Studies on International Cooperation of Taking Evidence Abroad: A Perspective of the Hague Evidence Convention

域外取证的国际合作研究

——以《海牙取证公约》为视角

乔雄兵 著

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中文摘要

域外取证是国际民事诉讼中的一个重要环节，它直接关系到案件的审理结果，也与当事人的利益有至关重要的联系，因此，在国际民事诉讼程序中具有十分重要的意义。国际民事诉讼经常需要获取域外证据，然而，由于各国法律文化传统及诉讼制度存在很大差异，导致在域外取证方面各国立法与实践均存在很大不同。例如，大陆法系国家和英美法系国家之间关于域外取证的性质、取证所处的阶段、取证的范围等就存在很大分歧，这使得各国在域外取证方面经常发生法律冲突。

为解决各国之间在域外取证方面的法律冲突，早在1954年的《民事诉讼程序公约》中就有域外取证的相关规定。但是由于1954年公约主要体现了大陆法系国家的利益，再加之公约对域外取证内容的规定过于简单，因此，以美国为代表的英美法系国家拒绝参加公约，这使得该公约发挥的成效十分有限。

为了进一步解决各国之间在域外取证方面的法律冲突，推动域外取证的国际合作，1970年3月18日，第十一届海牙国际私法会议正式通过了《关于从国外获取民事或商事证据的公约》（简称《海牙取证公约》）。《海牙取证公约》旨在协调大陆法系国家与英美法系国家之间在域外取证方面的冲突，1972年10月7日，公约正式生效。新公约是首个两大法系国家共同参加的公约，主要规定了三种取证方式：请求书取证；外交代表和领事取证；特派员取证。与1954年公约相比，《海牙取证公约》简化了请求书取证方式，扩大了领事取证的权力。与此同时，公约首次引进了特派员取证这一新的概念。《海牙取证公约》生效之后得到国际社会的普遍认可，截至2010年4月30日，公约缔约国已经达到50个，这使得该公约成为海牙国际私法会议通过的最为成功的公约之一。《海牙取证公约》构成了国际社会域外取证国际合作的法律基础。

本书以《海牙取证公约》为视角，深入分析了公约在推动域外取证国际合作方面所取得的成就及不足，并就公约实施过程中所产生的问题进行了分析。同时，本书还分析了我国域外取证立法及实践所存在的问题，并提出了完

善我国域外取证国际合作机制的相关建议。

在内容上，全书包括引言和结语以及六章内容，分别如下：

引言部分主要介绍了文章的选题由来及意义。该部分还对国内外有关域外取证国际合作问题的研究现状进行了评述。此外，该部分还指出了文章的主要研究思路以及采取的研究方法。

第一章为“国际民事诉讼中的域外取证概论”。主要对域外取证中“证据”的概念及其属性、域外取证的概念、域外取证的性质、域外取证的价值等进行了论述，并对国际民事诉讼中各国之间在域外取证方面的斗争与合作等进行了评析。

第二章为“《海牙取证公约》的产生及主要内容”。主要论述了《海牙取证公约》的产生背景以及公约所规定的主要取证制度。该部分重点结合公约制定之后的多次特委会报告对公约的主要内容进行了全面论述。此外，该章还对《海牙取证公约》与其他地区性取证合作文件，如《欧盟域外取证规则》、《美洲国家取证公约》等进行了全面的比较和分析。该章指出，《欧盟域外取证规则》在很多方面的规定比《海牙取证公约》的规定更加合理，主要包括：(1) 规则要求请求书直接通过法院间直接传递，免去了中央机关传递的繁琐程序，使得域外取证协助更加快捷、便利；(2) 规则规定可由请求国法院直接在被请求国取证，提高了域外取证的效率，也使得获取的证据更加有效；(3) 规则对请求书的执行以及拒绝等都规定了严格的时间限制，保证了域外取证的效率；(4) 规则要求成员国尽可能使用视频会议、电话会议等信息技术手段进行域外取证，适应了信息社会的发展趋势。此外，该章还指出，《美洲国家取证公约》比《海牙取证公约》在适用范围、请求书的传递途径、审前证据开示等方面的规定更加灵活。

第三章为“《海牙取证公约》实施的主要问题”。该章主要就《海牙取证公约》实施过程中所涉及的一般问题，如公约的排他性适用问题、审前证据开示的问题、在仲裁领域适用公约的可能性等进行了论述。该章指出，首先，对于公约排他性适用问题，尽管经过多次讨论，但各国之间分歧依旧。其次，在审前证据开示方面，各国与美国之间依然存在冲突。再次，对于公约能否适用于仲裁程序，各国立法与实践均存在分歧。最后，该章还结合一些统计数据对公约实施 30 多年所取得成就进行了总结，主要包括：(1) 提供了统一的域外取证国际合作的法律框架；(2) 协调了大陆法系和英美法系国家之间的取证制度；(3) 促进了国际民商事案件域外取证国际合作的发展。同时，该章也指出了公约存在的诸多缺陷，如对一些关键术语界定不清、请求书执行周期

过长带来程序延误等。

第四章为“《海牙取证公约》在主要缔约国的实施”。该章主要结合美国、英国、法国、德国等公约主要缔约国的立法与实践对《海牙取证公约》在各国的具体实施进行了论述，进一步分析了各国之间在域外取证方面产生法律冲突的根源。对《海牙取证公约》在美国的实施，该章指出，自公约对美国生效到现在，美国法院对公约的适用依然极不统一，绝大部分法院依然采取单边主义的做法，通过自由裁量的方法决定公约的适用，这是美国与其他国家之间域外取证冲突的根源。对公约在英国、法国、德国等的实施，该章指出，这些国家一方面坚持其传统，但另一方面这些国家在近年来都进行了立法改革，对美国的域外证据开示采取了日趋灵活的立场。

第五章为“信息技术与域外取证的国际合作”。该章首先分析了信息技术对传统域外取证规则的冲击和影响，随后论述了一些国家立法及司法实践在此方面的发展。此外，该章还结合海牙国际私法会议常设事务局针对信息技术所带来的挑战而采取的应对措施进行了评述。最后，作者提出，尽管在《海牙取证公约》下对利用信息技术进行域外取证国际合作没有法律障碍，但就各个缔约国而言，在利用信息技术进行域外取证国际合作方面依然存在法律、技术及人员的障碍。

第六章为“中国域外取证国际合作的法律制度”。该章主要结合我国现有立法以及多年的司法实践对我国域外取证国际合作法律制度进行了全面论述。该章通过一些典型案例分析了我国现有域外取证制度存在的问题。此外，该章还通过对问卷调查表的分析指出我国实施《海牙取证公约》过程中所存在的问题，并提出了构建我国域外取证国际合作制度的若干构想，包括完善现有域外取证立法、丰富域外取证的方式和合作形式、制定《海牙取证公约》实施细则等。

最后一部分为结语：“域外取证国际合作的反思与展望”。该部分主要在全文论述的基础上反思现有域外取证国际合作机制的诸多问题，并结合一些国际立法的新动向以及逐渐形成的域外取证新规则对域外取证国际合作的发展趋势进行了展望。域外取证国际合作的国际发展趋势主要包括：国内法的改革与趋同；政府间合作的多样化等方面。最后，作者指出，尽管域外取证的国际合作机制在21世纪将面临各种新的挑战，但是，在国际社会的共同努力下，《海牙取证公约》必将焕发新的活力。

Abstract

As an important aspect of international civil litigation, taking of evidence abroad directly related to the trial results, and also has vital influence on the benefits of the parties. Therefore, it is of great significance to international civil litigation. International civil litigation often requires access to materials or witnesses located outside the forum state. However, because the cultural traditions and litigation systems vary considerably, national legislations and practice in taking evidence abroad are quite different. For example, the civil law countries and the common law countries have conflict views about the nature of taking evidence, the scope of taking evidence abroad, and so on.

In order to resolve the conflicts among countries in taking evidence abroad, Provisions as to the taking of evidence abroad were included in the Civil Procedure Conventions of 1896 and 1905, as well as in that of the 1954 Convention, which reproduced the provisions of the 1905 Convention. However, *the Civil Procedure Convention of 1954* mainly reflected the interests of the civil law countries, and the provisions of taking evidence abroad was too simple, therefore, many common law countries refused to take part in the Convention, which limited the effectiveness of the Convention.

To ease the friction between the civil law countries and the common law countries, the Eleventh Hague Conference on Private International Law officially adopted a suggestion to revise and modernize Chapter Ⅱ of the 1954 Convention which dealt with the problems of taking evidence in foreign countries. On March 18, 1970, the Eleventh Session of the Hague Conference on Private International Law revised and approved the Convention on the Taking of Evidence Abroad in Civil or Commercial Matter (referred in brief to as *the Hague Evidence Convention*). The Hague Evidence Convention seeks to reconcile the conflicts of taking evidence abroad between civil and common law countries. On October 7, 1972, the Convention

entered into force. The Hague Evidence Convention was the first multilateral evidence convention in which both the civil law countries and the common law countries participated. The Hague Evidence Convention provided three vehicles for obtaining evidence: letters of request, taking of evidence by diplomatic officers, consular agents and commissioners. Compared with the 1954 Convention, the Hague Evidence Convention simplified and expedited the execution of letters of request by regulating their content and transmission, widened the limited authority previously given to consuls. At same time, the Hague Evidence Convention firstly recognized the authority of commissioners to take evidence within another signatory's territory. After the Convention entered into forced, it was widely accepted by international community. Up to April 30, 2010, States signatory to the Convention had reached 50. The Hague Evidence Convention is one of the most successful conventions which the Hague Conference on Private International Law have been adopted. The Hague Evidence Convention constitutes legal basis for international cooperation of taking extra-territorial evidence.

This paper analyzes the context of the Hague Evidence Convention and its operational issues in depth, as well as its achievements and deficiencies of promoting international judicial cooperation. At the same time, this paper uncovers the problems of obtaining evidence abroad in China's legislations and practice, proposes relevant recommendations in improving international cooperation of taking evidence abroad in China. On the content, with the exception of the introduction and conclusion, the full text is divided into six chapters, which are as follows:

The introduction of the article mainly discusses the origin and significance of topics. This part also reviews the literature in issue of international cooperation of taking evidence abroad. In addition, this part point out some key research ideas and research methods to be taken.

Chapter Ⅰ is on the taking of evidence abroad in international civil litigation. The chapter discusses many basic concepts in international civil litigation, such as the concept of evidence and the nature of evidence, as well as the meaning of taking evidence abroad, the nature of taking evidence abroad, the value of taking extraterritorial evidence, and so on. In addition, the chapter analyzes struggle and cooperation of taking evidence abroad in international community.

Chapter Ⅱ is on the background of the Hague Evidence Convention and its main

contents. The chapter focuses on the historical background of the Hague Evidence Convention and status quo. This Chapter analyzes the key provisions and the development of the Convention, especially on the reports of the special commission on the operation of the Convention. In addition, the chapter conducts a comprehensive comparison between the Hague Evidence Convention and other regional cooperation documents of taking evidence abroad, including EU Regulation on the Taking of Evidence and Inter-American Convention on the Taking of Evidence Abroad.

The article points out that content of the European Regulation are more reasonable than the Hague Evidence Convention in many respects, which include: (1) the Regulation requires the letters of request be transmitted directly between the courts, it eliminates cumbersome procedures between the Central Authorities and prompts the progress of taking evidence abroad; (2) the Regulation permits direct taking of evidence by the requesting court, it improves the efficiency of taking extraterritorial evidence; (3) the Regulation sets strict time limits to the execution of letters of request, it ensures the efficiency of the extraterritorial evidence; (4) the Regulation requires Member States to use the video conferences and teleconferences in executing the letters of request, it satisfy the development trend of information society. In addition, the article also stress that the Inter-American Evidence Convention is more flexible than the Hague Evidence Convention in the scope of application, the transmission of the letters of request and the issue of pre-trial discovery.

Chapter III is on the main problems of implementation of the Hague Evidence Convention. The chapter mainly analyzes some general issues involved in the implementation process of the Hague Evidence Convention, such as the issue of exclusivity of the Convention, the issue of pre-trial discovery, whether the Convention should applies to the arbitration proceeding. First of all, opinions were divided on the question whether the Convention is exclusive application of the Convention, some countries consider the applications of the Convention are exclusive, and other countries believe that the Convention applies to non-exclusive. After several rounded discussions of this problem, differences remain between member states. Secondly, many member states opposite pre-trial discovery of document in the United States, and make a reserve to the Article 23 of the Hague Evidence Convention, which result in conflicts between the United States and other member states. Thirdly, national

legislations and practice vary considerably about whether the Convention can be applied to arbitration proceedings. Finally, the chapter also explores the achievements of the Hague Evidence Convention, combining a number of statistical data on its implementation in the past 30 years. The main achievements of the Hague Evidence Convention include: (1) providing a unified legal framework of international cooperation of taking evidence abroad; (2) reconciling the conflicts of the civil law countries and the common law countries; (3) promoting international cooperation of taking evidence abroad in civil and commercial matters. Meanwhile, the author also summarized the defects of the Convention. For example, some unclear define of the key terms, the delays of executing the letter of request, etc.

Chapter IV is on the implementation of the Hague Evidence Convention in member states. The chapter demonstrates different practice in implementing of the Hague evidence Convention in United States, Britain, France and Germany. Through analyzing some cases in relate to the Hague Evidence Convention, the author further explores the root causes of conflicts between member states.

When it comes to the implementation of the Hague Evidence Convention in the United States, the article points out that since the Convention entered into force on the United States, the application of the Convention in the United States Courts is still far from unified. The vast majority of the Courts still take the practice of unilateralism and the method of discretion to decide whether to apply of the Convention, which is the root cause of conflicts between the United States and other countries. As for the implementation of the Hague Evidence Convention in the United Kingdom, France and Germany, the article explores that on the one hand, these countries adhere to their traditional system of taking evidence abroad, on the other hand, these countries conduct legislative reforms in recent years and begin to take an increasingly flexible position to the U. S. -style discovery.

Chapter V is on information technology and international cooperation of taking evidence abroad. At first, the chapter deals with the impact that information technology has on the traditional rules of taking extraterritorial evidence. And then the chapter undertakes a comparative analysis of the relevant law in several countries and stresses the need for a uniform international solution. In addition, the chapter also discusses reflection brought about by Hague Conference on Private International Law in the past decades. Finally, the author propose, although the Hague Evidence

Convention has no obstacle provisions for using of information technology, there are still legal, technical and personnel obstacles in taking of evidence abroad by information technology in many member states.

Chapter VI is on Chinese legal system of international cooperation of taking evidence abroad. The Chapter first provides a systematic explanation of the legal framework on taking evidence abroad in China. Then, the chapter elaborates some problems by analyzing of some typical cases about taking evidence abroad. In addition, the chapter also pointed out many issues in the implementation of the Hague Evidence Convention by studying of questionnaire that received from the Chinese courts. Then, the author put forward several suggestions to build our country's system of international cooperation of taking evidence abroad, including improving the existing legislation of taking extra-territorial evidence, adding the methods of taking evidence abroad and exploring new forms of cooperation, formulating practical handbook on implementation of the Hague Evidence Convention.

The last part is conclusion: reflection and prospect on the framework of international cooperation in taking of evidence abroad. The author undertakes the major exposition on the existing mechanisms of international cooperation in taking extraterritorial evidence, and then elaborates some gradual formation of the new rules in international communities, as well as new trends of international cooperation in future. The development trends are the following: domestic law reforms and convergence; the diversification of inter-governmental cooperation, and so on.

In conclusion, although international cooperation in taking of evidence abroad in the 21st century will face more challenges, international community will be able to find new solutions, and the Hague Evidence Convention will revitalize in the future.

目 录

引 言

一、选题的由来及意义

取证是民事诉讼赖以进行的一项必要程序，证据的收集与提供直接关系到案件的审理结果，因此，取证在诉讼程序中有着至关重要的意义。在国际民事诉讼中，因各国证据规则和取证制度在理论与实践上都存在很大的差异，故域外取证问题显得更加复杂。为协调各国的域外取证制度，保证国际民事诉讼的顺利进行，国际社会付出了很大的努力，也取得了一定的成果。在此方面，最值得提出的是海牙国际私法会议。早在1905年，海牙国际私法会议就在其制定的《民事诉讼程序公约》中对缔约国代为送达、取证的费用等问题作了规定。随后，其于1954年制定的新《民事诉讼程序公约》中也对相互协助调查取证做了规定。但1954年公约的内容仅涉及缔约国之间互相请求代为取证的问题，而对其他取证方式均未规定，加之公约的参加国主要是大陆法系国家，因此，其发挥的作用十分有限。基于此，海牙国际私法会议于1970年签署了专门的《关于从国外获取民事或商事证据的公约》（以下简称《海牙取证公约》）。该公约充分考虑了各国的相关制度，因此，得到了国际社会的广泛认可。除了海牙国际私法会议制定的公约以外，美洲国家组织也于1975年制定了《美洲国家间关于从国外调取证据的公约》（以下简称《美洲取证公约》）和《美洲国家间关于嘱托书的公约》（以下简称《美洲嘱托书公约》）。此外，1979年5月8日美洲国家组织在蒙得维的亚签署了《美洲国家间关于嘱托书的公约附加议定书》。1984年5月24日，美洲国家又在玻利维亚首都拉巴斯签署了《美洲国家间关于从国外调取证据公约的附加议定书》。① 《美洲取证公约》及《美洲嘱托书公约》对通过请求书进行域外取证等作了规定。而在欧洲，2001年欧盟理事会制定了《成员国法院间民商事域外取证的1206号规

① See http://www.oas.org/DIL/CIDIPII_home.htm, visited on October 12, 2007.