Taking of Evidence Abroad: from the 1970 Hague Convention to the 2001 European Regulation

EUROPEAN COMMISSION PROJECT
ON CIVIL JUDICIAL COOPERATION WITH THIRD STATES

INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES

Edited by
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EXTRAIT

BRUYLANT
BRUXELLES
2005

TAKING OF EVIDENCE ABROAD: FROM THE 1970 HAGUE CONVENTION TO THE 2001 EUROPEAN REGULATION

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1. A civil process takes place in State A and the evidence sought – the witness, the document, the item to be inspected – is located in State B (1). Could the judge, who is member of the judiciary of State A, order the gathering of evidence?

In practice, the judge must respect the limit, defined by international law, of the national frontiers of State sovereignty. As stated by the Italian Supreme Court in 1939 (2), "jurisdiction is a function of the sovereignty and, therefore, the individuals and assets subject to it must be located within (...) the State borders (...), otherwise it would infringe on the sovereignty of the other States on their own territory (...). Obviously the letter of request cannot be avoided, when the witnesses to be heard reside in another State and, for the above-mentioned reasons, the judge cannot resort to his own jurisdictional authority to force them to appear in court."

The court pointed out the undisputed principle regulating the taking of evidence abroad, i.e. the need to rely on the judicial assistance by the State B (3),

(1) The action could be national or international. All the elements of the decision could, for instance, be connected with the Italian system, and the plaintiff, or the defendant, requests the taking of evidence from a document or witness connected with another system (see FUMAGALLI, *Conflitti tra giurisdizioni nell'assunzione di prove civili all'estero*, Padua, 1990, 5).

(2) Cass., 31 July 1939, *Giurisprudenza completa di diritto internazionale privato*, VIII, 1942, 172-173.

(3) On the subject of international judicial assistence see, among Italian authors, MICHELI, "La cooperazione internazionale in materia civile", *Rivista di diritto processuale*, 1962, 570 s.; SERENI, "L'assistenza giudiziaria internazionale in materia civile con speciale riferimento alle relazioni italo-statunitensi", *Rivista trimestrale di diritto e procedura civile*, 1961, 749 s.; FRIGO-FUMAGALLI, *L'assistenza giudiziaria internazionale in materia civile*, Padua, 2003.

when the evidence-gathering must be conducted by the judge himself and entails direct coercive measures against the requested person. The judge of State A cannot directly and coercively exercise his jurisdictional power abroad (4): as a consequence, he cannot simply go to State B and take the statement of the witness who resides there, nor can he order that the witness appear before him, escorted by the police of State A (5).

Nevertheless, the taking of evidence is not always conducted by the judge and cannot always be performed by means of coercive measures.

With reference to the Italian system, let us consider the order to produce documents. On the one hand, its execution does not involve any judicial activity. On the other, it can be executed only on a voluntary basis (6). Can the Italian judge order the production of documents located abroad against a party or even a non-party and, possibly, impose sanctions pursuant to art. 116 (2) and art. 118 (3) of the Italian Code of Civil Procedure [C.P.C.] (7)? Let us consider expert evidence (8): in Italy, the expert is designated by the judge; nevertheless, he may carry out investigations on his own (9). Therefore, can the judge designate an Italian expert, who will carry out investigations on a property located abroad?

Let us now consider the other European continental systems. In France and in Germany, testimony is currently gathered by two different methods: before the judge, or in writing by means of an *attestation* and a *schriftliche Beantwortung* to the *Beweisfrage* (10). Can the French and German judges order a witness residing abroad to testify in writing?

At the level of international law, there is no final answer to such questions (11). At the level of national states, the limits of the extra-territorial taking of evidence, defined as *Beweisimport* by a German authors (12), are

(4) FUMAGALLI, "Conflitti tra giurisdizioni nell'assunzione di prove civili all'estero", *cit.*, 5 ff.

(5) See CARNELUTTI, "Audizione di testimoni all'estero", *Rivista di diritto processuale*, 1934, I, 77.

(6) I contend the opposite – i.e. that the order to produce documents is coercible – in my book *La prova prima del processo*, Turin, 2004, 168 ff.

(7) It is worth mentioning that the point is controversial among Italian authors and courts (as described in my book "La prova prima del processo", *cit.*, 168, note 89).

(8) Given the fact that the rules on "the appointment and activities of the expert" are positioned before the rules on "the taking of evidence in general", some Italian authors do not consider the expert as a "means of evidence". This is a misrepresentation (see my book "La prova prima del processo", *cit.*, 147 f.), as proved by the placement of the expert as one of the means of evidence in the Hague Convention and in EC Regulation no. 1206/2001 (see below, paragraphs 3 and 4).

(9) Under art. 194 of the Italian Code of Civil Procedure, the expert conducts the investigations pursuant to art. 62, on his own or with the judge, even outside the area of jurisdiction.

(10) On the French *attestation* and the German *schriftliche Beantwortung* to the *Beweisfrage*, see my book *La prova prima del processo*, *cit.*, 81 ff., 98 ff.

(11) See GROUD, *La preuve en droit international privé*, Aix-en-Provence, 2000, 257 ff.

(12) See, for instance, DAOUDI, *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess*, Berlin, 2000.

often set by the judges and the governments in a different way, depending on whether the evidence to be collected is located within or outside their territory.

2. The different methods of ascertaining the facts in the various systems become apparent whenever the evidence is located in a state other than the one where the process is pending. All current legal systems consider the same means of evidence, i.e. the testimonies of witnesses and parties, the inspections, the experts' reports and the documents (13). On the contrary, the procedure whereby evidence is taken are substantially different.

As we know, common law and civil law jurisdictions have different styles of evidence-taking. In common law systems the witnesses are examined and cross-examined by the lawyers, while in civil law systems it is the court that conducts the examination of the witness. Furthermore, in the Anglo-American process, the expert is presented by the parties on the same basis as other witnesses, while in the European-continental process the expert is appointed by the judge. Finally, in the Anglo-American system, the parties are compelled to disclose all the relevant documents, while in the continental Europe system the parties may be compelled to produce specific documents only by an order of the judge (14).

These differences are not accidental. They are deeply-rooted in the history of the two systems. They reflect a different structure of the process (15). The European process, heir of the Roman-canon law model, is an "episode process" (16), consisting of a number of hearings, where evidence is collected after the final definition of the *thema decidendum* and the *thema probandum* and before the decision phase. On the contrary, the Anglo-American process, the outcome of an original progress of the common law model (17), is based on a single consecutive hearing, the trial, preceded by a phase where the controversial questions are identified and all the relevant information is collected.

(13) TROCKER, "Il contenzioso transnazionale e il diritto delle prove", *Rivista trimestrale di diritto e procedura civile*, 1991, 505.

(14) Under articles 138-142 of the French New Code of Civil Procedure, for instance, a party and a non-party can be required by the judge to give evidence and to produce documents. However, the order will be granted only if the documents are specifically named. The German system is more restrictive than the French one. The *Zivilprozessordnung* allows an order for production of documents against the will of a party – and, since 1 January, 2002, a non-party – only if he has a duty according to substantive law (§442 ZPO).

(15) For a comparison between the two models of process see the now classic book by DAMAŠKA, *The Faces of Justice and State Authority : A Comparative Approach to the Legal Process*, New Haven, 1986.

(16) The definition is by VON MEHREN, "Aspetti e istituti fondamentali del processo civile di primo grado : common law e civil law", *Rivista di diritto processuale*, 1969, 604.

(17) For a summary of the history of the Anglo-American process see TARUFFO, "Diritto processuale civile nei paesi anglosassoni", *Digesto discipline privatistiche, sezione civile*, VI, Turin, 348 ff.

The different structure of the process reflects a different balance between the judge's and the parties' powers. The European process is an "inquisitorial process" controlled by the judge. The Anglo-American process is an "adversarial process" (18), dominated by the parties, or, rather, by their counsels.

The controversy over the taking of evidence abroad, however, is not one that pits common law against civil law, but rather one that pits the United States against the rest of the world (England, the motherland common law, has been in the forefront in diverging from American-style discovery requests (19)).

The reason is usually ascribed to the peculiar features of the pre-trial phase and, especially, of discovery in the North American process vis-à-vis the other processes, including the English one. While in England discovery traditionally relates to the production of documents only (20), in the United States, since the adoption of the Federal Rules of Civil Procedure (21) in 1938, all the information, that might reasonably lead to admissible evidence can be obtained from the other party or a non-party, through the discovery devices (22), before the trial.

One point should be made clear. Undoubtedly, the conflict originates from the peculiarities of the North American discovery (23). Yet, it also

(18) On the adversarial character of the U.S. process and a critical analysis, *cf.* KAGAN, *Adversarial Legalism. The American Way of Law*, Cambridge, 2001.

(19) LOWENFELD, *International Litigation and the Quest for Reasonableness*, Oxford, 1996, 137. *Cf.* the next paragraph.

(20) In the text I use the word "traditionally". In fact, the Civil Procedure Rules of 1998, on the one hand introduced the possibility that the court might make an order for disclosure against a non-party, while on the other hand they reversed, by the witness statements, the principle that a witness will be examined only at trial (*cf.* rule 31.17 and rule 32 of the CPR; for an analysis see ZUCKERMAN, *Civil Procedure*, Trowbridge, 2003, 492 ff., 600 ff.)

(21) For a summary of the evolution of the U.S. discovery and its peculiar features, see my book *La prova prima del processo*, cit., 72 ff.

(22) Discovery devices available to the litigants under the Federal Rules of Civil Procedure (FRCP) include the following:

- depositions, which may be taken through oral questioning or through written questions of either a party or a non-party witness (see rules 30 and 31 of the FRCP);
- interrogatories, under which written questions have put to a party (rule 33);
- requests for production of things and entry into property to inspect, make copies or photographs, or conduct tests (rule 34);
- physical or mental examinations of parties or persons "in the custody or under the legal control of a party" (rule 35);
- requests for admissions, which require a party to admit propositions of fact (rule 36).

Cf. JAMES-HAZARD-LEUBSDORF, *Civil procedure*, New York, 2001, 290 ff.

(23) The differences between the English and the North American discovery have at times been emphasized. Let us consider the production of documents. JOLOWICZ (*Some Twentieth-Century Developments in Anglo-American Civil Procedure*, Cambridge, 2000, 44) argued that the English discovery – before the Civil Procedure Rules came into force – was wider, as to the parties, than the American discovery (in fact, complaints of discovery abuse are present among the English, see ANDREWS, "Abuse of Process in English Civil Litigation", *Zeitschrift für Zivilprozeß International*, 1998, 9, 25). As we know, there is discontent in the United States with the current practice of discovery, and the rules of discovery are continuous. Changes have been made in 1980, 1983, 1993 and 2000. In brief, the reforms provide for greater judicial control over the discovery process and set limitations on the availability of discovery. See MILLER, "The Pre-Trial Rush to Judgement: Are the 'Litigation Explosion', 'Liability Crisis', and 'Efficiency Cliché' Eroding Our Day in Court and Jury Trial Commitments", *New York University Law Review* (78), 2003, 1012; MARCUS, "Discovery Containment Redux", *Boston College Law Review* (39), 1998, 747 ff.

reflects a more general discontent among foreigners regarding the American legal system and the intention to block particularly effective proceedings, such as antitrust proceedings (24).

3. The Hague Conference on Private International Law has been focussing on the subject of the taking of evidence abroad for some time. The 1905 and 1954 Conventions already contained provisions concerning the taking of evidence (25). In 1970, an ad hoc Convention – on an initiative caming largely from the U.S. (26) – was specifically devoted to the taking of evidence abroad. The Hague Evidence Convention was to build (27) a "bridge" between common law and civil law traditions, combining the formal and official function of evidence-taking typical of the civil law approach, with the counsels' initiative typical of common law (28).

The Convention defines two methods of obtaining evidence located in State B, when the process takes place in State A:

- Taking of evidence by letters of request, when the request of the judge of State A is transmitted to the central authority of State B where the evidence is located. The central authority forwards the letters of request to the court, which, in turn, takes evidence. The judge of State B applies its own law as to the procedures to be followed; however, he will comply with a request of the court of State A that a special method or procedure be followed, unless this is incompatible with the internal law of State B or is in opposition to internal practices or by reason of practical difficulties (29).

(24) LOWENFELD, *International Litigation, cit.*, 138.

(25) For a comment on the two Conventions, see POCAR, *L'assistenza giudiziaria internazionale in materia civile*, Padua, 1967.

(26) See the United States *memorandum*, in *Conférence de La Haye de droit international privé. Actes et documents de la onzième session*, IV, The Hague, 1970, 15-18. As pointed out by LOWENFELD (*International Litigation, cit.*, 180 f.), the United States, having become a member of the Hague Conference in 1964, took an active role in preparations for the Tenth Session, which produced the Service Convention, and at the following session took the lead in drafting the Evidence Convention.

(27) The Convention on the Taking of Evidence Abroad – opened for signature on 18 March 1970 – currently applies, as a result of ratification, acceptance or approval, to 29 States (see the list on www.hcch.net, where you may also find the list of the States where the Convention applies as a result of accession). For a comment on the Convention, see DROZ, VON MEHREN R., SMIT, VAN BOESCHOTEN, in *Law and Contemporary Problems* (57), 1994, 3 ff.; in the Italian literature SARAVALLE, "La convenzione dell'Aja sull'assunzione di prove all'estero", *Diritto del commercio internazionale*, 1987, 481 ff.; in the German literature BECKMANN, "Das Haager Beweisübereinkommen und seine Bedeutung für die Pre-Trial Discovery", *Praxis des internationalen Privat- und Verfahrensrechts*, 1990, 201-205.

(28) See KENNETT, "The Production of Evidence within the European Community", in *Modern Law Review* (56), 1993, 355.

(29) *Cf.* art. 9 of the Convention.

– Direct taking of evidence by consular agents, diplomatic officers or commissioners of State A, upon permission of the central authority of State B (30).

The problematic provision of the Convention is art. 23. The article, a proposal put forward by the British delegation on almost the last day of the Conference session (31), provides that a contracting State may declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries (32). It is not clear what the British had in mind. The expression "discovery of documents as known in common law countries" is a contradiction in terms (33) : in fact, in 1970 the common law countries had experience of two models of discovery, the English and the American (34).

The crisis (35) turned on discovery requests addressed in product liability litigation by injured Americans as plaintiffs to European manufacturers as defendants (36). European contracting States made the reservation

(30) On the taking of evidence by commissioners see PIERGROSSI, "Assistenza giudiziaria internazionale e assunzione di prove dinanzi a commissioner", *Rivista di diritto processuale*, 1995, 565 ss.

(31) The Eleventh Session of the Hague Conference.

(32) The Explanatory Report on the Convention (in www.hcch.net) ??? affirmed that the procedure of pre-trial discovery "varies widely among the various States and is not even uniform in all common law jurisdictions. Accordingly, some States may be quite prepared to accept letters for this purpose while other States may refuse them. Article 23 provides the machinery for the exercise of this option". Mr Newman – the United Kingdom delegate who proposed article 23 – explained the procedure of discovery of documents as it operated in the United Kingdom, and emphasized the problems attendant on making such a procedure mandatory on a foreign court :

– the procedure permits the parties to have some knowledge of the strength of each other's case, and so could have the positive effect of reducing litigation;

– it requires, however, careful control by the court to prevent misuse;

– extending its scope to aid foreign litigation did not allow of the careful control by courts which the procedure needs (*Conférence de La Haye de droit international privé. Actes et documents de la onzième session, cit.*, 156).

In my view, Newman's line of reasoning is un convincing : I do not understand why, where the taking of evidence is located abroad, the court could not control the discovery of documents.

(33) LOWENFELD, *International Litigation and the Quest for Reasonableness, supra*, 183.

(34) *Cf.* Lord WOOLF, Master of the Rolls at that time (in *State of Minnesota versus Philip Morris Incorporated*, 30 July 1997, available on the web-site www.lexis.com) : there are differences in approach to discovery in England and in the United States; "in general in the United States there is a tradition of oral discovery which has never been developed in this country; rightly or wrongly, we regard oral discovery as a form of discovery which generates unnecessary costs and complexity"; another difference is that in the U.S. "it is possible to get much wider non-party discovery".

(35) On the problems arising among the States in interpreting the Hague Evidence Convention, see the Report of the Special Commission, appointed in 1978 (*Conférence de La Haye de droit international privé. Actes et documents de la quatorzième session*, IV, The Hague, 1983, 420 f.).

(36) The conflicts on discovery concern three types of litigation (LOWENFELD, *International Litigation and the Quest for Reasonableness*, cit., 137-138) :

– purely civil litigation, primarily product liability actions, in which American plaintiffs allege injury caused by defective products made abroad (e.g. automobiles and airplanes);

– public law litigation alleging conduct that is deemed unlawful in the United States but in one way or another is allowed by other countries (for instance, cartels);

– public law litigation in which no country defends the conduct, such as drug trafficking, but countries defend their sovereignty, in regard in particular to the secrecy of bank records.

permitted by art. 23. Moreover, some of them issued the so-called blocking statutes, i.e. statutes imposing a penal sanction on nationals performing foreign discovery requests that do not comply with the Convention (37).

The Americans were ready to reply. The case law gave a limited interpretation of the scope of application of the Convention, which led to the decision of the Supreme Court in the *Aérospatiale* (38) case. Let us consider the decision, among the most famous and controversial in private international law.

The Court examined four possible interpretations of the relationship between the Hague Convention and the federal discovery rules :

1. the Convention excludes any other discovery procedures (39);

2. the Convention requires first, but not exclusive, use of its procedures;

(37) For France, see Law 80-538 of July, 16, 1980 (*Juris Classeur Procédure*, G 1980, III, 50160, commented by NÉVOT, in *Revue critique de droit international privé*, 1981, 421, COHEN-TANUGI, *ibid.*, 1983, 213, and RANOUIL, "Les lois de blocage", in *Droit et pratique de commerce internat.*, 1986, 513), which prohibits responding to discovery requests that do not comply with the procedures of the Convention and inflicts penal sanctions on citizens failing to observe them ("sous réserve des traitées ou accords internationaux et des lois et règlements en vigueur, il est interdit a toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci"). For the United Kingdom, see the Protection of Trading Interests Act 1980, which prohibits the taking of evidence that infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to sovereignty or the national safety and the production of documents non specifically mentioned.

(38) *Société Nationale Industrielle Aérospatiale versus United States District Court for the Southern District of Iowa*, in 1987 Lexis 2615. This was the background of the decision of the Supreme Court. In 1980, an aircraft crashed in Iowa. A suit was brought against two French corporations, owned by the Republic of France, alleging that they had manufactured and sold a defective plane. The plaintiffs served, in the pre-trial phase, request for the production of documents, a set of interrogatories, and requests for admission – The defendants filed a motion for a protective order. The motion was denied. The French corporations appealed. The Court of Appeals held that when the court "has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory of the Convention", and rejected the appeal. The corporations sought review of the decision by the Supreme Court of the United States. For discussion of the case see, in the American literature, GERBER, "International Discovery after Aérospatiale : the Quest for an Analytical Framework", *American Journal of International Law* (82), 1988, 521 ff.; BERMANN, "The Hague Evidence Convention in the Supreme Court : A Critique of the Aérospatiale decision", *Tulane Law Review* (63), 1989, 525 ff. In the Italian literature, see FUMAGALLI, "Problemi di conflitto fra Convenzione dell'Aja del 18 marzo 1970 e leggi locali : il caso Aérospatiale", *Rivista di diritto internazionale privato e processuale*, 1987, 709 ff.

(39) The first interpretation was asserted by the Republic of France. In the brief as *amicus curiae*, the Republic of France took the following position : "the Hague Convention is the exclusive means of discovery in transnational litigation among the Convention's signatories unless the sovereign State on whose territory the discovery is to occur chooses otherwise".

3. the Convention establishes a supplemental set of discovery procedures, which are strictly optional, to which concerns of comity (40) nevertheless require first resort by American courts;
4. the Convention has to be viewed as an undertaking to facilitate discovery to which an American court should resort, after considering the situations of the parties before it, as well as the interests of the foreign state concerned.

The first two of the interpretations were rejected: considering the application of the procedures set out by the Convention as compulsory or even a priority would be inconsistent with the language (41) and the negotiation history of the Convention (42). Nor was the third interpretation accepted either: the Court pointed out that, in many cases, the Convention procedures "would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the federal rules". Therefore – the Court concluded – the Convention represents an auxiliary instrument, whose application requires "a prior scrutiny in each case of the

(40) On the concept of comity, based on the *comitas gentium*, see BÜLOW-BÖCKSTIEGEL-GEIMER-SCHÜTZE, *Internationaler Rechtshilfeverkehr*, 3° ed., stand: 1/98, 900.8, note 15; SCHULZE, "Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr", *Praxis des internationalen Privat- und Verfahrensrechts*, 2001, 529, note 30.

(41) The Supreme Court pointed out on the one hand the omission of mandatory language in the preamble to the Hague Evidence Convention and on the other side the use of mandatory language on the preamble to the Hague Service Convention of 1965 (article 1 of the Service Convention provides that it "shall apply *in all cases*, in civil or commercial matters, where there is occasion to transmit a judicial or extra-judicial document for service abroad").

(42) The Supreme Court considered as erroneous one aspect of the Court of Appeals' opinion. That Court concluded that the Convention simply does not apply to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court. The Supreme Court, on the contrary, stressed that "the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is abroad and evidence that is within the control of a party subject to the jurisdiction of the requesting court". Thus, the Court held, "the optional Convention procedures are available whenever they will facilitate the gathering of evidence".

In the previous case law see:

– *In re Messerschmitt Bolkow Blohm GmbH*, where the Court of Appeals of the fifth Circuit (April 18, 1985, in 1985 U.S. App. LEXIS 28926) stated that "the Federal Rules of Civil Procedure, not the Hague Convention, normally govern the discovery of documents from foreign parties subject to the jurisdiction of a United States court, even though those documents are physically located in the territory of a foreign signatory of the Hague Convention". However – the Court held – an American court should "consider whether, as a matter of international comity, the parties should be required to proceed under the Hague Convention", that, in the event, the Court denied.

– The same Court of Appeals (March 7, 1985, *In re Anschuetz & CO GmbH*, in 1985, U.S. App. Lexis 28198) held that the Hague Convention "is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are non subject to the court's *in personam* jurisdiction". The Court invited *amicus curiae* briefs from the Federal Republic of Germany (the plaintiff was a German corporation, who designed the ferry boat causing the collusion that gave rise to the suit), and the American Department of Justice. The Department stated that the court's order regarding document production did non conflict with any treaty obligation of the U.S. under the Convention but, nevertheless, urged recourse to a careful comity analysis by courts.i

particular facts, sovereign interests and likelihood that resort to those procedures will prove effective" (43).

The American lower courts apply what they view as a test, and they almost always end by ordering the discovery devices, even though these concern evidence located abroad, pursuant to the provisions of the Federal Rules (44).

(43) The Supreme Court stressed that, when the evidence is taken abroad, American courts "should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position".

(44) Let us consider the following cases:

– *In re Aircrash near Roselawn, Indiana*, where – in relation to a crash of an airplane, an ATR-72 aircraft, designed and manufactured in France by the, then well-known *Société Aérospatiale*, in which all 68 persons aboard the plane perished – the District Court of Illinois (February 19, 1997, in 1997 U.S. Dist. LEXIS 10895) stated that plaintiffs' discovery requests were non subject to the Hague Convention because the use of the Convention letters of rogatory is "an unnecessary complicated, time consuming, and expensive means of discovery, thus thwarting the interests" of the American court system.

– *Administrators of the Tulane Educational Fund versus Debio Holding*, where the District Court of Louisiana (August 8, 2000, in 2000 U.S. Dist. LEXIS 11808) ordered the depositions of Swiss citizen to be taken in the United States, and granted sanctions under rule 37 a 4 A FRCP.

– *In re Vitamins Antitrust Litigation*, the District Court of Columbia (September 18, 2000, in 2000 U.S. Dist. LEXIS 14102), in an antitrust price-fixing action, applied the test of *Aérospatiale* and concluded that discovery under the Federal Rules would be more efficient and effective than under the Hague Convention.

– *In re Automotive Refinishing Paint Antitrust Litigation*, where the Court of Appeals for the third Circuit (February 13, 2004, in 2004 U.S. App. LEXIS 2432), in another antitrust price-fixing action against, inter alia, foreign corporations located in Germany, stated that jurisdictional discovery could proceed under the Federal Rules of Civil Procedure without first resorting to the Hague Convention. Judge Roth, however, expressed his concern that the Hague Convention has been given short shrift since the Supreme Court's decision and that the judges marginalize the Convention as an unnecessary option. It is time – he submitted – for the Supreme Court to revisit the *Aérospatiale* decision to ensure that lower courts are in fact exercising "special vigilance to protect foreign litigants" and demonstrating respect "for any sovereign interest expressed by the foreign State".

As to the cases where the Convention procedures were applied see:

– *In re Perrier Bottled Water Litigation*, where the District Court of Connecticut (July 11, 1991, in 1991 U.S. Dist. LEXIS 15947) granted the motion of the defendant, a French corporation, that any discovery request proceed pursuant to the provisions of the Hague Convention. All three-prongs of the test set forth in *Aérospatiale* – the Court held – suggest utilization of Convention procedures, whereas the use, by plaintiffs, of the Federal Rules of Civil Procedure was abusive and not narrowly tailored.

– *Tulip Computers International versus Dell Computer Corporation*, where the District Court of Delaware (March 21, 2003, in 2003 U.S. Dist. LEXIS 4735) granted the motion of the defendant – this time an American corporation – to proceed under the Hague Convention in taking the depositions of two citizens of the Netherlands (the plaintiff, a Dutch corporation, argued that the Netherlands' reservation under art. 23 barred the defendant's broad requests and that much of the evidence sought was privileged). The Court stated that resort to the Hague Convention was appropriate since both witnesses were not parties to the action, had not voluntary subjected themselves to discovery, and were citizens of the Netherlands not otherwise subject to the jurisdiction of the Court.

For an analysis of American case law after *Aérospatiale* see BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From Aérospatiale", *Texas International Law Journal* (38), 2003, 87 ff.; BORCHERS, "The Incredible Shrinking Hague Evidence Convention", *ivi*, 73 ff.; NAFZIGER, "Another Look at the Hague Evidence Convention After

4. In 2001, the European Council adopted the Regulation No. 1206 2001 (45), whose objective is the improvement of civil processes by simplifying and accelerating cooperation on the taking of evidence between the judges of the Member States (46).

As to simplification, in contrast to the 1970 Hague Convention (47) the Regulation removes the need to transmit the request to the central authority which will, in turn, forward it to the court : the judge of

Aérospatiale", *ivi*, 103 ff.; in the Italian literature FICCARELLI, "Pre-trial discovery statunitense e controversie transnazionali : una questione rimasta aperta", *Rivista di diritto civile*, 2000, 507 ff.; in the German literature TRITTMANN-LEITZEN, "Haager Beweisübereinkommen und pre-trial discovery : Die zivilprozessuale Sachverhaltsermittlung unter Berücksichtigung der jeweiligen Zivilprozessrechtsreformen im Verhältnis zwischen den USA und Deutschland", *Praxis des internationalen Privat-und Verfahrensrechts*, 2003, 8 f.

A compendium of 116 reported post-Aérospatiale cases citing the Hague Evidence Convention – from June 1987 to July 2003 – is attached to the U.S. response to the Questionnaire, communicated in November 2003, on the operation of the Convention (the U.S. response is available on the Hague Conference web-site, www.hcch.net).

(45) The Regulation "on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters" was adopted, on the initiative of the Federal Republic of Germany (in *Official Journal of the European Communities*, 3.11.2000, C314/2), by the European Council on 28 May 2001, and applies from 1 January 2004. For a comment see FUMAGALLI, "La nuova disciplina comunitaria dell'assunzione delle prove all'estero in materia civile", *Rivista di diritto intermazionale privato e processuale*, 2002, 327 ff.; GIOIA, "Cooperazione fra autorità giudiziarie degli stati CE nell'assunzione delle prove in materia civile e commerciale", *Nuove leggi civili commentate*, 2001, 1159 ff.; BRUNEAU, "L'obtention des preuves en matière civile et commerciale au sein de l'Union Européenne", *Semaine juridique*, 2001, n. 39, 1767 ff.; SCHULZE, "Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr", *cit.*, 527 ff.; BERGER, "Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelsachen", *Praxis des internationalen Privat- und Verfahrensrechts*, 2001, 522 ff.; OLIVIER, "De l'exécution des mesures d'instruction ordonnées par le juge français; le principe de la territorialité et la nouvelle réglementation communautaire", *Gazette du Palais*, 2002, 1302 ff.; GROUD, "Obtention de preuves situées à l'étranger. Harmonisation européenne et unification internationale", *Petites affiches*, 2002, n. 43, 11 f.; LEBEAU-NIBOYET, "Regards croisés du processualiste et de l'internationaliste sur le règlement CE du 28 mai 2001 relatif à l'obtention des preuves civiles à l'étranger", *Gazette du Palais*, 2003, 221 ff.; BONATTI, "Sovranità nazionale e leggi processuali nell'armonizzazione del diritto delle prove in Europa", *Rivista trimestrale di diritto e procedura civile*, 2004, 211 ff. On the production of documents see specifically GIUSSANI, "L'esibizione di documenti situati nello spazio giuridico europeo", *Rivista trimestrale di diritto e procedura civile*, 2002, 867 ff.

When there is urgency for evidence to be secured (the witness is about to go abroad or to die, the evidence to be examined is likely to change), the provision applicable, according to some national courts, is article 24 of the 1968 Brussels Convention (today replaced by art. 31 of the EC Regulation No. 44/2001), which states : "application may be made to the courts of a contracting State for such provisional, including protective, measures as may be available under the law of the State". See KENNETT, "The Production of Evidence within the European Community", *cit.*, 347 ff.; STÜRNER, "Das ausländische Beweissicherungsverfahren", *Praxis des internationalen Privat- und Verfahrensrechts*, 1984, 299-301.

(46) See report by Marinho to the Legal Affairs and Internal Market Committee, in European Parliament, Document no. 298.394.

(47) LEBEAU-NIBOYET ("Regards croisés du processualiste et de l'internationaliste sur le règlement CE du 28 mai 2001", *cit.*, 221) stress the principles, in regard to the technical solutions, common to the Regulation and the Convention, and hold (233) that the judge, no longer the State, plays the main role, so that it is correct to speak of judicial cooperation.

State A, where the process is pending, directly asks the judge of State B, where the evidence is located, to take it (48).

Furthermore, it is possible for the judge of State A to collect the evidence in State B (49) either directly or through any other designated person (50). The direct evidence taking by the judge of State A is considered as the most innovative feature of the Regulation (51), since it implies the renunciation of the principle of territoriality on the evidence-taking and the opening of the European judicial space. This possibility, however, applies only when the individual spontaneously performs the request and no measures of compulsion are necessary. The restriction might be unduly time-consuming and expensive (52). By analogy with art. 18 of the Hague Convention, it might have been useful to allow the judge of State A to apply to State B for the appropriate assistance to obtain evidence by compulsion.

Further to simplifying the acts (53), the procedure is accelerated by fixing time limits for the execution of the activities (54) : for instance, the tak-

(48) Art. 10 of the Regulation. Under art. 11 and art. 12, the parties and, if any, their representatives, and representatives of the requesting court have the right to be present during the taking of evidence.

(49) Art. 17. Direct taking of evidence by the judge of State A, or by his delegate, may only take place if the request is accepted by the central authority, which may refuse direct taking of evidence only if it "is contrary to fundamental principles of law in its member State".

(50) The Regulation does not provide for the gathering of evidence – which is on the contrary provided for under the Hague Convention – by consular agents or diplomatic officers. Does the omission signify that evidence could not be taken by this procedure? LEBEAU-NIBOYET (*op. cit.*, 222 f.) answer no : the Convention still applies to cases not regulated by the Regulation. Two arguments are advanced by the authors : one textual (under art. 21, the Regulation *prevails* over other provisions contained in the Hague Convention), and one of policy (the consular and diplomatic procedure is less time-consuming and less expensive). In any event, art. 17 takes us to the same outcome. Under the article, any person could be designated for the direct taking of evidence, and thus the court of State A may designate a consular agent or a diplomatic officer.

(51) LEBEAU-NIBOYET (*op. cit.*, 233) define the procedure a "small revolution".

(52) *Cf.* LEBEAU-NIBOYET, *op. cit.*, 228.

(53) The Regulation imposes the use of model forms. For a positive opinion see BERGER, "Die EG-Verordnung über die Zusammenarbeit der Gerichte", *cit.*, 523. LEBEAU-NIBOYET (*op. cit.*, 225) talk of a new, Community, example of formalism revival. In fact, the failure of the Hague Convention to provide model forms has created several difficulties (see the response by the United States to the XIV Hague Conference, in *Actes et documents de la quatorzième session*, *cit.*, 401).

(54) The lengthy delay entailed in gathering evidence is seen as the greatest problem of the Hague Convention procedures. See KENNETT ("The Production of Evidence within the European Community", *cit.*, 356 f.), and the responses to the questionnaire drawn up by the American Bar Association (*Report on Survey of Experience of U.S. Lawyers with the Hague Evidence Convention Letter of Request Procedure*, 9 October 2003, available on the Hague Conference's web-site, www.hcch.net). From the replies to the Special Commission on the operation of the Convention, we deduce that the average time elapsing between receipt of the request to obtain evidence and its performance is :

– in France, rarely less than 6 months,
– in the United States, from one day to as many as 2 years,
– in Germany, 4 months for gathering testimony and over 12 months for the preparation of an expert opinion.

ing of evidence by the judge of State B must be concluded within 90 days and the authorisation allowing the judge of State A to directly collect the evidence must be either given or denied within 30 days and so forth. However, no sanction is contemplated for non-compliance with the time limit fixed by the Regulation.

Under article 1, the Regulation applies in "civil or commercial matters". The formula is identical to the one used in the Hague Convention, which has been subject to different interpretations. Whereas the exclusion of criminal matters is clear in all systems, there are doubts as to the application of the Convention to public law matters in general and to fiscal matters in particular. While the civil law systems exclude the recourse to the Convention in such cases (55), the interpretation by the common law systems include all matters non-criminal, and here the United States and the United Kingdom (56) share the same viewpoint.

Which is the best solution? The Italian authors follow the solution adopted for the 1968 Brussels Convention and propose the restrictive interpretation (57), stressing the importance of adopting the same approach for Regulation No. 44/2001 and Regulation No. 1206/2001. This proposal is not, in my view, acceptable: both the Brussels Convention and the Regulation No. 44/2001 contain the wording "civil and commercial matters", explicitly mentioning the exclusion of "tax, custom and administrative matters". Such an exclusion is not mentioned in Regulation 1206. The extensive interpretation is therefore to be preferred, since it promotes broader utilisation of the Regulation, and thus greater European judicial cooperation.

5. Are the Regulation procedures mandatory or merely optional? The problem obviously concerns the means of evidence mentioned in the first paragraph above, such as those whose collection is not conducted by the judge (i.e. production of documents, expert evidence, written testimony).

We have already underlined the clear position of the European States, which have even imposed penal sanctions on nationals performing requests not issued through the Conventional channels. As a consequence, we would

(55) See FUMAGALLI, "La nuova disciplina comunitaria dell'assunzione delle prove all'estero in materia civile", *cit.*, 330 ff.; FRIGO-FUMAGALLI, "L'assistenza giudiziaria internazionale in materia civile", *cit.*, 162 ff.

(56) As to the United Kingdom, see the decision of the House of Lords, March 3, 1989 (*In re State of Norway*, with notes by BOYD, in *American Journal of International Law* (83), 1989, 933-936). As to the United States, see the report of the U.S. delegation to the Special Commission on the operation of the Hague Convention: "the United States will honour requests under the Convention for evidence to be used in foreign administrative proceedings (including fiscal matters), civil law suits drawing into issue the enforcement of public laws, and family relations" ("Conférence de La Haye de droit international privé. Actes et documents de la quatorzième session", *cit.*, 400).

(57) See FUMAGALLI, *supra*, at note 55.

expect these very same countries to consider the cooperation instruments as mandatory.

In actual fact, the Regulation is not clear. We find provisions suggesting an optional character (see art. 21 (2), stating that "the Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements" (58)) together with provisions suggesting the mandatory character. We do not so much refer to direct evidence-taking by the judge of state A, upon permission of State B: this possibility does not prevent the same judge from ordering the production of documents located in State B (59). Rather we are thinking of the inclusion of expert evidence among the means of evidence (see Regulation, arts. 12, 17, 18). The proposal contained in the German initiative provides for the possibility of an expert, appointed by the judge of State A, conducting his activities in State B without any previous permission (60). This proposal has been rejected.

Which of the two approaches will prevail? We would not be surprised if, in application by the national courts, and possibly by the European Court of Justice, the optional interpretation were to prevail, as the authors, after all, are currently suggesting (61).

Let us consider Great Britain, France and Germany. In all three countries, the courts have repeatedly ordered the taking of evidence abroad without resorting to the Hague Convention procedures. The German *Bundesgerichtshof*, in a paternity acknowledgement process, ordered a blood test to be performed in Italy (62). The French *Cour d'appel* of Versailles, having considered that the evidence could be executed without infringing the sovereignty of the Spanish state, ordered a preventive *constatation*,

(58) Certain European Union Member States declared that they did not intend to retain any bilateral agreements or arrangements with other Member States to farther facilitate the taking of evidence (*cf.*, for instance, the declarations by Italy and the United Kingdom, available on www.europa.eu.int). Such declarations could be read as a choice tending toward the mandatory nature of the Regulation procedures. In any case, other States, among the main actors in the conflict on the Hague Convention – i.e., France and Germany – did not make the declaration.

(59) See BERGER, "Die EG-Verordnung über die Zusammenarbeit der Gerichte", *cit.*, 526 f.

(60) Pursuant to the initiative of the Federal Republic of Germany, the taking of evidence could not be requested when the judge of State Member A orders an expert evidence to be executed in State Member B; in the event, the expert might be designated directly by the judge of State A, without authorization by the judge of State B (art. 1 (3) of the initiative, quoted above).

(61) See, in the Italian literature, FUMAGALLI ("La nuova disciplina comunitaria dell'assunzione delle prove", *cit.*, 347 f.), who alleges that the Regulation procedures do not prevent the judge of State A from ordering the direct taking of evidence under national law procedures, granting the order with coercive measures. The same author, however, had previously expressed his disappointment in *Aérospatiale* because "the Convention procedures are mandatory" ("Problemi di conflitto tra convenzione dell'Aja del 18 marzo 1970 e leggi locali: il caso 'Aérospatiale'", *cit.*, 735). See also GIUSSANI, "L'esibizione di documenti situati nello spazio giuridico europeo", *cit.*, 867 ff.

(62) SCHLOSSER ("Extraterritoriale Rechtsdurchsetzung im Zivilprozeß", *Festschrift für Lorenz*, Tübingen, 1991, 501) put the judgment of the Bundesgerichtshof (*Juristen Zeitung*, 1987, 42) on the same level as the judgment of the U.S. Supreme Court in the *Aérospatiale* case.

which consisted of some investigations in Spain (63). Finally, the English High Court issued an Anton Pillar order (64) to be executed in a Paris flat (65).

6. Can the Regulation apply beyond the European context to the existing conflict between the Unites States and Europe about the taking of evidence abroad?

The answer, in my view, is positive. In fact, the Regulation has been adopted by civil law and common law systems and does not include any article equivalent to art. 23 of the Hague Convention. This means that an English judge could order the disclosure of the relevant documents to be executed by a judge of a State such as Germany, which has always been hostile towards the execution of U.S. discovery orders (66). And the German judge could not reply that the execution of the request should follow German rules: in fact, under art. 10, paragraph 3 of the Regulation, the English judge could call for the request to be executed in accordance with the procedure provided for by the English law (67).

A more open attitude towards discovery requests issued by European States will necessarily generate a more positive response to the U.S. requests (68), one reason being that both the United States and European States have, at least partly, reconsidered their positions over the years. On

(63) *Cour d'appel* Versailles, April 9, 1993, in *Revue critique de droit international privé*, 1995, 80, with notes by COUCHEZ, who points out that the arguments used by the French *Cour d'appel* were the same as those used by the U.S. Supreme Court.

(64) On the order – now the search order – see DOCKRAY-REECE THOMAS, "Anton Piller orders: the new statutory scheme", *Civil Justice Quarterly*, 1998, 272 ff.; ZUCKERMAN, *Civil Procedure*, *cit.*, 523 ff. In brief, a search order, which is normally made without notice, directs the respondent (usually a defendant) to permit an authorized person to enter the respondent's premises in order to search, inspect, copy or take away items described in the order.

(65) *Cook Industries Incorporated versus Galliher* (order of the Chancery Division, 20 February 1978, available on the www.lexis.com web-side). On the decision see KENNETT, "The Production of Evidence within the European Community", *cit.*, 352-353, who stressed that a search order is intrusive and might be found highly offensive by the French jurisdiction in which the order to be carried out.

(66) See the German replies to the 2003 Questionnaire on the operation of the Hague Evidence Convention of 1970, in www.hcch.net ("pursuant to the reservation on article 23 of the Convention, Germany does not act on any requests for mutual assistance which involve the production of documents within the context of a pre-trial discovery of documents. In such cases, requests are sent back to the requesting agency unperformed, with, reference to the reservation").

(67) The call for the request to be executed in accordance with the procedure provided for by the law of State A may be refused by the requested court in State B only if the procedure is incompatible with the law of State B, or by reason of major practical difficulties (art. 10 of the Regulation).

(68) An example of a softer attitude towards U.S. requests for the taking of evidence is discernible in this opinion by Lord Brook, the present Master of the Rolls, in *United States of America versus Philip Morris* (Court of Appeal, March 23, 2004, in www.lexis.com): "it must be remembered that it is the duty and pleasure of the English court to respond positively to a letter of request if it can. It is also in the public interest that a court (on either side of the Atlantic) should have all relevant material available to it when it decides a case".

the one hand, following the English declaration (69), certain European countries adopted a softer version of the exclusion of discovery orders (70). On the other hand, the United States modified rule 28 FRCP (71), which regulates the taking of a deposition abroad, acknowledging a priority role for the Convention procedures and attaching more importance to the letter of request.

(69) Section 2 (4) of the Evidence Act of 1975: an order under this section shall not require a person "to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to, or to be likely to be, in his possession, custody or power".

(70) *Cf.*, for the Republic of France, the brief sent from the French Minister Raimond to Netherlands Minister van den Broek: "*la déclaration faite par la République française conformément a l'article 23 relatif aux commissions rogatoires qui ont pour objet la procédure de "pre-trial discovery of documents" ne s'applique pas lorsque les documents demandés sont limitativement énumérér dans la commission rogatoire et ont un lieu direct et précis avec l'objet du litige*".

(71) See FUMAGALLI, "Le nuove regole federali statunitensi in tema di notificazioni e di assunzione di prove all'estero", *Rivista di diritto internazionale privato e processuale*, 1994, 795 ff.