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## Cross-Border E-Discovery: Production of ESI from Chinese Entities

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# CROSS-BORDER E-DISCOVERY: PRODUCTION OF ESI FROM CHINESE ENTITIES

*Julie Sher\**

## ABSTRACT

*This Essay proposes a new approach to E-Discovery disputes in U.S.-China litigation. More specifically, it proposes a guide on best steps to take to resolve E-Discovery disputes in U.S. courts involving Chinese entities in general and Chinese banking and financial entities in particular. This Essay asserts that U.S. litigants should be required to attempt exchange of documents via the Hague Evidence Convention first. Additionally, the *Aerospatiale* Test should be expanded to include the Restatement Third International Comity Balancing Test. Using these steps and sources of law, U.S. courts will be able to resolve these discovery disputes much more efficiently and with greater satisfaction by all parties.*

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## INTRODUCTION

Chinese companies are rising in number as parties to legal disputes in the United States. However, there is no comprehensive framework for the efficient processing of cross-border E-Discovery requests between the United States and China. As China grows in economic prominence, U.S. courts need to develop and apply a consistent standard to the processing and enforcement of cross-border E-Discovery.

China is a party to the Hague Evidence Convention,<sup>1</sup> the current procedure for cross-border E-Discovery with Chinese parties. However, the process is long, complicated, and often results in rejection of discovery requests.<sup>2</sup> Should a U.S. litigant request the court to compel discovery or production under the Federal Rules of Civil Procedure (“F.R.C.P.”), Chinese litigants have Chinese statutory law that prevents production of documents containing a variety of different information, from state secrets to banking information, resulting in civil and criminal penalties.<sup>3</sup> If the Chinese litigant refuses to produce E-Discovery for fear of violating those statutes, U.S. courts have no real method of enforcement.<sup>4</sup> Some U.S. courts have taken to compelling discovery even if it requires violation of Chinese law, entering unenforceable judgments, and creating issues of international comity. Chinese parties engaged in U.S. litigation can also be disingenuous, using Chinese privacy laws as an excuse not to produce information in discovery. Currently, there is no guidance on how to handle these disputes.<sup>5</sup> Governing statutes and case law are both extremely outdated, disputes with Chinese litigants continue to increase in number, and judges need clearer instruction on how to handle these cases. Without a clear line of statutes or case law to follow, U.S. courts are left to pull from varying disconnected sources of guidance and crafting their own solutions.

This Essay proposes a procedure for judges to best resolve E-Discovery disputes with Chinese parties.

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<sup>1</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 847 U.N.T.S. 231.

<sup>2</sup> See generally Brian Friederich, *Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Privacy Directives, and Aérospatiale*, 12 SAN DIEGO INT’L L.J. 263 (2010) (detailing the problems with the convention).

<sup>3</sup> Ray Worthy Campbell & Ellen Claar Campbell, *Clash of Systems: Discovery in U.S. Litigation Involving Chinese Defendants*, 4 PEKING U. TRANSNAT’L L. REV. 129, 167–68 (2016); see *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452, 468 (S.D.N.Y. 2013).

<sup>4</sup> Campbell & Campbell, *supra* note 3, at 156.

<sup>5</sup> See generally *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87 (S.D.N.Y. 2015).

## I. BACKGROUND ON CROSS-BORDER E-DISCOVERY

Cross-border discovery is generally a very difficult task where a court must decide what U.S. law applies and whether it allows U.S. litigants to conduct that discovery. Logistical challenges such as scheduling and walking the line between compliance with discovery orders and not violating a foreign country's privacy regulations further complicate the process.<sup>6</sup> Additionally, the vast differences among varying legal systems and jurisdictions make it difficult for parties to comply with judicial orders without violating a statute elsewhere.<sup>7</sup>

### A. *E-Discovery in a Civil Law System*

Discovery in civil law systems is mainly conducted by the judge, including investigations.<sup>8</sup> Judges take an active role in questioning witnesses and requesting documents to keep the process from becoming a “fishing expedition.”<sup>9</sup> Chinese litigants can be particularly surprised by the expansive nature of the discovery process as well as the burden placed on the parties to conduct it. Chinese parties may not take discovery requests from other parties seriously if they are used to receiving them as orders from judges. In civil systems, parties may petition the judge for conferences, evidence exchanges among parties, or orders to preserve evidence.<sup>10</sup> However, all of these are strictly up to the discretion of the presiding judge.<sup>11</sup> Parties do not presume any of these discovery requests will be granted as a matter of procedure.<sup>12</sup>

Judges in civil systems also do not have the same governing or lawmaking power as those in common law systems.<sup>13</sup> Chinese litigants engaging with U.S. courts for the first time can often be surprised by the expansive powers of the judiciary. This can result in parties not understanding or resisting judicial orders or judgments.

The federal courts have followed varying methods to try to resolve and enforce discovery judgments against Chinese parties. With limited case and

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<sup>6</sup> Lynn M. Marvin & Yohance Bowden, *Conducting U.S. Discovery in Asia: An Overview of eDiscovery and Asian Data Privacy Laws*, 21 RICH. J.L. & TECH. 12, 13 (2015).

<sup>7</sup> Joel Wuesthoff et al., *Topical Issues in Cross Border Discovery: Reconciling Personal Data Regulations and International Guidelines*, 11 US-CHINA L. REV. 1570, 1574 (2014).

<sup>8</sup> Campbell & Campbell, *supra* note 3, at 146.

<sup>9</sup> Joel Wuesthoff et al., *Topical Issues in Cross Border Discovery*, at 1574.

<sup>10</sup> Campbell & Campbell, *supra* note 3, at 147.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Campbell & Campbell, *supra* note 3, at 146.

statutory law to seek guidance, U.S. courts and litigants have pulled from a variety of sources.

*B. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—The Hague Evidence Convention*

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was enacted on March 18, 1970.<sup>14</sup> The purpose of the treaty was to establish official channels through which evidence could be exchanged in a secure way for cross-border civil and criminal disputes.<sup>15</sup> It was the first multilateral treaty to attempt to bridge the gap between common law and civil law states.<sup>16</sup> Previous attempts and frameworks were implemented by Europe, where states are largely civil law systems.<sup>17</sup> It is also the current legal framework in place governing cross-border discovery between the United States and China.

Chapter I of the convention describes the letter of request process.<sup>18</sup> The process starts with a judicial authority in the Requesting State, sending a letter of request to the *central authority* in the Requested State.<sup>19</sup> The letter is then forwarded to appropriate, judicial personnel for execution.<sup>20</sup> The law of the Requested State applies to the letter.<sup>21</sup> Any specific requirements regarding method or procedure that the requesting state might have are under the prerogative of the Requested State in its execution of the letter.<sup>22</sup> Flexibility varies from state to state, with some states even creating domestic, statutory exceptions to engage efficiently and effectively with the process.<sup>23</sup> Ideally, the letters should be executed “expeditiously” and should not be rejected except in specific cases.<sup>24</sup>

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<sup>14</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art. 7, 1995 O.J. (L 281) 31–50.

<sup>18</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Articles 24 and 25 of the Hague Evidence Convention also designate that a Requested State can designate other bodies and even multiple bodies as having authority to receive and execute the letter of request. *See id.*

<sup>21</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## II. *AEROSPATIALE* TEST

Although the United States is a party to the Hague Evidence Convention, all suits are usually governed by the F.R.C.P.<sup>25</sup> A party first needs to persuade the judge to govern discovery under the Hague Evidence Convention; it is not automatically triggered if there is an international party.<sup>26</sup> Many of the instances of Chinese parties being ordered to violate Chinese law to comply with discovery orders were simply from judges who would not even consider the Hague Evidence Convention, instead requiring discovery to be conducted strictly under the F.R.C.P.

U.S. courts must use the *Aerospatiale* Test, developed by the Supreme Court in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*<sup>27</sup> to determine on a case-by-case basis whether discovery should be governed under the Hague Evidence Convention or the F.R.C.P..<sup>28</sup>

In *Aerospatiale*, the Supreme Court held that:

- (1) Hague Evidence Convention applied to request for information from foreign national which was a party to the litigation;
- (2) Hague Evidence Convention did not provide exclusive and mandatory procedure for obtaining documents and information located within territorial foreign signatory;
- (3) first resort to Hague Evidence Convention was not required; and
- (4) Hague Evidence Convention did not deprive district court of jurisdiction it otherwise possessed to order foreign national party before it to produce evidence physically located within a foreign signatory nation.<sup>29</sup>

Although it was important that the Court held that district courts retain jurisdiction to conduct discovery with foreign parties, it should have required judges to at least try to go through the Hague Convention. The Hague Evidence Convention is the agreed upon pathway for cross-border discovery between the

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<sup>25</sup> Joel Wuesthoff et al., *supra* note 7, at 1574.

<sup>26</sup> See Wuesthoff et al., *supra* note 7; *Societe Nat. Ind. Aero. v. U.S. Dist. Court*, 482 U.S. 522 (1987).

<sup>27</sup> *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

<sup>28</sup> Campbell & Campbell, *supra* note 3, at 154. See generally *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, *supra* note 1.

<sup>29</sup> *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

United States and China. At the very least it would go a long way with extending a gesture towards international comity.

The test that the Supreme Court developed in *Aerospatiale*, balances three factors for judges to determine whether to submit to the Hague Evidence Convention: (1) the importance of the information given through the particular facts of the case, (2) sovereign interests, and (3) the likelihood that resorting to the Hague Evidence Convention will be effective.<sup>30</sup> These factors are too vague and do not give enough guidance on how to weigh them against each other. Sovereign interests could include both the U.S. and Chinese national interests, as well as issues of general international comity. Sovereign interests may also include production blocking statutes in the foreign country, statutes whose purpose is to block its nationals from producing information in disputes in foreign countries.<sup>31</sup> The Supreme Court only concluded that blocking statutes in the foreign party's country are not dispositive in deciding whether to compel discovery and production.<sup>32</sup>

Additionally, how important must the information be to the case? In many cases, evidence must be looked at in totality to prove the case. One piece of evidence may seem insignificant on its own, but prove a lot when considered in concert, which may not be enough under this guideline. This would require the judge to look at what China has approved for production in past cases. China does not have a very good track record of answering or approving Hague Evidence Convention requests, but recently the Chinese government stated that it would commit to clearing requests more quickly.<sup>33</sup> Judges would have to weigh the strength of the government's word.

The Court also cautioned judges to "exercise special vigilance to protect foreign litigants from . . . unnecessary . . . or unduly burdensome discovery."<sup>34</sup> Although a good principle to theoretically adhere to, it does not give any specific instruction on how to protect those litigants and what constitutes unnecessary or unduly burdensome discovery. Judges have no power in foreign sovereigns.

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<sup>30</sup> Campbell & Campbell, *supra* note 3; Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 PITT. J. TECH. L. & POL'Y 1, 20 (2008).

<sup>31</sup> *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

<sup>32</sup> *Bodner*, 202 F.R.D. at 375; *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522. Courts have also paid particular attention to the nature of each blocking statute as some have been exhibited simply to exist so as to frustrate litigation discovery efforts in other jurisdictions, like the French Blocking Statute. This includes not submitting to the Hague Evidence Convention when encountering such a statute.

<sup>33</sup> Tom, *Service of Process in China Improves*, LEGAL LANGUAGE SERVICES: LEGAL LANGUAGE BLOG (Jan. 20, 2021), <https://www.legallanguage.com/legal-articles/chinese-central-authority-improving/>.

<sup>34</sup> Davila, *supra* note 30; *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

They cannot protect Chinese litigants in any way except to let them not produce any of the evidence that the other litigants may be entitled to in a U.S. court.

The general consensus about the *Aerospatiale* test is that it did not provide enough guidance to U.S. courts on how best to proceed with foreign parties, concluding that the Hague Evidence Convention is simply another “method of seeking evidence that a court may elect to employ.”<sup>35</sup> Courts have elected largely to ignore the Hague Evidence Convention and to keep compelling discovery of foreign parties under the F.R.C.P. They cite the need to move expeditiously in litigation,<sup>36</sup> the ineffectiveness of the Hague Evidence Convention procedure,<sup>37</sup> and the inability to separately describe each document sought,<sup>38</sup> among other reasons for this practice.<sup>39</sup> With the rise of global data and E-Discovery, the *Aerospatiale* Test has become outdated and ill-equipped to help attorneys to anticipate discovery processes or help judges make decisions about those discovery processes.<sup>40</sup>

#### A. *China and the Hague Evidence Convention*

Both the United States and China have ratified the Hague Evidence Convention, which facilitates the collection of extraterritorial evidence.<sup>41</sup> However, it is not an easy or efficient system. Currently, convincing a judge to submit a case under the Hague Evidence Convention is a difficult step because it necessitates judges actively taking a part in the process. A U.S. judge, not the party seeking discovery, must submit a Letter of Request to the Chinese Ministry of Justice.<sup>42</sup>

The request is then forwarded to the People’s Republic of China Supreme Court (“Chinese Supreme Court”).<sup>43</sup> The Chinese Supreme Court may narrow

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<sup>35</sup> Davila, *supra* note 30 (quoting *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522). *See generally* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>36</sup> Bodner, 202 F.R.D. at 376; Davila, *supra* note 30. In Bodner, the court cites how the Hague Evidence Convention would “consume precious time, and needlessly delay the resolution” in light of some parties being elderly and infirm. In *re* Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433 (D.D.C. June 20, 2001).

<sup>37</sup> In *re* Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433, at \*4 (“[T]here was insufficient evidence to establish the likelihood that these procedures would be effective[.]”); Davila, *supra* note 30. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>38</sup> *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 23 (2d Cir. 1998) (considering that in U.K. law, similarly to Chinese law, discovery requires that each document be described and sought separately).

<sup>39</sup> *First Am. Corp.*, 154 F.3d at 23; Davila, *supra* note 30.

<sup>40</sup> *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

<sup>41</sup> Campbell & Campbell, *supra* note 3, at 150. *See generally* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>42</sup> Campbell & Campbell, *supra* note 3, at 150.

<sup>43</sup> *Id.*

or outright reject the request should it violate state sovereignty, domestic laws, state security, or state public interest.<sup>44</sup> Here, often these requests will be rejected for errant reasons. Requests for proprietary information are sometimes rejected for seeking discovery protected as state secrets. The lines can often blur regarding entities like the Bank of China, that are quasi-government owned. However, the most limiting factor is actually the level of specificity required in the request.<sup>45</sup>

Most civil law systems require heightened specificity in discovery requests compared to the United States, but China sits even above them. For a deposition, the request must contain the witness' Chinese citizenship ID number, passport number, and Hukou address or residence address.<sup>46</sup> The Hukou system is something that most foreigners have never even heard of, let alone would know that it is required on the request or how to find the corresponding Hukou address for a specific witness. All of these details are information U.S. litigants would normally request through initial discovery. Additionally, China requires all the deposition questions to be included on the request.<sup>47</sup> Giving all the deposition questions beforehand could potentially reveal a litigant's ultimate litigation strategy.<sup>48</sup>

Even if the requesting party manages to get through all these hoops, all may be for naught.<sup>49</sup> The U.S. State Department previously posted on its website: “[w]hile it is possible to request compulsion of evidence in China pursuant to a letter rogatory or letter of request (Hague Evidence Convention), such requests have not been particularly successful in the past.”<sup>50</sup>

There are also no repercussions or remedies once a party has reached the end of the process. Chapter II of the Hague Evidence Convention allows foreign litigants to appeal to the diplomatic personnel in the country.<sup>51</sup> However, Article

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 152.

<sup>46</sup> *Id.* at 153. Hukou is a household registration system that officially identifies an individual as a resident of a particular area. See *What is the China “Hukou” System*, NEW HORIZONS: CHINA’S HUOU SYSTEM EXPLAINED, <https://nhglobalpartners.com/the-chinese-hukou-system-explained>. It determines the benefits that each individual is entitled to in a variety of social programs, including retirement pension, education, and healthcare. See *id.*

<sup>47</sup> Campbell & Campbell, *supra* note 3, at 153.

<sup>48</sup> *Id.* at 152.

<sup>49</sup> *Id.* at 153.

<sup>50</sup> Dan Harris, *How to Sue a Chinese Company, Part 2*, HARRIS BRICKEN: LITIGATION AND ARBITRATION (Sept. 29, 2019), <https://harrisbricken.com/chinalawblog/how-to-sue-a-chinese-company-part-2>.

<sup>51</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

thirty-three allows states to reserve sections of the treaty.<sup>52</sup> China has disallowed all of Chapter II of the Hague Evidence Convention, meaning “U.S. diplomatic officers may not appeal to Chinese authorities to compel production of evidence.”<sup>53</sup> For all of these reasons, the Hague Evidence Convention is insufficient to meet the needs of U.S.-China E-Discovery disputes.<sup>54</sup>

### III. PRACTICALITY

Additional problems with attempting to compel discovery include just practicality and access. Rule 45 of the F.R.C.P. states “that a subpoena may command a non-party to produce documents that are in its ‘possession, custody, or control.’”<sup>55</sup> However, “legal and practical inability to obtain the requested documents from the non-party, including by reason of foreign law, may place the documents beyond the control of the party who has been served with” a document request.<sup>56</sup> A document that is not within the party’s control cannot be produced and an order to compel will not change that. This is relevant when Chinese companies have a local branch within the United States and is subpoenaed for records that exist in China.

In cases in which the U.S. local branch of a Chinese company or bank has been found to be a separate entity, U.S. courts held that the local branch did not have “legal right” to the financial information being subpoenaed and thus did not compel discovery based simply on the F.R.C.P. The local branch never had access to bank records in the main entity in China so compelling discovery would be useless. Instead, parties needed to subpoena the entity in China for bank records. While attempting to bypass the cross-border E-Discovery process altogether, the parties actually increased the time, money, and effort spent on trying to obtain this evidence.

In *Tiffany (NJ) LLC v. Qi Andrew*, the plaintiff tried to compel production of financial information from Chinese, non-party banks.<sup>57</sup> The subpoenas were sent to the New York branches of each bank, however each entity returned objections that they did not have access to any records outside of the United States.<sup>58</sup> Additionally, even if they had access, trying to bring the data outside

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<sup>52</sup> Campbell & Campbell, *supra* note 3, at 153.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011); FED. R. CIV. P. 45.

<sup>56</sup> *Cohen v. Horowitz*, 07 Civ. 5834(PKC), 2008 WL 2332338, at \*2 (S.D.N.Y. June 4, 2008) (Castel, D.J.), (citing *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

of China, the banks argued, “would violate any applicable domestic or foreign law, including the banking, commercial and criminal laws of the People’s Republic of China.”<sup>59</sup> The magistrate judge actually weighed the consideration that previous Chinese litigants suffered heavy sanctions under Chinese law after being compelled to produce state secrets and bank records.<sup>60</sup> Almost all instances of providing information about Chinese citizens to foreign entities can violate Chinese law, opening financial entities up to civil and criminal liabilities in China.

#### IV. DIFFICULTIES WITH ENFORCEMENT

U.S. courts also have difficulty just enforcing judgments with Chinese parties as those judgments are not recognized in China, meaning that often, the solution for Chinese defendants is to simply ignore discovery requests and litigation in the United States.<sup>61</sup> Beyond discovery, there seems to be little incentive for Chinese litigants to even show up to litigation.

In many cases, it is possible that Chinese companies are simply asserting Chinese trade secrets or privacy laws to skirt production or litigation altogether.<sup>62</sup> In *Wultz v. Bank of China*,<sup>63</sup> the dispute involved allegations that the Bank had aided international terrorism.<sup>64</sup> In discovery, the Bank of China claimed that it could not comply with production requests without incurring liability.<sup>65</sup> Specifically, it could not produce information related to any money-laundering activities, counter-terrorism activities, or information about the People’s Bank of China investigations into suspicious transactions.<sup>66</sup> However, the court also notes that the Bank of China never produced any evidence that

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<sup>59</sup> *Id.*

<sup>60</sup> *Tiffany (NJ) LLC*, 276 F.R.D. at 153 (“Moreover, CMB claims that China has actively implemented the Convention, and in 2003 designated China’s highest local courts to directly forward and transfer judicial assistance requests in accordance with the Hague Convention (CMB’s Mem. in Supp. at 18 n. 18, *citing* Huang Jin et al., *Chinese Judicial Practice in Private International Law: 2006*, 8 CHINESE J. INT’L L. 715, 717 (2009)). BOC and ICBC specify that the Chinese Ministry of Justice has reported that over the last five years it has executed approximately 50% of the requests it has received, and that it takes an average of six to twelve months for a request to be executed. In the first half of 2010, the Ministry of Justice honored thirty-seven requests for evidence in commercial and civil matters (BOB/ICBC Mem. in Supp. at 2; Feinerman Decl. ¶ 12).”).

<sup>61</sup> *Campbell & Campbell*, *supra* note 3, at 156; *see, e.g.*, *Herman Miller, Inc. v. Aiphaville Design, Inc.*, No. C-08-03437 WHA, 2009 U.S. Dist. LEXIS 103384 (N.D. Cal. Oct. 22, 2009).

<sup>62</sup> *Campbell & Campbell*, *supra* note 3, at 167–68 (2016); *see* *Wultz*, 942 F. Supp. 2d at 468.

<sup>63</sup> *Wultz*, 942 F. Supp. 2d at 468.

<sup>64</sup> *Id.* at 452. Relatives of a suicide bombing victim in Tel Aviv claimed that the state-owned bank had aided and abetted terrorists in violation of the Antiterrorism Act. *See generally* *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

<sup>65</sup> *Wultz*, 942 F. Supp. 2d at 464.

<sup>66</sup> *Id.*

any bank had ever been sanctioned by the Chinese government for disclosing confidential information in a U.S. court, in breach of a Chinese statute.<sup>67</sup> With this information, the court found the Bank of China to be acting in bad faith in trying to circumvent discovery of its customers' accounts and shielding itself using empty threats of Chinese domestic sanctions.<sup>68</sup>

Bad faith holdings color the entire issue for all Chinese litigants as they encourage an assumption by many in the United States, that Chinese parties are all trying to get out of U.S. regulation while availing themselves of the U.S. market.<sup>69</sup> Many Chinese litigants could simply be overwhelmed and confused as to the discovery process in U.S. litigation, but judges and parties are prejudiced by assuming that all discovery objections are attempts to circumvent judgment in the United States. This only makes it more difficult to get through discovery in future cases.

U.S. courts compelling Chinese discovery are also aggravating the issue in that they are forcing Chinese parties to violate domestic law in China, incurring heavy fines and sanctions from the P.R.C. government.<sup>70</sup> When deciding whether to compel production, courts must weigh a variety of comity factors including: significance of the documents to the investigation or litigation, the request's level of specificity, whether the information has U.S. origins, whether the information can be secured elsewhere, whether noncompliance would undermine important interests of the United States or the state where the information is located, the degree of hardship compliance would impose on the requested party, and the requested party's good faith.<sup>71</sup>

In *Gucci America, Inc. v. Weixing Li*, Gucci brought suit over counterfeiting of its products.<sup>72</sup> Gucci found that the monetary proceeds from the counterfeit products were transferred to the Bank of China and requested production of banking and financial information from any accounts maintained by named defendants, but also a few that were specifically delineated.<sup>73</sup> The Bank of China only produced limited information about two specifically delineated accounts.<sup>74</sup>

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<sup>67</sup> *Id.* at 468.

<sup>68</sup> *Id.* The court further noted that the Bank of China has exhibited similar behavior in other cases, indicating a pattern of bad faith. *Id.*

<sup>69</sup> Campbell & Campbell, *supra* note 3, at 170.

<sup>70</sup> *Id.* at 167.

<sup>71</sup> *Gucci Am., Inc.*, 135 F. Supp. 3d at 101.

<sup>72</sup> *Id.* at 91.

<sup>73</sup> *Id.* The court issued a preliminary injunction, freezing the defendants' assets, enjoining any bank from engaging with the defendants' assets in any way, and requiring any party receiving a subpoena pursuant to the injunction to produce all relevant documents. *Id.*

<sup>74</sup> *Gucci Am., Inc.*, 135 F. Supp. 3d at 92.

In its objection, the bank cited a letter from the People's Bank of China and the Chinese Banking Commission regarding China's banking secrecy laws, China's being a party to the Hague Evidence Convention, and the likelihood that the Bank of China will incur penalties and sanctions as a result of producing the defendants' account information.<sup>75</sup> The banking secrecy laws barred the bank from producing any financial or banking account information.<sup>76</sup>

The court held that the Chinese bank must produce account information that was subpoenaed because principles of international comity weighed towards the United States.<sup>77</sup> The Bank of China failed to establish that compliance with production would cause it to incur criminal or civil liability in China and that the Hague Evidence Convention would be a viable alternative means of obtaining the information.<sup>78</sup> If the court had told the parties to engage with the Hague Evidence Convention process initially, the case could have avoided this separate dispute.

Additionally, after consulting with a Chinese banking law expert, the court concluded that the Bank of China would be at no risk of incurring penalties due to the fact that Chinese bank secrecy law privacy protections are waivable by several different public bodies.<sup>79</sup> The protection being a private one for an individual, the court also decided that there is no interference with Chinese national interests, thereby not requiring substantial deference.<sup>80</sup> The court concluded that the interests weighed in Gucci's favor because the documents were significant to the litigation, the requests were fairly specific, the information could not be secured elsewhere, U.S. interests of combatting counterfeiting were significant, and China had no interests in an individual's waivable account information.<sup>81</sup> The last two are concerns of sovereign interests

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 104.

<sup>78</sup> *Id.* at 101. The court also noted the significance of the type of case it was. This case was about counterfeiting of designs. *Id.* There is a demonstrated history of Chinese parties counterfeiting designs and products that companies sell in the United States. The court weighed the amount of damage a counterfeiter could do to a corporation like Gucci and the history of counterfeiters deliberately using institutions like the Bank of China to thwart prosecution.

<sup>79</sup> *Id.* at 103.

<sup>80</sup> *Id.*

<sup>81</sup> Gucci Am., Inc., 135 F. Supp. 3d at 87. Beijing also submitted judgments that affirmed U.S. interests in the case. *Id.* The judgments confirmed that China does not heavily enforce the banking privacy laws protecting individuals' account information. *Id.* Additionally, the judgments confirmed that the Bank of China and its customers have a contractual relationship, that the Bank of China needed to prove that the plaintiffs had breached that contract to afford the Bank of China the right to terminate that legal relationship. *Id.* This further cements the idea that bank privacy laws in China are a private matter, not a heavily regulated state matter.

or international comity interests. The United States has a strong interest in combatting counterfeiting as there has been an increasing number of Chinese parties counterfeiting products sold in the United States. This particularly tips the scale in Gucci's favor. Additionally, since the privacy protections of banking and financial information is a waivable protection, China has less national interest in enforcing those statutes, tipping the scale even further in Gucci's favor.

## V. CHINESE BANKING PRIVACY AND SECRECY LAWS

This Essay focuses in particular on production of banking and financial E-Discovery because of the nature of the statutes. China's statutes blocking production of banking and financial data are more of a legal protection for individuals. Banks can be punished if they attempt to freeze an individual's account or investigate an account on someone else's behalf. However, as the intent is protection of the individual, rather than a sovereign guarding information, there is room for distribution through consent. Article 6 of China's Commercial Bank Law describes that banks need to safeguard interests, implying that releasing bank data could be allowed if it was in the individual's interest.<sup>82</sup>

### A. Comity Concerns

More importantly to consider are the processes and consequences of releasing financial data. China's Provisions on the Administration of Financial Institutions' Assistance implies that production of financial data is not completely barred. The provisions describe an official route for governments to take in the interest of investigation. Although it requires notice from a government entity, it exhibits that China is, at least on paper, interested in cooperation. However, it is also important to note that the U.S. litigants and judges are not the ones who suffer the adverse consequences. Article 73 of the Commercial Bank Law details just some of the civil penalties that Chinese entities can face for failing to safeguard their information.<sup>83</sup>

Some jurisdictions apply the Restatement (Third) of Foreign Relations Law comity test.<sup>84</sup> In *Tiffany*, the court applied the comity test in the Restatement

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<sup>82</sup> *Tiffany* (NJ) LLC, 276 F.R.D. at 150.

<sup>83</sup> *Campbell & Campbell*, *supra* note 3, at 153; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

<sup>84</sup> *Tiffany* (NJ) LLC, 276 F.R.D. 143.

(Third) of Foreign Relations Law § 442(1)(c) to determine whether to order international discovery.<sup>85</sup> Section 442(1)(c) states that

In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account:

- (1) the importance to the investigation or litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;
- (4) the availability of alternative means of securing the information; and
- (5) 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.<sup>86</sup>

This judge sent the parties through the Hague Evidence Convention, as the Chinese government had exhibited more encouraging statements about potential for succeeding in attaining the requested discovery.<sup>87</sup> The judge also qualified this ruling saying that should the litigant's request still get rejected or unreasonably limited, then they could return to court and revisit the E-Discovery issue.<sup>88</sup>

In *Nike, Inc. v. Wu*,<sup>89</sup> the court also weighed the factors in the Restatement Third of Foreign Relations Law § 442, as well as the two additional ones considered by the court in *Gucci Am., Inc. v. Weixing Li*.<sup>90</sup> *Nike, Inc. v. Wu*, arose out of a trademark dispute.<sup>91</sup> The defendants included numerous online retailers infringing on both Nike and Converse trademarks.<sup>92</sup> After winning judgment, the plaintiffs requested that the Bank of China produce account information for all the defendants in efforts to enforce the judgments.<sup>93</sup> The

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<sup>85</sup> *Id.* See generally Restatement (Third) of Foreign Relations Law § 442 (Am. L. Inst. 1987).

<sup>86</sup> Restatement (Third) of Foreign Relations Law § 442.

<sup>87</sup> Campbell & Campbell, *supra* note 3, at 170; Tiffany (NJ) LLC, 276 F.R.D. 143.

<sup>88</sup> *Id.*

<sup>89</sup> NIKE, Inc. v. Wu, 349 F. Supp. 3d 346, 363 (S.D.N.Y. 2018).

<sup>90</sup> Gucci Am., Inc., 135 F. Supp. 3d at 87. Section 442 of the Restatement Third of Foreign Relations Law lists five balancing factors to weigh in the interest of international comity. The Court considered the two additional ones of degree of hardship to and good faith of the complying party.

<sup>91</sup> NIKE, Inc., 349 F. Supp. 3d 346.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Bank of China argued that the plaintiffs should have gone through the Hague Evidence Convention first.<sup>94</sup> As held in *Aerospatiale*, the court cited that the Supreme Court did not require first going through the Hague Evidence Convention and that the District Court continues to possess broad discretion in how it conducts discovery, in whatever manner is most effective.<sup>95</sup>

#### CONCLUSION—PROPOSAL

Currently the Hague Evidence Convention is the only procedural avenue for obtaining Chinese E-Discovery that is sanctioned by the Chinese government. Ideally, there would be a policy solution developed by a joint committee by the two governments, but with that being quite the pipe dream, courts need more clear guidance on how best to move cross-border E-Discovery along expeditiously.

The best path for U.S. courts is first to require parties requesting production to go through the Hague Evidence Convention. Although the Hague is a clunky and often useless endeavor, going through the motion at least gives a gesture in pursuit of respecting principles of international comity. The Chinese government has also committed to putting forth more resources towards increasing efficiency in the system.

Next the court should consider the Restatement (Third) of Foreign Relations Law § 442 international comity balancing test, as well as the two additional balancing factors of degree of hardship to party whom discovery is requested and the party's good faith. The international comity balancing test helps a judge decide whether to compel production of a piece of evidence in discovery proceedings. The factors expand on the *Aerospatiale* test to a more usable and helpful format, bringing the test into a much more developed and globalized era.

In terms of enforcement, in the specific area of banking and financial information, U.S. courts should feel more empowered to compel production of documents and information. Banking and financial information secrecy statutes in China are waivable privacy protections and there is negligible risk that Chinese parties will incur either criminal or civil liabilities. In cases of other data restrictions, courts can enforce orders and judgments by attaching company assets in the United States or entering an injunction, preventing the entity from conducting further business within the United States.

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<sup>94</sup> *Id.*; see *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522.

<sup>95</sup> *NIKE, Inc.*, 349 F. Supp. 3d at 364.

China continues to rise in economic power in the world. As more companies enter the U.S. market, more litigation will arise, as will the volume of cross-border discovery. Until the United States and China can come up with a bilateral solution, these recommended steps and practices will help guide judges in tackling a messy, complicated, and time-consuming process.