297.351 (West 1989). The California statute goes somewhat beyond the UNCITRAL Model Law in the case of arbitrator nationality, *supra* n.3, stating flatly in § 1297.111: "A person of any nationality may be an arbitrator."

9. *Lawler, Matusky & Skelly v. Attorney General of Barbados*, No. 320 of 1981 (Barbados). A copy is attached to this Report.

10. The court relied in part on *Bremer Vulkan v. South India Shipping Corp.* [1861] C.B. (N.S.) 312.

More recently, in 1988 the High Court of Singapore enjoined United States lawyers who had not associated Singapore counsel with them in a matter from acting or appearing on behalf of one of the parties to an international arbitration proceeding there which also involved a building construction dispute.¹¹ The Singapore court held that Singapore's Legal Profession Act applies to arbitrations and contains no exception to the definition of local law practice for international arbitration proceedings.¹²

Similar questions also have been raised in Japan,¹³ even though international arbitrations have occurred there in the past with the participation of non-local lawyers as representatives of parties.

Arbitration and the Practice of Law

National laws differ greatly in their definitions of the practice of law.¹⁴ Some laws, such as those of England, define this field narrowly, thus permitting a wide scope for activity by foreign lawyers, including their participation in international arbitrations in England.¹⁵ Others, such as the laws of Japan, define the practice of law more broadly and thereby greatly limit the activity of foreign lawyers.¹⁶ The extent to which activities by non-local lawyers involving international arbitration are regulated by local practice of law concepts undoubtedly will continue to vary.

In support of the view that such restrictions are necessary, it can be argued that more formal types of international arbitration are unlike labor arbitration and instead are similar to litigation, so that they require that standards be set and controls maintained for the protection of the public. Since there may be no effective international control of lawyers who engage in such arbitration, it is said, only local regulation in each jurisdiction can fill this need.

11. *Builders Federal (Hong Kong) Ltd. et ano. v. Turner (East Asia) Pte. Ltd.*, No. 90 of 1987 (Singapore), reprinted in 5 J. INT'L ARB. 140 (1988); see Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen?* 5 J. INT'L ARB. 71 (1988).

12. The Singapore Legal Profession Act, reprinted in Lowenfeld, *supra* n.11, §§ 31(g) and (j), does contain exceptions to the local bar admission requirement for persons serving as arbitrators and for representatives of parties before Singapore's Industrial Arbitration Court or the Syariah Court.

13. See, e.g., Taniguchi, *Commercial Arbitration in Japan* (International Council for Commercial Arbitration Conference Papers, Tokyo 1988); *Commercial Arbitration: Japan Is Odd Man Out*, EAST ASIAN EXECUTIVE REPORTS, March 15, 1989, at 12.

14. See Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUMB. L. REV. 1780 (1983); Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678 (1979); Comment, *International Legal Practice Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 298 (1974); Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

U.S. precedents also are not consistent. See Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

15. Note, *Providing Legal Services at 1781*.

16. *Id.*; see ABA Report, *supra* n.1.

The arguments against restriction are based primarily on the fact that the leading arbitration site nations impose none and have experienced no difficulties as a result. To the extent that the issue has been considered, courts have been willing either to characterize commercial arbitration as distinct from litigation and thus not the practice of law or to treat it as an activity best regulated by the chosen arbitral tribunal. In its 1983 decision, the High Court of Barbados reviewed both English and U.S. precedents and concluded that the common law grants a private arbitrator control over proceedings before him or her and, subject to the arbitrator's rulings, permits a party to the arbitration to be represented by any person, including a person not admitted to practice law in any jurisdiction. The Barbados Court reasoned that statutes restricting the practice of law are to be examined to determine whether they have repealed this set of common law rights, and in the case before it held that there was no such restriction. In the leading U.S. interstate decision, as noted above, the Court readily accepted that conduct of a construction arbitration, like a labor arbitration, is not the practice of law.¹⁷

In addition, national controls do exist. In the United States, lawyers who act with respect to a transaction involving the law of a jurisdiction in which they are not admitted to practice are required to inform themselves of it and to associate with them lawyers expert in such law to the extent necessary to assure that reasonable care is exercised in the giving of advice.¹⁸ This principle applies to the conduct of arbitrations as well as to other commercial transactions. Also, controls may be exercised by arbitrators and failures to use proper care can expose a lawyer to disciplinary measures or even civil liability. Lawyers admitted in a jurisdiction generally are subject to professional discipline for activities occurring anywhere, including in foreign countries. With these safeguards, conduct of commercial arbitrations by non-local lawyers, including non-American lawyers, has become accepted and has given rise to no reported difficulty.

Parties to international commercial transactions have a strong interest in choosing their representatives based on the skills they deem appropriate. Indeed, if a contract is governed by a law other than that of the place of arbitration, it would seem natural that lawyers familiar with the governing law play a prominent role. Such parties as a rule are not in need of a high degree of legal protection from abuse by their own lawyers, including lawyers who represent them in arbitration proceedings. Permitting party autonomy (subject to control by arbitrators) in the selection of these representatives helps further international confidence in a system of arbitral dispute resolution which harmonizes differing national legal traditions and does not subject any party entirely to "home town justice" under rules likely to favor another party. If one party can use local practice of law restrictions to establish a real or perceived advantage over a party of a different nationality, the development of a neutral system of international arbitration will be hindered.

17. *Donald J. Williamson, P.A. v. John D. Quinn Construction Corp.*, *supra* n.6.

18. See *ABA Report*, *supra* n.1.

Jurisdictions in which such restrictions are found will be disfavored as locations for international arbitrations, slowing the development of a variety of arbitration fora throughout the world for use by commercial parties.

International commercial arbitration can be considered a transnational activity which does not involve the practice of law locally in any particular jurisdiction. Ideally, as is the case in the major international fora at present, there should be no restrictions on representation of a party in international arbitration other than any which might be suggested or required by the arbitral tribunal.

Respectfully submitted,
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Chairman

Section of International Law and Practice

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