Techniques And Potential Conflicts
In The Handling Of Depositions (Part 2) (With Forms)

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With the spread of international business, it is increasingly likely that litigators will need to take a deposition that is subject to non-U.S. rules.

PART 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of depositions, objections, instructions not to answer, Rule 30(c)(2), special masters and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition.

Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems.

FOREIGN DEPONENTS AND THE HAGUE CONVENTION • More and more often, litigation involves foreign companies or non-citizens. This section focuses on three countries and the taking of foreign depositions of citizens of Japan, the United Kingdom, and Germany.

Most states authorize by statute or rule the taking of depositions in a foreign country:
On notice before a U.S. consular officer or a foreign officials;
Before a court-appointed commissioner; or
Pursuant to a letter rogatory.

Those state statutes or rules are commonly modeled after Federal Rule of Civil Procedure 29(b). See also, 1 Bruno Ristau, International Judicial Assistance (Civil and Commercial) §3-2-2 (Int’l Law Inst.
Depositions of foreign deponents may be obtained without the aid of foreign authorities only when the witness is willing to testify or produce documents or other evidence voluntarily and when the law of the foreign country does not preclude such voluntary testimony or evidence. Ristau, supra, at §3-2-3. Pursuant to Fed. R. Civ. P. 29, unless the court orders otherwise, the parties may stipulate to voluntary depositions. Deposition notices are authorized under Fed. R. Civ. P. 28(b)(1), which provide for foreign testimony “on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination.” 28(b)(1).

18 U.S.C. §3507

As discussed in U.S. v. Atiyeh, 402 F.3d 354 (3rd Cir 2005), cert. denied, 546 U.S. 1068 (2005), the District Court has authority under 18 U.S.C. §3507 to appoint a Special Master in a criminal case to preside at a deposition taken out of the country or to serve as an advisor on questions of U.S. law. You should note that the Special Master has no jurisdiction to decide questions of privilege under foreign law. 18 U.S.C. §3507 is worth repeating in its entirety:

“Upon application of a party to a criminal case, a United States district court before which the case is pending may, to the extent permitted by a foreign country, appoint a Special Master to carry out at a deposition taken in that country such duties as the court may direct, including presiding at the deposition or serving as an advisor on questions of United States law. Notwithstanding any other provision of law, a Special Master appointed under this section shall not decide questions of privilege under foreign law. The refusal of a court to appoint a Special Master under this section, or of the foreign country to permit a Special Master appointed under this section to carry out a duty at a deposition in that country, shall not affect the admissibility in evidence of a deposition taken under the provisions of the Federal Rules of Criminal Procedure.”

Minebea Co., Ltd. v. Papst, 370 F. Supp. 2d 302 (D.D.C. 2005), is a good example of how the Special Master and the Court can be angered by a party’s refusal to produce foreign witnesses for deposition. Minebea Co., Ltd. is a patent case in which the plaintiff obtained an order from the Special Master requiring the defendant to produce various witnesses located in Germany for American-style depositions in the U.S. and for testimony at trial in the U.S. The defendant objected. The District Court affirmed in part and reversed in part.

Defendant argued that even if it had control, it was not obligated to exercise that control. It also argued that it did not have “control” over the witnesses because attorneys do not control their clients.

The District Court found it dispositive that written agreements existed between the inventors and the Company required the inventors to provide testimony in legal proceedings at the Defendant’s request. The Court wrote:

“Given the Papst defendants’ repeated failures to report completely and accurately as to their communications and their counsel’s communications with the German witnesses and with the German authorities, and the Papst defendants’ continued reluctance to lay out for this Court the full story of their communications and arrangements with the German witnesses since September 5, the Special Master is constrained to conclude that the communications by and on behalf of the Papst defendants have effectively discouraged and dissuaded all of the German witnesses from appearing
in this District for their depositions. *R & R 19S at 8.* Because the inventors are expressly required to testify at the request of Papst by written contracts, the Court cannot but conclude that Papst’s ‘request’ for the voluntary appearance of the inventor witnesses was made with a wink and a nod and that their failure to appear must be attributed to Papst. The Court concludes that Papst has willfully failed to produce these witnesses. If it continues to fail to produce them for testimony at trial, the Court will instruct the jury what adverse inferences may be drawn from Papst’s failure to produce the witnesses.”

*Minebea*, 370 F. Supp. 2d at 310.

**The Court’s Inherent Power To Appoint Special Masters To Supervise Foreign Depositions**

*Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), is a significant case involving the role of Special Masters in foreign depositions. This case involved the Hon. Sol Schreiber and Hon. Manuel L. Real. Judge Real appointed Judge Schreiber as the Special Master to oversee the taking of 137 depositions of class members, to be taken in the Philippines. Judge Schreiber reported his findings in the trial. The jury accepted many of them, awarded more money to some class members than Judge Schreiber recommended, and awarded less money to other class members. The jury awarded, in the aggregate, compensatory damages of $766 million and exemplary damages of $1.2 billion.

In supervising the taking of the class member depositions, the depositions were noticed and taken pursuant to the Federal Rules of Civil Procedure, even though they were taken in the Philippines. Judge Schreiber “evaluated: whether the abuse claimed came within one of the definitions, with which the Court charged the jury at the trial..., of torture, summary execution, or disappearance; whether the Philippine military or paramilitary was... involved in such abuse; and whether the abuse occurred during the period September 1972 through February 1986.”

_Id. at 782._ The Special Master recommended ceilings on damages for lost wages and pain and suffering, which were followed by the jury. This procedure was unorthodox in several ways and the reported decisions are worth reading in full. Addressing a point made in the dissent by Judge Rymer, but disagreeing with its application, the Special Master wrote that the use of a Special Master in the case created “a solution to a major social problem” and used the traditional tools of our federal court system.

If the Court had not used the approach of the Special Master supervising the depositions, making substantive recommendations and using statistical sampling, the 9th Circuit estimated it would have taken about six and a half years for the District Court to have tried all 10,000 claims, handling roughly 30 per month. This would hardly have been feasible or rendered justice or due process to the parties.

**The Hague Convention Of 1970**

The Hague Convention of 1970, which codifies the taking of depositions between citizens of different countries on civil and commercial matters, streamlines deposition procedures for the more than 40 member countries, including the United Kingdom and Germany. Although each participating country was allowed to make its own reservations and declarations regarding the applicability of each article of the Convention, the procedure for a U.S. party to depose a citizen of one of the member-countries in that country is less cumbersome than to depose a Japanese citizen in Japan.

Under the Hague Convention, “a Contracting State may...request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence.”
See Article 1 of the Hague Convention.

“A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them.... Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.”

See Article 2 of the Hague Convention.

It is worth noting that if a party scheduling a deposition in a foreign nation who relies on the voluntary agreement of the deponent, rather than obtaining compulsion of law in the foreign country, it may risk monetary sanctions should the deponent fail to appear.

**The Letter Of Request**

A U.S. party seeking to depose a citizen of a Contracting State should submit an application to a U.S. Court for the issuance of a Letter of Request. See Articles 3(a), (b), 28(a), and 32 of the Hague Convention (authorizing the issuing authority to send Letters of Request directly from court to court or through a party to the action directly to the executing tribunal); see also the Sample Application to U.S. Court for Issuance of Letter of Request under the Hague Convention, which appears at the end of this article as Appendix 1.

Under Article 3 of the Hague Convention, the Letter of Request shall specify:

- The authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- The names and addresses of the parties to the proceedings and their representatives, if any;
- The nature and description of the proceedings for which the evidence is required, giving all necessary information in regard thereto; and
- The evidence to be obtained or other judicial act to be performed.

When appropriate, the Letter shall specify, inter alia:

- The names and addresses of the persons to be examined;
- The questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;
- The documents or other property, real or personal, to be inspected;
- Any requirement that the evidence is to be given on oath or affirmation, and any special form to be used; and
- Any special method or procedure to be followed that is not inconsistent with the executing State’s laws.

See Article 3 of the Hague Convention; see Sample Letter of Request, which appears as Appendix 2 at the end of this article; see also, 1 Ristau, at §5.

The Letter of Request and accompanying documents should be submitted in duplicate, with a translation into the language of the requested court. 1 Ristau, supra, at §3-3-2, 5-2-1(8); see Article 4 of the Hague Convention. The application for issuance of the Letter of Request should be made to the issuing court in the United States where the action is pending, with notice to the adverse party. Fed. R. Civ. P. 28(b).

Under Article 7, the requesting party shall be informed of the time and place the proceedings shall take place, although the United Kingdom normally appoints a special commissioner to execute