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Interamerican Cooperation in Obtaining Testimony: The Problems of Integrating Foreign Systems of Evidence: A Comparative Study of the United States, The Federal Republic of Germany, and Mexico

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COMMENT

Interamerican Cooperation in Obtaining Testimony: The Problems of Integrating Foreign Systems of Evidence: A Comparative Study of the United States, The Federal Republic of Germany, and Mexico*

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The volume of international litigation has increased proportionately with the increase of international commerce, travel, and politics. As international litigation has increased, however, so have related problems. A major difficulty is posed by the need to obtain oral evidence from witnesses, including parties and experts, in a foreign state for use in the domestic forum court. Faced with the problem of taking evidence abroad under judicial systems different from their own, many nations have adopted individual and collective laws.

This paper will consider the evidentiary problem as it is encountered in civil proceedings in the federal courts of three nations: the United States, a common law nation; the Federal Republic of Germany (Germany), a continental civil law nation; and Mexico, a Latin American civil law nation. By comparing the United States, Germany, and Mexico, not only will civil and common law countries be contrasted, but differences between civil law nations will also be noted. Only proceedings in which the judge is sitting without a jury will be addressed, even though civil cases in the United States may be tried before a jury. The role and problems of the judge in obtaining evidence will be primarily considered in this paper. The United States' pre-trial discovery process, which essentially involves litigants, will not be discussed.

Additionally, the powers of the judge and the procedure for obtaining the testimony of witnesses, parties, and experts to determine the difficulties encountered by a judge requested to take testimony for a foreign court will be examined. Recommendations will be suggested for the major problems a judge faces in application: the failure to appreciate conceptual differences of another system, the lack of tech-

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nical knowledge of specific differences in rules, and the judge's own reluctance to alter the status quo.

The European community, including as signatories the United States and Germany, formed the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters. The Convention provides a standard procedure to gather evidence abroad by letters of request (similar to letters rogatory), in which the forum court requests the foreign court to use its jurisdictional powers to perform some judicial act. The procedural laws followed will be those of the executing court, unless otherwise requested.[1] Requests will ordinarily be made by forum courts to avoid receiving inadmissible and valueless testimony. The executing court must follow the specified procedure unless the act is incompatible with internal constitutional or legislative law or the performance is impossible due to practical difficulties or a serious contradiction with internal practice (Article 9).[2] The Latin American community, including Mexico as a signatory, has adopted much of the Hague Convention, including Article 9, into the Inter-American Convention on Letters Rogatory.

The United States gives the court discretion to admit non-conforming evidence obtained in response to a letter rogatory for nations with which it does not have a treaty.[3] The United States' Federal Rules of Civil Procedure govern unless the request directs otherwise.[4] Where no treaty exists, both Mexico and Germany require letters rogatory to be subject to their own procedural laws, regardless of any request. Germany, however, will not compel a witness to appear and testify for a letter rogatory if it has no treaty with the requesting nation.[5]

Conventions and statutes have solved the problem of reciprocity, but each assumes that judges are able to apply the rules of another system. These laws do nothing to ameliorate the problems faced in their application.

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1. Ulmer, *Obtaining Testimony Outside the United States: Problem for the California Practioner*, 29 HASTINGS L.J. 1237 (1978).

2. 8 MARTINDALE-HUBBELL LAW DICTIONARY, SELECTED INTERNATIONAL CONVENTIONS, *Conventions on the Taking of Evidence Abroad in Civil or Commercial Matters*, 4556 (1981).

3. 28 U.S.C. § 1781 (1970).

4. 28 U.S.C. § 1782(a) (1970).

5. *See* Ulmer, *supra* note 1, at 1239.

I. Power of the Judge

The United States judge[6] is primarily responsible for admitting evidence throughout the litigation. Ordinarily, his decisions are made during the pretrial conference with the parties' counsel and in trial at a party's request. In accord with Rules 401 through 403 of the Federal Rules of Evidence, evidence must be relevant, meaning that it tends to make the existence of a consequential proposition more probable or less probable than that proposition would be without the evidence.[7] Evidence must also be reliable, thus excluding all rumor and hearsay unless the exclusion is excepted under the rules. Exclusions for lack of relevance and reliability are the only restrictions a judge can make of proof and witnesses. The judge may additionally play a role in determining the issues for trial during the pre-trial conference.

The judge can call and (or) examine witnesses, but he is under no duty to do so.[8] The judge has the power to appoint and call to the stand an impartial expert.[9] United States' judges sometimes exercise this power in cases where the opinions of the parties' experts are conflicting.[10] However, the primary responsibility for evidentiary presentation always remains with the parties.[11]

The court may ask supplementary questions at the presentation of evidence or, as a rare exercise of power, call for the production of evidence not offered by the parties. These are measures only used in public interest cases or if there is a distinct disadvantage of one party.[12]

The parties "offer" proof by placing the witness on the stand and asking questions. The court has reasonable control over the interrogation subject to the opponent's appropriate objections. The lawyers have interviewed the witness before the trial and have his written statement at the trial. In theory, a judge may call a witness not offered by either party and interrogate him even over protest of both parties.[13]

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6. The authors refer primarily to proceedings involving federal district and appellate court judges.

7. G. Lilly, An Introduction to the Law of Evidence 364 (1978) [hereinafter cited as Lilly].

8. Fed. R. Evid. 614, 706.

9. Fed. R. Evid. 706.

10. *See* Lilly at 5 n.9.

11. 9 J. Wigmore, Evidence § 2484 (3d ed. 1940) [hereinafter cited as Wigmore].

12. Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 Buffalo L. Rev. 31 (1970).

13. 3 Wigmore § 784.

The Federal Rules of Civil Procedure provide sanctions by which the judge's powers are enforced. A party, witness, or expert who refuses to obey a court order to appear at trial, to testify if privileged information will not be revealed, and to produce documentary evidence will be held in contempt of court and subject to fine or imprisonment.[14] A party is additionally subject to contempt if he refuses to submit to a court-ordered physical or mental examination.[15]

In a German court, the judge's power stems as much from determining issues as from directly taking evidence. In the German civil court procedure, the judge determines the factual issues of the case from the oral arguments, outlines of issues and offers of proof presented by the parties. For the issues identified, the court makes an order for proof-taking based on the offers of proof. These issues determine the relevancy of the evidence. There are no other extraneous admissibility rules. The proof-order specifies the issues on which the evidence is to be taken, witnesses and other proof used, and questions to be asked of the witnesses.[16] The proof-order is not required before testimony is taken, but is necessary before judgment.[17] The proof-taking, at which the testimony of witnesses is taken, follows to consider the issues then identified. The witness' testimony is limited to the issues specified in the proof-order.

A witness must be nominated by the parties to be called, but only the court can call witnesses. The court alone has the power to choose the type of nominated evidence, such as witnesses, and the number and sequence of witnesses to be called to prove each issue.[18] The judge can examine experts and parties or obtain an expert's written opinion without a party nomination.[19]

Generally, the court depends on the evidence offered by the parties. It does not make its own investigation of evidence.[20] The judge does have the duty to ensure all statements and proof are made which are necessary for the correct ascertainment of the facts in issue,[21] and to this end will make recommendations to the parties.

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14. FED. R. CIV. P. 34, 45, 45 (f).
15. FED. R. CIV. P. 35.
16. ZPO 358.
17. Shartel, Burke & Wolff, *Civil Justice in Germany*, 42 MICHIGAN L. REV. 883 (1944).
18. ZPO 359.
19. ZPO 144, 272(b)II(5), 452.
20. ZPO 138.
21. *See* Homburger, *supra* note 12, at 25 and ZPO 139.

However, the final allegations and offers of proof, including nominations of witnesses, are from the parties. Often a party will follow the court's suggestion if it sees some advantage to itself.

In special situations, particularly domestic actions such as divorce and actions involving the legal status of a party, the court has the power of judicial investigation, in which the judge takes the initiative in discovering the relevant facts. The court is not required to accept as settled and unimpeachable factual allegations agreed between the parties or left undisputed by them. Unless objected to by both parties, the court has the power in these special situations to call witnesses not nominated by the parties.[22] In practice, the court usually makes its suggestion to the parties, and allows them to decide whether to offer the evidence. The court can further acquire evidence by exercising its limited power to call for a party-hearing, party-testimony given during oral argument in order to clarify issues and factual information.[23]

The German court has the responsibility to require witnesses to appear and testify. If a witness refuses, he may be held liable for costs, a money fine, or subject to detention for a maximum of six weeks.[24] The witness also may be arrested and brought in by force, at the discretion of the court.[25]

The court cannot require party-testimony as direct proof, but a fine can be imposed on a party for failure to appear in response to a party-hearing order.[26] Once he has appeared, a party can refuse to speak. The court can, however, draw unfavorable inferences from the party's refusal.[27] In practice, a party will rarely risk the success of his suit by declining to cooperate. Thus, the lack of sanctions to compel party-testimony are practically overcome. An expert refusing to appear or testify may only be subject to a money fine.[28]

In Mexico, the judge may play a direct role in obtaining evidence throughout the trial. At the outset of the action, he must make an initial determination of the admissibility of evidence offered by the

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22. Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1227 (1958).
23. ZPO 141, 148.
24. ZPO 390.
25. ZPO 380.
26. ZPO 141(III), 272(b)(IV).
27. ZPO 286.
28. ZPO 409.

parties, in accord with Article 298 of the Code of Civil Procedure for the Federal District and Territories. Evidence must be relevant factually and legally, and permitted procedurally. Evidence cannot be submitted for an immoral purpose, such as provoking a scandal against a party or third person.[29] The judge may restrict the amount of proof or number of witnesses as he determines prudent. In the Mexican system, evidence is in principle produced by the parties, but Articles 278 and 279 give the court broad powers to obtain evidence on its own.[30] The use of these powers is discretionary.[31]

Article 278 authorizes the judge to make use of any person, and any thing or document necessary to know the truth about the points in controversy. Article 279 authorizes the court to use or extend the use of any method of fact-finding conducive to discovering the truth about the points in controversy. Thus, the judge has great freedom to manage the case as he deems best. He can delve deeper into evidence presented by the parties, or call evidence the parties have not offered. Unlike the parties, whose presentation of evidence may be restricted to a specific probatory period, the judge is free to call evidence at any time.[32]

Although the use of the judge's powers is discretionary, it must be impartial. Article 277 requires him to conduct the case without harm to the rights of either party. The judge must listen to the parties and procure evidence with all possible equanimity.

To ensure that the judge's powers are effective, the Mexican Code of Civil Procedure provides sanctions. In regard to a litigating party who refuses to obey a court order to submit to a physical or mental examination, to answer questions, or to supply documents or objects for inspection, Article 287 declares that the opposing party's point will be taken as proven, absent proof to the contrary. Against recalcitrant third persons, both witnesses and experts, Article 288 empowers the court to use the most effective means to compel the production of evidence.

It is apparent that the civil and common law systems have different conceptions of the role of the judge. This conceptual distinction

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29. E. PALLARES, DERECHO PROCESAL CIVIL 406 (4th ed. 1971) and R. PALMA, GUÍA DE DERECHO PROCESAL CIVIL 306-07 (3d ed. 1972).

30. *See* E. PALLARES, *supra* note 29, at 354.

31. Tesis 1899 de la Suprema Corte de Justicia, Quinta época, Tomo CXXVII pág. 687.

32. *See* R. PALMA, *supra* note 29, at 308.

represents a practical problem when a judge in one system is asked to take testimony using the methods of another system.

The United States judge is accustomed to working in a system in which his role in obtaining witnesses is traditionally limited and well-defined. For several reasons, he might have difficulty conducting proof-taking by civil law rules. An ingrained notion of a judge's function might hinder him from adapting to a new role. Fear of jeopardizing his impartiality might make him reluctant to fully utilize his powers, which are broad but not necessarily well defined in most civil law jurisdictions.[33] The temptation to rely on party representatives might deter the judge from actively injecting himself into proof-taking.

In contrast, a German or Mexican judge asked to take testimony for a United States court might feel constrained and ineffectual. The restricted use of the judge's power to obtain evidence might appear overly cautious to him, especially in light of two omissions of the common law adversary system. First, the adversary theory takes no account of the interest of each party in suppressing unfavorable evidence. Second, it presupposes that the parties are equally matched in resources and skill.[34] A German or Mexican judge would feel it was his duty to get all relevant evidence before him, and to adjust as much as possible inequalities in representation between the parties. It might be difficult for him to understand that the common law views the trial as an adversarial presentation rather than a tripartite investigation.

Between the courts of Mexico and Germany, of course, conceptual problems would be minimal. Nonetheless, a judge in one country would have to be informed of the scope of his authority under the laws of the other. As noted earlier, for example, a Mexican judge can call evidence on his own initiative at any time, whereas a German judge, except in extraordinary cases, can only call evidence with the permission of both parties.

II. Admissibility of Evidence

Hearsay evidence is excluded from admission into court in the United States,[35] with the following exceptions: evidence of non-assertive conduct,[36] prior statements by witnesses,[37] statements offered for

33. *See* Homberger, *supra* note 12, at 29.
34. *Id.* at 34-35.
35. Fed. R. Evid. 801(a)(2).
36. Fed. R. Evid. 801(d)(1).
37. Fed. R. Evid. 801(c).

other than their truth,[38] admissions by a party opponent,[39] and evidence for which the hearsay declarant's availability is immaterial.[40]

Under the adversary system, the purpose for the hearsay exclusionary rule is to allow each party a fair chance to challenge the reliability of the other's proof. Hearsay evidence may be plausible, but it cannot be tested adequately by the opponent's cross-examination.

A secondary purpose for the hearsay rule is to exclude evidentiary materials that present a substantial risk of misuse by the jury.[41] Currently, in trials held before a judge sitting without a jury, the trend is to admit evidence that might be rejected in a jury trial on the assumption the judge can appropriately weigh the evidence.[42]

Hearsay evidence is freely received and freely evaluated by the German judge in order to ascertain the truth without regard to technical rules.[43]

There is no exclusion of witnesses stating what they heard others say, nor is there any restriction on the probative weight to be attributed to their testimony.[44] The court's emphasis is on determining the source from which a witness derived his knowledge.[45] Whenever practical, the original declarant of a statement is called.[46] The goal of the procedure is to assure the immediacy and orality of the final hearing.[47] The protection of the judgment from distortion by hearsay is the judge's interrogation itself, at which the judge has the responsibility to uncover weaknesses and inconsistencies of the evidence.[48] In his evaluation, the judge does consider the inferior nature of derivative evidence.

Like Germany, Mexico relies on the judge to evaluate less reliable evidence, rather than instituting strict rules to exclude such evidence. Thus, hearsay is admissible. The distinction is still made, however, between a *testigo de oidas*, a witness whose knowledge comes from

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38. FED. R. EVID. 801(d)(2).
39. FED. R. EVID. 803.
40. FED. R. EVID. 803.
41. *See* LILLY at 4.
42. *Id.* at 3 n.4.
43. ZPO 286.
44. Hammelman, *Hearsay Evidence: A Comparison*, 67 L.Q. REV. 69 (1951).
45. ZPO 396(III).
46. *See* Hammelman, *supra* note 44, at 76.
47. *Id.* at 76.
48. *Id.* at 78.

others, and a *testigo ocular*, a direct or eyewitness.[49] Further, Article 369 requires the witness to inform the court of the circumstances behind this testimony. The witness thus has a legal obligation to alert the court as to whether the source of his testimony is direct or indirect.[50] In evaluating evidence, the judge will usually discount the value of hearsay testimony.

Not all exclusionary rules in the United States are based on the need to bar unreliable evidence from trial. The use of certain evidence, even if reliable, is inimical to principles or relationships which the law seeks to preserve.[51] For example, spouses cannot be compelled to reveal their confidential communications on the ground that marital intimacy should be encouraged, and, alternatively, that certain aspects of private life should be free from public disclosure.[52] Certain professional-client relationships, such as those between attorney and client, physician and patient, clergyman and penitent, and journalist and source, may be protected to promote full and candid disclosure by the client.[53] Government officials cannot be compelled to reveal state secrets if disclosure might endanger national security or foreign relations. Communications between high level government officials may be privileged in order to encourage frank discussion among those responsible for executive decisions.[54] Under the principle established by the Fifth Amendment to the Constitution of the United States, persons cannot be compelled to give testimony which might be used against them in a criminal action.[55]

German courts permit persons to refuse to testify without reason based on their relationships, including a party's spouse or his near relative by blood, marriage, or adoption. Such persons may refuse even if the party is willing for them to testify. Privileges, like those in the United States, also extend to professional-client relationships and public officials.[56] To protect the court from the possibility of a witness committing perjury to protect himself, resulting in unreliable testimony,[57] in a broad privilege against self-incrimination, a witness

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49. *See* E. PALLARES, *supra* note 29, at 405.
50. *Id.* at 409.
51. *See* LILLY at 317.
52. *Id.* at 320-21.
53. *Id.* at 328-30, 357-58.
54. *Id.* at 358-59.
55. *Id.* at 336-38.
56. ZPO 376, 383, 385.
57. Pieck, *Witness Privilege Against Self-Incrimination in the Civil Law*, 5 VILL. L. REV. 381 (1960).

may refuse to answer a question which would dishonor, risk criminal prosecution of, or cause direct pecuniary loss to himself, his spouse, or a near relative, or cause him to reveal trade secrets.[58] With all privileges, a court need not advise the witness of his privilege, but apprisal is often given.[59] Inferences may be drawn by the court from a privileged refusal to testify. Incriminating statements a witness makes which are included in the judicial report may be used in a subsequent criminal proceeding against him.[60]

Mexico, like the United States and Germany, recognizes circumstances in which persons should not be compelled to give testimony. Article 288 lists these circumstances as two broad exceptions to the general obligation upon persons having knowledge of the facts in dispute to testify at trial. The first exception excludes close relatives of a party, specifically ascendants, descendants, and spouses from the duty to give testimony. The second exception exempts those persons who guard a party's confidences as the result of a professional relationship. In either case, the privilege exists only where proof is sought against the party to whom they are related. Public authorities are privileged in a roundabout way under Article 326. They may submit written answers rather than appear directly before the court. Failure to reply or to reply adequately does not result in actions against the official; the point in question is simply deemed admitted. The Code of Civil Procedure does not mention a privilege against self-incrimination in civil trials.

Admissibility of evidence may be further limited by the exclusion of incompetent witnesses. In the United States, a witness is usually declared incompetent to testify to prevent inaccurate or perjured testimony. The witness is disqualified, under the common law lack of relevancy test, only when he is shown to be incapable of perceiving, remembering, or describing the event in question or when he is deemed unable to appreciate his duty to testify truthfully.[61] The test is usually applied where the witness is extremely young or suffers from a particular type or degree of mental illness. Under the Federal Rules of Evidence, a witness is disqualified only if he is found to lack personal knowledge of the matter about which he testifies,[62] or if he fails to declare by oath or affirmation that he will testify truthfully.[63]

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58. ZPO 384.
59. *See* Pieck, *supra* note 57, at 381.
60. *Id.* at 403.
61. *See* LILLY at 65.
62. FED. R. EVID. 602.
63. FED. R. EVID. 603.

In the German court an individual is competent to be a witness if he is not a party, a party's representative in court, or the presiding judge.[64] The party's legal representative remains incompetent to testify even if all information has been admitted to court through the party-interrogation and he has nothing to protect.[65]

Under present Mexican law, there is no category of incompetent witnesses.[66] Instead, Mexico relies on the parties to object to the testimony of unreliable witnesses, and the court to consider all circumstances in its evaluation of such testimony. Under Article 363, a witness must tell the court of certain grounds for objections to his reliability, such as a close relation to one of the parties or an interest in the matter being litigated. If he does not mention a ground, the opposing party may introduce it on his own motion, according to Article 371. Objections are made solely to inject doubt into the testimony of a witness. To invalidate evidence completely as false testimony, contradictory evidence must be rendered against it.[67]

Under the common law approach, unreliable evidence that cannot be tested must not be presented to the judge. In contrast, the civil law theory holds that the judge should be able to freely evaluate all evidence without procedural interference. Accordingly, more specific admissibility rules exist under the common law than the civil law. Ignorance of the conceptual and specific technical differences in rules creates a practical problem for the judge of one system who is asked to take testimony applying the procedure of another system.

The United States judge is handicapped by the lack of specific rules in civil law jurisdictions on questioning of witnesses to determine the reliability of testimony. The problem is diminished by two factors: first, a growing similarity in common and civil law concepts of reliability as the trend to admit hearsay in United States courts continues, and, second, the judge's own experience as trial counsel. An unresolved issue is whether the judge is required to call the original declarant of hearsay evidence to replace the requested witness.

Mexican and German judges using United States' procedure need to know the specific exclusionary rules and exceptions that they must enforce. They will be unable to rule rapidly during testimony and cross-examination since determining what is admissible is not intuitive

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64. ZPO 373(2).
65. ZPO 373(2)(B).
66. *See* E. PALLARES, *supra* note 29 at 403, and R. PALMA, *supra* note 29 at 382.
67. *See* R. PALMA, *supra* note 29 at 390.

to them. Additionally, the judges will have difficulty in interpreting and applying the United States' general rules on competency without more specific instructions. The United States judge can relate the Mexican judge's discretionary power in determining competency to his own concerning impeachment of witnesses. Similar privileges are recognized in all three countries, and are not problematic, except for the notably broader German self-incrimination privilege.

III. Taking of Testimony

A. *Ordinary Witnesses*

The production of testimonial evidence in the United States is controlled largely by the parties. Although the court may theoretically call witnesses on its own, they are usually summoned upon request from the parties. Party attorneys may prepare witnesses for trial, and even rehearse their testimony. Interrogation originates with one of the parties, and opposing counsel retains the right to cross-examination.[68] The reason that the parties are given such a dominant role is that in the United States the taking of evidence is conceived as an adversary process. Questioning is put largely in the hands of the parties, who, it is assumed, will make every effort to bring all the facts favorable to their side to the attention of the court. Similarly, cross-examination allows an opposing party to vigorously test the accuracy, completeness, and credibility of an opposing witness' testimony.[69]

Under the common law, the United States court does have the power to ask questions at any stage of proof-taking and to require, when appropriate, testimony by free narrative in preference to specific questions on direct examination by the party who produced the witness.[70] The judge is also assumed to have the power to interrogate witnesses called by either himself or a party, but in practice this power is used sparingly.[71] In addition, the witness is entitled to the court's protection if he is unduly harassed or exposed to unfair tactics.[72]

In Germany, parties can nominate witnesses, but only the court can choose and call them. Once the witness is admitted, he is the court's witness. Thus, a party is not bound by the testimony of a

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68. *See* Homburger, *supra* note 12, at 34-35.
69. *Id.*
70. *Id.* at 37, and Fed. R. Evid. 611.
71. *Id.* at 37.
72. *Id.* at 35.

witness whom he has nominated. The witness is not interrogated, nor prepared prior to giving testimony, as immediacy and spontaneity is desired. Offers of witnesses must be tied to proof of a specific allegation of fact. It is insufficient to state that the witness has something to contribute to the case.[73]

The witness is excluded from the courtroom until he is to testify[74] but this exclusion does not apply to experts. The court first admonishes the witness of his obligation to tell the truth, and refers to the criminal penalties imposed for false sworn and unsworn testimony and to the fact that an oath may be requested of him when his testimony is concluded.[75] Only if the judge deems it advisable is a witness required to take an oath.Thoughout the testimony, the witness is reminded of his obligation to tell the truth. This procedure gives the witness the opportunity to change his testimony before he is sworn. In any event, the oath-taking ceremony is used infrequently.

Witnesses are examined by the presiding judge. Counsel sometimes suggests questions to be asked. Upon demand, the judge must allow counsel to put questions to the witness directly,[76] a rule which also applies to experts. Usually, there is little questioning by counsel or the parties. When done, it is more often direct than through the court.[77]

The proof order will specify the issue on which the witness is to testify.[78] Once testimony begins, the questioning can go beyond the stated issue to correct or enlarge upon it. A new issue cannot, however, be introduced without the agreement of both parties in oral-argument.[79] The proof-taking can be interrupted in order to amend the proof-order or to call a new witness discovered from the proof-tak-

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73. *See* Kaplan, *supra* note 22, at 1217.
74. ZPO 394.
75. ZPO 392, 395.
76. ZPO 397.
77. *See* Kaplan, *supra* note 22, at 1235.
78. ZPO 359, 377.
79. The oral argument, a stage separate from the proof-taking, is designed to shape the issues and content of the case, and to clarify allegations, proof-offers, and matters discovered from proof-takings. *See generally* Kaplan, *supra* note 22. Since no jury is present in civil trials, it is a collaborative discussion between the court, parties, and counsel, at which the parties play an active part and may be heard on request. ZPO 137(IV). The judge has a duty to ask questions of the parties to clarify the issues and claims. The parties, however do not have to answer. *See* Homburger, *supra* note 12, at 26. Proof-taking itself is often interrupted by the court directing such questions to counsel and the parties. Counsel is present to protect the party from any violation of procedure or oppressive conduct by the judge or opponent.

ing. The proof-taking can then resume. Since the questioning of a witness is limited to one stated issue, a party has no opportunity to discover further evidence, except through a loosely phrased or enforced proof-order, an unexpected witness statement, or clarification at oral argument.

The witness is first told what the court desires to know, and is allowed to reply with a narrative story in his own words, without undue interruption.[80] His statement is then followed by questions to clarify, test, and amplify his story. There is no direct or cross-examination as in the United States. Questioning may begin at once if the court already has the basic facts. The taking of proof may be done in installments over several days. If one witness contradicts another, the court may order confrontation,[81] a rule also applicable to experts.

No verbatim report is made. Ordinarily, the judge dictates to the reporter a brief statement of the witness' testimony. The statement is then read back to the witness for his correction and approval. With the court's permission, an ordinary witness can submit a written statement in lieu of appearing in person, when his testimony will probably involve reference to books and records, or in other situations if the parties agree.

In Mexico, the judge and parties share in taking testimony. The parties usually nominate witnesses, but the judge may call his own under the broad powers granted him by Article 278.[82] Attorneys may prepare witnesses for trial, since the Code of Civil Procedure does not prohibit the practice.[83] In order to retain some spontaneity in a witness' response to questioning, Article 364 forbids a witness who has been interrogated from having any relation with witnesses about to be examined.

Before a witness may testify, Article 363 requires the witness to affirm that he will tell the truth. The judge is required to warn the witness of the penalties for false testimony.

Interrogation is conducted primarily by the parties. The party presenting the witness questions him first. Article 361 requires that questioning take place in the presence of opposing counsel. When direct examination ends, the witness submits to cross-examination by

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80. ZPO 396.
81. ZPO 394.
82. *See* E. PALLARES, *supra* note 29, at 410.
83. *Id.*

the opposing party, a procedure called *la repugna.*[84] The judge is present to assure that the interrogation is fair. Under Article 360, he may strike all questions which violate the law, which are submitted for an immoral purpose, or are unclear or overly broad. The judge may also question witnesses under Article 366, usually after the parties have finished direct and cross-examination.[85]

B. *Parties*

United States courts no longer make a distinction between in-court testimony given by a witness and that of a party in litigation. Party testimony is subject to no special evidentiary rules at trial.

German courts consider party testimony intrinsically unreliable, because it is colored by self-interest.[86] Separate rules thus distinguish testimony of a party from that of a witness. A party is broadly defined to include the legal representatives of parties lacking capacity to appear in court for themselves, such as juristic persons and those natural persons who are underage or who suffer from various physical or psychological disabilities.[87]

A party may, however, offer himself to testify on an issue. If the opposing party consents, the court may, but is not required, to hear the party testimony. Only if the party has the burden proof on an issue may he propose that his opponent be called to testify on that issue. The court will call the opponent if, after hearing all other evidence on the issue, the truth still remains in doubt.[88] If a similar condition of doubt remains on an issue after all other evidence is heard, the court on its own motion may call one or both of the parties, regardless of where the burden lies.[89] In all situations, testimony is limited to the issue stated in the proof-order. Party testimony is considered a last resort. It is subject to a special rule which requires in all cases that it is to be ordered only by a formal proof-order.[90]

The court also has a limited inquisitorial power to call for a party-hearing to clarify ambiguities in the case.[91] Technically, the

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84. C. LARA, TEORIA GENERAL DE PROCESO 277 (1st ed. 1974).
85. *See* E. PALLARES, *supra* note 29, at 407-08.
86. *See* Kaplan, *supra* note 22, at 1242.
87. ZPO 455; *See* Kaplan, *supra* note 22, at 1241.
88. ZPO 445.
89. ZPO 448.
90. ZPO 450.
91. ZPO 448.

information gathered is available only for background, but practically it will also affect the ultimate judgment.[92]

For both a party-hearing and party-testimony, the party is subject to a fine for failure to appear,[93] but once he appears, a party can refuse to answer a particular question or refuse to testify at all. Refusal to answer, however, may properly result in unfavorable inferences made by the court in its final consideration.[94]

The parties have a duty to be complete and truthful when declaring factual circumstances.[95] Like a witness, a party is criminally liable for giving false testimony under oath, whether intentionally or negligently.[96] A party intentionally giving false unsworn testimony is subject to punishment for the offense of fraud.[97] The oath-taking may be requested, but in practice there is particular reluctance to require it of a party.

Mexico, like Germany, deems party statements inherently unreliable. Rules governing the admission of party statements are more strict than those governing the statements of witnesses. Party testimony also only has probative force if it is to the prejudice of the party making it.[98] In addition, there is a second reason that Mexico distinguishes party statements. The Mexican method of taking party testimony originated historically not as a method of adducing proof, but as a means of defining the positions of the litigating parties.[99] Since the aim of the party confession was to define the issues, both questions and responses had to be as concrete and specific as possible.

Articles 317 and 318 allow both the court and the opponent to question a party. A party may be either a litigant or the attorney of a litigant who is authorized to answer for him. Interrogation is conducted through a formal type of question called a *posición*, described in Article 311. The subject of a *posición* is limited to the acts of the party confessing. Each *posición* must not encompass more than a single fact. It must be formulated such that the confessing party can answer it with a simple yes or no.[100] A *posición* cannot be insidious;

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92. *See* Kaplan, *supra* note 22, at 1226.
93. ZPO 272(b)(IV).
94. ZPO 286, 446, 453.
95. ZPO 138.
96. StGB 154, 163.
97. StGB 263.
98. Tesis 775 de la Suprema Corte de Justicia, Boletín 1961, pág. 394.
99. *See* R. Palma, *supra* note 29, at 332.
100. *See* C. Lara, *supra* note 84, at 274-75.

in other words, it cannot be designed to confuse the respondent with the intent of tricking him into a false confession.

Under Articles 308 and 309, every litigant is obligated to submit to interrogation upon court order. Failure to respond to a *posición* is deemed an admission, unless rebutted. Article 315 bars a respondent from receiving assistance from his attorney or any person other than an interpreter in formulating his answer. The answer must be a categoric affirmative or negative, together with whatever explanation is convenient or asked for by the court. Under Articles 316 and 322, failure to give a definite answer will be presumed to be a confession of the facts asserted in the *posición*.

Although the rules governing the taking of party testimony are strict, once made, a party statement is complete proof under Article 496. In contrast, witness and expert testimony are governed by less stringent rules, but their probative value is subject to free evaluation by the court.

C. *Experts*

In the United States, the court has the opportunity to choose the most qualified and fit experts. As the court must depend on experts for technical advice but is little able to assess the value of their opinion, the expert must be impartial and unbiased.[101] Since experts must give opinions and conclusions to statements, they are exempt from the Opinion Rule, which excludes opinion, inference, and belief from the testimony of ordinary witnesses.[102]

Experts in the United States are usually chosen and paid for by the parties. There is no qualification floor imposed on experts, and there is a tendency for experts to support the party presenting and paying them.[103] This often results in contradictory evidence. Even if an expert tries to be impartial, he is frequently forced into a partisan position when his authority is challenged during cross-examination.[104] If the expert evidence is so confused that the court cannot decide the issue without summoning technical assistance, it may decide that the point is not proven and the loss will fall on the party which bears the burden of proof on that issue.[105]

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101. Hammelman, *Expert Evidence*, 10 MOD. L. REV. 33 (1947).
102. *Id.* at 33 n.3.
103. *Id.* at 34.
104. *Id.* at 34 n.4.
105. *Id.* at 35.

There is a trend in the United States for the court to call its own expert to give impartial technical assistance. In this role, the expert does not have a judicial function, but remains a source of evidence as to the facts.[106] The expert gives advice to the judge, who is not bound to take the advice. The court has the inherent power to call its own experts.[107] The expert may be agreed upon by the parties or selected by the court. Costs are to be shared as the court directs.[108] This rule is in no way to infringe on the parties' ability to call their own experts.

Courts are reluctant, however, to call their own experts for fear that calling an expert might be construed by the jury as an espousal of one party's cause over the other's.[109] Experts are also infrequently used due to indecision as to the allotment of costs, the lack of master lists from which to select qualified and impartial experts, and the absence of established circumstances in which a court should appoint an expert.[110]

In Germany, experts assist the court in finding facts or drawing conclusions from given facts based on their special studies or experience beyond the range of the tribunal. Experts are not regarded as witnesses nor as instruments of proof. They are assistants to the tribunal and non-partisan. The court, not the parties, has the responsibility to determine whether an expert witness is to be called. The court will act on the advice of the parties, but ultimately decides himself whether to call an expert and how many to call. Each court maintains a list of publicly accredited experts drawn up by professional associations for different types of matters likely to come before it. It is from this list that court experts are selected and appointed.[111] A party may nominate an expert, but the court is entitled to reject his choice and select another expert.[112] A party may choose anyone as his expert, but usually chooses one who is eminent or has special qualifications. When the parties agree upon one expert, the court cannot refuse to hear him. The court can, however, call an additional expert if it finds the agreed expert's opinion to be insufficient.[113] A party may file the

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106. *Id.*
107. Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962).
108. FED. R. EVID. 706.
109. Basten, *The Court Expert in Civil Trials—A Comparative Appraisal*, 40 MOD. L. REV. 183 (1977).
110. *Id.* at 184.
111. *See* Hammelman, *supra* note 101 at 37 n.14.
112. ZPO 404.
113. ZPO 404, 412.

report of an expert he has retained and paid, but such reports are treated circumspectly by the courts, like the party's initial written statement.[114] Experts can be challenged by a party in the same way judges are challenged, i.e., based on conflict of interest, relationship to the parties, or bias.[115]

While investigating, experts can question parties and their counsel and call third persons. An expert will usually submit a written opinion in advance; he will then reappear and be questioned on it. A written opinion alone may be submitted. Even so, a party can still require that the expert appear before the court.[116] If insufficient evidence is obtained, the court can appoint new experts to furnish another report, regardless of the parties' wishes.[117]

In contrast to the practice in the United States, there is no complaint about the bias of experts in German courts. The judges most often complain that the experts do not offer quality assistance. This problem is probably due to the German tendency to call experts when they are really not necessary.

Like a witness, the expert is criminally punishable for giving false testimony under oath, whether intentionally or negligently.[118] He is also subject to a criminal penalty for intentionally giving false unsworn testimony.[119]

Mexico considers an expert as an auxiliary of the judge, or as a technical consultant.[120] Expert opinions give the judge technical orientation, but they are never binding on him.[121] The production of expert evidence is not adversarial in the traditional common law sense, but the parties still play an important role. Under Article 347, a single expert may render an opinion if the parties agree upon his nomination. If, as usually happens, the parties cannot agree, then

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114. *See* Kaplan, *supra* note 22, at 1243.
115. ZPO 406.
116. ZPO 411, 402, 397.
117. *See* Hammelman, *supra* note 101 at 38.
118. StGB 154, 163.
119. StGB 153.
120. Tesis 1692 de la Suprema Corte de Justicia, Suplemento de 1956, pág. 354.
121. Jurisprudencia 1693 de la Suprema Corte de Justicia; Porfirio Guzmán Arenas, Volumen XVIII, pág. 103; Ernesto Alfonso Guerro y Fernández de Arcipestre, Volumen XXVII, pág. 95; Luis Castillo López, Volumen XXXIV, pág. 53; Ismael Bucio Bucio, Volumen XLIII, pág. 76; Librorio Mata Torres, Volumen LIII, pág. 54.

each party nominates its own expert and the court nominates a third, called a *tercero en discordia.*[122]

A party is free to nominate anyone he chooses as an expert, provided the person has a legal title in the area of the controversy, unless a legally titled expert does not exist in the field or is not available. Experts nominated by the court must be Mexican citizens, and must be chosen from the official list compiled by the Supreme Court.[123] Under Article 351, an expert can decline appointment if he is related by blood to one of the parties, has an interest in the matter being litigated, or has social or business ties with one of the parties. Experts who testify are paid by the party who presented them. Article 354 requires litigants to share the cost of the court expert without regard to the disposition of the case.

Article 349 gives the parties the right to question experts, but Article 350 states that the experts will ultimately discuss the case alone. If the experts nominated by the parties agree in their opinion, only their opinion will be submitted to the court. If they disagree, the *tercero en discordia* will express his opinion.

D. *Analysis*

It is evident that conceptual and practical differences in the taking of testimony abound, thus presenting judges in each country with a variety of problems. An initial difficulty is whether to distinguish between types of witnesses, particularly between parties and ordinary witnesses. While civil law jurisdictions deem parties more unreliable than ordinary witnesses, common law jurisdictions do not. Even between civil law countries, however, there are practical differences in approach. For example, both Mexico and Germany apply stringent rules to the taking of party testimony, while Germany also limits the circumstances under which it may be taken.

Whether the judge should allow attorney preparation of persons giving testimony is a further difficulty. Under the common law, presentation of evidence is adversarial; therefore attorneys are permitted to prepare both witnesses and parties with an eye towards giving the most effective testimony. Civil law countries differ greatly, even from each other. Germany allows absolutely no preparation, for two reasons: first, witnesses do not represent the parties, and second, wit-

122. *See* E. PALLARES, *supra* note 29, at 398-99.
123. *Id.*

nesses should make spontaneous statements for the benefit of the court.[124] Mexico, on the other hand, allows attorneys preparation of ordinary witnesses but not parties. In Germany, proof-taking is done in installments, giving the parties time to reflect on and pursue evidence which they may then submit to the court. Advance preparation is less important than in the United States or Mexico, where presentation of evidence is concentrated and there is little time to reflect on evidence of call back witnesses.

Another difficulty concerns the oath administered to witnesses in the United States. The United States judge applying Mexican or German procedure might be uneasy taking testimony from persons not under oath. Actually, this problem is more apparent than real. Both German and Mexican courts warn persons of the penalties for false testimony, and have other safeguards to compel persons to speak truthfully.

Cross-examination, or the lack of it, presents another problem. The United States judge should have little trouble working under Mexican procedure, which provides for cross-examination. Germany, however, has no procedure for cross-examination. In order to assure the accuracy of testimony, the judge must take an active part in questioning. The United States judge may be unwilling to do so, out of reluctance to break with his traditionally passive role and fear of jeopardizing his impartiality.

For similar reasons, the United States judge may find it difficult to call his own expert witness. It is easier for him to let the parties present their own experts and for him to treat them as any other witness. There is strong justification, however, for making a distinction between experts and other witnesses. Ordinary witnesses are chosen by circumstance. Their personal observations cannot be substituted. There is good reason to view their testimony skeptically, and to submit it to all the rigors of the adversarial process. Experts, on the other hand, can be chosen based on how qualified they are to give testimony.

The danger of an adversarial presentation is that the judge may be swayed by the most persuasive expert, rather than the most solidly based opinion.[125] Since there is less need for an adversarial presentation in the case of an expert than an ordinary witness, it might be

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124. *See* Homburger, *supra* note 12, at 32-34.
125. *See* Hammelman, *supra* note 101, at 32-34.

better for an expert to act as a technical advisor to the court, working to inform the judge rather than to persuade him. This approach is taken by both Germany and Mexico.The problem with this approach is that the judge may accept the expert opinion at face value, rather than subjecting it to the critical evaluation which even apparently impartial opinions merit.[126]

IV. Conclusion

The difficulties encountered by a judge asked to take testimony under the procedures of another system can be divided into three categories: (1) the failure to appreciate conceptual differences of the other system; (2) the lack of technical knowledge of specific differences in rules; and (3) the judge's own reluctance to alter the status quo. It is suggested that the following recommendations will alleviate the problems presented by each category:

A. The executing judge might authorize an expert on the law of the foreign forum court to carry out the request. The presence of the expert eliminates both the conceptual and lack-of-knowledge problems. This approach may be advantageous to the foreign court because someone familiar with its systems would be involved with the case. The executing court could not act, however, if an expert was unavailable. The court's dependency on experts would allow it no on-going capacity to deal with requests.

B. The requesting judge could be required to submit clear, well-drafted, specific instructions and issues in his letter of request to inform the executing judge of the purpose and use of the evidence to be taken. Such information would alleviate problems stemming from ignorance of specific rules and practices, although conceptual misconceptions might still exist. The specific instructions should not leave to the executing judge's discretion the decision whether to exclude evidence, thus protecting the witness' interest and admissibility to the forum court. The stated issues allow the executing judge to follow up on unexpected information gained from the testimony. A resulting problem may be incorrect interpretations by the executing judge of the specific instructions and issues given. The risk of this possibility, however, could be greatly reduced by unambiguous drafting.

C. The requesting judge might ask for a *verbatim* transcript of the testimony to eliminate the risk of irremedial errors, should the

126. *Id.* at 38-39.

executing judge misapply the procedural rules. Removing the executing judge from ruling on the testimony eliminates all three categories of the problem. This approach is advantageous in that the executing judge does not have to make an evaluation using an unfamiliar system. The requesting judge would still have difficulty evaluating the testimony after the fact of its occurrence and without having the opportunity to see the witness make the statements. Further, the requesting judge would be unable to ask follow-up questions regarding inadmissible evidence or to depend on the executing judge to do so. Conceptual problems may also still exist for the executing judge while conducting the interrogation of the witness. From a public policy standpoint, this approach would be disadvantageous since it would not educate the executing judge in the taking of testimony under letters rogatory or in the use of a foreign procedure.

D. The requesting court could liberally rule to permit the inclusion of all evidence taken abroad to present in its forum. The elimination of all admissibility rules would reduce the magnitude of the lack-of-knowledge problem. Such a system, however, would require a United States judge to make a rigorous evaluation of the reliability of such evidence, a burden usually sustained by rules of exclusion. Since this approach only affects the admissibility of evidence, its effectiveness overall in eliminating the difficulties of application would be very limited.

E. The executing judge could use similarities between his system and that of the foreign court to help him bridge the conceptual gap between systems and more easily relate to the foreign system. By applying methods the judge knows, this approach eliminates the conceptual problem. Nevertheless, the judge might not always recognize parallels between the laws of the foreign and executing courts. In addition, there is the danger the judge will see similarities which do not actually exist. Finally, success of this approach can only be as complete as the congruence between systems.

F. Each nation involved in international litigations could create a government-supported central staff to provide information and assistance on foreign procedure to all courts upon request. This approach would eliminate the conceptual and lack-of-knowledge problem and might alleviate the reluctance problem through continuing education of judges. This staff would benefit both requesting and executing judges who need to know the laws of the country with which they were dealing. Continuity of information would also be assured. A potential problem would be the difficulty of acquiring government

support. Cooperation among private institutions and universities could, however, achieve the same result, with sufficient impetus.

The adoption of any or all of these recommendations offers the possibility of providing a more flexible and productive basis for Inter-American and international cooperation in obtaining testimony.