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Obtaining Evidence for International Litigation in American Courts

JAY L. WESTBROOK*

I. INTRODUCTION

This is primarily a discussion on the subject of obtaining testimony and documents abroad through formal discovery methods in the U.S. federal courts. The focus will be on *formal* discovery methods, since nearly anything can be done by stipulation. I will refer to cases in the federal courts, because that is where a great deal of international commercial litigation takes place, and most of my experience has been in this area. In particular, I intend to examine the cases in which the attorney represents the foreign party, because this situation best illustrates the problems. However, you should bear in mind that almost anything said in that context will be applicable in reverse if you are representing the domestic party.

Since I am primarily concerned with commercial litigation, the discussion will not address the special problems of obtaining evidence in criminal cases. Moreover, most of the conventions and procedures that will be highlighted are not applicable to criminal cases. Indeed, as we will discuss later in connection with *In re Westinghouse Electric Corp.*,¹ most of the international conventions expressly state that the foreign country need not provide compulsory attendance of a witness for testimony or the production of documents if the witness exposes himself to a penalty by doing so. That may exclude, for example, antitrust actions from coming under the operation of these conventions because of the antitrust provisions for treble damages.

On a practical level, I should point out that the methods of obtaining evidence suggested here are generally very expensive. At the same time, they may be sufficiently important so that if the client is unable to finance foreign discovery, you should consider whether or not to settle the case rather than litigate it on a shoestring. In other words, litigation in which you represent a foreign party is substantially more expensive in relation to the size of the case. Therefore, at the outset, you have the factor of expense to consider in

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1. [1978] 2 W.L.R. 81 (H.L.).

deciding whether to go forward with the litigation or to reach a settlement.

II. METHODS OF OBTAINING EVIDENCE ABROAD

A. Practical Considerations

I would like to begin by addressing several practical considerations before turning to the specific procedures. The first rule of gathering evidence is that as soon as you have a case involving a foreign party, you should go to his country immediately, sit down in his office, and discuss the case. Often, you will be under a good deal of pressure not to make the trip. The client will assure you that he will telex all the details and mail the pertinent documents, but it is a fatal mistake to agree. The point is that there are certain facts that cannot go across the telex wire. You will waste thousands of dollars in time and expense on the most simple misunderstandings of fact if you do not go there and communicate personally. If the case will not support your going there, perhaps it will not support litigation.

The second rule is that if your foreign client has to make interrogatory or documentary discovery, go, or at least send a legal assistant to the client's office to examine the files. Failure to do so may result in inappropriate responses or delays which will prejudice your client in court. Again, this may seem expensive, but in the long run, it is cheaper.

The third rule is to obtain good local counsel in your client's home country at the earliest possible time. This may or may not be your client's regular attorney; it depends upon that attorney's capabilities and expertise in the subject matter of the particular case. Remember, good local counsel is vital to your case. If you are not satisfied with the client's regular attorney, find someone who is good.

Finally, if you are bringing your case on behalf of a foreign client, tell them about the two uniquely shocking aspects of American litigation. The first, non-recovery of attorney's fees, will absolutely horrify him, particularly after he finds out what your fees are: fees which will be far beyond those he has seen in the past.

The second is the sweeping pretrial discovery rule, which is probably unknown to the foreign client. Virtually every foreign client will be perturbed by the idea that in order to vindicate his contractual rights, for example, he has to undress in the United States courts. Thus, these procedures must be described to him in detail at the earliest possible time and always prior to filing suit on behalf of a

foreign party. If you do not let the client find out about these procedures until after you have filed the lawsuit, he will be most unhappy with you.

Very often a foreign client would rather not bring the case, or he would rather settle it for some small amount of money, than go through that process, especially when you tell him his people must come here for the deposition. We had one client, an old-line, respectable English company with nothing to hide, and they settled a matter with the Securities and Exchange Commission almost solely because they did not want to face what they perceived to be the ordeal and the invasion of privacy involved in American pretrial discovery.

B. Sources

The existing international conventions pursuant to which you can gather evidence are: (1) the Hague Convention of 1905;² (2) the Hague Convention of 1954;³ (3) the Hague Convention of 1965;⁴ and (4) the Hague Evidence Convention.⁵

The original conventions of 1905, and later in 1954, essentially codified common international practice at their respective times. They remain important because they have been ratified by more countries than have ratified the later conventions, and certain of their provisions are not preempted by the modern conventions, even as to countries that have ratified these modern agreements. The more recent 1965 and 1970 Conventions codified that same kind of procedure but are highly flexible and permissive. Each ratifying country is required to cooperate and to compel testimony only under highly formal and elaborate procedures.⁶ However, each signatory can, by declaration, adopt more informal and less expensive means of gathering evidence within their borders.⁷

Unfortunately, many countries which are parties to the 1905 Convention have not ratified the 1970 Convention. Therefore, you need to know which provisions of the Convention have been adopted

2. 99 BRITISH AND FOREIGN STATE PAPERS 990 (1905).

3. 286 U.N.T.S. 266 (1958).

4. 20 U.S.T. 361, T.I.A.S. No. 6638 (1965).

5. 23 U.S.T. 2555, T.I.A.S. No. 7444 (1969). The Convention became effective in the United States on October 7, 1972.

6. *See id.* at art. 10.

7. *Id.* at arts. 10, 17.

by the particular country where the witness whom you are seeking is located, or where the documents which you are seeking are located.

In addition, you also need to know if any declarations have been issued which may have liberalized the evidence gathering procedures available in your case. If there are no declarations, then, as a rule of thumb, the strictest, least liberal, and least helpful procedures in the Convention will apply.

This question arises, generally, as to the manner of collecting evidence: can you collect evidence with a court reporter as you are able to in the United States, or do you have to gather evidence by the method used by the contracting state? For example, the common practice in Italy is to collect evidence before a judge who poses the questions, much in the same way *voir dire* is conducted in the United States.

There are two other sources which should be examined. The first is Rule 28(b) of the Federal Rules of Civil Procedure which, like the 1970 Evidence Convention, provides three ways to take a deposition abroad.⁸ The second is 28 U.S.C. § 1783 which contains provisions for the subpoena of an American citizen or resident who is in a foreign country.⁹

The first method under Rule 28(b) is by an ordinary deposition notice where a party is involved. Usually that does not present a problem because the U.S. courts have sanctions which may be imposed pursuant to Rule 37 of the Federal Rules of Civil Procedure. The second method of taking a deposition abroad is by an order ap-

8. FED. R. CIV. P. 28(b) provides in relevant part:

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory.

9. 28 U.S.C. § 1783(a) (1970) reads as follows:

A Court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

pointing a commissioner to take testimony overseas.¹⁰ Unfortunately, this method cannot be used in the many countries that have not adopted that option under the 1970 Evidence Convention.¹¹ The final and most difficult approach is the letter rogatory or, as the term is used in the 1970 Evidence Convention, the letter of request.

The notice and commissioner approaches are not permitted in many countries, so letters of request must frequently be used where the parties fail to agree. The 1970 Evidence Convention itself sets forth in detail what has to be in the letters of request from the American court. Generally, the letter must identify the party to be examined, the documents to be produced, and describe in reasonable detail the nature of the testimony sought. Obviously, this last method is a trap for the unwary, in terms of giving the witness a roadmap of what you are going to do. You should, however, bear in mind that if you are not reasonably specific, your request will be refused either by the central authority, who is usually the foreign minister of the contracting state, or by the foreign court.

III. THE WESTINGHOUSE EXAMPLE

At this point, I would like to turn to the notable obstacles to obtaining discovery overseas, and in particular, to the *Westinghouse* cases. By way of background, Westinghouse defaulted on a series of uranium supply contracts when the price of uranium skyrocketed some years ago.¹² One of the defenses raised by Westinghouse was that a world-wide uranium cartel had artificially raised the price. In addition, Westinghouse brought an antitrust action in Illinois against the purported cartel. In the United States District Court for the Eastern District of Virginia, Westinghouse sought to obtain discovery from various foreign companies, some of which were government-owned, and which allegedly were part of this cartel.¹³

10. Hague Evidence Convention, *supra* note 5, at chapter II.

11. For the reservations of the signatories to the 1970 Hague Evidence Convention, including those relating to chapter II, see 7 MARTINDALE-HUBBELL LAW DIRECTORY 4468-71 (1979).

12. For a discussion of the Westinghouse litigation, see generally Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979). See also Wall St. J., May 4, 1979, at 1, col. 6.

13. Thirteen cases had been transferred for consolidated pretrial discovery by the Judicial Panel on Multi-District Litigation. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, 405 F.Supp. 316, 319 (J.P.M.D.L. 1975).

The District Court requested the courts in the United Kingdom to compel testimony and production of documents from companies and individuals in the United Kingdom who were allegedly participants in the cartel. Indeed, Judge Merhige of the Eastern District of Virginia went to England to obtain the evidence pursuant to the letters of request provisions of the 1970 Evidence Convention. The request was granted in part by the lower courts, but refused *in toto* by the House of Lords.¹⁴

The grounds for the decision of the House of Lords were as follows: (1) notwithstanding the recitals of the letters of request, the request was in part for discovery, not evidence, and thus not permitted under English law; (2) the request exposed the United Kingdom's companies and witnesses to "penalties" under the rules of the European Economic Community; (3) the request raised fifth amendment questions and was in some respects an attempt to use request procedures to get evidence for criminal proceedings; and (4) the request was against the public policy of the United Kingdom.¹⁵

The *In re Westinghouse* case is significant for several reasons. First and foremost, the request for testimony and documents was rejected *in toto* despite the personal appearance of a United States District Court Judge. Secondly, it was the first case in the United Kingdom's courts under the new Convention. Thirdly, the rejection was made by a country that has a legal system and a perception of fairness that is closely related to that of the United States. The fundamental lesson to be learned from *In re Westinghouse* is that there are additional and special difficulties in bringing actions involving controversial American statutes or statutes arguably "penal" in nature.¹⁶ In order to avoid this predicament, it is a good idea to make a record, preferably with an evidentiary hearing, in an American court. Have the findings of that proceeding specifically identify each witness, the nature of his testimony, and the documents sought, and

14. [1978] 2 W.L.R. 81 (H.L.).

15. *Id.*

16. Another example shedding light on the letters rogatory procedure and the difficulties involved is the Canadian government's adoption of special regulations blocking discovery by *Westinghouse*. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (Rio Algom Subpoena), where a U.S. subsidiary of a Canadian company escaped sanction for its failure to undergo discovery. See also *In re Evidence Act*, R.S.O. 1970 C. 151.

The weight of authority seems to be that the existence of a foreign law forbidding disclosure of evidence otherwise discoverable in the American courts does not justify refusal to grant discovery, but it may affect the imposition of sanctions for failure to provide the discovery ordered. See *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

have the court hold them to be both relevant and admissible at trial, at least on a preliminary basis.

Turning to 28 U.S.C. § 1783(a), any U.S. citizen or resident not physically present in the United States may be subpoenaed by a federal court.¹⁷ This was an issue in part of the litigation brought by Westinghouse. As part of its discovery in the breach of contract suit, Westinghouse obtained a subpoena ordering the Rio Algom Corporation to produce its president for a deposition and to produce certain business records. A civil contempt order was brought against the corporation and its president, but it was reversed on appeal, one of the issues being the citizenship of Rio Algom's president.¹⁸ The court held that nothing in the record indicated that the corporation or its president had "run" to Canada to gain the protection of Canadian law; the president was a resident, if not a citizen of Canada prior to the controversy.¹⁹ Under § 1783, this question can be of overriding importance, because if the president was a U.S. citizen or resident, he could be brought to the United States for testimony, or a deposition could be taken in Canada pursuant to a United States subpoena.

IV. DISCOVERY LOGISTICS

At this point, I would like to address the questions of where the deposition takes place and who will bear the costs. If a foreign plaintiff comes to the United States, the general rule is that he is required to make himself and those under his control available for deposition. If the foreign party is the defendant in the United States, the general rule is that the plaintiff will have to go to his country to depose him, whether by letters rogatory or by notice of taking a deposition. Ordinarily, the plaintiff will choose the latter. There are, however, exceptions to the general rule. For example, one may apply a balancing test analyzing the importance of the testimony of the particular witness against the financial and other hardships imposed on him in coming to the United States.²⁰

17. Subsection (b) provides for travel costs and other expenses:

The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expense, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

18. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977).

19. *Id.* at 998.

20. Compare *Seuthe v. Renewal Prods., Inc.*, 38 F.R.D. 323 (S.D.N.Y. 1965) and *Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578 (S.D.N.Y. 1962)

When you are evaluating a case and contemplating the possibility of traveling overseas to take depositions, you have to ask yourself whether the costs can be recovered. The courts are divided on this issue, with some applying the so-called "one hundred mile" rule, while others allow reasonable travel costs and counsel fees. The "one hundred mile" rule is a wholly illogical concept which assumes that, because a local federal district court only has a hundred miles' worth of subpoena jurisdiction,²¹ you can only pay witness fees and travel expenses for one hundred miles.

This is a ridiculous result which has been perpetuated over and over again. In fact, "the one hundred mile" rule is not the test which the United States Supreme Court adopted in the dispositive case of *Farmer v. Aramco*.²² In that case, a former employee sued on an employment contract, lost, and was assessed twelve thousand dollars in costs, illustrating that costs can be a substantial matter in an international case. The Court complained that the parties seeking the depositions did not come into court in advance to identify the need for the discovery and the costs of travel and counsel involved, nor did they try to work out suitable alternatives by stipulation before proceeding to take discovery. The Court was attempting to apply a balancing-of-need analysis. The key to *Farmer*, then, is that if you have to take depositions overseas, bring that before the court in advance and get the court's blessing, or at least its indication of whether or not those costs will be taxed to the benefit of the prevailing party.

I also refer you to an interesting local rule in the Southern District of New York.²³ Rule 5 says that anytime you go outside the one hundred mile area to take depositions, the applicant—the person wishing to take depositions—must seek an order and must advance reasonable travel expenses, including reasonable counsel fees, for each adversary party who would be entitled to attend. On the other hand, those costs will be taxed so that, if an opposing party ultimately

with *Hyam v. American Export Lines, Inc.*, 213 F.2d 221 (2d Cir. 1954) and *Ellis Airlines v. Bellanca Aircraft Corp.*, 17 F.R.D. 395 (D. Del. 1955). See also *Wright, Discovery*, 35 F.R.D. 39, 59 (1963).

21. FED. R. CIV. P. 45(e)(1) provides that:

A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is 100 miles of the place of the hearing or trial specified in the subpoena.

22. 379 U.S. 227 (1964).

23. Rule 5(a) Local Civil Rules, S.D.N.Y. provides that:

When a proposed deposition upon oral examination, including a deposition before action, or pending appeal, is sought to be taken at a place more

prevails, he will get them back. This is a very interesting resolution, at least as a general rule, of the issues raised by *Farmer*. It is also, in my experience, persuasive in other federal district courts that do not have a similar rule.

Another area of concern is translation where one or more of the parties or deponents do not speak English at all, or if they do speak English, do not speak it very well. The difficulties of translations in a multilingual case are numerous. It is very important to have your own translator read documents and attend the deposition, especially if your client is the foreign party. It is almost as important that you have, if possible, a lawyer as a translator. This is necessary regardless of the fact that the other party is taking the deposition, because *your* translator is representing *you*. Further, there are special problems with foreign witnesses who speak English; it is often desirable to have them testify in their native language, or alternatively, in both English and their native language. It is important for your translator to prepare or supervise translations of the transcript for subsequent review and signing by the witness. However, having a client who does not speak English may frequently be advantageous, especially if your case can be made on English-speaking witnesses, other than your main client, and on documents.

By the same token, if you are deposing a foreign party or witness, the selection of the translator is critical. Again, it is highly preferable that he be a lawyer, though not, of course, involved in the case. Remember that official translator fees are generally taxable, but the fee of your extra translator—the one that I am recommending that you have—will not be taxable.

Let me just touch briefly on a few other points. There are special deposition problems which arise when your client is a foreign party. Recent evidentiary trends under Rule 612 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure have broadly advanced the proposition that any documents which have been used in preparing a witness for testimony, or any document that

than 100 miles from the courthouse, the court may provide in the order therefor, or in any order entered under Rule of Civil Procedure 30(b), that prior to the examination the applicant pay the expense of the attendance at the place where the deposition is to be taken of one attorney for each adversary party, or expected party, including a reasonable counsel fee. The amounts so paid shall be a taxable cost in the event that the applicant recovers costs of the action or proceedings.

he has looked at, are discoverable, notwithstanding the work product doctrine and notwithstanding the attorney-client privilege.²⁴

Transnational litigation often involves extensive correspondence between lawyer and client and not infrequently, formal memoranda or opinions analyzing the case for the foreign client. In fact, foreign clients will often begin their association with you by asking for a formal opinion or a memorandum analyzing their problem. You can tell them that it is money down the drain; nonetheless, they will want this analysis which will go into their files. Later, you will receive notice that a deposition is to be taken. You will tell your client to undertake an independent review of his files prior to the deposition. The first thing the client is going to do is read your correspondence and memo, thus making these materials discoverable.

Therefore, I recommend the following procedures. First, gather your own evidence by traveling abroad to your client's office at the earliest possible time. Second, be extremely careful in providing this kind of work product to your client and in keeping it away from your client in connection with preparation for any kind of testimony. Of course, similar problems arise with respect to obtaining written statements from the foreign client or a foreign witness. If, for example, in talking to the witness and preparing him for his statement, you are reading from a memorandum that you have prepared, that memorandum could become discoverable. This is something about which you must be very careful.

V. CONCLUSION

Finally, let me reiterate that obtaining evidence abroad, absent stipulation, is very time consuming and expensive. In addition, it may be very difficult to do in cases involving statutes such as the antitrust laws. However, the obtaining of evidence abroad in most cases can be done by a careful practitioner familiar with the reasonably detailed rules of the game and with the special problems and requirements involved. If you know what you are doing and do your homework well, you can, in my experience, solve your problems.

For example, if you want to take a deposition on the southern coast of Spain, proceed in a very formal and correct fashion, under

24. See, e.g., *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, 1978-2 Trade Cas. ¶ 62,134 at 74,997 (N.D. Ill. 1978); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

the applicable rules and conventions. Your opponent will want to schedule the deposition when it is convenient, that is to say, when his wife can come, too. He will find a way to work it out with you if he believes that you know the ropes. In fact, in the overwhelming majority of cases, you will find that once your knowledge is established, you will not have to go through all of the procedures that we have discussed today.