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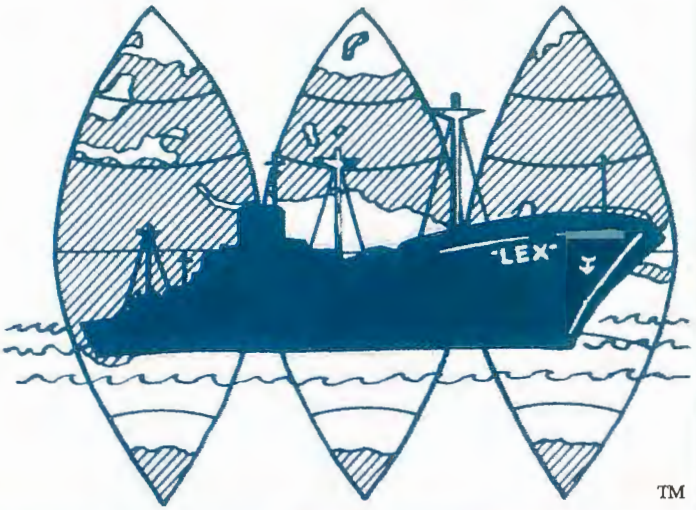

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Taking Evidence at the Flood Tide: How to Obtain the Testimony of Departing, Departed and Unavailable Admiralty Witnesses

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I
INTRODUCTION

This article is about when and how to obtain testimony from people who do not want to be deposed—because they have departed or are departing the jurisdiction or because they are otherwise unavailable to give such testimony.

The key to successfully obtaining testimony under such circumstances is swift and certain action, commenced early in any litigation. In this regard, the theme of the article can be summarized best with these words of William Shakespeare:

> There is a tide in the affairs of men
> which taken at the flood, leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and in miseries.
> On such a full sea are we now afloat,
> And we must take the current when it serves,
> Or lose our ventures.[1]

We will treat separately each of the three categories of such recalcitrant witnesses: the departing witness (in Section III), the departed witness (in Section IV), and the unavailable witness (in Section V). But, first, we provide (in Section II) an overview of deposition timing, a subject more complicated than it sounds.[2]

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[1] *Julius Caesar,* IV. iii. 85.

[2] Our subject here is limited to obtaining evidence for use in United States courts, leaving foreign tribunals or arbitrations for another article.

II
WHEN CAN A RECALCITRANT WITNESS' TESTIMONY FIRST BE SCHEDULED?

The universal adoption in 2000 of Federal Rule of Civil Procedure 26 by all Federal district courts established everywhere the same starting point for depositions. Previously, some districts had opted out of that Rule. Up until 2000, in those districts, depositions were expected to occur within a reasonable time after the filing of a defendant's answer.

Rule 26 now provides the earliest time when depositions can occur. Rule 26(d), which addresses the timing and sequence of discovery, states that a party may not seek discovery from any source before the parties have conferred at an early meeting of counsel as required by Rule 26(f). Under Rule 26, the first notices of deposition can be served after the parties meet and confer to discuss the nature of the claims and defenses, the possibility of settlement, and the discovery timetable for the case. That meeting of the parties, in turn, has to be scheduled no later than twenty-one days before the date set for the initial case management conference in the case, or twenty-one days before a scheduling order is due under Rule 16(b). Rule 16(b) states that a scheduling order shall be issued by the district judge "as soon as practicable" but in any event within ninety days of a defendant's appearance and within 120 days of the service of the complaint upon a defendant.[3]

The usual date for the initial case management conference will vary by district. In the Southern District of New York, for example, depending on the priorities of the individual district judge assigned to the case, that date can be as little as two months after the filing of the complaint, or it can be many months thereafter. It is therefore of critical practical importance to know the practices of both the court and the judge, as these may impact when the conference is scheduled and thus when depositions may begin.

The key point, however, and one that is often overlooked, is that one need not wait for the scheduling of the initial case management conference to schedule the Rule 26(f) meeting of the parties. That meeting can be scheduled, by agreement of the parties, at any time after the filing of the complaint.

Thus, the bottom line on the timing of depositions is this: if you need them, schedule and hold the Rule 26(f) meeting of the parties as soon as all of the answers have been filed.

Of course, certain situations may require that depositions occur even more quickly than allowed by Rule 26. When these situations occur, there are

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[3]Of course, the parties may stipulate to begin discovery before the initial case management conference, although presumably, the stipulation would have to be agreed to by all parties. See Charles Alan Wright & Arthur Raphael Miller, 8 Federal Practice & Procedure § 2046.1 (2d. ed. 1987).

three methods which can be used to expedite the taking of depositions prior to a Rule 26 meeting of the parties. These methods are:

1. moving under Rule 27 for a court order to compel a deposition before the filing of a lawsuit due to exigent circumstances; or
2. immediately after filing a lawsuit, serving a notice of deposition, pursuant to Rule 30(a)(2)(C), that contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless immediately deposed. A court order is not needed to proceed by this method;
3. immediately after filing a lawsuit, obtaining a court order for any other reason acceptable in the court's discretion.

III
OBTAINING THE TESTIMONY OF THE DEPARTING WITNESS

Historically, bills for depositions to perpetuate testimony were well known in Roman law, and commonplace in English chancery practice before the adoption of the United States Constitution.[4] The English practice was adopted by the first Congress of the United States in the Judiciary Act of 1789.[5] Today, as noted above, there are two separate Federal Rules of Civil Procedure that expressly provide grounds for the immediate deposing of a witness who is feared to be departing (either from the United States or because of impending death), regardless of the stage of the lawsuit. Rule 27, which requires a court order, allows such a deposition even before a lawsuit is commenced. Otherwise, Rule 30 (a)(2)(C) authorizes a deposition immediately after filing an action.

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[4]See Moseller v. United States, 158 F.2d 380, 381 (2d Cir. 1946).

[5]Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 88, amended by Act of Mar.1, 1817, ch. 30, 3 Stat. 350; Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 168; Act of July 29, 1854, ch. 159, § 2, 10 Stat. 315; and Act of May 9, 1872, ch. 146, 17 Stat. 89; Rev. Stat. §§863-865, codified as 28 U.S.C. §§ 639-41 (1948). Commonly known as the *de bene esse* deposition statute, it was superceded by amendment in 1970 of Fed. R. Civ. P. 26, after the unification of the Supreme Court Admiralty Rules and the Federal Rules of Civil Procedure in 1966. See text accompanying notes 26-29 infra. A specific employment of the procedure described in the statute is detailed in Green v. Compagnia Generale Italiana Di Navigation, 82 F. 490, 494-95 (S.D.N.Y. 1897), aff'd, 102 F. 650 (2d Cir. 1900). For a historical overview of the *de bene esse* statutes, see Nicholas J. Healy & Joseph C. Sweeney, The Law of Marine Collision 60-62 (1998).

A. Testimony Obtained Through Rule 27

Rule 27, despite its invaluable provision allowing depositions even before the bringing of an action, is nevetheless one of the least utilized discovery tools available in an admiralty case. To obtain a court order permitting a deposition under Rule 27, the requesting party must furnish:

1. a statement that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or to cause it to be brought;
2. a description of the subject matter of the expected action and the petitioner's interest therein;
3. statements of the facts that the petitioner desires to establish by the proposed testimony and the reasons for acting to perpetuate it;
4. the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and
5. the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.[6]

The purpose of Rule 27 is to serve as a means of perpetuating testimony before trial.[7] A party seeking a deposition pursuant to Rule 27 must show that there is an immediate need to perpetuate the testimony.[8] As a result, the petitioner must specifically demonstrate that the testimony needs to be taken in advance of any action being brought or it may be lost.[9] General allegations are not sufficient.[10]

Rule 27 is not a substitute for broad discovery.[11] The scope of Rule 27 has been held to be narrower than that of Rule 26.[12] It is not to be utilized as a means to find facts sufficient to support the bringing of a complaint.[13] The rule is designed to be used in instances where, as a result of time passing, a witness' testimony may become unavailable; and is not to be used to provide a method of discovery to determine whether a cause of action exists, or

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[6]Fed. R. Civ. P. 27(a)(1).

[7]Ash v. Cort, 512 F.2d 909, 912 (3d Cir. 1975).

[8]Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995).

[9]See In re Checkosky, 142 F.R.D. 4, 7 (D.D.C. 1992).

[10]*Penn Mutual*, 68 F.3d at 1375.

[11]In re Deiulemar Compagnia di Navigazione S.p.A, 198 F.3d 473, 485, 2000 AMC 317, 330 (4th Cir. 1999); Ash v. Cort, 512 F.2d at 912.

[12]See *Penn Mutual*, 68 F.3d at 1376; see also Wright & Miller, supra note 3, at §2071; but see Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961) (leaving open issue as to whether discovery under Rule 27 is as broad as that under Rule 26).

[13]*Deiulemar*, 198 F.3d at 485, 2000 AMC at 3330; In re Stork, 179 F.R.D. 57, 58 (D. Mass. 1998) ("The rule is not designed to allow pre-complaint discovery.").

against whom suit should be brought.[14] A Rule 27 petition must demonstrate the facts that the petitioner is seeking to establish via the deposition.[15] If the substance of the testimony is unknown to the petitioner, the motion should be denied.[16]

Rule 27 requires that the party seeking the deposition demonstrate that it is presently unable to bring an action in any court, either state or federal, within the United States.[17] However, courts have allowed depositions even though filing suit might have been technically possible at the time of the Rule 27 petition where the petitioner voiced reasonable fear of Rule 11 sanctions as a consequence of suing prematurely.[18]

If the court is "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice," it shall permit the depositions to be taken.[19] A reviewing court will only reverse the lower court's decision to deny a Rule 27(a) petition for an abuse of discretion.[20]

Consider this common admiralty scenario: a trans-Pacific vessel arrives at an East Coast port having just passed through heavy seas and swell. While at sea, the vessel lost several containers and arrives with others crushed on deck. Counsel is contacted by the insurer of the lost and damaged cargo who, of course, has not yet been presented with formal claim documents, much less paid any claim. The vessel's crew, who are Filipino, are expected to be in port for only two to three days, after which the vessel will leave the United States for ports unknown, with future crew rotations unknown.

These would appear to be circumstances warranting resort to Rule 27. Filing a lawsuit is neither feasible (nor always desirable) as (a) the cargo insurer at this time arguably has no title to sue, not yet having paid the claim, and (b) documents are not yet available, such as bills of lading, which may contain package limitation defenses that could seriously affect the economics of a full-fledged law suit. On the other hand, prompt deposition of the captain and first mate could establish the severity of the weather encoun-

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[14]In re Gurnsey, 223 F. Supp. 359 (D.D.C. 1963); see, e.g., In re Exstein, 3 F.R.D. 242 (S.D.N.Y. 1942) (petition denied as an attempt to obtain discovery in order to find facts to bring a complaint).

[15]*Penn Mutual*, 68 F.3d at 1376; *Deiulemar*, 198 F.3d at 485, 2000 AMC at 330.

[16]See In re Sitter, 167 F.R.D. 80, 82 (D. Minn. 1996).

[17]Shore v. Acands, Inc., 644 F.2d 386, 388 (5th Cir. 1981).

[18]See In re Delta Quarries and Disposal, Inc., 139 F.R.D. 68, 69 (M.D. Penn. 1991); In re Town of Armenia, NY, 200 F.R.D. 200 (S.D.N.Y. 2001).

[19]Fed. R. Civ. P. 27(a)(3).

[20]Carey Canada, Inc. v. Columbia Cas. Co., 940 F.2d 1548, 1559 (D.C. Cir. 1991) ("We may reverse the District Court's discovery and evidentiary rulings only if these rulings are an abuse of discretion.") (citing Viles v. Ball, 872 F.2d 491, 494 (D.C. Cir. 1989); Brune v. IRS, 861 F.2d 1284, 1288 (D.C. Cir. 1988)); United States v. Price, 723 F.2d 1193, 1194 (5th Cir. 1984) (district court's ruling on Rule 27(a) motion reviewable for abuse of discretion); Ash v. Cort, 512 F.2d at 912.

tered, the nature of the container securing utilized, and the existence of any structural damage to the ship, and preserve this vital evidence.

A Rule 27 request will usually be accompanied by a motion (normally successful) to obtain the vessel's documentation including its rough log-book, before it is lost or rewritten into a smooth log.[21] Defense counsel is immediately retained and, the next day, the depositions are taken. The results serve justice: the parties have a witness with a fresh recollection, with original documents available to refresh that recollection, and have now, within days, put on paper detailed testimony about the true circumstances of the loss.[22]

The case law provides a number of additional factual grounds sufficient to procure a Rule 27 deposition. These include:

(a) a witness who is elderly or in failing health;[23]
(b) a witness who plans to leave the United States;[24] and
(c) a vessel scheduled to depart United States' waters.[25]

B. Testimony Obtained Through Rule 30

As noted above, Rule 30 (a)(2)(C) provides a method by which a deposition may be taken without court order if the notice of deposition contains a certification, with supporting facts, that the person in question is expected to leave the United States and thereafter be unavailable for examination in this

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[21]The perpetuation of testimony under Rule 27 includes the inspection of documents and things. Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[22]A practical issue that arises, of course, is how to sufficiently serve a petition under Rule 27 requesting a deposition in just a few days. The courts have been eminently practical in this regard. See In re Town of Amenia, NY, 200 F.R.D. 200, 204 (S.D.N.Y. 2001) (service of Rule 27 petition by facsimile permitted). Indeed, in recent years, service of far more significant papers by facsimile transmission has been approved. See e.g., Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F 3d 1112, 1115 (9th Cir. 2000) (order to show cause containing temporary restraining order); United States v. Pelullo, 178 F.3d 196, 199 (3d Cir. 1999) (notice of filing of bankruptcy petition served upon U.S. Marshal to invoke automatic stay against a judicial sale); Robinson v. Chavez, 2001 WL 276830 (N.D. Tex. Mar. 19, 2001) (service of summons and complaint).

[23]Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967) (71-year old witness); De Wagenknecht v. Stinnes, 250 F.2d 414, 417 (D.C. Cir. 1957) (74-year old witness); see also In re Boland, 79 F.R.D. 665, 667 (D.D.C. 1978) (noting that age of proposed deponent is relevant to Rule 27 petition, but denying petition on other grounds); Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (81-year old witness).

[24]See e.g., In re Deiulemar Di Navigazione, S.p.A., 153 F.R.D. 592, 593, 1994 AMC 2250, 2252 (E.D. La. 1994); Boland, 79 F.R.D. at 667.

[25]See *Deiulemar*, 153 F.R.D. at 593, 1994 AMC at 2252, (allowing Rule 27 perpetuation of evidence from a ship that was scheduled to leave United States waters three weeks after the petitioner was notified of an expected indemnity claim); Ferro Union Corp. v. S.S. Ionic Coast, 43 F.R.D. 11, 14, 1868 AMC 2385, 2387-88 (S.D. Tex. 1967) (permitting Rule 34 discovery from a ship that was scheduled to leave port in four days).

country unless deposed prior to his or her departure. Rule 30(a)(2)(C) was devised as a compromise between the admiralty and general civil litigation bars. The old *de bene esse* ("to preserve testimony") statutes historically allowed depositions to be taken where a witness was bound on a sea voyage, among other circumstances.[26] At the time of the enactment of these statutes, leave of court was necessary for taking depositions. Under the *de bene esse* statutes, it became the common practice of maritime lawyers to take depositions immediately after filing a complaint, to avoid the possibility of losing witnesses to long ocean voyages while the plaintiff was seeking the court's permission to depose them.[27] Anticipating the unification of admiralty and civil procedure, the admiralty bar opposed abandoning this practice, and the general civil bar opposed adopting it.[28] A compromise was reached with the drafting of Rule 30, intended to replace the *de bene esse* statutes, and which applies to both suits in admiralty and ordinary civil litigation.[29]

Under Rule 30(a)(2)(C), the party seeking the exigent deposition must certify to facts that demonstrate an urgent need for it to occur immediately, including, as the text of the Rule indicates "that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time." Notably, although the Rule clearly contemplates that a witness may later be available for deposing in a foreign country, that is not a reason to disallow taking the deposition in this country by this method.[30]

A certification pursuant to Rule 30(a)(2)(C) must be signed by the attorney for the party (usually the plaintiff) seeking the deposition. Although the Rule no longer specifically states that Rule 11 sanctions apply to the certification,[31] Rule 26(g) likely provides a basis for sanctions.[32]

Of course, under Rule 32(a)(3), any deposition testimony (taken under Rule 30(a)(2)(C), Rule 27 or otherwise) can be utilized as evidence at trial either by stipulation of the parties, or without such a stipulation if the court finds at the time of trial that:

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[26]Rev. Stat. §863-65, 28 U.S.C. §§639-41 (1946).

[27]Leavenworth Colby, Admiralty Unification, 54 Geo. L.J. 1258, 1261 (1966).

[28]See Charles Alan Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 332 (1964).

[29]See generally Wright & Miller, supra note 3, at § 2105. Although the term "*de bene esse* deposition" is heard occasionally in practice today, the 1970 amendments to the Federal Rules of Civil Procedure omitted the provision previously found in Rule 26(a) that, in admiralty cases, depositions could be taken in accordance with R.S. §§ 863-65. As a result, the *de bene esse* statutes may be deemed repealed. See id. at § 2002, n. 1; see also Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358, 1359, n.3 (11th Cir. 2002) (noting that the phrase "*de bene esse*" does not appear in the Federal Rules).

[30]See Wright & Miller, supra note 3, at § 2105.

[31]See the 1970 version of Rule.

[32]See Wright & Miller, supra note 3, at § 2105.

(A) the witness is dead; or
(B) the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
(C) the witness is unable to attend or testify because of age, illness, infirmity or imprisonment; or
(D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
(E) that, upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.[33]

In an admiralty case—where a vessel's officers, crew, managers and surveyors are often located much further away from the courthouse than 100 miles, and sometimes can only be found across the globe—more often than not, one of the exceptions set forth in Rule 32(a)(3) will be met. In practice, this means that the depositions taken in an admiralty case (which can, of course, be videotaped) will often constitute some, if not all, of the trial testimony on the plaintiff's direct case (and possibly even the defense case).

Interestingly, these provisions of the Federal Rules seem to contemplate that the circumstances referred to in Rule 30(a)(2)(C) may be so exigent that some of the parties may not have time to obtain counsel. Under those circumstances, Rule 32(a)(3)(E) allows the deposition to go forward nonetheless so as to preserve the evidence, but further provides that the deposition may not actually be utilized at the trial, if it can be demonstrated by the party who lacked representation that they were unable despite "the exercise of diligence" to obtain counsel to represent them at the deposition.

C. Testimony Taken By Order to Show Cause and Subpoena

When time is of the essence due to a party's impending unavailability, one can also move for an order to show cause to promptly compel a deposition or documents. In the alternative, upon reasonable notice, a subpoena can be served upon a non-party anywhere in the United States to compel a prompt deposition within 100 miles of that person's location:

[33]Fed. R. Civ. P. 32(a)(3)(A)–(E).

> Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefore, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. §1783.[34]

A subpoena has the same force of law as a court order and must be complied with, in the absence of the filing of a timely motion for a protective order. Under section 1783, a subpoena issued to a United States national or resident in a foreign country issues only upon a court order. The issuance of the order requires a showing of necessity, that there be no other means to obtain the testimony (or the documents), and the tendering in advance of estimated travel and "attendance" expenses.

D. Testimony Taken in the Ordinary Course of the Lawsuit

In deciding whom to depose, one should not forget about friendly witnesses, or even the parties themselves. Even where exigent circumstance do not exist, deposing these witnesses early on, regardless of the condition of their status or health, ensures that their testimony is not lost due to their future unavailability, loss of memory, or the loss of their favorable leanings. Such testimony, which is taken usually in the form of direct testimony, can be taken at any time during the discovery process. Taking testimony from a very favorable witness both preserves it and allows an adversary to be shown the strength of your position—sometimes leading to a favorable settlement.

IV
OBTAINING THE TESTIMONY OF THE DEPARTED WITNESS

A witness can be departed in two ways: by leaving the jurisdiction in a ship, airplane or other vehicle of transportation; otherwise, by dying. We deal here with the problem presented by the first sort of departure; we deal

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[34]Fed. R. Civ. P. 45(b)(2).

with problems presented by the death of a witness below, in the discussion of unavailable witnesses.

A. Testimony Obtained in Live Depositions

If a maritime witness has departed the jurisdiction, the first question is whether the witness has already reached another sovereign nation, or is still in transit. If the witness is still aboard a vessel, there is a precedent for allowing his deposition to be taken before he reaches port.

People's Insurance Co. of China v. Amalia Del Bene,[35] involved a general cargo ship that loaded grain for China but then broke down in Louisiana waters. After temporary repairs were made to her engine, the *Amalia Del Bene* departed U.S. waters, transited the Panama Canal, and headed westward. In the middle of the Pacific Ocean, she suffered another engine breakdown, and her owners made arrangements to transfer the cargo to another vessel. While the owners were arranging the mid-Pacific transfer, one of the authors was obtaining a court order for deposition of the crew, proposing that the depositions be taken at sea, during the cargo transfer. The court took the position that, because the vessel had first called and loaded the cargo in Louisiana waters, the court retained jurisdiction over the vessel and her crew sufficient to compel their testimony. Lawyers and court reporter went to sea, climbing a jacob's ladder up the side of one bobbing ship, crawling across a gangway to another, and taking depositions, while the master and crew of the *Amalia Del Bene* accomplished the shifting of the cargo to her substitute.

This sea story serves to underscore the fact that, with respect to party witnesses, so long as the United States court has personal jurisdiction over the party in question, the court can order even a foreign party witness who has departed the jurisdiction (or was never there at all) to travel to the United States for his or her deposition. Such a power is now understood to be concomitant with the power to issue a judgment, so that if the court has personal jurisdiction over a party, it has jurisdiction over the party's witnesses sufficient to compel discovery from them. Such a deposition can then be treated as testimony at trial.[36]

When deciding whether to take a foreign deposition, it is wise to keep in mind that, in some districts, such as the Southern District of New York, the court can require any party who takes a deposition of a witness more than 100 miles from the courthouse to pay opposing counsel's fees for one attor-

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[35]Civ. Action No. 96-1088 (E.D. La. 1996) (unreported).

[36]Cf. Fed. R. Civ. P. 32(a)(3)(B). See discussion in text supra at note 33.

ney per party.[37] This rule is not frequently invoked, but is potentially a powerful early cost-shifting tool.[38]

B. Testimony Obtained Through Written Deposition Questions

The service of written deposition questions upon a party is also an available, but cumbersome, method of obtaining discovery. Note that such questions and answers are different from interrogatories and their responses: the questions are put to the witness by a court officer, and spontaneous answers recorded.[39] The relevant rule describes a process that will take at least twenty eight days just to get all of the questions answered, divided as follows:

> Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve re-cross questions upon all other parties. The court may for cause shown enlarge or shorten the time.[40]

V
OBTAINING THE TESTIMONY OF UNAVAILABLE WITNESSES

Inevitably, certain key witnesses, particularly third-party witnesses, will be unavailable to testify at trial. Nonetheless, these witnesses can, by resort beforehand to various methods, be deposed, and their depositions utilized at trial. One such witness, no one would contest, is a witness who is dying. Another is a witness who is located so far from the jurisdiction that, either in light of the economics of the case or because the witness cannot be located or persuaded to travel, he or she is, for all practical purposes, "unavailable" for an appearance at trial.

Included in this category are witnesses who are "unable" to testify at trial "because of age, illness, infirmity or imprisonment."[41] These witnesses must be deposed if their testimony is to be utilized at trial. The deposition of imprisoned witnesses, for example, can be ordered at their place of imprisonment, which usually will have suitable rooms.[42]

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[37]S.D.N.Y. Civ. R. 30.1.

[38]See Usinor Steel Corp. v. Artemis, 1990 AMC 362 (S.D.N.Y. 1990) (noting that if the deposition is also needed by the other parties, they may be ordered later to share the fees and expenses).

[39]Here, spontaneous does not mean unpremeditated. The questions, having been sent beforehand to opposing counsel, will presumably have been discussed with the witness.

[40]Fed. R. Civ. P. 31 (a)(4).

[41]Fed. R. Civ. P. 32 (a)(3)(C).

[42]See Fed. R. Civ. P. 30(a)(2).

Several methods are available by which a party may secure the testimony of a person located abroad. Testimony from a party located in a foreign country may be obtained by means of stipulation, or by resort to the process described in the Federal Rules of Civil Procedure, the Hague Convention, or one of a number of treaties. Additionally, pursuant to recent additions to the Federal Rules of Evidence, testimony my be presented in the form of declaration. Each of these methods is discussed in turn below.

A. Testimony Taken by Stipulation

When testimony is needed from a witness located abroad, the easiest, and likely the least expensive, way is pursuant to an agreement by the parties in a stipulation. Such testimony may be taken by telephone, by remote video conference, or in person—subject, of course, to any limitations imposed by the country in which the witness is to be found. Japan, for example, requires court orders and special visas for depositions, and expressly prohibits, in foreign cases, depositions by telephone. Depending upon the country involved, other restrictions may exist.[43]

It is commonplace for federal courts to allow depositions by telephone or in a teleconference, pursuant to either stipulation or court order. In some jurisdictions, such as the Eastern District of New York, the Local Rules provide that a request for such a telephone deposition of an adverse party shall be presumptively granted.[44]

B. Testimony Taken Pursuant to the Federal Rules of Civil Procedure

The Federal Rules set forth the methods for discovery in a case, offering a wide array of discovery devices. In general, these include depositions,[45] interrogatories,[46] document requests,[47] and requests for admission.[48] These rules may apply even to foreign parties, that is, to those over whom the court exercises jurisdiction.[49] However, The Hague Convention,[50] which took

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[43]Japan's legal requirements are summarized by the U.S. Department of State at <http://travel.state.gov/japan_obtaining_evidence.html> (visited 11/20/02).

[44]E.D.N.Y. Civ. R. 30.3.

[45]See Fed. R. Civ. P. 30 & 31.

[46]Fed. R. Civ. P. 33.

[47]Fed. R. Civ. P. 34.

[48]Fed. R. Civ. P. 36.

[49]See generally Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

[50]Hague Convention on the Taking of Evidence in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, reprinted following 28 U.S.C.A. § 1781.

effect in the United States on October 7, 1982, also provides a means for evidence to be obtained in a civil lawsuit pursuant to letters of request[51] from the court in one nation to a designated authority in another. An issue thus arises as to which law, the Federal Rules or the Hague Convention, governs discovery in a particular case.

In *Société Nationale Industrielle Aérospatiale v. United States District Court,*[52] the Supreme Court of the United States addressed whether the Hague Convention provided the exclusive procedures to be followed for pretrial discovery in cases where the evidence was located in a foreign country. The Court held that it did not; rather, where the foreign party was subject to the jurisdiction of the court, discovery could also be obtained by reference to the Federal Rules of Civil Procedure.[53] Other cases have stressed that the convention offers an alternative procedure, neither exclusive nor mandatory.[54]

A court must examine the facts of a particular case to determine whether it is more appropriate to take discovery abroad under the Hague Convention or under the Federal Rules.[55] The convention may be utilized by a court after considering 1) the particular facts of the case, 2) the sovereign interests involved, and 3) the likelihood that resort to the convention would be an effective discovery device.[56] Other factors to be considered when deciding whether to utilize the convention's procedures are the intrusiveness of the discovery sought, any special problems faced by the foreign litigant because of its nationality or location of its operation, the importance of the evidence sought, the degree of specificity of the request, whether the information originated in the United States, the alternative means available for obtaining evidence, and the competing interests of the sovereign states involved.[57] The party proposing convention procedures has the burden of demonstrating their necessity.[58]

In *Doster v. Schenk,*[59] North Carolina plaintiffs in products liability actions sought documentary discovery from a German contractor pursuant to the Federal Rules. In turn, the German contractor sought a protective order requir-

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[51]Although the Hague Convention uses term "Letter of Request," this term is interchangeable in practice with the perhaps more readily recognized term, "Letter Rogatory." See Black's Law Dictionary 917 (7th ed. 1999).

[52]482 U.S. 522 (1987).

[53]Id. at 539-40.

[54]Compagnie Francaise d'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 26-28 (S.D.N.Y. 1984). Nor must the Hague Convention be the first resort when discovery is sought from a foreign party. Id. at 542.

[55]Madanes v. Madanes, 199 F.R.D. 135, 140 (S.D.N.Y. 2001).

[56]Benton Graphics v. Uddeholm Corp.,118 F.R.D. 386, 388 (D.N.J. 1987).

[57]See In re Asbestos Litig., 623 A.2d 546 (Super. Ct. Del. 1992).

[58]Doster v. Schenk, 141 F.R.D. 50, 51 (M.D.N.C. 1991).

[59]141 F.R.D. 50 (M.D.N.C. 1991).

ing the plaintiffs to seek discovery under the Hague Convention instead. The court applied the factors listed above and held that, in this case, discovery was proper under the Federal Rules. The court noted that use of the Federal Rules was warranted. The causes of action arose from injuries allegedly sustained from the defendant's construction activities in this country, so the defendant reasonably should have expected the possibility of litigation here.[60] The court then reviewed the discovery demands at issue and found them specific and narrowly tailored; they were "not so potentially harassing or of such a sensitive nature" that the more formal Hague procedures were required.[61] The court noted that if discovery were to become abusive or unfair, the defendant had recourse to the protective devices of the Federal Rules.[62]

As for the sovereign German interests allegedly at stake, the court held that the defendant had failed to demonstrate that any such interests would be compromised by the plaintiffs' seeking discovery under the Federal Rules. The defendant's conclusory assertion that German sovereignty was compromised, without any showing in this regard, was insufficient to persuade the necessity of resort to the procedures of the Hague Convention.[63]

The court also considered the likely effectiveness of the Hague Procedures in obtaining the requested evidence, noting that they are slow and expensive. Furthermore, as Germany had stated that it would not honor requests for documents as set forth in Article 23 of the Hague Convention,[64] the court thought a request pursuant to the Hague Convention would be futile.[65]

Lastly, the court rejected the defendant's argument that the evidence was available from an alternate source, specifically, third parties. The court thought that obtaining this evidence from third parties would be cumbersome and awkward and cause later problems of identification and authentication.[66] Thus, the court concluded that, when all relevant factors were considered, the Federal Rules afforded the discovery procedures appropriate for the case.[67]

Although the Hague Convention's procedures are not mandatory, a court may find them appropriate in certain circumstances.[68] The convention

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[60]Id. at 52.

[61]Id. at 53.

[62]Id.

[63]Id. at 54.

[64]See Section V.A infra.

[65]141 F.R.D. at 54.

[66]I.d.

[67]Compare In re Perrier Bottled Water Litig., 138 F.R.D. 348 (D. Conn. 1991) (applying Hague Convention and noting that discovery sought from French defendant was overbroad and abusive; France had sovereign interests strongly disfavoring use of the Federal Rules within its borders; district court had no reason to believe Convention's procedures would be ineffective in obtaining evidence sought by plaintiffs). At least one commentator is of the opinion that courts prefer the Federal Rules to the Hague Convention. See Joseph J. Ortego, Discovery Subject to the Hague Convention, N.Y.L.J., Oct. 2, 1995, at p. 1.

[68]See. e.g., In re Perrier Bottled Water Litig., 138 F.R.D. 348 (D. Conn. 1991).

applies more broadly than do the Federal Rules because its use is not limited to parties in litigation. For that reason alone, the Hague Convention is an important method whereby testimony may be obtained abroad.[69]

C. Testimony Taken Abroad Pursuant to the Hague Convention[70]

The Hague Convention sets forth the rules for taking the testimony of a witness abroad, where the country in which the case has been initiated and the country in which the witness can be found are both parties to the convention.[71] The convention was envisioned as "a bridge between civil law and

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[69]See Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 541 (1987); see also S. & S. Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 614 (M.D. Tenn. 1986) (because United States courts lack sovereign power to compel compliance by most non-parties abroad, the convention provides the exclusive method of obtaining testimony from such persons).With respect to deposing witnesses visiting the U.S., keep in mind that, pursuant to Rule 45, a court may issue a subpoena compelling a party or an officer of a party to travel more than 100 miles from their place of residence, employment or place from which they regularly conduct business in person in order to comply with that subpoena, providing the subpoena was served pursuant to the requirements of Rule 45(b). Thus, for example, assume that a shipowner with offices in New York and London is a defendant in the Southern Dist. of New York, and the plaintiff seeks to depose an officer of the shipowner who resides in London. If he or she were served with the subpoena while briefly in Connecticut on business (within 100 miles of New York City), he or she could be compelled to return to New York from London for the deposition. However, as the party whose deposition is being sought, he or she might in turn make a motion to change the location of the deposition, and the court may grant it if good cause is shown. Factors potentially considered good cause may include expense and inconvenience to the party, as well as whether that party chose the forum for the case. For a discussion on the location of depositions, see Wright & Miller, supra note 3, at § 2112.

[70]In addition to the procedures prescribed by the Federal Rules of Civil Procedure and the Hague Convention, there are procedures for testimony abroad prescribed in other conventions, e.g., the Inter-American Convention on the Taking of Evidence Abroad, Jan. 30, 1975, 14 I.L.M. 328, Additional Protocol, 18 I.L.M. 1238, reprinted following 28 U.S.C.A. §1781. According to the U.S. State Department, this convention was in force in the following countries as of October 2002: Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, U.S., Uruguay and Venezuela. See Inter-American Convention on Letters Rogatory and Additional Protocol (Inter-American Service Convention) (Circular) at <http://travel.state.gov/Interam.html> (visited 12/23/02). This article will focus on the procedures of the Hague Convention.

[71]According to the U.S. State Department, the Hague Convention was in force in the following countries: Anguilla, Argentina (excludes recognition of the extension of the Convention by the United Kingdom to the Malvinas, South Georgia and South Sandwich Islands), Aruba, Australia, Barbados, Bulgaria, Cayman Islands, China, Cyprus, Czech Republic, Denmark, Djibouti, Estonia, Falkland Islands, Finland, France, French Guiana, French Polynesia, Germany, Gibraltar, Guadeloupe, Guernsey, Hong Kong Sar, Isle of Man, Israel, Italy, Jersey, Latvia, Luxembourg, Macao Sar, Martinique, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Saint Pierre and Miquelon, Singapore, Slovak Republic, Sovereign Base Areas of Akrotiri and Dhekelia, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela. See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Circular) at <http://travel.state.gov/hague_evidence.html> (visited 12/23/02).

common law practices for international judicial assistance in the taking of evidence abroad."[72]

The Hague Convention allows for evidence from both parties to the litigation and non-parties. This evidence can be testimonial in form, such as a deposition or interrogatory responses, or it can be documentary.[73] The convention allows a signatory country to forbid the use of the convention to obtain "pretrial discovery of documents as known in Common Law countries";[74] thus, its usefulness for obtaining documents may be limited. Under the convention, evidence is obtained abroad pursuant to the judicial authority of that country's legal system.

The convention sets forth the procedures for obtaining evidence abroad. Article 3 lists the information which should be included in the "Letter of Request," including the authority requesting its execution and the authority from which such execution is requested;[75] the names and addresses of the parties to the proceedings and their representatives;[76] and "all necessary information" as to the nature of the proceedings for which the evidence is required.[77] Article 3 also lists other information that, where appropriate, should be contained in the letter of request, such as the questions to be put to the persons to be examined,[78] and the documents to be inspected.[79]

The letter of request, as well as any such questions and statements, must be translated in the local language, or English or French, if the requested state so permits.[80] Additionally, all other documents that are to be "inspected" by the witness must also be so translated.[81]

Article 9 of the convention states that the judiciary in the country receiving the request must consult its own law as to what methods and procedures apply to the evidence obtained pursuant to the request. It also directs a requested country to follow a request of the receiving country to use a special method or procedure, unless that method or procedure is incompatible with the requested country's internal law, is impossible pursuant to that country's internal practice, or because doing so causes "practical difficulties." Pursuant to article 10, the requested authority in the foreign country must "apply the

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[72]Philip W. Amram, United States Ratification of the Hague Convention on the Taking of Evidence Abroad, 67 Am. J. Int'l L. 104, 105, 107 (1973).

[73]Hague Convention, supra note 51, art. 3.

[74]Id., art. 23.

[75]Id., art. 3(a).

[76]Id., art. 3(b).

[77]Id., art. 3(c).

[78]Id., art. 3(f).

[79]Id., art. 3(g).

[80]Id., art. 4.

[81]Id., art. 3(g).

appropriate measures of compulsion in the instances and to the same extent as is provided by its internal law . . . . " Thus, the convention obliges the foreign court to compel the production of evidence within its country, despite the fact that the evidence is being produced for a matter abroad.

The convention allows a person to refuse to give evidence if he or she has a privilege or duty to refuse under the law of the state of execution,[82] or, under the law of the state of origin, and the privilege or duty has been specified in the letter.[83] A signatory state may also state that it will respect other privileges and duties existing under the law of other states.[84]

Under the Hague Convention, the state of execution may only refuse to execute the letter of request if such execution does not fall within the functions of the judiciary in that state,[85] or the sovereignty or security of the state of execution would be prejudiced by compliance with the letter of request.[86] Article 12 also makes clear that execution of a letter of request may not be denied on the grounds that, pursuant to the internal law of the state of execution, it would have exclusive jurisdiction over the subject matter of the action, or that such internal law does not recognize such a cause of action.

Often overlooked is the fact that under the convention the request need not go through diplomatic channels. An advantage of instructing a foreign lawyer directly to make the application is that it bypasses the diplomatic system. In many countries, the diplomatic system is tediously slow, whereas a foreign attorney can sometimes obtain an order within a matter of days. For example, when a court in the United Kingdom responds to a letter rogatory pursuant to the procedure prescribed by the Hague Convention, the response may be made to the clerk of the particular United States district court from which the letter originated, to the attorney in the United States who initiated the letter, or to the English lawyer who made application to the High Court.[87] In the United Kingdom, the quickest route to obtaining the testimony or documents requested is to identify an English lawyer as the person to receive the executed request.[88]

Since each country has its own peculiarities with respect to the practical side of obtaining answers to letters of request or letters rogatory, to insure prompt and satisfactory results, local counsel in each such jurisdiction may need to be consulted, at least initially.

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[82]Id., art. 11(a).
[83]Id., art. 11(b).
[84]Id., art. 11(c).
[85]Id., art. 12(a).
[86]Id., art. 12(b).
[87]Gary D. Assim, Guidelines for Drafting Letters Rogatory, N.Y.L.J., Dec. 11, 1996, at p. 4.
[88]Id.

In any given country, utilizing the Hague Convention or another international convention can present special problems.[89] As noted above, some signatory countries (including the United Kingdom, France and The Netherlands) forbid, pursuant to article 23, the use of the Hague Convention to obtain documentary evidence, while some have enacted "Blocking Statutes" that may forbid the release of requested documents by their court.[90] In many foreign courts, procedures differ significantly from those common in the United States. For example, in many countries, the witness is questioned, not by counsel, but by the judge.[91] As the Hague Convention requires a letter of request from one court to another, significant legal fees may be incurred by following a particular country's procedures, and additional costs must be incurred to obtain translations of the relevant documents.

Nonetheless, the fact that witnesses may be in a foreign country does not mean that their testimony is necessarily lost. Rather, if they are located in a country that is a signatory to the Hague Convention, their testimony may still be obtained pursuant to the Convention, even if, for some reason, it is unavailable pursuant to the Federal Rules. Although cumbersome and usually slow, the Hague Convention, and other similar conventions,[92] should not be overlooked by the maritime lawyer.

D. Testimony Permitted by Declaration

Sometimes a cooperative witness in a geographically undesirable location is needed only to authenticate documentary evidence. Recent additions to the Federal Rules of Evidence are helpful in such a situation. According to these new evidentiary rules, sworn declarations suffice for authentication, whether the witness is located domestically[93] or in a foreign country.[94] For example, with respect to foreign witnesses and documents, Rule 902(12) states that the original or a duplicate of a foreign record will be admissible if accompanied by a written certification by its custodian or other qualified person that the record:

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[89]For a first-hand account of the Hague Convention process in action in France, see Lawrence W. Newman, "International Litigation—A Tale of Two Cities: Compulsory Testimony Abroad," N.Y.L.J., May 9, 2002, at p. 3.

[90]E.g., French Penal Code Law No. 80-538. Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 526, n.6 (1987). See Lawrence W. Newman & Michael Burrows, U.S. Evidence for Foreign Tribunals, N.Y.L.J., June 30, 1995, at p. 3.

[91]*Société Nationale*, 482 U.S. at 560 & n.17 (1987).

[92]See supra note 70.

[93]Fed. R. Evid. 902(11).

[94]Id., 902(12).

a. was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
b. was kept in the course of the regularly conducted activity; and
c. was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a matter that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with fair opportunity to challenge them.[95]

Rule 902(11), applicable to domestic witnesses, is nearly identical.

The ramifications of these two new rules for admiralty cases are significant. Cargo interests typically use documentary evidence (such as packing lists, bills of lading and surveys) to make their prima facie case of delivery to the carrier in good order and condition and receipt from the carrier in damaged condition. The new evidientiary rules allow cargo interests to prove a large part, if not all, of their case through declarations, and to avoid the expense and inconvenience of bringing a live witness to testify.

How far in advance one must produce these declarations to opposing counsel, so as to provide a "fair opportunity" to challenge them, is left unclear by the rules. It is best to produce them sufficiently in advance of the close of discovery so that the party challenging the evidence has an opportunity to schedule a deposition of the witness in question, if he or she considers the declaration to be untrustworthy, or otherwise desires to exercise the right of cross-examination.

VI
CONCLUSION

Given the nature of admiralty practice, a mastery of the rules of taking testimony from departing, departed and unavailable witnesses is an essential part of our trade's craft – not to mention of its heritage. With such mastery, you will find, as Shakespeare predicts, that all of your cases lead "on to fortune."

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[95]Id.