

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
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United States District Judge

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March 1, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
United States District Court for the
Southern District of Florida

Re: Proposed Amendment, Federal Rules of Civil Procedure, for Cross-Border Discovery

Dear Judge Rosenberg,

This letter is a supplement to my previous letter, dated February 3, 2023, which enclosed a proposed amendment to Rule 28 to allow for “cross-border discovery”. (Exhibit A).

I have now added, as an alternative, a brand-new rule devoted to cross-border discovery only. (Exhibit B). There are obvious overlaps.

As you may be aware, in 2015 the Federal Judicial Center published a booklet titled “Discovery in International Civil Litigation – A Guide for Judges,” which discussed procedural aspects, as well as the laws of different countries, concerning cross-border discovery. I am attaching a copy of the table of contents for your information. (Exhibit C). I was also privileged to provide a draft of a Rule 16 Pretrial Order to initiate international civil discovery, a copy of which is attached, as Exhibit D.

By way of brief personal background, I have been involved in these issues over the course of my legal career as a private attorney representing clients with international law

exposure, in my capacity as the United States Attorney in this district, and during the twenty years I have served on this Court. In 2015, I was invited to speak at Georgetown University Law School on the 50th anniversary of the Hague Convention, co-sponsored by the Hague Conference on Private International Law, the American Branch of the International Law Association, the American Society of International Law, the ABA Section of International Law and the International Law Institute (a summary of this program is attached as Exhibit E).¹

My recent decision in Behrens v. Arconic, which arose out of the tragic 2017 London high-rise apartment fire in which 72 persons lost their lives and hundreds were injured, dealt with many of these issues. Behrens v. Arconic, Inc., 502 F. Supp. 3d 931 (E.D. Pa. 2020), affirmed in part, reversed in part, 2022 WL 2593520 (3d Cir. July 8, 2022). A petition for certiorari was recently denied. No. 22-630, 2023 WL 2123819 (Feb. 21, 2023).

In this case, I allowed extensive cross-border discovery, some of which took place pursuant to the Hague Convention, because one product which allegedly caused the fire had been manufactured in France. Eventually, I decided to transfer the case under the doctrine of forum non conveniens to England.

In this case I benefitted from the participation of the Honorable Noelle Lenoir, a former judge of the French Constitutional Court, now in private practice in Paris, as a special master in reviewing the requested documents and recommending protection for privilege communications. Judge Lenoir has substantial expertise on these topics and is acting in this capacity in other cases.

¹ I have authored or coauthored two articles in *Judicature Magazine*, published by Duke University School of Law, which discuss this issue. See Michael M. Baylson, *Cross-Border Discovery at a Crossroads*, *JUDICATURE*, Vol. 100, No. 4 Winter 2016 at 56; Michael M. Baylson and Sandra Jeskie, *Overseas Obligations: An Update on Cross Border Discovery*, *JUDICATURE*, Vol. 103, No.1, Spring 2019. (I can supply copies upon request).

As is well known, no other country has pretrial discovery practices as broad as the United States. Thus, there can be substantial conflicts which arise between the efforts of U.S. based parties and their counsel to get information from individuals, entities or governmental agencies located overseas.

In recent years, there has been increasing attention to this topic, because of the overall increase in international commerce and related litigation. I believe the bar and bench of the United States, as well as many U.S. based business interests, would be well served by the Advisory Committee on Civil Rules proposing a rule to guide the procedural aspects of this issue for consideration under the Rules Enabling Act, leading to a decision by the U.S. Supreme Court.

Assuming the Committee undertakes this issue, it should also review Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., 138 S. Ct. 1865 (2018) (commonly referred to as the “Vitamin C” case, for the name of the product involved), giving important guidance to lower federal courts on the interpretation and application of Rule 44.1, Federal Rules of Civil Procedure, concerning “Determining Foreign Law”.

The Sedona Conference, a highly respected continuing legal education organization, based in Phoenix, Arizona, has sponsored programs, and drafted principles, on the topic of cross-border discovery, for guidance by judges and lawyers. I’ve been an invited speaker at these programs and, following my communication with Sedona officers about my proposal, they will forward a letter to you expressing their interest in this project and their support.

As I mentioned in my prior letter, Professor Steven Gensler, of the University of Oklahoma Law School and also a member of the Advisory Committee on Civil Rules at the same time as I, is very interested and supportive of this proposal. Assuming this topic is on your

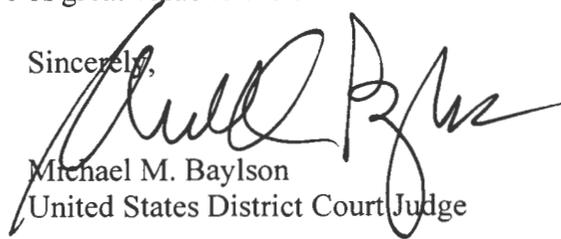
agenda for your March 2023 meeting, Professor Gensler expects to be in Miami at that time and would like to attend as an observer.

There are many recent decisions about cross-border discovery by U.S. Courts, and also important regulations adopted within the European Union and by other countries. I won't go into any details about these in this letter, but they are easily accessible, and I would be happy to contribute to this project if you undertake a consideration of a proposed rule.

I have added several other possible provisions to my proposals. Among these is special consideration of Electronically Stored Information ("ESI"), which is a frequent topic of cross-border discovery. Prior to the existence of ESI, when discovery was limited to "paper documents," restrictive overseas rules about discovery prohibited the transfer of paper documents to the United States. Now, with the widespread use of ESI, the Committee should consider recommending procedures to transfer ESI without physical transfer of paper documents.

I respectfully suggest that you appoint a subcommittee, to look into this in some detail, as I think that any resulting amendment will be of great value to the bench and bar.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael M. Baylson". The signature is fluid and cursive, with a large, stylized initial "M".

Michael M. Baylson
United States District Court Judge

CC: Craig Weinlein, Esq., Sedona Conference
Professor Richard Marcus, Reporter
Professor Steven Gensler
Hon. Noelle Lenoir
Mira Gur-Arie, Esq., Federal Judicial Center

Proposed Amendment to Rule 28(b) (Baylson Draft 3/1/23)

(1.) A deposition may be taken in a foreign country, and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

(2.) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both, may be issued and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

[The definitions and procedures set forth in Rule 34 may be incorporated by reference].

New (3.) This Rule may be invoked by a party seeking documents, electronically stored information, or other data, relevant to the dispute, located in a foreign country. In considering the notice of deposition, request, and any objection, a court shall take into account the existence of any treaty or foreign law, and principles of comity.

New (4.) This rule may be invoked by noticing the deposition, or issuing a letter of request, or other document, to the custodian(s) of the documents or electronically stored information, located in a foreign country.

New (5.) The Court may require redaction of information protected by principles of personal privacy, either by the laws of the country in which the information is located, or for other good cause.

New (6.) The principles underlying the provisions of 28 U.S.C. § 1782 (“Assistance to foreign and international tribunals and to litigants before such tribunals”) shall be considered in making the request.

New (7.) A court may allocate the costs of providing the information depending on burden, relevance, and other material factors.

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(Draft – 3/1/23) Proposed New Rule of Civil Procedure Re: Cross Border Discovery

If a case warrants discovery of facts, documents, or other matters, which took place, or are located, in a foreign country, (commonly referred to as “cross-border discovery”), the Court may first consider whether the Hague Convention, or any other treaty or law, can or must be followed by the parties.

The Court may also allow the parties to conduct discovery in another country, under Rule 28(b), or otherwise. In any event the court should consider:

- A. Comity, under the principles as stated in 28 U.S.C. § 1782;
- B. Proportionality;
- C. Whether expenses should be shared by parties other than the requesting party;
- D. Whether electronically stored information (“ESI”) can be produced without violating the laws of the country in which the information originated or is stored.

If depositions will take place in a foreign country, under Rule 28(b), the court may also consider whether to require the production of documents, ESI, and other matters, as allowed under Rule 34.

The Court may also consider whether any other provision under Rule 26 should be followed.

Exhibit “B”

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Appendix E: Sample Rule 16 Pretrial Order Addressing International Discovery Issues²⁰⁹

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

JOHN DOE v. [LIST]	CIVIL ACTION NO. _____
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PRETRIAL ORDER RE INTERNATIONAL DISCOVERY

AND NOW, this ____ day of _____, 2015:

Pursuant to the Court's authority under Rule 16, F.R.Civ.P., the parties having advised the Court [the Court determining from review of the pleadings and any other initial papers in the case] that international discovery may be involved, which may result in substantial delays in concluding discovery, the Court sets special procedures for expediting international discovery.

The provisions of this Order are intended to facilitate the parties taking of discovery outside the United States and/or pursuant to the laws of other countries, and will enable the Court to promptly rule on any disputes that arise concerning international discovery.

It is therefore **ORDERED**:

1. Within ____ days, any party which intends to initiate discovery outside of the United States shall file and serve a statement making disclosure of its intention as of this time, including, but not limited to, the following:

(a) Whether applications will be made under the Hague Convention or any other treaty.

209. We thank U.S. District Judge Michael M. Baylson (E.D. Pa.) for providing a sample Rule 16 Pretrial Order addressing international discovery issues for inclusion in this guide.

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- (b) Whether Letters Rogatory will be used.
 - (c) Whether parties abroad are likely to be deponents in this case.
 - (d) Whether documents located outside the United States will be sought for production, including, but not limited to, electronically stored information (“ESI”).
 - (e) Whether a party is aware of any blocking statutes or data protection laws that may apply to a request for discovery in a particular country, and if so, identify the country and if possible cite the laws which may be applicable.
2. Within ____ days, other parties shall respond to this initial disclosure of foreign discovery, by commenting:
- (a) To what extent it will or will not oppose such discovery.
 - (b) If there will be opposition, state concisely the nature of the opposition and the reasons.
3. Within ____ days after the response, the parties shall meet and confer to discuss reaching agreement, or narrowing disputes concerning:
- (a) Conducting discovery outside of the United States, pursuant to the Federal Rules of Civil Procedure or otherwise.
 - (b) What date shall be set to complete international discovery.
 - (c) Whether any objections will be presented to this Court and, if so, when.
 - (d) Whether any protective order will be sought and the extent to which disputes remain as to the contents of a protective order.
4. The Court set a deadline for the initiation of any discovery to take place outside the United States as _____ [date].
5. Motions that may be necessary or appropriate on international discovery issues will be filed no later than _____ [date]. Responses will be due within fourteen (14) days, and a reply brief should be filed within fourteen (14) days thereafter.

6. In most countries with blocking statutes and/or data protection rules, an authorized official or judge within that country may be permitted to negotiate, hear, and/or authorize disclosure of information for use in litigation, even though it is arguable that a blocking statute or data protection law may be construed otherwise. In each party's pretrial disclosures on international discovery, the Court requires each party relying on any such statute or rule to state:

(a) Its knowledge of this practice as applied to this case;

(b) Its position on this issue;

(c) The contact information for the official or judge in each country who is likely to be knowledgeable or authorized to act within that country.

7. The Court anticipates having pretrial conferences with counsel to discuss the course, progress and any problems in international discovery. The first conference will take place on _____ [date]. Subsequent conferences will be scheduled on a need basis. If problems and issues arise frequently, the Court may schedule conferences on a regular basis.

8. Counsel who do not practice regularly in this District may appear by telephone by notifying Chambers at least 48 hours prior to any pretrial conference.

9. Counsel appearing at these conferences, whether in person or by telephone, shall be authorized to speak on behalf of their client, and shall discuss with their client issues as they are arising so that they can accurately inform the Court of their position.

10. If it appears that certain discovery is relevant in this case, but cannot be secured by normal means of discovery through the Federal Rules of Civil Procedure, or any convention or other recognized international procedure, the Court may undertake itself initiation of communications with any data protection officer of a foreign country or court of a foreign country to determine if such discovery can be authorized, facilitated and completed on a prompt basis.

11. The obligations stated above apply throughout this litigation, and apply to any initiation of international discovery.

12. The Court encourages the parties to adopt, in this case, the Sedona Conference Principles of International Discovery, Disclosure and Data Protection as follows:

(a) With regard to data that are subject to preservation, disclosure, or discovery, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.

(b) Where full compliance with both Data Protection Laws and preservation disclosure and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.

(c) Preservation or discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.

(d) Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict.

(e) A Data Controller subject to preservation, disclosure, or discovery obligations should be prepared to demonstrate that data protection obligations have been addressed and that appropriate data protection safeguards have been instituted.

(f) Data Controllers should retain Protected Data only as long as necessary to satisfy legal or business needs. While a legal action is pending or remains reasonably anticipated, Data Controllers should preserve relevant information, including relevant Protected Data, with appropriate data safeguards.

BY THE COURT:

, U.S.D.J.

50th anniversary of the Hague Convention of 15 November 1965 on the Service of Documents Abroad

The UIHJ participated on 2 November 2015 at the Law Center of Georgetown University in Washington (USA) at the 50th Anniversary of the Hague Convention of 15 November 1965 on the Service of Documents Abroad and the 45th Anniversary of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad.



Christophe Bernasconi, Secretary General of The Hague Conference on Private International Law

The conference was co-sponsored by the Hague Conference on Private International Law, the American Branch of the International Law association, the American Society of International Law, the ABA Section of International Law and the International Law Institute.

About eighty people from a dozen countries participated in this international conference on the theme: "The Service of Process and Taking of Evidence Abroad: The Impact of "Electronic Means" on the Operation of the Hague Conventions". The UIHJ was represented by Sue Collins, member of the board, and Mathieu Chardon, Secretary General. The National Association of Professional Process Servers (NAPPS), member of the UIHJ was represented by Gary Crowe and Celeste Ingalls.

Patrick P. Stewart, Professor from practice at the Georgetown Law Center and William Treanor, Dean of the Georgetown Law Center welcomed in turn the participants.

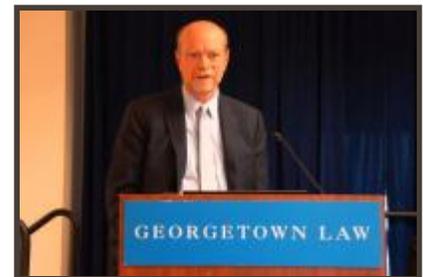
Christophe Bernasconi, Secretary General of the Hague
Exhibit E-1



Christophe Bernasconi, Secretary General of The Hague Conference on Private International Law



Patrick P. Stewart, Professor from Practice at the Georgetown Law Center



William Treanor, Dean of the Georgetown Law Center



Panel 1, from L. to R.: Mathieu Chardon, Theodore J. Folkman, Peter Trooboff, Alejandro Manevich.



Panel 2, from L. to R.: Jeanne E. Davidson, Barbara Fontaine, Glenn P. Hendrix, Louise Ellen Teitz

Conference on Private International Law presented his organization as well as the two celebrated conventions. He recalled that 79 countries as well as the European Union are members of the Hague Conference and that 146 countries are connected by at least one Hague Convention. With regard to The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Mr. Bernasconi welcomed the delegation of the UIHJ. He recalled that the UIHJ was at the origin of this convention and, by the play of Article 10 b), the documents could be transmitted directly between the judicial officers of the signatory countries, enabling extremely fast service (forty-eight hours). The Secretary General of the Hague Conference said that over 40,000 requests for service are issued and that the duration of the whole process does not exceed two months in 75% of cases.

Christophe Bernasconi finally mentioned the work in the pipeline of the Hague Conference on Private International Law: judgments Project, private international law issues surrounding the status of children, recognition and enforcement of foreign civil protection orders, recognition and enforcement of voluntary cross-border agreements, co-operation in respect of protection of tourist and visitors abroad, use of video-link and other modern technologies in the taking of evidence abroad. He also announced that the new Practical Handbook on the Operation of the Service Convention and a Handbook on the Operation of the Evidence Convention will be available in December 2015.

The day was divided into four panels.

The first panel was entitled "How We Got Where We Are: The Conventions in Theory and Practice." The moderator was Peter Trooboff, Senior Counsel in the Washington office of Covington & Burling LLP (USA). The three speakers were Theodore J. Folkman, lawyer at Murphy & King in Boston (USA), Mathieu Chardon, and Alejandro Manevich, Counsel with the Toronto boutique firm Ricketts Harris LLP (Canada).

Mathieu Chardon presented the UIHJ, the profession of judicial officer and the Global Code of enforcement. He traced the close links between the UIHJ and the Hague Conference. Regarding the 1965 Convention, he emphasized its importance and the fact that this text is an inspiration at global level, as evidenced by Regulation (EC) No 1393/2007 of 13 November 2007 on Service of documents in the Member States of the European Union,

Exhibit E-2



Rimsky Yuen Kwok-Keung



Panel 3, From L. to R.: Roland Portmann, David W. Bowker, Mark N. Bravin, Alexander B. Blumrosen



Panel 4, from L. to R.: Michael M. Baylson, Charles T. Kotuby, Christophe Bernasconi, Noelle Lenoir, Nurzhan Kosbayev



From L. to R.: Gary Crowe, Sue Collins, Christophe Bernasconi, Mathieu Chardon

some of which comes from whole sections of the 1965 Convention. Then the Secretary General of the UIHJ explained the promotion by the UIHJ for the implementation of this convention. He referred to the numerous interventions of The Hague Conference during the events organized by the UIHJ for over fifteen years. Mathieu Chardon stressed the importance for countries to join the Convention. In Africa, judicial officers of the member countries of the Organization for the Harmonization of Business Law in Africa (Ohada) would be able to directly receive documents to be served through Article 10 b). So instead of many months and all the problems linked to the complexity of transmission he stressed out, the documents could be sent, served and returned very quickly - even in one day -. "The 1965 Hague Convention is safe, secure, efficient, and inexpensive," said Mathieu Chardon, indicating that the UIHJ strongly recommended the implementation of the Convention in all countries.

The theme of Panel 2 was: "The Central Authorities: What's Working and What's Not". It was chaired by Glenn P. Hendrix, managing partner of Arnall Golden Gregory LLP in Atlanta (USA). The three speakers were Louise Ellen Teitz, Professor of Law at Roger Williams School of Law, Rhode Island (USA), Barbara Fontaine, Senior Master, Queen's Bench Division, Judiciary of England and Wales, Central Authority for England and Wales, and Jeanne E. Davidson, Director of the Commercial Branch of the Civil Division of the US Department of Justice (USA).

Panel 3: "Civilians and Common Lawyers Deal with the Conventions" was chaired by Mark N. Bravin, Global Co-Chair of Winston & Strawn's international arbitration practice (USA). The speakers were Alexander B. Blumrosen, partner with the French law firm Bernard-Hertz-Béjot (France), Roland Portmann, Legal Advisor at the Embassy of Switzerland in the USA, and David W. Bowker, Chair of WilmerHale's international litigation group (USA).

Panel 4 on "What's coming Next? Critical Challenges Facing the Conventions", was chaired by Christophe Bernasconi. The speakers were Nurzhan Kosbayev, head of Office on expertise of Draft Multilateral Treaties Department of International Law and Cooperation at the Ministry of Justice of the Republic of Kazakhstan, Charles T. Kotuby, partner in Jones Day in Washington DC (USA), Noelle Lenoir, partner with Kramer Levin Naftalis & Frankel LLP in Paris (France), and Michael M. Baylson, judge at the Eastern District Court of Pennsylvania (USA).

During lunch, Rimsky Yuen Kwok-keung, Secretary for Justice of the Hong Kong Special Administrative Region of the People's Republic of China described the relations between the Hong Kong Special Administrative Region and the Hague Conference on Private International Law and the latest developments as regards The Hague Conventions in the region.

The quality of interventions and the high level of the debates turned these two anniversaries into one of the highlights of the judicial year.