

Cross-Border Lessons In Using Hague Evidence Convention

By **Jeffrey Mok, Chris Marchese and Mohammad Kameli** (March 17, 2025)

Consider the following scenario: You need evidence from foreign nationals for U.S. litigation, and you initiate a discovery request under the Federal Rules of Civil Procedure. However, the individuals or entities from whom discovery is sought resist, citing national blocking statutes or data security laws, which restrict the transfer of certain types of information abroad.

The difficulty increases when the custodian of the relevant information is a third party. When voluntary production fails, you instead file a motion in U.S. court to try to compel evidence collection under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

But U.S. courts exercise discretion when considering whether to grant such requests. For example, on Jan. 22, in *In re: Didi Global Inc. Securities Litigation*, the U.S. District Court for the Southern District of New York ruled that the Hague Evidence Convention was unnecessary for dealing with a Chinese blocking statute.

In other cases, courts grant Hague Evidence Convention requests when the target is a foreign nonparty outside the court's jurisdiction, such as the U.S. District Court for the Central District of California on Aug. 20, 2024, in *Topalsson GmbH v. O'Gara Coach Co. LLC*, a case involving a British data custodian.

These examples highlight the growing challenges of navigating potential foreign legal barriers and underscore the option of utilizing Hague Evidence Convention procedures as a tool to seek evidence from foreign nationals abroad.

Utilizing The Hague Evidence Convention to Facilitate Cross-Border Evidence Collection

The Hague Evidence Convention provides a framework for obtaining evidence from foreign jurisdictions. There are two primary mechanisms for obtaining evidence under the Hague Evidence Convention.

Chapter 1: Letters of Request

A U.S. court issues a letter of request to a contracting state's competent authority seeking assistance in obtaining evidence. The foreign authority then executes the request according to its legal procedures, often with restrictions on the scope and manner of evidence collection. While this process can be time-consuming and subject to local limitations, it provides an official, treaty-based avenue for evidence collection.

Chapter 2: Direct Taking of Evidence

This allows evidence collection directly by litigants through diplomatic officers, consular



Jeffrey Mok



Chris Marchese



Mohammad Kameli

agents or private commissioners, rather than utilizing a foreign authority to execute a request. The effectiveness of collecting evidence under Chapter 2 depends on permissibility in the country where the evidence resides and the willingness of the witness or custodian to comply.

The U.S. is a member state of the convention, although some American attorneys may not be well-versed in its procedures. Those facing an international evidence roadblock may find a crash course on basics of the Hague Evidence Convention helpful.

Challenges With Cross-Border Evidence

Foreign nationals often cite foreign blocking statutes or data privacy laws to resist discovery in U.S. litigation.[1] These laws may only allow for the transmission of information for U.S. discovery pursuant to international agreements or through diplomatic channels — e.g., the Hague Evidence Convention. France's national blocking statute is illustrative:

Subject to international treaties or agreements and laws and regulations, it is prohibited for any person to request, seek or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purpose of gathering evidence for the purpose of or in connection with foreign judicial or administrative proceedings.[2]

Conflicts between U.S. discovery practice and foreign laws can also present dilemmas for those who possess the evidence being sought. For example, a French litigant in the U.S. might have to choose between complying with France's blocking statute and facing repercussions for violating a discovery order in the U.S., or producing the evidence and violating the blocking statute, which brings a risk of prosecution in France.

One way to address foreign laws is by utilizing the Hague Evidence Convention. We will focus on the letters of request route, or Chapter 1 of the Hague Evidence Convention, herein, as it is the primary mechanism for obtaining evidence from uncooperative witnesses or custodians abroad through judicial cooperation.

Unlike Chapter 2, which governs the taking of evidence by diplomatic officers or commissioners and usually involves voluntary compliance by the witness or custodian, Chapter 1 provides a formal process for collecting evidence through the recipient state's judicial authority.

The Hague Evidence Convention letter of request process generally proceeds as follows:

- U.S. counsel submits a motion for the issuance of a letter of request to the U.S. court along with a proposed letter of request, which should contain, inter alia, "(a) the authority requesting its execution and the authority requested to execute it"; "(b) the names and addresses of the parties to the proceedings," "(c) the nature of the proceedings for which the evidence is required," and "(d) the evidence to be obtained or the judicial act to be performed."
- If the court grants the motion, the court forwards the letter of request to the recipient state's designated central authority, which ensures that the request complies with the Hague Evidence Convention. If so, the central authority forwards the letter of request to the authority competent to execute it.

- The recipient state's competent authority executes the request, applying its internal laws and procedures regarding evidence collection, including any methods of compulsion that may be available.
- The foreign authority returns the executed documents to the U.S. court and to the attorneys of the requesting party, if requested by the U.S. court. If the foreign authority is unable to execute the letter of request in whole or in part, it will notify the requesting authority.

Because the executing authority applies its own laws when executing Hague Evidence Convention letters of request, including any privileges to which the target of the request may be entitled, U.S. litigants should familiarize themselves with the laws and procedures of the recipient state in addition to those of the Hague Evidence Convention.

Engaging local counsel in the country where evidence is sought can be instrumental in utilizing the Hague Evidence Convention. Local counsel can provide critical analysis of applicable legal frameworks, assess the likelihood of compliance by foreign courts, and, if necessary, submit declarations to the U.S. court explaining local laws on the evidence gathering process.

Other assistance local counsel may provide once the process begins includes access to judicial authorities, and familiarity with procedural nuances in the local execution of a letter of request.

The Chapter 1 letter of request process can take several months to over a year, depending on the timelines of the recipient state's central authority, the complexity of the request and any legal objections raised by the opposing party. Potential hurdles include procedural delays, restrictive local laws on evidence gathering and the discretionary power of foreign courts, which may limit or deny requests that conflict with domestic legal protections.

Growing Tensions

Recent case law highlights the complexities of seeking evidence from foreign custodians. Courts often balance competing interests, such as the broad discovery laws in U.S. litigation, against foreign legal frameworks that may limit access to information.

These cases reveal a range of judicial responses, from direct compulsion under U.S. law to the use of international mechanisms like the Hague Evidence Convention, each shaped by the specific circumstances and legal arguments at play.

In some cases, U.S. courts have deemed the Hague Evidence Convention impractical or unnecessary. For example, in *In re: Didi Global Inc. Securities Litigation*, the plaintiffs moved to compel testimony from DiDi Global Inc.'s Rule 30(b)(6) witness regarding interactions with Chinese regulators. The Southern District of New York weighed the U.S. interest in regulating securities markets and ensuring full discovery against China's data privacy and state secret concerns.

The court found that Chinese law did not clearly prohibit disclosure in this case, China had not formally objected, and DiDi failed to provide any concrete evidence that compliance would result in actual penalties. The court also rejected DiDi's argument that discovery should proceed through the Hague Evidence Convention, noting that Southern District of New York courts have found it ineffective for obtaining discovery from China due to the

uncertainty of compliance and delays. The court granted the plaintiffs' motion to compel under the Federal Rules of Civil Procedure.[3]

In contrast, other cases demonstrate courts' support for use of the Hague Evidence Convention procedures, for example when the foreign custodian is a nonparty or when foreign legal restrictions necessitate a more formal approach.

In the Topalsson case, the court considered whether to require discovery through the Hague Evidence Convention to obtain source code from nonparty Rolls-Royce Motor Cars Ltd. in the U.K. The defendants objected to the use of the Hague Evidence Convention on multiple grounds, arguing that the burden on nonparty Rolls-Royce Motor Cars outweighed the need for discovery.

The court rejected the defendant's arguments, finding that the requested source code was necessary for the plaintiffs to assess infringement and that a letter of request was appropriate given Rolls-Royce Motor Cars' status as a foreign nonparty outside the court's jurisdiction.[4]

Similarly, in 2020, in *Behrens v. Arconic Inc.*, in the U.S. District Court for the Eastern District of Pennsylvania, the court addressed a discovery dispute involving the French Blocking Statute. The defendant argued that producing documents from its French subsidiary could violate the blocking statute. The court appointed an expert in French law to assess the applicability of the blocking statute. After considering the expert's report and the parties' arguments, the court required the plaintiffs to utilize the Hague Evidence Convention to obtain the evidence.

These exemplary cases demonstrate that securing evidence located abroad requires a strategic, well-prepared approach. To increase chances of success, parties should be prepared to justify to the court their chosen path to gather foreign evidence, whether through the Federal Rules of Civil Procedure or a letter of request, and to anticipate challenges based on foreign law.

Practice Tips for U.S. Litigants Seeking Evidence Abroad

Litigants who anticipate using the Hague Evidence Convention to obtain evidence abroad must plan ahead, especially if seeking evidence via a letter of request under Chapter 1. Given that this often is a lengthy process, early strategic decision-making is important for obtaining the evidence in time to be most useful in litigation.

Litigants should verify that the country where the requested evidence resides is a party to the Hague Evidence Convention and the matter falls within a civil or commercial scope, as some signatories may interpret this differently. Further, some countries have made declarations under Article 23, limiting pretrial discovery of documents.[5]

If the Hague Evidence Convention is determined to be appropriate, the next challenge is persuading the court to authorize its use and issue a letter of request. Courts scrutinize such requests on a case-by-case basis using several factors enumerated by the U.S. Supreme Court in 1987 in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*.[6]

U.S. litigants seeking to increase their chances of a judge agreeing to use the Hague Evidence Convention should show the following in their motions for the issuance of letters of request.

- That the information sought is relevant;
- That the request is narrowly tailored and directed to the witnesses' knowledge of issues related to the proceeding;
- That there is no expedient alternative means of securing the information;
- That the U.S. has an important interest in vindicating the rights of litigants and enforcing judgments in its courts;
- That the foreign country has an important interest in seeing that the dispute is fairly adjudicated; and
- That the foreign country is likely to comply with the request.

The Hague Evidence Convention is a tool for seeking evidence across international borders, and wielding it effectively requires preparation. As legal disputes continue to go global, knowledge of the Hague Evidence Convention will be helpful for practitioners seeking to navigate cross-border evidence gathering.

Jeffrey Mok and Chris Marchese are principals, and Mohammad Reza Kameli is an associate, at Fish & Richardson PC.

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[1] See, e.g., *Clear Spring Property and Casualty Company v. Arch Nemesis LLC*, 2024 WL 4134846, at 5 (D. Kan. Sept. 10, 2024).

[2] Article 1 bis, Law No. 68-678.

[3] See also *Skillz Platform Inc. v. Papaya Gaming Ltd.*, 2024 WL 4471684 (S.D.N.Y. Oct. 11, 2024).

[4] See also *Webpros Int'l, LLC v. Asli*, 2024 U.S. Dist. LEXIS 108922 (D. Or. June 20, 2024).

[5] See Status table, Hague Conference on Private International Law, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>.

[6] *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522 (1987) (enumerating factors, including importance to litigation of information requested; degree of specificity of request; whether information originated in U.S.; availability of alternative means; and extent to which noncompliance with request would undermine important interests of U.S., or compliance with request would undermine important interests of the state where information resides).