

**DISCOVERY IN FRANCE
UNDER THE HAGUE CONVENTION
ON THE TAKING OF EVIDENCE ABROAD
IN CIVIL OR COMMERCIAL MATTERS**

**By: Karim Boulmelh and Eric Borysewicz
Courtois-Lebel
Paris, France**

In France, the gathering of evidence to be used in a foreign litigation is, to some extent, governed by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters. This article examines important procedures and implications.

You are a Plaintiff or a Defendant in an action brought before a U.S. Court and:

A French citizen, resident or entity is involved, or
A witness is to be deposed in France, or
Documentary evidence is located in France, or
You are considering carrying out discovery measures or pre-trial investigations for the gathering of evidence in France,

French law requires that the procedures set forth under the Hague Convention of 18 March 1970 be strictly complied with.

However, if well-prepared, the taking of evidence under the Hague Convention in France allows US parties to adequately achieve their goals for the purpose of discovery.

In France, the gathering of evidence to be used in a foreign litigation is, to some extent, governed by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters.

Whenever cross-border litigation involves information located in France in the possession of French nationals or French residents – whether they are party or third party to the lawsuit –, the Hague Convention is the relevant and exclusive authority, assuming the country where the proceedings are pending is one of the forty-seven contracting States of the Convention.

The objective of the Hague Convention is to resolve differences between the common law discovery practices and the more restrictive civil law tradition regarding the gathering of evidence. The Hague Convention aims at ensuring an effective method for taking evidence that would be consistent with the laws of the country in which evidence is sought and eventually to allow some form of discovery of documents and testimony. For that purpose, the Hague Convention requires that a central authority be designated the role of which is to provide prior authorization for the use of one of the three means offered by the Convention. In France, the central authority is the Ministry of Justice.

Evidence can be obtained through: (i) letters of request sent by the foreign judicial authority to the Ministry of Justice for either production of documents or testimony. The Ministry of Justice is responsible for transmitting the request to the appropriate French judicial authority in charge of carrying out the task of taking the evidence; (ii) depositions conducted by a diplomatic officer or consular agent. Prior authorization by the French Ministry is not

required if the witness is a national of the country represented by the diplomatic officer or consular agent; (iii) depositions conducted by a duly court-appointed commissioner. In practice, the commissioner is an attorney not related to the parties involved in the proceedings abroad.

Several issues should be considered when planning to obtain documents or take depositions in France under the Hague Convention.

Firstly, it is necessary to determine whether recourse to compulsory measures may be required in order to choose the appropriate means for obtaining evidence accordingly. Indeed, diplomatic authorities and commissioners have no authority to compel depositions before them while letters of request benefit from the coercive power of the French judicial authority when performing the requested act. However, on the other hand, the letter of request process often lasts longer than depositions conducted by a diplomatic officer or a commissioner.

Secondly, practical issues have to be considered such as formalities to be carried out before the central authority, translation of documents, interpreters, videotaping, transcripts and fees (especially consular fees and commissioner fees). This is particularly true given that there are generally no fees to be paid to the French judicial authority executing a letter of request unless special procedures are requested by the foreign court. These issues may increase the cost and prove burdensome depending on the means used. Those practical issues may also have an impact on the way in which a deposition is performed. For instance, theoretically a foreign court issuing a letter of request may request the deposition to be videotaped; the French judicial authority should in theory defer to such a request and perform a videotaped deposition. This is permitted by Article 739 of the French Code of civil procedure, however, French jurisdictions are quite reluctant to admit such process in their courts and French case law even offers an example where such a request was denied on the ground that it was contrary to the “*current French usages*” (*Tribunal de grande instance* of Paris, decision dated May 23, 2003). Therefore, if a videotape is required by the foreign jurisdiction, recourse to a diplomatic officer or a commissioner may prove a more suitable and flexible means of conducting depositions than a letter of request.

Thirdly, French reservations and declarations must be complied with. This is particularly true with respect to pre-trial discovery of documents. After having initially refused to execute letters of request related to pre-trial discovery of documents in its territory, France now allows the production of documents under the condition that the requested documents are “*enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure*” (Modification dated 19 January 1987 of the French declaration relating to Article 23 of the Hague Convention). Similarly, application for authorization to have recourse to a diplomatic officer or a commissioner must be presented to the French Ministry of Justice with some particulars in order to be authorized by the French central authority.

Generally, and as a matter of law, compliance with the provisions of the Hague Convention is mandatory in France for any person seeking to obtain information of any nature when such information is to be produced as evidence in the course of foreign proceedings. In 1980, France – as many Western countries did – enacted a statute (also known as a “blocking statute”) that strictly forbids any person from obtaining or attempting to obtain, either in writing or orally, any economic, commercial, industrial, financial, or technical information that are to be used as evidence in judicial or administrative proceedings abroad (Law N° 68-

678 dated 26 July 1968 as modified by the blocking statute N° 80-538 of July 16, 1980, Article 1 bis). Non compliance with this prohibition is subject to criminal prosecution and punishable by either a six month prison sentence or a fine of 18,000 Euros or both. This statute is subject to the Hague Convention's provisions. Therefore, it is clearly intended to force foreign authorities and parties to comply with the strict requirements and procedures of the Hague Convention.

In practice, there are mainly two consequences to this law.

Firstly, one needs to be extremely cautious when contacting a possible witness. Such witness can only be contacted on a neutral basis to determine whether she/he would be willing to depose under the Hague Convention procedures i.e. through the means of a diplomatic officer or a court-appointed commissioner. In December 2007, the *Cour de cassation* – the highest French civil court - found a lawyer guilty of attempting to obtain economic, commercial or financial information in violation of the law n° 68-678 because he entered into a non-formal contact with a possible witness in order to obtain business information related to proceedings pending in the United States, (*Cour de cassation*, December 12, 2007). The *Cour de cassation* based its decision on two grounds: (i) the testimony should have been obtained through use of the provisions of the Hague Convention and (ii) the prosecuted lawyer in question had not been not commissioned within the meaning of the Hague Convention to obtain such evidence.

Secondly, whenever a French national or a French resident is asked to communicate documents, testify or provide any other information outside the scope of the Hague Convention, the law provides a defense of illegality for refusing such communication. A US case offers an example of such legal excuse. A French defendant agreed to appear for a deposition in Paris, but on the day of the deposition, a French bailiff delivered a “formal protestation and preview criminal complaint” on plaintiffs and their counsel based on the provisions of Law n° 68-678. As a consequence, and in light of the risk of criminal prosecution, the plaintiff declined to pursue the deposition. The U.S. court later on refused to compel the defendant to travel to the U.S. for a deposition, noting that the plaintiffs “would have been exempt from possible French sanctions had plaintiffs proceeded pursuant to the Hague Convention”. See *Damien v. Terrien*. See 2002 WL 1824941 (Cal. App. 2 Dist. 2002) cited in *Compendium of Reported Post-Aerospatiale cases citing the Hague Evidence Convention* prepared by the American Bar Association and attached to the *Response of the United States to the questionnaire of the Hague Conference for International Private Law*.

In conclusion, the Hague Convention creates standardized procedures in order to facilitate the taking of evidence. In France, these procedures are the exclusive ways of obtaining business-related information of any kind to be used in civil or commercial litigation abroad. The Hague Convention aims to create a balance between the interests of foreign litigants in obtaining evidence in the context of cross-border disputes, on the one hand, and protection of French sovereignty and compliance with its laws and regulations, on the other. If well-prepared, the taking of evidence under the Hague Convention in France can prove, in most instances, extremely satisfactory to foreign litigants allowing them to adequately achieve their goals for the purposes of discovery.