An Examination of Factors Considered By U.S. Courts in Ruling on Requests to Conduct Discovery of Information Located in Foreign Countries

American Bar Association
Annual Meeting
August 8, 2014
Boston, Massachusetts

George L. Washington, Jr.
Head of Litigation for the Americas
Orange Business Services
13775 McLearen Road
Oak Hill, Virginia 20171
When a party in U.S. litigation serves discovery requests for information located in a foreign country, American courts are often faced with a choice between deferring to extraterritorial discovery procedures (such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters) or compelling the requested discovery through the Federal Rules of Civil Procedure (or analogous state rules). This dilemma can be compounded by the existence of foreign blocking statues, banking secrecy laws, data privacy laws and other laws designed to prohibit or restrict disclosure of certain types of information outside or inside the particular country. The seminal case Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist., 482 U.S. 522 (1987), provided a framework for understanding the key considerations that must be taken into account when courts rule on such requests, and it also clarified questions about the interplay between American discovery rules and the laws of other countries. The discussion below examines the central holdings of Aerospatiale and it reviews the seven factors that courts often turn to when ruling on requests to discover information in foreign countries.

The Aerospatiale Decision

The Supreme Court in Aerospatiale answered two central questions concerning the Federal Rules of Civil Procedure’s interplay with the Hague Convention and the degree of deference that U.S. courts must give to the Hague Convention when litigants seek discovery of information located in a foreign signatory to the Convention. First, the Court held that the Convention does not provide exclusive means or mandatory procedures for U.S. litigants to obtain information located in a foreign territory. Second, the Court concluded that considerations of international comity do not in all instances require American litigants to “first
resort” to Convention procedures before initiating discovery under the Federal Rules of Civil Procedure (hereafter, the “Federal Rules”).

_Hague Convention Procedures Are Not Exclusive or Mandatory_

Petitioners in _Aerospatiale_ were aircraft manufacturers that were owned by the Republic of France and that were sued in U.S. federal court after one of their planes crashed in Iowa. 482 U.S. 524-25. In response to plaintiffs’ document requests, interrogatories and requests for admission, petitioners moved for a protective order on the grounds that the Hague Convention is the exclusive avenue for obtaining the discovery sought by plaintiffs. Id. at 525. Petitioners asserted that, because they were “‘French corporations, and the discovery sought can only be found in a foreign state, namely France,’” the discovery had to be conducted pursuant to the Hague Convention. _Id._ at 525-26. According to petitioners, the Hague Convention “provide[d] the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory.” _Id._ at 529 (internal quotation marks omitted). The Republic of France took a similar position, arguing in an amicus brief that “[t]he Hague Convention is the exclusive means of discovery in transnational litigation among the Convention’s signatories unless the sovereign on whose territory discovery is to occur chooses otherwise.” _Id._ at 529 n. 11 (citing Brief for Republic of France as _Amicus Curiae_ 4).

The Court “reject[ed]” the exclusivity arguments “as inconsistent with the language and negotiating history of the Hague Convention,” _id._ at 534, and it therefore concluded that the Eighth Court of Appeals had “correctly rejected this extreme position.” _Id._ at 529. While acknowledging that petitioners had “correctly asserted that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States,” _id._ at 533, the Court noted that “[t]his observation . . . does not dispose of the question”
and that the question required an analysis of “the interaction between these two bodies of federal law.” *Id.* The Court performed such an analysis through a review and examination of the history and text of the Convention, which led the Court to conclude that there was no basis for a reading of the Convention as containing mandatory procedures. To the contrary, the Court determined that such a reading of the Convention’s procedures “is foreclosed by the plain language of the Convention,” *id.* at 529, and the Court instead concluded that “the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad.” *Id.* at 536.

Specifically, the Court found that the Convention is devoid of any “mandatory” language that could be construed to require exclusive use of Convention procedures when American litigants seek to discover information located within the borders of a foreign signatory. Noting the “conspicuous” “absence within the Hague Convention of any command that a contracting state must use Convention procedures,” *id.* at 535, the Court observed that Chapter I ("Letters of Requests") and Chapter II ("Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners") “both use permissive rather than mandatory language.” *Id.* Specifically, “Article 1 provides that a judicial authority in one contracting state ‘may’ forward a letter of request to the competent authority in another contracting state for the purpose of obtaining evidence. Similarly, Articles 15, 16, and 17 provide that diplomatic officers, consular agents, and commissioners ‘may . . . without compulsion,’ take evidence under certain conditions.” *Id.*

In addition to the use of permissive language in the Convention, the *Aerospatiale* Court found petitioners’ assertion of exclusivity to be undermined by the fact that the Convention does not purport to amend the domestic laws of the signatories. “The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the
Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.” *Id.* at 534.

Rather, the Court determined that Articles 23 and 27 in Chapter III of the Convention contained provisions that could only be construed as permitting a contracting state to avail itself of its own laws and procedures.

Article 23 authorizes a contracting state to opt out of the Convention’s procedures by declaring that it “will not execute any letter of request in aid of pretrial discovery of documents in a common-law country.” *Id.* at 536. “Surely,” the Court reasoned, “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 enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery.” *Id.*

Thus, absent “explicit textual support,” the Court found itself “unable to accept the hypothesis” that the common-law contracting states agreed to forego recourse to their own discovery procedures while also accepting “the possibility that a contracting party could unilaterally abrogate even the Convention's procedures.” *Id.* at 537.

Article 27’s terms provided a more direct basis for the Court to conclude that the Hague Convention was not intended to provide a compulsory process for obtaining discovery of information in foreign countries. The Court noted that “Article 27 plainly states that the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention.” *Id.* at 537-38. “Thus,” the Court concluded, “the text of the Evidence Convention . . . unambiguously supports the conclusion that it was
intended to establish optional procedures that would facilitate the taking of evidence abroad.” *Id.* at 538.

In the final analysis, the Court emphasized, the fact that there is an “utter absence in the Hague Convention of an exclusivity provision has an obvious explanation: The contracting states did not agree that its procedures were to be exclusive.” *Id.* at 538 n23. To read the Convention otherwise “would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities.” *Id.* at 539. Because the Convention “contains no such plain statement of a pre-emptive intent,” the Court concluded that “the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.” *Id.* at 539-40.

*There is No Rule of “First Resort” to Hague Convention Procedures*

The Court also rejected an argument from petitioners that, even if it does not consider the Hague Convention’s procedures to be mandatory, the “Court should adopt a rule requiring that American litigants first resort to those procedures before initiating any discovery pursuant to the normal methods of the Federal Rules of Civil Procedure.” *Id.* at 541-42. The Court found itself “convinced that such a general rule would be unwise,” *id.* at 542, because “the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive” in many situations. *Id.* Moreover, the procedure would be “less certain to produce needed evidence than direct use of the Federal Rules.” *Id.* Accordingly, “a rule of first resort in all
cases would . . . be inconsistent with the overriding interest in the ‘just, speedy, and inexpensive determination’ of litigation in our courts.” *Id.* at 542-43 (citing Fed. Rule Civ. Proc. 1).

The Court was not persuaded by petitioners’ claim that “a rule of first resort is necessary to accord respect to the sovereignty of states in which evidence is located.” *Aerospatiale*, 482 U.S at 543. In the Court’s view, “the concept of international comity requires . . . a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners’ proposed general rule would generate.” *Id.* at 543-44. The Court therefore “decline[d] 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.” *Id.* at 544.

Petitioners also argued that “blocking statutes” in France would penalize them for responding to any discovery requests that did not comply with the Hague Convention and that they were therefore prohibited from responding to plaintiffs’ requests. *Id.* at 526. The Court addressed the French blocking statute at length, noting at the start that it “does not alter . . . [the Court’s] conclusion” that a rule of first-resort to the Hague Convention’s procedures was unwarranted. *Id.* at 544 n.29. “It is well settled,” the Court observed, “that such statutes do not deprive an 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.” *Id.* (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 204-206 (1958)). Thus, “it is clear that American courts are not required to adhere blindly to the directives of such a statute.” *Aerospatiale*, 482 U.S. at 544 n.29. The Court also noted that “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 . . .

that the party could respond to on the basis of personal knowledge.”  *Id.*  While “[t]he blocking

statute . . . is relevant to . . . [a] court's particularized comity analysis . . . to the extent that its
terms and its enforcement identify the nature of the sovereign interests in nondisclosure of
specific kinds of material,” *id.*, it “need not be given the same deference by courts of the United
States as substantive rules of law at variance with the law of the United States” where such a
statute “frustrate[s] . . . [the] goal” of “adjudicat[ing] . . . on the basis of the best information
available.”  *Id.*  (internal quotation marks and cite omitted).

Although the Court reaffirmed the principle that U.S. courts are not required to accord
deference to blocking statues, it cautioned that “American courts, in supervising pretrial
proceedings, should exercise special vigilance to protect foreign litigants from the danger that
unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”
*Id.*  at 546.  While courts should always strive to prevent abuse of discovery requests, “[w]hen it
is necessary to seek evidence abroad, . . . the district court must supervise pretrial proceedings
particularly closely to prevent . . . [such] abuses.”  *Id.*  In this regard, the Court commented,
“[o]bjections [from foreign litigants] to ‘abusive’ discovery . . . should therefore receive the most
careful consideration” and “American courts should . . . 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.”  *Id.*

*Key Factors Courts Consider when Reviewing Requests for Foreign Discovery*

The Court did “not articulate specific rules to guide this delicate task” of weighing
problems and interests that arise in the context of foreign discovery requests.  *Id.*  However, it
commented that “[t]he nature of the concerns that guide a comity analysis is suggested by the
Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986) (Restatement),” id. at 544 n.28, which lists the following five factors that “are relevant to any comity analysis” and that district courts have often considered after *Aerospatiale* in determining whether to order foreign discovery in the face of objections by foreign litigants:

(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; and

(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.

*Aerospatiale*, 544 U.S. at 544 n.28.

Courts of the Second Circuit and other jurisdictions have also considered two additional factors:

(6) the compliance hardship on the party or witness from whom discovery is sought; and

(7) the good faith of the party resisting discovery.


**Factor 1: The Importance of the Documents or Other Information Requested**
The first factor calls on the court to weigh the importance of the foreign discovery that is requested. Naturally, courts perform this task by determining the requested information’s significance to the allegations in plaintiff’s complaint or to plaintiff’s ability to prove the alleged cause of action. In doing so, however, courts have applied different standards to measure the level of importance that is required.

Some courts have determined that the requested information has to satisfy a higher level of importance in order for this factor to weigh in favor of proceeding with foreign discovery under the Federal Rules over objections about foreign law. See e.g., In re Activision Blizzard, Inc. Stockholder Litigation, 86 A.3d 531, 544 (Del. Ch. 2014) (“This factor calls on the court to consider the degree to which the information sought is more than merely relevant under the broad test generally for evaluating discovery requests.”) (emphasis added); Wultz, 910 F. Supp. 2d at 556 (“With regard to foreign discovery materials, I recognize that ordinarily it may be ‘reasonable to limit foreign discovery to information that is necessary to the action . . . and directly relevant and material,’ rather than ‘information that could lead to admissible evidence.’”) (citing Restatement (Third) of Foreign Relations Law of the United States § 442, cmt. a).

Courts that take such an approach often do so based on an expressed acknowledgement of the differences between pretrial discovery procedures in the U.S. and the laws in other countries. See Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 440 (EDNY 2008) (“Because the scope of civil discovery in the United States is broader than that of many foreign jurisdictions, some courts have applied a more stringent test of relevancy when applying the Federal Rules to foreign discovery.”) (citing Aerospatiale, 482 U.S. at 542, 546, as characterizing the requested documents in that case as "vital" to the litigation, and for the proposition that the Supreme Court
therein advised U.S. courts that “‘[w]hen it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses’’’); see also Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992) (“Where the outcome of the litigation ‘does not stand or fall on the present discovery order,’ . . . courts have generally been unwilling to override foreign secrecy laws.”) (quoting In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 999 (10th Cir. 1977)).

Courts that employ the more stringent standard have tended to find that this first factor weighs in favor of proceeding under the Federal Rules when the requested information is “vital” or “crucial” to claims raised in the litigation. Thus, the court in Strauss denied a motion by defendant Credit Lyonnais for a protective order that would have compelled plaintiffs to seek requested discovery through the Hague Convention or would have excused Credit Lyonnais from providing discovery protected under France’s bank secrecy laws. Strauss, 249 F.R.D. at 430. Plaintiffs in that case had alleged that Credit Lyonnais was liable for providing material support, resources and financing to a terrorist organization, and they sought documents and information relevant to Credit Lyonnais’s knowledge of a group associated with the terrorist organization, that group’s alleged terrorist connections, and the extent to which Credit Lyonnais provided financial services in support of that group’s alleged terrorist acts. Id. at 440. In reviewing the discovery requests, the court determined that plaintiffs sought banking account information that was “crucial and relevant” to their claims, which required a showing that defendant “knowingly provided material support and/or resources to a designated terrorist and willingly provid[ed] or collect[ed] funds used to carry out terrorist acts.” Id. Thus, the court reasoned, “Given plaintiffs’ allegations regarding Credit Lyonnais’s provision of financial services to . . . [the terrorist group] for more than thirteen years, including . . . distributing funds to alleged terrorist
organizations on behalf of . . . [the group], the court finds that the discovery sought is both relevant and vital to the litigation of plaintiffs’ claims. Because the documents, information and testimony sought by plaintiffs are highly relevant and important to the claims and defenses in this action, the court finds that this first factor weighs heavily in plaintiffs’ favor.” Id. See also Richmark, 959 F.2d at 1475 (“In this case, the information sought is not only relevant to the execution of the judgment, it is crucial. Without . . . [it], TFC cannot hope to enforce the judgment. The execution proceedings, and in some sense the underlying judgment itself, will be rendered meaningless. The importance of the documents to the litigation weighs in favor of compelling disclosure.”); SEC v. Stanford Int’l Bank, Ltd., 776 F. Supp. 2d 323, 331 (ND Tex. 2011) (“Because documents and information concerning the Stanford Defendants' SG Suisse accounts will aid the Receiver in discovering the disposition of the Ponzi scheme funds obtained and used by the Stanford Defendants, the Receiver seeks discovery of relevant and highly important materials. Accordingly, the Court finds that this factor weighs in the Receiver's favor.”).

In contrast to the more stringent standard, some courts have only required relevance as a basis for determining that the first factor weighs in favor of proceeding with foreign discovery under the Federal Rules. See e.g., Strauss 249 F.R.D. at 440 (quoting Compagnie Francaise D’Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 32 n.8 (S.D.N.Y. 1984) (“In ordering production of these documents, this Court does not need to find, nor can it find at this point, that the requested documents are ‘vital’ . . . ”)). This has occurred even where a court has expressly acknowledged that a higher level of scrutiny is appropriate in reviewing requests for foreign discovery. In Wultz, Judge Shira Scheindlin, recognized that a court might ordinarily limit foreign discovery to “necessary,” “directly relevant and material”
information, but “in light of the significant U.S. interest in eliminating sources of funding for international terrorism, and . . . other factors . . ., the law governing discovery disputes in this case must ultimately be the broad discovery rules of the Federal Rules of Civil Procedure.”

_Wultz_, 910 F. Supp. 2d at 556.

In addition, foreign information that has been requested as part of discovery to determine the court’s jurisdiction over a dispute has been viewed under the lower relevance standard because, by its nature, jurisdictional discovery is seen as less intrusive than discovery on the merits of a claim. Thus, the court in_TruePosition, Inc. v. LM Ericsson Tel. Co.,_ 2012 U.S. Dist. LEXIS 29294 (E.D. Pa. Mar. 6, 2012) declined to grant a French defendant’s motion for a protective order that sought to limit jurisdictional discovery between the parties to the channels of the Hague Convention. “The documents in question deal with . . . ETSI's contacts with the United States and are relevant discovery,” the court stated. _Id._ at *4. “In fact, such limited jurisdictional discovery, which is not nearly as intrusive as merits discovery, has been ordered by this Court so that we can determine whether personal jurisdiction over ETSI is proper.” _Id._

**Factor 2: The Degree of Specificity of the Request**

The second factor requires courts to weigh the degree of specificity of the requests for foreign discovery. This analysis flows from the court’s general obligation under_Aérospatiale_to “exercise special vigilance” to ensure that foreign discovery is not abused and that foreign parties are not placed “in a disadvantageous position” by “unnecessary, or unduly burdensome, discovery.” 482 U.S. at 546.

In weighing this factor, courts look to the degree to which the foreign discovery requests are appropriately “tailored” to the claims and defenses of the litigation. _See Strauss_, 249 F.R.D. at 441 (“Here, the court finds that the requested discovery is relevant, vital and narrowly tailored
to the litigation. . . . Plaintiffs’ discovery requests are sufficiently focused on the vital issues in this case: whether and to what extent Credit Lyonnais knowingly provided material support and resources to Specially Designated Global Terrorist organizations, and/or financial services to a terrorist organization.”) (internal quotation marks and cites omitted); id. (“Plaintiffs have established, and Credit Lyonnais has not contested in its submissions, that plaintiffs’ discovery demands are specifically tailored to their claims and the defenses in this action.”); Stanford, 776 F. Supp. 2d at 332 (“Despite the broad scope of the Receiver’s request, the Court finds it reasonably tailored to the circumstances of this case.”).

Where discovery requests seek evidence that is “cumulative,” American “courts are less inclined to ignore a foreign state’s concerns” about conflicts between the discovery and the state’s laws. In re Cathode Ray Tube (CRT) Antitrust Litig., 2014 U.S. Dist. LEXIS 41275, *70 (N.D. Cal. Mar. 26, 2014). Similarly, requests that amount to “[g]eneralized searches for information, the disclosure of which is prohibited under foreign law, are discouraged” and will weigh against discovery under Federal Rules. Richmark, 959 F.2d at 1475. Cf. Stanford, 776 F. Supp. 2d at 332 (finding that SG Suisse bank account transactions were “integral” to an alleged Ponzi scheme and that a discovery request for information related to those transactions thus “does not implicate civil law countries’ traditional concerns with pretrial “fishing expeditions”); In re Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 54 (D.D.C. 2000) (“Since plaintiffs have alleged a prima facie basis for jurisdiction and their revised requests are narrowly tailored and are not the type of blind fishing expeditions of concern to these signatory nations, the Court finds that the signatory defendants’ sovereign interests will not be unduly hampered by proceeding with jurisdictional discovery according to the Federal Rules.”).
The number of requests for information propounded by a party seeking foreign discovery is not necessarily evidence that the discovery sought is burdensome. “The sheer number of requests must be measured against the size and magnitude of the case at hand; given the unprecedented size and complexity of . . . [an] action, . . . [a] . . . court cannot find that plaintiffs are bound to follow the Hague Convention based solely on the number of their discovery requests.” In re Vitamins, 120 F. Supp. 2d at 52. The “pertinent question is whether the requests are narrowly tailored, material to the issues in question, and as unintrusive as possible under the circumstances.” Id.

A party that fails to meaningfully confer about disputes over requests for foreign discovery may face a waiver argument or may otherwise find its position undermined when it opposes such discovery based on foreign law or argues that the discovery should be conducted solely through the Hague Convention. A German defendant in Doster v. Schenk, 141 F.R.D. 50 (M.D.N.C. 1991), found itself in such a compromised position when it moved for a protective order that would have required discovery sought by plaintiffs to be obtained through the Hague Convention. Among other things, defendant’s motion argued that plaintiff’s document requests and interrogatories were “overly broad, burdensome, and not reasonably related to the issues raised by the pleadings.” Id. at 51. In response, plaintiffs “expressed their willingness to cooperate with defendant’s counsel to narrow the scope of discovery and reduce the intrusive nature of the requests,” and one of the plaintiff’s had already pared down its requests considerably before the motion. Id. at 53. Agreeing with plaintiffs that defendant had not “meaningfully cooperat[ed] in a discovery conference wherein plaintiffs could attempt to satisfy defendant’s objections,” the court emphasized that defendant had “not adequately utilized the Local Rule 205(c) discovery conference procedure to eliminate any burdensome discovery,”
which weighed against the defendant’s arguments for a protective order. *Id.* at 53, 55. “By failing to take advantage of the discovery conference procedure, defendant loses the right to urge use of the Hague Convention based on the nature or alleged burden of the discovery requests. . . . Defendant cannot at the same time frustrate attempts to simplify discovery and complain about it being burdensome.” *Id.* at 53.

**Factor 3: Whether the Information Originated in the United States**

Despite the fact that the third factor asks the court to weigh whether the requested information “originated” in the United States, some courts focus their analysis on whether the information is *located* in the United States. *See e.g.*, Richmark, 959 F.2d at 1475 (“The fact that all the information to be disclosed (and the people who will be deposed or who will produce the documents) are *located* in a foreign country weighs against disclosure, since those people and documents are subject to the law of that country in the ordinary course of business.”) (emphasis added); *cf.* Stanford, 776 F. Supp. 2d at 333 (“As *Crédit Lyonnais* makes clear, this factor focuses on ‘whether the ‘information originated in the United States,’ not whether the information currently is *located* there.’” (cite omitted) (emphasis in original)). The Delaware Court of Chancery recently explained the basis for the intended focus on origination. “If the information originated in the United States and is simply being stored abroad or was taken there,” the court stated, “then the American origins of the information and its prior presence in the United States counsel in favor of production. A company or individual should not be able to evade discovery in American courts by secreting information offshore.” *In re Activision Blizzard*, 86 A.3d at 545.

Regardless, in practice, courts have tended to view this factor as weighing against conducting foreign discovery under the Federal Rules where all of the requested information and
the people who would be involved in assembling it are located in a foreign country. See Richmark, 959 F.2d at 1475 (finding that “[t]his factor weighs against requiring disclosure” where the foreign litigant “has no United States office” and “[a]ll of its employees, and all of the documents [that were] requested . . . are located in the . . . [Peoples Republic of China]”). This is especially true where the foreign country has laws that purport to prohibit disclosure of the requested information. See e.g., Stanford, 776 F. Supp. 2d at 333-34 (finding that “this factor weighs in SG Suisse's favor” and against disclosure under the Federal Rules where “SG Suisse insists that the materials responsive to the . . . request may only be found in Switzerland,” where Swiss bank employees are prohibited “from turning over the . . . documents to their colleagues in the United States for purposes of production . . . because . . . the act of facilitating the improper production abroad . . . constitutes the violation” of Swiss Penal Code and “where Swiss law apparently criminalizes the preparatory acts of selecting the relevant documents which . . . will [be disclosed] . . . in the forum state”).

Where there is evidence that the foreign laws against disclosure are actually enforced, courts have been even more persuaded that this factor weighs against discovery under the Federal Rules. See Reinsurance Co. of America, Inc. v. Administratia Asigurarilor De Stat, 902 F.2d 1275, 1282 (7th Cir. 1990) (noting that “[a]ll the information . . . sought through these interrogatories is located within Romania” and subject to Romania’s “vigorously enforced” law against disclosing “service secrets, thus presenting a “very real threat [of criminal sanctions] faced by . . . [foreign litigant employees] who would have to remove this information from Romania”).
Factor 4: The Availability Of Alternative Means Of Securing The Information

Similar to the second factor, the motivating intent of the fourth factor is to avoid “unnecessary . . . discovery” that may unduly burden a foreign litigant or place foreign parties “in a disadvantageous position.” Aerospatiale, 482 U.S. at 546. “If the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.” Richmark, 959 F.2d at 1475. To the extent that alternative means exist, some courts take the view that “the alternative means must be substantially equivalent to the requested discovery.” Id. (internal quotation marks and cite omitted).

Courts have tended to find this factor weighing in favor of discovery under the Federal Rules where the requested information is in the complete control of the foreign party resisting discovery and where the requestor cannot reasonably obtain the information otherwise. Thus, in Strauss, the court noted that “plaintiffs do not have direct or ready access to Credit Lyonnais’s records through means other than discovery demands” and “only Credit Lyonnais can provide plaintiffs with complete responses to their requested discovery.” Strauss, 249 F.R.D. at 442. Similarly, in Stanford, the court held that this factor weighed in favor of a court-appointed Receiver who sought discovery of banking transactions from third-party Swiss company SG Suisse. “Only SG Suisse can produce the documents and information sought by the Receiver, so no alternative means of securing the information are available. SG Suisse avers that its Miami office lacks access to these materials and that no documents or information responsive to the Receiver’s request may be found in the Miami office.” Stanford, 776 F. Supp. 2d at 334. The court noted that the U.S. Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) had access to the requested information under applicable treaties, but the SEC claimed it was legally prohibited from sharing the information with the Receiver. Id.
Accordingly, obtaining the information through DOJ or the SEC was not an available alternative means, so the court concluded that the factor weighed in favor of granting the Receiver’s discovery request under the Federal Rules. *Id.* See also, *In re Cathode Ray Tube*, 2014 U.S. Dist. LEXIS 41275 at *71-72 (finding that “this factor weighs in favor of production” of a confidential European Commission “Decision” concerning an investigation of defendants’ participation in an alleged price-fixing conspiracy where a public version of the Decision was not yet available, where defendants had received a nonpublic version of the Decision, and, consequently, where “there does not appear to be an alternative means of accessing the Decision without contravening EU law and policy”).

It should be noted that, in analyzing this factor, courts often discuss the adequacy or effectiveness of the Hague Convention as an alternative means of securing the information. In this context, “[n]umerous decisions evince . . . skepticism about the efficiency, timeliness, and effectiveness of the Evidence Convention.” *In re Activision Blizzard*, 86 A.3d at 546 (citing decisions). See e.g., *TruePosition*, 2012 U.S. Dist. LEXIS 29294 at *15 (“Even though both the Federal Rules and the Hague Evidence Convention are means of securing information, it must be noted that the procedures required pursuant to the Hague Evidence Convention are much more likely to be time-consuming than the procedures under the Federal Rules.”); *In re Automotive Refinishing Paint*, 358 F.3d 288, 300 (3d Cir. 2004) (“Aerospatiale notes that in many situations, the Convention procedures would be unduly time-consuming and expensive, and less likely to produce needed evidence than direct use of the Federal Rules.”); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51 (EDNY 2010) (“[T]he outcome of a request pursuant to the Convention is by no means certain, and making the request will undeniably result in delays of unknown, and perhaps considerable, duration.”); *Doster*, 141 F.R.D. at 54 (“It has been
recognized that use of the Convention procedures in Germany can involve considerable time and expense.”) (cite omitted). As a result, because of the view that “Hague would be extremely unlikely to provide efficient and effective discovery,” In re Vitamins Antitrust Litig., 120 F. Supp. 2d at 54, courts have often been unwilling to view the Hague Convention as an available alternative means for obtaining foreign discovery and that the factor weighs in favor of discovery under the Federal Rules.

Factor 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.

The fifth factor is most often given the greatest weight by courts in analyzing whether discovery should proceed under the Federal Rules or whether American courts should follow the Hague Convention or otherwise defer to foreign anti-disclosure laws. See Wultz, 910 F. Supp. 2d at 558 (“This factor -- the balancing of national interests -- ‘is the most important, as it directly addresses the relations between sovereign nations.’” (quoting Strauss, 249 F.R.D. at 443-44); Strauss, 249 F.R.D. at 443 (“The comity factor -- requiring analysis of the competing interests of the United States and France -- is of the greatest importance in determining whether to defer to the foreign jurisdiction.”) (quotation marks and cite omitted). This factor “is a balancing of competing interests, taking into account the extent to which the discovery sought serves important interests of the forum state versus the degree to which providing the discovery would undermine important interests of the foreign state.” In re Activision Blizzard, 86 A.3d at 547.

Courts have observed that it “is axiomatic that the United States has ‘a substantial interest in fully and fairly adjudicating matters before its courts.’” Strauss, 249 F.R.D. at 443. Although this is recognized as an important interest, courts typically view it as a general interest and acknowledge that it is balanced by the foreign jurisdiction’s interests in enforcing and promoting
respect for its laws. However, in the context of certain types of litigation, courts see this general adjudication interest as bearing greater and more compelling significance. Thus, for example, courts presiding over claims relating to terrorism have regarded the general adjudication interest as accounting for greater weight than it normally would in the balancing of interests. See Strauss, 249 F.R.D. at 443 (“When . . . [the United States’s] interest [in fully and fairly adjudicating matters before its courts] is combined with the United States’s goals of combating terrorism, it is elevated to nearly its highest point, and diminishes any competing interests of the foreign state.”) (quotation marks and cite omitted). Similarly, a compelling national interest has been found in adjudication of other types of claims, including: ensuring that American patent laws were not undermined by a French blocking statute, see Reinsurance, 902 F.2d at 1280 (citing Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984)); protecting the integrity of American antitrust laws through litigation of commercial disputes, see Reinsurance, 902 F.2d at 1280 (citing In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979)); enforcing tax laws, see Reinsurance, 902 F.2d at 1280 (citing United States v. Vetco, 691 F.2d 1281 (9th Cir. 1981)); enforcing securities laws, see Reinsurance, 902 F.2d at 1280 (citing SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (SDNY 1981); and resolving products liability cases involving international suppliers or manufacturers. Doster, 141 F.R.D. at 53. In contrast, adjudication of standard commercial disputes between private parties will not usually implicate interests having greater weight. See Reinsurance, 902 F.2d at 1280.

Typically, courts find that litigants who rely on general expressions of a foreign sovereign’s interests have not satisfied their burden of showing that the factor weighs against discovery under the Federal Rules. Instead, parties opposing foreign discovery usually must identify particular sovereign interests and, because the factor speaks to “important interests” of
the foreign state, such interests must be significant in the eyes of many courts. See e.g., Doster, 141 F.R.D. at 54 (“Defendant likewise fails to show in general how an important German interest would be offended by the use of the Federal Rules of Civil Procedure.”); Cathode, 2014 U.S. Dist. LEXIS 41275 at *72-73 (“[T]he Court must balance international comity with the policies of the Federal Rules . . . in order to determine the extent to which noncompliance with the discovery request would undermine important United States interests, compared to how compliance could undermine important interests of the state where the information is located.”). Moreover, the litigants “must show that the specific discovery . . . [that has been requested] would compromise those interests by a resort to the Federal Rules of Civil Procedure.” Doster, 141 F.R.D. at 54. See also, Richmark, 959 F.2d at 1477 (“Further, neither Beijing nor the PRC has identified any way in which disclosure of the information requested here will significantly affect the PRC’s interests in confidentiality.”); Strauss, 249 F.R.D. at 443 (“Despite numerous and ample opportunities to do so, the French Ministry of Justice has not specifically objected to the plaintiffs’ discovery demands. Rather, the French Ministry of Justice merely restates French law, and vaguely notes French sovereignty, but fails to address how its interest . . . should be reconciled. Nor does the French Ministry of Justice provide any ground for refuting the court’s conclusion that the balance of interests at stake in this case favor production of the relevant information.”).

In weighing the strength of the sovereign’s interests, courts will often consider “‘expressions of interest by the foreign state,’ ‘the significance of disclosure in the regulation . . . of the activity in question,’ and ‘indications of the foreign state's concern for confidentiality prior to the controversy.’” Richmark, 959 F.2d at 1476 (emphasis in original) (citing Restatement (Third) of Foreign Relations Law § 442 comment c.). Thus, for example, where
“Switzerland has a long-standing national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens” and where “[t]hat tradition is embodied in . . . bank secrecy statutes that have the legitimate purpose of protecting commercial privacy inside and outside Switzerland,” Switzerland’s interest in protecting the confidentiality of information within the scope of its anti-disclosure laws has been held to be “substantial.” Stanford, 776 F. Supp. 2d at 336 (quotation marks and cites omitted). On the other hand, where a foreign government “did not express interest in the confidentiality of . . . [the requested] information prior to the litigation in question,” or where the litigant voluntarily or “routinely disclosed information” similar to the sought-after discovery without objection from the foreign government, that state’s interest in protecting the confidentiality of the information is not deemed to be important. Richmark, 959 F.2d at 1476.

The existence of a blocking statute, banking statute or other privacy law has not been consistently viewed as an indication or expression of a substantial interest held by a foreign sovereign. On the one hand, some courts have recognized that such laws represent a valid “sovereign interest in managing access to information within . . . [the country’s] borders, as well as attempting to protect its citizens from discovery in foreign litigation.” TruePosition, Inc., 2012 U.S. Dist. LEXIS 29294 at *17. See also, In re Vitamins Antitrust Litig., 120 F. Supp. 2d at 53 (“Clearly, . . . [Hague Convention] signatory nations have a strong interest in protecting their citizens from what they may perceive as unduly burdensome discovery under evidence laws foreign to and incompatible with their own procedures. . . . [T]hose nations retain a separate and important sovereign interest in ensuring that discovery involving their citizens be taken in accord with their traditions and accepted practices. This interest of foreign nations in the sanctity and respect of their laws is both important and deserving of significant respect.”).
On the other hand, other “courts have been unwilling to give much deference to” such statutes. *MeadWestvaco Corp. v. Rexam PLC*, 2010 U.S. Dist. LEXIS 139843, *5 (E.D. Va. 2010) (cites omitted) (citing decisions that characterize the French blocking statute as “both overly broad and vague” and that found it “need not be given the same deference as a substantive rule of law” and, further, holding that the court was “not persuaded . . . that the circumstances of this case warrant departing from that characterization”). Courts that take this view often cite to the Supreme Court’s discussion of the French blocking statute in *Aerospatiale*, where the Court noted, “It is clear that American courts are not required to adhere blindly to the directives of such a statute. 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.” *Aerospatiale*, 482 U.S. at 544 n.29. Indeed, some courts have gone as far as reasoning that such blocking statutes are in fact “sham law[s]” because they were created for the purpose of blocking U.S. discovery. See e.g., *Strauss*, 249 F.R.D. at 441 (citing decisions critical of France’s blocking statute, including *Minpeco S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 528 (S.D.N.Y. 1987), which noted that that court was not faced with “a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure”). Even where courts do not go so far as to invoke the “sham” characterization, those that are not inclined to defer to foreign anti-disclosure laws have no problem concluding that “the sovereign interest of managing access to information within [a country’s] borders . . . [or] attempting to protect . . . [the country’s] citizens from discovery in foreign litigation, pales in comparison to the interests at stake for the United States.” *TruePosition, Inc.*, 2012 U.S. Dist. LEXIS 29294 at *20.
Factor 6: The Hardship of Compliance on the Party or Witness from Whom Discovery is Sought

“In determining whether a litigant will endure hardship in complying with a discovery request [for information located in a foreign country], courts generally have looked to three elements: whether foreign law creates penalties for complying with discovery requests of U.S. origin, the likelihood that foreign authorities will enforce those laws, and the party/nonparty status of the litigant resisting discovery.” Stanford, 776 F. Supp. 2d at 337 (cites omitted).

In examining the first of the three elements, courts have ruled that the mere existence of a foreign law that purports to penalize a foreign litigant for disclosure of the requested discovery is not dispositive. Thus, “the fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production.” Reinsurance, 902 F.2d at 1282 (quotations marks and cite omitted). As stated above, “It is clear that American courts are not required to adhere blindly to the directives of such a [blocking ] statute.” Aerospatiale, 482 U.S. at 544 n.29. See also, Strauss, 249 F.R.D. at 454 (citing decisions for the proposition that the French blocking statute and the French banking secrecy laws do not necessarily bar U.S. courts from ordering production of requested discovery).

Instead, courts give more weight to evidence regarding the second element – whether foreign authorities would be likely to enforce the law prohibiting disclosure. See e.g., Richmark, 959 F.2d at 1477 (“The effect that a discovery order is likely to have on the foreign company is another factor to be considered. If Beijing is likely to face criminal prosecution in the PRC for complying with the United States court order, that fact constitutes a ‘weighty excuse’ for nonproduction.”) (quoting Rogers, 357 U.S. at 211); Strauss, 249 F.R.D. at 454, (“In examining
the hardship on the party from whom compliance is sought, courts . . . look at the likelihood that enforcement of the foreign law will be successful.”) (quoting Minpeco, 116 F.R.D. at 526).

Even under the second element, some courts make a distinction between anti-disclosure laws that impose only civil liability versus those that impose criminal sanctions. “[C]ourts do not treat foreign discovery laws equally. The prospect that the foreign litigant would face criminal penalties rather than civil liabilities weighs in favor of the objecting party.” Stanford, 776 F. Supp. 2d at 338 (quotation marks and cite omitted). “[W]here the consequence of disclosure is at most civil liability,” courts “have considered the foreign nation's interest in prohibiting disclosure [to be] weaker.” Minpeco, 116 F.R.D. at 524.

Accordingly, courts look to the litigant that opposes foreign discovery to demonstrate that the litigant would face a real risk of criminal prosecution or some other significant sanction for disclosing the requested information. Merely stating that the litigant “will bear the ‘legal consequences’ of disclosing the information,” without “provid[ing] any indication of what those consequences are likely to be,” will be insufficient to tilt the factor in favor of nondisclosure under the Federal Rules. Richmark, 959 F.2d at 1477 n.11. In contrast, courts will find that the factor weighs in favor of the opposing party and against disclosure under the Federal Rules where that party produces statements of qualified counsel or officials to show that the foreign law has been “vigorously enforced” or that there is a history of prosecution in that country in cases of disclosure. See Reinsurance, 902 F.2d at 1281 (relying on “an affidavit provided by . . . a Romanian attorney” as evidence that the Romanian litigant’s employees “would face criminal sanctions for revealing” information requested by plaintiff and that the law prohibiting such disclosure “is vigorously enforced”); Stanford, 776 F. Supp. 2d at (concluding, based on statements in declaration, that “Swiss authorities have prosecuted individuals and entities for
failing to heed laws designed to promote that interest”). Where such evidence is lacking, or where relevant foreign officials or agencies are silent or tardy in response to requests for guidance about treatment of the discovery requests under the foreign anti-disclosure law, see e.g., Strauss, 249 F.R.D. at 455, or where there is a history of the foreign litigant producing similar discovery on prior occasions without suffering criminal or civil sanction, see e.g. Wultz, 910 F. Supp. 2d at 559, then the factor weighs against the opposing party and in favor of production under the Federal Rules.

It bears noting the courts have taken into account the nature of the anti-disclosure law and whether its purpose is legitimately to protect sensitive data or to impede U.S.-style discovery. In this context, some courts have viewed interests served by “blocking statutes” as less legitimate than those of other types of anti-disclosure laws for purposes of determining whether such laws impose a hardship on foreign litigants who would risk breaking them if discovery proceeded. The court in Stanford drew such a distinction in reviewing a Swiss company’s motion for a protective order based on an argument that complying with plaintiff’s discovery requests would require the Swiss company to violate Switzerland’s banking secrets laws. The court noted that “the bank secrecy laws involved here have the legitimate purpose of protecting commercial privacy inside and outside Switzerland. In this respect, . . . [the Swiss statute] is to be distinguished from a number of other foreign anti-disclosure laws whose purposes courts have determined do not warrant deference.” 776 F. Supp. 2d at 340 n.31 (cites omitted) (referencing “cases involving “blocking statute[s] designed to frustrate discovery””). The Stanford court also emphasized that “the Swiss laws relied upon by SG Suisse have been on the books for decades, suggesting that this case does not present ‘a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure.’” Id. at 341 (cites omitted);
Thus, courts give less weight to the significance of anti-disclosure laws whose intended purpose appears to be to allow the foreign country to exert some degree of control over the use in U.S. litigation of information within its borders, particularly where there is scant history of enforcement. See e.g., Reinsurance, 902 F.2d at 1280 (“Unlike a blocking statute, Romania's law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests.”) (citing Compagnie Francaise D'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) for the proposition that “French blocking statute ‘never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts’”); TruePosition, Inc., 2012 U.S. Dist. LEXIS 29294 at *18-19 (“Notably, . . . [the foreign litigant opposing discovery based on fear of prosecution] has presented no evidence that the French Blocking Statute has ever been enforced in the context of a federal suit, not even an antitrust case, filed in the United States regarding jurisdictional discovery. In addition, . . . [the litigant] does not present any evidence showing that it faces a significant risk of prosecution by complying with . . . discovery requests under the Federal Rules of Civil Procedure. In fact, . . . ‘other courts . . . have held the French Blocking Statute does not subject defendant to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.’”) (quoting In re Global Power Equipment Group Inc., 418 B.R. 833, 847 (Bank. D. Del. 2009)).

The third element used to analyze the hardship factor looks at whether the litigant resisting discovery is a party to the litigation. Where “the objecting litigant is a party to the
action, courts accord that party’s hardship less weight” than if the litigant is a nonparty. *Strauss*, 249 F.R.D. at 454. In contrast, “where the party sought to be compelled to produce documents in violation of foreign secrecy laws is merely a neutral source of information, and not itself a target of a criminal investigation or an adverse party in litigation, some courts have found the hardship to weigh more heavily in the balance.” *Stanford*, 776 F. Supp. 2d at 340 (cites omitted). In such a situation, “this portion of the hardship analysis . . . weighs in [the nonparty’s] favor” and counsels against production under the Federal Rules. *Id.*

**Factor 7: The Good Faith of the Party Resisting Discovery**

Courts applying the good faith factor look to determine whether the party that opposes foreign discovery has engaged in “[b]ad faith delays and dilatory tactics” that should weigh against it. *Strauss*, 249 F.R.D. at 456 (cite omitted). Thus, courts will likely find good faith where foreign parties have promptly advocated for use of the Hague Convention in response to requested foreign discovery or have made timely attempts to obtain guidance from appropriate foreign officials concerning the foreign country’s treatment of the discovery request. See e.g., *id.* (“In this case, Credit Lyonnais has made . . . at least three efforts to contact the French Ministry of Justice for guidance [in response to plaintiffs' discovery requests]. . . . Thus, the defendant has apparently made good faith, diligent efforts to secure discovery.”) (quotation marks and cites omitted).

At times, Courts are presented with the argument that a party opposing foreign discovery under the Federal Rules has requested to proceed under the Hague Convention as a delay tactic. See e.g., *Stanford*, 776 F. Supp. 2d 340 (“Although the Receiver suggests that SG Suisse has invoked the Convention as a delay tactic and ‘pretext,’ SG Suisse long ago suggested that the Receiver pursue his discovery request ‘through appropriate international channels.’”). However,
where the court finds that the opposing party did not wait an unreasonable amount of time after
the discovery request before seeking application of the Hague Convention, the court will not find
bad faith. See id. (“Because only a short amount of time has passed since the Receiver served
his subpoena, the Court does not consider SG Suisse’s failure to make inquiry of Swiss
authorities as a sign of bad faith.”) In addition, a party has “no obligation to affirmatively apply
to the appropriate governmental authority for an exemption” to a statute that might prohibit the
foreign discovery where a request for the discovery is not pending. Id. at.