

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS	:	MDL DOCKET No. 875
LIABILITY LITIGATION (No.VI)	:	(MARDOC)
	:	
NEIL HAMILTON	:	
	:	CIVIL ACTION NO.
v.	:	2:11-31524
	:	
AMERICAN PRESIDENT LINES	:	
LTD, et al	:	

**ORDER<sup>1</sup>**

Before the Court in this maritime asbestos case are three motions relating to the notice by plaintiff of his deposition to take place in France on August 15, 2012. Certain shipowner defendants have moved to quash the notice (Mardoc Doc. 1760, Hamilton Doc. 58), defendant Crane Co. has filed an expedited motion to quash the deposition (Hamilton Doc. 50), and plaintiff has filed an emergency motion for the issuance of a commission for a court reporter to which certain shipowner defendants have responded (Mardoc Docs. 1761 & 1762). I held an on-the-record teleconference on the motions on August 10, 2012. For the reasons that follow, I will deny the motions to quash and will grant the motion for commission of a court reporter.

Mr. Hamilton was diagnosed with mesothelioma in approximately 2010, and his counsel represents that they noticed his deposition to preserve his trial testimony because

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<sup>1</sup>This Order shall be filed both on the above-listed docket and also on the main Mardoc docket, 02-md-875.

his condition has recently deteriorated significantly. Plaintiff is a citizen of the United States who lives in France.

Crane moves to quash on the ground that Mr. Hamilton's case was dismissed by virtue by Judge Robreno's recent order dismissing the actions of certain asymptomatic plaintiffs (Mardoc Doc. 1755). The medical diagnosing report for Mr. Hamilton clearly discloses that he was diagnosed with mesothelioma. Therefore, I will not grant the motion to quash on this ground, and plaintiff is instructed to show cause in accordance with the procedure set forth in Judge Robreno's order to re-open his case. Crane also asserts that the deposition was noticed to take place next week, after this week's deadline for fact discovery. Although plaintiff has not excused his delay in seeking this deposition, in light of the primary interest of giving priority where possible to addressing the most serious cases, the deposition will not be quashed on this ground.

The moving shipowner defendants ("defendants") argue that the deposition should be quashed on the ground that it is not in compliance with Federal Rule of Civil Procedure 28 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Convention").<sup>2</sup> Plaintiff asserts Rule 28 as authority for the deposition and issuance of a commission.

Rule 28 states that "[a] deposition may be taken in a foreign country . . . before a person commissioned by the court to administer any necessary oath and take testimony."

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<sup>2</sup>There is no dispute that both France and the United States are parties to the Convention.

Fed. R. Civ. P. 28(b)(1)(D).<sup>3</sup> The Convention, which is set forth in the Editor's Notes to 28 U.S.C. § 1781, sets forth procedures for gathering evidence for use in a civil case when the evidence is located in a foreign country. In this case, plaintiff, who is a national of the United States, seeks the taking of his own deposition testimony in France for use in his civil case in the United States. Two articles of the Convention may apply to this scenario. First, Article 15 states that "a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents." Second, Article 17 states "a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if – (a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and (b) he complies with the conditions which the competent authority has specified in the permission." The proposed deposition does not comport with the terms of either Article 15 or 17 as plaintiff has not arranged for the taking of the deposition either by a U.S. consular or diplomatic officer or by an appointed commissioner designated by France. Rather, plaintiff seeks to proceed with the deposition under the authority of Rule 28 alone.

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<sup>3</sup>Plaintiff has identified an individual who is over 21 years of age who is a United States certified court reporter. Mardoc Doc. 1761 at 1.

The Supreme Court has addressed whether the provisions of the Convention are compulsory or permissive, and decided that they are permissive. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987) (“the optional Convention procedures are available whenever they will facilitate the gathering of evidence”). The United States Court of Appeals for the Third Circuit has interpreted the Supreme Court’s holding as follows:

Aerospatiale holds that the Hague Convention does not provide exclusive procedures for obtaining documents and information located in a foreign signatory national’s territory. . . . Aerospatiale holds that the Convention’s plain language, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was “intended as a permissive supplement, not a preemptive replacement, for other means of obtaining evidence located abroad.” . . . Accordingly, the Convention does not deprive the District Court of its jurisdiction to order, under the Federal Rules of Civil Procedure, a foreign national party to the proceedings to produce evidence physically located within its territory.

In re Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288, 300 (3d Cir. 2004) (quoting Aerospatiale, 482 U.S. at 536). The Third Circuit noted that the Court also rejected a rule of first resort favoring the Convention over the Federal Rules, and that instead courts should consider three factors in determining whether the Convention’s provisions should apply, namely the particular facts of the matter at issue, the sovereign interests involved, and the likelihood that resorting to the Convention will prove effective in gathering the information. Id. The Supreme Court’s ruling did not ignore the interests

of foreign nationals, however, and instructed courts to “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.” Id. at 301 (quoting Aerospatiale, 482 U.S. at 546).

Considering the three factors as they apply to the particular deposition at issue here, it is clear that the Convention should not be used as a barrier. Plaintiff is a United States national who is seeking redress in a United States court for injury done to him in the maritime jurisdiction of the United States courts. All defendants are United States entities, and no foreign interest has been asserted whether by plaintiff or by any defendant. It happens that plaintiff is currently located in France, and that his deposition, if it is to take place at all, must take place promptly in France due to his health. The voluntary deposition of plaintiff in this case poses no threat to France’s sovereignty or to France’s interest in its own legal procedures.<sup>4</sup> The deposition will not compel anyone’s testimony, nor will it burden or inconvenience France or its courts and citizens. Moreover, resort to the Convention’s procedures could result in delay which, in view of the state of plaintiff’s health, would be unduly prejudicial. Although defendants raise the possibility that the attorneys entering France to participate in the deposition may be somehow violating French law as France has not countenanced the deposition, defendants

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<sup>4</sup>This case does not present the question of the deposition of a non-U. S. citizen. See, e.g., Schindler Elevator Corp. v. Otis Elevator Co., 657 F. Supp.2d 525 (D.N.J. 2009) (holding that deposition in New Jersey of Swiss party in patent case should be in accordance with Convention).

point to no law or authority that such would be the case. For these reasons, the Convention's procedures need not be applied, and the motion to quash is denied.

Accordingly, the deposition scheduled to take place August 15, 2012, in Mr. Hamilton's home in France shall proceed in accordance with the Federal Rules. I will enter a separate order granting a commission for the purposes of administering an oath and taking testimony. Plaintiff is directed to make arrangements for defense attorneys unable to personally attend the deposition to participate by telephone.

So ordered this 13th day of August, 2012.

BY THE COURT:

/s/ Elizabeth T. Hey

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ELIZABETH T. HEY  
UNITED STATES MAGISTRATE JUDGE