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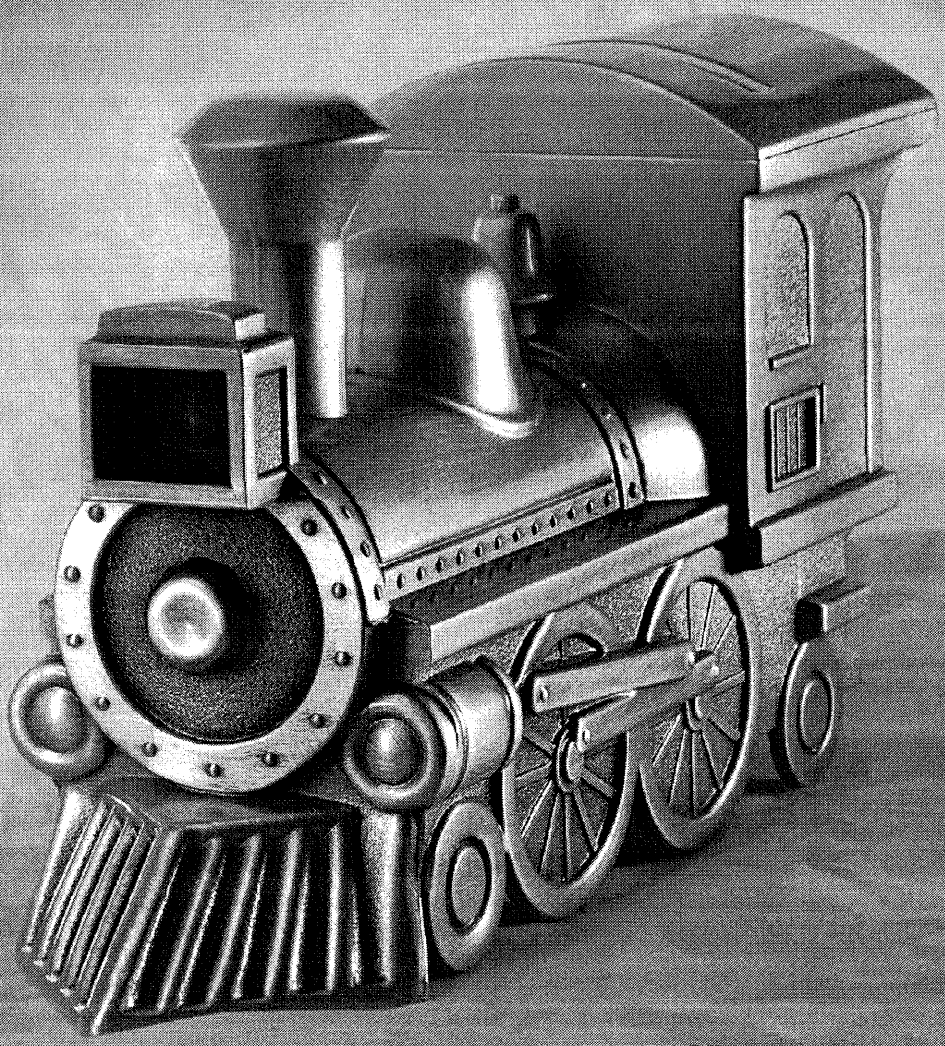

Products liability

Keeping your case on track

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Successfully suing foreign manufacturers

MARK P. CHALOS

A products liability case against a foreign defendant presents a variety of hurdles, both procedural and substantive. This step-by-step guide will help you map a course to success in your case—and justice for your client.

As the world economy becomes more fully integrated, Americans are buying more products made abroad. One recent report estimated that China manufactures 80 percent of children's toys sold in the United States, while as few as 10 percent are made here.[1] Recent contamination scares have also revealed that many other products—including toothpaste, pet foods, and pharmaceuticals such as the anticlotting agent heparin—are imported from foreign sources.[2]

Products made outside the United States are sometimes designed and manufactured in environments with fewer regulations and less-stringent legal requirements to ensure product safety. When these products harm U.S. citizens, getting compensation can pose unique and daunting challenges.

American courts and lawyers have long wrestled with the fundamental question: What is the role of the American legal system in providing redress when defective foreign products cause harm in the United States? While this is an interesting philosophical and public policy question, it is also a relevant question for trial lawyers. What can a lawyer do when a parent says, "My child was injured by a defective toy made in a foreign country?"

Prevailing over a foreign defendant presents a variety of hurdles, each warranting threshold and ongoing analysis as the litigation proceeds. Specifically, suing foreign defendants raises the following issues: whether the court can properly exercise personal jurisdiction over the foreign defendant; how to effect service of process; how to overcome motions to dismiss based on forum non conveniens; and how to conduct discovery from the foreign sources.

Initial concerns

Getting compensation for a client who has been injured by a foreign product requires a threshold analysis of two related questions. First, does an American court have personal jurisdiction over the defendant? Second, is the de-

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fendant amenable to service of process?

Answering these questions definitively is difficult at the outset of litigation, but understanding the framework a court will apply to the analysis will help you evaluate the likelihood of meeting these burdens.

The ever-shifting issue of personal jurisdiction. Personal jurisdiction is the power of a court to render a judgment against a specific defendant.[3] All states have enacted statutes or rules for exercising jurisdiction over nonresident defendants, including foreign defendants.[4] Although the language of the various state "long-arm" statutes differs, such provisions can extend the court's personal jurisdiction only to the due process limits that the U.S. Constitution permits.[5]

American courts have struggled with defining the limits of personal jurisdiction over a foreign defendant. A brief review of the winding path the law has taken historically will help a practitioner better navigate this area's current jurisprudence.

Until the mid-20th century, the widely held view was that a court's jurisdiction extended no further than to the boundaries of the state's territory.[6] As international commerce expanded and industry increased worldwide, courts developed a more expansive concept of personal jurisdiction.

Twentieth-century court attempts to fairly assess constitutionally proscribed limits yielded vague concepts labeled with precise-sounding names, such as "minimum contacts" and "purposefully avail."[7] These phrases proved confusing to law students and mostly unhelpful to practitioners deciding whether and where to bring suit.

The expansive notion of personal jurisdiction peaked with the Supreme Court's decision in *World-Wide Volkswagen v. Woodson*, which set forth a two-pronged approach for determining when an assertion of personal jurisdiction is warranted. First, the defendant must have purposefully created minimum contacts with the forum ("purposeful contacts") such that the defendant should "reasonably anticipate being haled into court there"[8] and, sec-

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ond, the exercise of jurisdiction must be "reasonable."[9]

Although the relative weight of each prong of the analysis shifted in later cases,[10] contemporary courts generally apply the two-pronged *World-Wide Volkswagen* framework when deciding whether to exercise personal jurisdiction over a foreign defendant. In a later plurality opinion, Justice Sandra Day O'Connor introduced examples of conduct that could justify an exercise of jurisdiction. These included

- showing an intent to serve the market in the forum state
- designing the product for that forum's market
- advertising in the forum state
- establishing channels to provide regular advice to customers in the forum state
- marketing the product through a distributor or agent in the forum state.[11]

The rise of Internet commerce has complicated the jurisdictional analysis, with some courts finding that maintaining an "interactive" Web site used by forum residents can support an exercise of personal jurisdiction.[12] Although the analysis has evolved and will continue to evolve with slight differences among the states and the various federal circuits, *World-Wide Volkswagen* provides the basic analytical structure for most courts.

Courts typically address the question of personal jurisdiction on an early motion to dismiss for lack of jurisdiction. Often, these motions are made before substantial discovery has been completed and are supported by affidavits from defendants stating that they have not had sufficient minimum contacts with a forum state.

To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists.[13] A plaintiff should request that the court allow discovery to proceed, at least regarding the issue of the defendant's contacts with a forum state.

Discovery should include inquiry into

- marketing and advertising plans and analysis
- direct and indirect sales data, including online and phone sales
- sales projections
- travel by officers and employees into the forum state
- phone records of calls into and from the forum state
- correspondence with persons or entities in the forum state
- data regarding Internet traffic for any company Web sites
- assets held by the defendant in the forum state
- any contracts with any party located in the forum state.

Requesting an evidentiary hearing on the jurisdictional issue rarely benefits the plaintiff. Instead, evidentiary hearings may encourage a court to move beyond determining whether a plaintiff has established a prima facie case and to instead make factual findings requiring a higher standard of proof. In any event, a challenge to personal jurisdiction may be waived, so a plaintiff should evaluate whether any challenge was made timely.

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Service of process on a foreign defendant. A related, yet distinct, requirement for pursuing a case against a foreign defendant is that the defendant must be given proper notice and an opportunity to appear in the lawsuit.[14] The means and procedure for effecting service of process on a foreign defendant vary depending on the forum and on the defendant's home country.[15] Each forum state has a version of a long-arm statute that permits service of process on foreign defendants.

In federal cases, Rule 4 of the Federal Rules of Civil Procedure governs service of process. Under Rule 4, service on corporations in foreign countries is permitted pursuant to the Hague Service Convention or any other applicable treaty. If there is no governing treaty, service may be made

- according to the law of the foreign country in which service of process is being attempted
- as directed by a foreign authority in response to a letter rogatory, which is a written request issued by a court filing an action that asks the appropriate foreign authority for assistance in serving documents on one of its citizens, or a letter of request
- by signed-receipt mail delivery sent by the clerk of the court
- pursuant to any court-ordered means not prohibited by international agreement.[16]

Effecting proper service of process on a foreign defendant in its home country can be expensive and time-consuming. For example, Article 5 of the Hague Service Convention requires that, unless specifically waived by the receiving country, documents must be translated into the receiving country's language. Translating complex legal documents can cost several thousand dollars and take weeks to complete.

Moreover, where service is made with the help of the receiving country's judicial authorities, the convention imposes no time requirement in which the authorities must attempt service. Adding further complication, Article 15 presents significant hurdles to obtaining a default judgment if service through the authorities stalls.

As an alternative to serving a foreign defendant in its home country, plaintiffs should consider asking the defendant to waive the requirements of formal service of process—under Rule 4(d), for example. Although a foreign defendant cannot be taxed with costs for failure to waive service, a waiver provides the defendant with extra time to respond to the complaint. As a practical matter, in exchange for waiving expensive formal

service and the related cumbersome maneuverings, a plaintiff might consider agreeing to other inducements, such as extra time in which the defendant must answer discovery.

If service of process will be especially difficult or expensive, the plaintiff should consider asking a defendant to waive it in exchange for the plaintiff's agreement to take corporate representative depositions in the defendant's home country. Such an agreement may be particularly helpful if the forum law does not generally require a foreign defendant to produce foreign witnesses in the forum state for deposition. The costs of traveling to a defendant's home country can be substantially less than the cost of service of process and the inevitable motions practice associated with seeking to compel a foreign citizen to travel to the forum state.[17]

Another alternative to serving a foreign defendant in its home country is to serve a U.S.-based agent appointed by the defendant or by law to receive service.[18] Many states require foreign corporations doing business in their state to appoint such an agent. Another alternative under some states' law is to serve a closely affiliated entity, such as a subsidiary company doing business in a forum. Properly effecting service on a related entity typically requires demonstrating an alter ego or agency relationship.[19]

If an alternative agreement cannot be reached and service must be effected in a foreign nation, one should consider using a professional service-of-process company. These companies are located throughout the United States and have the experience and knowledge needed to properly navigate the often complicated requirements for effecting service of process outside the United States. These companies are readily findable through an Internet search.

Forum non conveniens

Even when the exercise of personal jurisdiction is proper and service of process is successfully carried out, a court has discretion to dismiss a case against a foreign defendant under the doctrine of forum non conveniens. According to the U.S. Supreme Court, "the principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized."[20] Although the principle seems straightforward, as Justice Antonin Scalia observed, "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible."[21]

The modern formulation of forum non conveniens was introduced in a pair of 1947 Supreme Court cases, *Gulf Oil Corp. v. Gilbert* and *Koster v. Lumbermens Mutual Casualty Co.* In *Gilbert*, the justices addressed factors that a court should consider when determining whether to dismiss an action on the basis of forum non conveniens.[22] The Court grouped the factors into private- and public-interest categories.

Private-interest factors include ease of access to sources of proof; availability of compulsory process for and cost of obtaining attendance of witnesses; possibility of view of premises, if appropriate; enforceability of a judgment; and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."[23]

Considering these factors, the court should weigh the "relative advantages and obstacles to fair trial."[24] The Court also explained that a "plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[25] However, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," the Court noted.[26]

The public-interest factors include considering the administrative difficulties the lawsuit would present for the affected courts; whether the court should impose jury duty on citizens from a community that has no connection with the origin of the litigation; whether a particular community has an interest in having a localized controversy decided in their community; and whether a state has an interest in applying and deciding complex issues of its own law, rather than having a foreign forum decide those issues.[27]

Discovery from foreign sources is expensive, cumbersome, and difficult. Local counsel can often provide invaluable advice and access to the proper channels for navigating the process.

Handed down the same day as *Gilbert*, the *Koster* decision emphasized that the choice of forum by a plaintiff suing in his or her own state will be accorded strong deference.[28] Read together, *Gilbert* and *Koster* make it clear that although a plaintiff's choice of forum is important, it can be overridden and a case dismissed when contrary relevant private and public interests should prevail.[29]

The Supreme Court further refined the modern doctrine of forum non conveniens in *Piper Aircraft Co. v. Reyno*.[30] *Piper* held that the threshold determination in a forum non conveniens analysis is whether an adequate alternative forum exists.[31] If it does, the court must then apply *Gilbert*'s private- and public-interest factors. The *Piper* Court also noted that the question of whether the substantive law of the alternative forum is less favorable to the plaintiff should not be given conclusive or even substantial weight in the analysis, unless the remedy provided in the alternative forum is so clearly inadequate or unsatisfactory that the plaintiff has no remedy at all.[32]

Forum non conveniens motions are typically made early in litigation, and courts may choose to decide the issue on affidavits alone.[33] When a court grants

dismissal on the basis of forum non conveniens, it may impose conditions on the dismissal, such as requiring a defendant to consent to jurisdiction and service of process in the alternative forum, to produce documents or witnesses in the foreign action, to waive any statute-of-limitations defense in the foreign action, and to consent to pay any foreign judgment obtained by the plaintiffs.[34]

To make dismissal more palatable to trial courts, defendants may agree in advance to stipulate to such conditions.[35] While these conditions might be of little comfort to a litigant whose case was dismissed, they can be important concessions if litigating in an alternative venue is viable.

When a product manufactured abroad causes injury in the United States, domestic parties may be culpable. Foreign products generally enter the country through the efforts of domestic actors.

Discovery

Conducting discovery from foreign sources can pose additional difficulties. Information that is within the territorial United States, even if in the possession of a foreign-based defendant, is subject to discovery under the applicable federal or state rules.[36] Discovery of information from foreign sources outside the United States may be governed by

- federal or individual state rules of civil procedure
- international conventions or treaties, such as the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (also known as the Hague Evidence Convention)
- customary international law, which primarily includes letters rogatory or letters of request[37]
- legal procedures of the specific foreign country from which the information is sought.[38]

Most discovery is conducted according to applicable rules of civil procedure and through international treaties like the Hague Evidence Convention. The U.S. federal rules provide significant flexibility in conducting extraterritorial discovery.[39]

When a nonparty witness in a foreign country agrees voluntarily to provide information, the federal rules provide several methods for taking the deposition, including by notice or by commission.[40] Even with the deponent's agreement, some countries prohibit private attorneys from taking a deposition. The State Department can provide helpful information regarding the applicable law.[41]

When a witness is not expected to appear voluntarily, the federal rules permit a party to seek a letter of request from the court directed to the appropriate foreign authority seeking assistance in conducting discovery.[42] The letter should explain why it is necessary to take the testimony, the areas of testimony of each identified witness, and the documentation to be used during the examination.[43] In countries where a private attorney typically is not permitted to question a witness directly, the letter of request should ask for permission to cross-examine the witness during the deposition.[44]

The Hague Evidence Convention applies to discovery from foreign nonparties, and, in certain circumstances, a court may require a litigant to use the convention exclusively to obtain discovery from foreign sources.[45] It provides methods for obtaining testimonial evidence and documentary evidence, although the information discoverable under the convention is far more limited than under federal and state rules.

For example, Article 23 of the convention permits countries to refuse to allow pretrial discovery of documents, and all but four signatories have opted to refuse such discovery.[46] Notwithstanding the blanket refusal, some signatories may enforce "carefully drafted, specific document requests."[47]

Regardless of which method a litigant uses to obtain discovery from foreign sources, the process will be expensive, cumbersome, and difficult. As with domestic cases, local counsel can often provide invaluable advice and access to the proper channels for navigating the process. Practitioners would be prudent to conduct domestic discovery before seeking foreign discovery.

The information necessary to try the case might be found domestically, through subsidiary or related entities or through entities with which the foreign defendant does business. Even when additional information is needed, learning from the domestic discovery will typically help narrow the requests to foreign sources and may reduce costs and increase the likelihood of obtaining the requested information.[48]

Moreover, documents located in the United States are more likely to be in English, which would obviously avoid the expense and delay of translation. In any event, if a non-English-speaking deponent will testify, either in the United States or abroad, the plaintiff should consider engaging his or her own translator rather than relying on another party's translator.

Plaintiffs suing foreign defendants in American courts can expect a variety of procedural and practical hurdles, including the unique challenges of obtaining personal jurisdiction, effecting service of process, withstanding forum non conveniens motions, and obtaining discovery from foreign sources.

Although it varies among state and federal courts, generally the framework for the personal jurisdiction analysis involves, first, determining whether a defendant has purposefully created sufficient minimum contacts with the forum state such that the defendant should reasonably anticipate being haled into court there and, second, determining whether the exercise of jurisdiction would be reasonable. Once personal jurisdiction is established, the rules governing service of process vary widely depending on the home state of the defendant.

Because of these challenges, the costs of litigating against a foreign defendant can be significantly higher than those incurred in litigating against a domestic defendant. Procedures that are routinely and efficiently carried out in lawsuits against domestic defendants can become cumbersome and, in some circumstances, impossible.

These difficulties make suing foreign defendants prohibitively expensive and resource-consuming in many cases. In appropriate cases, however, ample procedures exist for successfully holding foreign defendants accountable for their misconduct.

Counsel should keep in mind that when a product that has been manufactured abroad causes injury in the United States, domestic parties may be culpable, too. Foreign products generally enter the United States through the efforts of domestic actors. For example, toys manufactured abroad are often imported, rebranded, marketed, distributed, and sold by American companies.

While the foreign manufacturer might bear the ultimate moral responsibility for problems with their products, under most states' laws, domestic actors have legal obligations not to market and sell dangerous or defective products, regardless of their manufacturing origin. With the procedural and substantive challenges that arise in litigation against foreign defendants, successfully getting redress for a person injured by a foreign product often begins at home. ■

Notes

1. Jayne O'Donnell & Mindy Fetterman, *When It Comes to Toys, Buying American Is Tough*, USA Today B1 (Oct. 5, 2007). In fiscal year 2007, Chinese toys accounted for 88 percent of the toy recalls of the Consumer Product Safety Commission. *Id.*

2. *See e.g. FDA Stops Imports of Chinese Toothpaste*, Wash. Post (May 24, 2007).

3. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 609-10 (1990); see *International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts* 113 (David J. Levy ed., Am. Bar Assn. 2004) for an excellent discussion of the issues of personal jurisdiction and service of process.

4. Gary Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 76 (Aspen Publishers, 4th ed. 2007).

5. *See generally Hanson v. Denckla*, 357 U.S. 235, 256 (1958).

6. *See Pennoyer v. Neff*, 95 U.S. 714 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

7. *Intl. Shoe Co. v. Wash.*, 326 U.S. 310 (1945) (setting forth the "minimum contacts" test); *Hanson*, 357 U.S. at 253 (holding that to warrant an exercise of personal jurisdiction, the Constitution requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state").

8. 444 U.S. 286, 297 (1980).

9. *Id.* at 292.

10. *Compare Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (treating the "reasonableness" requirement as the key to the court's analysis), *with Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987) (emphasizing the importance of the "purposeful availment" requirement for personal jurisdiction).

11. *Asahi Metal Indus. Co.*, 480 U.S. at 112.

12. *See generally Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398-401 (4th Cir. 2003); *see also* Born & Rutledge, *supra* n. 4, at 146-48 (collecting cases citing various conduct to support personal jurisdiction).

13. *See Arar v. Ashcroft*, 532 F.3d 157, 173 (2d Cir. 2008).

14. *See Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

15. "Service of process" for purposes of this discussion means service of the complaint and summons.

16. The U.S. Department of State provides substantial guidance on effecting service of documents on foreign defendants, including listings and links to relevant treaties. U.S. Dept. of State, Bureau of Consular Affairs, *Service of Legal Documents Abroad*, www.travel.state.gov/law/info/judicial/judicial_680.html.

17. In April 2008, Rep. Loretta Sanchez (D-Cal.) introduced H.R. 5913 in Congress, titled "Protecting Americans from Unsafe Foreign Products Act." This bill provides for service of process in any action brought in federal or state court for injury by a product manufactured by a foreign entity or person that "knew or reasonably should have known that the product or component would be imported for sale or use in the United States," or "had contacts with the United Sates, whether or not such contacts occurred in the place where the injury occurred." The bill further states that service under this provision "establishes jurisdiction over the person of the citizen or subject." The bill was referred to committee and hearings were held in May 2008.

18. Fed. R. Civ. P. 4(h).

19. Born & Rutledge, *supra* n. 4, at 821; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

20. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), *superseded by statute as stated in Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

21. *Am. Dredging Co.*, 510 U.S. at 445.

22. *Gilbert*, 330 U.S. at 508-09.

23. *Id.* at 508.

24. *Id.*

25. *Id.*

26. *Id.*

Procedures routinely and efficiently carried out in lawsuits against domestic defendants can become cumbersome and, in some circumstances, impossible in cases against foreign defendants.

27. *Id.*

28. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

29. See Ronald A. Brand & Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* 47-48 (Oxford U. Press 2007), for a discussion of the historical development of the doctrine of forum non conveniens.

30. 454 U.S. 235 (1981).

31. *Id.* at 254 n. 22.

32. *Id.* at 254.

33. *See e.g. Transunion Corp. v. PepsiCo., Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (per curiam).

34. Born & Rutledge, *supra* n. 4, at 406.

35. *International Litigation*, *supra* n. 3, at 219.

36. *See e.g. In re Aircrash Disaster near Roselawn, Ind.*, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

37. 28 U.S.C. §1781 (2008).

38. *International Litigation*, *supra* n. 3, at 278.

39. *Id.*

40. Fed. R. Civ. P. 28(b).

41. *See e.g.* U.S. Dept. of State, Bureau of Consular Affairs, *International Judicial Assistance, Notarial Services and Authentication of Documents*, www.travel.state.gov/law/info/judicial/judicial_702.html.

42. Fed. R. Civ. P. 28(b).

43. *International Litigation*, *supra* n. 3, at 287.

44. *Id.*

45. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 544 (1987).

46. *International Litigation*, *supra* n. 3, at 292.

47. *Id.*

48. See *id.* at 277-78 for an exposition on obtaining foreign discovery and for sources of additional information for various countries.