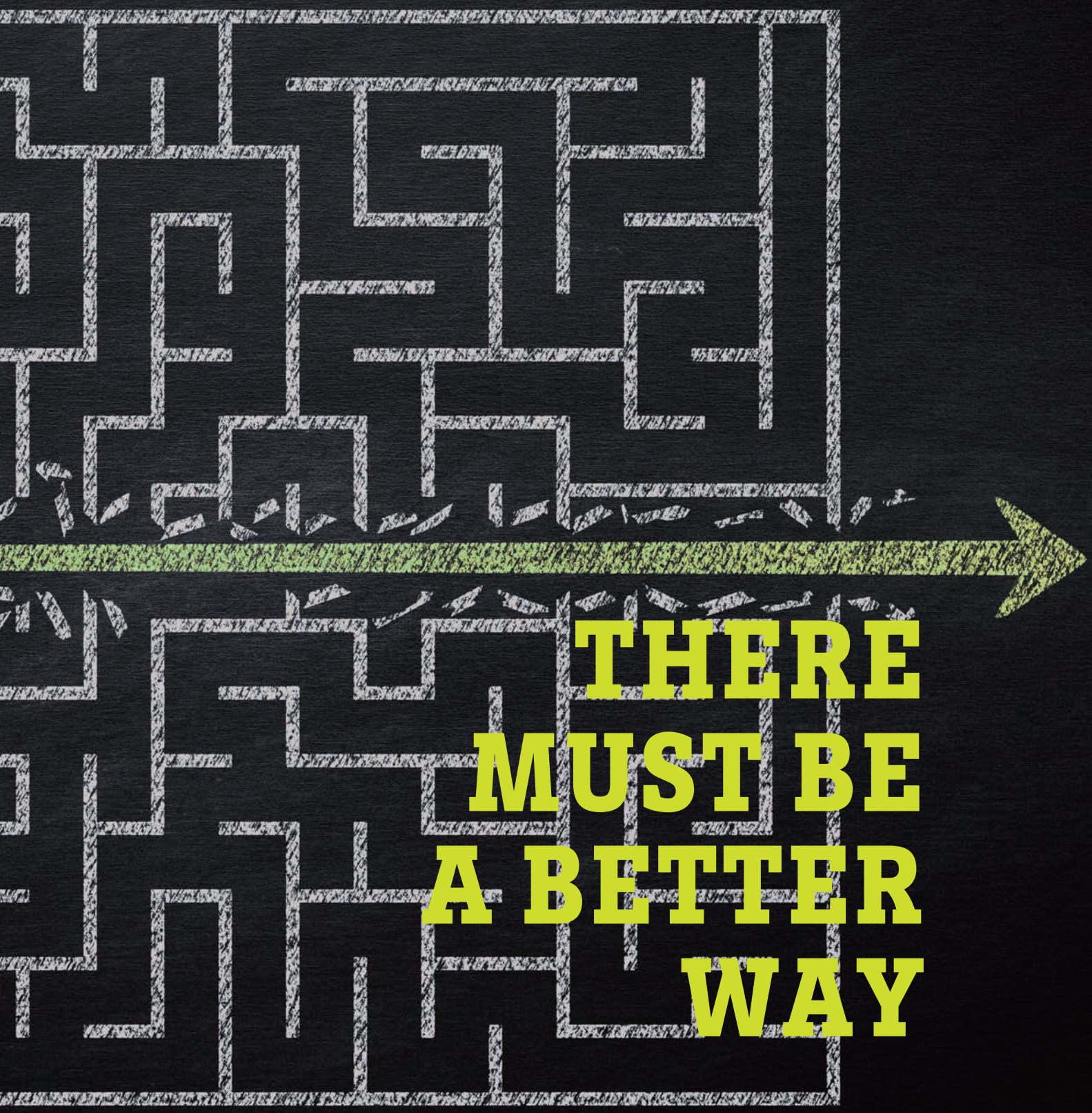


THERE MUST BE A BETTER WAY

SHOULD THE FEDERAL RULES OF CIVIL PROCEDURE BE AMENDED TO ADDRESS CROSS-BORDER DISCOVERY?

BY MICHAEL M. BAYLSON[1] & STEVEN S. GENSLER

In today's world of borderless commerce, digital documents, and cloud storage, information relevant to U.S. litigation frequently is located outside of the United States. When discovery in a U.S. case crosses the border to reach that non-U.S. information, the lawyers and judges face a complex web of issues. Can a party use the federal court discovery scheme to get the information? Maybe. Must the party seek the information through the government of the foreign country where it is located? Maybe. Will that process be governed by a treaty like the Hague Evidence Convention[2] (HEC)? Maybe. If the HEC or another treaty exists, will it ultimately yield the information sought? Maybe. And when a party seeks discovery through a foreign country's process, what role does the federal judge play, to what extent are the federal rules discovery mechanisms involved, and do any of the duties and certifications associated with the discovery rules apply?

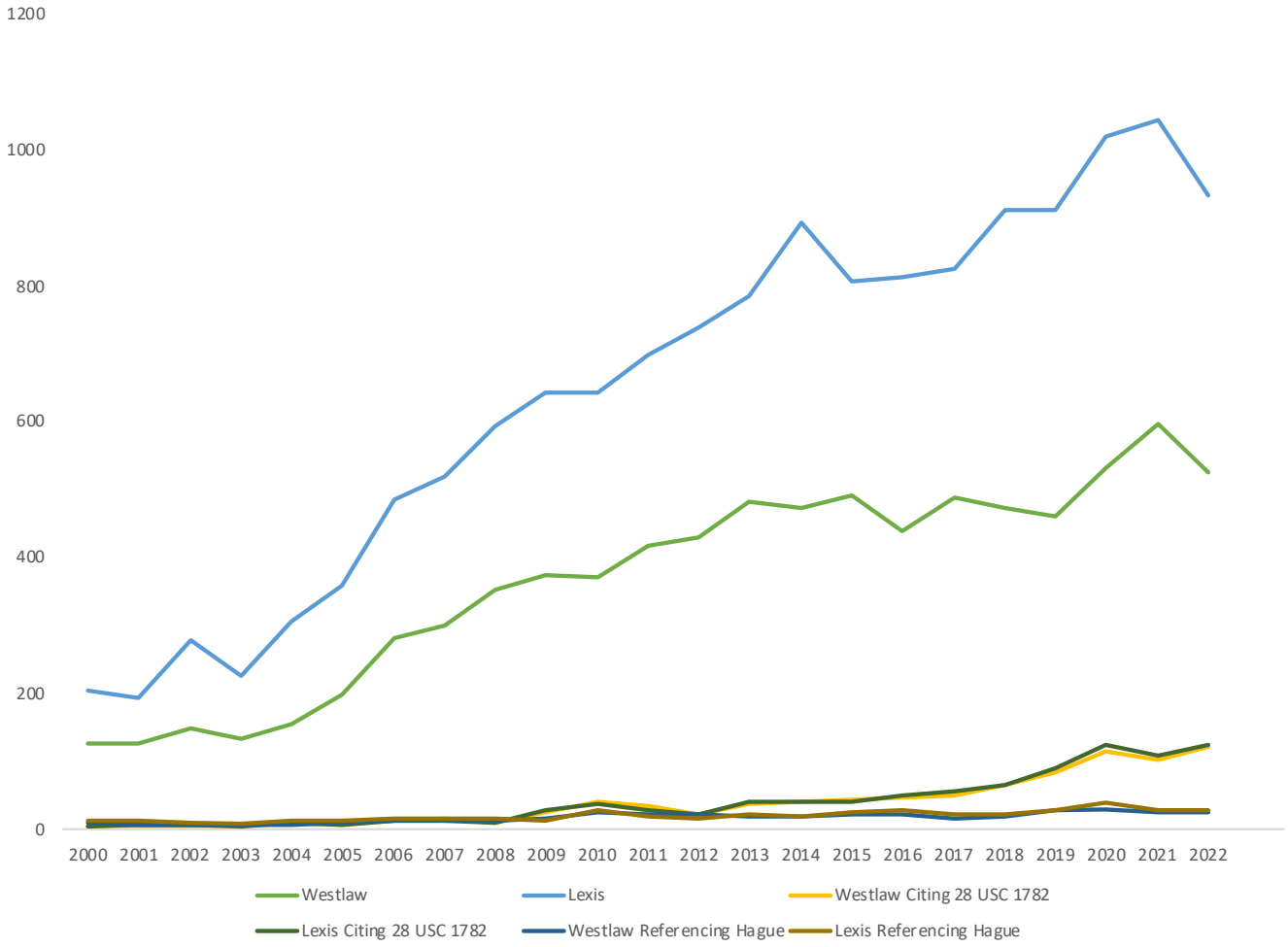
One might expect the civil rules to establish a procedural framework for judges and attorneys to follow when confronted with the daunting prospect of seeking cross-border discovery. But they largely don't — with the most glaring void being the lack of any framework for seeking documents and electronically stored information (ESI) located overseas.[3]

We propose that the Advisory Committee on Civil Rules examine how the civil rules might be amended to better guide judges and attorneys through the cross-border discovery maze.[4] One of the greatest features of the rule-making process is its ability to brainstorm ideas and then evaluate them in a public and iterative process, with the best ideas emerging at the end. We have every faith that the rule-making process, if deployed, will answer the question posed by the title of this article and reveal whether and how the civil rules should be amended to address cross-border discovery. We think that, at a minimum, that inquiry will demonstrate the need for cross-border discovery to be added to the rules that govern the discovery-planning process. We believe it will show that even more could, and should, be done in this crucial area. But the question for today is whether rule-makers should initiate a cross-border discovery project to explore what that might look like.[5] We think the answer is a resounding "yes."

SURGING CROSS-BORDER DISCOVERY

Information is everywhere. And in litigation, it is increasingly located outside the U.S., continuing a trend noted by the Supreme Court more than 35 years ago.[6] This trend has accelerated since then with an even more globalized economy, the development of the internet, and advances in communications technology. To get a window into how much cross-border discovery has increased since the turn of the 21st century, we searched the LexisNexis and Westlaw databases for terms associated with international or cross-border ▸

CASES MENTIONING INTERNATIONAL OR CROSS-BORDER DISCOVERY



discovery. As the timeline graph above shows, case references to those terms have risen significantly and steadily over the last 20-plus years.[7]

This exponential growth is likely to persist as international trade continues to expand. There is no reason to think that foreign companies will stop expanding their operations worldwide, including into the United States, while keeping their corporate headquarters — and the bulk of their records — overseas. Nor is there any reason to think that domestic companies will discontinue their own overseas activities — both with directly managed operations and with operational relationships with foreign entities — generating large amounts of records kept overseas as well.

SETTING THE SCENE

Our thesis is that the civil rules could do more — possibly much more — to provide guidance to lawyers and judges dealing with cross-border discovery. Before exploring what that might entail, however, we need to explain what we mean by cross-border discovery and what that process currently looks like.

Cross-border discovery is the gathering of evidence from sources located outside the U.S. One important type involves getting help from the foreign country where the information is located. This often involves a process created by a treaty defining how requests may be made and prescribing the foreign country's duty to respond. The best-known and most important treaty is the Hague Evidence Convention (which we will discuss in greater detail later). In the absence of a treaty, requests for help can be made through diplomatic channels, but whether and how to respond will be entirely up to the foreign country.

Most cross-border discovery probably occurs without asking the foreign country for its help. That's because

when the source is a party to the lawsuit subject to U.S. jurisdiction, the U.S. court can compel that party to produce information regardless of the information's location. For example, imagine that a foreign company is a defendant in a case in U.S. federal court. Assuming the company is subject to the court's jurisdiction, the court can order the company to gather records located at its foreign headquarters and produce them in the United States. Similarly, the U.S. court can order the company to produce its business officers to be deposed — at a location that could be abroad or in the U.S. — even if those officers work at the company's foreign headquarters.

What determines which cross-border discovery pathway will be used? The most important variable is whether the foreign source is subject to the U.S. court's jurisdiction. If it isn't, the court will have no power to enforce a discovery request. So unless the source produces the evidence voluntarily, help from the foreign country will be needed to compel compliance. Things get trickier when the foreign source is subject to the U.S. court's jurisdiction. Now, both pathways are on the table. Nothing prevents the parties or the court from reaching out to the foreign country for help. But the party seeking the information is likely to want the U.S. court to "go it alone" and compel production through U.S. discovery rules.

In its landmark 1987 *Aerospatiale* decision, the U.S. Supreme Court answered what is arguably the thorniest "pathway" question by finding that the HEC is neither mandatory nor exclusive.[8] The issue in *Aerospatiale* was whether cross-border discovery *must* go through the HEC process when the information being sought is located in a country that is also a party to the HEC. The Court said no, holding that the HEC creates an *optional* pathway that need not be used if another way of getting evidence is available. The Court also held that parties have no obligation to try the HEC process first before seeking the information through "regular" civil discovery. However, the trial court has ultimate authority to choose which pathway to take, and thus can require parties to go through the HEC process when the court concludes it is the better pathway.

The fact that the U.S. court has authorized the discovery — and may be willing to compel compliance — doesn't stop the foreign country from regulating in-country activities or from penalizing actors who violate local law. This might leave a party caught between the rock of being sanctioned by the U.S. court if they don't comply and the hard place of being sanctioned by the foreign country if they do.

There is another layer to this big-picture overview. When the U.S. court allows the parties to conduct "regular" discovery to obtain information from foreign sources, is that foreign country cut out of the picture? Not at all. It means only that the U.S. court isn't *asking* the foreign country for help. It doesn't stop the foreign country from asserting its own interests. The foreign country may view the taking of evidence by private parties as an illegal act. The foreign country may have adopted a so-called blocking statute, making it illegal for the source to provide the information in question. And, increasingly, such information may be subject to data-protection laws in the foreign country. The fact that the U.S. court has authorized the discovery — and may be willing to compel compliance — doesn't stop the foreign country from regulating in-country activities or from penalizing actors who violate local law. This might leave a party caught between the rock of being sanctioned by the U.S. court if they don't comply and the hard place of being sanctioned by the foreign country if they do.

The Federal Rules of Civil Procedure say very little about cross-border or foreign discovery. The discovery rules mention "foreign" discovery only twice, and both mentions are narrow and obscure.[9] The first reference occurs in the little-known Rule 28, "Persons Before Whom Depositions May Be Taken." Rule 28(b) addresses the taking of depositions "[i]n a foreign country." It lists four options: taking depositions "under an applicable treaty," "under a letter of request," "on notice," or "before a person commissioned by the court." Rule 28(b) concludes with the important evidentiary principle that evidence taken in pursuant to a letter of request "need not be excluded merely because it is not a verbatim transcript [or] because the testimony was not taken under oath." Foreign discovery isn't mentioned again until Rule 45, and there's even less substance there. Rule 45(b)(3), "Service in a Foreign Country," is just a ▸

cross-reference to the statute authorizing federal courts to issue and serve subpoenas on U.S. citizens residing in a foreign country.[10]

Think about what *isn't* addressed in the current civil rules. There's nothing about planning for cross-border discovery, or about case management. There's nothing that explicitly addresses document discovery — a much bigger part of modern cross-border discovery than depositions. And there's nothing addressing what aspects of the civil rules' discovery scheme apply when parties seek information through the HEC or other process that utilizes a foreign country's evidence-gathering force. Indeed, nothing in the civil rules even tells us whether that is considered "discovery" at all.

Before delving further into those topics, however, we need to explore more fully what the HEC does and how its evidence-gathering tools operate. We also need to discuss some structural limits and operational problems that constrain its effectiveness as a substitute for civil discovery.

THE HAGUE EVIDENCE CONVENTION

The U.S. has been a party to the HEC since 1972.[11] The HEC creates a process by which a court in one country can ask a second country to help secure evidence located in the second country. While such requests have always been possible through diplomatic channels, treaties allow countries to create standard mechanisms for the submission of requests and to define the duties of response. The HEC does so in a way designed to address an inherent difficulty in cross-border discovery.

The HEC is structured to bridge the gap between countries' different views about the nature of gathering evidence in litigation. We in the U.S. view the gathering of evidence as a task for attorneys, with judges regulating the process and enforcing compliance. But many countries view evidence gathering as a task for the state and consider party efforts to gather evidence as an intrusion on their sovereign authority.[12] To address that disconnect, the HEC creates a process by which foreign litigants can tap into the evidence-gathering methods of the country where the information is located, thereby ensuring due respect for that country's norms. The HEC also provides methods for parties to ask that evidence gathered through the foreign country's mechanisms be collected in ways so it is usable in the requesting court. As the Supreme Court put it, "[t]he 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."[13]

The Hague Evidence Convention allows participating countries to decide whether to go along with U.S.-style pretrial document discovery, and many continue to reject our approach entirely.

The HEC's best-known means for seeking foreign-country assistance is the letter of request (LOR).[14] Under this process, a party asks the U.S. judge to send a request to the foreign country's central authority, which then coordinates with an appropriate official in that country to take the requested evidence and return it to the central authority for forwarding to the U.S. The LOR method can be used to take witness testimony or to secure documents. While the foreign country presumptively follows its own practices for taking evidence, the foreign country can be asked to employ special methods and procedures to ensure that the evidence is captured in ways that ensure its usability in the requesting country.[15]

While the LOR process can be useful, several frustrating limitations have prevented it from reaching its full potential. Most significantly, Article 23 of the HEC permits countries to opt out of executing LORs "issued for the purpose of obtaining pretrial discovery of documents as known in the Common Law countries."[16] Of the 61 participating countries, 26 have made full Article 23 declarations barring execution of any LOR for pretrial discovery, while another 17 have made partial Article 23 declarations that set restrictions on the type and amount of evidence that may be sought. In short, the HEC allows participating countries to decide whether to go along with U.S.-style pretrial document discovery, and many continue to reject our approach entirely. Others reject so-called "fishing expedition" requests but will enforce narrowly tailored requests for known documents that are described with particularity and obviously relevant to the case. Second, the LOR process has developed a reputation for bureaucracy and delay. Hard data is tough to come by, but anecdotes are common about LORs being held up by a central authority or by officials designated to take the evidence. While some anecdotes may be exaggerated, what is certain is that if an LOR gets slow played in the for-

eign country, the requesting court (or parties) can do little under the HEC to speed things up.

A second, lesser-known method for seeking foreign-country assistance is sometimes available. Under Chapter II of the HEC, the judge handling the case can appoint a commissioner to take witness testimony or receive documents in the foreign country.[17] The commissioner — often a local attorney — can act as soon as the appointment is approved, frequently within just a few weeks. The process is especially helpful in France because it has been held that evidence taken by a Chapter II commissioner does not violate France's blocking statute. For example, Judge Baylson appointed a Chapter II commissioner in *Behrens v. Arconic Inc.* — a case concerning the tragic 2017 fire at the Grenfell Tower in London that killed 72 people and injured hundreds more — to collect important documents possessed by the defendant's French subsidiary and located in France.[18]

However, the Chapter II commissioner process comes with substantial limits. Countries can opt out of the Chapter II process entirely, and many have.[19] Of those participating, most require permission to use the process, and conditions can be imposed. Finally, and most importantly, Chapter II commissioners lack the power to compel cooperation from unwilling sources.[20] While countries can opt under the HEC to supply compulsive aid, very few do so.[21] So although a Chapter II commissioner may be the fastest and easiest way to get information from a *willing* foreign source, the LOR remains the standard HEC method for getting evidence from uncooperative sources.

AEROSPATIALE AND THE CIVIL RULES SCHEME

As discussed earlier, the Supreme Court held in *Aerospatiale* that the HEC is *not* the exclusive means of securing discovery from foreign sources. Rather, it described the HEC as creating an optional procedure that did not displace the power of U.S. courts "to order a foreign national party before it to produce evidence physically located within a signatory country."[22] Taking the matter one step further, the Court declined to require U.S. litigants to resort to the HEC process before initiating discovery.[23] Rather, trial courts must decide in each situation whether to require resort to the HEC process or allow discovery under the civil rules, taking into account "the particular facts, sovereign interests, and likelihood that resort to [the HEC] procedures will prove effective."[24] The Court went on to reference and implicitly endorse factors set out in a draft of what would become Section 442(1) of the Restatement (Third) of Foreign Relations Law of the United States:

1. The importance to the litigation of the documents or other information requested
2. The degree of specificity of the request
3. Whether the information originated in the United States
4. The availability of alternative means of securing the information
5. The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[25]

To illustrate what this means in practice, imagine a suit by a U.S. plaintiff against a German defendant with records (in its "possession, custody, or control") located in Germany. Imagine further that the plaintiff filed a Rule 34 document request. Using its power over the German defendant as a party, the court could compel compliance and require the defendant to gather documents in Germany and produce them in the U.S. Or the court could decline to enforce the Rule 34 request and instead direct the plaintiff to seek the records through the HEC process. The court would make that decision based on its evaluation of the *Aerospatiale* factors, with no presumption in favor of requiring the party seeking the evidence to use the HEC. In contrast, imagine that the same plaintiff also wished to obtain documents from a second German entity that was not party to the U.S. lawsuit. The court would then lack jurisdiction to compel production through the discovery rules, forcing the plaintiff to ask the judge to initiate the HEC process.

Aerospatiale provides clear guidance in one respect — it clearly tells the parties and the judge that they can sidestep the HEC process in many cases. And while one would scarcely call the *Aerospatiale* analysis predictable in its outcome, it does provide a test for courts to apply.

But *Aerospatiale* provides only hints at how the "optional" HEC process fits within the larger framework of civil discovery. Consider case management. In *Aerospatiale*, the question of whether to resort to the HEC arose in the context of a motion to compel after the French defendant objected to the plaintiff's Rule 34 request. Technically, all the trial court did was resolve a discrete discovery dispute. But the *Aerospatiale* analysis strongly implies ▸

a larger management role for courts. Surely the trial court can address potential *Aerospatiale* questions in advance as part of the discovery-management process. Indeed, the Supreme Court recognized that requiring a party to attempt HEC procedures was but a step in the larger discovery process since the trial court retains authority to order rules-based discovery if such attempts fail. In many ways, the *Aerospatiale* analysis anticipates today's more actively managed and iterative discovery process.

Aerospatiale is essentially silent on other questions regarding the intersection of HEC discovery and the federal rules scheme. Is it subject to the early moratorium under Rule 26(d) or the discovery deadline set in the Rule 16(b) scheduling order? Does it count toward any numerical limits on discovery? Does the Rule 26(e) duty to supplement apply? Are requests to use the HEC process subject to Rule 26(g)'s duties and certifications? What about objections and responses? Do any aspects of HEC discovery fall within the sanctions provisions of Rule 37? For example, what happens if a court learns that documents produced were fake, or that the production was materially incomplete? One might view all of these questions as variations on a larger theme: To what extent is the use of the HEC process (or other diplomatic channels) "discovery" under the rules in the first place?

We pause to emphasize two things. First, we don't fault the Supreme Court for not answering these questions; they were neither raised in nor necessary to the Court's decision. Our point is only that if one is looking to *Aerospatiale* to locate the HEC process within the discovery rules, it is no more helpful than those rules themselves. Second, we appreciate that federal judges can answer all of the questions we posed above. And if those answers created or identified serious regulatory gaps, those judges likely could provide sensible solutions through the exercise of their inherent authority. But that doesn't mean we shouldn't think more carefully and deeply about how HEC discovery fits into the rules-based scheme as it stands.

We think the time has come for rule-makers to systematically explore how the federal rules might address the gathering of evidence located outside the United States. We emphasize the word "systematically." While we have our own ideas about issues that should be looked into, the greater task would be to examine how cross-border discovery fits into the entire civil rules scheme. This is the type of task to which the rule-making process is especially suited.

THE TIME HAS COME

When rule-makers revised Rule 28(b) in 1963, it was part of a larger, congressionally mandated examination of the rules and statutes governing cross-border discovery.[26] A product of its times, it reflected an era when depositions were king and document requests still required advance court approval.[27] Since then, the discovery scheme has become more complicated. The advent of electronic discovery has transformed the process. And litigation increasingly plays out on a global stage that seeks to protect data privacy.

We think the time has come for rule-makers to systematically explore how the federal rules might address the gathering of evidence located outside the United States. We emphasize the word "systematically." While we have our own ideas about issues that should be looked into, the greater task would be to examine how cross-border discovery fits into the entire civil rules scheme. This is the type of task to which the rule-making process is especially suited. We have no doubt that the bench, bar, and academy can and will help rule-makers identify potential contact points and puzzle through possible solutions.

An easy starting point might be to integrate *Aerospatiale* and the HEC process into the discovery-management and case-management rules. Rule 26(f) requires parties to consider a broad range of discovery topics and submit a plan setting forth their views on those topics. Developing that plan forces parties to think ahead and prompts judges to consider ways to keep the process on track and prevent problems from festering. Should cross-border discovery be on that list? Should it also be on the list of items for consideration at the initial Rule 16 case-management conference?

We think the answers to these questions are obvious. Over 35 years ago,

the Supreme Court remarked that "[w]hen it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses."[28] More generally, the need for advance planning is heightened in cross-border discovery because the court might require parties to at least try to use the HEC before considering next steps.[29] The need for early and active management is all the more important today because of the emergence of robust data-protection laws that may require the parties and the court to interact with data-protection regulators in the source country.

The civil rules might explicitly address what parties can do to obtain documents located outside the United States. Can they be obtained through the Rule 28(b) deposition process by requiring a witness to bring them to the deposition? Although Rule 28(b) allows for depositions in a foreign country, it says nothing about securing documents from the witness or the witness's employer. Allowing depositions but not allowing documents is like an opera without a libretto — you can hear the music, but there are no words to explain the story. Rule 28(b) might be amended to require deponents to bring requested and relevant documents to depositions unless disclosure is constrained by a foreign law.

More broadly, the rules say nothing about the role of document requests when documents are located overseas. As *Aerospatiale* illustrates, Rule 34 has no geographic limit. A party must produce documents within its "possession, custody, or control" whether they are located next door to the courthouse or halfway around the world. But what about documents outside the party's possession, custody, or control — and how is "control" defined when disclosure or production may be constrained by the host country's law? What about documents that are within party control but the court determines the better path is to use methods set out in the HEC? Should Rule 34 include a list, similar to Rule 28(b), outlining the options? Similar questions might be asked with respect to document subpoenas under Rule 45.

Taking the analysis one step further, could there be a "master" rule comprehensively addressing cross-border discovery? Recall the many questions we posed earlier about how the HEC process intersects with the civil discovery scheme. Answers could be provided in the specific rules dealing with these topics. Or maybe an overarching rule is needed that collects those answers in a single place — or possibly even answers them in the aggregate.

A "master" rule might provide a roadmap for lawyers and judges to follow. Consider again the scenario discussed above, in which a party seeks records located in Germany. Nothing in the current rules scheme alerts litigants or the court to the *Aerospatiale* choice of seeking the documents through the Rule 34 process or the HEC. A "master" rule might also address depositions. Rule 28(b) provides options once the decision has been made to take a witness's testimony in a foreign country, but it doesn't address what might be the antecedent choice of whether to require foreign-based parties (or their officers or managing agents) to appear for depositions in the United States. Moreover, Rule 28(b)'s list of options is buried where many lawyers and judges wouldn't even know to look. A "master" rule for cross-border discovery could also clearly address the relationship between *Aerospatiale* and interrogatories and requests for admission.

We're not saying this would be the best course. Rule drafting is tricky. Pesky details and complications often emerge only once the drafting starts. Sometimes the drafting process can refine or even change how we think about a topic, leading rule-makers to reject what seemed like a clear fix in favor of a different path.[30] But that's a feature of the system, not a bug, and perhaps even more reason to think about whether cross-border discovery is or is not susceptible to road mapping or comprehensive treatment.

We save for last what might be the most controversial topic: Should rule-makers revisit the result reached in *Aerospatiale* itself? Recall *Aerospatiale*'s reasoning. The Court held that nothing in the HEC provided any "plain statement" sufficient to cut off the preexisting authority of U.S. courts to exercise their traditional discovery powers over parties subject to their jurisdiction.[31] That holding described the state of the law as the Supreme Court found it. Nothing in *Aerospatiale* stops the United States from choosing a different path as a matter of internal law.

Indeed, nothing in *Aerospatiale* would be contravened if the civil discovery rules were to provide a nudge in favor of greater reliance on the HEC. Should there be a nudge? That was the view Justice Harry Blackmun took in his concurring *Aerospatiale* opinion (joined by three other justices). He worried that judges would gravitate toward using the known and liberal federal discovery scheme whenever possible rather than navigate the unfamiliar and potentially more restrictive HEC process. He supported the "first resort" rule rejected by the majority:

> In my view, the Convention provides effective discovery pro- ▸

cedures that largely eliminate the conflicts between United States and foreign law on evidence gathering. I therefore would apply a general presumption that, in most cases, courts should first resort to the Convention procedures.[32]

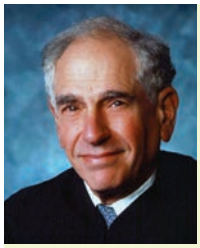
Longtime followers of the rule-making process may recall that the civil rules committee considered just such an amendment to Rule 26 in 1988, publishing a proposal to require parties to use treaty-based methods unless they "afford discovery that is inadequate."[33] The proposal was modified in response to criticism in the public comments, but the modified version drew even more vigorous criticism.[34] Though the modified version was approved by the Judicial Conference, it was rejected by the Supreme Court.[35] The Advisory Committee tried once more after making some changes to the accompanying Committee Note, but this effort failed, too, when the Standing Committee on Rules of Practice and Procedure refused to recommend it to the Judicial Conference.[36] The proposal was then abandoned.

In one sense, Justice Blackmun's prediction seems to have been spot on.[37] Lawyers and judges seem no better versed in the HEC now than they were in 1987. In our experience, many lawyers view the HEC process as a quagmire to be avoided whenever possible. But is that view well-founded, or do lawyers not know how to use the HEC effectively because we've made it too easy to avoid? Perhaps a nudge is needed. Rule-makers could also take a fresh look at the factors to be considered.

The operative word is "could." Rule-makers could follow Justice Blackmun's lead and include some type of presumption or nudge toward using the HEC process. Or not. Analysis of and reflection upon 35 years of experience under *Aerospatiale* might persuade rule-makers that the *Aerospatiale* approach more or less gets it right as a matter of policy. Rule-makers could reach that conclusion and then choose to embed it in the rules. Or they could reach that conclusion and decide that it remains better left out of the rule scheme. They could even decide to leave the matter outside the scope of the project.

CONCLUSION

Cross-border discovery has become increasingly important to U.S. litigation practice. But the process remains confusing to most and avoided by many. It is also a part of discovery practice that has never really been integrated into the modern civil rules' discovery scheme. We think that more and better guidance is needed — and possible. Accordingly, we propose that the Advisory Committee on Civil Rules should undertake consideration of whether and how the civil rules might be amended to bring clarity and guidance to the realm of cross-border discovery, for the benefit of lawyers and judges alike.



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1 Judge Baylson sincerely appreciates the assistance of his law clerks, Carolyn Jackson and Christopher Goetz, and an intern in chambers, Blair Williams, for their valuable inputs on this article. For further reading on this topic, *see* Michael Baylson and Sandra Jeskie, *Overseas Obligations: An Update on Cross-Border Discovery*, Judicature Vol. 103 No. 1 (2019), and Michael Baylson, *Cross Border Discovery at a Crossroads*, Judicature Vol. 100 No. 4 (2016).

2 *See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Evidence Convention] (codified as 28 U.S.C. § 1781).

3 For simplicity, we will use the term "document" to include both paper documents and ESI.

4 The issues we explore in this article can also arise in state court proceedings. *See, e.g.*, *In re Cote d'Azur Est. Corp.*, 286 A.3d 504 (Del. Ch. 2022) (issuing letter of request under the Hague Evidence Convention to Switzerland). Though we limit our focus to the intersection of cross-border discovery and the federal civil discovery rules, any changes made to the federal rules might serve as a model for states to follow.

5 Commentators have also identified legitimate concerns with how federal courts handle petitions under 28 U.S.C. § 1782 seeking evidence for use in foreign tribunals. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089 (2020) (suggesting that the civil rules be amended to require notice to the foreign tribunal and opposing parties). While we would support including § 1782 in a cross-border discovery project, we note that the distinct nature of § 1782 petitions — in which the court plays a very limited role and does not adjudicate the merits of the claims for which assistance is sought — likely suggests that any civil rules provisions addressing § 1782 practice be kept distinct from those governing discovery generally.

6 *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 531 (1987) (quoting secretary of state's submittal letter to the president). The trend is but one aspect of how globalization has affected litigation in the U.S. *See* Stephen Breyer, *America's Courts Can't Ignore the World*, The Atlantic, Oct. 2018, at 100.

7 The slight decline in the 2020–2022 period reflects the decline relating to the global COVID-19 pandemic, but the growth of cross-border discovery is sure to increase as normal litigation resumes.

8 *See Aerospatiale*, 482 U.S. at 539–40.

9 The only rule with the word "foreign" in the

title is Rule 44.1, which deals with the issue of what a party must do when it intends to rely on a foreign country's law. *See* Fed. R. Civ. P. 44.1.

10 *See* 28 U.S.C. § 1783.

11 *See* Hague Evidence Convention, *supra* note 2.

12 *See* Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. Pitt. L. Rev. 903, 913 (1989) ("Common law jurisdictions entrust the gathering and presentation of evidence to counsel comparatively free of governmental oversight. That process contrasts sharply with the civil law system in which investigation and development of the facts are governmental activities assigned exclusively to, and jealously guarded by, the judiciary.").

13 *Aerospatiale*, 482 U.S. at 530–31 (citation omitted).

14 *See* Hague Evidence Convention, *supra* note 2, at ch. I, art. 1; *see also* Fed. R. Civ. P. 28(b) advisory committee's note to 1993 amendment (noting that the term "letter of request" has been substituted for the term "letter rogatory" because it is the primary method provided by the Hague Evidence Convention).

15 *See* Hague Evidence Convention, *supra* note 2, at ch. I, art. 9.

16 *See id.* at ch. III, art. 23. For a table listing which countries have made reservations and exclusions to the optional parts of the Hague Evidence Convention, *see* Hague Convention on Private International Law, *Table reflecting applicability of Articles 15, 16, 17, 18, and 23 of the Hague Evidence Convention* (June 2017), *available at* https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence [hereinafter Exclusions Table].

17 *See* Hague Evidence Convention, *supra* note 2, at ch. II, art. 17. Related provisions in Chapter II also allow for discovery to be taken by the forum country's diplomats residing in the foreign country where the evidence is to be gathered. *See, e.g., id.* at ch. II, art. 15–16.

18 *See Behrens v. Arconic, Inc.*, 487 F. Supp. 3d 283, 300–01 (E.D. Pa. 2020); *see also Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004 (D. Ariz. 2018) (appointing Chapter II commissioner to oversee production of documents in France).

19 *See* Hague Evidence Convention, *supra* note 2, at ch. III, art. 33; *see also* Exclusions Table, *supra* note 16.

20 *See* Hague Evidence Convention, *supra* note 2, at ch. II, art. 17.

21 *See id. at* ch. II, art. 18; *see also* Exclusions Table, *supra* note 16.

22 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 539–40 (1987).

23 *See id.* at 541–42.

24 *Id.* at 544.

25 *Id.* at 544 n.28 (quoting Restatement (Third) of Foreign Relations Law of the U.S. (Revised) § 437(1)(C) (Am. L. Inst. Tentative Draft No. 7, 1986) (approved May 14, 1986) (subsequently adopted as Restatement (Third) of Foreign Relations Law of the U.S. § 442(1)(C)) (incorporated in Restatement (Fourth) of Foreign Relations Law of the U.S. § 426 cmt. a). The American Law Institute published its Restatement (Fourth) of Foreign Relations Law in 2018. Due to some restructuring, this topic is now addressed in Section 426, with the list of factors moving from the Black Letter to the Comment. *See* Restatement (Fourth) of Foreign Relations Law of the U.S. § 426 cmt. A.

26 *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004).

27 *See* Fed. R. Civ. P. 34 advisory committee's note to 1970 amendment (asserting that a goal of the revision was to eliminate the requirement of good cause).

28 *Aerospatiale*, 482 U.S. at 546.

29 *See* Michael M. Baylson, *Cross-Border Discovery at a Crossroads*, 100 Judicature 56, 58 (2016).

30 For example, one person with whom we've discussed this topic has suggested that any rules amendments that would address the Hague Evidence Convention process describe it as providing for "disclosure" rather than "discovery" due to the negative view many countries have of U.S.-style discovery.

31 *See Aerospatiale*, 482 U.S. at 539 (stating that the Hague Evidence Convention contains "no such plain statement of a pre-emptive intent").

32 *Aerospatiale*, 482 U.S. at 548–49 (Blackmun, J., concurring).

33 *See* Advisory Committee on Civil Rules, Report to the Committee on Rules of Practice and Procedure 47–48 (1988), *available at* https://www.uscourts.gov/sites/default/files/fr_import/1988-12-Committee_Report-Civil.pdf. The draft Advisory Committee Note cites to a law review article by Judge Joseph F. Weis, Jr., then the Chair of the "Standing Committee" on Rules of Practice and Procedure, in which he specifically endorses Justice Blackmun's approach and proposes that the civil rules be amended to require first resort to the HEC process. *See also* Weis, *supra* note 12, at 930–31.

34 *See* Gary B. Born & Andrew N. Vollmer, *The Effect of The Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 243 (1993).

35 *Id.* at 244.

36 *Id.* at 245.

37 For a recent scholarly assessment of how courts have applied the *Aerospatiale* test, see Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 970–72 (2017) ("Justice Blackmun's prediction . . . has been borne out by the practice of the district courts.").