

February 1996

## Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative

Paul Robert Eckert

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [International Law Commons](#)

---

### Repository Citation

Paul Robert Eckert, *Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 Wm. & Mary L. Rev. 749 (1996),  
<https://scholarship.law.wm.edu/wmlr/vol37/iss2/7>

## NOTES

### UTILIZING THE DOCTRINE OF ADVERSE INFERENCES WHEN FOREIGN ILLEGALITY PROHIBITS DISCOVERY: A PROPOSED ALTERNATIVE\*

With the growth of a modern, global economy, commercial business transactions routinely involve multinational corporations with offices located in, and subject to the laws of, a foreign jurisdiction.<sup>1</sup> The increase in multinational commerce has led to a concomitant increase in multinational commercial litigation.<sup>2</sup> In addition to concerns about service and jurisdiction, litigants engaged in such litigation often require the production of evidence located in a foreign jurisdiction where the law of situs prohibits disclosure.<sup>3</sup>

The problem is not new. Courts and legislatures have struggled to produce equitable solutions designed both to protect the interest in full disclosure in the domestic litigation and to balance the comity interests of the foreign sovereign.<sup>4</sup> As a result, domestic litigants seeking the production of documents and records located abroad and subject to nondisclosure statutes are faced with the task of negotiating a morass of issues involving corporate control, comity balancing, foreign illegality and waiver, changing discovery standards, good faith, prerequisites to compelled discovery, available alternatives to direct discovery, and possible sanctions for noncompliance with a production order.<sup>5</sup>

---

\* Special thanks to Conrad M. Shumadine, Esq., of Willcox & Savage, P.C., for providing invaluable guidance.

1. See generally GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1 (2d ed. 1992) (discussing how the increase in international trade and investment has led to increased civil litigation in American courts).

2. *Id.*

3. See *infra* notes 76-82 and accompanying text.

4. See *infra* notes 83-146 and accompanying text.

5. See *infra* notes 10-169.

The law with respect to compelled production of evidence located abroad and subject to nondisclosure statutes is relatively settled. Although minor variations exist between circuits, the tests applied to determine whether a court should exercise its unquestioned authority to compel a party to produce evidence, and whether a party is subject to nondisclosure statutes, are essentially the same. Judges and scholars have addressed which factors should be determinative in the decision to order production, the decision to compel production, and the decision to award sanctions for noncompliance. Inquiries into issues of comity, good faith, and hardship are indicative of the judiciary's reluctance to impose harsh penalties when foreign illegality is invoked as an excuse for nonproduction.

Rather than attempting to provide an academic evaluation of the wisdom of the leading decisions in this area, this Note proposes not that the tests established by the leading decisions in this area are deficient in terms of providing a framework for examining the litigants' behavior, but rather that limiting a court's options to a choice between sanctions for nonproduction and virtual surrender to the nondisclosure statute is inadequate. Accordingly, this Note provides a practical road map to the judicial prerequisites to a production order and advocates the increased use of the doctrine of adverse inferences when foreign illegality is offered as an excuse for nonproduction of evidence located abroad. This Note will show that the doctrine of adverse inferences provides an intermediate approach for a court to utilize when either the existing tests provide inconclusive results or when factual determinations regarding the secreting of evidence abroad warrant jury deliberation.

The general rule is that the nonproduction of available witnesses or evidence, or the destruction or spoliation "of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*."<sup>6</sup> Jury instructions on the adverse inference rule are permissible in federal court when there is an "unexplained failure or refusal of a party . . . to produce

---

6. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 285 (Chadbourn rev. 1979).

evidence that would tend to throw light on the issues.”<sup>7</sup> The adverse inference rule must be predicated on the existence of certain factors:

(1) it appears that the documentary evidence exists or existed; (2) the suppressing party has possession or control of the evidence; (3) the evidence is available to the suppressing party, but not to the party seeking production; (4) it appears that there has been actual suppression or withholding of evidence.<sup>8</sup>

Whether a corporation is within the control of a party to litigation, whether discovery of foreign evidence may be compelled, whether the Hague Evidence Convention procedures provide an effective alternative, and whether a party may be sanctioned for the failure to produce evidence located abroad for discovery are all integral components of an evaluation of the availability of the adverse inference doctrine. As a result, the analysis of the availability and scope of a potential adverse inference instruction will be organized in a four-part approach.

The first section of this Note will examine the factors that determine whether a third party is sufficiently controlled by a litigant to require it to comply with domestic discovery requests. The second section will examine the procedures and tests that courts use to determine the propriety of ordering discovery of evidence located abroad in spite of restrictive foreign nondisclosure statutes. Section three will then examine the role of the Hague Evidence Convention, its procedures for foreign discovery, and whether domestic litigants must resort to these procedures. Finally, section four will examine the availability and applicability of the adverse inference doctrine in situations involving non-production due to foreign illegality. This section also will ad-

---

7. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983); see 3 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 72.16 (4th ed. 1987).

8. *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990) (citing 31A C.J.S. *Evidence* § 156(2) (1964)); see also *Spesco, Inc. v. General Elec. Co.*, 719 F.2d 233, 239 (7th Cir. 1983) (holding that in the absence of evidence alleging “any intentional acts of misconduct by Spesco to conceal or destroy any relevant evidence . . . the district court committed no error by refusing to read [an instruction allowing the presumption of adverse evidence] to the jury”).

dress contemporary criticism of the doctrine and set forth a working model for utilization of a proposed approach.

### CORPORATE CONTROL OF THIRD PARTY DEPOSITORIES

A determination of whether a third party in possession of evidence is within the control of a party to domestic litigation is essential to a party's ability to either compel discovery or receive an adverse inference instruction.<sup>9</sup> In general, a party must only produce evidence for disclosure if it is "available,"<sup>10</sup> or within its "control."<sup>11</sup> This qualification becomes quite significant when the parties to litigation have evidence in the custody of subsidiaries and related affiliates that are not parties to the litigation and are located abroad.<sup>12</sup>

The ownership of all or most of the stock in a related corporation is one of the most common methods by which one corporation controls another.<sup>13</sup> Indeed, the ability to establish control of a subsidiary is greatly increased when it is wholly owned and managed by the parent. Ownership, however, is not dispositive of the control issue, and even wholly owned subsidiaries often are not considered under the control of the parent.<sup>14</sup> Conversely, courts have noted that, at least in the context of jurisdiction, control may be present even when a related corporation owns no stock of the other corporate entity.<sup>15</sup> Because stock ownership is not dispositive of the control issue, courts must consider a variety of factors when determining whether a corporate party to litigation has sufficient influence over an affiliate or subsidiary, effectively controlling it.

The test for determining whether an American court can order an American parent corporation to produce the documents of its foreign subsidiary was delineated in *In re Investigation of World*

---

9. See DEVITT ET AL., *supra* note 7, § 72.16.

10. FED. R. CIV. P. 33(a).

11. FED. R. CIV. P. 34(a)(2).

12. See BORN & WESTIN, *supra* note 1, at 355.

13. Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 362-63 (D. Colo. 1967).

14. See *id.* at 363.

15. Superior Coal v. Ruhrkohle, A.G., 83 F.R.D. 414, 421 (E.D. Pa. 1979) (noting that "ownership of less than half of the stock is no talisman") (citing United States v. Watchmakers of Switzerland Info. Ctr., 133 F. Supp. 40, 49 (S.D.N.Y. 1955)).

*Arrangements*<sup>16</sup>:

[I]f a corporation has power, either directly or indirectly, through another corporation or *series* of corporations, to elect a majority of the directors of another corporation, such corporation may be deemed a parent corporation and in control of the corporation whose directors it has the power to elect to office.<sup>17</sup>

In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery*,<sup>18</sup> the district court held that the plaintiff, a Swiss corporation, had control of its Swiss-based bank.<sup>19</sup> After an evaluation of the corporate affiliations of the two partners, the court stated that an "interlocked web of corporate organization, management and finance" led to the conclusion that the "fundamental identity" of the partners was sufficient to support a finding of control.<sup>20</sup> As the language of the preceding cases suggests, whether one corporate entity controls another ultimately rests upon findings of fact.<sup>21</sup> The factual inquiry, however, searches beyond corporate formalities and organization to determine the actual balance between the two entities.<sup>22</sup>

The factors discussed in jurisdictional inquiries are especially valuable in the discovery context, in which exertion of influence and interlocking interests are also pertinent indicia of control and availability. A thoughtful inquiry considers whether the parent corporation and its subsidiary or affiliate have common officers and directors,<sup>23</sup> a common marketing image,<sup>24</sup> a common

---

16. *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952).

17. *Id.* at 285.

18. 111 F. Supp. 435 (D.D.C. 1953), *modified sub nom.* *Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

19. *Id.* at 442.

20. *Id.*

21. *See, e.g., In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979).

22. *See id.* (noting that control "rests on a determination of whether the defendant has practical and actual managerial control over, or shares such control with, its affiliate, regardless of the formalities of corporate organization").

23. *See Tokyo Boeki (USA), Inc. v. SS Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971).

24. *Call Carl, Inc. v. British Petroleum Oil Corp.*, 391 F. Supp. 367, 374 (D. Md.

use of trademark or logo,<sup>25</sup> common use of employees,<sup>26</sup> an interchange of managerial and supervisory personnel,<sup>27</sup> or an integrated sales system.<sup>28</sup> Other factors include "whether the related corporation performs business duties and functions which the principal corporation would normally transact through its own agents or departments,"<sup>29</sup> whether the related corporation acts as a "marketing arm" of the principal,<sup>30</sup> whether the related corporation acts as an exclusive distributor,<sup>31</sup> and whether the officers of the related corporation receive instructions from the principal corporation.<sup>32</sup>

It is not necessary to "pierce the corporate veil" to establish that evidence requested for discovery is available and within the control of the party to the litigation.<sup>33</sup> In *Hubbard v. Rubbermaid, Inc.*,<sup>34</sup> the plaintiff, Hubbard, argued that Rubbermaid, by failing to produce relevant documents from its two wholly owned subsidiaries, had not produced all available documents within its control.<sup>35</sup> The court, without piercing the corporate veil, held that "the nonparty status of the . . . subsidiaries [did] not shield their documents from production" and that the "crucial factor" was that "the documents must be in the custody, or under the control of, a party to the case."<sup>36</sup>

In *Alimenta*, the defendant, Anheuser-Busch, was involved in

---

1975), *aff'd in part and rev'd in part*, 554 F.2d 623 (4th Cir. 1977); *SCM Corp. v. Brother Int'l Corp.*, 316 F. Supp. 1328, 1332 (S.D.N.Y. 1970).

25. *Audio Warehouse Sales, Inc. v. United States Pioneer Elecs. Corp.*, 1975 Trade Cas. (CCH) ¶ 60,213, at 65,832 (D.D.C.), *vacated*, 1975 Trade Cas. ¶ 60,293 (D.D.C. 1975).

26. *Id.*

27. *Tokyo Boeki*, 324 F. Supp. at 366.

28. *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519, 527 (S.D.N.Y. 1972).

29. *Superior Coal v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 421 (E.D. Pa. 1979).

30. *Call Carl, Inc. v. British Petroleum Oil Corp.*, 391 F. Supp. 367, 374-75 (D. Md. 1975).

31. *SCM Corp. v. Brother Int'l Corp.*, 316 F. Supp. 1328, 1333 (S.D.N.Y. 1970); *United States v. Watchmakers of Switzerland Info. Ctr.*, 133 F. Supp. 40, 49 (S.D.N.Y. 1955).

32. *In re Siemens & Halske, A.G.*, 155 F. Supp. 897, 898 (S.D.N.Y. 1957).

33. *See Alimenta (USA) v. Anheuser-Busch Cos.*, 99 F.R.D. 309, 313 (N.D. Ga. 1983).

34. 78 F.R.D. 631 (D. Md. 1978).

35. *Id.* at 636.

36. *Id.* at 637.

a dispute over the quality of peanuts purchased by Alimenta USA from Alimenta BV and shipped to the United States for resale to Anheuser-Busch.<sup>37</sup> Noting that "the crucial factor is that the documents must be in the custody, or under the control of, a party to the case,"<sup>38</sup> the court observed that the "Alimenta subsidiaries acted 'as one' in the transaction at issue in this case."<sup>39</sup> The court refuted the argument that control is frustrated by separate corporate identities by utilizing this concept of transactional identity to estop Alimenta USA from asserting that it did not control relevant documents in the possession of Alimenta BV.<sup>40</sup> Transactional identity should not be seen as a determinative factor of control. Like the other factors discussed above, it serves only as further indicia of control between corporate entities. Transactional behavior, however, is highly indicative of corporate relationships and, in certain circumstances, a parent corporation's exercise of control within the context of the transaction at issue may be sufficient to support a finding that documents and evidence related to that transaction are available.

In *In re Uranium Antitrust Litigation*,<sup>41</sup> Noranda was party to the antitrust suit, although it did not itself own uranium or any uranium-producing properties.<sup>42</sup> Noranda did, however, own 43.8% of the common shares of Kerr-Addison Mines, Ltd., a Canadian corporation that owned a ninety percent interest in a uranium-producing mine in Canada.<sup>43</sup> The court accepted Noranda's arguments that it should not be forced to produce evidence in the custody of Kerr-Addison, observing that "[w]hile a minority of the directors of Kerr-Addison are also officers of Noranda, Kerr-Addison keeps its own books and records and holds its own corporate meetings separate and apart from any other company."<sup>44</sup> Significantly, the balance of Kerr-Addison

---

37. *Alimenta*, 99 F.R.D. at 310.

38. *Id.* at 313 (relying on *Rubbermaid*, 78 F.R.D. at 637).

39. *Id.*

40. *See id.*

41. 480 F. Supp. 1138 (N.D. Ill. 1979).

42. *Id.* at 1152.

43. *Id.*

44. *Id.*



shares were publicly traded on the Toronto Stock Exchange and were owned by more than 11,000 shareholders.<sup>45</sup> The combination of Noranda's minority stock ownership and the fact that the balance of the shares was not owned by an entity related to Noranda was interpreted as evidence that Kerr-Addison retained sufficient control over its business affairs to negate any inference that it was under the control of Noranda.<sup>46</sup>

In the same case, however, the court required Rio U.S. to produce evidence in the custody of Rio Canada.<sup>47</sup> The court noted "that Rio U.S. and Rio Canada . . . operated as a single functional unit in all aspects of their uranium business."<sup>48</sup> Both "shar[ed] an interlocking structure of corporate directors, officers, and executive and administrative personnel who . . . managed the . . . activities of both corporations."<sup>49</sup> Rio U.S. argued for this holding, relying on cases involving a corporation's liability for a related corporation's actions.<sup>50</sup> The court, however, distinguished the prerequisites to a corporation's liability for related and affiliated corporations, noting the "crucial distinction between ability to *compel production of documents* and *liability for a subsidiary's acts*."<sup>51</sup> Explaining that control for the purposes of document production could be supported without a finding of managerial control, the court again utilized the concept of transactional identity to disregard the corporate "formalities" that separated the two corporations.<sup>52</sup> Although Rio U.S. was the wholly owned subsidiary of an intermediate corporation that was in turn wholly owned by Rio Canada, the significant and consistent focus of judicial investigations regarding a parent corporation's control over a related or affiliate corporation centers on the substance, not the form, of the intercorporate nexus.<sup>53</sup>

---

45. *Id.*

46. *See id.*

47. *Id.* at 1153.

48. *Id.* at 1152.

49. *Id.*

50. *Id.* at 1153.

51. *Id.* (emphasis added).

52. *Id.*

53. *See K.J. Schwartzbaum, Inc. v. Evans, Inc.*, 44 F.R.D. 589, 592 (S.D.N.Y. 1968).

In *Erone Corp. v. Skouras Theatres Corp.*,<sup>54</sup> Skouras had a part ownership interest in another corporate entity, not unlike the relationship between Noranda and Kerr-Addison.<sup>55</sup> In *Erone*, however, Skouras also had a relationship with the other joint owner.<sup>56</sup> The court noted that the request for production was reasonable and relevant to the litigation,<sup>57</sup> charged Skouras with control of the evidence in the custody of the related company,<sup>58</sup> and observed that joint ownership and an "interlocking relationship" with the other owner made information in the possession of one "available" to the other.<sup>59</sup>

The cases discussed in this section demonstrate that corporate control is an extremely malleable concept capable of manipulation based upon the facts presented to the court. A significant amount of case law and scholarly writing addresses control issues in the discovery context, and this Note attempts only to identify some of the factors pertinent to the analysis. Control over the third party for discovery purposes, however, is an essential prerequisite to the utilization of the adverse inference doctrine.<sup>60</sup>

#### DISCOVERY OF EVIDENCE LOCATED ABROAD AND SUBJECT TO NONDISCLOSURE STATUTES

Because the use of the adverse inference doctrine is within the discretionary power of the trial court,<sup>61</sup> a determination of whether discovery of evidence located abroad may be ordered is also an essential prerequisite. A court has unquestioned jurisdiction to order a party litigant or a subpoenaed witness to appear and produce documents, wherever located, that are within the control of the party or witness.<sup>62</sup> *Societe Internationale pour*

---

54. 22 F.R.D. 494 (S.D.N.Y. 1958).

55. *Id.* at 500.

56. *Id.*

57. *Id.* at 497.

58. *Id.* at 498.

59. *Id.* at 500.

60. See *infra* notes 192-97 and accompanying text.

61. See *infra* notes 242-43 and accompanying text.

62. Donald L. Roth, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U. L. REV. 295 (1962) (citing *Societe*

*Participations Industrielles et Commerciales, S.A. v. Rogers (Societe Internationale)*<sup>63</sup> remains the leading case discussing an American court's ability to order the production of documents located abroad.<sup>64</sup>

In *Societe Internationale*, a Swiss holding company brought suit under the Trading with the Enemy Act to recover assets that the United States government had seized during World War II.<sup>65</sup> At an early stage in the litigation, the government moved under Rule 34 for an order requiring the holding company to produce documents held by its bank in Switzerland.<sup>66</sup> The plaintiff sought relief from production on the ground that disclosure of the required bank records would violate Swiss penal laws and subject those responsible for disclosure to criminal sanctions.<sup>67</sup> Upon plaintiff's failure to comply with the awarded production order, the district court dismissed the complaint after holding that the plaintiff had control over the bank records, that the records might prove a deciding factor in the suit, and that Swiss law did not provide an adequate excuse for noncompliance.<sup>68</sup>

On certiorari, the Supreme Court affirmed the issuance of the production order<sup>69</sup> but reversed the dismissal of the action.<sup>70</sup> The Court identified three factors that influenced its decision that have since become the backbone of current investigatory analysis of the propriety of production orders for foreign evidence.<sup>71</sup> First, a court should consider and facilitate the strength of American interests as identified by statute.<sup>72</sup> Sec-

---

*Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery*, 111 F. Supp. 435 (D.D.C. 1953), *modified sub nom. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956)).

63. 357 U.S. 197 (1958).

64. Timothy G. Smith, Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 749 (1974).

65. *Societe Internationale*, 357 U.S. at 198-99.

66. *Id.* at 199-200.

67. *Id.* at 200.

68. *Id.* at 201.

69. *Id.* at 206.

70. *Id.* at 213.

71. *Id.* at 201, 204-05, 209.

72. *Id.* at 204 ("[T]he problem before us requires consideration of the policies un-

ond, a court should replace the normal discovery standard of relevance with a higher standard that inquires whether the requested documents are crucial to the resolution of a key issue in the litigation.<sup>73</sup> Third, the Court indicated that a party's good faith attempt to comply with a production order, to obtain a waiver, or otherwise to achieve compliance is a valid consideration.<sup>74</sup>

*Societe Internationale* is cited invariably by both sides in prohibited discovery cases for either the proposition that liability under a foreign nondisclosure law is no excuse for noncompliance with a validly issued discovery order or the assertion that dismissal or similarly harsh sanctions should not be issued when the party's good faith inability to comply is due to foreign penal laws that forbid compliance.<sup>75</sup>

### *Determining Foreign Illegality*

The first step in any evaluation of an offered excuse of foreign illegality is a determination of whether the proffered law in fact prohibits disclosure.<sup>76</sup> The party relying on the foreign law as an excuse bears the burden of demonstrating to the trial court that a statute bars compliance with a particular discovery request.<sup>77</sup> The party resisting discovery meets this burden only when it has "provide[d] the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign

derlying the Trading with the Enemy Act.").

73. *Id.* at 201 ("[S]uch records might prove to be crucial in the outcome of this litigation . . ."); *id.* at 205 ("[R]ecords might have a vital influence upon this litigation . . .").

74. *Id.* at 209 ("[W]e must dispose of this case on the basis of the findings of good faith . . .").

75. *Smith*, *supra* note 64, at 750 (citing *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962)).

76. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 510 (N.D. Ill. 1984). The court added: "Even where there is no conflict with a foreign law, courts are well advised to proceed cautiously any time they order discovery involving activity within another country." *Id.* at 510 n.9.

77. *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (citing *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Roberts v. Heim*, 130 F.R.D. 430, 436 (N.D. Cal. 1990)).

law."<sup>78</sup> Although the burden to establish that a conflict with a foreign nondisclosure law rests on the party resisting discovery, the court may examine all relevant materials when making its determination, regardless of whether the materials were submitted by a party or were admissible under the Federal Rules of Evidence.<sup>79</sup> As the determination concerning the law of a foreign country is a question of law, it is "freely reviewable [on appeal] and is not limited by the "clearly erroneous" test."<sup>80</sup>

Often, however, the import of the statute in question will be clear, and a trial court may simply take judicial notice of its prohibition of disclosure and the conflict with American discovery procedures.<sup>81</sup> Accordingly, the degree to which litigants must battle the issue of foreign law prohibition necessarily varies with the specificity of the statute in question and the discovery philosophy of the foreign sovereign.<sup>82</sup>

### *The Balance Approach*

Generally, courts now agree that they must balance competing interests in determining whether foreign illegality should preclude the issuance of a production order and that the result in each case will turn on the particular circumstances.<sup>83</sup> The first

---

78. *Id.* (citing *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978); *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 24-25 (S.D.N.Y. 1984)).

79. FED. R. CIV. P. 44.1 ("The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.").

80. *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 344 (7th Cir. 1983) (quoting 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2446 (1971) (alterations in original)).

81. *See Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 855 (1981) (concluding that broad doctrinal differences in discovery procedures would result in the violation of West German sovereignty should discovery be ordered).

82. *See, e.g., Roth, supra* note 62, at 296-97 (discussing (1) statutes that prevent the removal of original business documents, (2) statutes designed to protect the confidential nature of business records, and (3) statutes prohibiting the removal of both originals and copies of business records if the removal is in response to the order of any agency of a foreign sovereign).

83. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d

courts to address these issues used the balancing test set forth in the *Restatement (Second) of Foreign Relations Law of the United States* section 40.<sup>84</sup> Subsequent drafts of the *Restatement* have addressed the issue of the foreign illegality excuse for nonproduction more directly,<sup>85</sup> but the vast majority of federal

---

992, 997 (10th Cir. 1977); *United States v. Field* (*In re Grand Jury Proceedings*), 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979).

84. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (entitled "Limitations on Exercise of Enforcement Jurisdiction") [hereinafter Section 40 Test].

85. For example, RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420(2) (Tentative Draft No. 3, 1982), states:

If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness,

(a) the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) the court may not ordinarily impose the sanction of contempt, dismissal, or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) the court may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

In addition, the *Restatement (Third)* states:

If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

cases still consistently utilize the Section 40 Test.<sup>86</sup> Although the application of the Section 40 Test has varied among the federal circuits, virtually every circuit that has addressed the foreign illegality excuse for nonproduction has recognized that its factors provide "a useful starting place for the court's analysis."<sup>87</sup> The disagreements among the circuits focus not so much on which factors trial courts should evaluate but on the significance of each factor and the standards that courts should apply when evaluating such amorphous factors as "good faith" and "importance."<sup>88</sup>

The Section 40 Test was not designed to function as a rigid formulaic device to determine the propriety of a production order. Rather, it was promulgated in recognition of the necessity of an ad hoc factual inquiry balancing the competing interests of comity present in transnational discovery.<sup>89</sup> The Section 40 Test requires consideration of:

(a) vital national interests of each of the states,

---

(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(2) (1986).

86. In the Second Circuit, see *United States v. Davis*, 767 F.2d 1025, 1033-34 (2d Cir. 1985); *Trade Dev. Bank*, 469 F.2d at 41 (alluding to factors set forth in the *Restatement*); *Alfadda*, 149 F.R.D. at 34; *Minpeco*, 116 F.R.D. at 522; *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981). In the Fifth Circuit, see *Field*, 532 F.2d at 407. In the Seventh Circuit, see *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 512 (N.D. Ill. 1984). In the Ninth Circuit, see *Vetco*, 691 F.2d at 1288. In the Tenth Circuit, see *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1373 (10th Cir. 1978); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d at 997.

87. *Graco*, 101 F.R.D. at 512; see *supra* note 86.

88. *Compare In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1154 (N.D. Ill. 1979) ("whether the requested documents are crucial to the determination of a key issue in the litigation") with *Vetco*, 691 F.2d at 1290 (whether the "documents sought are the type of records relevant" to an issue in the litigation).

89. David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 854-56 (1986) (discussing the abandonment of early Second Circuit decisions utilizing a "pure comity" approach to whether discovery sanctions should be ordered in favor of the Section 40 Test, which had been commonly prescribed for conflicting interests in international law).

- (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, and
- (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>90</sup>

Courts have characterized the first two factors as far more important than the last three.<sup>91</sup> In keeping with *Societe Internationale's* requirements, courts also evaluate the importance of the information and the requested documents to the litigation, as well as the good or bad faith of the party resisting discovery.<sup>92</sup>

### *Vital National Interests*

There are three components to a court's analysis of the competing national interests at stake in a transnational discovery dispute: (1) the nature and purpose of the foreign nondisclosure statute, (2) the domestic interest in procuring discovery, and (3) the interest and concern expressed by the foreign state.<sup>93</sup>

### *Nature and Purpose*

Foreign laws enacted expressly for the purpose of frustrating American discovery of documents located abroad have been given little deference by courts evaluating discovery requests.<sup>94</sup>

---

90. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 84, § 40.

91. *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987) (citing *Remington Prods., Inc. v. North Am. Philips Corp., N.V.*, 107 F.R.D. 642, 652 (D. Conn. 1985); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981)).

92. *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *Alfadda*, 149 F.R.D. at 34; *Minpeco*, 116 F.R.D. at 523.

93. *Morris E. Lasker, Discovery in the United States Courts Relating to Material Subject to Foreign Secrecy Laws*, C475 A.L.I.-A.B.A. 9 (1989), available in WL, TP-ALL Database.

94. *See, e.g., Minpeco*, 116 F.R.D. at 524 (distinguishing bank secrecy laws with



Similarly, courts have been prone to discount the foreign interest either when the party resisting discovery is a subsidiary of an American corporation<sup>95</sup> or when the nationality of the party resisting discovery is not of the nation under whose laws it has taken refuge.<sup>96</sup> Further, when a nation's nondisclosure law has the effect of encouraging or fostering criminal activity, the court will recognize a diminished foreign interest.<sup>97</sup>

### *Domestic Interest*

In considering competing national interests, both the Second and Ninth Circuits have distinguished actions brought by the government from private suits because "[i]n the latter situation, 'there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed.'"<sup>98</sup> The distinction between actions brought by the government and private suits is diminished when a private litigant brings an action under a statute expressly authorizing private enforcement suits.<sup>99</sup> Congressional authorization of private enforcement suits through legislation may well evince a strong national inter-

---

"the legitimate purpose of protecting commercial privacy" from "other foreign anti-disclosure laws whose purposes courts have determined do not warrant deference"); *Remington Prods.*, 107 F.R.D. at 651 (addressing a Dutch blocking statute designed to frustrate discovery in U.S. antitrust cases); *Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (addressing a French blocking statute designed solely to protect French business from foreign discovery); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979) (addressing Canadian, Australian, and South African statutes enacted for the express purpose of impairing jurisdiction of U.S. courts).

95. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976).

96. *Alfadda*, 149 F.R.D. at 34 n.6.

97. See, e.g., *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985) (concluding that the Cayman Islands' policy against improper use of its business secrecy laws reduced its interest in nondisclosure to an American grand jury).

98. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 n.9 (9th Cir.) (quoting *Timberlane Lumber Co.*, 549 F.2d at 613), cert. denied, 454 U.S. 1098 (1981); *Minpeco*, 116 F.R.D. at 523 (noting that the court would "accord some deference to the determination of the Executive Branch") (quoting *Davis*, 767 F.2d at 1035).

99. *Minpeco*, 116 F.R.D. at 523 (noting that antitrust, commodities, and racketeering statutes "have the effect—intended by Congress—of enforcing the law by means of 'private attorney generals'[sic] (citation omitted)).

est in adjudication.<sup>100</sup>

*In re Uranium Antitrust Litigation*<sup>101</sup> demonstrates the inherent difficulty of balancing American interests against foreign "blocking" statutes. In that case, Westinghouse brought an antitrust action against an alleged international marketing arrangement.<sup>102</sup> The court noted that several foreign governments had enacted nondisclosure legislation in response to Westinghouse's suit, each "aimed at nullifying the impact of American antitrust legislation by prohibiting access" to certain documents.<sup>103</sup> The court went on to emphasize the fundamental importance of the antitrust laws and the strength of congressional policies underlying the statute that formed the basis of the plaintiff's action.<sup>104</sup> Additionally, courts have recognized a strong national interest in the enforcement of securities laws, the collection of taxes, the prosecution of tax fraud, and the grand jury's power to investigate crimes.<sup>105</sup>

On a broader level, courts have recognized that "the United States has a substantial interest in fully and fairly adjudicating matters before its courts."<sup>106</sup> In *Compagnie Francaise*, the court went on to note that the United States has an important interest in preventing foreign litigants from obtaining an "unfair

---

100. *Id.* at 523-24 (noting that "it is difficult to imagine a private commercial lawsuit which could be more infused with the public interest"); see also *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 513 (N.D. Ill. 1984) ("The United States patent laws rely heavily for their enforcement on private infringement actions by patent holders, and pre-trial discovery, under the Federal Rules of Civil Procedure, is an important part of the system of private enforcement.").

101. 480 F. Supp. 1138 (N.D. Ill. 1979).

102. *Id.* at 1148.

103. *Id.*

104. *Id.* at 1154 (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("[Antitrust laws] are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); *United States v. First Nat'l City Bank*, 396 F.2d 897, 903 (2d Cir. 1968) (stating that "[t]hese laws have long been considered cornerstones of this nation's economic policies")). Given the importance of the American interests, the court in *In re Uranium Antitrust Litigation* observed that it was "simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1148.

105. *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (citations omitted).

106. *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984).

advantage" when they sue in American courts and assert a foreign illegality excuse.<sup>107</sup> Such broad assessments of American interest have led commentators to criticize the "overvaluation" of American interests in the balancing approach.<sup>108</sup>

### *Interest and Concern Expressed by the Foreign State*

"[A] foreign government's failure to express a view that the disclosure at issue threatens its national interests militates against a finding that strong national interests of the foreign country are at stake."<sup>109</sup> A court may discern the interest that a foreign government has in opposing a discovery order from submitted affidavits, from penalty provisions in nondisclosure statutes, or from provisions allowing nationals to waive certain restrictions.<sup>110</sup>

### *Hardship*

The hardship considerations as to the effect of noncompliance with the foreign nondisclosure laws are also fact-specific. Section 40(b) was drafted to reflect the view of the Supreme Court in *Societe Internationale* that "fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."<sup>111</sup> The Supreme Court's articulated reluctance to compel production in the face of foreign criminal sanctions provided further incentives for foreign governments to

---

107. *Id.*

108. Teitelbaum, *supra* note 89, at 863.

109. *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (citing *United States v. First Nat'l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968) ("[W]hen foreign governments . . . have considered their vital national interests threatened, they have not hesitated to make known their objections . . ."); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 116 F.R.D. 517, 525 (S.D.N.Y. 1987) (citing *Davis*, 767 F.2d at 1035 ("The absence of any objection by the Cayman government to the subpoena and subsequent order . . . is significant.")); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) ("The Swiss government, . . . though made expressly aware of the litigation, has expressed no opposition.")).

110. Lasker, *supra* note 93, at \*14-\*16.

111. Teitelbaum, *supra* note 89, at 863 (quoting *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958)).

enact blocking legislation expressly designed to frustrate American discovery.<sup>112</sup>

Recognizing that many foreign nondisclosure statutes are little more than tactical weapons designed to provide a foreign litigant with "bargaining chips" to use in discovery negotiations,<sup>113</sup> courts now consistently evaluate the likelihood of enforcement and the availability of defenses for compliance with an American discovery order.<sup>114</sup> A court may also choose to recognize an obligation on the part of a foreign corporation with a domestic presence to keep specified records in the United States.<sup>115</sup> Finally,

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.<sup>116</sup>

---

112. See *id.* at 863-64.

113. *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984).

114. See, e.g., *Alfadda v. Fenn*, 149 F.R.D. 28, 35 (S.D.N.Y. 1993) ("[P]rosecutions under Art. 162 are commenced only upon complaint of the party injured by disclosure. Because a confidentiality order has been entered in this case, the likelihood that the disclosure will be discovered or will cause injury is greatly reduced . . . . [There is] no real threat of prosecution . . . ."); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 116 F.R.D. 517, 526 (S.D.N.Y. 1987) ("Consequently, it appears that the likelihood of a successful defense to a Swiss prosecution based on Article 47 is highly speculative in the circumstances of these cases."); *Remington Prods., Inc. v. North Am. Philips Corp., N.V.*, 107 F.R.D. 642, 652 (D. Conn. 1985) ("Article 39 is a criminal statute, a fact found significant by the Supreme Court in *Societe* with respect to the Swiss law involved there. As previously noted, however, no prosecution has ever been pursued under Article 39. As in *Banca*, the availability . . . of a 'necessity' defense . . . diminishes the hardship . . . .") (citation omitted); *Compagnie Francaise*, 105 F.R.D. at 30 ("[blocking statute] was never expected nor intended to be enforced against French subjects"); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981). The court in *Banca* stated:

Not only may the particular bank involved obtain waivers from its customers to avoid prosecution, but Article 34 of the Swiss Penal Code contains a "State of Necessity" exception that relieves a person of criminal liability for acts committed to protect one's own good, including one's fortune . . . if one is not responsible for the danger . . . .

*Id.*

115. See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289-90 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

116. *Minpeco*, 116 F.R.D. at 526-27 (citing *United States v. First Nat'l Bank of*

This factor, however, seems more endemic to the control analysis than to the consideration of hardship<sup>117</sup> given the fact that a finding of absolute neutrality would favor preclusion of the production order at a much earlier stage than the balancing test.<sup>118</sup>

The hardship review may be seen as being more concerned with the probability of criminal and civil penalties than with the harshness of any particular statute. Therefore, in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, the court was unpersuaded by relatively severe penalties set forth in the Canadian nondisclosure statute.<sup>119</sup> The district court concluded that the penalties under the Canadian law were not an adequate excuse for the nonproduction of evidence.<sup>120</sup> The court found significant the fact that neither party had diligently sought to comply with its order nor made a good faith showing of inability to comply by seeking a timely exemption from the Canadian nondisclosure law.<sup>121</sup>

### *Location, Nationality, and Expectation*

As noted above, courts have characterized the first two factors of the *Restatement* test as far more important than the last three.<sup>122</sup> At least in part, this stems from the simple fact that the *Restatement* was not designed for use in the discovery context and that factors such as the location of the required conduct merely describe the nature of the problem that the court is addressing.<sup>123</sup> Although courts may buttress balancing decisions by observing that the last three factors "tip in favor" of the

---

Chicago, 699 F.2d 341, 346 (7th Cir. 1983)).

117. See *supra* notes 9-60 and accompanying text.

118. See *supra* notes 10-12 and accompanying text.

119. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 996 (10th Cir. 1977). The Canadian statute provided for a penalty of \$5,000 or two years imprisonment or both. *Id.* Upon an indictment and conviction, however, the penalty could be as high as \$10,000 or five years imprisonment or both. *Id.*

120. *Id.*

121. *Id.*

122. See *supra* note 91 and accompanying text.

123. Teitelbaum, *supra* note 89, at 858 n.64.

avored party,<sup>124</sup> it is now settled that the last three factors of the Section 40 Test are not a part of the annunciated balancing approach.<sup>125</sup>

### *Importance to the Litigation*

In *Societe Internationale*, the Supreme Court implied that courts should use a heightened standard of "materiality" for discovery involving a foreign illegality excuse for nonproduction.<sup>126</sup> The Court did not define this standard clearly, however,<sup>127</sup> and subsequent lower court decisions have articulated the standard differently.<sup>128</sup> Regardless of the standard applied, the importance to the litigation of the information sought by the requesting party is clearly a factor to be considered.

Courts consistently have refused to require production when the information sought is largely cumulative of records already produced.<sup>129</sup> The character of the action at bar may also bear on the importance of the requested discovery. One commentator

---

124. SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

125. Minpeco, S.A. v. ContiCommodity Servs., Inc., 116 F.R.D. 517, 522-23 (S.D.N.Y. 1987) (articulating the "principal" factors as vital national interests, hardship, importance, and good faith).

126. Smith, *supra* note 64, at 751 (citing *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 200-01 (1958)).

127. The *Societe Internationale* decision left the standard unresolved. The Court noted that "the Government alleged that the records sought were relevant" but went on to acknowledge the district court's conclusion that "such records might prove to be crucial in the outcome of this litigation." *Societe Internationale*, 357 U.S. at 200-01.

128. See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281, 1290 (9th Cir.) ("relevant", *cert. denied*, 454 U.S. 1098 (1981)); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) ("relative unimportance of the information" as a factor); *Alfadda v. Fenn*, 149 F.R.D. 28, 39 (S.D.N.Y. 1993) ("directly relevant"); *Minpeco*, 116 F.R.D. at 527-28 ("may be crucial to the litigation"); *Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 32 n.8 (S.D.N.Y. 1984) (rejecting a "vital" test and finding "only that the requested documents are relevant"); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 515-16 (N.D. Ill. 1984) (eschewing a precise standard while recognizing "the significance of this factor"); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1146 (N.D. Ill. 1979) ("whether the requested documents are crucial to the resolution of a key issue in the litigation").

129. *Vetco*, 691 F.2d at 1290 (citing *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977); *Trade Dev. Bank*, 469 F.2d at 40-41).

has noted that "the heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case."<sup>130</sup> This holds exceptionally true when a party alleges an antitrust conspiracy that has apparently taken deliberate and elaborate steps to cloak its activities.<sup>131</sup> Cases pursuing private rights of action of a vital domestic interest may have an advantage should documents or other evidence located abroad become necessary to maintain a case or establish a defense.

### *Good Faith*

As noted above, the Court in *Societe Internationale* emphasized the importance of the good faith requirement, strongly implying a requirement that a party seek a waiver of the prohibiting law and noting that the courting of legal impediments would warrant judicial notice.<sup>132</sup> In fact, the issue of good faith was the dispositive factor behind the Supreme Court's decision not to impose sanctions in *Societe Internationale* for noncompliance with the valid discovery order.<sup>133</sup> Although courts should evaluate a party's good faith attempts to cooperate with discovery throughout the litigation process, the good faith evaluation as expressed in *Societe Internationale* tends consistently to focus on, and is applied by the courts in, the postproduction order context.<sup>134</sup> The very nature of a good faith examination into the nonproducing party's reasons for nondisclosure presupposes the existence of a production order.<sup>135</sup> Essentially, the good faith evaluation concedes the validity of a foreign nondisclosure statute and "requires [the nonproducing party] to demonstrate that the blame for nonproduction lies entirely with the foreign sovereign."<sup>136</sup> Accordingly, the good faith evaluation may be seen

---

130. *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1155 (citing Smith, *supra* note 64).

131. *Id.*

132. *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208-09 (1958).

133. *Id.* at 209.

134. See Lenore B. Browne, Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1340-50 (1983).

135. See *id.*

136. Teitelbaum, *supra* note 89, at 871.

as distinct from the *Restatement* balancing. If, after consideration of the factors noted in the *Restatement* approach, it appears that the burden of producing the evidence should remain on the party with control over the evidence, the good faith evaluation will focus on whether the failure to produce the evidence was justified.<sup>137</sup>

The good faith evaluation is also fact-specific. The district court in *McGrath* provided a nonexhaustive list of factors to be considered.<sup>138</sup> These factors include whether the nonproducing party applied for permission to produce the documents, whether the nonproducing party exhausted all efforts with the executive branch of the foreign country, whether the nondisclosure statute's prohibitions are subject to waiver, whether the foreign country's actions in the case have been consistent with their own law, and whether the nonproducing party had sought any available judicial redress.<sup>139</sup>

In addition to examining a nonproducing party's good faith efforts to comply with a production order, evidence of bad faith based upon a party's conduct prior to the litigation and upon conduct after the onset of litigation can weigh against the nonproducing party.<sup>140</sup> Purposefully locating documents in a jurisdiction that prohibits disclosure in anticipation of litigation could lead a court to find that "one who deliberately courted legal impediments to production . . . cannot . . . be heard to assert its good faith after this expectation was realized."<sup>141</sup> Bad faith has been found not only in a party's purposeful utilization of a foreign jurisdiction's nondisclosure policy but also in actions taken to advance blocking statutes.<sup>142</sup> Undoubtedly, a good

---

137. See Roth, *supra* note 62, at 305 (citing factors analogous to those of the *Restatement*).

138. *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. McGrath*, 11 F.R.D. 294, 296 (D.D.C. 1951); Roth, *supra* note 62, at 305 n.51.

139. *McGrath*, 11 F.R.D. at 296; Roth, *supra* note 62, at 305 n.51.

140. Browne, *supra* note 134, at 1343.

141. *Societe pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208-09 (1958).

142. Browne, *supra* note 134, at 1344 (citing *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 296-99 (S.D. Cal. 1981) (storing documents abroad with expectation that they would thereby under foreign law be unavailable for discovery in anticipated



faith evaluation overlaps with an inquiry into the availability of alternative means of compliance with discovery and discovery orders. A party's willingness to pursue and proffer substantially equivalent alternative means for obtaining requested information is highly pertinent to the court's resolution of the issue.<sup>143</sup> In the case of British nondisclosure laws, substantially equivalent alternative means are not readily available.<sup>144</sup> As noted, the British "dispute with United States laws involves not only a clash of antitrust jurisdiction and enforcement policies, but also a strong difference in discovery philosophies."<sup>145</sup> Indeed, it appears that the only practical alternate means for obtaining the requested information is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>146</sup> The availability, effectiveness, and optional aspects of this convention will be discussed in the next section.

#### THE ROLE OF THE HAGUE EVIDENCE CONVENTION PROCEDURES

"In *Societe Nationale Industrielle Aerospatiale v. United States District Court*,<sup>147</sup> the Supreme Court held that the Hague Convention in no way restricted district courts' discretion to apply the Federal Rules to discovery requests for production of evidence located abroad."<sup>148</sup> The Supreme Court instructed that,

---

litigation in the United States)). In discussing *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), the court in *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984), noted that "[s]ome of the laws . . . were enacted precisely as an attempt to frustrate discovery in the uranium antitrust litigation, and possibly to protect certain defendants not only from discovery, but even from an adverse determination of the merits of the litigation." *Id.* at 514.

143. See *United States v. Vetco, Inc.*, 691 F.2d 1281, 1290 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977).

144. See Smith, *supra* note 64, at 769-70 (citing F.A. Mann, *Anglo-American Conflict of International Jurisdiction*, 13 INT'L & COMP. L.Q. 1460, 1463 (1964)).

145. *Id.* at 761 n.60.

146. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, 12 I.L.M. 323 [hereinafter *Hague Evidence Convention*].

147. 482 U.S. 522 (1987).

148. Joshua O. Stein, *Subordinating the Hague Evidence Convention to the Federal Rules of Civil Procedure: Societe Nationale Industrielle Aerospatiale v. United States District Court*, 21 CONN. L. REV. 167, 167 (1988) (footnote omitted) (citing *Société*

in determining whether to require use of the Hague Evidence Convention procedures or to permit discovery pursuant to the Federal Rules, courts must consider (1) the particular facts of each case, (2) the sovereign interests at issue, and (3) the "likelihood that resort to [Convention] procedures [would] prove effective."<sup>149</sup> The Supreme Court derived the tripartite test from the more general approach taken by the *Restatement of Foreign Relations Law of the United States*.<sup>150</sup> Although "[l]eaving the determination to be made on a case-by-case basis by the trial court, the Supreme Court advised that American courts 'should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.'"<sup>151</sup>

In the years immediately following the *Société Nationale* decision, lower courts disagreed as to which party should bear the burden of establishing which discovery procedure to utilize.<sup>152</sup> Presently, consensus states that a correct reading of *Société Nationale* requires that "[t]he proponent of using the Hague Convention has the burden of demonstrating the necessity for those procedures."<sup>153</sup>

*Nationale*, 482 U.S. 522).

149. *Société Nationale*, 482 U.S. at 544.

150. *Id.* at 544 n.28 (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tentative Draft No. 7, 1986)). Section 437(1)(c) provides:

In issuing an order directing production of information located abroad, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which non-compliance 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.

*Id.*

151. *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 353 (D. Conn. 1991) (quoting *Société Nationale*, 482 U.S. at 546).

152. *See, e.g.*, *Benton Graphics v. Uddenholm Corp.*, 118 F.R.D. 386 (D.N.J. 1987) (stating that the burden is on the party seeking the use of the Hague Evidence Convention procedures); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987) (stating that the burden is on the party opposing the use of the Hague Evidence Convention procedures).

153. *Doster v. Schenk A.G.*, 141 F.R.D. 50, 51 (M.D.N.C. 1991); *see also Perrier*,

As the tripartite approach so closely resembles the analysis of the previous section, this section will emphasize the differences rather than reiterate a tautology of factor balancing. The particular facts of each case are to be weighed against the extent and intrusiveness of the discovery sought, so as not to offend notions of international comity.<sup>154</sup> A strong interest in litigating a dispute domestically, coupled with a finding that the party resisting discovery should have expected American litigation, favors use of American discovery procedures.<sup>155</sup> Under the tripartite test, a reasonable expectation that a foreign company's business activities would subject it to American litigation may support a finding that the nonproducing company would not be disadvantaged by compelled discovery.<sup>156</sup> As discussed above, American interest in the successful resolution of antitrust suits is undisputed. Additionally, a court should consider a litigant's fear of "abusive" discovery in light of "[t]he protective devices of the Federal Rules of Civil Procedure [that] are available to protect a foreign defendant against abusive or unfair discovery."<sup>157</sup>

The "particular facts" prong of the tripartite analysis is best interpreted as an effort to obviate concerns that the domestic litigant is seeking to take advantage of any "special problem confronted by the foreign litigant on account of its nationality or the location of its operations."<sup>158</sup> Cooperation with the foreign litigant and narrowly tailored discovery requests weigh heavily in favor of the domestic litigant's seeking discovery under the

---

138 F.R.D. at 354 ("[A] party who seeks the application of Convention procedures rather than the Federal Rules bears the burden of persuading the trial court.") (citing *Benton Graphics*, 118 F.R.D. at 389); *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) ("[D]efendants have not met their burden of showing that plaintiffs should be required to resort to discovery via the Hague Evidence Convention."); *Haynes v. Kleinwebers*, 119 F.R.D. 335, 337 (E.D.N.Y. 1988) (stating that defendant failed to show any compelling reason to proceed with discovery via the Hague Convention procedures).

154. See *Perrier*, 138 F.R.D. at 354-55; Stein, *supra* note 148, at 176 & n.48.

155. *Schenk*, 141 F.R.D. at 52.

156. *Id.*

157. *Id.* at 53.

158. *Haynes v. Kleinwebers*, 119 F.R.D. 335, 337 (E.D.N.Y. 1988) (quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 547 (1987)).

Federal Rules.<sup>159</sup>

The sovereign interests prong tracks the approach described earlier. One should note, however, that the party seeking to employ the Hague Evidence Convention procedures must identify specific reasons why specific discovery requests under the Federal Rules would be obtrusive.<sup>160</sup> This requirement becomes all the more significant given the vastly different views held by commercialized nations regarding American antitrust, securities, commodities, and patent jurisdiction and enforcement policies, as well as discovery processes.<sup>161</sup>

Perhaps the most important prong of the tripartite analysis is the likelihood that resort to Convention procedures would prove effective.<sup>162</sup> In terms of the effectiveness analysis, the "documents exception" rule permitting parties to the Hague Evidence Convention not to execute Letters of Request issued for the purposes of obtaining pretrial discovery of documents stands as an intransigent roadblock to effective discovery of evidence located abroad.<sup>163</sup> This particular exception, which the British delegation drafted, has been invoked routinely.<sup>164</sup> The primary purpose of "[t]he pretrial discovery exception was . . . to prevent pretrial discovery of a 'fishing nature' or . . . 'the production of documents not *directly* required by a foreign court.'"<sup>165</sup> Al-

---

159. *Id.* at 337-38.

160. *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987) ("These 'critical sovereign interests' are merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules.").

161. *Cf. Smith*, *supra* note 64, at 761 n.60 (noting the role of conflicting British and American discovery philosophies in antitrust disputes).

162. *See Société Nationale*, 482 U.S. at 542-43. The Court in *Société Nationale* observed:

In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. . . . [The procedure also is] inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts.

*Id.* (quoting FED. R. CIV. P. 1).

163. *See* Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 771-79 (1983).

164. *See id.* at 771.

165. *Id.* at 773 (quoting D.M. Edwards, *Taking Evidence Abroad in Civil or Com-*

though courts have been reluctant to accept generalizations regarding the cumbersome nature of the Hague Evidence Convention procedures,<sup>166</sup> probable delays and increased costs often weigh against their use.<sup>167</sup>

The ability of a country to deny document discovery pursuant to Convention procedures has been cited as a valid reason for declining use of the Hague Evidence Convention.<sup>168</sup> Commentators agree that a party should not be forced to embark on a quixotic journey to use the Hague Evidence Convention procedures if it becomes clear that cooperation will be refused.<sup>169</sup> Although a court's refusal to mandate the use of the Hague Evidence Convention procedures does not necessarily mean that direct discovery methods should be ordered, when an adverse party has placed evidence abroad in anticipation of potential litigation, the absence of good faith combined with a substantial domestic interest will weigh in favor of the domestic litigant in the adverse inference calculus.

#### AVAILABILITY AND APPLICABILITY OF THE DOCTRINE OF ADVERSE INFERENCES TO THE NONDISCLOSURE DUE TO FOREIGN ILLEGALITY SETTING

The doctrine of adverse inferences arose long before the advent of modern discovery procedures, "at a time when parties had no means of compelling their opponents to produce . . . evi-

---

*mercial Matters*, 18 INT'L & COMP. L.Q. 646, 650-51 (1969) (alterations in original)).

166. *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991) (pointing out that delays may be due to lack of familiarity with Convention procedures) (citing *Hudson v. Hermann Pfanter Gmbh & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987)).

167. *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987). Considering the potential for delays should Convention procedures be utilized, the court in *Benton Graphics* expressed typical concern:

[D]efendants' letter of request should be processed by the Swedish authorities in approximately two months. That is an approximation based upon past history; there are certainly no guarantees. This case has already endured numerous delays and discovery should proceed apace. . . . [F]urther litigation undoubtedly spawned by their decision may bring actual discovery to a standstill.

*Id.*

168. See *Doster v. Schenk*, 141 F.R.D. 50, 54-55 (M.D.N.C. 1991).

169. *Oxman*, *supra* note 163, at 782.

dence."<sup>170</sup> The doctrine "supplied a necessary incentive for the parties to present a full picture of the facts."<sup>171</sup> Today, in civil litigation, the content of any proposed testimony or desired evidence is generally obtainable, reducing the need for such an instruction.<sup>172</sup> In litigation involving evidence located abroad and subject to foreign nondisclosure laws, however, the doctrine of adverse inferences remains a valuable tool for either compelling disclosure or limiting the benefits to be achieved by foreign secreting of evidence.<sup>173</sup>

### *The Origins of the Adverse Inference Doctrine*

The adverse inference doctrine for the nonproduction of evidence traces its roots to the eighteenth-century British case of the Chimney Sweeper's Jewel. The case, *Armory v. Delamirie*,<sup>174</sup> involved a chimney sweeper's boy who found a jewel ring and brought it to the defendant, a goldsmith, for appraisal. The goldsmith's apprentice removed the gem and returned only the setting to the sweeper's boy.<sup>175</sup> In an action of trover, the court directed the jury "that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels [that could fit in the setting] the measure of their damages."<sup>176</sup>

The Supreme Court dealt with the doctrine of adverse inferences in *Clifton v. United States*.<sup>177</sup> In *Clifton*, Justice Nelson characterized the doctrine as an analog to the best evidence rule<sup>178</sup> and acknowledged that the doctrine had applications to

170. Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137, 141 (1985).

171. *Id.*

172. Joseph M. Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27, 32 (1984).

173. *Cf.* Smith, *supra* note 64, at 757, 757 n.48, 758 (discussing the courts' use of negative inferences of fact under Federal Rule of Civil Procedure 37 to compel discovery of evidence located abroad and subject to foreign nondisclosure laws) (citing *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860-61 (5th Cir. 1970)).

174. 1 Strange 505, 93 Eng. Rep. 664 (1722).

175. *Id.*

176. *Id.*

177. 45 U.S. (4 How.) 242 (1846).

178. *Id.* at 247. Recognizing the roots of the doctrine, Justice Nelson stated:

the nonproduction of evidence.<sup>179</sup>

The adverse inference doctrine also has cognizable roots in the spoliation doctrine and the maxim "*Contra spoliatorem omnia praesumuntur* (All things are presumed against the destroyer)."<sup>180</sup> Under this doctrine,

a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.<sup>181</sup>

Whatever its origins, the adverse inference doctrine for the nonproduction of evidence is perhaps best stated by Wigmore:

These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the*

---

One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof . . . .

*Id.*

179. *Id.* Justice Nelson explained:

The meaning of the rule is . . . that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind . . . because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.

*Id.*

180. Stier, *supra* note 170, at 140 (citing BLACK'S LAW DICTIONARY 1257 (5th ed. 1979)).

181. 2 WIGMORE, *supra* note 6, § 278.

*party's cause.*<sup>182</sup>

As recognized by Professor Livermore, the failure to produce certain evidence amounts to an admission by conduct.<sup>183</sup> As this conduct is not intended as an assertion, there is no hearsay problem under the Federal Rules of Evidence,<sup>184</sup> but the evidentiary inferences follow an identical route.<sup>185</sup> First, the failure of a party to produce evidence in the litigation indicates the nonproducing party's belief that the evidence is adverse.<sup>186</sup> Next, the party's apparent belief that the evidence is adverse allows an inference that the unproduced evidence is, in fact, adverse.<sup>187</sup>

### *Application of the Adverse Inference Doctrine*

The adverse inference doctrine is at the heart of several judicial applications involving the nonproduction of evidence. Adverse inferences may be drawn, under certain circumstances, "when a party fails to call a witness whom that party would ordinarily produce if the facts known by the witness were favorable to that party,"<sup>188</sup> "from the destruction of evidence relevant to a case,"<sup>189</sup> from "[t]he production of weak evidence when strong is available,"<sup>190</sup> and when there exists an "unexplained failure or refusal of a party . . . to produce evidence that would tend to throw light on the issues."<sup>191</sup>

Although the prerequisites vary depending on whether the adverse inferences are based upon a missing witness, spoliation, weaker evidence, or the nonproduction of evidence, the underlying principles are the same. Before a court permits adverse

---

182. 2 *id.* § 285.

183. Livermore, *supra* note 172, at 29.

184. FED. R. EVID. 801(c).

185. Livermore, *supra* note 172, at 29.

186. *Id.*

187. *Id.*

188. *United States v. Ariza-Ibarra*, 651 F.2d 2, 15 (1st Cir.), *cert. denied*, 454 U.S. 895 (1981).

189. *Glover v. Bic Corp.*, 987 F.2d 1410, 1417 (9th Cir. 1993) (quoting *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991), *cert. denied*, 503 U.S. 962 (1992)).

190. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (citing *Clifton v. United States*, 45 U.S. (4 How.) 242, 247 (1846)).

191. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983).



inferences, the proponent of the inference must establish that the evidence or testimony that was not produced was controlled by the nonproducing party,<sup>192</sup> was peculiarly available to the nonproducing party,<sup>193</sup> would elucidate the transaction,<sup>194</sup> and was, in fact, actually withheld.<sup>195</sup> A court may apply the doctrine either through the use of a jury instruction or through arguments by counsel at closing.<sup>196</sup>

For nonproduction of evidence, the adverse inference rule is permissible when

- (1) it appears that the documentary evidence exists or existed;
- (2) the suppressing party has possession or control of the evidence;
- (3) the evidence is available to the suppressing party, but not to the party seeking production;
- (4) it appears that there has been actual suppression or withholding of evidence.<sup>197</sup>

The party requesting an adverse inference instruction has the burden of showing that the criteria have been satisfied.<sup>198</sup> The adverse inference instruction is argumentative,<sup>199</sup> making the trial court's decision to grant or deny a request for an adverse inference instruction reviewable under an abuse of discretion standard.<sup>200</sup> A court, however, should not preclude argument regarding the inference when the case presents a significant question on the failure to produce.<sup>201</sup>

---

192. *United States v. Johnson*, 562 F.2d 515, 517 (8th Cir. 1977).

193. *United States v. Frost*, 914 F.2d 756, 765 (6th Cir. 1990) (citing *United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973)).

194. *Id.*

195. *Gumbs*, 718 F.2d at 96 (citing 31A C.J.S. *Evidence* § 156(2) (1964)).

196. *See infra* notes 205-09 and accompanying text.

197. *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990) (citing 31A C.J.S. *Evidence* § 156(2) (1964)).

198. *Wilson v. Merrell Dow Pharmaceuticals Inc.*, 893 F.2d 1149, 1151 (10th Cir. 1990); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659-60 (11th Cir. 1988); *United States v. Sutton*, 732 F.2d 1483, 1492 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985).

199. "[A jury] instruction is argumentative if it . . . singles out the testimony of one witness while disregarding other relevant evidence . . ." *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 201-02 (8th Cir. 1981) (citing *Systems, Inc. v. Bridge Elecs. Co.*, 335 F.2d 465, 467 (3d Cir. 1964)), *cert. denied sub nom. Saint Louis-S.F. Ry. v. Vanskike*, 455 U.S. 1000 (1982).

200. *Sutton*, 732 F.2d at 1492.

201. *Chicago College of Osteopathic Medicine v. Fuller Co.*, 719 F.2d 1335, 1352-53

What, then, is the adverse inference? One commentator has noted that the inference "does not supply affirmative or substantive proof but merely affects the weight or credibility of the evidence."<sup>202</sup> In *Felice v. Long Island Railroad*, Judge Friendly described the inference as one that "permit[s] the jury 'to give the strongest weight to the evidence already in the case in favor of the other side, and which has not been, but might have been, effectively contradicted or explained by the absent [evidence].'"<sup>203</sup> The adverse inference doctrine is thus a self-limiting rule that acknowledges that the failure to produce does not amount to substantive proof and therefore does not alter the proof requirements in a particular case.<sup>204</sup> The adverse inference doctrine essentially strengthens a party's case that has been disadvantaged by the nonproducing party's failure to cooperate with the trial court's search for truth.

One should note a distinction between argument and instruction. An argument involves counsel's analysis of all of the evidence and is not limited to those matters for which a jury instruction is required. Significantly, a jury instruction has the weight of law, even if it only permits and does not require the inference.<sup>205</sup> Counsel whose request for an instruction has been denied may still retain the ability to argue the inference to the jury in closing argument because the argument may be proper even if the instruction is not.<sup>206</sup> Wigmore noted that "the failure to produce is in evidence from the very nature of the situation, and therefore, when relevant . . . , may be referred to."<sup>207</sup>

---

(7th Cir. 1983) ("Questions as to the propriety of comment by counsel in argument upon the failure to produce a witness rest largely in the discretion of the trial court, but the court should not preclude such argument when the case presents a significant question on this point.").

202. Stier, *supra* note 170, at 148 (emphasis omitted).

203. *Felice v. Long Island R.R.*, 426 F.2d 192, 195 n.2 (2d Cir. 1970) (quoting *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 22 A.D.2d 625, 630 (N.Y. App. Div. 1965)).

204. 29 AM. JUR. 2D *Evidence* § 245 (1964); *Brown v. Maryland Casualty Co.*, 55 F.2d 159 (8th Cir. 1932) (using a *prima facie* case prerequisite for application of the adverse inference doctrine).

205. Stier, *supra* note 170, at 168.

206. 75A AM. JUR. 2D *Trial* § 596 (1964).

207. Stier, *supra* note 170, at 166 (quoting 6 WIGMORE, *supra* note 6, § 1806) (omission in original).

The issue of relevance returns to the same question of fact discussed above—whether the party could have produced the evidence.<sup>208</sup> Once a fact is in evidence, counsel may argue inferences from the fact subject only to the duty to exercise good faith.<sup>209</sup> The extent to which counsel may comment on the absence of certain evidence would seem to be a function of the degree to which a party fails to explain satisfactorily the absence,<sup>210</sup> fails to show that the evidence would have been cumulative,<sup>211</sup> or fails to show that the evidence was equally available to both parties.<sup>212</sup>

### *Criticism of the Adverse Inference Doctrine*

Modern use of the adverse inference doctrine has not gone uncriticized. First, the doctrine has been criticized as archaic in the age of liberal discovery and a broad subpoena power that makes all evidence “available” to all parties.<sup>213</sup> Second, the adverse inference arising from the nonproduction of evidence may be objectionable in light of “the many reasons having nothing to do with the content” of the evidence that might prevent a party from producing it.<sup>214</sup> Third, the adverse inference instruction itself has been criticized as duplicative and “not informative.”<sup>215</sup>

In discussing the continued validity of the missing witness rule, a three-judge panel of the Fifth Circuit expressed a common criticism of the adverse inference doctrine:

It is not difficult to demonstrate how the evidentiary scheme created by the Federal Rules of Evidence, as complemented

---

208. *Id.* at 167.

209. *See, e.g.,* *Graves v. United States*, 150 U.S. 118, 125 (1893) (Brewer, J., dissenting).

210. *Felice v. Long Island R.R.*, 426 F.2d 192, 194-95 (2d Cir. 1970).

211. *In re Evangeline Refining Co.*, 890 F.2d 1312, 1321 (5th Cir. 1989).

212. *Felice*, 426 F.2d at 194-95; *Wagner v. United States*, 264 F.2d 524, 531 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959).

213. *See* *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 n.4 (11th Cir. 1988); *Livermore, supra* note 172, at 31.

214. *Stier, supra* note 170, at 153.

215. *United States v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994).

by the Federal Rules of Civil Procedure, renders the uncalled-witness rule an anachronism. A litigant may use modern discovery procedures to ascertain the identity and proposed testimony of witnesses identified with her opponent. If the district court finds that a party is concealing the identity and location of persons with knowledge of discoverable matter, the court may impose an appropriate penalty.

... Accordingly, if unconstrained by precedent, we would hold that in trials conducted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure, the trier of fact may draw no inference from a party's mere failure to call a witness who is susceptible to subpoena by either party, and that it is inappropriate for counsel to argue to the fact finder that such an inference is permissible.<sup>216</sup>

Similarly, McCormick suggests that, with the advent of modern discovery procedures, the adverse inference doctrine has diminished utility in civil cases.<sup>217</sup> Certainly, modern discovery and subpoena power have obviated much of the need for the doctrine, but, in the context of nonproduction of evidence located abroad and subject to nondisclosure statutes, a domestic litigant has a reduced ability to compel production, and the court is under an obligation to balance the forum interest in production against the interests of the nation opposing discovery.<sup>218</sup> In such cases, one can hardly say that the requested evidence is equally available to both sides. Although a district court has unchallenged authority to compel production<sup>219</sup> and sanction accordingly,<sup>220</sup> the doctrine of adverse inferences provides an intermediate option between draconian sanctions and complete surrender to the foreign blocking statute.

The inference drawn from the nonproduction of evidence has been challenged on the ground that many of the various reasons for nonproduction may be legitimate tactical concerns and not technically adverse.<sup>221</sup> At least in the context of a proffered for-

---

216. *Herbert*, 911 F.2d at 1048 (footnotes omitted).

217. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 272 (3d ed. 1984).

218. See *supra* notes 83-146 and accompanying text.

219. See *supra* note 62 and accompanying text.

220. FED. R. CIV. P. 37.

221. See, e.g., *Livermore*, *supra* note 172, at 30 (citing *United States v. Hines*, 470 F.2d 225, 230 (3d Cir. 1972)) ("Often all that can be inferred is that the [evidence]

eign illegality excuse for the nonproduction of evidence under a valid discovery order, the nonproducing party not only has the *opportunity* to explain the reasons for nonproduction<sup>222</sup> but also the *obligation* to provide the district court with specific reasons for noncompliance, which may include proof of an actual conflict with the foreign law and good faith efforts to obtain a waiver from its terms.<sup>223</sup> Although some commentators have viewed a nonproducing party's ability to rebut the inference by explanation as "unsatisfactory" and an "invit[ation to] the jury to consider a collateral issue,"<sup>224</sup> in light of a proffered foreign illegality excuse, the reasons for a nonproducing party's inability to comply with a discovery order cannot be described as collateral. In fact, in the foreign illegality context, nonproduction and noncompliance are synonymous.<sup>225</sup> A nonproducing party's explanations as to the reasons for noncompliance will not only determine the propriety of sanctions<sup>226</sup> but will also factor into both the court's decision as to the propriety of an adverse inference instruction<sup>227</sup> and the jury's decision on how much weight, if any, should be given to counsel's argument urging adverse inferences from a party's failure to produce the evidence in question.<sup>228</sup>

The third criticism of the adverse inference doctrine asserts that the adverse inference instruction is duplicative of arguments made at closing and tends to overemphasize the unpro-

---

would not have been *helpful* to a party, not that the [evidence] would have been *adverse*."), *cert. denied*, 410 U.S. 968 (1973)).

222. Indeed, Wigmore noted that the adverse inference is "open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure." 2 WIGMORE, *supra* note 6, § 285. In fact, "[e]rror occurs if a party is denied an opportunity to explain the absence of [evidence]." Livermore, *supra* note 172, at 30 n.12 (citing *United States v. McCaskill*, 481 F.2d 855 (8th Cir. 1973)).

223. See *supra* notes 61-82 and accompanying text.

224. Livermore, *supra* note 172, at 30.

225. Recall that a district court examines the foreign illegality excuse for nonproduction after discovery has been ordered. See *supra* notes 132-46 and accompanying text. Accordingly, in this context, use of the adverse inference doctrine is not open to the challenge that the evidence was equally available to the proponent of the doctrine.

226. See *supra* note 75 and accompanying text.

227. 2 WIGMORE, *supra* note 6, § 285.

228. 6 *id.* § 1806.

duced evidence.<sup>229</sup> In *United States v. Pryor*,<sup>230</sup> Judge Easterbrook made a forceful argument that the use of the adverse inference instruction in the weaker evidence context was superfluous and duplicative of allowed arguments by counsel.<sup>231</sup>

Given the permissive tone of the adverse inference instruction, Judge Easterbrook's approach is appealing. However, prohibiting adverse inference instructions precludes their effective use not only as an illumination of the law concerning nonproduction but also as a check on potential overreaching by counsel during closing arguments. As one commentator observed, "[j]urors are expected to sort through not only the mass of conflicting testimony and exhibits but also the arguments of counsel. The absence of instructions leaves jurors with their individual conceptions and misconceptions of what the applicable law is."<sup>232</sup>

### *Application of the Adverse Inference Doctrine to Nonproduction of Evidence Due to Foreign Illegality*

The availability of adverse inferences for the failure of a party to produce evidence located abroad and subject to foreign nondisclosure laws was first articulated by the Supreme Court in

---

229. See *United States v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994).

230. *Id.* at 1192.

231. *Id.* at 1194. Judge Easterbrook stated:

The judge declined to give this instruction, lifted from a formulary. He might have declined on the ground that it is pabulum. Telling the jury that it may, but needn't, "consider" a fact is not informative. Of course the jury may *consider* the strength of the evidence. Why give vapid instructions that add nothing to the arguments of counsel?

*Id.*

232. Stier, *supra* note 170, at 169 (citing *United States v. Young*, 463 F.2d 934, 945 (D.C. Cir. 1972) (Robinson, J., concurring)). To recognize the utility of the adverse inference instruction is not to denigrate the district court's discretion in determining when its use is appropriate. Such discretion is universally recognized. *Pryor*, 32 F.3d at 1194; *United States v. Frost*, 914 F.2d 756 (6th Cir. 1990); *Wilson v. Merrell Dow Pharmaceuticals Inc.*, 893 F.2d 1149, 1150 (10th Cir. 1990); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1990); *Brownlow v. Aman*, 740 F.2d 1476 (10th Cir. 1984). Just as a district court may determine that an adverse inference instruction is inappropriate to a certain situation, it has discretion to limit comments by counsel during closing arguments concerning adverse inferences. *United States v. Sblendorio*, 830 F.2d 1382, 1394 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988).

*Societe Internationale pour Participations Industrielles et Commerciales, S.A.*<sup>233</sup> Although reversing the district court's decision to award dismissal as a sanction, the Court refused to limit the possible discretionary remedies available for a failure to comply with a production order.<sup>234</sup> The Court noted that, on remand, the district court may "be justified in drawing inferences unfavorable to petitioner as to particular events."<sup>235</sup>

Reported cases involving the nonproduction of evidence located abroad usually discuss the availability of adverse inferences, if at all, as a possible sanction under Rule 37 for failure to comply with a production order.<sup>236</sup> One commentator has made several observations pertinent to the doctrine of adverse inferences:

(1) District court judges . . . do not hesitate to order discovery in the face of foreign illegality. They are aware that foreign governments often waive their non-disclosure laws . . .

(2) [In an effort to achieve partial waiver of foreign nondisclosure laws,] [j]udges, charged with the enforcement of . . . United States antitrust laws, often do not hesitate to . . . threaten[] harsh remedies for noncompliance, thus exercising leverage for a favorable settlement.

[(3)] . . . [C]ourts . . . do not hesitate to announce their intention to draw negative inferences of fact under Rule 37 should full production not occur. In many cases, such a threat is equivalent to a threat of a default judgment.<sup>237</sup>

The consistent tenor of this judicial approach seems to embrace the facilitation of evidence production. Courts seek to promote the flow of evidence, not the utilization of Rule 37 sanctions. Although a court may be willing to concede to a "narrowing" of requested evidence, disclosure remains the touchstone.<sup>238</sup>

---

233. 357 U.S. 197 (1958).

234. *Id.* at 213.

235. *Id.*

236. See, e.g., *id.* at 212-13; *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (discussing *Societe Internationale*); see also Smith, *supra* note 64, at 762-63 (citing *In re Ampicillin Antitrust Litig.*, M.D.L. Docket No. 50, Misc. 45-70 (D.D.C. Jan. 22, 1974)).

237. Smith, *supra* note 64, at 757-58 (citations omitted).

238. See, e.g., *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1155 ("[D]efendants argue that they are equally prejudiced by the nondisclosure laws, since they may be

Drawing negative inferences of fact under Rule 37 is not, however, the same as applying the doctrine of adverse inferences. In the Rule 37 setting, a judge may impose a penalty upon the nonproducing party as a matter of law, which simply deems certain facts established.<sup>239</sup> Such a sanction would almost certainly be given only upon a finding that the nonproducing party either "courted legal impediments" to discovery or acted in bad faith.<sup>240</sup> The sanctions available under Rule 37 allow a district court to enforce discovery and ensure that a party does not benefit from the willful secreting of evidence. Similarly, a district court's discretion to deny or narrow a discovery order serves the valid purpose of observing international comity concerns and ensuring that parties with evidence subject to nondisclosure statutes are not punished when they have consistently acted in good faith.

The shortcoming of the current approach to nonproduction due to foreign illegality is that it envisions a mythical land of good faith and bad faith, of willful secreting of evidence and honest international business activity, of laws enacted to protect vital national interests and laws enacted solely to combat American discovery. Unfortunately, modern commercial litigation rarely involves such extremes. Under the current approach, a district court faced with inconclusive results of the balancing approach is faced with a Hobson's choice of either resorting to compelled discovery and possible use of Rule 37 sanctions or no discovery at all. Either result may be riddled with inequity.

Expanded use of the doctrine of adverse inferences would provide courts with an effective discretionary tool when the balancing approach proves inconclusive. Threatened sanctions certainly can work effectively as the final step in a reasoned progression designed to bring relevant information before a court. Utilization of the doctrine of adverse inferences, however, would allow a district court to resolve the discovery issue by leaving the determination of whether the nonproducing party

---

prevented from using exculpatory documents which are covered by those laws. However, the solution to this 'problem' lies in the fullest possible disclosure, not in a mutual limitation on relevant information.") (citation omitted).

239. FED. R. CIV. P. 37.

240. *Societe Internationale*, 357 U.S. at 209.



had been courting legal impediments with the finder of fact. Permitting the jury to consider the circumstances surrounding the nonproduction of evidence when foreign illegality is proffered as an excuse would allow a district court to take a middle-ground approach when the balancing approach provides inconclusive results. Certainly, as a discretionary tool, the calculus for determining the award of an adverse inference instruction would track the analysis undertaken to weigh the propriety of ordering production or requiring use of the Hague Evidence Convention procedures.

From the preceding analysis, the prerequisites to the use of the adverse inference doctrine in the case of a party failing to produce evidence located abroad may be evaluated readily. The requisite elements are: (1) evidence under the control of the failing party that is (2) reasonably available to him and (3) not reasonably available to the adverse party.<sup>241</sup> The first section set forth the factors that would favor a determination of a party-litigant's control over a third-party corporation within the trans-actional and discovery context. The second section set forth the criteria a court must use to determine whether the discovery sought would be reasonably available to a party exercising good faith efforts. The third section went on to evaluate the likelihood that the Hague Evidence Convention procedures would not constitute a viable alternative to frustrated discovery under the Federal Rules.

The award of an adverse inference instruction, however, is discretionary.<sup>242</sup> In commenting on when a missing witness instruction should be ordered, one judge observed that it is especially true that when an instruction is sought that "creates evidence from the absence of evidence, the court is entitled to reserve to itself the right to reach a judgment as wisely as can be done in all the circumstances, even when the general guidelines . . . are found to be supported by the evidence."<sup>243</sup>

Of course, knowing that the award of an adverse inference

---

241. 3 DEVITT ET AL., *supra* note 7, § 72.16.

242. See *United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989).

243. *Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970) (footnotes omitted).

instruction is left to judicial discretion offers little in terms of predictability. The best explanation for when a court should permit the instruction in a case involving the failure to produce evidence located abroad would seem to be when the balancing approach provides inconclusive results. Such a result may arise when the party resisting discovery establishes the conflict with the foreign law and the vital foreign interests involved, but the remaining factors—including good faith and importance of the evidence to the litigation—remain unclear. In such a situation, the district court would deny the motion to compel production but would allow either an adverse inference instruction, arguments concerning adverse inferences, or both.

Accordingly, the adverse inference doctrine would operate in a manner similar to when evidence is admitted conditioned upon a finding of fact.<sup>244</sup> Should a district court judge determine that a conflict with the foreign nondisclosure statute exists but that the Section 40 Test proves inconclusive, the jury would be permitted to hear all the circumstances surrounding the nonproducing party's failure to produce. The jury would then decide, using the prerequisites discussed above, whether to infer that the evidence, had it been produced, would have been unfavorable to the nonproducing party.

### CONCLUSION

The law as it relates to the foreign illegality excuse for nonproduction of evidence located abroad is settled. The factors for determining whether a party-litigant has control over a third-party depository, the Section 40 Test for the appropriateness of compelled production of evidence subject to nondisclosure statutes, and *Société Nationale's* tripartite test for the use of the Hague Evidence Convention procedures are the product of an evolutionary approach developed by the federal courts in response to the problems posed by complex litigation implicating the laws of a competing sovereign. Inquiries into issues of inter-

---

244. See FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

national comity, good faith, and hardship demonstrate the judiciary's reticence to formulate some form of binary test that would provide a more mechanical litmus test for compelled production.

The path to an order to compel the production of evidence located abroad and subject to nondisclosure statutes is necessarily an uncertain one. The operation of any balancing test is inherently amorphous, and, when one balance test provides unpredictable results, judicial consideration of a proffered foreign illegality excuse geometrically increases the uncertainty by lining up three consecutive factor-based tests as wickets to the issuance of an order to compel production. Although the process concededly does little to advance predictability, the existence of the factor-based tests does provide specific criteria for corporations to consider before engaging in business practices that could be construed, or misconstrued, as evidence-secreting or the courting of legal impediments.

The factor-based tests *are* workable, and the time for academic critique of their utility has passed. Appropriate remedies, however, have garnered little evaluation outside of the limited choice between compelled production and complete surrender to foreign blocking statutes. Given the judiciary's deliberate decision to construct a broad-based, factor-balancing test for the issuance of a production order and for consistent inquiry into issues of good faith and comity, distilling the choice of remedies to an "either-or" proposition appears inconsistent.

Use of the adverse inference doctrine would allow the courts to fashion a new solution to an old problem without deviating from the existing law of evidence. Far from an innovation, the adverse inference doctrine rests on the same common-law foundations that underlie the best evidence rule and modern spoliation doctrine. Although the modern discovery provisions of the Federal Rules of Civil Procedure obviate the need for its application in most circumstances, the adverse inference doctrine should be utilized as an intermediate remedy when a foreign illegality excuse is proffered.

*Paul Robert Eckert*