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Smit, ed: International Co-operation in Litigation: Europe

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INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE. Edited by *Hans Smit*. The Hague: Martinus Nijhoff. 1965. Pp. xxxiv, 486. $17.50.

The title of this work should be qualified in two ways. First, the designation "Europe" is not quite accurate, since the book only deals with fifteen countries—Austria, Belgium, Denmark, England, Finland, France, West Germany, Greece, Holland, Italy, Norway, Portugal, Spain, Sweden, and Switzerland—which include no Eastern European countries (despite the increasing number of commercial exchanges with them) and which together do not even comprise the whole of Western Europe. Second, because of the sources from which the work was compiled, it tends to emphasize problems of international cooperation in litigation which are of special interest to common-law jurists, while only broadly reviewing the practices of the fifteen European countries. The book consists of a number of reports which were prepared for Columbia University's "Project on International Procedure." These reports attempted to examine how the United States, with its notorious reluctance for adopting treaties dealing with international judicial cooperation, could modify and improve its existing rules to meet the practical needs of foreign countries. The Columbia project stimulated the United States Congress to create the Commission on International Rules of Judicial Procedure, which was charged with studying means by which the system of international cooperation in litigation could be improved.

The results obtained (set out in the work's appendix) are undoubtedly significant. They provide means not only for improving the judicial assistance which foreign countries seek from the United

States, but also for liberalizing the procedural rules of American courts, thus making it easier for these courts to utilize the judicial help proffered by foreign countries. With regard to this last point, special mention should be made of the reform of the Rules of Civil Procedure for District Courts, which include notable innovations in the American practice and procedure (app. B, pp. 438-44). The Advisory Committee on Civil Rules frankly stated that "the ordinary rules of evidence are often inapposite to the problem of determining foreign law" (p. 441); consequently, it proposed that when such a problem arises, courts should be permitted to consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." This attempt to broaden the courts' powers to take cognizance of foreign law without imposing a formal obligation to "take judicial notice of it" (p. 442) introduces an approach very close to that which prevails among European courts (France, p. 150; Italy, p. 279). Thus, the concrete solutions which are worked out by various countries under the pressure of practical necessities may result in a greater uniformity of law than one would expect given the differences between their respective legal systems.

Despite these encouraging signs, serious difficulties still exist, as the reports collected in Smit's book amply demonstrate. The book presents a quantity of data (sometimes with such excessive detail that the main structures of the systems tend to be obscured) in which many problems come to light which are not easily soluble. Thus, even when the difficulties inherent in obtaining evidence abroad are overcome, problems of evaluating the evidence still will confront the domestic judge. For example, in the civil-law countries, the evidence is not normally recorded in a verbatim transcript, but rather in the judges' summation (Belgium, p. 39; France, p. 161; Germany, p. 204; Italy, p. 260; Norway, p. 294), although the courts of these countries will usually consent should the foreign judge request a verbatim transcript. Similarly, the principle of cross-examination is alien to the judicial practices of civil law, in which the examination of witnesses is carried out by the judge. There is no doubt that American judges view the latter means of taking evidence with some concern and are thus influenced in their approach toward letters rogatory (comments, p. 12 n.76).

Another difficulty involves the reluctance of foreign courts to cooperate in ways which would cause them to violate local public policy, a problem of not a little concern since there are wide contrasts between the basic principles of the various national legal systems, particularly as to rules governing the admission of evidence. In civil proceedings of most European countries, the parties are disqualified as witnesses and cannot be examined under oath. While this disa-

bility of a party to act as witness seems to be based on reasons of public policy, it remains open to doubt whether a request to take testimony of a party will be honored by the courts of these countries (Belgium, p. 39; France, p. 161; Italy, p. 261). Clearly, it would be a serious inconvenience to common-law judges to have their requests for examination of a party as a witness under oath be rejected by European courts.

Moreover, the ability, or inability, of a court to obtain evidence from a foreign country has an effect on the application of evidentiary rules in the court requesting the evidence. For instance, the United States has recently extended the possibility of compelling the production of tangible evidence abroad (app. A, p. 412), but compulsory production will not be ordered if the law of the foreign country effectively forbids production. This, in turn, affects the application of other evidentiary rules, for instance, the best evidence rule.[1]

The variations between countries in the treatment of expert witnesses also gives rise to some difficulties in international judicial cooperation. In the civil-law countries, the expert is not a witness but an auxiliary judge and thus in most countries is required to be a citizen (France, p. 135). Consequently, it is difficult to appoint an impartial expert in a foreign country unless a qualified citizen happens to be available there. Obstacles of this nature, however, may not prove insurmountable; international conventions often waive the requirement that the expert be a national.[2] Yet, doubts still exist as to the scope of the expert's task and the proper weight to be given his testimony. In this connection the role of the impartial expert must be distinguished from that of the partisan expert familiar to Americans. An impartial expert is appointed by the court and must assist the court in obtaining and evaluating evidence, while an expert witness serves one of the parties and is subject to examination and cross-examination. Nevertheless, one should not overlook the current developments taking place in regard to expert testimony in the common-law countries, especially in the United States where there is now less concern for the adversary aspects of the expert testimony. According to the Model Code of Evidence and to the Model Expert Testimony Act, the expert may be appointed by the court as an impartial expert. This tendency to follow the civil-law practice will reduce the difficulties of appointing experts through letters rogatory and evaluating expert testimony obtained abroad.

We must therefore recognize that the various legal systems are evolving in such a way that the differences which hitherto have represented the main obstacle to international judicial cooperation

1. On this subject, *see* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 IOWA L. REV. 825, 843 (1966).

2. *See* Hague Convention on Civil Procedure, art. 16 (1954).

are being reduced. Moreover, in recent years the judges in some countries have shown, in the face of practical necessities, a laudable willingness to allow a more liberal interpretation of "public policy," which, in turn, assists the process of evolution in their respective systems. For example, it is well known that one of the characteristics of the admission of evidence in the civil-law countries is to preface the examination of witnesses with the specific questions of fact, thus providing a limit to the examination itself.[3] Nevertheless, European judges have been disposed to extend the examination to other facts bearing on the case, even if they are not specified in the letters rogatory (Belgium, p. 37 and Switzerland, p. 368). Similarly, the tendency of Italian judges to admit evidence obtained abroad, even if different methods from those employed in Italy have been used, has recently led to the admission of a deposition taken in Germany upon the witness' sworn confirmation of its validity.[4]

In conclusion, the present book not only offers to legal practitioners a wide and well-documented view of the law in force in fifteen selected countries, but also reveals the main trends of future reconciliation in international judicial relationships. Probably the best method of achieving cooperation is to permit judges in the various countries to employ sufficiently flexible rules to meet the needs of justice in particular cases, without adhering too strictly to doctrines peculiar to their own individual systems. In other words, it seems easier to overcome the present difficulties on the judicial plane rather than through legislation. Still, it must be emphasized that in order for judges to function effectively in this area, they must be given the necessary freedom of action.

One final comment may be apposite. In this field, as in others where comparative methods of research are employed, the "factual approach" seems the best means of investigating the points of contact between the life of the law in different systems. Such investigations do much to help the law stay in harmony with the growing development of international relationships.

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3. This feature, however, is declining. In France, for instance, it has been abrogated by the reform of 1958. *See* SICARD, LA PREUVE EN JUSTICE APRÈS LA RÉFORME JUDICIAIRE 252 (1960).

4. *See* d'Alfonso v. Kieselhorst, [1967] Foro Ital. I 184 (Corte di Cassazione).