# Problems Associated with Foreign Deposition Testimony, Foreign Experts, and Foreign Claimant Under the Defense Base Act

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A request for documents or to depose a party in a Defense Base Act [DBA] case is an ordinary duty that does not invite much excitement. The biggest hurdle to receiving the documents or conducting a deposition is usually either an unresponsive opposing counsel or scheduling conflicts. Historically, a defense attorney would send a deposition notice to the claimant's counsel, a date and time are agreed upon, and the deposition takes place, all without complications. Additionally, any request for documents would follow a similarly straightforward process. More and more frequently, however, issues have been raised by parties, particularly claimants and their attorneys, when the party or documents are in a foreign country. The increasingly common argument being put forth is that the requests cannot merely follow the established procedures of the United States adjudication system but must comply with the laws of the foreign nations. This could mean abiding by the procedures set forth by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970[2] [Hague Convention] if the nation is a signatory or abiding by an individual country's statutes. Foreign laws that impose obstacles to discovery are known as blocking statutes.

This paper will examine the precedents set by the United States Supreme Court and the Benefits Review Board [the Board] in cases involving the application of blocking statutes and the Hague Convention and what the OALJ has done in an attempt to explain how parties should treat them. The cases and the OALJ's notice will then be extrapolated to address discovery issues the Board did not explicitly address in their decisions. This is especially important to gain a firm understanding of the rulings and opinions of the authorities on the issue, as they are the subject of

[2] Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter cited as Hague Convention].

other DBA cases and will be in the future and can help guide the parties on the legally recognized applicable procedures. Lastly, possible solutions will be presented that parties can and have used to avoid the described discovery issues.

In *Société Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, the U.S. Supreme Court reviewed district court's decision to dismiss a case after the district court, using the powers granted to them by the Federal Rules of Civil Procedure [FRCP], ordered the petitioner, a Swiss holding company, to produce documents prior to trial.[3] The applicable federal rules utilized by the district court state that the court can compel a party to produce relevant non-privileged information evidence that is under the party's control.[4] The petitioner argued that the documents were not under their control because Switzerland, where the petitioner and the documents were located, has a blocking statute that bars disclosure of certain documents, with the penalty for noncompliance being a fine or imprisonment.[5]

The Supreme Court held that, while the district court could not dismiss the case, they did have the power to order production of the evidence in violation of the Swiss statute.[6] The Court did note however that it was not necessarily setting a bright-line rule for every court to use in every case involving a blocking statute.[7] While the scope of the ruling seems narrow today, it set a precedent for ruling against a blocking statute that would later be expanded to consider a new international treaty.

The Hague Convention, which concluded in March of 1970, attempted to set forth a uniform system under which countries can request evidence located in a foreign country through

[3] *Société Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958).
[4] *See id.* at 200.
[5] *See id.*
[6] *See generally Rogers*, 357 U.S.
[7] *See id.* at 205-6.

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First appeared as part of the conference materials for the
32nd Annual David W. Robertson Admiralty and Maritime Law Conference session
"Limits and Interplay of Discovery"