

INTERNATIONAL LITIGATION

FROM THE U.S. PERSPECTIVE

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SERVICE OF PROCESS IN U.S. COURTS

FEDERAL RULES OF CIVIL PROCEDURE (FRCP) –

RULE 4(f): Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

- (1) by any internationally agreed means reasonably calculated to give notice, such as the [Hague Service Convention]; or
- (2) if there is no [applicable convention]:
 - (A) in the manner prescribed by the law of the foreign country . . . ; or
 - (B) as directed by the foreign authority in response to a [letter rogatory];or
- (C) unless prohibited by law of the foreign country, by
 - (i) [personal delivery]; or
 - (ii) [mail] addressed and dispatched by the clerk of the court; or
- (3) by other means not prohibited by international agreement as directed by the court.

1965 HAGUE CONVENTION ON SERVICE ABROAD OF JUDICIAL & EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS aka "HAGUE SERVICE CONVENTION"

61 Members: United States – 1969; Czech Republic – 1993

Creates "uniform" faster method than old Letters Rogatory

Key: "Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6."

U.S. Central Authority: Dept. of Justice Civil Div. in Wash D.C.

Czech Central Authority: Ministry of Justice, Prague

AUTHORIZED METHODS OF SERVICE UNDER HSC

CENTRAL AUTHORITY HAS THREE OPTIONS UNDER ARTICLE 5:

1. In the Same Manner as the Foreign Country Authorizes for Domestic Service
2. In the Manner Specified by Requesting Party Not in Violation of Foreign Law
3. Voluntary Acceptance by Recipient

OTHER APPROVED OPTIONS OUTSIDE CENTRAL AUTHORITY PROCEDURE:

Arts 8 & 9: Through Use of Diplomatic and Counselor Agents (But See RUDs)

Art 10 (a): Through Sending by Mail (But See RUD)

Art 10(b) & (c): Through Use of Judicial Officers (But See RUDs)

Art 19: Other Methods Authorized by Domestic Law of Foreign State

REMEMBER: HSC is "Exclusive" Method Between Contracting Parties

UNITED STATES “DISCOVERY”

FRCP 26(b) DISCOVERY SCOPE and LIMITS:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. . . .

AUTHORIZED DISCOVERY DEVICES:

Requests for Production of Documents & Things & Entry Upon Land

Written Interrogatories

Depositions Upon Oral Examination

Requests for Admissions

EXTRATERRITORIAL DISCOVERY

IF U.S. COURT HAS PERSONAL JURISDICTION OVER FOREIGN PARTY, IT HAS POWER TO ORDER PARTY TO PRODUCE RELEVANT DOCUMENTS WITHIN THEIR POSSESSION, CUSTODY AND CONTROL WHEREVER THEY ARE LOCATED (even when Diplomatic Objection or Blocking Rule).

FAILURE TO PRODUCE CAN RESULT IN SANCTIONS THAT RANGE FROM MONETARY "TERMS" TO DISMISSAL OF CASE.

FOREIGN DEPOSITIONS – FRCP 28 (b) OR Hague Evidence Convention

1970 HEC – 50 Members: United States 1972; Czech Republic 1993
Streamlined "Letter of Request" through Central Authority

EVIDENCE REQUESTS TO U.S. COURTS

HEC IS NORMALLY NOT THE BEST METHOD

28 USC § 1782 is Better Because it Provides that:

1. If you are an “interested person” in a “foreign proceeding” and
2. The person from whom evidence is sought is in the District of the Court where the discovery application is made,
3. You may obtain both Documentary and Testimonial evidence directly through Order of the District Court without asking foreign tribunal for order first (as in HEC).

EVIDENCE REQUESTS INTRA-EU

HEC HAS BEEN LARGELY REPLACED BY EC REG 1206/2001 ON COOPERATION BETWEEN THE COURTS OF THE MEMBER STATES IN TAKING EVIDENCE IN CIVIL OR COMMERCIAL MATTERS.

Council Reg Permits Direct Communication Between Courts or Direct Taking of Evidence by the Requesting Court Without Time-Consuming Method of Sending Letters Rogatory Through Diplomatic Channels.

Excellent Website With Standardized Request Forms

http://ec.europa.eu/justice_home/judicialatlascivil/html/te_information_en.htm

Permits State of the Art Forms of Evidence Gathering

INTERNATIONAL COMMERCIAL ARBITRATION

DEFINING CHARACTERISTICS:

- 1) CONSENSUAL/VOLUNTARY PARTICIPATION, PROCEDURE & LAW
- 2) RESULTS IN FINAL BINDING AWARD CAPABLE OF JUDICIAL ENFORCEMENT
- 3) NEUTRAL – NONGOVERNMENT DECISION-MAKERS

DISTINGUISH OTHER FORMS OF DISPUTE RESOLUTION:

E.G., MEDIATION, EXPERT INTERVENTION, CONCILIATION

ADVANTAGES OF ARBITRATION OVER LITIGATION

1. PRIVACY/CONFIDENTIALITY
2. CHOICE OF "JUDGE"
3. NEUTRALITY
4. FLEXIBILITY
5. LIMITED "DISCOVERY"
6. FINALITY
7. ENFORCEABILITY
8. EXPENSE - SAVING
9. TIME – SAVING
10. RELATIONSHIP MAINTENANCE

LEGAL FRAMEWORK THAT MAKES ARBITRATION WORK



NEW YORK CONVENTION

REQUIRES MEMBER STATES TO DO THREE MAJOR THINGS:

- 1) ART II (1) – RECOGNIZE THE VALIDITY OF ARBITRATION AGREEMENTS,
WITH EXCEPTIONS.
- 2) ART II (3) – DECLINE JURISDICTION AND REFER PARTIES WITH VALID ARB
AGREEMENT, TO ARBITRATION.
- 3) ART III & V – RECOGNIZE & ENFORCE ARBITRATION AWARDS,
WITH EXCEPTIONS