By Victoria E. Brieant

With the spread of international business, it is increasingly likely that litigators will need to take a deposition that is subject to non-U.S. rules.

PART 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of depositions, objections, instructions not to answer, Rule 30(c)(2), special masters and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition.

Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems.

FOREIGN DEPONENTS AND THE HAGUE CONVENTION • More and more often, litigation involves foreign companies or non-citizens. This section focuses on three countries and the taking of foreign depositions of citizens of Japan, the United Kingdom, and Germany.
Most states authorize by statute or rule the taking of depositions in a foreign country:
- On notice before a U.S. consular officer or a foreign official;
- Before a court-appointed commissioner; or
- Pursuant to a letter rogatory.

Those state statutes or rules are commonly modeled after Federal Rule of Civil Procedure 29(b). See also, 1 Bruno Ristau, *International Judicial Assistance (Civil and Commercial)* §3-2-2 (Int’l Law Inst. 2000 ed.) (“Ristau”). Depositions of foreign deponents may be obtained without the aid of foreign authorities only when the witness is willing to testify or produce documents or other evidence voluntarily and when the law of the foreign country does not preclude such voluntary testimony or evidence. 1 Ristau, supra, at §3-2-3. Pursuant to Fed. R. Civ. P. 29, unless the court orders otherwise, the parties may stipulate to voluntary depositions. Deposition notices are authorized under Fed. R. Civ. P. 28(b)(1), which provide for foreign testimony “on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination.” 28(b)(1).

18 U.S.C. §3507

As discussed in *U.S. v. Atiyeh*, 402 F.3d 354 (3rd Cir 2005), *cert. denied*, 546 U.S. 1068 (2005), the District Court has authority under 18 U.S.C. §3507 to appoint a Special Master in a criminal case to preside at a deposition taken out of the country or to serve as an advisor on questions of U.S. law. You should note that the Special Master has no jurisdiction to decide questions of privilege under foreign law. 18 U.S.C. §3507 is worth repeating in its entirety:

“Upon application of a party to a criminal case, a United States district court before which the case is pending may, to the extent permitted by a foreign country, appoint a Special Master to carry out at a deposition taken in that country such duties as the court may direct, including presiding at the deposition or serving as an advisor on questions of United States law. Notwithstanding any other provision of law, a Special Master appointed under this section shall not decide questions of privilege under foreign law. The refusal of a court to appoint a Special Master under this section, or of the foreign country to permit a Special Master appointed under this section to carry out a duty at a deposition in that country, shall not affect the admissibility in evidence of a deposition taken under the provisions of the Federal Rules of Criminal Procedure.”

Minebea Co., *Ltd. v. Papst*, 370 F. Supp. 2d 302 (D.D.C. 2005), is a good example of how the Special Master and the Court can be angered by a party’s refusal to produce foreign witnesses for deposition. *Minebea Co.* is a patent case in which the plaintiff obtained an order from the Special Master requiring the defendant to produce various witnesses located in Germany for American-style depositions in the U.S. and for testimony at trial in the U.S. The defendant objected. The District Court affirmed in part and reversed in part.

The Court considered these factors:
- That the defendant arranged for and paid for counsel for these witnesses in Germany; and
- That the defendant arranged for meetings in Germany with its counsel and these witnesses.

Defendant argued that even if it had control, it was not obligated to exercise that control. It also argued that it did not have “control” over the witnesses because attorneys do not control their clients.

The District Court found it dispositive that written agreements existed between the inventors and the Company required the inventors to provide testimony in legal proceedings at the Defendant’s request. The Court wrote:

“Given the Papst defendants’ repeated failures to report completely and accurately as to their communications and their counsel’s communications with the German witnesses and with the German
authorities, and the Papst defendants’ continued reluctance to lay out for this Court the full story of their communications and arrangements with the German witnesses since September 5, the Special Master is constrained to conclude that the communications by and on behalf of the Papst defendants have effectively discouraged and dissuaded all of the German witnesses from appearing in this District for their depositions. R & R 19S at 8. Because the inventors are expressly required to testify at the request of Papst by written contracts, the Court cannot but conclude that Papst’s ‘request’ for the voluntary appearance of the inventor witnesses was made with a wink and a nod and that their failure to appear must be attributed to Papst. The Court concludes that Papst has willfully failed to produce these witnesses. If it continues to fail to produce them for testimony at trial, the Court will instruct the jury what adverse inferences may be drawn from Papst’s failure to produce the witnesses.”

_Minebea_, 370 F. Supp. 2d at 310.

**The Court’s Inherent Power To Appoint Special Masters To Supervise Foreign Depositions**

_Hilao v. Estate of Ferdinand Marcos_, 103 F.3d 767 (9th Cir. 1996), is a significant case involving the role of Special Masters in foreign depositions. This case involved the Hon. Sol Schreiber and Hon. Manuel L. Real. Judge Real appointed Judge Schreiber as the Special Master to oversee the taking of 137 depositions of class members, to be taken in the Philippines. Judge Schreiber reported his findings in the trial. The jury accepted many of them, awarded more money to some class members than Judge Schreiber recommended, and awarded less money to other class members. The jury awarded, in the aggregate, compensatory damages of $766 million and exemplary damages of $1.2 billion.

In supervising the taking of the class member depositions, the depositions were noticed and taken pursuant to the Federal Rules of Civil Procedure, even though they were taken in the Philippines. Judge Schreiber “evaluated: whether the abuse claimed came within one of the definitions, with which the Court charged the jury at the trial..., of torture, summary execution, or disappearance; whether the Philippine military or paramilitary was... involved in such abuse; and whether the abuse occurred during the period September 1972 through February 1986.”

_Id._ at 782. The Special Master recommended ceilings on damages for lost wages and pain and suffering, which were followed by the jury. This procedure was unorthodox in several ways and the reported decisions are worth reading in full. Addressing a point made in the dissent by Judge Rymer, but disagreeing with its application, the Special Master wrote that the use of a Special Master in the case created “a solution to a major social problem” and used the traditional tools of our federal court system.

If the Court had not used the approach of the Special Master supervising the depositions, making substantive recommendations and using statistical sampling, the 9th Circuit estimated it would have taken about six and a half years for the District Court to have tried all 10,000 claims, handling roughly 30 per month. This would hardly have been feasible or rendered justice or due process to the parties.

**The Hague Convention Of 1970**

The Hague Convention of 1970, which codifies the taking of depositions between citizens of different countries on civil and commercial matters, streamlines deposition procedures for the more than 40 member countries, including the United Kingdom and Germany. Although each participating country was allowed to make its own reservations and declarations regarding the applicability of each article of the Convention, the procedure for a U.S. party to depose a citizen of one of the
member-countries in that country is less cumbersome than to depose a Japanese citizen in Japan.

Under the Hague Convention, “a Contracting State may…request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence.”

See Article 1 of the Hague Convention.

“A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.... Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.”

See Article 2 of the Hague Convention.

It is worth noting that if a party scheduling a deposition in a foreign nation who relies on the voluntary agreement of the deponent, rather than obtaining compulsion of law in the foreign country, it may risk monetary sanctions should the deponent fail to appear.

The Letter Of Request

A U.S. party seeking to depose a citizen of a Contracting State should submit an application to a U.S. Court for the issuance of a Letter of Request. See Articles 3(a), (b), 28(a), and 32 of the Hague Convention (authorizing the issuing authority to send Letters of Request directly from court to court or through a party to the action directly to the executing tribunal); see also the Sample Application to U.S. Court for Issuance of Letter of Request under the Hague Convention, which appears at the end of this article as Appendix 1.

Under Article 3 of the Hague Convention, the Letter of Request shall specify:

- The authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- The names and addresses of the parties to the proceedings and their representatives, if any;
- The nature and description of the proceedings for which the evidence is required, giving all necessary information in regard thereto; and
- The evidence to be obtained or other judicial act to be performed.

When appropriate, the Letter shall specify, inter alia:

- The names and addresses of the persons to be examined;
- The questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;
- The documents or other property, real or personal, to be inspected;
- Any requirement that the evidence is to be given on oath or affirmation, and any special form to be used; and
- Any special method or procedure to be followed that is not inconsistent with the executing State’s laws.

See Article 3 of the Hague Convention; see Sample Letter of Request, which appears as Appendix 2 at the end of this article; see also, 1 Ristau, at §5.

The Letter of Request and accompanying documents should be submitted in duplicate, with a translation into the language of the requested court. 1 Ristau, supra, at §3-3-2, 5-2-1(8); see Article 4 of the Hague Convention. The application for issuance of the Letter of Request should be made to the issuing court in the United States where the action is pending, with notice to the adverse party. Fed. R. Civ. P. 28(b).

Under Article 7, the requesting party shall be informed of the time and place the proceedings shall take place, although the United Kingdom
normally appoints a special commissioner to execute the Letter of Request and examine the witness under oath. The parties or the attorneys for the parties will be permitted to be present and to cross-examine the witness. The verbatim transcript of the proceeding will be returned to the court of origin in the state of origin. See 1 Ristau, supra, at §5-2-2.

**Germany**

In civil cases, when a witness is willing to testify voluntarily, a deposition may be conducted at the American Embassy in Bonn or any of the American Consulates. Depositions may be taken on notice or by issuance of a commission by an American court to a “Consular Officer.” See 22 C.F.R. §92.53. The deposition cost is $200 per hour. Although technically the consular officer takes the deposition, attorneys for either side may ask questions orally or in writing. See http://travel.state.gov/germany. Authority for American Consular Officers to depose willing witnesses of German or third-country nationality is derived from Agreements Between the United States of America and the Federal Republic of Germany, T.I.A.S. 9938 (referred to here as diplomatic notes). Key points under the diplomatic notes are:

- That absolutely no compulsion be brought to bear on the witness to appear or to provide testimony (e.g., the request to give information may not be called a “summons” nor may the interview be called an “interrogation”);
- Witnesses must give their expressed consent to be interviewed outside the consulate (i.e. at their home or place of business); and
- Witnesses have a right to be accompanied by an attorney.

Any deposition of German or third-country nationals must be in accordance with the agreements made in this exchange of diplomatic notes. The issue of whether non-Germans who do not have a business or residence in Germany may be deposed is in dispute.

In civil cases in which the party must compel the witness to testify, a German judge must ask the questions via a German court proceeding. See http://travel.state.gov/germany. However, an American attorney may request to be present and may pose additional questions through the German judge. Id. Like requests for service, requests for evidence from involuntary witnesses must also follow the procedures set forth in the appropriate convention. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Part VII U.S.C. §1781 (1977 Supp.), reprinted in 28 U.S.C. §1781; Martindale-Hubbell International Law Digest, Part VII (1993). Basically, the same rules as those for the Service Convention apply. The Letter of Request, as well as questions and all other documents, must be translated into German and submitted in duplicate. A model letter of request follows the text of the Convention.


**Criminal Cases**

The Hague Evidence Convention does not apply to criminal cases. Instead, counsel must use written questions submitted via letters rogatory and rely on a German court to handle the matter. This procedure is slow and arduous to execute and return to the requesting American court. See http://travel.state.gov/germany.
Administrative Cases

German authorities do not regard The Hague Evidence and Service Conventions as applicable to administrative cases. See http://travel.state.gov/germany. The German courts may, however, hear requests for both service and evidence in these cases pursuant to letters rogatory.

Japan

In order to depose a Japanese citizen in Japan:
• The deponent must be willing to be deposed;
• A U.S. Court Order or Commission must issue to the U.S. Embassy or Consulate in the appropriate Japanese city;
• The deposing party must obtain a Deposition Visa; and
• The deposing party must make the proper arrangements regarding the deposition’s logistics. Fed. R. Civ. P. 28(b)(2); 22 C.F.R. §92.57.

A Japanese citizen may be deposed in Japan if a U.S. Court Order or U.S. Court Commission issues to any Consul or Vice-Consul in Japan, directing the Consul or Vice-Consul to preside over the deposition. 22 C. F. R. §92.58; see also Sample Court Order or Commission, which appears as Appendix 3 at the end of this article. According to Article 17(1)(c)(ii) of the U.S.-Japan Consular Convention, the deposition must be conducted on U.S. consular premises.

Each person traveling from the United States to Japan to participate in a deposition of a Japanese citizen in Japan must obtain a Deposition Visa; including, without limitation, stenographers, videographers, and attorneys. To obtain a Deposition Visa, one must apply to a Japanese Embassy or Consulate in the United States at least two weeks before the deposition is scheduled to occur. To apply, the applicant must present a copy of the Court Order or Commission along with a request, which should include:
• The name and location of the court;
• The name and occupation of each witness; and
• A summary of the case.

See http://travel.state.gov/japan_obtaining_evidence.html. Failure to obtain a Deposition Visa may be viewed as a violation of the judicial sovereignty of Japan and could result in the arrest, detention, or deportation of the participants.

It is the deposing party’s responsibility to make the necessary logistical arrangements regarding the deposition. The deposing party must contact the Consular or Vice-Consular officer to schedule the availability of U.S. consular premises and a U.S. consular officer to conduct the deposition. The date will be reserved for no more than three weeks pending the receipt of the court order and a non-refundable scheduling fee of $410.00. 22 C.F.R. §22.1. Because the embassy/consulate does not schedule the appearance of deponents or make arrangements for court reporters/stenographers or interpreters for private attorneys, such arrangements fall to the parties.

United Kingdom

Based on principles of comity, attorneys from abroad are allowed to depose anyone in the United Kingdom provided they are willing witnesses. No commission from a court is necessary. Id. The American Embassy in London or the consulates in Belfast or Edinburgh can offer assistance by providing a list of local stenographers. Attorneys should
not bring court reporters or stenographers with them from the United States, as the United Kingdom requires that they have work permits. United Kingdom solicitors may also be retained to take voluntary depositions.

When compulsion is needed to take testimony, two options for conducting deposition exist in the United Kingdom: via the Hague Evidence Convention or by way of a British solicitor.

**Hague Evidence Convention**


The Convention provides a model format for the request, which should include a list of the questions to be posed to the witness by the British court. Counsel may also request permission to ask questions directly of the witness, 28 U.S.C. §1781, and it is within the discretion of the individual court to grant or deny the request.

As noted above, each country that is party to the Convention had the opportunity to make reservations and declarations regarding the applicability of each article of the Convention to their country. See http://travel.state.gov/uk. The United Kingdom has made a reservation regarding the pretrial discovery of documents. All the reservations can be found at the end of the Convention with the Central Authority information. Id. The letter of request must be signed by the judge and sent to the appropriate central authority:

**Central Authority for England and Wales**

Foreign and Commonwealth Office Clive House
Petty France
London SW1, England, U.K.

Central Authority for Scotland
Crown Agent for Scotland
Lord Advocate’s Department
Crown Office
5/7 Regent Road
Edinburgh EH7 5BL Scotland, U.K.

**An Alternative Method**

Alternatively, rather than using the Hague Convention, counsel may opt to hire a British solicitor to act as his agent. In that case, counsel should send the solicitor the Letter of Request directly and may then apply for a commission from the British court to take the testimony of the witness.

**Criminal Cases**

American attorneys may take voluntary witness depositions in criminal cases. If the assistance of the U.S. Embassy is required in connection with the taking of a deposition you should contact the American Citizen Services Unit of the Consular Section in London at 44–71499–9000 or by Facsimile at 44–71–495–5012. When the deponent is not willing, then counsel must obtain evidence by way of letters rogatory. See 28 U.S.C. §1781(a)(2); 28 U.S.C. §1696; Fed. R. Civ. P. 4(j)(1)(B), 28(b); 4 J. Moore, *Moore’s Federal Practice* §28.05.
Appendix 1
Sample Application for Letter of Request Issuance

UNITED STATES DISTRICT COURT FOR THE

AB, )

Plaintiff )

v. ) Civil Action No. ____

CD, )

Defendant )

APPLICATION FOR THE ISSUANCE OF A LETTER OF REQUEST FOR THE EXAMINATION OF WITNESSES IN GERMANY PURSUANT TO THE HAGUE EVIDENCE CONVENTION

Plaintiff, ______, by its attorneys, respectfully applies for the issuance by the Court of a letter of Request in the form attached hereto as Exhibit A, addressed to the Central Authority in Germany, for the examination of ______, a resident of Germany. This Application is made pursuant to, and in conformity with, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters, T.I.A.S. 7444, 23 U.S.T. 2555, reprinted in 28 U.S.C. §1781, (“Hague Evidence Convention”), which is in force between the United States and Germany.


Plaintiff requests that the Court approve and sign the attached Letter of Request. Plaintiff further requests that after the Court has signed the Letter of Request, the Clerk of this Court authenticate the Court’s signature under the seal of this Court and that the Letter of Request be thereafter returned by the Clerk to counsel for the plaintiff. Counsel will promptly cause the Letter of Request to be translated into the German language, as required by Art. 4 of the Hague Evidence Convention, and will transmit the Letter, together with the translation, to the French Central Authority for execution in conformity with Art. 2 of the Convention.

Respectfully submitted,

_______________________
Attorneys for the Plaintiff

Dated: __________, 200_.

Note: see, 1 Ristau at §5-2-1.
CERTIFICATE OF SERVICE
The undersigned hereby certifies that the foregoing Application for the Issuance of A Letter of Request Pursuant to the Hague Evidence Convention, together with the enclosures thereto, was mailed, first class, postage prepaid, on this ___ day of _______ to the attorneys for the defendant at the following address:
________________________________________________
Attorney for the Plaintiff

Note: see, 1 Risrau at §5-2-1.

Appendix 2
Sample Letter of Request

UNITED STATES DISTRICT COURT FOR THE
. . . . . . . .District of . . . . . . . .

AB, )
   )
   ) Plaintiff:
   )
   ) ) Civil Action No. _____

v. )

CD, )
   ) Defendant
   )

REQUEST FOR THE INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

1. Sender:
2. Central Authority of the Requested State:
3. Person to whom the executed request is to be returned:
4. In conformity with Article 3 of the Convention, the undersigned applicant has the honour to submit the following request:
5. Requesting judicial authority:

To the competent authority of:

6. Names and addresses of the parties and their representatives
   a. Plaintiff:
   b. Defendant:
7. Nature and purpose of the proceedings and summary of the facts:
8. Evidence to be obtained or other judicial act to be performed:
9. Identity and address of any person to be examined:
10. Questions to be put to the person to be examined or statement of the subject matter about which he is to be examined:

11. Documents or other property to be inspected:

12. Any requirement that the evidence be given on oath or affirmation and any specific form to be used:

13. Special methods or procedure to be followed:

   It is requested that: (1) the parties’ representatives or their designees, interpreters, and a stenographer be permitted to be present during the examination; (2) there be excluded from the examination, if permitted under German law, all persons other than the judicial officer conducting the examination of [name of person to be examined], the officials of the German court normally present during such proceedings; (3) the representatives or their designees be permitted to submit additional questions for presentment to [name of person] following his answering of the questions set forth in Section 10 above; (4) a stenographer be permitted to record verbatim the examination of [name of person].

- Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified.
- Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request.
- Specification of privilege or duty to refuse to give evidence under the law of the State of origin:

17. The fees and costs incurred that are reimbursable under the second paragraph of Article 14, or under Article 26 of the Convention will be borne by:

18. Date of Request:

19. Signature and seal of the requesting authority:

20. Attachment: Questionnaire

Appendix 3

Sample Court Order of Commission

NAME OF COURT

(CAPTION)

TO ANY CONSUL OR VICE CONSUL OF THE UNITED STATES

UNITED STATES (embassy/consulate) (name of city)

Upon the application of (plaintiff, defendants), and pursuant to Article 17 of the United States-Japan Consular Convention, you have been duly appointed and you are hereby authorized to take oral depositions at the United States (embassy/consulate) in (name of city), Japan, of the following witnesses who will appear voluntarily: [alternative “it is ordered that the depositions on notice of the following witnesses be taken at the United States (embassy/consulate) in (name of city), Japan”] (names, addresses, and employer of witnesses) commencing on or about (date), (time) and terminating on or about (date), (time), and to mark any documentary exhibits in connection therewith.
Counsel for defendant who will participate in said depositions are (names); and counsel for plaintiffs who will participate in said depositions are (names). The proceedings will be reported by (name of American court reporter, if one is traveling from United States to Japan). Please cause the testimony of said witnesses to be reduced to writing and the depositions signed by said witnesses and annex said deposition testimony to your commission and close the same under your seal and make return thereof to this court with all convenient speed.

Date: ______________________________________

____________________________________________
Signature of judge

Name of judge:

Seal:

Note: see http://travel.state.gov/japan_obtaining_evidence.html.

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