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# CASE COMMENT

## In re Anschuetz & Co., GmbH: A Critical Analysis

BY JANE ANN LANDRUM\*

### I. INTRODUCTION

John R. Brown, Circuit Judge for the Fifth Circuit United States Court of Appeals concluded in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3102 (U.S. July 17, 1985) (No. 85-98), that Anschuetz, a West German corporation, which was subject to in personam jurisdiction in a federal district court, must comply with the Federal Rules of Civil Procedure, and provide interrogatories, documents and notices of deposition for use in the American court. Judge Brown concluded that the Federal Rules would not be supplanted by the Hague Evidence Convention. When a party was subject to an American court's jurisdiction, he believed, it was not mandatory to obey this international treaty.

Judge Brown's discussion in this case is riddled with complications. The purpose of this case comment is to evaluate and criticize the *Anschuetz* decision, and to explore some workable alternatives.

### II. FACTS OF ANSCHUETZ

In January of 1979, a collision between two ferry boats precipitated an action between the Mississippi River Bridge Authority and Compania Gijonesa de Navegacion S.A. (Gijonesa). Gijonesa brought a third-party complaint against Anschuetz, a West German corporation, alleging the failure of a steering device designed by Anschuetz as a contributing cause of the accident. In October of 1983, Gijonesa amended its complaint to allege product liability claims against Anschuetz and embarked on a round of discovery involving interrogatories, requests for production of documents and notices of depositions. In January of 1984, Anschuetz moved for a protective order with respect to all these requests. In February, the United States Magistrate ordered Anschuetz to comply with Gijonesa's discovery demands. On April 18, 1984, Anschuetz moved for a protective order based on the Hague Evidence Convention to stop the

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depositions scheduled to take place in West Germany on May 2, 1984. The Magistrate denied the motion. Anschuetz appealed to the district judge, but the judge upheld the Magistrate's denial. When Anschuetz appealed to the Fifth Circuit Court of Appeals for a Writ of Mandamus, Judge Brown's decision followed.<sup>1</sup>

### III. THE HAGUE EVIDENCE CONVENTION

#### A. Definitions

The Multilateral Hague Evidence Convention on the Taking of Evidence Abroad in Civil and Commercial Matters<sup>2</sup> was ratified and entered into force by the United States on October 7, 1972 and by the Federal Republic of Germany on April 27, 1979. The preamble to the Convention identifies its dual purposes: (1) to facilitate the transmission and execution of Letters of Request and to accommodate the different methods used for such actions; and (2) to improve mutual judicial cooperation in civil and commercial matters.<sup>3</sup>

Professor Philip W. Amram<sup>4</sup>, a prominent American proponent of the Hague Convention, described the Convention and its purposes as follows:

The Convention recognizes the use of letters of request, the technique used in the civil law, as the principal means of obtaining evidence abroad. However, the Convention permits increasing the powers of Consuls to take evidence, codifies existing rights to take evidence informally without the use of judicial authorities, and introduces into the civil law world on a limited basis the concept of taking evidence by commissioners.<sup>5</sup>

Articles 1 and 23 define the letters of request regulated by the Convention. Letters must issue from a "judicial" authority and must be issued in a "civil or commercial matter." They must be used to "obtain evidence" or to perform some "other judicial act."<sup>6</sup>

Other relevant articles for the discussion of *Anschuetz* are the following:

Article 9 requires the requested authority to follow any special proce-

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1. For a full account of the facts see *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 604-605 (5th Cir. 1985).

2. Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, done 18 March 1970 (1972), 23 U.S.T. 2555, TIAS No. 7444, 8 I.L.M. 37 (1969).

3. *Id.*

4. Chairman of the Advisory Committee to the United States Commission on International Rules and Judicial Procedure, and a delegate of the United States to the Hague Conferences on Private International Law in 1956, 1964, and 1968, and the Conference on the Proposed Convention.

5. Amram, Note: *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104 (1973).

6. The Hague Evidence Convention, *supra*, note 2.

dure specified by the requesting authority, subject to the limits of incompatibility, etc.<sup>7</sup>

Article 10 states: in executing a letter of request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution or orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 12(b) directs that execution of a letter of request may be refused if the state addressed considers that its sovereignty or security would be prejudiced thereby.

Article 23 states: 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 in Common Law countries.

Article 27 states that the Convention "shall not prevent a contracting state methods of taking evidence other than those provided for in this Convention."

The Hague Convention was designed to facilitate the process of obtaining evidence in foreign countries without doing violence to the rights of foreign nationals in their own countries, or to each country's notion of its own sovereignty.<sup>8</sup> Professor Amram concluded:

What the Convention has done is to provide a set of minimum standards to which all countries may subscribe. It also provides a flexible framework within which any future liberalizing changes in policy and tradition in any country, with respect to international cooperation, may be translated into effective change in international procedures. At the same time it recognizes and preserves procedures of a country that now or hereafter may provide international cooperation in the taking of evidence on more liberal and less restrictive bases, whether this is effected by side agreement, side convention or internal law and practice.<sup>9</sup>

The United States Justice Department views the Convention as "a great step forward in the area of international judicial assistance in civil and commercial matters."<sup>10</sup>

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7. It is the position of the Federal Republic of Germany that, according to the legislative history and the purpose of Article 9, the provision for declining to proceed in a specially requested way are to be construed narrowly, i.e., it must be genuinely impossible, not merely impracticable, to correspond with the requested method. Shemanski, *Obtaining Evidence in the FRG: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 472 (1982).

8. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651,655 (1969).

9. *Id.*

10. Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 119, 133-134 (1978); as cited in Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evi-*

In recommending ratification, Professor Amram described the possible effects of the Convention: "It makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the front, it will give United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants."<sup>11</sup>

Civil law nations (e.g. the FRG), on the other hand, agreed to make the cooperative procedures for securing evidence in their territory more effective even to the point of requiring their courts to use some common-law practices alien to them, such as the ability of Commissioners to gather evidence in their country. The Convention was proposed in a 'spirit of accomodation'. Grounded in that agreement was an expectation that the Convention procedures would be used and that their territorial sensitivities would be respected.<sup>12</sup>

According to Professor Bernard H. Oxman<sup>13</sup>, even if the treaty did not foreclose all other options for the state seeking evidence abroad (as articulated in Article 23 above), it may require a state to consider in good faith the use of the Convention's procedures before resorting to procedures that are not permitted by the internal law or policy of the state where the evidence is located.<sup>14</sup> In *Volkswagenwerk Aktiengesellschaft, etc. v. Superior Court, Alameda County*<sup>15</sup> (VWAG 1982), a California Court of Appeals cited Article 27 of the Convention to conclude that "the Convention established not a fixed rule but rather a minimum measure of international cooperation. The articles within the Convention should therefore be flexible. In light of the different understandings of 'pre-trial' procedures in civil law and common law countries, it is more likely that foreign courts would honor requests that reflect an American court's decision that each item of evidence sought is properly relevant and necessary for the just disposition of a precise issue or plausible claim."<sup>16</sup>

### B. The *Anschuetz* Opinion

The *Anschuetz* court declared initially that the Hague Convention is permissive rather than mandatory, pursuant to another district court's ruling in *Lasky v. Continental Products Corporation, et al.*<sup>17</sup> In *Lasky*,

*dence Convention*, 37 U. MIAMI L. REV. 733, 761.

11. Amram, *supra* note 8.

12. *Id.*

13. Professor of Law at University of Miami School of Law, Miami, Ohio.

14. Authority for such a synthesis could be found in the liberal rule that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Art. 31, U.N. Doc. A/CONF. 39/27 (1979), as cited in Oxman, *supra* note 10 at 761.

15. 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (Ct. App. 1982).

16. VWAG 1982, 176 Cal. Rptr. at 886.

17. 569 F. Supp. 1227 (E.D. Pa. 1983).

the court cited Article 27 of the Convention in support of its conclusion that the Convention "shall not prevent a contracting state from using methods of taking evidence other than those provided for in this Convention."<sup>18</sup> Judge Brown distinguished his case from the three prominent California cases,<sup>19</sup> holding that the state laws in those cases needed to yield to the supremacy of a federal treaty, but "the Federal Rules of Civil Procedure have the force and effect of a federal statutes,"<sup>20</sup> so they need not yield to a federal treaty.<sup>21</sup> The *Anschuetz* court touched only briefly on the purpose of the Hague Convention, which was so clearly and adamantly expressed in *VWAG 1982*. The *VWAG 1982* court held that "the Hague Convention provides international access, by means consistent with local sovereignty, to evidence within West Germany. One of the principal objects of a Convention on this subject is to bridge differences between common law and civil law nations."<sup>22</sup> Instead, Judge Brown dwelled on the reservations in the Convention. He said articles such as Article 23<sup>23</sup> allow states to limit the scope of evidence taking for which they will employ their compulsory powers on behalf of foreign courts, but does not give foreign authorities the significant prerogative of determining how much discovery may be taken from their nationals who are litigants before American courts.<sup>24</sup> "If the *Anschuetz* corporation were to have its way, foreign authorities would be the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court."<sup>25</sup>

#### IV. INTERNATIONAL COMITY

##### A. Definitions

Courts which agree that personal jurisdiction affords them the right to use the domestic procedural laws, recognize at the same time the countervailing force of international comity. International comity is "the concept that the courts of one sovereign state should not, as a matter of

18. The Hague Convention, *supra* note 2, Art. 27.

19. Volkswagenwerk Aktiengesellschaft v. Superior Court in and for County of Sacramento (*VWAG 1973*), 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (Ct. App. 1973); Volkswagenwerk Aktiengesellschaft, etc. v. Superior Court, Alameda County (*VWAG 1982*), 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (Ct. App. 1982); and Pierburg GmbH & Co. KG v. Superior Court of Los Angeles County (*Pierburg*), 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (Ct. App. 1982). In these state court cases, the judges ruled that the Supremacy Clause of the United States Constitution dictated that a Federal treaty preempted state procedural law.

20. *United States for Use of Tanos v. St. Paul Mercury Insurance Co.*, 361 F.2d 838 (5th Cir. 1966), *cert. denied*, 385 U.S. 971 (1966); *cited in Anschuetz*, at 608.

21. *In re Anschuetz*, 754 F.2d at 608.

22. *VWAG 1982*, 176 Cal. Rptr., at 881.

23. Article 23 of the Convention states that 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. See The Hague Evidence Convention, *supra* note 2.

24. *In re Anschuetz*, 754 F.2d at 612.

25. *Id.*

sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternate means make clear that the order is justified; judicial restraint is the basis of this concept which American courts traditionally recognize."<sup>26</sup>

To allow a forum court to substitute the Hague Convention with its own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories to the treaty.<sup>27</sup> Traditional rules of international comity prohibit court orders that are inconsistent with another state's laws, unless a balancing of competing interests and alternatives justifies the order.<sup>28</sup> Judicial self-restraint is a policy of avoiding international discovery methods productive of friction with the procedures of host nations.<sup>29</sup> The failure of one litigant in a domestic action to demand compliance with the Convention cannot divest the foreign nation of its sovereign judicial rights under the Convention. The Convention may be waived only by the nation whose judicial sovereignty would thereby be infringed upon.<sup>30</sup>

Competing interests were weighed in *Graco v. Kremlin, Inc.*,<sup>31</sup> by the standards in RESTATEMENT SECOND OF FOREIGN RELATIONS LAW § 40 (1963), which require each State to consider moderating its jurisdiction in the light of such factors as:

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person,
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.<sup>32</sup>

The *Graco* court also noted that the RESTATEMENT SECOND § 40 was not tailored specifically to resolve conflicts between foreign laws and discovery requests. However, RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW §. 420 (Tentative Draft No. 3)(1980), gives courts guidelines in this situation. The factors are:

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26. *VWAG 1982*, 176 Cal. Rptr., at 883.

27. 100 F.R.D. AT 60.

28. *Schroeder v. Lufthansa German Airlines*, 3 Av. L. Rep. (CCH)(18 Av. Cas. par. 17, 222), as cited in *Th. Goldschmidt A.G. v. Bob Smith*, 676 S.W.2d 443 (Tex. Civ. App. 1984).

29. *VWAG 1982*, 176 Cal. Rptr. at 883; *Volkswagenwerk Aktiengesellschaft v. Superior Court in and for the County of Sacramento*, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (Ct. App. 1973).

30. *Pierburg Gmbh & Co. KG v. Superior Court of Los Angeles County*, 137 Cal. App. 3d 238, 186 Cal. Rptr. at 876 (Ct. App. 1982).

31. *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984).

32. See *Graco*, 101 F.R.D. at 512.

- (a) the importance of the documents or information,
- (b) the specificity of the request,
- (c) the origin of the documents,
- (d) the extent to which the foreign state's interests are implicated,
- and
- (e) the possibility of securing the information through alternate means.<sup>33</sup>

In the United States, evidence gathering in civil litigation is primarily a function of the parties, not of the court. A party seeking evidence here for use in a civil action abroad does not usurp the authority of any United States court, so long as no compulsion is involved. In many civil law countries, however, the gathering of evidence is an exercise of "judicial sovereignty" entrusted exclusively to the courts.<sup>34</sup>

The Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law has stated:

In drafting the Convention, the doctrine of "judicial sovereignty" had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.<sup>35</sup>

The Report went on to state:

[t]he 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. This civil law approach has a direct bearing upon choice among the three general methods of taking evidence abroad.<sup>36</sup>

In *S.S. Lotus* (France v. Turkey)<sup>37</sup>, the Permanent Court of International Justice held that "a State may not directly invoke its compulsory process against foreign nationals in the territory of a sovereign state without the latter state's consent." West Germany, since its inception, has taken the position that gathering of evidence within the state by a foreign state may be regarded as a violation of West German's judicial sover-

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33. *Id.*

34. Oxman, *supra* note 10 at 762.

35. *Id.*

36. *Id.*

37. 1927 P.C.I.J., Ser. A, No. 10, (Judgment of Sept. 7).



eignty.<sup>38</sup> Politically, every intrusion by a court of one nation into the sovereign domain of a foreign nation has the potential for creating a political problem between the nations concerned, because it may be regarded as an infringement on a country's territorial sovereignty.

To alleviate this problem somewhat, West Germany and the United States signed a Treaty of Friendship<sup>39</sup> which provides that:

Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party and to their property, enterprises and other interests. . . [the] offices, warehouses, factories and other premises of nationals and companies of either Party are Subject to official search and examinations. . . only according to law.<sup>40</sup>

The relevant law is presumably that of the place where such premises are located.<sup>41</sup> The two countries agreed this treaty would stay intact after the adoption of the Hague Evidence Convention.<sup>42</sup> There is another area of law incorporated into international comity. The "constitutional law" that orders relations among separate nations is customary international law as well as treaties and other agreements to which the nations are parties. The basic treaty provisions requiring respect for a foreign state as a sovereign equal, and protection of the rights and interests of its nationals and companies, are set forth in the Charter of the United Nations. Among the interests to be weighed, the concept of "territorial sovereignty" is rooted in the U.N. Charter as well as U.S. precedent and I.C.J. case-law. The U.N. General Assembly declared that sovereign equality of all member nations includes the concepts that:

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable. . . .<sup>43</sup>

Chief Justice Marshall authored the American formulation of the principle of territorial sovereignty in 1812: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of [sic] no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. . . . [T]he jurisdiction of

38. Volkswagenwerk Aktiengesellschaft, etc. v. Superior Court, Alameda County, 176 Cal. Rptr., 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (Ct. App. 1982), citing Report of United States Delegation to Eleventh Session of Hague Conference (1969) reprinted in 8 I.L.M. 785, 804, 806; Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters* (1969) 18 INT'L & COMP. L.Q. 618, 646, 647.

39. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States—West Germany, art. I, 1, 7 U.S.T. 1839, T.I.A.S. No. 3593.

40. *Id.*

41. Oxman, *supra* note 10 at 746.

42. *Id.* at 745.

43. U.N. CHARTER art. 2, para. 1; as cited in Oxman, *supra* note 10 at 733.

courts is a branch of that which is possessed by the nation as an independent sovereign power."<sup>44</sup> This is in agreement with the P.C.I.J.'s views in *The S.S. Lotus* case.

### B. *The Anshuetz Opinion*

In the *Anshuetz* case, the West German government's and the United States Department of Justice's opinions were clearly set out. The German government stated that "the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, would be a violation of German sovereignty unless the order is transmitted according to a letter of request as specified in the [Hague Evidence] Convention."<sup>45</sup> It can therefore be implied that with full knowledge of all the provisions of the Convention, West Germany would have accepted and executed letters of request properly given to them. The Department of Justice contended that the Hague Convention is not the exclusive method of obtaining evidence and that the district court's order regarding document production did not conflict with any treaty obligation of the United States under the Convention. The Department of Justice, however, urged that a careful comity analysis be employed by courts before departing from the mechanisms of the Convention. It is also the Department's position that a district court's order of depositions to be conducted on German soil is a violation of the international law obligations of the United States.<sup>46</sup> The Department of State supports the German position, and has offered in the past "its own services in transmitting letters rogatory to the German authorities as provided by federal law"<sup>47</sup> and the Hague Evidence Convention.<sup>48</sup>

The *Anshuetz* court did not heed the above authorities' advice, and chose instead to take a stricter view of international comity. Using the definition in *Companie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum*,<sup>49</sup> Judge Brown concluded that "American courts should refrain, whenever it is feasible, from ordering a person to engage in activities that would violate the laws of a foreign nation. Comity, however, is not a matter of absolute obligation. . . ; it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."<sup>50</sup> The *An-*

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44. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

45. *In re Anshuetz* at 605.

46. *Id.*

47. FED. R. CIV. P. 28(b); as cited in *VWAG* 1973, 33 Cal. App.3d, at 505.

48. *The Hague Convention*, done Mar. 18, 1970, (1972) 23 U.S.T. 2555, T.I.A.S. No. 7444, 8 I.L.M. 37 (1969).

49. *Companie Francaise D'Assurance Pour le Commerce Exterieur v. Philips Petroleum*, 105 F.R.D. 16.

50. *In re Anshuetz*, at 609; citing *Hilton v. Guyot*, 159 U.S. 113 (1895), and *Companie Francaise*, 105 F.R.D. at 28.

*schuetz* court also relied on *Murphy v. Reifenhauer KG Maschinenfabrik*<sup>51</sup> to define international comity. The *Murphy* court decided that: (1) to require a litigant to proceed first under the Convention at a relatively late stage in discovery, and particularly where it appears that a request for production of documents under the Convention would be futile; (2) the United States interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation far outweighs West German's interest in protecting the integrity of its judicial rights and procedures and; (3) in the interest of the parties and of sound judicial administration generally, unnecessary delay in discovery should not be tolerated.<sup>52</sup> The *Lasky* court as well as the *Murphy* court recognized that they must exercise self-restraint pursuant to principles of international comity, but reasoned that where it was not clear that compliance with discovery would require a violation of West German law or impinge upon the sovereignty of the Federal Republic of Germany's law, discovery could go forward under the Federal Rules of Civil Procedure and the Hague Evidence Convention would not be applied.<sup>53</sup>

The Federal Rule of Civil Procedure 28(b) provides the same three procedures<sup>54</sup> (i.e., discovery through a Consul, a court-appointed commissioner, or a letter rogatory [letter of request]), but unlike the Convention, states further that it is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases.<sup>55</sup> A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)".<sup>56</sup>

The *Anschuetz* court relied on *United States v. First National City Bank*<sup>57</sup>, in which the Second Circuit Court of Appeals held "it is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of materials."<sup>58</sup>

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51. *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984).

52. *Id.* at 363.

53. *Lasky*, 560 F. Supp. at 1228-1229.

54. Fed. R. Civ. P. 28(b): In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony; or (3) pursuant to a letter rogatory [i.e. letter of request]. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate.

55. *Id.*

56. *Id.*

57. *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968).

58. *Id.* at 900.

Another court disagreed with this assumption. In *Philadelphia Gear Corporation v. American Pfauter Corporation*<sup>59</sup>, a Pennsylvania court conceded that "a corporation doing business in this jurisdiction. . .remains subject to any discovery orders that might issue. . .[but went on to declare that] the proper exercise of judicial restraint requires that the avenue of first resort be the Hague Evidence Convention."<sup>60</sup> The fact that a witness, documents, or a person in control of other evidence located abroad is subject to the jurisdiction of the court does not necessarily mean the court should apply the ordinary discovery practices of the forum.<sup>61</sup> This analysis is in agreement with *Philadelphia Gear* in that the existence of jurisdiction is relative rather than absolute, and should not be taken out of context.<sup>62</sup>

The notion that jurisdiction to command appearance before the court "domesticates" the witness or party for all purposes relevant to the litigation is fallacious.<sup>63</sup> Courts should not ignore the foreign nationality or locus of the witness or evidence. To allow a forum court to proceed under its own practices with no regard to the Hague Evidence Convention or with no awareness of the need for international cooperation "runs afoul of the interests of sound international relations and comity."<sup>64</sup>

The *Anschuetz* court purported to follow *Societe Internationale pour Participations Industrielles et Commerciales, S.A., etc. v. Rogers*,<sup>65</sup> declaring that "a finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary."<sup>66</sup> Judge Brown fails to note, however, the deciding factor in *Societe Internationale*: "The Court must weigh considerations of international comity in determining what sanctions, if any, to impose for a failure to comply with the court's order."<sup>67</sup> The Supreme Court of the United States then concluded that when good faith efforts to comply with the production order are shown, and a party fails because to so comply would subject itself to criminal prosecution, a federal district court cannot impose the sanction of dismissal.<sup>68</sup> It was clear to the Supreme Court that the inability to satisfy discovery requirements fostered by decisions and circumstances beyond a party's control constitutes sufficient reason

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59. *Philadelphia Gear Corporation v. American Pfauter Corporation*, 100 F.R.D. 58 (E.D. Pa. 1983).

60. *Id.* at 61.

61. Oxman, *supra* note 10.

62. *Philadelphia Gear*, 100 F.R.D. at 60.

63. Oxman, *supra* note 10.

64. *Philadelphia Gear*, 100 F.R.D. at 60.

65. *Societe Internationale pour Participations Industrielles et Commerciales, S.A., etc. v. Rogers*, 357 U.S. 197 (1958).

66. *Id.* at 204, 206.

67. *Id.*

68. *Id.*

for non-compliance.<sup>69</sup>

*In re Anschuetz* is a demonstration of an American court's exploitation of the tenuous relationship between domestic and international law. Judge Brown asserted that "insofar as the Anschuetz corporation seeks discovery it would be permitted the full range of free discovery provided by the Federal Rules of Civil Procedure. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention."<sup>70</sup>

This analysis is inconsistent with any of the facts in the case. Anschuetz corporation gave no indication that it did not also expect to be bound by the Hague Convention procedures. It merely asked the other parties to use the Convention as a first resort, and invited further discussion if that proved to be an impossibility. There were no efforts made whatsoever to apply the Hague Convention.

Domestic procedures should only be limited to the extent of comity considerations, curtailed discretion, or implied statutory qualifications. Courts must conform to channels and procedures established by the host nation.<sup>71</sup>

## V. CONCLUSION

If international agreements are ever to be effective, a court must seriously attempt to comply with them before automatically jumping from the jurisdictional conclusion to the domination of internal over international law. Treaties must always be regarded with the same spirit of cooperation in which they were made; otherwise they are useless. The basic principles of sound international relations in case-law, statutes, and re-statements dictate that the Hague Evidence Convention must be used as an avenue of first resort. It is a flexible document to be sure, but at the same time it serves as an assurance to the civil-law countries that the United States is willing to make some compromises in order to close the gap a little between civil-law and common-law discovery procedures. *Anschuetz* dilutes the efforts made by American legislators in 1972, when the Hague Convention was ratified. A close scrutiny of this case proves that the court in *Anschuetz* should have ordered all parties involved to first make the attempt to use the Hague Evidence Convention.

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69. *Id.*

70. *In re Anschuetz* at 606.

71. *Volkswagenwerk Aktiengesellschaft v. Superior Court in and for the County of Sacramento*, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (Ct. App. 1973).