

# DELAWARE BUSINESS COURT INSIDER

COMMENTARY

## Chancery Court Addresses the Requirements for Issuing Letters of Request Under the Hague Convention

In *In re Cote D'Azur Estate*, Vice Chancellor J. Travis Laster considered a motion for the issuance of a letter of request under the Hague Convention. In granting the motion, the vice chancellor addressed the requirements for issuing letters of request.

By Barry M. Klayman and Mark E. Felger | December 07, 2022 at 09:00 AM



Barry M. Klayman, left, and Mark E. Felger, right. Courtesy photos

Most litigators have heard of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also known as the Hague Convention or the Evidence Convention (codified as 28 U.S.C. Section 1781), but the procedures for utilizing it is less well known. In *In re Cote D'Azur Estate*, C.A. No. 2017-0290-JTL (Del. Ch. Nov. 18, 2022), Vice Chancellor J. Travis Laster considered a motion for the issuance of a letter of request under the Hague Convention. In granting the motion, the Vice Chancellor addressed the requirements for issuing letters of request.

Plaintiff Lilly Lea Perry sought to obtain by a letter of request electronic data that Swiss investigators had seized from the law offices of defendant Dieter Neupert. Neupert was the

architect of the estate plan for Perry's husband. When he died, Neupert advised Perry that her husband had been the sole member of Cote D'Azur Estate LLC, a Delaware limited liability company, which owned a villa in the south of France. Neupert told Perry that her husband's interest in the LLC had passed to his estate and that she was his sole heir. Subsequently, a dispute over the estate arose between Perry and the couple's daughters, and Neupert reversed his position, saying that Perry's husband had assigned his interest in the LLC to a different entity before his death. Neupert then arranged to convert the LLC to a corporation and to authorize the issuance of its stock to that other entity.

Perry brought suit in the Delaware Court of Chancery for a decree invalidating the issuance of the stock and the conversion of the LLC. She alleged that her husband had never completed the assignment of his interest in the LLC to the other entity and thus was the sole member of the LLC when he died. She asserted claims for fraud, conversion and tortious interference with contract against Neupert and the entity that received the stock from the converted LLC.

Perry moved for a letter of request to the central authority of Switzerland to obtain materials in the possession of the Zurich Prosecutor's Office, which had conducted a criminal investigation of Neupert that had led to a search of Neupert's law office and the seizure of electronic devices belonging to Neupert and his assistant. Perry sought the production of all of the seized materials or, alternatively, the production of those materials that touched on topics related to the Chancery litigation.

The Vice Chancellor noted that a party seeking a letter of request under the convention bears the burden of persuading the court that its issuance is warranted. Since Switzerland was a signatory to the convention, and there were no reservations to its acceptance of the convention that were applicable to Perry's request, the court could consider whether to issue the letter of request.

Next, the Vice Chancellor noted that the requested discovery must be permissible under the law of the requesting jurisdiction such that production would be ordered by the requesting court. In Delaware, that meant the discovery must fall within the scope of Rule 26. After considering both Perry's broad request and her alternative narrow request, the vice chancellor concluded that if the discovery were subject to the court's jurisdiction, he would order production in conformity with the narrow request since the broad request would exceed the scope of permissible discovery.

Finally, the Vice Chancellor noted that he then must determine whether to impose the burden of the request on the courts in the foreign jurisdiction. In the leading case on the subject, *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District Of Iowa*, 482 U.S. 522 (1987), the U.S. Supreme Court had identified five factors to consider in determining whether to issue a letter of request:

- The importance to the litigation of the documents or other information requested;
- The degree of specificity of the request;
- Whether the information originated in the United States;
- The availability of alternate means of securing the information; and
- The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

The Vice Chancellor then analyzed each factor as it applied to the case before him. The first factor required an assessment of the importance of the requested documents to the litigation. The vicechancellor concluded that the requested materials were highly likely to contain evidence that was directly probative to the issues in the case. Perry alleged that Neupert fabricated corporate records and a power of attorney that enabled him to obtain control of the LLC whose ownership was in dispute. The electronic records seized by the Zurich Prosecutor's Office might contain drafts and notes relevant to those subjects.

The second factor concerned the degree of specificity of the request. The Vice Chancellor had already determined that Perry's alternative narrow request was targeted and specific, and easily satisfied this test.

The third factor concerned whether the requested information originated in the United States. The Vice Chancellor said this factor was primarily concerned with helping the court to evaluate whether the discovery could be obtained either under the forum court's rules or under the Hague Convention. Although framed in terms of where the information originated, it was actually concerned with the physical location of the requested information. If the requested information were located in a foreign jurisdiction where local laws would impose additional compliance obligations on a producing party, this factor would favor the use of the Hague Convention so that the central authority in that jurisdiction could take those obligations into account. In this case, the discovery materials originated and were located in Switzerland, so the assistance of the Swiss central authority was appropriate.

The fourth factor concerned whether alternative means of obtaining the requested information was available. If there was an alternative means to obtain the information without burdening the foreign court system, it would be preferable to use those means instead of the letter of request. The Vice Chancellor found that the letter of request was the only feasible way to procure the discovery materials, since the Zurich Prosecutor's Office was not a party to the case or otherwise subject to the court's jurisdiction. Perry had also shown that she was unlikely to obtain the materials from Neupert, since it was unclear whether he had them and even if he did, it was unlikely that he would produce them. He had stopped participating in the litigation, and had refused to comply with any discovery requests or take any action except that required to avoid a default judgment.

The final factor involved balancing the competing interests of the sovereigns involved. The court weighs any interest that the United States or the forum state has in obtaining production of the information against any interest the foreign state has in not providing it. According to the Vice Chancellor, this factor is most salient where the litigation implicates national security concerns or national economic policies, which was not the case here. Instead, the vice chancellor found the interests of the forum state to be most significant. Delaware has a substantial interest in providing an effective forum for litigating disputes involving the internal affairs of Delaware business entities. At issue was whether Neupert used phony documents to mislead a Delaware registered agent, made false filings with the Delaware Secretary of State, and improperly took control of a Delaware entity. These were important interests of the forum state. On the other hand, Switzerland did not appear to have any competing interest in not providing the requested information.

In the end, after considering the five *Societe Nationale* factors, the Vice Chancellor found that all the factors supported the issuance of the letter of request. Accordingly, Perry had met her burden of persuasion to have the court grant the letter of request.

The opinion in this case is fact specific and significant only insofar as it illustrates the court's application of the *Societe Nationale* factors for issuance of a letter of request. The case is most instructive as a tutorial on the requirements that must be met for a letter of request. Most practitioners can go through their careers without having to invoke the Hague Convention, but it is helpful to know that there exists case law in Delaware that clearly delineates the requirements for obtaining a letter of request under the convention from the court.

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