MODERNIZING THE HAGUE EVIDENCE CONVENTION: A PROPOSED SOLUTION TO CROSS-BORDER DISCOVERY CONFLICTS DURING CIVIL AND COMMERCIAL LITIGATION

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I. INTRODUCTION

"An email can travel just as quickly from New York to London as it can from Madison Avenue to Park Avenue."[1] Continued globalization has increased the number of multinational corporations that use electronic means to transfer

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[1] Courtney Ingraffia Barton, *Framing the International E-Discovery Issues: Data Across the Globe*, THE DISCOVERY STANDARD, Oct. 2007, *available at* http://tiny.cc/barton.

data across geographic and political boundaries.[2] Globalization intensifies economic interconnectedness among sovereign countries' markets and increases the volume of cross-border communication among businesses and individuals.[3] The resulting electronically stored information ("ESI")[4] is often located in multiple countries simultaneously and is thereby subject to the disparate laws of multiple jurisdictions.[5]

If litigation in one jurisdiction requires the production of the ESI, the corporation or individual producing the ESI risks being sanctioned for noncompliance in that jurisdiction while also being sanctioned under the laws of another jurisdiction that prohibits its production. Corporations subject to United States jurisdiction must preserve and produce all relevant ESI during pre-trial discovery in U.S. courts or risk receiving civil sanctions under the Federal Rules of Civil Procedure ("FRCP").[6] Other jurisdictions may sanction the same corporation for preserving and producing the same ESI during U.S. pre-trial litigation, forcing a corporation to choose between violating the FRCP by failing to produce the ESI and violating the laws of the other jurisdiction by transferring the ESI for use in U.S. litigation.[7] Without established standardized legal procedures for processing and transferring ESI among jurisdictions, corporations cannot accurately assess the legal and financial

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[2] Iraj Mahdavi, *Social Implications of Business Globalization*, 5 PERSP.: ELECTRONIC. J. AM. ASS'N. OF BEHAV. & SOC. SCI. (2002), *available at* http://tiny.cc/0eeev ("Closely related to this notion is global business corporation's approach to management of business operations in various countries, as elements of a unified system, regardless of the location and the national boundaries.").

[3] The World Bank, Group, Poverty Reduction and Economic Management Economic Policy Group and Development Economics Group, *Briefing Paper: Assessing Globalization: What Is Globalization?* (2000), *available at* http://tiny.cc/iizoh. ("[T]he most common or core sense of economic globalization . . . refers to the observation that in recent years a quickly rising share of economic activity in the world seems to be taking place between people who live in different countries (rather than in the same country).").

[4] Electronically stored information includes electronic mail, voicemail, voice over internet protocol, text messages, instant messages, databases, random access memory, internet cache data, photos, and videos. This paper uses the abbreviation "ESI" to represent all types of electronic data.

[5] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §414 cmt. a (1986) [hereinafter REST. 3D] ("[M]ultinational enterprises do not fit neatly into the traditional bases of jurisdiction . . . ; [they] may not be nationals of one state only and their activities are not limited to one state's territory.").

[6] *See* FED. R. CIV. P. 37(b)(2) (providing for sanctions including adverse inferences, default judgments, contempt, or dismissal plus reasonable expenses and attorney fees).

[7] *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 527 (1987) [hereinafter *Aerospatiale*] ("[Petitioners argued] that they could not comply with the discovery requests without violating French penal law.").

risks of investing in the U.S. or in other jurisdictions.[8] For multinational corporations, even if simultaneous compliance with each jurisdiction's legal and procedural requirements is possible, such compliance consumes immense amounts of money and time. Where simultaneous compliance is impossible, the costs increase via sanctions and the potential dismissal of claims in U.S. courts under *forum non conveniens* due to this extra time and expense.[9]

"[G]lobalization is overwhelmingly a function of private activity: expanding markets, increasing mobility, instantaneous financial transactions, and virtually unlimited information exchange through the mass media and theinternet."[10] The sovereign states that regulate this private economic activity seek to protect the rights of their constituents and the privacy of their ESI and other personal information. The absence of a mutually legal channel for processing or transferring ESI can impede these sovereign interests and create diplomatic friction.

Private international law is a commonly used by sovereign states and their citizens to foster "cooperation in cross-border litigation" in resolving multi-jurisdictional disputes by providing a means for, and to establish procedures regulating, the transfer of "goods, services, and peoples around the globe."[11] The consistency provided by private international law in turn facilitates investment risk assessment by corporations and individuals who prefer "legal certainty and predictability in their transactions."[12]

The Hague Conference for Private International Law ("Hague Conference") developed a private international law treaty, the Hague Evidence Convention for the Taking of Evidence Abroad during Civil or Commercial Matters ("Evidence Convention"),[13] to regulate the transfer of electronic or other

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[8] Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach when American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1011-12 (2009) ("[B]y establishing different standards for litigants who have information abroad and litigants who have all of their information in the United States, courts could potentially create an unlevel playing field. Companies with all of their information in the United States would face higher risks in litigation and the higher insurance premiums that attach to those risks.").

[9] BLACK'S LAW DICTIONARY 680 (8th ed. 2004) (defining *forum non conveniens* as "[t]he doctrine that an appropriate forum . . . may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum . . . .").

[10] David P. Stewart, *Private International Law: A Dynamic and Developing Field*, 30 U. PA. J. INT'L L. 1121, 1123 (2009).

[11] *Id*. at 1122-23.

[12] *Id.* at 1123.

[13] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Evidence Convention].

evidence among jurisdictions.[14] The Hague Conference developed the Evidence Convention specifically to "reconcile the differing legal philosophies of the Civil Law, Common Law, and other systems with regard to the taking of evidence."[15] The Evidence Convention procedure requires judicial cooperation from both the requesting jurisdiction and the petitioned jurisdiction. A judicial authority in the requesting jurisdiction must send a Letter of Request, also known as a Letter Rogatory, to judicial authorities in the jurisdiction in which the evidence is located.[16] The petitioned judicial authority determines whether to execute the Letter of Request and compel evidence production using whatever domestic procedures are at its disposal.[17]

Despite the Evidence Convention's stated goal of reconciling procedural discrepancies among jurisdictions, Article 23 of the Evidence Convention allows any signatory "to declare that it will not execute a Letter of Request if it has been issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[18] The United Kingdom proposed Article 23 late in the Evidence Convention's development following concerns about the broad scope of discovery in the U.S.[19] During the Evidence Convention's development, many signatories had mistakenly believed that "pre-trial" referred to the period of time before the filing of a claim instead of the period of time after the filing of a claim and prior to an actual trial proceeding.[20]

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[14] *Id.* ("The States signatory to the present Convention . . . [desire] to improve mutual judicial co-operation in civil or commercial matters . . . .").

[15] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987) (Blackmun, J., concurring).

[16] Evidence Convention, *supra* note 13, art. 1 ("In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.").

[17] *Id.* art. 2 ("A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.").

[18] Philip W. Amram, *Explanatory Report on the 1970 Hague Evidence Convention* 4 *in* ACTS AND DOCUMENTS OF THE ELEVENTH SESSION: TAKING OF EVIDENCE ABROAD (1970), *available at* http://hcch.e-vision.nl/upload/expl20e (citing Evidence Convention, *supra* note 13, art. 23).

[19] *See id*. (noting that Article 23 was adopted at the United Kingdom's request); Cornelis D. van Boeschoten, *Hague Conference Conventions and the United States: A European View,* 57 LAW & CONTEMP. PROBS. 47, 51 (1994) (noting that broad pre-trial discovery in the United States is "practically unknown in Europe" and "may contribute to the European view that getting involved in U.S. litigation would be a major catastrophe."). Response of the United
States of America to Questionnaire on the 1970 Hague Convention on Taking of

Evidence Convention procedures rely on judicial cooperation,[21] but many signatories consider the extraterritorial reach of U.S. jurisdiction a threat to national sovereignty.[22] In response, the signatories exercise their Article 23 power under the Evidence Convention to declare that they will not execute Letters of Request seeking to obtain ESI for pretrial discovery in common law jurisdictions.[23] This loophole arguably defeats the purpose of the Evidence Convention itself.[24]

When determining whether to execute a request for ESI, a judicial authority will balance its interests in retaining the ESI with the requesting authority's interest in obtaining it. The interests of many Evidence Convention signatories in preventing the transfer of ESI to common law jurisdictions involve protecting their citizens' fundamental right to privacy from being

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Evidence Abroad in Civil or Commercial Matters ¶ 6, http://tiny.cc/miv2x [hereinafter Response of the U.S. to the Evidence Convention] ("In some circumstances, states may have made a reservation under Article 23 as a result of confusion with the term 'pretrial' when used in conjunction with the U.S. judicial system, and have erroneously assumed that it meant prior to the initiation of a judicial proceeding. Once understood as merely referring to the obtaining of evidence prior to a former testimonial proceeding before a judicial officer, but subsequent to the initial filing of a complaint, states may find that their Article 23 reservations can be appropriately limited.").

[21] *See* European Commission, Justice and Home Affairs, Glossary, http://tiny.cc/cmkg2 (last visited Jan. 28, 2010) ("Judicial Cooperation: Aimed at bringing laws and procedures of EU Member States closer together in order to provide better access to justice across the EU, its four main principles are: approximation of laws, coordination of proceedings, mutual recognition of decisions and protection of individuals' rights.").

[22] RALPH H. FOLSOM ET. AL., INTERNATIONAL BUSINESS TRANSACTIONS 1094 (2d. ed. 2001) ("Unlike the United States, most foreign countries reject extensive extraterritorial jurisdiction.").

[23] Evidence Convention, supra note 13, art. 23 ("A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.").

[24] U.S. Department of State, Law, Regulations & Public Policy, Information for Americans Abroad, Judicial Assistance, Obtaining Evidence Abroad, Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, http://tiny.cc/lkdfr (last visited Mar. 21, 2010) ("The Convention's primary purpose is to reconcile different, often conflictive, discovery procedures in civil and common law countries."); *see also id.* ("Pre-Trial Discovery of Documents: Most countries party to the Convention, with the exception of the Czech Republic, Israel, the Slovak Republic and the United States, made specific declarations objecting to the Article 23 provision on pre-trial discovery of documents."). *But see* Vienna Convention on the Law of Treaties, art. 19(c), May 23, 1969, 1155 U.N.T.S. 331 ("A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty.").

violated in a jurisdiction that does not offer sufficient protection of personally identifiable information. This paper will address the impact of the increase of ESI and the European Union's Council Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ("Data Directive") on the financial and diplomatic expense of cross-border discovery during litigation in U.S. courts. The Data Directive prohibits any processing or transfer of personally identifiable information in or to a country outside of the EU that does not provide adequate safeguards of its citizens' fundamental right to privacy.[25] Personally identifiable information, or personal data, is any "information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information . . . ."[26]

The Supreme Court of the United States held in *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa* ("*Aerospatiale*") that use of Evidence Convention procedures instead of the FRCP to obtain extraterritorial evidence during discovery in U.S. courts is not mandatory.[27] *Aerospatiale* involved a class-action product liability claim

[25] Council Directive 95/46, art. 7, 1995 O.J. (L 281) 31 (EC) [hereinafter Data Directive] ("Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent . . . ."); *id.* art. 25 ("The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection . . . .").

[26] Memorandum from Clay Johnson III, Deputy Director for Management, Office of Management and Budget, Safeguarding Against and Responding to the Breach of Personally Identifiable Information (May 22, 2007), *available at* http://tiny.cc/rad8m; *see also* Data Directive, *supra* note 25, art. 2(a)] ("'[P]ersonal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"). Where personally identifiable data is collected for a non-litigation purpose and consent was not obtained to use the evidence for litigation purposes, the right to privacy is implicated. *Id.* art. 6(b) (requiring Member States to ensure that personal data is only "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes").

[27] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 536-37 (1987) ("Surely, if the Convention had been intended to replace completely the broad discovery powers that the common law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common law contracting parties to agree to Article 23, which

against French airplane manufacturers after an airplane built by the manufacturers crashed in Iowa.[28] The French manufacturers argued that discovery should proceed under the Evidence Convention and not the FRCP because: (1) the evidence sought was located in France; (2) both France and the U.S. were Evidence Convention signatories; and (3) the corporations could not comply with U.S. discovery requests under the FRCP without violating the French Blocking Statute ("Blocking Statute"),[29] a French penal law that prohibits the transfer of information to the U.S. for litigation purposes.[30]

According to the Supreme Court, France's sovereign interest in enforcing the Blocking Statute did not outweigh the U.S.'s interest in obtaining the evidence for use in litigation because the France's interests involved attempting to govern the U.S. judges' decisions.[31] The Supreme Court ultimately held that the Evidence Convention was neither the mandatory nor the exclusive way to obtain information located in a foreign signatory country during discovery.[32] The Supreme Court determined that mandatory application of Evidence Convention procedures would undermine and be inconsistent with U.S. legal proceedings where signatories refused to produce necessary information under Article 23.[33]

The purpose of the Evidence Convention was to create a "method [of discovery that is] 'tolerable' to the authorities of the state where it is taken and at the same time 'utilizable' in the forum where the action will be tried."[34] In 1970, the Evidence Convention authors could not have foreseen the

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enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery."); *see also infra* Part III(a).

[28] *Aerospatiale,* 482 U.S. at 525 (describing cause of action and procedural history).

[29] Law No. 80-538 of July 16, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980, p. 1799 [hereinafter Blocking Statute].

[30] *Aerospatiale,* 482 U.S. at 525-26 (listing French corporations' arguments for using Evidence Convention procedures).

[31] *Id.* at 544-45 n.29 ("Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge.").

[32] *Id.* at 544 ("We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.").

[33] *Id.* at 542-43 ("A rule of first resort [to Evidence Convention procedures] in all cases would therefore be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts.") (citing FED. R. CIV. P. 1.).

[34] *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 I.L.M. 785, 806 (1969).

exponential globalization and increased frequency of cross-border electronic communications that is now commonplace.[35] In today's modern business and legal world its procedures are too inefficient and costly and have fallen into disuse.

Several options exist to reduce or remove the risk of criminal and civil sanctions from the cost of doing business in or with the U.S. Establishing and incorporating minimum data protection standards into Evidence Convention provisions that are acceptable to both common law and civil law signatories could lessen the diplomatic friction between the U.S. and other signatories and remove the risk to litigants in U.S. courts of concurrent sanctions. Minimum data protection standards that require an intermediate level of specification in the description of requested ESI could reduce the chances that U.S. discovery will be a "fishing expedition" that could violate foreign citizens' privacy rights and decrease the perceived need for the overt blocking statutes that frustrate cross-border litigation while still allowing litigants in U.S. courts to request data reasonably likely to be in another party's possession. The Hague Conference could educate signatories on the differences between the litigation process in civil law and common law jurisdictions to clarify the role of "pre-trial" discovery in U.S. courts. Signatories could negotiate less restrictive and more tailored bilateral agreements within the Evidence Convention framework. Delegating the resolution of cross-border conflicts of evidence-related law to special authorities or to an institution within The Hague Conference could improve the efficiency of Evidence Convention procedure to align it with current litigation timelines and decrease the administrative burdens on the participating judicial systems.

This paper discusses the need for an international solution to conflicts in cross-border litigation, focusing specifically on conflicts between the FRCP and the EU's Data Directive and between the FRCP and France's Blocking Statute. This paper proposes that an optional protocol to the Evidence Convention could build on the existing private international law treaty mechanism and provide a "tolerable" discovery procedure necessary to resolve such conflicts of discovery law.[36] An optional protocol could allow signatories to: 1) establish minimum data protection standards requiring descriptions of ESI that are narrower in scope than the broad requests allowed in the U.S. but broader than those allowed in civil law jurisdictions; 2) establish the meaning of "pre-trial" discovery; 3) enter less restrictive bilateral agreements within the Evidence Convention framework; or 4) shift the administrative burden of executing letters of request to a special authority or an agency within the Hague Conference. This paper also suggests that an optional protocol or other

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[35] *See* Evidence Convention, *supra* note 13, at 2555 ("Concluded 18 March 1970").

[36] *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, supra* note 34, at 806.

agreement that is time-limited would incentivize changes by allowing signatories to "try out" potential solutions and renew those that work.

II. ESI AND THE EXPENSE OF ELECTRONIC DISCOVERY

"[D]iscovery is the legal obligation of organizations to produce information that is or may be relevant to the subject matter of a lawsuit or government investigation."[37] Relevant "information" no longer refers primarily to paper documents, because "information, as a cultural and technological edifice, has profoundly and irrevocably changed."[38] Each advance in technology changes the meaning of the word "document," "writing" or "record."[39] Paper documents today comprise less than one-tenth of one percent of all existing information, while ESI comprises over ninety percent.[40] Since ESI is quickly scanned and organized by computers and their human users, this large "volume of [ESI] . . . now means that more information is obtainable and disclosable with greater ease."[41] Globalization and the use of electronic communications to conduct cross-border transactions and business functions result in the existence of multiple copies of ESI, each copy of which could be needed during pre-trial discovery in U.S. courts.

ESI's multi-faceted and intangible existence is substantially different from tangible paper. The Sedona Conference[42] identified six characteristics of ESI that distinguish it from paper formats, including its volume and duplicability; persistence; dynamic, changeable content; creation of "metadata"[43];

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[37] ANDREW M. COHEN, EMC CORP., A PRACTICAL ENTERPRISE METHODOLOGY FOR ADDRESSING THE COMPLIANCE CHALLENGES OF EDISCOVERY, ERETENTION MANAGEMENT, AND DEFENSIBLE DISPOSITION 7 (2006), http://tiny.cc/fz3vq (last visited Feb. 27, 2010).

[38] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1, 1 (2007).

[39] Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 216 (Cal. 2007) ("An e-mail is considered a writing for purposes of mediation confidentiality.").

[40] PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003 (Oct. 27, 2003) (unpublished, on file with the School of Information Management and Systems at the University of California at Berkeley) ("Ninety-two percent of new information is stored on magnetic media, primarily hard disks. Film represents 7% of the total, paper 0.01%, and optical media 0.002%.").

[41] European Union Article 29 Data Protection Working Party, Working Document 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation 3 (WP 158, 2009), *available at* http://tiny.cc/sx1bd [hereinafter EU Working Document].

[42] The Sedona Conference is a nonprofit legal think tank that has developed helpful guidelines and principles for the handling of ESI and e-discovery. THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA PRINCIPLES FOR ELECTRONIC DOCUMENT PRODUCTION (Jonathan M. Redgrave et al. eds, 2d ed. 2007), *available at* http://tiny.cc/ajoua [hereinafter SEDONA PRINCIPLES].

[43] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL

environment-dependence and obsolescence; and dispersion and searchability.[44] These principles seem to enjoy general support.[45] As described by Grenig et al., in the eDiscovery and Digital Evidence Database, ESI grows at an exponential rate due to its ease of creation and duplication.[46] Second, ESI is difficult to erase, as deleted ESI remains on the storage device and is recoverable until overwritten.[47] Third, ESI is dynamic and changes automatically over time with automatic saves, reorganizations, backups, and transfers.[48] Fourth, ESI may contain metadata about the generation, handling, transfer, and storage of data within a computer system,[49] which adds to the difficulties of disposing of ESI. Fifth, ESI may be incomprehensible without computer software, appearing as a list of binary numbers or characters.[50]

INFORMATION MANAGEMENT 33 (Conor R. Crowley et al. eds., 2d ed. 2007) ("Metadata: Data typically stored electronically that describes characteristics of ESI . . . . [Metadata can] be supplied by applications, users or the file system. Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted. [Metadata can] be altered intentionally or inadvertently . . . . Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.").

[44] SEDONA PRINCIPLES, *supra* note 42, at 23-58. (grouping differences between paper and electronic documents into six categories: volume and duplicability; persistence; dynamic, changeable content; metadata; environment-dependence and obsolescence; and dispersion and searchability).

[45] JAY E. GRENIG ET AL., EDISCOVERY & DIGITAL EVIDENCE DATABASE 7 (2008).

[46] *Id.* at 8 ("[D]igital documents are created at much greater rates than paper documents. Consequently, the amount of information available for potential discovery has exponentially increased with the introduction of electronic data.").

[47] *Id.* ("'[D]eleting' a[n electronic] file does not actually erase the data from the computer's storage devices; 'deleting' simply finds the data's entry in the disk directory and changes it to a 'not used' status. This permits the computer to write over the 'deleted' data. Until the computer writes over the 'deleted' data, it may be recovered by searching the disk itself rather than the disk's directory.").

[48] *Id.* ("Computer information . . . has dynamic content that is designed to change over time even without human intervention. For example, workflow systems automatically update files and transfer data from one location to another, tape backup applications move data from one cartridge to another in order to function properly, web pages are constantly updated with information fed from other applications, and email systems reorganize and remove data automatically . . . . Even the act of merely accessing or moving digital data can change it.").

[49] GRENIG, s*upra* note 45, § 1:3 ("Metadata is information about the document or file that is recorded by the computer to assist the computer and often the user in storing and retrieving the document or file at a later date. The information may also be useful for system administration as it reflects data regarding the generation, handling, transfer, and storage of the data within the computer system.").

[50] *Id.* ("Digital data, unlike paper data, may be incomprehensible when separated from its environment . . . . [I]nformation in a database may be incomprehensible when

Sixth, ESI is easy to search and transfer, unlike paper documents stored in filing cabinets.[51]

The 2006 FRCP Advisory Committee changed the FRCP in 2006 to reflect changes in both business practices and the format of discoverable information from paper to ESI.[52] The Advisory Committee Notes to the 2006 FRCP Amendments ("2006 Amendments") show that the drafters intended their definition of ESI to be expansive and adaptable to technological advances.[53] Proponents stated that the Committee chose this expansive definition because it was concerned that continuing increases in ESI, e-discovery and "litigation costs were having a serious impact on the ability of American companies to compete in global markets."[54] Part of the reason for the high cost of litigation in U.S. courts comes from the process of e-discovery, which requires "identifying, collecting, filtering, searching, de-duplicating, reviewing and potentially producing [any] ESI that relates to pending or reasonably anticipated litigation in the host or a foreign country."[55]

"[W]hen an employee generates [ESI] and sends it by e-mail to several dozen people within an organization, it can be duplicated on numerous servers and employee hard drives . . . [and] backed up to multiple tapes from multiple servers, every night."[56] A single piece of ESI can be simultaneously located on servers throughout the world, accessed from personal computers around the world, and copied on PDAs, cell phones, and portable hard

removed from the structure in which it was created or stored. If the raw data (without the underlying structure) in a database are produced, it will appear as merely a long list of undefined numbers or characters. To make sense of the data, a viewer needs the context that includes labels, columns, report formats, and other information.").

[51] *Id.* at 9-10 ("While paper documents will often be consolidated in a handful of boxes or filing cabinets, digital documents could reside in numerous locations, such as desktop hard drives, laptop computers, network servers, floppy disks and backup tapes . . . . Copies of evidence . . . may exist in a number of formats and stages of development as hidden or deleted files on large servers distributed throughout the world, local personal computers, personal digital assistants, cellular telephones, or on difficult to access storage media or devices.").

[52] *See generally* Amendments to the Federal Rules of Civil Procedure, http://www.uscourts.gov/rules/supct1105/CV_Clean.pdf (last visited Mar. 21, 2010).

[53] FED. R. CIV. P. 34(a)(1) advisory committee's note ("[T]he rapidity of technological change[] counsel[s] against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically.").

[54] Shira A. Scheindlin, *E-Discovery: The Newly Amended Federal Rules of Civil Procedure*, *in* MOORE'S FEDERAL PRACTICE 14-15 (2006).

[55] M. James Daley et al., Framework for Analysis of Cross-Border Discovery Conflicts: *A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery*, THE SEDONA CONF., Aug. 2008, at 5.

[56] COHEN, *supra* note 37, at 10-11.

drives.[57] This massive amount of ESI must be sifted through to determine its relevance to the litigation.[58] The extra time needed to locate ESI and determine its relevance greatly increases the expense of discovery.[59]

Many countries have laws and regulations requiring corporations to retain massive amounts of ESI for use by law enforcement or intelligence agencies. The United States alone has over 14,000 laws and regulations requiring businesses to retain certain types of ESI.[60] Although very little collected data may ultimately be relevant, litigants – and their attorneys – are theoretically liable for failing to search the entire mass of data.[61] Cost-efficient document review of this ESI is difficult, if not impossible.[62] In the U.S., 75-90% of

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[57] GRENIG, *supra* note 45, § 1:3 ("Copies of evidence, regardless of the so-called "best evidence" rule, may exist in a number of formats . . . distributed throughout the world . . . ."); FED. R. EVID. 1001(3) (stating that any printout of data stored in a computer or other device that accurately reflects the data is an "original"); *see also* CAROLE BASRI & MARY MACK, EDISCOVERY FOR CORPORATE COUNSEL § 22:2 (2008) (reporting that emails typically contain 70% of a company's digital assets and that Americans alone send more than 50 billion e-mails and two billion instant messages every day).

[58] EU Working Document, *supra* note 41, at 3 ("The ease with which electronic records can be downloaded, transferred or otherwise manipulated has meant that the discovery process in litigation often gives rise to a vast amount of information which the parties need to manage to determine which parts are relevant to the particular case in hand.").

[59] Jerry F. Barbanel & Thomas W. Avery, *Understanding the World of E-mail: How It Can Significantly Increase or Decrease the Costs of Electronic Discovery – Part II*, THE METROPOLITAN CORP. COUNS. 73 (2007) ("[A]ny [ESI] documents that are going to be produced to the opposing party have to be [converted to a different format]. This process requires additional time and costs.").

[60] BASRI & MACK, *supra* note 57, § 21:7 ("There are over 14,000 laws and regulations dictating how long ESI must be retained in a specific industry."); *see, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) (requiring certain businesses to retain ESI for years).

[61] COHEN, *supra* note 37, at 7-8 (noting the difficulties of "culling" information from the collected data, including its huge cost and potential malpractice liability for attorneys); JAMES N. DERTOUZOS ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 1 (2008) ("[C]ompanies retain vast relational databases that are continuously updated. These systems contain payroll, sales, manufacturing, and supplier transactions and provide a snapshot of an entire enterprise . . . stored on data recovery systems or 'backup' tapes. Historical information is retained on decades-old legacy systems that are now difficult to access and read. Data that have supposedly been deleted from computers may still in fact exist in 'slack memory' and the various nooks and crannies of hard drives.").

[62] Jason R. Baron, *Discovery Overload*, LAW TECHNOLOGY NEWS, Jan. 2008, *available at* http://commonscold.typepad.com/eddupdate/2008/01/edd-showcase-di.html#more ("[S]earching [manually] through 1% of a billion e-mails presents an insurmountable problem.").

discovery costs arise from paying law firms to review preserved ESI.[63] The cost can be even higher in more complex industries.[64] Both attorneys[65] and judges[66] in the U.S. have raised concerns about the monetary and temporal cost of processing and producing this endless reserve of ESI.

III. EXTRATERRITORIAL DISCOVERY IN UNITED STATES COURTS

Discovery becomes extraterritorial when U.S. courts find production of evidence located in a foreign country is necessary, or when litigation in foreign courts requires evidence located within the U.S. This paper uses the first scenario to illustrate complications arising from conflicts of electronic discovery law.[67]

A. Option 1: The Evidence Convention

The Hague Conference's Evidence Convention is important in transnational litigation among signatories.[68] In U.S. courts, the Evidence Convention

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[63] DERTOUZOS ET AL., *supra* note 61, at x ("[A]s much as 75 to 90 percent of cost increases come from the additional time it takes attorneys to conduct an 'eyes-on' review of electronic documents."); *see also* Socha Consulting, LLC, Sixth Annual Electronic Discovery Survey, *available at* http://tiny.cc/bs949 (estimating that the e-discovery market will earn $4.7 billion by 2010).

[64] DERTOUZOS ET AL., *supra* note 61, at 3 ("These burdens are likely to increase exponentially with the size, complexity, and scope of the business enterprise."); *see also* RALPH C. LOSEY, E-DISCOVERY: CURRENT TRENDS AND CASES 2 (ABA Pub. 2008) ("The costs associated with e-discovery requests can be enormous, sometimes far exceeding the total amount in controversy.").

[65] DERTOUZOS ET AL., *supra* note 61, at ix-x (describing results of study examining "legal and economic implications of e-discovery" and "interviews with plaintiff and defense attorneys as well as IT personnel and in-house counsel for a number of large corporations.").

[66] John Bace, *Cost of E-Discovery Threatens to Skew Justice System,* GARTNER, INC., Apr. 20, 2007, at 3 (noting Justice Breyer's concerns that the high costs of e-discovery will "drive out of the litigation system a lot of people who ought to be there.'"), *available at* http://www.akershaw.com/Documents/cost_of_ediscovery_threatens_148170.pdf.

[67] Although the taking of depositions is also an important part of judicial cooperation and conflicts of law during discovery, the scope of this paper covers only production of documents during discovery.

[68] *See* Hague Evidence Convention, Acceptances of Accessions, Feb. 1, 2010, *available at* http://www.hcch.net/upload/overview20e.pdf ("The Hague Convention is binding, as of July 14, 2008, between the United States and Argentina, Australia, Barbados, Belarus, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Israel, Italy, Latvia, Lithuania, Luxembourg, Mexico, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland,

provides procedures to obtain extraterritorial evidence from nonparties[69] and parties over which U.S. courts lack personal jurisdiction or subpoena power.[70]

Under the Evidence Convention, judicial authorities may request extraterritorial evidence from another judicial authority[71] if the evidence cannot be obtained by a U.S. consular officer[72] or private commissioner.[73] A judicial authority in the U.S. can send a Letter of Request, which contains a description of the lawsuit and information requested, to a signatory's central authority who then submits the request to a judicial authority who determines whether to execute the Letter of Request under the judicial authority's binding laws and procedures.[74]

Turkey, Ukraine, United Kingdom, and Venezuela.").

[69] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 530 (1987) ("The [Evidence] Convention's purpose was to establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state.") (citing Amram, *supra* note 18).

[70] *See* Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992) ("The presence of important witnesses in Mexico . . . would create extreme difficulties were this case to be tried in Texas. First, this court could not compel the attendance of these witnesses at trial because its subpoena power does not extend to them . . . . [T]he testimony of unwilling nonparty witnesses in Mexico can only be obtained to aid in a United States litigation through letters rogatory pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters . . . .").

[71] Evidence Convention, supra note 13, art. 1 ("In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.").

[72] *Id.* art. 15 ("[A] diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.").

[73] *Id.* art. 17 ("In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if – (a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case . . . .").

[74] Id. art. 2 ("A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law."); *see also id.* art. 4 ("A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. Nevertheless, a

The U.S. ratified the Evidence Convention on October 7, 1972,[75] before globalization and pervasive electronic communications changed the monetary and temporal aspects of litigation in U.S. courts. The Supreme Court's 1987 *Aerospatiale* decision held that Plaintiffs were not required to use Evidence Convention procedures to obtain evidence of their breach of warranty and product liability claims against two French airplane manufacturers.[76] Ultimately, the Supreme Court held that the Evidence Convention was neither mandatory nor the exclusive way to obtain extraterritorial evidence[77] despite arguments from the French corporations that they could not comply without violating French penal law.[78]

Aerospatiale established that litigants can use FRCP procedures to obtain extraterritorial evidence when comity balancing tests show that using the Evidence Convention would unfairly inhibit U.S. discovery.[79] The comity

Contracting State shall accept a Letter in either English or French, or a translation into one of these languages . . . ."); *id.* art. 3 ("A Letter of Request shall specify - (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority; (b) the names and addresses of the parties to the proceedings and their representatives, if any; (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto; (d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia – (e) the names and addresses of the persons to be examined; (f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined; (g) the documents or other property, real or personal, to be inspected . . . ."); *id.* art. 9 ("The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.").

[75] United States Department of State, Multilateral Treaties in Force for the United States as of January 1, 2007 97, *available at* http://www.state.gov/s/l/treaty/treaties/2007/index.htm (Convention on the taking of evidence abroad in civil or commercial matters . . . [e]*ntered into force October 7, 1972*.").

[76] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 525 (1987) ("On August 19, 1980, a Rallye crashed in Iowa, injuring the pilot and a passenger.").

[77] *Id. at* 544 ("We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.").

[78] *Id. at* 525-26 (listing French corporations' arguments for using Evidence Convention procedures).

[79] *Id. at* 543-44 ("[T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation . . . ."); *but cf. id.* (J. Blackmun et al., *dissenting*) (requiring that parties first resort to Evidence Convention procedures to avoid abuse of the *ad hoc* comity analysis and to preserve international relations).

analysis considers five factors from the Restatement of Foreign Relations Law: (1) importance of requested evidence to litigation; (2) specificity of the request; (3) territory of evidence's origination; (4) availability of alternative methods of obtaining evidence; (5) impact of noncompliance on important U.S. or foreign interests.[80] U.S. Courts primarily weigh the first two factors,[81] but some courts consider two additional factors: 1) hardship of compliance (civil and criminal consequences);[82] and 2) resisting party's good faith.[83]

Under the comity analysis, U.S. trial courts have held that Evidence Convention procedure is optional if the court has jurisdiction over an individual in possession of the requested ESI or if using FRCP procedure has no unfair impact on sovereign interests.[84] Other courts have held that the comity doctrine obligates U.S. courts to use the treaty as often as possible to avoid conflicts with foreign state interests.[85] Still other courts have required that litigants must show that if Evidence Convention procedures are used, the requested specifically described documents are likely to be in the party or nonparty's "possession, custody, or power,"[86] and that the foreign signatory

[80] *Id.* at 544 n. 28 (citing REST. 3D, *supra* note 5, § 437(1)(c)); *see also* United States v. Bank of Nova Scotia, 691 F.2d 1384, 1391 (11th Cir. 1982) (holding that U.S. interest in grand jury's power of investigation outweighed foreign bank secrecy law interests). *But cf.* United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 346 (7th Cir. 1983) (holding that Greek interests in bank secrecy laws outweighed U.S. interest in tax collection).

[81] Philip M. Berkowitz, *International E-Discovery: A Clash of Cultures and Law*, N.Y. L.J., Jul. 12, 2007, *available at* http://tiny.cc/rzhkl ("Courts generally consider the first two of these factors as the most important in determining whether the information should be produced.").

[82] *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 905 (2d Cir. 1968) (finding that the risk of civil liability was "speculative").

[83] REST. 3D, *supra* note 5, § 442, reporter's note 8 (describing cases in which good faith played a role).

[84] *See, e.g.*, Jones v. Deutsche Bank AG, 2006 WL 648369 (N.D. Cal. 2006) (holding that using the Hague Evidence Convention was optional as long as the request for production of documents under the FRCP would not "seriously impair the sovereign interests of other nations"); *see also* In re Flag Telecom Holdings, Ltd. Sec. Litig., 236 F.R.D. 177, 180 (S.D.N.Y. 2006) (holding that court jurisdiction over former CEO who has "control" over documents located abroad gives court ability to compel production of documents under FRCP 34 without using the Hague Evidence Convention).

[85] Madanes v. Madanes, 199 F.R.D. 135, 141 (S.D.N.Y. 2001); *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 543-44 (1987) (holding that courts must undertake a "particularized analysis of the respective interests of the foreign nation and the requesting nation").

[86] *See, e.g.*, First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 23 (2d Cir. 1998) (using the FRCP because the "Hague Convention does not really offer a meaningful avenue of discovery in the present case . . . the U.K. permits pretrial discovery only if

will not refuse to produce the evidence based on any Article 23 reservation.[87] Despite the Supreme Court's decision that the Evidence Convention is merely a "permissive supplement" to discovery under the FRCP, some state and federal courts have decided to use Evidence Convention procedure as the default procedure.[88]

B. Option 2: FRCP

Most U.S. courts will conduct extraterritorial discovery under FRCP procedures unless a litigant shows that a comity analysis favors using Evidence Convention procedures. The FRCP now specifically address increased globalization and electronic communications and current business practices.[89] Judges may compel litigants and third parties to produce ESI if

each document is separately described . . . . Because . . . such specificity is impossible in the present case, the Hague Convention would prove an ineffective tool"); *see also* In re Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433, at 4 (D.D.C. Jun. 20, 2001) (finding use of the FRCP appropriate "[c]onsidering the length of time this litigation has already taken and the pretrial schedule currently in place . . . [and] the fact that the Hague Convention procedures . . . are unlikely to result in the timely and efficient discovery required in this case"); *see also Aerospatiale*, 482 U.S. at 542-43 ("A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts."); In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 305 (3d Cir. 2004) (approving cases holding that the "burden of persuasion as to the optional use of the Convention procedures" is on the party requesting use of the Hague Convention).

[87] *See* REST. 3D, *supra* note 5, § 473 cmt. h (Most signatory countries executed a form of Article 23 declaration.); Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions November 2003 ¶ 29, http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf [hereinafter Conclusions and Recommendations] (noting that Article 23 is a "continued source of misunderstandings"). *But see* Response of the U.S. to the Evidence Convention, *supra* note 20, ¶ 6 (speculating that some countries made an Article 23 reservation because of confusion over the U.S. usage of the term "pretrial").

[88] *See, e.g.*, Husa v. Laboratoires Servier SA, 740 A.2d 1092, 1096 (N.J. Super. Ct. App. Div. 1999) ("[T]he [Evidence] Convention should be utilized unless it is demonstrated that its use will substantially impair the search for truth . . . .").

[89] E-Discovery Amendments and Committee Notes, Amendments Approved by the Supreme Court - Submitted to Congress (Apr. 2006), *available at* http://tiny.cc/pmk9h; *see also* Richard L. Marcus, E-Discovery Beyond the Federal Rules, Keynote Address at the University of Baltimore Law Review Symposium: Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules (Mar. 13, 2008), *in* 37 U. BALT. L. REV. 321 (2008) (giving an overview of the amendment process). The 2006 Amendments govern the format in which parties will produce ESI, the consequence of inadvertent release of privileged information, and when sanctions for inadvertent loss of ESI are appropriate. *See* DERTOUZOS ET AL., *supra* note 61, at 11 ("The rules encourage the use of agreements between the parties to

U.S. courts have personal jurisdiction[90] over the individual or entity or if relevant evidence is within a party's "possession, custody, or control" under FRCP 34, 45, and 16.[91]

U.S. courts construe "control" broadly[92] to encompass the subsidiaries of any corporation over which U.S. courts have personal jurisdiction or subpoena power.[93] A parent corporation has "control" over a subsidiary under FRCP 34 if the parent has substantial ownership in and control over the subsidiary,[94] and a subsidiary has "control" over evidence if it regularly requests the data from the parent in the normal course of business[95] and employees regularly access the data in the "course of employment."[96] This paper assumes, for the

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handle situations in which privileged data slips past the review process. 'Claw-back' agreements set forth the rules for trying to get the data back if a leak is subsequently discovered. 'Quick-peek' agreements allow requestors to review briefly a large body of data for relevance and then, if some portion of it is determined to be of the type that they seek, the producer will subject the identified information to the usual tests for privilege before a more permanent release. Finally, there is a 'safe harbor' provision that may restrict sanctions in situations in which data are lost through an automatic computer process that was routine and in good faith. However, the conditions under which such restrictions are applicable remain vague and discretionary.").

[90] *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that minimum contacts with state are necessary for due process); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding that foreign defendants receive benefits of Fifth Amendment due process requirements).

[91] *See generally* FED. R. CIV. P. 34(a), 45(a), 16(b)(3); REST. 3D, *supra* note 5, § 442 reporter's note 2 ("Subsection (1) is designed to achieve greater control of the scope of discovery than is common in wholly domestic litigation and to advance consideration of the issues set forth in Subsection (1)(c) to the initial discovery order rather than leave them to the compliance stage.").

[92] Camden Iron & Metal, Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 441 (D.N.J. 1991) (citing Scott v. Arex, Inc. 124 F.R.D. 39, 41 (D. Conn. 1989)).

[93] *See, e.g.*, IDT Corp. v. Telefonica, 2003 WL 230894 (S.D.N.Y. 2003) (compelling production of documents located in Spain by the party's U.S. office because the company had "control" over documents and operated "seamlessly" between all locations); *see also* Camden Iron & Metal, 138 F.R.D. at 441-42 (citing Gerling Intern. Ins. Co. v. C.I.R., 839 F.2d 131, 140-41 (3d Cir. 1988)) (finding that ordering production from parent company is appropriate when the "alter ego" doctrine allows for "piercing the corporate veil"; the subsidiary was an agent of the parent; the agent-subsidiary can use the parent's documents in its own business; the subsidiary has access to the parent's documents in the ordinary course of business; or the subsidiary was a marketer/servicer of the parent's products in the U.S.).

[94] *Camden Iron & Metal, Inc.*, 138 F.R.D. at 441 (citing *Gerling Intern. Ins. Co.*, 839 F.2d at 140).

[95] *Id.* at 443 (citing Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984)).

[96] *See, e.g.*, In re Flag Telecom Holdings, 236 F.R.D. 177, 181 (S.D.N.Y. 2006) (finding

sake of discussion, that a U.S. court would find personal jurisdiction over the foreign defendant or third party and subject matter jurisdiction over the litigated events. To reduce the amount of time and money spent collecting and reviewing electronic evidence, FRCP 26(f) requires parties to confer in order to agree on the amount and types of ESI they will produce.[97] Parties must also address any preservation issues,[98] general electronic discovery issues and privilege and waiver issues.[99] The parties must submit their agreement to the judge[100] and, under FRCP 16(b)(5), the judge must include "provisions for discovery or disclosure of [ESI]" in its initial scheduling order.[101]

FRCP 26(b)(2)(B) created two tiers of ESI in an effort to reduce the expense of e-discovery: (1) ESI that is accessible and discoverable that must be produced by the parties; and (2) ESI that is not reasonably accessible and presumptively not discoverable.[102] ESI that requires undue burden or cost to produce is "not reasonably accessible."[103] Even if parties prove that ESI is not "reasonably accessible," however, a judge may still compel its production if the requesting party shows "good cause."[104]

Parties may object to producing accessible ESI under FRCP 26(b)(2)(C) if "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . ."[105] Sanctions for the "[i]nspection or testing of certain types of [ESI] . . . may raise issues of confidentiality or privacy" under foreign law, or subject parties to sanctions that could be considered an undue burden on

"control" over foreign documents where "employees are permitted to utilize the documents in the course of employment, as they must in order to perform their jobs").

[97] FED. R. CIV. P. 26(f)(3)(C).

[98] *Id.* 26(f)(2).

[99] *Id.* (f)(3)(D).

[100] *See* Revised Form 35, "Report of Parties' Planning Meeting," 2006 Amendments, *supra* note 52, at 41-42, *available at* http://tiny.cc/drlu5.

[101] FED. R. CIV. P. 16(b)(5) (2006).

[102] FED. R. CIV. P. 26(b)(2)(B).

[103] *Id.* advisory committee's note ("A party's identification of sources of [ESI] as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence.").

[104] *Id.* (listing factors determining "good cause" as: 1) specificity of request; 2) existence of more accessible alternative sources; 3) whether the ESI previously existed in an accessible source; 4) likelihood of finding ESI; 5) likelihood of ESI being important; 6) importance of litigated issues; and 7) parties' available resources); *see also* Static Control Components, Inc. v. Lexmark Int'l, Inc., 2006 U.S. Dist. LEXIS 16662, at *19 – *20 (E.D. Ky. 2006) (holding that an unusual computer system does not negate requirement to produce ESI in usable form).

[105] FED. R. CIV. P. 26(b)(2)(C) (listing proportionality considerations).

production costs and a reason for objecting under FRCP 26(b)(2)(C).[106]

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[107] While essential, when relevant facts or individuals are subject to the laws of other jurisdictions, proceeding under the FRCP often creates conflicts of law. Often, the conflict is with a civil law jurisdiction, as discovery in the U.S. is wider in scope than in any other country, particularly civil code jurisdictions.[108] Complications also arise when corporations store relevant ESI in countries with privacy or discovery obligations that specifically conflict with U.S. discovery production obligations.[109] Where ESI is subject to the jurisdiction of two or more countries at the same time, a "higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation" will supersede the normal relevance standard.[110]

American courts have held that sovereignty does not impede an order from a U.S. court to compel production of documents located abroad for discovery in the U.S.[111] In the report from the U.S. delegation to the 11th Hague

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[106] *Id.* 34(a)(1), advisory committee's note.

[107] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[108] *See, e.g.*, CIV. P. RULE 31.6 (U.K), *available at* http://tiny.cc/lljnc. English Civil Procedure Rules limit "disclosures" to documents on which a party relies. *Id.*

[109] Gary A. Adler et al., *Electronic Discovery and the Global Workplace*, *in* ELECTRONIC DISCOVERY GUIDANCE 2008: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW 289, 291 (2008) ("For companies doing business in the U.S., storing data in other countries subjects them to a myriad of foreign laws, some of which conflict with their obligations to produce Electronically Stored Information ("ESI") in U.S. litigation.").

[110] In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1146 (N.D.Ill. 1979) (rehearsing the determinations in Société Internationale, 357 U.S. 197 (1958)); *see also Société Internationale*, 357 U.S. at 205 (foreign compulsion barring production does not preclude "a court from finding that petitioner had 'control' over [certain records], and thereby from ordering their production" pursuant to Rule 34); *see also* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972) (affirming trial court's holding that Swiss law prohibiting disclosure warranted, "as a matter of comity," that party need not disclose account information, "since . . . the [information] was not essential to the issue on trial"); *see* REST. 3D, *supra* note 5, § 442, reporter's note 2 ("While the proponent of discovery may not know at the beginning of the process whether a given item of information will turn out to be directly relevant or material, Subsection (1) requires him to persuade the court that the request meets a higher standard for permissible discovery than applies in routine domestic cases; if the proponent of discovery cannot do so at the outset, the discovery request may be renewed at a later stage in the action.").

[111] *See, e.g.*, In re Anschuetz & Co., 754 F.2d 602, 611 (5th Cir. 1985) ("We find particularly apt the court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information -- if this is really how civil law judicial sovereignty is understood -- when such documents

Conference, the U.S. said that since a party's voluntary production of documents in private litigation is not a public matter, it does not violate sovereignty rights of the foreign state.[112]

One effort to resolve the diplomatic friction caused by these conflicts of law is a "Safe Harbor" program that was negotiated by the U.S. Department of Commerce and the EU to allow corporations that comply with the "Safe Harbor" framework to legally transfer ESI containing an EU citizen's personally identifying information across borders within the same multinational corporation.[113] The Safe Harbor framework requires: (1) notice to the individual; (2) the choice to opt-out; (3) notice and choice for transfers to third parties; (4) access to his or her own personal information; (5) reasonable security precautions to protect data; (6) inclusion of only relevant and accurate data; and (7) a complaint and enforcement mechanism. Multinational entities can also comply by publishing their own privacy policies using either: (1) legally Binding Corporate Rules approved by data protection authorities in each state wherein the multinational corporation does business; or (2) model contractual clauses that provide adequate safeguards.[114]

While the Safe Harbor program legally allows multinational entities to transfer ESI across borders, it does not legally allow the processing of ESI for litigation purposes. Therefore, multinational entities complying with the Safe Harbor program can still be sanctioned under a domestic blocking statute or the Data Protection Directive and its domestic implementing legislation for

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are to be produced in the United States.").

[112] Graco v. Kremlin, Inc., 23 I.L.M. 757, 771-72 (N.D.Ill. 1984) ("Nor does the court agree that the Convention requires deference to a country's judicial sovereignty over documents, people, and information -- if this really is how judicial sovereignty in to be understood -- when they are to be produced in this country . . . . If they are subject to the court's jurisdiction, or if the court can compel a party to produce them under Fed. R. Civ. P. 37(d), then the court may order that they be produced for deposition; violation of the other country's judicial sovereignty is avoided by ordering that the deposition take place outside the country."); *see also* Report of United States Delegation to Eleventh Session Hague Conference on Private International Law, 8 I.L.M. 785, 806 (1969) ("The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent.").

[113] U.S. Dept. of Commerce, "U.S.-European Union Safe Harbor," http://tiny.cc/gor2u (last visited Nov. 23, 2009).

[114] *Id.* at "European Union Safe Harbor Overview," http://tiny.cc/e5ael (last visited March 10, 2010).

processing ESI containing an EU citizen's personally identifiable information.

The lack of consistent standards and the *ad hoc* nature of the multi-factor comity test used to determine applicable law during pre-trial discovery in U.S. courts leave parties without a guide to predict whether U.S. courts will compel a production of ESI that would violate criminal or civil foreign laws, preventing the parties from accurately assessing the risk of doing business in the U.S.[115]

IV. THE NEED FOR AN INTERNATIONAL SOLUTION

Many countries view U.S. discovery's broad scope as an invasion of privacy and an attack on national sovereignty.[116] "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[117] Some countries believe that the U.S. should obtain their permission to exercise authority over entities and documents within their territories.[118] The U.S. believes that its courts should be able to exercise authority over extraterritorial discovery because any parties taking advantage of business opportunities in the U.S. should be

[115] *See* Columbia Pictures Ind. v. Bunnell, 2007 WL 2080419 at *13 (C.D. Cal. 2007) (compelling production of data from server located in the Netherlands despite potential violation of Dutch law). *But cf.* Volkswagen v. Valdez, 909 S.W.2d 900, 901 (Tex. 1995) (reversing vacating a decision ordering Volkswagen to produce its corporate phone directory, in part because of potential German data protection law violation, and conditionally granting a writ of mandamus).

[116] *See* Barton, *supra* note 1 at 1 ("Fueling the international conflicts are the attitudes abroad about the U.S. discovery process underscored by less liberal rules in other countries that see the American need for discovery as not only an invasion of privacy, but also an attack on foreign sovereignty.").

[117] REST. 3D, *supra* note 5, § 442 reporter's note 1.

[118] Gibson, Dunn & Crutcher, LLP, The French Supreme Court Applies the 1980 Blocking Statute for the First Time and Strengthens the Conditions Under Which Evidence To Be Used in Foreign Litigation Can Be Obtained in France (Jan. 17, 2008) ("[The French Blocking Statute] of July 16, 1980 . . . was enacted by France in response to perceived abuses in the extraterritorial application of United States laws. Similar blocking statutes were adopted at the time by most Western countries (including the U.K., Australia, Canada, The Netherlands, Norway, etc.) . . . . The legislative history makes it clear that the 1980 Blocking Statute was intended to block the extraterritorial application of foreign procedural rules on the French territory and to force foreign authorities to comply with the strict requirements and procedures provided by the Hague Convention while gathering information in view of foreign litigation."), *available at* http://tiny.cc/pkc89; *see also* Officiel Journal, Assemble Nationale – Questions et Responses 373 (Jan. 26, 1981) ("Aussi bien la loi n'a-t-elle évidemment pour objet ni d'entraver les relations d'affaires avec des *pays* étrangers, ni de limiter ou de contrôler les relations des avocats internationaux avec leurs clients."), *available at* http://archives.assemblee-nationale.fr/6/qst/6-qst-1981-01-26.pdf.

"subject to the burdens as well as the benefits of United States law, including the laws on discovery."[119] Economic globalization increases the number of requests for extraterritorial evidence and consequently, the number of conflicts regarding ESI and other evidence that is subject to concurrent jurisdiction.[120]

Temporal and monetary expenses, conflicts of law, and the potential for civil and criminal sanctions related to extraterritorial discovery in U.S. courts, continue to act as barriers to the efficient and legal transfer of evidence across borders as well as comfortable diplomatic relations. Claims are frequently dismissed on *forum non conveniens* grounds due to the time-consuming and expensive nature of Evidence Convention procedures.[121] If a litigant needs to obtain a judgment on property or anything else located in the U.S. or within U.S. jurisdiction, such a dismissal can be a serious impediment. Diplomatic friction can also cause a litigant's case to be dismissed from U.S. courts if extraterritorial evidence is needed from a signatory with an Article 23 reservation or some other law that prohibits cooperation with requests for pre-trial discovery in common law.[122]

[119] REST. 3D, *supra* note 5, § 442 reporter's note 1.

[120] *See, e.g.*, Norex Petroleum Ltd. v. Access Indus., Inc., 620 F. Supp. 2d 587, 589-91(S.D.N.Y. 2009) (discussing Evidence Convention and attempts to circumvent discovery stays in Racketeer Influenced and Corrupt Organizations Act case).

[121] *See, e.g.*, Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231, 243 n.8 (D. Conn. 2009) (finding that time-consuming practice of sending letters of request under the Hague Evidence Convention weighed against litigating dispute in U.S. courts); Do Rosario Veiga v. World Meteorological Org., 486 F. Supp. 2d 297, 308-09 (S.D.N.Y. 2007) (dismissing claim under *forum non conveniens* due to time delay and resultant expense of using the Hague Evidence Convention); Turedi v. Coca Cola Co., 460 F. Supp. 2d 507, 529 (S.D.N.Y. 2006) (dismissing claim under *forum non conveniens* test due to time necessary to obtain evidence from Turkey under the Hague Evidence Convention); Reers v. Deutsche Bahn AG, 320 F. Supp. 2d 140, 162-63 (S.D.N.Y. 2004) (dismissing claim on *forum non conveniens* grounds due to cost and time needed to obtain evidence from France using Hague Evidence Convention procedure).

[122] *See* Estate of Thomson v. Toyota Motor Corp. Worldwide, 2007 WL 1795271, *4 – *5 (N.D. Ohio 2007) (dismissing claim under *forum non conveniens* in part because the likelihood of obtaining evidence abroad was extremely low due to South Africa's reservation under Article 23). *But see* Deirmenjian v. Deutsche Bank, A.G., 2006 WL 4749756 at *8 (C.D. Cal. 2006) (finding that Germany's Article 23 reservation is not sufficient by itself to dismiss a claim under *forum non conveniens* balancing test); Ramirez de Arellano v. Starwood Hotels & Resorts Worldwide, Inc., 448 F. Supp. 2d 520, 529 (S.D.N.Y. 2006) (denying *forum non conveniens* motion because Spain is a signatory of Hague Evidence Convention despite reservation).

A. Data Protection and the Definition of "Pre-trial"

Pre-trial discovery in U.S. courts is intended to encourage early disclosure and efficient settlement prior to trial.[123] Litigants in U.S. courts must produce any information relevant to a discovery request that is under the party's "possession, custody or control" regardless of format.[124] A requesting party may even ask for indirectly relevant information[125] and the responding party must produce it along with other basic information.[126] The broad scope of U.S. discovery is controversial when applied extraterritorially because "[a]n institution like U.S. pretrial discovery is practically unknown" in other jurisdictions, most notably in civil law European jurisdictions.[127]

Civil law jurisdictions do not have isolated pre-trial and trial proceedings, rather they have a series of meetings before a judge, and therefore have no equivalent need or desire to encourage efficient settlements using expansive pre-trial discovery rules.[128] Discovery in civil law jurisdictions is informal[129]

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[123] *See* EU Working Document, *supra* note 41, at 3 ("The scope of discovery differs greatly between common law and civil code jurisdictions . . . [t]he ability to obtain, and indeed, the obligation to provide information in the course of litigation . . . is based on the belief that the most efficient method for identifying the issues in dispute is the extensive exchange of information prior to [trial]. This is particularly the case in the United States where the scope of pre-trial discovery is the widest of any common law country."); Nigel J. Binnersley & LeRoy Lambert, *Two Systems Divided by a Common Law: "Pretrial Discovery,"* 4 MAINBRACE 2, 3 (Dec. 2007), *available at* http://tiny.cc/3erab ("By requiring the other side to disclose such documents and information earlier rather than later, the common law systems allow each side to know the strengths and weakness of their respective cases earlier. In this way, it is believed that settlements will be more likely, trials fewer, and for those trials that do occur, the issues will be narrowed and the risk of "trial by ambush" avoided.").

[124] *See* FED. R. CIV. P. 34(b) ("[a]ny party may serve on any other party a request to produce . . . any designated documents or electronically stored information . . . stored in any medium from which the information can be obtained . . . and which are in the possession, custody or control of the party upon which the request is served.").

[125] *But see* FOLSOM ET. AL, *supra* note 22, at 1107 ("Much that the lawyers are seeking will help in the further development of the case . . . [and] will never be used [in trial].").

[126] *See generally* FED. R. CIV. P. 26; Binnersley & Lambert, *supra* note 123, at 3 ("It is up to a party to choose which discovery device(s) it wishes to use. A party drafts the request. The other party must either comply or object. If the parties do not agree on what may be permissibly requested, the court will decide.").

[127] van Boeschoten, *supra* note 19, at 51.

[128] JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 27 (Fed. Judicial Ctr. 1995) ("In contrast to the progressive unfolding of evidence – under near complete control of the parties – that occurs through the discovery process in the American common-law system, there is no formal civil-law counterpart to discovery. Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial. Instead, a civil-law civil action is a continuing series of meetings,

and restricted to disclosure of particularly identified documents.[130] Judges alone regulate evidence gathering, and parties voluntarily disclose information throughout a proceeding.[131] Many civil law jurisdictions view U.S. pre-trial discovery as a "fishing expedition"[132] because of the relatively broad scope of U.S. discovery rules.[133] These procedural differences have led several civil law jurisdictions to misconstrue the words "pre-trial" as referring to the period before a claim is filed, rather than to the period after a claim is filed and prior to commencement of a trial.[134]

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hearings, and written communications through which evidence is introduced and evaluated, testimony is taken, and motions are made and decided. Initial pleadings are quite general, and the issues are defined at the direction of the judge as the proceedings progress.").

[129] *See, e.g.*, EU Working Document, *supra* note 41, at 5 ("Aside from any data protection issues, it is the contrast between the 'opinion of the truth' compared to the 'truth and nothing but the truth' that emphasizes [sic] the difference between the approach of the civil code and common law jurisdictions to questions of discovery of information including personal data.").

[130] Binnersley & Lambert, *supra* note 123, at 4 ("In most cases, each party must make "standard disclosure" after an action starts. It is done by way of a list which sets out, describes and identifies documents relating to any matters in question between them."); *see also* EU Working Document, *supra* note 41, at 4 ("The courts may . . . [order] disclosure or discovery . . . only on specified terms and conditions, including the method or the matters to be considered.").

[131] FOLSOM ET. AL, *supra* note 22, at 1107 ("In most civil law tradition nations, judges with substantial discretion closely regulate the gathering of evidence.").

[132] *See* REST. 3D, *supra* note 5, reporter's note 1.

[133] *Id.* ("To a considerable extent, the hostility to United States discovery practices reflects dislike of aspects of substantive American law, notably United Statos [sic] antitrust law and laws providing for regulation of international shipping. To some extent, also, the response arises from differences in civil and criminal procedure between the United States and many foreign states. While developed legal systems generally make some provision for pretrial disclosure of documents, many limit such disclosure to specifically identified documents in possession of a party.").

[134] *See, e.g.*, Permanent Bureau of the Hague Conference on Private International Law, *Synopsis of Responses to the Questionnaire of May 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters*, Prel. Doc. Nos. 8, 5, 10 (2009), *available at* http://tiny.cc/362mf (Responding to question, "What requires improvement? Possible solutions?" The U.S. delegation stated: "Indeed, during the course of the proceedings of the 2003 Special Commission, a delegate from a state that had recently ratified the Convention indicated that her country had entered an Article 23 reservation based upon precisely this misunderstanding."); *see also* Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, ¶ 31 (2003) [hereinafter 2003 Special Commission], *available at* http://hcch.e-

As mentioned in the Introduction, Article 23 of the Evidence Convention allows signatories to make reservations or declarations refusing to execute Letters of Request to common law countries during pretrial discovery.[135] Due to privacy concerns and the misunderstanding of "pre-trial," the majority of Evidence Convention signatories made a reservation under Article 23, refusing to execute requests for evidence during pre-trial discovery in common law jurisdictions.[136] Many states making reservations and declarations under Article 23 "mistakenly believed that they [were] only objecting to evidence requests submitted prior to the *opening of a proceeding in the state of origin*," instead of after the filing of a claim but prior to determination of the merits.[137] As a result, the U.S. signed the Evidence Convention but did not implement corresponding domestic legislation.[138]

The Hague Conference has made several efforts to clarify the meaning of "pre-trial" and to encourage signatories to remove their Article 23 reservations. Eight years following the Evidence Convention's enactment the

vision.nl/upload/wop/lse_concl_e.pdf (indicating that delegates entered a reservation under Article 23 with the understanding that "pretrial" meant prior to the commencement of a claim).

[135] *See generally* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1115 U.N.T.S. 331 [*hereinafter* VCLT]. States may make declarations at any time, whereas states must make reservations only at the time when they consent to a treaty. *Id.* art. 23(2) ("If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty."). States can withdraw reservations at any time. *Id.* art. 22(1) ("Unless the treaty otherwise provides, a reservation may be withdrawn at any time . . . .").

[136] *See* 2003 Special Commission, *supra* note 134, ¶ 32.

[137] *See id.* ¶ 31; VCLT, *supra* note 135, art. 2(1)(d) (defining reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). States without Article 23 reservations are: Barbados, Belarus, Bosnia and Herzegovina, the Czech Republic, Israel, Latvia, the Russian Federation, the Slovak Republic, Slovenia, and the United States. States making complete prohibitions on pretrial discovery are: Argentina, Australia, Bulgaria, Denmark, Greece, Hungary, Iceland, Italy, Kuwait, Luxembourg, Monaco, Poland, Portugal, Seychelles, South Africa, Spain, Sri Lanka, Sweden, Turkey, and Ukraine. Countries with "limited" reservations allowing production of identified documents are: China, Cyprus, Estonia, Finland, France, India, Mexico, the Netherlands, Norway, Romania, Singapore, Switzerland, the United Kingdom, and Venezuela.

[138] Hague Conference on Private International Law, *Evidence Convention Status Table, Reservations, Declarations or Notifications*, http://tiny.cc/hlf0p [hereinafter Evidence Convention Status Table]; *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 527 (1987).

Special Commission of The Hague Conference ("Special Commission") determined that the Article 23 reservation option was too broad.[139] Seven years later, the Special Commission began encouraging signatories to revise or remove their Article 23 reservations and declarations.[140] Finally, in 1994, the Special Commission and many signatories recognized that a cultural understanding of the differences between litigation procedures in common law – especially of "pre-trial" discovery in U.S. courts - and civil law jurisdictions was necessary to resolve sovereignty and privacy conflicts.[141]

Several signatories have indicated a willingness to withdraw their

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[139] *See* Permanent Bureau of the Hague Conference on Private International Law, *Report on the Work of the 1978 Special Commission,* 17 I.L.M. 1425, 1428 (1978) [hereinafter 1978 Special Commission] ("[T]he Convention had been poorly drafted as shown by the misunderstanding resulting from the expression employed, "pre-trial discovery." The reservation could reasonably be applied only in those cases where the lack of specificity in the Letter of Request was such that it did not permit sufficient identification of the documents to be produced or examined. For this reason the Commission expressed the desire that the States Parties to the Convention and those which were to become Parties withdraw or never make this reservation, or at least that they restrict by declaration the application of the reservation to Letters of Request which are not sufficiently specific, taking as their example the declaration made by the United Kingdom.").

[140] *See* Permanent Bureau of the Hague Conference on Private International Law, *Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* 24 I.L.M. 1668, 1677 (1985) [hereinafter 1985 Special Commission] ("The discussion also showed that serious problems had arisen as a result of the co-existence of blocking statutes and the article 23 reservation. Indeed, the combined effect of a blocking statute and a general, unrestricted reservation under article 23, may paralyse the Convention and has caused the courts in the United States not to use the Convention.").

[141] See, e.g., van Boeschoten, *supra* note 19, at 20 (arguing that the U.S. should change FRCP to make them more acceptable to other countries or that a resolution would not be possible without a different view of U.S. discovery on the part of foreign party states); *see also* 1978 Special Commission, *supra* note 139, at 1428 ("It appeared that a serious misunderstanding held sway in regard to the concept of 'pre-trial discovery of documents.' The explanation given by the American Expert showed that all procedures for obtaining pre-trial discovery necessarily implied that a legal proceeding had been instituted in the requesting State and that the evidence in question was being sought under authorisation from a judge . . . . The procedure for obtaining pre-trial discovery does not generally occur before a legal proceeding has been initiated . . . [but] [i]t appears that when making this reservation the Contracting States did not intend to refuse all requests for evidence submitted by the American judicial authorities before the trial on the merits commenced before the jury. Finally, following the explanation given by the Experts of the United Kingdom, which had first proposed the reservation, it seemed that this reservation had been sought essentially for the purpose of countering requests for evidence which lack specificity in that they do not describe precisely enough the documents to be obtained or examined.").

reservations or alter their requirements in light of encouragement from the Special Commission and the 2006 FRCP Amendments that provide more judicial oversight.[142] Despite these expressions of support, no signatory state to date has rescinded its comprehensive Article 23 reservation.[143]

B. Administrative Inefficiency

U.S. courts can sanction litigants for failure to preserve or produce evidence including even ESI from old backup tapes.[144] Judges can sanction parties with monetary fines and adverse inference findings possibly resulting in expensive jury verdicts with no opportunity to argue on the merits of a case.[145] The risk of sanctions for loss or failure to produce evidence is greatest in the area of electronic discovery. "In a world where 60 billion emails are sent daily, and most large corporations have more information stored on their computers than the biggest libraries in the world, the accidental loss of ESI can easily occur" and result in sanctions.[146]

From 2003 to 2005, the Southern District of New York issued a series of influential electronic discovery decisions - *Zubulake v. UBS Warburg*[147] -

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[142] *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1013 (2003) ("Finally, Rule 26, the centerpiece of the discovery process, has undergone dramatic revisions as a result of amendments in 1983, 1993, and 2000 that provide for greater judicial control over the discovery process and set limitations on the availability of discovery."); *see also* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?* 52 DEPAUL L. REV. 299, 301 (2003) ("The rapid pace of amendments to the federal discovery rules has brought expanded case management, discovery conferences, pretrial conferences, required attorney consultations, more stringent certification, numeric discovery limits, the concept of proportionality, mandatory disclosure, [and] a redefinition of 'scope'"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 183-84 (1999) ("[T]he cumulative effect of the changes that have been made [to the discovery rules] already move beyond mere tinkering. . . . [I]t could be said that America is finally eliminating the 'extravagant' features of discovery, opening the way to accommodation with the practice of the rest of the world.").

[143] *See generally* Evidence Convention Status Table, *supra* note 138.

[144] *See, e.g.*, Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045XXOCAI, 2005 WL 679071, at *7 (Fla. Cir. Ct. Mar. 1, 2005) (sanctioning nonproducing party with adverse inference).

[145] *Id.* (returning a jury verdict of more than one billion dollars against non-producing party that received an adverse inference sanction).

[146] LOSEY, *supra* note 64, at 3.

[147] Zubulake v. UBS Warburg, LLC, 382 F. Supp. 2d 536 (S.D.N.Y. 2005); Zubulake v. UBS Warburg, LLC, 231 F.R.D. 159 (S.D.N.Y. 2005); Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y.

establishing that U.S. courts may sanction non-producing parties with high financial penalties as well as adverse inference instructions.[148] Many commentators believe that fear of being sanctioned for failure to preserve or produce ESI causes corporations to store immense amounts of data and spend immense amounts of money reviewing and retrieving it during discovery.[149] The potential sanctions under the FRCP may force litigants to choose between adverse inference instructions or monetary fines in U.S. courts and civil or criminal sanctions from their home states.[150]

The slowness of current Evidence Convention procedure only compounds the amount of time spent by the parties in reviewing preserved ESI for discovery and by judges reviewing electronic discovery procedures. U.S. courts dismissed numerous cases from 2006 to 2008 for *forum non conveniens* reasons citing a signatory's Article 23 reservation, the time-consuming, burdensome and expensive nature of Evidence Convention procedures[151] or

2003); Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y. 2003); UBS Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg, LLC, 230 F.R.D. 290 (S.D.N.Y. 2003).

[148] Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 437 (S.D.N.Y. July, 20, 2004) (imposing stiff sanctions and a negative/adverse inference instruction due to deletion of email).

[149] *See* Scheindlin, *supra* note 54, at 24; *see also* The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 802 (2002) (penalizing records management violations with up to 20 years imprisonment and substantial financial penalties). Multinational corporations also "face legal and reputational risks associated with destroying information and later being second-guessed and accused of spoliation, or the wrongful destruction of evidence." COHEN, *supra* note 37, at 7. U.S. courts may compel multinational parties to make good faith efforts to obtain ESI from foreign authorities and may sanction a deliberate concealment of ESI or a failure to make a good faith effort to obtain ESI. REST. 3D, *supra* note 5, § 442(2)(a) ("[A] court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available . . . ."). "If the respondent does not meet the test of good faith, some courts have taken the position that balancing of interests is not required, and that sanctions for noncompliance, including heavy fines, should be imposed." *Id.* reporter's note 8.

[150] *See, e.g.*, Lynondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A., No. 02 Civ. 0795 (CBM), 2005 WL 1026461, at *4 (S.D.N.Y. May 2, 2005) (sanctioning defendant with adverse inference instruction after failure to produce data due to Venezuelan law).

[151] *See* Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231, 243-44, 243-44 n.8 (D. Conn. 2009) (identifying Article 23 reservation and time-consuming nature of letters rogatory process under the Hague Evidence Convention as a private factor weighing against litigating dispute in American courts); In re Automotive Refinishing Paint Antitrust Litigation, 229 F.R.D. 482, 493-94 (E.D. Pa. 2005) (granting motion to compel under FRCP due to the undue burden of using the Hague Evidence Convention

the incompatibility of the Evidence Convention's time-consuming process with U.S. litigation schedules.[152] Where discovery is less extensive some courts will adjust the litigation schedule to account for the time-consuming nature of the Letters Rogatory process, but due to the large amounts of ESI and potential locations involved in multinational corporate litigation, discovery is more often than not extensive.[153]

C. Criminal and Civil Sanctions

Even if litigants produce extraterritorial evidence to avoid sanctions in U.S. courts, the producing party often risks criminal prosecution under foreign data protection laws or blocking statutes. The EU Data Directive prohibits any processing[154] or transferring of any EU citizen's personal data[155] to jurisdictions without certain privacy protections.[156] Litigants may only

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for extensive discovery necessary in class-action claims).

152 *See* Seoul Semiconductor Co. v. Nichia Corp., 590 F. Supp. 2d 832, 834 (E.D. Tex. 2008) (denying request for letter rogatory under the Hague Evidence Convention due to scheduling concerns); Vivendi S.A. v. T-Mobile USA, Inc., No. C06-1523JLR, 2008 WL 2345283, at *13-14 (W.D. Wash. 2008) (dismissing claim based on *forum non conveniens* due to cumbersome letters rogatory process under the Hague Evidence Convention); In re Aspartame Antitrust Litigation, No. 2:06-CV-1732-LOD, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008) (denying request to use Hague Evidence Convention due to extensive discovery and time-consuming procedure); Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., No. 04 C 3109, 2005 WL 6246195, at *5 (N.D. Ill. Sept. 12, 2005) (denying request to use Hague Evidence Convention due to time, burden, complication involved in getting evidence from Italy). *But see* In re Baycol Prod. Litig., 348 F. Supp. 2d 1058, 1060-61 (D. Minn. 2004) (allowing issuance of letter of request under the Hague Evidence Convention despite Italy's Article 23 reservation to enable Italian courts to determine relevancy).

153 *See generally* GLL GmbH & Co. Messeturm KG v. LaVecchia, 247 F.R.D. 231 (D. Me. 2008) (addressing change in scheduling to compensate for time needed to obtain evidence under the Hague Evidence Convention).

154 Data Directive, *supra* note 25, art. 2(b) (Processing "shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure, or destruction . . . .").

155 *Id.* art. 2(a) (Personal data is "any information relating to an identified or identifiable natural person.").

156 *Id.* art. 25 ("Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection."). The United States Department of Commerce's Safe Harbor Privacy Principles adequately protects EU data but is not

transfer data to U.S. courts if privacy and data protection measures are taken and if the data is "necessary for the establishment, exercise or defence of legal claims."[157] When considered under a comity analysis, foreign privacy laws are no match for the long-arm of U.S. personal jurisdiction.[158]

Some states have municipal laws specifically designed to protect their citizens against the broad scope of discovery in U.S. courts. Parties located in or dealing with France may also be subject to a French Blocking Statute that imposes criminal liability on individuals or entities transferring personal data for use in U.S. courts.[159] France's Blocking Statute prohibits requests for or production of any information in any form for the purpose of foreign judicial or administrative proceedings.[160] U.S. courts do not consider foreign blocking statues a legitimate basis for failing to produce ESI and other evidence during discovery.[161]

The Supreme Court has held that "[b]locking statutes do not deprive an

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compatible with U.S. discovery.

[157] *Id.* art. 8(2)(e).

[158] *See* In re Vitamins Antitrust Litig., No. 99-197 (TFH) 2001 U.S. Dist. LEXIS 8904 (D.D.C. June 20, 2001) (affirming special master's decision to apply FRCP and ordering defendants to produce privacy log for preliminary judgment despite claim of foreign privacy law).

[159] *See, e.g.*, Daniel Schimmel & Emmanuel Rosenfeld, *New Respect for Hague Evidence Convention in Discovery*, N.Y. L.J., May 8, 2008, at 4 ("A U.S. lawyer sought information in Paris for the purposes of prosecuting a case in federal court in Los Angeles. He did not follow the procedures of the Hague Evidence Convention and was criminally convicted and sentenced to a fine of 10,000 euros. This first criminal conviction reflects the French and civil law approach that the proper way to seek evidence in France is to adhere to the procedures of the Hague Evidence Convention. Accordingly, individuals and entities in France responding to a U.S. discovery order may have to choose between facing criminal prosecution in France and incurring sanctions in the United States.").

[160] *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 526 n.6 (1987) ("Article 1A of the French 'blocking statute,' French Penal Code Law No. 80-538, provides: 'Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.'").

[161] REST. 3D, *supra* note 5, § 442, reporter's note 8 ("As courts in the United States have become more willing to impose severe sanctions for failure to comply with discovery orders generally, . . . they have become unsympathetic to parties, especially United States parties, seeking to take advantage of foreign laws restricting disclosure of information, and have been prepared to impose substantial sanctions."); In re Vivendi Universal, S.A. Securities Litigation, No. 02CIV557RJHBP, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006) (using FRCP to obtain foreign evidence under comity analysis despite good faith of French party due to French blocking statute).

American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[162] Several decisions indicate that recognition of a blocking statute's legitimacy would allow litigants to hide evidence in countries with blocking statutes to avoid producing it during discovery in U.S. courts.[163]

V. MODERNIZING THE EVIDENCE CONVENTION WITH A PROTOCOL

The EU's Article 29 Working Party[164] specifically addressed "the need for reconciling the requirements of the US litigation rules and the EU data protection provisions . . . ."[165] The Working Party suggested resolution of pre-trial discovery conflicts "on a governmental basis, perhaps with the introduction of further global agreements along the lines of the Hague Convention."[166] This paper proposes that the current Evidence Convention, with amendments or protocols, can provide such a treaty mechanism.

Current methods of cross-border discovery are unpredictable, inefficient, and lacking in reciprocity. Pre-trial discovery is very limited under Article 23[167] of the Evidence Convention,[168] and getting action on a Letter of Request

[162] *Aerospatiale*, 482 U.S. at 544 n. 29; *see* Vivendi Universal, 2006 WL 3378115 (holding that party must comply with discovery request regardless of potential sanctions under French blocking statute); *see also* In re Aspartame Antitrust Litigation, No. 2:06-CV-1732-LOD, 2008 WL 2275531 (E.D. Pa. May 13, 2008) (denying request to use Hague Evidence Convention due to extensive discovery and time-consuming procedure even though compelling production of evidence under the FRCP violates criminal and data protection laws in multiple countries).

[163] *See, e.g.*, Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (requiring production of data when party stored data in The Netherlands to avoid disclosure during litigation); United States v. Gonzalez, 748 F.2d 74, 77-78 (2d Cir. 1984) (finding that the French blocking statute was intended to protect French companies from foreign discovery); *see also* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 508 (N.D. Ill. 1984) (finding that the French blocking statute "is a manifestation of French displeasure with American pretrial discovery procedures, which are significantly broader than the procedures accepted in other countries").

[164] Data Directive, *supra* note 25, art. 30 ("The Working Party shall . . . (c) advise the Commission on . . . any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms . . . .").

[165] EU Working Document, *supra* note 41, at 7.

[166] *Id.* at 2.

[167] *See* Evidence Convention, *supra* note 13, art. 23 ("A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.").

[168] *See* Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., No. 04 C 3109, 2005 WL 6246195, at *5 (N.D. Ill. Sept. 12, 2005) (finding Evidence Convention procedures

can take more than 12 months.[169] Article 23 and the slowness of the current Evidence Convention procedures render it ineffective and almost obsolete.[170] It has ultimately failed to predict the globalization of business, "the mobile quality of people and documents," and the "movement required to comply with some American discovery orders"[171] and lacks the flexibility needed to resolve modern discovery conflicts.

Attorneys in the U.S. view the current Evidence Convention as tedious and unreliable.[172] Judges in the U.S. find that Article 23 is inconsistent with the broad discovery powers that U.S. courts are supposed to exercise,[173] and that comity analyses favor unilateral application of the FRCP to extraterritorial discovery of evidence.[174] The Hague Conference Special Commission itself discussed the ineffectiveness of Article 23 reservations.[175]

Unilateral application of FRCP to extraterritorial discovery, even if effective and timely, does not assist foreign litigants in avoiding sanctions in their home countries,[176] and increases diplomatic friction.[177] "One has, therefore, in the field of the taking of evidence, a clear-cut case for reciprocal accommodations,

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drawn out and inappropriately restrictive).

[169] *See, e.g.*, Patrick E. Higginbotham, *Foreign Depositions Through Letters of Request*, *in* 6 MOORE'S FEDERAL PRACTICE § 28.12 (2009) ("Execution of letters may take from six months to one year, or even longer.").

[170] *See* DERTOUZOS ET AL., *supra* note 61, at x ("Our interviews highlighted a number of concerns about the effects of e-discovery on the legal system. First, the most frequent point mentioned in interviews was the rising costs of reviewing information produced in e-discovery . . . . [and] regulations did not go far enough to clarify the steps that should be taken with potential evidence in advance of and during litigation.").

[171] DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 111 (1992).

[172] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 542 (1987) ("In many situations the letter-of-request procedure authorized by the Convention would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.").

[173] *Id.* at 536-37.

[174] *Id.* at 543-44 (holding that U.S. parties need not attempt to use the Evidence Convention before seeking discovery under the FRCP).

[175] *See generally* 2003 Special Commission, *supra* note 134.

[176] REST. 3D, *supra* note 5, § 442, reporter's note 5 ("[F]riction created by discovery requests . . . suggest the desirability of moderating the application abroad of United States procedural techniques.").

[177] Geoffrey C. Hazard, Jr. et al., *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L L. & POL. 769 (2001) ("[T]here are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.").

which can be achieved only by way of treaty mechanisms."[178]

The current Evidence Convention provides an excellent framework and foundation for a much-needed protocol. While time-consuming and infrequently used, some U.S. courts still consider the availability of current Evidence Convention during a *foreign non conveniens* analysis to counter arguments that pursuing foreign evidence is cumbersome despite complaints about its time-consuming nature.[179] Some courts have also considered the Evidence Convention's administrative or other difficulties in obtaining evidence as neutral factors where both countries involved are signatories,[180] and some courts have called the Evidence Convention a vital tool for obtaining evidence located abroad.[181]

This paper recommends that Evidence Convention signatories modernize the current Evidence Convention's groundwork with a gentlemen's agreement, a time-limited optional protocol, or a protocol to: 1) establish the meaning of "pre-trial" discovery; 2) establish minimum data protection standards using the United Kingdom's model letter of request that requires more specific descriptions of evidence requested than U.S. courts but allows more broad descriptions than in civil law jurisdictions; 3) allow bilateral agreements among signatories; or 4) shift the administrative burden of executing letters of request to a special authority or an agency within the Hague Conference.

A. Establish Minimum Data Protection Standards to Reduce Diplomatic Friction

Using a protocol or other agreement to negotiate and establish minimum data protection standards could increase the ability of U.S. courts to utilize a treaty mechanism to obtain relevant data and reduce diplomatic friction by

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[178] van Boeschoten, *supra* note 19, at 52.

[179] Hayes Bicycle Group, Inc. v. Muchachos Intern. Co., No. 06-CV-1305, 2008 WL 4830570, at *5 (E.D. Wis. Oct. 31, 2008) (finding that the availability of the Hague Evidence Convention to obtain foreign evidence weighs against dismissing the case under *forum non conveniens*).

[180] *See* Windt v. Qwest Commc'n Intern., Inc., 544 F. Supp. 2d 409, 427-428 (D.N.J. 2008) (finding that the ease of obtaining evidence does not weigh in favor of either dismissal or retention of claim because Dutch courts could also use Hague Evidence Convention procedures to compel production of evidence located within the United States); Windt v. Qwest Commc'n Intern., Inc., No. 04-3026 (GEB), 2006 WL 2987097, at *10-11 (D.N.J. Oct. 17, 2006) (finding that if both countries are signatories to the Hague Evidence Convention the ease of obtaining evidence and administrative difficulties do not weigh in favor of litigation in either country if neither country made a reservation under Article 23).

[181] *See* U.S.O. Corp. v. Mizuho Holding Co., No. 06 C 0459, 2007 WL 2893628, at *5 (N.D. Ill. Sept. 27, 2007) (finding that obtaining discovery of evidence located in Japan is virtually impossible since Japan is not a signatory to the Hague Evidence Convention).

assuring jurisdictions with data privacy concerns that pre-trial discovery in U.S. courts would not be an overbroad "fishing expedition."[182] Such a consensus could provide a long-term working legal procedural channel without creating subsequent privacy concerns. Minimum data protection standards could even diminish privacy concerns to the point where signatories would withdraw their Article 23 reservations.[183]

Other authors have also recognized the importance of establishing minimum data protection standards and have suggested possible ways to implement them once they are established. An article by Stanley W. Crosley, et al. recommended using a series of "legal processes protocols" requiring model contracts, notification of data subjects, protective orders prohibiting the data processing and appointment of a Special Discovery Master to monitor compliance with EU laws.[184] Legal processes protocols could create a consistent legal channel but they also risk creating a disparate and complicated procedural regime if signatories only sign selected protocols.

A recent article by Moze Cowper, et al., suggested that data protection standards should be determined using a continuum in which more sensitive information requires a narrower request during discovery and less sensitive information may be requested using a broader request.[185] The same article also proposed using a self-authenticating "Certificates of Compliance for the Transfer of Personal Data Across Borders" to expedite cross-border data transfers.[186] While aimed at cutting the administrative costs of ensuring *ad hoc* compliance with laws on cross-border transfer of data, this article fails to address the prohibition of data protection laws against processing data before and after its transfer. Ultimately, a broader solution is necessary.

Regardless of the method, U.S. courts, EU authorities, and The Hague Conference itself acknowledge that conflicts of data protection law will not resolve themselves. The failure to resolve these conflicts of law affects

[182] Kia Motors America, Inc. v. Autoworks Distrib., No. 06-156 (DWF-JJG), 2007 WL 4372949, at *5 (D. Minn. Sept. 27, 2007) (noting that requests for evidence located in Korea under the Hague Evidence Convention were rejected because request was insufficiently narrowly tailored).

[183] *See* Metso Minerals Inc. v. Powerscreen Intern. Distribution Ltd., No. CV 06-1446(ADS)(ETB), 2008 WL 719243, at *17 (E.D.N.Y. Mar. 18, 2008) (rejecting letter of request due to lack of specificity in overbroad request).

[184] Stanley W. Crosley et. al., *A Path to Resolving European Data Protection Concerns with U.S. Discovery*, 6 PRIVACY & SECURITY L. REP. 1610 (2007) (suggesting that signatories implement a series of protocols providing standardized procedures that comply with both the FRCP and the Data Protection Directive).

[185] Moze Cowper & Amor Esteban, *E-Discovery, Privacy, and the Transfer of Data Across Borders: Proposed Solutions for Cutting the Gordian Knot*, 10 SED. CONF. J. 263, 274 (2009).

[186] *Id.* at 265.

multinational corporations with ties to the U.S.[187] Heightening the description requirement in the current Evidence Convention's letter of request by way of a protocol could present a compromise that would lessen diplomatic friction and decrease the need for overt blocking statutes that frustrate cross-border litigation. The United Kingdom's own Article 23 declaration states that it will execute pre-trial discovery requests for documents that a requesting court finds are "likely to be in [a party's] possession, custody or power," a standard that is more narrowly tailored than the U.S.'s expansive personal jurisdiction basis.[188] This intermediary "narrowly tailored" letter of request, whether based on a continuum or ensured by a self-authenticating certificate, is an effective first step forward and is a strategy that has been endorsed by the Special Commission.[189] U.S. courts have also recognized the positive aspects of the United Kingdom's narrowly tailored standard.[190] A heightened description requirement for requested evidence implemented through a protocol or other agreement could provide the basis for establishing minimum data protection standards.

B. Clarify Definition of Common Law Pre-trial Discovery

Memorializing a clear definition of U.S. common law "pre-trial" discovery in a protocol would develop institutional knowledge of the U.S. and common law litigation system. Many Article 23 reservations were made because signatories were still unfamiliar with the concept of "pre-trial discovery" in U.S. courts, inhibiting a successful resolution to these conflicts and leading to

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[187] Each EU Member State must issue domestic legislation implementing the Data Protection Directive.

[188] Hague Conference on Private International Law, United Kingdom, Declarations Notifications Reservations, *available at* http://tiny.cc/rcnq0 ("In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person: a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.").

[189] *See* 2003 Special Commission, *supra* note 134, ¶ 29 ("[T]he wording of the particularized declaration submitted by the UK (i.e., the proponent of the provision) reflected [the] purpose more adequately than the wording of Article 23.").

[190] *See* Metso Minerals Inc. v. Powerscreen Intern. Distrib. Ltd., No. CV 06-1446(ADS)(ETB), 2007 WL 1875560, at *2 (E.D.N.Y. June 25, 2007) (discussing positive aspects of the United Kingdom's Article 23 reservation and declaration).

the Evidence Convention's disuse in U.S. courts.[191]

The Special Commission has indicated that civil law jurisdictions currently have a better understanding of the definition of "pre-trial" discovery.[192] The Special Commission also stated that in 1985 "the majority of States [were] prepared to frame . . . [or] limit[] their reservations along the lines of the reservation formulated by the United Kingdom . . . or contained in the Protocol[193] drawn under the auspices of the Organisation of American States."[194] A greater comprehension of common law legal procedure and a memorialized definition of "pre-trial" in a protocol could allow signatories to rescind their Article 23 reservations.[195]

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[191] *See, e.g.*, van Boeschoten, *supra* note 19, at 50 (arguing that the U.S. should change FRCP to make them more acceptable to other countries or that a resolution would not be possible without a different view of U.S. discovery on the part of foreign party states); *see also* 1978 Special Commission, *supra* note 139, at 1428 ("It appeared that a serious misunderstanding held sway in regard to the concept of 'pre-trial discovery of documents.' The explanation given by the American Expert showed that all procedures for obtaining pre-trial discovery necessarily implied that a legal proceeding had been instituted in the requesting State and that the evidence in question was being sought under authorisation from a judge . . . . The procedure for obtaining pre-trial discovery does not generally occur before a legal proceeding has been initiated . . . [but] [i]t appears that when making this reservation the Contracting States did not intend to refuse all requests for evidence submitted by the American judicial authorities before the trial on the merits commenced before the jury. Finally, following the explanation given by the Experts of the United Kingdom, which had first proposed the reservation, it seemed that this reservation had been sought essentially for the purpose of countering requests for evidence which lack specificity in that they do not describe precisely enough the documents to be obtained or examined.").

[192] *See generally* 2003 Special Commission, *supra* note 134.

[193] Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8 1979, O.A.S.T.S. No. 56., *available at* http://tiny.cc/6o0g7.

[194] LAWRENCE COLLINS, ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 308 (1996).

[195] *See* Miller, *supra* note 142, at 1013 ("Finally, Rule 26, the centerpiece of the discovery process, has undergone dramatic revisions as a result of amendments in 1983, 1993, and 2000 that provide for greater judicial control over the discovery process and set limitations on the availability of discovery."); *see also* Subrin, *supra* note 142, at 301 ("The rapid pace of amendments to the federal discovery rules has brought expanded case management, discovery conferences, pretrial conferences, required attorney consultations, more stringent certification, numeric discovery limits, the concept of proportionality, mandatory disclosure, [and] a redefinition of 'scope' . . . ."); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 183 (1999) ("[T]he cumulative effect of the changes that have been made [to the discovery rules] already move well beyond mere tinkering. . . . [I]t could be said that America is finally eliminating the 'extravagant' features of discovery, opening the way to accommodation

The Permanent Bureau of the Hague Conference on Private International Law's Preliminary Document Number 10 discussed the increasingly archaic nature of the Article 23 reservation in 2008.[196] Since 1985, the Special Commission determined that "the adoption of an unqualified reservation as permitted by Article 23 would seem excessive and detrimental to the proper operation of the Convention."[197] "[The] Commission [also] encouraged any States which have made or contemplate making the reservation under Article 23 to limit the scope of such reservation."[198]

In 2003, the Special Commission acknowledged that many signatories made "excessive" Article 23 reservations and declarations under the mistaken belief that "pre-trial" meant before a claim was filed, instead of after a claim is filed but prior to a final determination.[199] It "recognised [sic] that the terms of Article 23 . . . are [still] a continued source of misunderstandings . . . intended to permit States to ensure that a request for the production of documents must be *sufficiently substantiated* so as to avoid [overbroad] requests . . . ."[200] An optional protocol could allow this decades-long understanding to come to fruition and allow signatories to move on and accurately address and negotiate minimum data protection standards with a clearer understanding of the issues.

C. *Allow Bilateral Agreements between Signatories*

The American Legal Institute and the European Institute for the Unification of Private Law ("UNDROIT") developed a system of legal rules intended for use during cross-border litigation and transactions. The proposed rules and

with the practice of the rest of the world . . . .").

[196] PERMANENT BUREAU, HAGUE CONF. ON PRIVATE INT'L L., PRELIMINARY DOCUMENT NO. 10, THE MANDATORY / NON-MANDATORY CHARACTER OF THE EVIDENCE CONVENTION ¶ 25 (2008), *available at* http://hcch.e-vision.nl/upload/wop/2008pd10e.pdf ("It may be that the arguments based upon Article 23 have now lost some of their force due to the interpretation of this Article that has been taken by successive Special Commissions.").

[197] PERMANENT BUREAU, HAGUE CONF. ON PRIVATE INT'L L., REPORT ON THE WORK OF THE SPECIAL COMMISSION OF MAY 1985 ON THE OPERATION OF THE CONVENTION § 7(1), at 42(I) (1986), *available at* http://hcch.e-vision.nl/upload/scrpt85_20e.pdf.

[198] PERMANENT BUREAU, HAGUE CONF. ON PRIVATE INT'L L., REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS § 34(d), at 19 (1989).

[199] 2003 Special Commission, *supra* note 134, ¶ 29.

[200] *Id.* ("Article 23 was intended to permit States to ensure that a request for the production of documents must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding.").

procedures seek to resolve cross-border conflicts of law because "[i]n a modern legal system, there is a growing practical necessity – if one is serious about justice – to permit document discovery to some extent . . . ."[201] Bilateral agreements within Evidence Convention frameworks could allow cross-border discovery and give signatories the ability to specify procedures or legal relationships with particular signatories to further ensure fairness and reciprocity in cross-border discovery and litigation.

The Evidence Convention allows states to negotiate more expansive discovery procedures than those allowed by the Evidence Convention itself.[202] The U.S. could use bilateral agreements to incentivize the removal of Article 23 declarations and reservations or the narrowing of reservations to allow execution of requests for "material" ESI.[203] Signatories could also use these bilateral agreements to expedite the cross-border discovery process, reduce discovery cost, and implement any other beneficial procedures. These agreements could be time-limited and renewable, and could be memorialized or take the form of an informal gentleman's agreement.

Using bilateral agreements in this way would allow signatories and litigants to focus on the merits of disputes[204] instead of discovery's potential monetary and temporal expenses.[205] Using bilateral agreements could serve the same

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[201] THE AM. LAW INST. & UNIDROIT, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006), *available at* http://tiny.cc/6tg5z ("In 1997, the American Law Institute (ALI), partnering with the European Institute for the Unification of Private Law (UNIDROIT) in 1999, began an ambitious project to establish a model system of legal procedures for use in transnational commercial transactions, that would maintain the integrity of individual cultures and, at the same time, advance cross-border cooperation. The project was undertaken successfully in the face of doubt that it was possible to overcome fundamental differences between cross-border legal systems. Since publication in 2006, the Principles have been adopted and/or adapted for use by many countries both in international commerce and other personal civil disputes.") (quoting preface on website).

[202] *See* Evidence Convention, *supra* note 13, art. 27 ("The provisions of the present Convention shall not prevent a Contracting State from . . . permitting . . . methods of taking evidence other than those provided for in this Convention.").

[203] *Id.* (allowing signatories to conduct discovery of evidence under "less restrictive conditions").

[204] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008), *available at* http://tiny.cc/me51a ("The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information . . . . In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether . . . .").

[205] *See id.* ("Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources

function as a 26(f) meet-and-confer[206] conference by lowering administrative expenses for courts, removing disputes from the docket of more general judicial authorities and allowing parties to predict which ESI they will need to preserve and produce.[207] Since the average litigant spends more than seventy percent of its budget during the discovery period,[208] "an early agreement as to what sources a party must search for responsive information may go a long way toward reducing litigation costs."[209]

Bilateral agreements could also alter or further clarify the specificity of descriptions required [210] or procedures for when the parties cannot agree about the scope.[211] While Crosley, et al. suggest negotiating issue- or process-specific "legal process protocols," this paper advocates for the inclusion of all procedures. Whether it is within a multilateral optional protocol or in individualized bilateral agreements, the benefits obtained from "issue-specific" protocols – while increasing flexibility in negotiations between countries – [212] could require numerous negotiation cycles and large expenditures of time and

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on unnecessary disputes, and the legal system is strained by 'gamesmanship' or 'hiding the ball,' to no practical effect.").

[206] *See* FED. R. CIV. P. 26(f)(1) ("[P]arties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer . . . .").

[207] Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure,* 7 SEDONA CONF. J. 1, 24 (2006) ("[T]he revision to Rule 26(f) encourages the parties to discuss the form or forms of production of electronically stored information before any formal document request is issued.").

[208] Conrad J. Jacoby, *The Sedona Conference Cooperation Proclamation: Cooperation as Zealous Advocacy*, DISCOVERY RESOURCES, Jan. 19, 2009) http://tiny.cc/47kp8 ("In a typical litigation matter today, the average litigant spends over 70% of its budget on discovery and discovery-related motion practice and less than 30% on substantively developing its legal case.").

[209] *See* Scheindlin, *supra* note 54, at 5.

[210] *See* SEDONA PRINCIPLES, *supra* note 42, at ii ("Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.").

[211] *See* Custodian of Records for the Legislative Tech. Servs. Bureau v. Wisconsin (In re John Doe Proceeding), 680 N.W.2d 792, 810 (Wis. 2004) (Abrahamson, C.J., concurring) ("[T]rial courts may need to be more active in managing electronic discovery and production than in managing conventional discovery or production of information, especially when parties cannot agree about the scope of the request for electronic information.").

[212] Cohan, *supra* note 8, at 1043 (suggesting that signatories use "issue-specific memoranda of understanding" utilizing the executive branch of the U.S. government instead of multilateral treaties to resolve cross-border discovery conflicts).

money.[213]

D. Delegate Complex Claims for Administrative Efficiency

The more complex and extensive the discovery, the less amendable the Evidence Convention is to the litigation schedule in U.S. courts.[214] Evidence Convention procedures present a slow process that is better suited to the pace of snail mail and paper documents,[215] not for the efficient transfers of electronic data used today.[216] In 2009, the Hague Conference Special Commission recognized the inefficiency of current Evidence Convention procedures and "encourage[d] States Parties to take measures to improve the effective operation of the Convention . . . [and] provide informal assistance to requesting authorities."[217] The Special Commission also encouraged using electronic Letters Rogatory because "requests for discovery relating to electronically stored information are likely to increase."[218]

The immense amount of ESI preserved and processed combined with the conflicts of law inherent in cross-border litigation creates a specialized area of dispute resolution and can absorb an inordinate amount of the parties' and the judges' time. Under FRCP 53, U.S. courts may appoint special masters to expedite court procedures involving complex matters.[219] Crosley, et al.,

[213] *Id.* at 1042 (suggesting that Executive and Legislative branches take part in negotiating bilateral memoranda of understanding with signatories to the Evidence Convention that utilize Article 23 reservations or declarations or blocking statutes).

[214] *See, e.g.*, In re Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008) (ruling against using the Evidence Convention during discovery because "[t]his case, like many other antitrust class actions, requires the extensive production of discovery"); In re Plastics Additives Antitrust Litig., No. Civ. A. 03-2038, 2004 WL 2743591, at *14 (E.D. Pa. Nov. 29, 2004) (citing numerous antitrust cases with extensive and complex discovery).

[215] The Evidence Convention was, however, recently altered to allow taking of depositions by video-link, and the Special Commission has encouraged signatories to accept electronic letters of request. *See* PERMANENT BUREAU, HAGUE CONF. ON PRIVATE INT'L L., CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, SERVICE, TAKING OF EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS §§ 49, 55, at 9 (2009) [hereinafter 2009 PRACTICAL OPERATION], *available at* http://www.hcch.net/upload/wop/jac_concl_e.pdf.

[216] Bondi v. Citigroup, Inc., No. BER-L-10902-04, 2005 WL 975856, at *11 (N.J. Super. Ct. Law Div. Feb. 28, 2005) ("Documentary evidence not located here is easily transportable physically or capable of being converted into digital form for electronic transmission.").

[217] 2009 PRACTICAL OPERATION, *supra* note 215, §§ 43, 45.

[218] *Id.* §§ 49-50, at 9.

[219] *See* FED. R. CIV. P. 53(b) (providing that special masters may examine witnesses in jury trials, and under any exceptional condition in non-jury trials); *see also* Board of

suggested that a judge should issue an order appointing a special discovery master on an *ad hoc* basis for each case involving cross-border discovery. This paper suggests that promulgating an optional protocol that requires signatories to appoint an independent special discovery master or to establish an independent agency within the Hague Conference - similar to the Eurojust[220] agency within the European Union – to handle cross-border litigation conflicts of law could streamline and expedite Evidence Convention procedures while removing complex discovery matters from judicial dockets.

Incorporating a special master early in litigation could provide all parties with a mediator and facilitator to resolve conflicts of law through arrangements such as the meet-and-confer obligation under FRCP 26(f).[221] A special master could expedite the process [222] by monitoring meet-and-confer conferences, the use of a "rational search protocol," acceptable keyword search terms and data privacy issues.[223]

Special masters can contribute to efficient dispute resolution in areas that might otherwise clog a court's docket and areas that require specialized knowledge.[224] A special master who understands data privacy concerns could

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Educ., Yonkers City School Dist. v. CNA Ins. Co., 113 F.R.D. 654, 654-55 (S.D.N.Y. 1987) (finding that a special master was needed to determine complex issues); Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 Cardozo L. Rev. 347, 374-75 (recommending that the 2003 revision of FRCP 53 and the 2006 revision of the Federal Rules of Civil Procedure combine to encourage the use of special masters to resolve electronic discovery disputes in United States courts).

[220] "Eurojust was set up by Council Decision 2002/187/JHA (2) as a body of the European Union with legal personality to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States." Council Decision 2009/426/JHA, ¶ 1, 2009 O.J. (L 138) 14.

[221] EU Working Document, *supra* note 41, at 11; *see* Fed. R. Civ. P. 26(f)(1) (requiring parties to determine a cost efficient plan for electronic discovery).

[222] *See, e.g.*, Mastafa v. Australian Wheat Bd. Ltd., No. 07 Civ. 7955(GEL), 2008 WL 4378443, at *8 (S.D.N.Y. 2008) (dismissing claims by Kurdish women against U.S. and Australian companies alleging violations of Torture Victims Protection Act and Alien Tort Claims Act due to inability to obtain evidence and inefficiency of time and expense).

[223] *See* Scheindlin & Redgrave, *supra* note 219, at 356-57 (reviewing FRCP 26(f)(1) and potential topics of discussion regarding electronic discovery during the meet-and-confer conference).

[224] *See* FED. R. CIV. P. 53(a)(1)(C) (2003) (providing that special masters may "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district"); *see also* Evolution, Inc. v. Suntrust Bank, Case No. 01-2409-CM-DJW, 2004 U.S. Dist. LEXIS 20490, at *7 (D. Kan. Sept. 29, 2004) (appointing special master to resolve electronic discovery dispute); Physicians Interactive v. Lathian Sys., Inc., No. CA 03-1193-A, 2003 WL

ensure reciprocity among parties to cross-border litigation and negate the need for Article 23 reservations and declarations. In each case, the special master could oversee requests to strip ESI of unnecessary personal information[225] and consider potential sanctions on parties for compliance with U.S. discovery procedures.[226]

A special master with knowledge of e-discovery and cross-border discovery procedures could expedite cross-border discovery by keeping discovery-related requests off of judicial dockets and establishing discovery and litigation deadlines.[227] Special masters could ensure that both parties are taking all reasonable measures to make sure that collected data is relevant and that irrelevant financial or medical information is kept within the EU.[228] A major concern of privacy commissioners is that the scope of discovery in United States litigation will not be proportionate to the need for the information in litigation, or that the need for ESI will not be legitimate.[229] A knowledgeable special master could oversee the Letters Rogatory procedure, approve search algorithms, and ensure the legitimacy and relevance of

23018270, at *10 (E.D. Va. Dec. 5, 2003) (using a computer forensics expert to expedite discovery); Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999) (using special master to review data for relevance and privilege); Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90 (D. Colo. 1996) (appointing a special master as a neutral party to resolve disputes); Samide v. Roman Catholic Diocese of Brooklyn, 773 N.Y.S.2d 116, 117-18 (N.Y. App. Div. 2004) (appointing expert to help supervise and recover ESI); Ranta v. Ranta, No. FA980195304S, 2004 WL 504588, at *1 (Conn. Super. Ct. Feb. 25, 2004) (using neutral computer expert to monitor ESI).

[225] The special master or authority could undertake this responsibility as special masters in the United States review discovery materials for privilege and work product claims. The EU Data Directive prohibits unauthorized processing or transfer of any information that identifies an individual, not just sensitive information involving financial or medical information, so removing unnecessary personal information from discovery materials could work to preserve the privacy protections.

[226] *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 546 (1987) ("American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.").

[227] *See* EU Working Document, *supra* note 41, at 14 ("[T]imescales can be built into the litigation process").

[228] *See id.* at 10-11.

[229] *See* Daley et al., *supra* note 55, at 12 ("In-person meetings with many of the privacy commissioners have indicated that these and other 'in-country' measures are needed to provide adequate assurance that the scope of the data processing and transfer is proportional – narrowly tailored to answer the legitimate information need.").

searches.[230]

Rule 53 now allows parties to consent to the use of a special master at any time, without exceptional circumstances, including during pre-trial and post-trial periods.[231] U.S. courts have used special masters for decades specifically to monitor pre-trial discovery involving large volumes of documents and complex privilege issues.[232] Special masters have resolved discovery conflicts, document production issues and privilege issues while establishing administrative discovery groundwork during pre-trial conferences.[233] The

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[230] *See, e.g.*, Leggett v. Eli Lilly & Co. (In re Zyprexa Prods Liab. Litig.), No. 04-MD-1596 (JBW), No. 06-CV-5115 (JBW), 2009 WL 1850970, at *3-4 (E.D.N.Y. June 22, 2009) (using special discovery master to oversee complex discovery); Huber v. Taylor, No. 02cv304, 2009 WL 1750954, at *1-4 (W.D. Pa. June 19, 2009) (noting outcome of rulings on appeals from special discovery masters' decisions); In re Cleveland, 678 S.E.2d 91 (Ga. 2009) (affirming decision of special discovery master after lengthy discovery process); Bro-Tech. Corp. v. Thermax, Inc., Civil No. 05-CV-2330, 2008 WL 5210346, at *1 (E.D. Pa. Dec. 11, 2008) (noting appointment of special electronic discovery master to increase efficiency and oversee legitimacy of electronic searches).

[231] *See* FED. R. CIV. P. 53(a)(1)(A), (C) ("[A] court may appoint a master . . . [to] perform duties consented to by the parties . . . [or to] address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.").

[232] *See, e.g.*, In re "Agent Orange" Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (appointing a special master due to "sheer volume of documents to be reviewed," privilege issues, and complexity of discovery issues). *See generally* Shira A. Scheindlin and Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. B. ASS'N J. 18, 19 (2004); *see* Scheindlin & Redgrave, *supra* note 219, at 374 ("Our research has revealed four different roles of Rule 53 masters in the context of electronic discovery: (1) facilitating the electronic discovery process; (2) monitoring discovery compliance related to ESI; (3) adjudicating legal disputes related to ESI; and (4) adjudicating technical disputes and assisting with compliance on technical matters, such as conducting computer/system inspections."); *see, e.g.*, Mobil Oil Corp. v. Altech Indus., 117 F.R.D. 650, 652 (C.D. Cal. 1987) (using special master for discovery due to large volume of data); Costello v. Wainwright, 387 F. Supp. 324, 325 (M.D. Fla. 1973) (using special master due to complexity of technical documents and necessity for medical comprehension); Inventory Locator Serv., LLC v. Partsbase, Inc., No. 02-2695 Ma/V, 2006 WL 1646091, at *2 (W.D. Tenn. 2006) (appointing special master due to amount of data); *see also* Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652-654 (D. Minn. 2002) (appointing "neutral" computer forensics specialist); Simon Prop. Group, L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (appointing expert for limited role); Dodge, Warren & Peters Ins. Servs., Inc. v. Riley, 130 Cal. Rptr. 2d 385 (Ca. Ct. App. 2003) (allowing inspection by neutral court-appointed expert).

[233] *See, e.g.*, In re U.S. Dept. of Def., 848 F.2d 232, 236-37 (D.C. Cir. 1988) (finding that the difficulty of reviewing documents warranted use of special master); *see also* Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973) (finding that special masters assist the court by "assuming much of the burden of examining and evaluating voluminous

Honorable Judge Learned Hand himself encouraged the use of a third party special master to monitor discovery procedures,[234] and the Supreme Court later held that appointment of a special master is appropriate where "exceptional circumstances" exist.[235]

The U.S. and the EU both give dedicated third parties the responsibility to ensure "proportionality and the balance of the rights of the different interests."[236] The EU Data Directive uses a "data controller" to determine whether to disclose evidence for litigation in other jurisdictions, filter out irrelevant data and remove unnecessary personally identifying information on data controllers.[237] "Any organization, agency, or individual is a 'data controller' if it is responsible for determining whether personal data falls under the Data Directive, and whether the purpose of processing might violate the Data Directive."[238] A data controller is often a "trusted third party" who collects or distributes personal data.[239] Data controllers balance interests by weighing "issues of proportionality, the relevance of the personal data to the litigation and the consequences for the data subject"[240] to determine how

documents that currently falls on the trial judge"); United States v. AT&T, 461 F. Supp. 1314, 1348-49 (D.D.C. 1978) (using special master to review documents for privilege and work product claims); United States v. Philip Morris, Inc., No. 99-2496 (GK) (D.D.C. 2000) (Order No. 41) (order appointing special master) (using special master to resolve all pre-trial discovery conflicts and set administrative groundwork for trial procedures).

[234] *See* Pressed Steel Car Co. v. Union Pac. R.R. Co., 241 F. 964, 967 (S.D.N.Y. 1917) (finding that parties should agree on a special master to conduct discovery procedures).

[235] La Buy v. Howes Leather Co., Inc., 352 U.S. 249, 259 (1956) (holding that "congestion in itself is not such an exceptional circumstance" that necessitates the use of a special master, and that the mere complexity of issues does not necessitate using a special master).

[236] EU Working Document, *supra* note 41, at 10.

[237] *Id.* at 9 ("Against these aims have to be weighed the rights and freedoms of the data subject who has no direct involvement in the litigation process and whose involvement is by virtue of the fact that his personal data is held by one of the litigating parties and is deemed relevant to the issues in hand, e.g. employees and customers.").

[238] Marissa L.P. Caylor & Jason R. Baron, *Searching for ESI in the EU: Some Rules of the Road for the European Union Data Controller* 5 (June 8, 2009) (position paper for DESI III Global E-Discovery/E-Disclosure Workshop: A Pre-Conference Workshop at the 12th International Conference on Artificial Intelligence and Law), *available at* http://www.law.pitt.edu/DESI3_Workshop/Papers/DESI_III.Caylor_Baron.pdf.

[239] *Id.* at 10 ("As a first step controllers should restrict disclosure if possible to anonymised or at least pseudonymised data. After filtering ('culling') the irrelevant data – possibly by a trusted third party in the European Union – a much more limited set of personal data may be disclosed as a second step.").

[240] *Id.* ("Adequate safeguards would also have to be put in place and in particular,

personal data will be used and whether it may be transferred to other countries.[241]

Multinational corporations commonly have multiple data controllers located in different countries and subject to different laws.[242] The law of the data controller's country determines when ESI may be processed or transferred under the Data Directive and national laws.[243] Since most foreign legal proceedings satisfy the requirements of due process,[244] it is likely that using special masters to oversee discovery disputes, even under bilateral agreements between signatories to the Evidence Convention, will also satisfy due process requirements despite a lack of jury trial, more restrictive

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there must be recognition for the rights of the data subject to object under Article 14 of the Directive where the processing is based on Article 7(f) and, in the absence of national legislation providing otherwise, there are compelling legitimate grounds relating to the data subject's particular situation.").

[241] *Id.* at 11 ("Once personal data has been identified, the data controller would need to consider whether it is necessary for all of the personal data to be processed, or for example, could it be produced in a more anonymised or redacted form."). Data controllers must process data "fairly and lawfully." *Id.* at 10 ("Article 6 of the Directive provides that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not used for incompatible purposes."). Data controllers may also hire data processors to provide particular services and most keep the data secure. *See generally,* Cubiks, European Economic Area Data Controller/Processor Agreement, http://tiny.cc/iahvo (last visited, Apr. 10, 2009).

[242] *See* Daley, *supra* note 55 at 12 ("Many companies in a corporate group will each be a data controller in respect of certain types of personal data, and if they are established in different countries then many sets of laws may apply.").

[243] *See id.* The law of the country where the data processing is taking place also applies regardless of the country from which the data was transferred. *See id.* ("If the data controller is established outside the EEA then personal data will be subject to the law of the EEA member country where equipment is used to process the data, and not just to transport it."). Parties often use a notary public to verify that data processing prior to production was authorized under the Data Directive. *See id.* ("In some cases, certification by a notary public may be sufficient to provide evidence that processing has been properly undertaken.").

[244] *See* United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988) (French deposition procedure where deponent answers questions without presence of defense counsel did not violate fundamental principles of fairness); El Ajou v. First Nat'l Bank of Chicago, No. 93-C-88, 1993 WL 393051, at *3 (N.D. Ill. Sept. 30, 1993) ("[C]ourts have found that the Swiss courts are generally 'a fair and reasonable forum for resolution of disputes.'") (quoting Medoil Corp. v. Citicorp, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990)); Raskin, S.A. v. Datasonic Corp., No. 86-C-7596, 1987 WL 8180, at *3 (N.D. Ill. Mar. 16, 1987) ("[T]here is no reason to believe that the Swiss system of civil jurisprudence will be unable to provide an adequate forum for the adjudication . . . ."); *see also* Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987) (recognizing Belgian court judgment despite lack of cross-examination).

discovery rules and limitations on evidence admitted,[245] provided the parties have access to a fair hearing.[246]

In addition to or instead of a special discovery master, the Hague Conference could create an independent agency to oversee cross-border requests for evidence and other judicial cooperation matters. An office or agency within the Hague Conference could provide more consistency throughout the review process while providing the same benefits as the individual special discovery master. The office or agency would have the "sufficient level of independence and trustworthiness to reach a proper determination on the relevance of the personal data" and the institutional knowledge to monitor compliance with the Data Directive and other national laws.[247]

These neutral third parties could be special authorities appointed to this agency, in the same way that they are appointed to Eurojust, an agency that coordinates judicial cooperation among EU Member States during criminal investigations and litigation.[248] "Eurojust has been very active in working towards signing cooperation agreements allowing the exchange of judicial information and personal data," for reasons other than the Evidence Convention's civil and commercial reasons.[249] Eurojust was established "to improve coordination and cooperation between competent judicial authorities

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[245] *See generally* Hilton v. Guyot, 159 U.S. 113, 202-03 (1895); Tahan v. Hodgson, 662 F.2d 862, 866 (D.C. Cir. 1981) (stating that it would be "unrealistic for the United States to require all foreign judicial systems to adhere to the Federal Rules of Civil Procedure"); Panama Processes, S.A. v. Cities Serv. Co., 796 P.2d 276, 282-83 (Okla. 1990) (recognizing Brazilian judgment despite absence of subpoena, cross-examination, and pre-trial discovery procedures).

[246] Ma v. Cont'l Bank N.A., 905 F.2d 1073, 1075 (7th Cir. 1990) (enforcing foreign judgment because procedural due process requirements satisfied when "the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice").

[247] *See* EU Working Document, *supra* note 41, at 11 ("The Working Party recognises [sic] that this may cause difficulties in determining who is the appropriate person to decide on the relevance of the information taking into account the strict time limits laid down in the US Federal Rules of Civil Procedure to disclose the information requested. Clearly it would have to be someone with sufficient knowledge of the litigation process in the relevant jurisdiction. It may be that this would require the services of a trusted third party in a Member State who does not have a role in the litigation but has the sufficient level of independence and trustworthiness to reach a proper determination on the relevance of the personal data.").

[248] Eurojust was created in 2002 by Council Decision 2002/187/JHA. *See* Eurojust, http://www.eurojust.europa.eu/ (last visited Nov. 24, 2009).

[249] Eurojust, *The History of Eurojust*, http://www.eurojust.europa.eu/about.htm (last visited Nov. 24, 2009).

of the Member States."[250] To achieve this end, each Member State provides one permanent member to Eurojust that has the authority to make determinations regarding "requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition."[251]

While the EU Member States comprising Eurojust are joined by their mutual interests in EU policies and their collective interest in combating transnational crimes, a component of Eurojust or a small agency similar to Eurojust could easily be adapted to monitor and resolve cross-border disputes of civil or commercial law.

VI. CONCLUSION

Due to the rapid pace of technology, without a forward-thinking, flexible framework for examining electronic discovery issues, discovery law will always lag behind the times.[252] Providing a clear definition of pre-trial discovery, establishing minimum data protection standards, allowing signatories to make more liberal bilateral agreements and using knowledgeable special masters will reduce the need for Article 23 reservations, and thereby allowing the U.S. to utilize the Evidence Convention. Predictable procedures allow parties to predict discovery costs and multinational corporations to predict the cost of doing business in a particular country. Implementing a protocol to bridge international discovery procedures and prevent conflicts of discovery law during civil litigation between private parties in U. S. courts will provide a flexible vehicle for cross-border discovery and encourage further economic globalization.

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[250] Council Decision 2009/426/JHA, 2009 O.J. (L 138) 14, ¶ 1, *available at* http://tiny.cc/2lkfp.

[251] *Id.* ¶¶ 2, 3, 9.

[252] DERTOUZOS ET AL., *supra* note 61, at 7 ("[I]n the case of e-discovery, technology is evolving faster than the law.").