Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act

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As the volume and importance of international business activity have increased, litigation involving multinational corporations has become more and more common. Thus, the problems involved in obtaining foreign discovery are no longer simply of theoretical interest; they are increasingly important to multinational corporations involved in international litigation, to corporations wishing to avoid such litigation, and, especially in the case of antitrust actions, to the U.S. Department of Justice. A new English statute, the Evidence (Proceedings in Other Jurisdictions) Act, which sets forth the procedures by which the British courts may order compliance with foreign discovery requests, is certain to have a significant impact on the availability of discovery in England for litigation in the United States.

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1. The term “discovery” is often limited in English procedure to the production of documents. See 13 Halsbury’s Laws of England para. 1 n.1 (4th ed. 1975). In this Note “discovery” includes the gathering of information through depositions, interrogatories, and production of documents. The term “foreign discovery” denotes an attempt by a party to an action in one state to obtain information located in another state.


3. The Act applies only to discovery pursuant to letters rogatory, which are “the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter’s control, to assist the administration of justice in the former country.” The Signe (Tiedemann v. The Signe), 37 F. Supp. 819, 820 (E.D. La.), case decided sub nom. The Signe (renamed Florida), 39 F. Supp. 810 (1941), aff’d sub nom. The Florida, 133 F.2d 719 (5th Cir. 1943). See generally Note, Taking Evidence Outside of the United States, 55 B.U. L. Rev. 368, 372-73 (1975). Such requests are of course not binding on the foreign court; they are “made, and . . . usually granted, by reason of the comity existing between nations in ordinary peaceful times.” 37 F. Supp. at 820. See also 28 U.S.C. §§ 1781-1784 (1976); Fed. R. Civ. P. 28(b); 14A Bender’s Forms of Discovery § 13.05[3] (1974).

Letters rogatory are generally appropriate when the persons from whom discovery is sought are not willing to disclose the information and must be compelled to do so by a court in the foreign country. The “methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice. [The requesting state] cannot execute [its] laws in a foreign country, nor can [it] prescribe conditions for the performance of a request which is based entirely upon the comity
This Note will examine the Evidence Act in the context of antitrust actions such as the recent Westinghouse uranium contracts litigation, the first case in which the English Court of Appeal and House of Lords considered the Act. The case highlights the need for foreign discovery, the mechanics of nations, and which, if granted, is altogether ex gratia.' E. Weeks, A TREATISE ON THE LAW OF DEPOSITIONS § 128, at 151 (1880), quoted in Union Square Bank v. Reichmann, 9 A.D. 596, 600, 41 N.Y.S. 602, 605 (1896).

Federal Rule of Civil Procedure 28(b), which provides for discovery by letters rogatory, also permits discovery by notice and by commission from witnesses who are willing to testify. Use of these other two methods need not involve foreign courts at all, and most of the problems discussed in this Note would not arise in such cases. For a comparison of discovery by letters rogatory, by notice, and by commission, see Note, supra at 369-77. See generally Sklaver, Obtaining Evidence in International Litigation, 7 CUM. L. REV. 233, 234-42 (1976).

4. The Westinghouse litigation, encompassing at least 27 separate suits, involves contracts made in the 1960's and 1970's by Westinghouse Electric Corporation to provide a number of American utilities with uranium for nuclear reactors at a fixed price, subject only to adjustments for inflation. Between 1972 and 1975 the price of uranium on the world market skyrocketed from about $7 to about $42 a pound, and in 1975 Westinghouse announced that it could not fulfill its contracts because performance had become "commercially impracticable." Thirteen federal actions brought by the purchasing utilities were consolidated in the Eastern District of Virginia, In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 405 F. Supp. 316 (J.P.M.D.L. 1975), and the case went to trial September 12, 1977, N.Y. Times, Sept. 13, 1977, at 47, col. 1. Four suits brought in state courts were settled, and three suits were brought in Sweden. Cheeseright, RTZ stands in the shade, Financial Times (London), Nov. 8, 1977, at 14, col. 3.


6. Discovery of evidence concerning the existence of a cartel was relevant to Westinghouse's "commercial impracticability" defense in the contracts litigation and was essential to Westinghouse's antitrust action. Much of this evidence, however, was located abroad. In October 1976, a federal court in Virginia issued letters rogatory to the Supreme Court of Ontario in Canada, to the Supreme Court of New South Wales in Australia, and to the High Court of
of the new Act, and the problems involved in foreign discovery, including the political and economic issues that can complicate the legal question of the availability of discovery. The Note will focus on the kinds of discovery available in England to American litigants, the traps that can defeat discovery, and how these traps can be avoided or exploited.

I

VALIDITY OF THE LETTERS ROGATORY

The first possible challenge to discovery in England concerns the validity of the letters rogatory. The technical requirements for requesting evidence from a foreign court are set forth in section 1 of the Evidence Act. No specific form or content is required. The court to which the request is directed in England. The discovery sought in England included documents possessed by Rio Tinto Zinc Corporation (RTZ), an English company thought to be a member of the cartel, and oral testimony from certain RTZ officials. In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 97-99 (H.L. 1977).

The English Court of Appeal in the Westinghouse case upheld the letters rogatory under the Evidence Act, but at the ensuing depositions RTZ officials refused both to testify, asserting the American fifth amendment privilege against self-incrimination, and to produce documents, asserting the English privilege against self-incrimination. In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1977] 3 W.L.R. 492, 494-96 (C.A.), aff'd, [1978] 2 W.L.R. 81 (H.L. 1977). The U.S. Department of Justice granted use immunity to the RTZ officials in order to obtain evidence for its grand jury investigation of the cartel, see Letter from Hugh P. Morrison, Jr., Antitrust Div., U.S. Dept of Justice, to Honorable Robert R. Merhige, Jr. (June 14, 1977) (copy on file at the offices of the Cornell International Law Journal), but the officials still refused to testify, The Times (London), July 26, 1977, at 17, col. 7. The appeals from the Court of Appeal judgments were heard in the House of Lords amid intense diplomatic pressure from the governments of Australia, Canada, France, and South Africa to prevent the British Government from allowing the discovery. Id. The Law Lords ruled that, because of the grant of immunity by the Department of Justice, the testimony could not be compelled under the Evidence Act. In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 116 (H.L. 1977).

An examination of the legal ramifications in an American proceeding if discovery is ultimately forbidden by British authorities is beyond the scope of this Note. See generally In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977); 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 (1974).

9. For a definition and discussion of "letters rogatory," see note 3 supra.

10. Articles 3 and 4 of the Hague Convention, supra note 2, however, require that letters rogatory comply with certain language requirements and that they specify certain information, such as the identity of the authority making the request, the names and addresses of parties, the nature of the proceedings, and the evidence to be obtained. Although these requirements are not mentioned in the Evidence Act, they must be met since both the United States and the United Kingdom are parties to the Convention, 23 U.S.T. 2555, T.I.A.S. No. 7444; [1977] Gr. Brit. T.S. No. 20 (Cmd. 6727). See also RULES OF THE SUPREME COURT (Eng.) Order 70, rules 2-3. For a brief description of the usual form for letters rogatory under the old statutes, see 1 THE SUPREME COURT PRACTICE 1021-22 (J. Jacob ed. 1970). See also 2 id. at 41-42; I. JACOB, CHITTY AND JACOB’S QUEEN’S BENCH FORMS 776-84 (20th ed. 1969); 14A BENDER’S FORMS OF DISCOVERY § 13.05, Forms Nos. 13.05:7 to :11 (1974).
rected must be satisfied that the request is issued by "a court or tribunal . . . exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom"—a requirement that is easily met.11 In addition, the evidence must be requested "for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."12 Thus, the first real hurdle is to show that the proceedings in the requesting court are civil rather than criminal in nature.13

This ordinarily simple question may become complex and of great practical importance when the U.S. Department of Justice has a criminal investigation of the same conduct underway, especially when the Department has granted immunity from prosecution to witnesses in the private action in order to secure evidence for a grand jury investigation. The granting of immunity is arguably an attempt by the Department of Justice to use the letters rogatory to gather evidence for the grand jury investigation,14 in contravention of the spirit,15 if not the letter, of the Hague Convention,16 to which both the United States and Great Britain are parties,17 and in direct contravention of the Evidence Act.18 In fact, when the Department of Jus-

11. Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 1(a). This requirement would clearly be satisfied in any case originating in an American court. The status under the Act of an administrative proceeding, however, if it arguably involves rulemaking or investigation rather than adjudication, is unclear. See also P. Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 12 INT'L LEGAL MATERIALS 327, 342-43 (1973).
12. Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 1(b). The term "civil proceedings" is defined in § 9(1) as "proceedings in any civil or commercial matter."
13. Section 5 of the Evidence Act does provide for obtaining evidence for a criminal proceeding at the request of a foreign court. Here, however, the powers of discovery under the statute are much narrower. The foreign criminal proceeding must have been "institution"—precluding the granting of evidence for use by a grand jury investigation—and the range of discovery is limited to examination of witnesses and production of documents. Id. § 5(1)(b)-(c); see note 18 infra. Thus, the U.S. grand jury investigating the uranium cartel, see note 7 supra, cannot obtain evidence directly for its criminal investigation through the use of this statute. In addition, no evidence can be obtained "in the case of criminal proceedings of a political character.” Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 5(3). The criminal provisions in the Act are reenactments of prior legislation involving criminal evidence and have nothing to do with the Hague Convention, supra note 2, which deals exclusively with civil matters. See P. Amram, supra note 11, at 343; Preliminary Note, 45 HALS-BURY'S STATUTES OF ENGLAND 482 (3d ed. continuation vol. 1975).
14. A variation of this argument is that the granting of immunity is an "intervention" by the Department of Justice in the civil proceeding—an attempt to use the civil proceeding as a criminal investigation. See Memorandum from Hugh P. Morrison, Jr., Antitrust Div., U.S. Dept of Justice, to Herbert Hansell, U.S. Dept of State 1-2 (July 6, 1977) (copy on file at the offices of the Cornell International Law Journal).
15. See note 25 infra and accompanying text.
18. See Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, §§ 1(b), 5(1)(b); note 13 supra. Lord Fraser of Tullybelton declared that using the statutory procedures to gather evidence for a grand jury investigation was "a purpose altogether outside the Act of 1975 and
tice granted immunity in the *Westinghouse* litigation,\(^{19}\) it openly stated that its goal was to obtain evidence for a grand jury.\(^{20}\)

On the other hand, certain factors militate against invalidating the letters rogatory. The Department's role, if any, in such cases is much more limited than in typical criminal investigations. If the United States is not a party to the case, and if the proceeding is a bona fide civil case between private parties involving no collusion with the Government, the litigation will be conducted independently of the Department of Justice. Indeed, the Department takes a certain risk in granting immunity, since its own lawyers have no opportunity to examine the witnesses who are immunized.\(^{21}\) Moreover, the Hague Convention and the Evidence Act leave the resolution of claims of privilege from testifying under the law of the requesting state to the authorities of that state.\(^{22}\) The Department of Justice, as the final authority regarding the prosecutorial intentions of the U.S. Government,\(^{23}\) is clearly an appropriate arbiter under federal law of the question of immunity from prosecution, and, therefore, of the question of privilege from testifying.\(^{24}\) Indeed, the purpose of the Hague Convention was to facilitate the discovery of evidence in civil cases in foreign countries.\(^{25}\) That goal could be severely undermined if the Department of Justice were not permitted to grant immunity when a witness claims the fifth amendment privilege in a civil proceeding between private parties. Finally, testimony given in court or pursuant to discovery is a matter of public record, and testimony given in


The Law Lords were divided on the question whether the letters rogatory were valid before the grant of immunity, but they were unanimous in finding that after the grant of immunity the letters could not be enforced. Viscount Dilhorne stated: “It cannot be right for a state to seek to avail itself for the purpose of securing evidence for criminal proceedings, of the obligations accepted by another state in respect of the furnishing of evidence for civil or commercial proceedings.” *Id.* at 107. Lord Wilberforce went so far as to conclude that “the making of the order [compelling testimony and granting immunity] is a matter of government policy, and not related to the civil proceedings in Richmond [Virginia].” *Id.* at 94.

\(^{19}\) See note 7 supra.

\(^{20}\) Letter, *supra* note 7, at I. The *Westinghouse* litigation appears to be the first case in which the Department of Justice granted immunity for witnesses in a civil action to which the United States was not a party. See note 140 infra.


\(^{22}\) Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1)(b); Hague Convention, supra note 2, art. 11; see RULES OF THE SUPREME COURT (Eng.) Order 70, rule 6(3)(c)-(d).

\(^{23}\) See Memorandum, supra note 14, at 7-8.


civil cases is normally available for use in criminal investigations. Thus, if
the use of civil evidence obtained under the Evidence Act in a subsequent
criminal proceeding would violate the Act, no such evidence could ever be
safely taken. This was surely not the intent of the drafters of the statute, and
the Act contains no clause so limiting the use of evidence obtained pursuant
to its provisions.

Further, as a matter of policy the grant of immunity should not invali-
date the letters rogatory. A litigant’s right to obtain evidence under the stat-
ute should not be prejudiced by the fact that the evidence is also of interest
to the Justice Department. If a private party to a civil suit seeks evidence in
good faith pursuant to the Evidence Act, the procedures adopted by Ameri-
can authorities to settle the American privilege question should not affect
the production of that evidence under the Act. It is equally clear, however,
that the Department of Justice has an obligation to be cautious in its use of
immunity in a civil proceeding to obtain evidence for use in a criminal
investigation. Criminal proceedings that might involve a foreign defen-
dant, particularly those concerning antitrust violations overseas, can raise
sensitive international issues, and comity dictates that the need for the
evidence be balanced against the possible adverse reaction in the foreign
country to the ultimate use of the evidence.

27. A related argument made in the Westinghouse case was that Westinghouse really
wanted the evidence for its civil antitrust action in Illinois, see note 4 supra, an action that was
claimed to be penal in nature because of the claim for treble damages. None of the Law
Lords accepted this argument, and Lord Wilberforce, the presiding Lord, answered this argu-
ment in a manner that seems to undermine the logic behind their conclusion on the immunity
issue:

I need not express any opinion whether if the letters rogatory had been issued in the
Illinois proceedings they could be implemented in England, for I am of opinion that
the appellants' argument fails at an earlier stage. Unless a case of bad faith is made
against Westinghouse (which is expressly disclaimed) it is impossible to deny that the
letters rogatory were issued for the purposes of obtaining evidence in the Richmond
proceedings. The fact, if it be so, that evidence so obtained may be used in other
proceedings and indeed may be central in those proceedings is no reason for refusing
to allow it to be requested: all evidence, once brought out in court, is in the public
domain, and to accept the argument would largely stultify the letters rogatory proce-
dure. I must therefore reject this separate contention . . .

In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 89 (H.L.
1977). See also id. at 97, 126.
28. The effect of the granting of immunity in the Westinghouse case was aggravated by the
federal grand jury's subpoena requiring Westinghouse to produce the information obtained
through discovery. See id. at 93, 107.
29. See notes 118-20 infra and accompanying text.
30. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES
§ 40 (1965); id. Reporters' Note 2. See generally Stanford, The Application of the Sherman Act
to Conduct Outside the United States: A View from Abroad, 11 CORNELL INT'L L.J. 195 (1978);
Address by Griffin B. Bell, U.S. Attorney General, before the American Bar Ass'n 3-4 (Aug. 8,
A second possible hurdle to the validity of the letters rogatory is the discretion of the English court in accepting them. Although the Evidence Act does not explicitly state that the acceptance of the letters is discretionary, this conclusion can be inferred from the language of the statute. Normally the letters are accepted as a matter of course. However, where honoring the letters rogatory would injure the public interest, a court may refuse to honor them, despite the possibility that the refusal might offend the government issuing the letters.

II

TYPES OF DISCOVERY AVAILABLE

If the English court honors the letters rogatory, the next possible challenge is that the particular discovery sought is not available under the Evidence Act. At first glance, the Act seems to allow a wide range of discovery. Section 2(1) empowers the court to “make such provision for obtaining evidence... as may appear to the court to be appropriate,” and section 2(2) lists specific examples of permissible discovery, such as oral or written examination of witnesses, production of documents, inspection of property, and medical examinations. These provisions alone significantly broaden the type of discovery available under earlier legislation. Section 2(3), however, places a severe limit on the scope of discovery: it is available

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31. Section 1 of the Evidence Act states that the British court “shall have the powers,” not “duties,” appropriate to compel discovery, and § 2(1) likewise refers to the court’s “power... to make... provision for obtaining evidence.” See In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 101-02 (H.L. 1977). By contrast, other provisions of the Act are phrased categorically: “[a]n order... shall not require,” § 2(3)-(4); “[a] person... shall be entitled,” § 2(5); and “[a] person shall not be compelled,” § 3(1)-(3). Moreover, the granting of discovery in an English action is normally discretionary, rather than a matter of right. See note 56 infra and accompanying text.

32. See note 65 infra and accompanying text.

33. The circumstances that would provoke a refusal by an English court would probably be similar to those situations giving rise to the English public interest privilege. See notes 104-15 infra and accompanying text. The court’s discretion would most likely be expressed not as a refusal to honor the letters because of their invalidity, but rather as a refusal to allow the particular discovery requested, see notes 55-64 infra and accompanying text, or as a finding that the information sought is privileged, see notes 105-15 infra and accompanying text. Yet when the American court in the Westinghouse litigation sent letters rogatory to the Supreme Court of Ontario, the Canadian court in its discretion refused to honor the letters because the request violated strong Canadian public policy. Re Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont. 2d 273, 290-92 (High Ct. Justice 1977).

34. Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 2(1).

35. Id. § 2(2)(a).

36. Id. § 2(2)(b).

37. Id. § 2(2)(c).

38. Id. § 2(2)(e).

39. For example, cases under the earlier acts, see note 2 supra, held that third parties could be required to produce documents only if they were ancillary to oral testimony. E.g., American Express Warehousing, Ltd. v. Doe, [1967] 1 Lloyd’s List L.R. 222, 225 (C.A.); Burchard v.
only through "steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order."40

The procedural rules for discovery in England probably contain few provisions that would be unfamiliar to an American attorney acquainted with the Federal Rules of Civil Procedure.41 The substantive scope of discovery in English litigation, however, is in some respects considerably more limited than in American proceedings.42 The most significant example is pretrial discovery, which is used much less extensively in England than in America.43 Before the enactment of the Evidence Act, English courts consistently refused to grant pretrial discovery requested by foreign courts;44 in fact, the argument most commonly asserted to defeat compliance with letters rogatory was that the discovery sought was pretrial.45 In the Westinghouse case, the English Court of Appeal declared that the old cases did not apply under the new Act, and that pretrial discovery would be freely permitted.46 But the House of Lords took the opposite view:47 discovery may only be obtained under the Act if it is shown—not merely al-

40. Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 2(3). Another provision of the Act, § 2(1), further limits the scope of discovery to what "may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made." This latter restriction, however, is subsumed by the general requirement that evidence be taken according to English law, since under English law the availability of discovery is always subject to the discretion of the court. See note 56 infra and accompanying text.


44. The leading case on this point is Radio Corp. of America v. Rauland Corp., [1956] 1 Q.B. 618 (1955), which involved a request from an American court for documents and oral testimony from directors of two English companies that were not parties to the American action. The court did not allow discovery, holding that the applicable statute, the Foreign Tribunals Evidence Act, 1856, 19 & 20 Vict., c. 113, § 1, allowed only "evidence which may be used at the trial," not "proceedings for inspection and discovery before the trial." Id. at 648.


46. In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1977] 3 W.L.R. 430, 436-37, 442-43 (C.A.), rev'd on add'l facts, [1978] 2 W.L.R. 81 (H.L. 1977). This view is supported by the text of the Act; § 1(b) specifically states that evidence may be requested "for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated." Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 1(b). This is a marked departure from the language of prior legislation, which referred to proceedings which were "pending." Foreign Tribunals Evidence
leged⁴⁸—in the letters rogatory that the information sought is to be used at trial and is not being sought merely because it might lead to the discovery of other information that would be used at trial.⁴⁹ This decision reflects the English prohibition of "fishing expeditions," and it severely narrows the range of discovery available to an American litigant.⁵⁰

Theoretically, oral depositions can be used freely; an English court may order a deposition, at its discretion, in "any cause or matter where it appears necessary for the purposes of justice."⁵¹ But in practice, the English much prefer that testimony be given at trial, and courts generally order oral depositions only in extraordinary circumstances—for example, if an important witness cannot attend the trial.⁵² The examination of witnesses abroad is an established exception to this rule,⁵³ however, and a request for evidence by letters rogatory would naturally fall within this exception. The scope of oral questioning at a deposition is generally not limited as long as the questions "fairly relate to the matters in dispute in the foreign action."⁵⁴

Act, 1856, 19 & 20 Vict., c. 113, § 1; Evidence by Commission Act, 1859, 22 Vict., c. 20, § 1. The new language seems to anticipate the use of the statute in pretrial procedure.


the Court of Appeal, while correctly stating that the Act of 1975 was a new Act, may have been led to treat it as dealing more liberally than its predecessor with pre-trial discovery. I do not so regard the Act: on the contrary, it appears to me that it takes a stricter line. Id. at 87.

⁴⁸. Although two Law Lords were willing to accept the requesting court's statement of the purpose for which the evidence was sought, id. at 110, 129, the other three Lords looked beyond the phrasing of the letters rogatory, which they noted were drafted by Westinghouse's lawyers with an eye to the requirements of English law, id. at 87-88, 118. These judges looked to the "substance of the letters rogatory"—that is, whether they were "calculated to elicit ... a substantial quantity of material that would not be direct evidence," and "to the circumstances in which they were issued," including a statement by Judge Merhige when he issued the letters that "it may lead to something." Id. at 118-19. The burden of showing that the request is not a "fishing expedition" is, of course, on the party seeking discovery. "If the court is not satisfied that evidence [for use at trial] is required, ... however much the court may be disposed to accede to the request, it has no power to do so." Id. at 96.

⁴⁹. Id. at 101.

⁵⁰. The English prohibition against "fishing expeditions" extends to requests that do not adequately describe the documents sought. See id. at 99-100; note 63 infra and accompanying text.

⁵¹. RULES OF THE SUPREME COURT (Eng.) Order 39, rule 1(1). The deposition may be made at any place, either before the court or before a person named by the court. Id. Order 70, rule 4(1).


Discovery of documents, although used more often in English proceedings than depositions, is still employed much less frequently than in American federal courts. Documents generally cannot be obtained as a matter of right, but only in the discretion of the court. English courts have denied discovery when they believed it was not absolutely necessary to the proceedings—for example, when the information sought did not appear to be relevant or when the plaintiff had failed to make out a prima facie case. Further, the courts are sensitive to possible inconvenience or unfairness to the recipient of the request. They have denied discovery when the expense or labor involved in production of the documents would be unduly oppressive, when production would be vexatious or improper or work injustice, and particularly when the documents were not sufficiently specified—a requirement now expressly set forth in the Evidence Act. A showing of such circumstances will not necessarily block all discovery; the court may simply limit the request so as to prevent any oppression. In addition, since English courts generally grant discovery requested by foreign courts, the person from whom discovery is sought would probably

57. See RULES OF THE SUPREME COURT (Eng.) Order 24, rule 8.
59. E.g., Philips v. Philips, 40 L.T.R. (n.s.) 815 (C.P.D. 1879); Lane v. Gray, L.R. 16 Eq. 552, 43 L.J. Ch. (n.s.) 187 (V.C. 1873).
61. E.g., Attorney-General v. North Metropolitan Tramways Co., [1892] 3 Ch. 70, aff'd, 72 L.T.R. (n.s.) 340 (Ch. App. 1895) (company not required to produce all its books to its trade rival); Mansell v. Feeney (No. 2), 4 L.T.R. (n.s.) 437 (V.C. 1861) (defendant not required to disclose business profits to an alleged partner). The corresponding American rule is Federal Rule of Civil Procedure 26(c).
63. Section 2(4) of the Act provides:

An order under this section shall not require a person—

(a) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 2(4).
64. RULES OF THE SUPREME COURT (Eng.) Order 24, rule 2(5); see Cory v. Cory, [1923] 1 Ch. 90 (Ch. App. 1922). The corresponding American rule is Federal Rule of Civil Procedure 26(c). If the request is too far-reaching, however, the court may refuse to grant it at all. See In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 88 (H.L. 1977).
65. "Judicial and international comity requires that any request of a foreign court for evidence... should be treated with sympathy and respect and complied with so far as the princi-
have to show significant hardship in order for the court to refuse discovery on discretionary grounds.

Finally, under English common law, discovery of documents is ordinarily available only against a party to the action. But the definition of "party" for purposes of discovery is very broad. Additionally, there are several exceptions to the general rule: (1) discovery may not be defeated by placing documents in the hands of nonparties; (2) nonparties must produce documents at trial pursuant to a subpoena duces tecum; and (3) nonparties may be ordered by the court to produce documents at nontrial proceedings. Orders under the third exception include depositions at the request of a foreign court and have the effect of a subpoena duces tecum. The courts have construed this exception as requiring production of documents in the hands of nonparties only when the evidence is ancillary to oral testimony and have denied discovery where the true purpose of the deposition was to obtain discovery of the documents. Nevertheless, it is not clear whether an English court today would follow these rules, which were developed by cases decided prior to the passage of the Evidence Act and the signing of the Hague Convention. It seems more in keeping with the principles of English law permit.” Seyfang v. G.D. Searle & Co., [1973] 1 Q.B. 148, 151-52 (1972); accord, In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 95 (H.L. 1977).

69. RULES OF THE SUPREME COURT (Eng.) Order 38, rule 14; id, rule 18.
70. At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.
72. See Radio Corp of America v. Rauland Corp., [1956] 1 Q.B. 618 (1955); Burchart v. Macfarlane, [1891] 2 Q.B. 241 (C.A.). Order 38, rule 13(2) of the Rules of the Supreme Court of Judicature provides: “No person shall be compelled by an order under paragraph (1) [see note 70 supra] to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter.”
74. The opinions of the Lords in the Westinghouse case contain contradictory statements on the applicability of the older cases. Lord Diplock would adhere to the rationale of the older cases, asserting that “[u]nder the procedure of the High Court of England there is no power to order discovery of documents by a person not a party to the action, but such a person can be required by subpoena duces tecum to produce documents to the court.” In re Westinghouse...
policy of "mutual judicial co-operation" that underlies the Convention to allow discovery of documents from nonparties despite the fact that the non-parties' oral testimony is not required. But to be safe, a party seeking discovery should probably plan to obtain documents from nonparties at oral deposition.

III

PRIVILEGE

Section 3 of the Evidence Act, dealing with privileges from discovery, could well be the most significant provision for the attorney seeking to obtain evidence in England. The Act recognizes two categories of privileges: (1) those that are available in civil proceedings in the English court answering the request for evidence, and (2) those that are available in civil proceedings in the requesting court.\textsuperscript{76}


\textsuperscript{76} Hague Convention, supra note 2.

\textsuperscript{77} Discovery can also be resisted by asserting a privilege, see notes 79-140 infra and accompanying text; by a denial of relevance, see 13 HALSBURY'S LAWS OF ENGLAND para. 38 (4th ed. 1975); and by an agreement between the parties not to disclose the documents, see id. para. 94.

\textsuperscript{78} Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1). In addition to the privileges discussed below, a person may claim the legal professional (attorney-client) privilege. See 13 HALSBURY'S LAWS OF ENGLAND paras. 71-85 (4th ed. 1975).

\textsuperscript{79} Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1)(a). For the text of § 3(1)(a), see note 78 supra. See generally 13 HALSBURY'S LAWS OF ENGLAND paras. 67-95 (4th ed. 1975). This category includes a "national security" privilege, which can be exercised by a British Secretary of State; this privilege is set out in § 3(3) of the Act. For the text of § 3(3), see note 132 infra.

\textsuperscript{80} Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1)(b). For the text of § 3(1)(b), see note 78 supra.
A. Privileges Under English Law

1. Self-incrimination

The common law privilege against self-incrimination, as codified in section 14 of the Civil Evidence Act,\(^1\) allows a person to refuse to give testimony or produce documents that might expose that person to criminal prosecution or civil liability under English law.\(^2\) In the context of an antitrust suit, this privilege could be invoked by any witness who might be liable under either British antitrust law\(^3\) or the antitrust legislation of the European Economic Community (EEC),\(^4\) which has the force of law in Great Britain.\(^5\) There are, however, important reasons that a corporation might prefer not to claim the privilege. The European Commission\(^6\) has extensive powers to investigate and prosecute violations of the EEC antitrust laws,\(^7\) and it appears that EEC law recognizes neither a self-incrimination privilege nor even an attorney-client privilege.\(^8\) Hence, depending on the seriousness of the consequences of disclosure, a corporation might prefer to disclose quickly and quietly rather than claim the privilege.

\(^{1}\) 1968, c. 64.
\(^{2}\) Id. § 14(1)(a). The American privilege against self-incrimination, by contrast, applies only in criminal prosecutions. See note 135 infra.
\(^{3}\) The basic British antitrust statutes are the Resale Prices Act, 1976, c. 53; the Restrictive Trade Practices Act, 1976, c. 34; and the Restrictive Practices Court Act, 1976, c. 33. See also Fair Trading Act, 1973, c. 41; Restrictive Trade Practices Act, 1968, c. 66; Resale Prices Act, 1964, c. 58; Restrictive Trade Practices Act, 1956, c. 68. For a general discussion of British antitrust law written before the enactment of the 1976 consolidating acts, see Kintner, Joelson, & Griffin, Recent Developments in United Kingdom Antitrust Law, 19 Antitrust Bull. 217 (1974).
\(^{4}\) The basic provisions of EEC antitrust law are found in articles 85 and 86 of the Treaty of Rome, done Mar. 25, 1957, 298 U.N.T.S. 11; the corresponding enforcement provisions are found in Règlement No. 17: Premier règlement d'application des articles 85 et 86 du traité, 5 Journal Officiel des Communautés Européennes 204 (1962) [hereinafter cited as Regulation No. 17].

Unlike American antitrust law, EEC antitrust law applies only to corporations ("undertakings"). Treaty of Rome, supra, arts. 85-86. Such corporations, if found liable, can be subjected to a very substantial fine. Regulation No. 17, supra, arts. 15-16. Hence, the British self-incrimination privilege based on the threat of enforcement of EEC antitrust law can be claimed by corporations but not by individuals. By contrast, the American privilege against self-incrimination protects only individuals. United States v. White, 322 U.S. 694, 699 (1944); Hale v. Henkel, 201 U.S. 43, 74 (1906). For a discussion of EEC antitrust law and a translation of the relevant documents, see D. Barounos, D. Hall, & J.R. James, EEC Antitrust Law (1975); Business International S.A., Europe's Rules of Competition (1976).

\(^{5}\) European Communities Act, 1972, c. 68, § 2(1).

\(^{6}\) The Commission, pursuant to the Treaty of Rome, supra note 84, arts. 155-163, is a nine-member body chosen "by the Governments of Member States acting in common agreement," id. art. 158. Its responsibilities include "ensur[ing] the application of the provisions of this Treaty" and "formula[ting] recommendations or opinions in matters which are the subject of this Treaty." Id. art. 155.

\(^{7}\) Regulation No. 17, supra note 84, arts. 9-16.

and thus draw attention to possible violations of EEC law, risking prosecution in a very unfavorable forum. On the other hand, if the European Commission already knows of the possible violations, or if the Commission is unlikely to prosecute because of the prevailing political climate, little is lost by claiming the privilege.89

There are several ways the party seeking discovery can defeat the claim of privilege. First, the claimant must satisfy the court that there are reasonable grounds for the assertion of privilege.90 The court will not uphold the privilege if the claim is made in bad faith,91 or if there is no danger of punishment because too much time has elapsed,92 the defendant has been pardoned,93 or the offense has become obsolete.94 Thus, if the European Commission granted immunity to a prospective deponent, or declared article 85 of the Treaty of Rome95 inapplicable to a certain case,96 or issued a negative clearance,97 the deponent could not claim the privilege.98 Finally, the danger of criminal prosecution or civil proceedings99 must be “real and appreciable,” and not “some extraordinary and barely possible contingency,” for the privilege to arise.100 In the Westinghouse case the prospective deponent argued that, despite the theoretical chance of prosecution by the European Commission, there was no real and appreciable risk since the Commission had been aware of the existence of the cartel for five years, had known for ten months of certain highly incriminating documents concerning the cartel, and had not instituted an investigation.101 The court held,

89. In the Westinghouse case, it appears that the European Commission had known about the alleged uranium cartel’s activities five years before the RTZ officials claimed the British privilege against self-incrimination, and it seemed clear that the Commission would take no action. See note 101 infra and accompanying text. The RTZ officials were therefore risking little in claiming the privilege.
91. See Ex Parte Reynolds, 20 Ch. D. 294, 300-01 (Ch. App. 1882).
95. Treaty of Rome, supra note 84, art. 85; see note 84 supra.
96. See Treaty of Rome, supra note 84, art. 85(3).
97. Regulation No. 17, supra note 84, art. 2. A “negative clearance” is, in effect, a declaratory judgment that article 85 is not being violated.
99. See note 82 supra and accompanying text.
however, that it was impossible to determine that the Commission would never investigate the alleged cartel. Since the Commission was under a duty to act if the evidence was sufficient, and since the evidence sought by Westinghouse might be used by the Commission in deciding whether to investigate and prosecute the cartel, the court concluded that the risk of prosecution was real and substantial and that the privilege should be upheld.102 Thus it seems that the privilege, once claimed, is not likely to be denied.103

2. Public Interest (Crown) Privilege

It is a basic principle of English common law that testimony or production of documents may be refused on the ground that disclosure of certain information would be injurious to the public interest.104 This privilege105 is available in any proceeding at any time.106 Ordinarily the privilege is claimed by the minister of the governmental department concerned, who should have personally evaluated the content of the documents.107 But in theory any person may raise the privilege,108 and it is arguably the duty of the parties in private litigation to inform the Crown of the possibility that disclosure of certain evidence may harm the public interest.109 In addition,
the court is bound to assert the privilege when appropriate.110 The decision whether to uphold the privilege is the court's,111 but the view of the minister is entitled to great weight.112 The court will apply a balancing test113 and forbid disclosure when the injury to the public interest by disclosure is greater than that resulting from withholding the evidence.114 The privilege is applicable, for example, "where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."115

In judging the circumstances under which the public interest privilege might attach in a foreign antitrust action, it is important to keep in mind that the British attitude toward "public interest" differs significantly from the attitude prevalent in America. First, the British views of government secrecy and discovery in general could cause problems unforeseen by an American. For example, the British are much less insistent than Americans that all government information be made available to the public;116 arguments aimed at the nondisclosure of evidence to protect government operations will therefore be considered more seriously in England than an American might expect—especially in light of the generally cautious English attitude toward discovery.117 Second, the British concept of jurisdiction is much more limited than the American view.118 This difference has led to conflicts in the past, particularly in the sensitive area of antitrust en-
forcement,\textsuperscript{119} and has even led to legislation designed to protect English jurisdiction from foreign intrusion.\textsuperscript{120} Thus, arguments that the jurisdiction of the United Kingdom is being infringed upon would probably be seriously considered by an English court.\textsuperscript{121} In the \textit{Westinghouse} case, for example, the existence of a U.S. Department of Justice antitrust investigation and the perceived threat it posed to British sovereignty were vigorously argued before the House of Lords,\textsuperscript{122} and were probably decisive in the Lords' refusal to enforce the letters rogatory.\textsuperscript{123} Furthermore, any effect on England's relations with other countries that could result from disclosure of

\textsuperscript{119} Since the effects of commercial activity tend to spill over national boundaries, and since American antitrust law is aimed at any activity that affects American trade, enforcement of U.S. antitrust laws against activity taking place in foreign countries has led to controversy and more than a little ill will abroad. \textit{See} Address by Bell, \textit{ supra} note 30, at 2-3, 6-7; Stanford, \textit{ supra} note 30. A good example of the jurisdictional complications that can arise in multinational antitrust actions is the \textit{ICI} case, in which an American court ordered DuPont, an American company, and Imperial Chemical Industries (ICI), a British company, to divest themselves of holdings in Canadian Industries Limited, a Canadian company. In addition, the court ordered ICI to refrain from asserting rights in Britain under British patents. United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), \textit{supplemental opinion}, 105 F. Supp. 215 (S.D.N.Y. 1952). Soon thereafter, not surprisingly, a British court granted an injunction restraining ICI from complying with the decree. British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., [1953] 1 Ch. 19 (Ch. App. 1952). As Lord Wilberforce observed in \textit{Westinghouse}, "It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack." \textit{In re} Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 94 (H.L. 1977).


\textsuperscript{121} \textit{See} \textit{In re} Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 94, 125 (H.L. 1977). Indeed, article 12(b) of the Hague Convention, \textit{ supra} note 2, specifically allows a court to consider whether granting the request would prejudice the sovereignty or security of the requested state.


\textsuperscript{123} Her Majesty's Government regards as an unacceptable invasion of its own sovereignty the use of the United States courts by the United States Government as a means
controversial information would undoubtedly bear directly on protection of the "public interest."\(^{124}\)

3. Statutory Privileges

A number of British statutes forbid the disclosure of certain kinds of information, and a litigant seeking evidence may find that it cannot lawfully be disclosed. For example,\(^{125}\) a party may not disclose certain information relating to national security\(^{126}\) or commercial information obtained by the British Government under statutory powers.\(^{127}\) In addition, the Shipping Contracts and Commercial Documents Act\(^{128}\) empowers the British Board of Trade to forbid the furnishing of any commercial document to a foreign court if doing so would infringe upon "the jurisdiction which, under international law, belongs to the United Kingdom."\(^{129}\) This statute was not invoked in the Westinghouse case, but since extraterritorial antitrust cases raise hotly disputed jurisdictional issues,\(^{130}\) it might well be invoked in a similar case to defeat discovery.\(^{131}\) Finally, the Evidence Act forbids dis-

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\(^{125}\) This consideration is particularly relevant in the Westinghouse case since Westinghouse alleged that the cartel included the governments of Canada, Australia, South Africa, and France. Indeed, it was reported that these four governments put strong pressure on the British Government not to force the RTZ officials to testify. See The Times (London), July 26, 1977, at 17, col. 7.

\(^{126}\) Other statutory limitations on disclosure involve information relating to adopted children, Adoption Act, 1958, 7 Eliz. 2, c. 5, § 20(5); agriculture, Agriculture Marketing Act, 1958, 6 & 7 Eliz. 2, c. 47, § 47(2)-(3); and census and population statistics, Population (Statistics) Act, 1938, 1 & 2 Geo. 6, c. 12, § 4(2); Census Act, 1920, 10 & 11 Geo. 5, c. 41, § 8(2).

\(^{127}\) See, e.g., Atomic Energy Act, 1946, 9 & 10 Geo. 6, c. 80, § 11, 13; Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 2(1), as amended by Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75, §§ 9(1), 10, sched. 1.

\(^{128}\) See, e.g., Fair Trading Act, 1973, c. 41, § 133; Sea Fish Industry Act, 1970, c. 11, § 42; Statistics of Trade Act, 1947, 10 & 11 Geo. 6, c. 39, § 9; Coal Industry Nationalisation Act, 1946, 9 & 10 Geo. 6, c. 59, § 56.

\(^{129}\) See notes 118-19 supra and accompanying text.

\(^{130}\) It does not appear to be difficult to prove an infringement of British jurisdiction under the Shipping Contracts and Commercial Documents Act, 1964, c. 87. In 1968, the British Board of Trade applied the Shipping Act against an order by the U.S. Federal Maritime Commission, stating that "insofar as the said Order applies to things done or to be done outside the territorial jurisdiction of the United States of America by persons carrying on business in the United Kingdom it constitutes an infringement of the jurisdiction which under international law belongs to the United Kingdom." See Shipping Contracts (Foreign Measures) Order 1968, 1968 Stat. Inst. No. 1382, para. 6(b). There is no requirement in the Act that the Board of Trade balance British interests against the interests of the foreign governments involved, and an order of the Board, while subject to "annulment in pursuance of a resolution of
closing any evidence if a British Secretary of State certifies that the disclosure “would be prejudicial to the security of the United Kingdom.”

B. PRIVILEGES UNDER AMERICAN LAW

The most significant privilege arising under American law that would affect discovery proceedings abroad is the fifth amendment privilege against self-incrimination. Whether or not the privilege applies is, of course, determined solely by reference to American law. The procedure for claiming the privilege is set out in section 3(2) of the Evidence Act and in the Rules of the Supreme Court of Judicature. If the claim of privilege is supported by a statement of the requesting court or is conceded by the requesting party, production of the evidence will not be compelled. Otherwise, the evidence as to which the privilege is claimed will be taken provisionally and transmitted to the requesting court only if that court rules against the claim of privilege. The net effect of claiming the fifth amendment privilege under the Evidence Act would therefore be no different from claiming the privilege in an American court; no arguments for or against either House of Parliament,” does not appear to be subject to judicial review. Shipping Contracts and Commercial Documents Act, 1964, c. 87, § 1(3).

132. [A] person shall not be compelled by virtue of an order under section 2 . . . to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(3). Such an order apparently is not subject to judicial review.


133. “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .” U.S. CONST. amend. V. Compare the British privilege against self-incrimination, see notes 81-84 supra and accompanying text.


135. RULES OF THE SUPREME COURT (Eng.) Order 70, rule 6.

136. Id. In the Westinghouse litigation, provisional taking of evidence was unnecessary since Judge Merhige, who was presiding over the contract actions in the U.S. District Court for the Eastern District of Virginia, went to London to preside over the deposition and to rule on the applicability of the fifth amendment privilege. See In re Westinghouse Elec. Corp. Uranium Contract Litigation, [1978] 2 W.L.R. 81, 90 (H.L. 1977).
the use of the privilege arise solely as a result of the evidence being taken in Great Britain.\textsuperscript{137}

A grant of immunity from the appropriate American authorities invalidates a claim of privilege under the fifth amendment.\textsuperscript{138} The Department of Justice has a firm policy against granting immunity in civil litigation to which the United States is not a party;\textsuperscript{139} in fact, \textit{Westinghouse} may be the first case in which this has ever been done.\textsuperscript{140} This single grant of immunity almost certainly does not indicate a sharp change in the policy of the Department of Justice. Nevertheless, it is possible that immunity will be granted in future civil cases involving large cartels or other antitrust violations that have a significant impact on the American economy if the Department cannot obtain the information it needs through more direct means.

CONCLUSION

English discovery law, while similar in many respects to American law, contains a number of political and legal pitfalls that an American attorney might not expect. The most important of these are the validity of the request for evidence, the availability under English law of the particular discovery sought, and the question of privilege. An examination of the provisions of the new Evidence Act reveals the framework through which discovery in England for foreign tribunals may be compelled, and suggests ways in which an American attorney can elude or use many obstacles to discovery.

\textit{Alexander C. Black}

\textsuperscript{137} If the court requesting the evidence either is not an American court or is not applying American law, a deponent cannot claim the fifth amendment privilege, even if the testimony will clearly subject the deponent to criminal liability under American law. \textit{See} Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, § 3(1)(b).

\textsuperscript{138} The United States immunity statutes are 18 U.S.C. § 6002 (1976), providing for immunity granted by an order of the court, and 18 U.S.C. § 6003 (1976), providing for immunity granted by a U.S. Attorney with the approval of either the Attorney General or a Deputy or Assistant Attorney General.

\textsuperscript{139} Letter from Griffin B. Bell, U.S. Attorney General, to William B. Cummings 1 (July 12, 1977) (copy on file at the offices of the \textit{Cornell International Law Journal}).

\textsuperscript{140} Memorandum of Views Furnished for the Honourable Robert R. Merhige, Jr. by Linklaters & Paines 21-22, \textit{In re Westinghouse Elec. Corp. Uranium Contracts Litigation}, M.D.L. No. 75-235 (E.D. Va., filed Dec. 23, 1975) (copy on file at the offices of the \textit{Cornell International Law Journal}). The only case the Department of Justice cited as precedent for its grant of immunity in the \textit{Westinghouse} case was \textit{In re Letters Rogatory from the Tokyo District, Tokyo, Japan}, 539 F.2d 1216 (9th Cir. 1976). Memorandum, supra note 14, at 9. That case, however, involved criminal violations of Japanese income tax laws and was not a civil action. Moreover, the case involved a joint investigation by Japanese and American authorities, so it is arguable that the U.S. Government was involved in the case. Memorandum of Views, supra at 22-25.