Michigan Law Review

Volume 62 | Issue 8

1964

Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Takings of Testimony

Richard F. Gerber
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Civil Procedure Commons, Comparative and Foreign Law Commons, Jurisdiction Commons, and the Litigation Commons

Recommended Citation

Richard F. Gerber, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Takings of Testimony*, 62 MICH. L. REV. 1375 (1964).
Available at: https://repository.law.umich.edu/mlr/vol62/iss8/5

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REVITALIZATION OF THE INTERNATIONAL JUDICIAL ASSISTANCE PROCEDURES OF THE UNITED STATES: SERVICE OF DOCUMENTS AND TAKING OF TESTIMONY

The increasing number of Americans traveling, residing, and doing business abroad has led to a corresponding growth of civil litigation which involves contacts with two or more countries. A court in which such litigation is commenced may lack the power to obtain relevant evidence and testimony from parties not within the country, or it may lack the power to effect service of documents abroad. Such failure to obtain testimony or serve documents may well make it impossible to maintain the action. Lack of power to accomplish these purposes may be due to the fact that no law authorizes the performance of these acts in foreign countries, or it may stem from the court's self-imposed limitations, commonly referred to as "lack of jurisdiction." To the extent that either of these reasons is the explanation for the court's inability to act, it may be remedied unilaterally by legislation or judicial modification of jurisdictional concepts. However, even if the law of the country in which the action is pending authorizes the performance of these acts, it is still necessary to elicit the cooperation of the foreign country in order to

secure its performance. This lack of power to act may be the result of the foreign country's prohibition of the performance of the act on its soil, or its refusal to intervene to insure the performance of the act when requested to do so by the litigants or by the court in which the action is pending. To the extent that this is the explanation of the court's inability to act, it may be remedied only by establishing procedures whereby each country undertakes to cooperate with and aid judicial proceedings of another to the fullest extent consistent with its own internal law. Countries other than the United States long ago recognized the need for procedures to aid judicial proceedings in foreign states, and the world is consequently laced with a network of multipartite conventions[1] and bilateral treaties[2] which have to a great extent met this need. Although in theory a constant supporter of judicial cooperation between countries, the United States has only recently taken positive measures to improve its procedures for giving judicial assistance to foreign countries, and it has not yet sought to enter into treaties through which the benefits of judicial cooperation may be mutually secured.[3] The increasing quantity of litigation with international aspects, however, has led to a growing awareness of the problems of obtaining judicial assistance abroad for litigants in domestic courts, as well as a growing sensitivity to problems of litigants in foreign courts who may seek assistance within the United States.[4] Efforts to improve American practice have recently culminated in a revision of the Federal Rules of Civil Procedure and the proposal of several amendments to the Judicial Code.[5]

1 Countries party to the Hague Convention on Civil Procedure of 1905 are Austria, Belgium, Czechoslovakia, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, Luxemburg, the Netherlands, Norway, Poland, Portugal, Roumania, Russia, Spain, Sweden, Switzerland, and Yugoslavia. 33 AM. J. INT'L. L. SPEC. SUPP. 27 (1939). The Bustamante Code of 1928 contains provisions relating to judicial assistance and has been adopted by Bolivia, Brazil, Costa Rica, Cuba, Chile, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 555 (1953). In 1940 at Montevideo a Treaty of International Procedural Law was entered into by Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, and Uruguay. 37 AM. J. INT'L L. SPEC. SUPP. 116 (1943).

2 An exhaustive list of bilateral treaties existing as of 1939 may be found in 33 AM. J. INT'L L. SPEC. SUPP. app. I (1939).

3 Although the United States has entered into many treaties which contain provisions relating to subjects concerned with judicial assistance, *e.g.*, the performance of notarial acts abroad and the attesting and authentication of foreign official records, it has not entered into any agreement which provides for a comprehensive treatment of the problems involved. A list of existing treaties may be found in SMITH & MILLER, INTERNATIONAL COOPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES app. A (Colum. Univ. Project of Int'l Procedure 1961).

4 In the past the United States has explicitly rejected overtures of other countries to participate in treaties and conventions on the subject of international judicial procedure. This attitude became so well known abroad that the United States was not even invited to attend the Seventh Hague Conference on the subject in 1951. However, beginning with the *Harvard Draft on Judicial Assistance*, 33 AM. J. INT'L. L. SPEC. SUPP. 59 (1939), there have been increasing signs of an emergence from this position of isolationism. See Jones, *supra* note 1, at 556.

5 The Commission on International Rules of Judicial Procedure was created in 1958.

These recent and proposed changes in American procedure, insofar as they create or authorize new and more effective methods for performing acts in a foreign country which are necessary to further litigation in American courts, increase the power of American courts to dispose of litigation pending before them. Similarly, the power of a foreign court effectively to dispose of litigation before it is enhanced to the extent that methods for granting assistance within the United States accommodate procedures established by foreign law. This comment will examine two aspects of such judicial assistance—service of documents[6] and taking of testimony—and it will analyze each from the viewpoint of assistance obtained abroad in aid of American litigation as well as assistance rendered within the United States in aid of foreign litigation. It will attempt to survey some of the problems involved in securing performance of these acts, indicate the changes in current practice which are likely to result from the revisions of the Federal Rules of Civil Procedure and the proposed amendments to the Judicial Code, and, last, suggest some additional measures which might promote greater cooperation in this area between the United States and other countries.

I. SERVICE OF DOCUMENTS

A. *Service of Documents Abroad in Aid of American Litigation*

1. *Practice Prior to New Rule 4(i)*

Personal service of process may be necessary for a court to have jurisdiction to render a valid in personam judgment. Supreme Court decisions extending the possibility of in personam jurisdiction through service on a defendant in another state,[7] and requiring better notice to defendants whose addresses are known in quasi in rem and in rem proceedings,[8] imply

The enabling legislation, 72 Stat. 1743 (1958), stated that the Commission's purpose was to study and investigate the existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to improving these practices. Because in 1959 Congress failed to appropriate funds to finance the work of the Commission, the following year the Commission established a working liaison with the Columbia Project on International Procedure, the latter having just been granted $350,000 by the Carnegie Corporation. For three years the two groups worked closely with the Civil Rules Advisory Committee, drafting and redrafting the provisions in the Federal Rules and Judicial Code which were finally embodied in FED. R. CIV. P. 4(i), 28(b), 43(a), and 44, and several proposed amendments to the Judicial Code, some of which will be discussed in detail in this comment. Comm'n on Int'l Rules of Judicial Procedure, *Fourth Annual Report to the President for Transmission to Congress*, H.R. DOC. No. 88, 88th Cong., 1st Sess. (1963) [hereinafter cited as *Fourth Annual Report*].

6 Although applicable to the service of other documents as well, discussion will be specifically directed to service of those documents necessary to commence a cause of action in American courts. The problems of serving United States subpoenas upon residents abroad will be omitted. For a discussion of the problems arising out of sections 1783 and 1784 of the Judicial Code, dealing with service of American subpoenas abroad, see *Fourth Annual Report* 47; Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961).

7 Milliken v. Meyer, 311 U.S. 457 (1940).

8 Mullane v. Central Hanover Bank, 339 U.S. 306 (1949).

that in some cases nothing less than service delivered personally to a defendant abroad will be sufficient. Some federal and state statutes expressly authorize service abroad on persons not found within the state[9] or have been interpreted to so provide.[10] Most, however, merely provide that service may be made abroad, and fail to indicate what types of service may be employed,[11] or, where personal service is specified, do not further indicate how such service is to be made.[12] In some cases the only consequence of not meeting American requirements for proper personal service is that the judgment may be set aside within a statutory period.[13] But where enforcement of the American judgment is sought in the country where the service was made, the service in the original proceeding may also have to conform to foreign requirements. Consequently, many countries will not recognize the judgment as valid unless service was made by their own officials in conformity with their local laws.[14]

In the past the need to satisfy the requirements of proper service of both the forum and the foreign country has presented serious problems. Before these problems need be faced, however, it is necessary to determine how service abroad may be accomplished, a task which is often difficult even if such service is authorized by a state or federal statute. It is often erroneously assumed that service may be accomplished through an American consular official in the foreign country, but aside from treaties with the United Kingdom[15] and Ireland,[16] United States consular treaties do not expressly authorize consular officials to serve judicial documents, even on American nationals. Furthermore, the delivery of civil process by diplomatic and consular officers is expressly prohibited by the United States Foreign Service Regulations.[17] Although the prohibition is subject to an exception where a federal or state statute requires service of process to be made by a

9 *E.g.*, Immigration and Nationality Act § 340(b), 66 Stat. 260 (1952), 8 U.S.C. § 1451(b) (1958) (notice to aliens in revocation of naturalization proceedings); 35 U.S.C. § 146 (1958) (notice to patentee in patent infringement suit); N.Y. VEHICLE AND TRAFFIC LAW § 253 (nonresident motor vehicle statute); PA. STAT. ANN. tit. 12, § 1254 (1953) (authorizing service in all suits).

10 *E.g.*, Chapman v. Superior Court, 162 Cal. App. 2d 421, 338 P.2d 23 (1958); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

11 *E.g.*, Securities Act of 1933, § 229, 46 Stat. 86, 15 U.S.C. § 77v (1958); Public Utility Holding Co. Act of 1935, § 25, 49 Stat. 835, 15 U.S.C. § 79y (1958) (wherever defendant is found).

12 *E.g.*, Immigration and Nationality Act § 340(b), 66 Stat. 260 (1952), 8 U.S.C. § 1451(b) (1953); Veterans' Benefit Act, 38 U.S.C. § 784(a) (1958).

13 See 28 U.S.C. § 1655 (1958) (In a suit to enforce a lien, a defendant who is not personally notified of the action, may within one year, enter an appearance and set aside the judgment.).

14 PAN AMERICAN UNION DEP'T OF INT'L LAW, 1950 REPORT ON UNIFORMITY OF LEGISLATION IN INTERNATIONAL COOPERATION IN JUDICIAL PROCEEDINGS 20 (1952).

15 Consular Convention with United Kingdom, June 6, 1951, art. 17g, [1952] 3 U.S.T. & O.I.A. 3426, T.I.A.S. No. 2494.

16 Consular Treaty with Ireland, May 1, 1950, art. 17g, [1954] 5 U.S.T. & O.I.A. 949, T.I.A.S. No. 2984.

17 22 C.F.R. §§ 92.85, 92.92 (1958).

foreign service officer, in practice the regulation is an almost insurmountable obstacle, since consular officers will not act except upon receiving special authorization from the State Department.[18] Upon realizing that service of process may not be made through a United States government official, one seeking to make such service who is also aware of the dangers of proceeding on the assumption that service may be made by traditional common-law methods,[19] will probably turn to the laws of the foreign country to determine what means are available to him. Advice may be sought directly from counsel in the particular country in which service is to be made, but language difficulties, as well as a lack of understanding by foreign counsel of the American forum's procedural requirements, make it advisable first to seek information from the United States State Department. The answer to this inquiry will more than likely be that service can be obtained only with the aid of the competent local authority or, in some cases, only if service is requested pursuant to a letter rogatory[20] issued by the American court before which the litigation is pending.[21] Many countries will also permit service by consular authority, but, in view of the Foreign Service Regulations, this alternative will not generally be practicable.[22]

When the proper method of making service under foreign law has been ascertained, it may be found that in some aspects it does not satisfy requirements prescribed by the American court. For example, where service is made by an official of the foreign court, he may refuse to make a sworn return of service on grounds that the required sworn statement is beneath the dignity of his office and therefore an unverified certificate should be accepted.[23] Similar problems can arise where foreign counsel is

18 Longley, *Serving Process, Subpoenas, and Other Documents in Foreign Countries*, A.B.A. SECTION ON INTERNATIONAL AND COMPARATIVE LAW 34 n.14 (1959).

19 It is possible that the acts necessary to effect good common-law service of process, when committed on foreign soil, will violate that country's penal laws and thus subject the actor to unforeseen consequences. In regard to Swiss law on this subject, see Jones, *supra* note 1, at 35. See also Longley, *supra* note 18, at 35.

20 Broadly defined, a letter rogatory is a formal request from a court of one country to a court of another to perform some judicial act. The act requested may be service of summons, subpoena, or other legal notice, the taking of evidence, or the execution of a civil judgment.

21 For an informative compilation of the means of service abroad as well as the taking of testimony, see Harwood & Dunboyne, *Service and Evidence Abroad Under English Civil Procedure*, 10 INT'L & COMP. L.Q. 284 (1961). According to information available to the authors, countries where service may be made only if accompanied by a letter rogatory include Argentina, Bolivia, Brazil, Iran, and Israel. Service may be made through any suitable person who is appointed to act by the court in which the action is heard, or by one of the parties, in Chile, Cuba, Ethiopia, Mexico, Nicaragua, Sudan, Sweden, and the United Kingdom. In some countries, *e.g.*, Belgium and Spain, service may be made by a lawyer admitted to practice in the foreign country. See Longley, *supra* note 18, at 35.

22 See note 17 *supra* and accompanying text.

23 Danish process servers are permitted to refuse to do more than subscribe their proof of service, and this has been considered insufficient by some courts, despite the fact that no other proof was possible. See Jones, *supra* note 1, at 537. It has been suggested that this difficulty could be circumvented by having a lawyer or other private individual accompany the official and observe the latter present the document to the person upon whom service is sought. The private individual could then make an affidavit that the requisite

employed to make the service, and the rather large fee which may be charged by such counsel makes the defect even more exasperating.[24] In this situation the consequences of inadequate procedures providing for judicial cooperation between countries are evident. If the officials of the foreign country refuse to comply with the American requirement of a sworn oath that service was made, the plaintiff in need of service abroad is faced with unfortunate alternatives. He can act in conscious disregard of the foreign country's laws and attempt to make service without the assistance of the competent foreign authority by a method acceptable to the American court, or he can undertake the difficult task of convincing the foreign authority to swallow his pride and make the necessary sworn statement that service was made. However, if neither side will retreat from its position, and plaintiff wants an enforceable judgment, he may be without a remedy short of bringing suit in the foreign country and seeking judicial assistance in the United States.

2. *Service of Documents Abroad Under New Rule 4(i)*

In January 1963 the Supreme Court adopted a new civil procedure rule, 4(i), which provides:

> "(1) When the federal or state law . . . authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:
>
> "(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
>
> "(B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or
>
> "(C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or
>
> "(D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
>
> "(E) as directed by order of the court.
>
> "Service under (C) or (E) above may be made by any person who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for trans-

steps had been taken under his observation and that the serving party was precluded by the law of the country from making a certificate regarding the fact of service. Letter from John C. McKenzie to Harry L. Jones, April 18, 1962, reprinted in 5 Colum. Univ. Project on Int'l Procedure, Commission on Int'l Rules of Judicial Procedure.

24 For example, in Germany the lawyer's fee is based on a predetermined percentage of the amount involved in the dispute. SCHLESINGER, COMPARATIVE LAW 209 (2d ed. 1959).

mission to the person or the foreign court or officer who will make the service.

"(2) Return. Proof of service may be made as prescribed by . . . law of the foreign country, or by order of the court. When service is made pursuant or subparagraph (1) (D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court."[25]

It is to be hoped that this important step forward in American practice will eliminate several of the problems discussed above. First, it provides a definite answer to the question of how service may be accomplished where authorization but not specification of the method is found in a federal or state statute. Second, subparagraph (A) assures the plaintiff of the availability of a method of effecting service which will be acceptable to both the foreign country and the American court. The provision would appear to be based on the reasonable assumption that if the method of service is sufficient to begin an action in the foreign country, it should not be considered inadequate in connection with proceedings initiated within the United States. Third, subparagraph (B), authorizing service of process pursuant to a letter rogatory, brings United States practice into line with that existing in almost the entire civil-law world, where use of letters rogatory is the principal method of obtaining extraterritorial service.[26] Fourth, subparagraph (D), authorizing service by mail, offers an expeditious and inexpensive alternative method of service which is doubly attractive because of the minimal number of acts required to be performed in the foreign country. This provision may be criticized on grounds that the reliability of postal service may vary and that there is no way to guarantee that the signature on the receipt is that of the addressee. Yet service by registered mail is authorized in many states,[27] and there does not seem to be any reason which would make this method less acceptable to effect service abroad, at least where it appears that foreign postal authorities are no less competent than their American counterparts. Additional assurance of receipt of service by the proper party can be provided by requiring that the mail be addressed and stamped by the clerk of the court. Subparagraph (C), authorizing personal delivery of service, is, of course, the traditionally preferred method of service in the United States, but by enlarging the category of persons authorized to make service abroad beyond certain designated officials of either country, the new rule increases the chances of finding a process server who is able to comply with American procedural requirements and who at the same time will not be viewed as exercising American sovereignty on foreign soil. It should be noted, however, that the use of any of the above-mentioned methods of effecting service is always subject to the condition that the particular acts be legal under the

[25] FED. R. CIV. P. 4(i), adopted January 1963.
[26] See Jones, *supra* note 1, at 543-45; 44 COLUM. L. REV. 72 (1944).
[27] *E.g.*, HAWAII REV. LAWS § 230-32 (1955); OHIO REV. CODE ANN. § 3105.07 (Page 1958).

law of the foreign country where they are to be performed. Since many American attorneys are not aware of the technicalities involved in service of process abroad,[28] it would seem advisable that language warning of this danger be incorporated into the rule itself. Additional flexibility is provided by subparagraph (E), which authorizes service by anyone designated by either the district or the foreign court. This permits the court to consider the circumstances of each case and select the method most suitable in light of the procedures available in the foreign country. Finally, by allowing proof of service in the manner prescribed by foreign law, the new rule will eliminate proof of service problems arising out of the refusal of foreign process servers to comply with such American requirements as a sworn statement that service was properly made. However, new problems relating to proof of foreign law may be created if service is challenged in American courts.[29] In order to discourage dilatory and harassing attacks on the adequacy of proof of service, it would seem advisable to go a step further and incorporate into the rule a rebuttable presumption that service made by a foreign official is properly effected under foreign law.

B. *Service of Documents in the United States in Aid of Foreign Litigation*

In view of the fact that practice in the United States generally permits the plaintiff to select the method of service so long as minimum standards of notice are met, one might assume that a foreign litigant would have few problems in effecting service in this country; yet this is not necessarily the case, for what is not understood is that in many civil-law countries service of process is a sovereign act "which requires the interposition of public functionaries, judicial or administrative, as a guarantee of authenticity and veracity."[30] This is but another manifestation of the basic differences between the adversary system as practiced in most common-law jurisdictions and the inquisitorial system typical of most civil-law jurisdictions. Whereas we rely principally on the parties to protect their own interests and to perform many acts of a juridical nature, the typical civil-law system vests principal responsibility for directing the litigation and performing most juridical acts in the judge and other public officials.[31] While governments in the United States usually permit service to be effected in this country by mail or by the private agents of the parties, the law of the foreign country where the action is pending may provide for and recognize as

28 See note 19 *supra*.

29 A proposed new rule, 43A, would permit a district court to consider any relevant material or source in ascertaining foreign law, whether or not submitted by a party or admissible under rule 43. It would further provide that determination of foreign law is to be made by the court and not the jury. *Fourth Annual Report* 63.

30 PAN AMERICAN UNION DEP'T OF INT'L LAW, *op. cit. supra* note 14, at 6.

31 SCHLESINGER, *op. cit. supra* note 24, at 215-27. *But see* Jones, *A Plea for Study and Comment on the Report of the International Juridical Committee on International Judicial Cooperation in Judicial Procedures*, in PROCEEDINGS OF THE TENTH CONFERENCE OF THE INTER-AMERICAN BAR ASS'N (1957).

valid only service by an appropriate American government or judicial official pursuant to a request of a foreign court contained in a letter rogatory. In at least two instances American courts have refused to honor such requests.[32] In both cases the basis for refusal was that service would confer personal jurisdiction and would render a United States citizen subject to a personal judgment in a foreign country.[33] These decisions are based on a misapprehension of the civil-law concept of jurisdiction and the function of service. A civil-law court gains jurisdiction by some contact with the transaction which is the subject of the action. The requirement of personal service is nothing more than a means of notification to the defendant, and the court may render an enforceable judgment whether or not he is personally served. Personal service may be required merely to afford greater protection of the defendant's rights by insisting on the best notice available, and the court can, as a matter of jurisdiction, proceed after notice by publication or some other means.[34] Since the citizen may be subjected to a foreign judgment despite the refusal of the American court to honor the request for personal service, it follows that such a refusal will not protect him. On the other hand, if the request is honored, the court insures that defendant receives as much notice as possible. Furthermore, rendering such assistance does not commit the American court to recognize a judgment rendered in the foreign country if it does not otherwise comport with our concepts of jurisdiction and due process of law.[35]

Being aware of the problems caused when an American court refuses to honor a request by a foreign court to aid in service of process, the Commission on International Rules of Judicial Procedure has recommended an amendment to the Judicial Code which would permit service within the United States pursuant to a request made by letter rogatory.[36] To the extent that this amendment would overcome judicial reluctance to comply with such requests, it would remedy the regrettable situation in which many civil-law countries now find themselves when attempting to obtain service within the United States. However, the proposal solves only half the problem. Also needed is an efficient method of transmitting the letter

[32] *In re* Letters Rogatory, 261 Fed. 652 (S.D.N.Y. 1919); Matter of Romero, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

[33] See 44 COLUM. L. REV. 72 (1944).

[34] PAN AMERICAN UNION DEP'T OF INT'L LAW, *op. cit. supra* note 14, at 19-27.

[35] See Smit & Miller, *supra* note 3, at 6.

[36] Proposed § 1696 provides:

"(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or a request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this sub-section does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal." *Fourth Annual Report* 37.

See Rule 6(g), *Report of the Inter-American Juridical Committee*, 2 AM. J. COMP. L. 365 (1953); *Harvard Draft on Judicial Assistance*, art. 2, § 7, 33 AM. J. INT'L L. SPEC. SUPP. 59 (1939).

rogatory to the court, which could then appropriately satisfy the request. On this problem the United States Government has demonstrated an indifference which is thought by some to be a breach of international courtesy.[37] While it is true that in many civil-law countries the preferred method of transmitting letters rogatory to the appropriate court is through the consul of the state of origin to the authorities of the state of execution, there are also many countries which continue to transmit them through diplomatic channels.[38] Despite the fact that diplomatic channels are commonly used in other countries, however, the United States does not recognize such means as a proper method for transmitting a foreign letter rogatory.

The situation is well described by the statement:

> "Foreign diplomatic missions in Washington have been somewhat taken aback . . . when the letters rogatory and accompanying documents they sent to the Department of State for transmission to the appropriate American court were returned to them with a polite note indicating the Department's regret that it is not in a position to handle the matter."[39]

Three reasons have been advanced by the State Department in defense of this striking lack of cooperation: (1) no treaty or domestic law gives the executive branch of the federal government the power to forward letters rogatory to the appropriate American courts; (2) the use of diplomatic courier in such cases is a mere substitute for the postman, and (3) under our federal system of government the individual states are entitled to prescribe the method by which the exercise of jurisdiction of their courts is to be invoked.[40] Upon close examination, however, these rationalizations of our present practice appear rather unconvincing. It would seem that the executive has adequate authority to provide such procedures under its power to conduct foreign affairs, and the fact that use of the mail could achieve the same result is irrelevant if there is a genuine need for the government to provide this service. The existence of two separate and

37 See 33 AM. J. INT'L. L. SPEC. SUPP. 43-45 (1939); McCusker, *Some United States Practices in International Judicial Assistance*, 37 DEP'T STATE BULL. 808, 810 (1957); Jones, *supra* note 1, at 538.

38 See Hague Convention of 1905, art. 1, 33 AM. J. INT'L L. 148 (1939). The *Harvard Draft on Judicial Assistance, supra* note 36, recommends a direct court-to-court approach for transmitting letters rogatory. *Id.* at 45, art. 2, § 1. In its comments to this section it lists twelve agreements permitting direct communication between judicial authorities. However, art. 2, § 4 provides that "the request may be transmitted by the tribunal making it or by diplomatic or consular officer of the state of origin." See Rules of Law proposed in *Report of the Inter-American Judicial Committee*, 2 AM. J. COMP. L. 365, 368 (1953).

39 McCusker, *supra* note 37, at 810. The late Chief Justice Hughes, then Secretary of State and the American delegate to the Havana Conference of 1928 which produced the Bustamante Code, stated that our government was unable to adhere to the Convention "in view of the Constitution . . . relations of the states members of the Union, and the powers and functions of the Federal Government . . . ." SCOTT, THE INTERNATIONAL CONFERENCE OF AMERICAN STATES 1889-1928, at 371 (1931).

40 McCusker, *supra* note 37, at 810.

independent systems of courts which often have concurrent jurisdiction may present an unfathomable maze to the foreign court or consular official, and it is unreasonable to place upon such an official the burden of ascertaining the proper court to which to address his request.[41] Furthermore, it is most unlikely that the states would protest if the federal government, upon receiving such requests, forwarded them to the tribunals in a position to comply with them.[42] On the other hand, the feelings of ill will generated in foreign countries requesting this assistance, who may not understand our peculiar notion of federalism, could seriously hamper American efforts to obtain judicial assistance abroad. The creation of a special office or agency to forward such requests to the appropriate American tribunal would be relatively simple and would have benefits far outweighing the minor objections which have been advanced to justify our present position.[43] The Advisory Committee on Revision of the Federal Rules has accordingly recommended that section 1781 of the Judicial Code be amended to give the State Department power to receive letters rogatory issued by foreign tribunals and to transmit them to the appropriate American tribunal or agency.[44]

If both recommended amendments to the Judicial Code were adopted, the assistance available to foreign litigants attempting to serve process within the United States would be a model of judicial cooperation. Where possible, the foreign litigant could proceed without the intervention of an American official or court, but when official intervention is required by the law of the country where the litigation is pending, he would also be able to enlist the aid of American courts. Unfortunately, improvement in the methods of obtaining service abroad which are presently available to litigants before American courts cannot be achieved so easily. Many civil-law jurisdictions regard service of process as a sovereign as well as juridical act. It must be demonstrated to these countries that, since we do not regard service of process as the performance of a sovereign act, our efforts to obtain service without directly enlisting the aid of a foreign official are not attempts to encroach upon their sovereignty. The fact that the British, in their twenty-two bilateral treaties dealing with judicial assistance, have been able to obtain permission for service by an agent of

41 For a civilian's comment on the problems of ascertaining American law on this subject, see Nekam, *Entr'aide Judicaire aux Etats-Unis*, 3 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 36 (1936).

42 Where the request is merely for service of process, any federal court or court of general jurisdiction in the state where defendant is domiciled, doing business, or merely happens to be found could satisfy the request.

43 *But cf.* British procedure as discussed in Harwood & Dunboyne, *Service and Evidence Abroad Under English Civil Procedure*, 10 INT'L & COMP. L.Q. 284, 287 (1961). A list of countries which have designated an official governmental authority to receive such requests may be found in 33 AM. J. INT'L L. SPEC. SUPP. 54 (1939).

44 *Fourth Annual Report* 41. For proposed state legislation, see UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT.

the party in only twelve countries[45] is evidence of the reluctance of many countries to countenance the common-law point of view.

II. TAKING OF TESTIMONY

A. *Testimony Taken Abroad in Aid of American Litigation*

Failure to obtain admissible testimony is often fatal to a meritorious cause of action. The importance of providing adequate methods by which testimony may be taken abroad for use in American litigation is therefore self-evident. American procedures for taking testimony abroad for use in federal courts are governed by Federal Rule of Civil Procedure 28(b), which prior to its revision in 1963 provided in part as follows:

> "In a foreign state or country depositions shall be taken (1) on notice before the secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by Commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate."

Rule 29 provided, as it still does:

> "If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions."

Since deposition procedures in states which have not adopted the Federal Rules vary greatly, they will not be separately discussed.[46] Federal deposition procedures will be treated in the context of old Rule 28(b), so as to provide a clear appreciation for the changes made by the revision of the rule as well as the problems which remain.

1. *Deposition by Stipulation of the Parties (Rule 29)*

From the standpoint of convenience to the litigants, this is the most expeditious method of taking testimony abroad. Since it does not require the participation of the foreign government,[47] the parties can insure that

[45] Austria, Finland, Greece, the Netherlands, Norway, Poland, Spain, and Sweden permit service by an agent of the party on nationals of both requesting and executing countries. Denmark, Germany, and Portugal permit service in this manner only upon nationals of the requesting state, and Italy requires such service to be made by a notary public or lawyer. Harwood & Dunboyne, *supra* note 21, at 302.

[46] A complete list of state statutes on deposition practice existing as of 1932 may be found in Legislation, 45 HARV. L. REV. 176 n.3 (1932). Alaska, Arizona, California, Louisiana, Maryland, Michigan, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wyoming have enacted the UNIFORM FOREIGN DEPOSITION ACT, which provides:

> "Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, the witness may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state."

[47] For an admittedly approximate listing of those countries where evidence may be

the testimony will be taken in a manner acceptable to the American court before which the litigation is pending. On the other hand, even assuming that the method stipulated by the parties is not proscribed by the laws of the foreign country or considered to be a usurpation of its sovereign functions,[48] it will be of use only when the deponent is willing to testify, for it is obvious the parties have no power to compel the attendance of a recalcitrant witness. Another disadvantage is that, unless the examination is made before a United States consular official,[49] perjury by the deponent may not be punishable.[50]

2. *Deposition on Notice (Rule 28(b)(1))*

This method requires only that the party seeking the deposition serve notice upon all opposing parties to the action, setting forth the time and place for the taking of the deposition and identifying the witnesses to be examined, and, when possible, the name or title of the person before whom the deposition is to be taken. If the examination is to be on written interrogatories, copies of the proposed interrogatories must be served with the notice.[51] The advantages and disadvantages of this procedure are similar to those discussed in connection with the stipulation procedure, although there is no problem with regard to the perjury sanction, since the deposition must be taken in the presence of persons before whom such acts are punishable. Requests for depositions on notice will be executed by United States consular officials in all countries except those in which this procedure is prohibited by local law.[52]

3. *Deposition by Commission (Rule 28(b)(2))*

A commission is an order issued out of the court in which the action is pending, directing that the deposition of witnesses who are beyond the territorial jurisdiction of the court be taken. The order may provide that the deposition be taken by oral examination, written interrogatories, or some variation of these methods.[53] Thus the commission procedure differs

taken, in the absence of a treaty, by any suitable person who is appointed to act by the court in which the action is heard, or by one of the parties, see Harwood & Dunboyne, *supra* note 21, at 304.

48 The taking of depositions of foreign nationals on notice is probably prohibited in Bolivia, Bulgaria, the Dominican Republic, Haiti, Honduras, Hungary, Japan, Latvia, Liberia, Poland, Switzerland, Turkey, and Yugoslavia. Jones, *supra* note 1, at 524 n.21.

49 Perjury committed before a consular officer in a foreign country is punishable as though committed within the United States, 28 U.S.C. § 1203 (1958).

50 18 U.S.C. § 1621 (1958). Although the language which punishes perjury is broad enough to cover perjury committed outside the United States before a person authorized to administer oaths by United States law, it has been argued that it was intended to apply only to perjury committed within the territory of the United States. Smit, *supra* note 6, at 1055-56 (1961). A proposed amendment to this section would expressly make it applicable to perjury committed without the country. *Fourth Annual Report* 29.

51 4 MOORE, FEDERAL PRACTICE ¶ 31.03, at 2154 (2d ed. 1963).

52 22 C.F.R. § 92.55(c) (1958).

53 See FED. R. CIV. P. 30(c). For a discussion of the relative advantages and disadvantages of proceeding by way of open commission (oral testimony) or closed com-

from the notice procedure only in that it requires the court to appoint the person before whom the testimony is to be taken. This difference may be crucial in those countries where notice procedure before consular officials is not permitted.[54] Like the stipulation and notice procedure, an advantage of taking depositions under commission is that they will necessarily conform to the American procedural requirements. In addition, in some common-law countries compulsory process is made available to the commissioner upon petitioning the foreign tribunal.[55] In those countries which regard the taking of testimony as a sovereign function, however, the use of the commission is ill advised, for the intervention of the American court in making the appointment may be viewed as an attempt to exercise American sovereignty on foreign soil.[56] Since under the language of 28(b) "a commission or letter rogatory shall be issued only when necessary or convenient," the use of the commission has, in practice, been limited to those situations where notice procedure was not available under the laws of the country where the testimony was to be taken.[57]

mission (written interrogatory), see address by Werner Galleski reprinted in LETTERS ROGATORY—A SYMPOSIUM 36-39 (Grossman ed. 1956). The Hague Convention of 1905 makes no provision for the taking of evidence by commission. Article 15 provides merely that evidence may be taken through the diplomatic or consular officer if provision therefor is made in a special convention or the state of execution does not oppose it. 33 AM. J. INT'L L. SPEC. SUPP. 84 (1939).

54 See note 48 *supra* and accompanying text.

55 Under The Evidence Act of 1856, 19 & 20 Vict. c. 113, an ex parte motion may be made requesting appointment of an examiner who, as an officer of the court, has subpoena powers. British courts do not object to the commissioner being appointed as a special examiner, provided such commissioner is an American consular official. Harwood & Dunboyne, *supra* note 21, at 290.

56 It has been suggested that much of the hostility in civil-law countries toward depositions taken by commission stems from a semantic confusion between the English word "commission" and the French "commission rogatoire," Italian "commissione rogatoria," and Spanish "comision rogatoria," which are equivalent to the English term "letter rogatory." The latter, of course, may be issued and satisfied by the judiciary of each country. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 526 (1953).

The following countries do not allow testimony of Americans or their own nationals to be taken by commission: Afghanistan, Denmark, the Dominican Republic, Guatemala, Iran, Japan, Jordan, Luxemburg, the Peoples Republic of China, Russia, Switzerland, and Venezuela.

Countries which permit the voluntary testimony of American nationals to be taken by commission include Bolivia, Bulgaria, Egypt, Finland, Haiti, Honduras, Hungary, Kuwait, Liberia, Poland, Saudi Arabia, Turkey, the Union of South Africa, and Yugoslavia.

Countries which permit the voluntary testimony of their own nationals as well as Americans to the taken by commission include Argentina, Austria, Belgium, Brazil, Cambodia, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, El Salvador, Ecuador, France, Germany, Greece, Hong Kong, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Korea, Laos, Lebanon, Lichtenstein, the Netherlands, Mexico, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, Portugal, Rumania, Spain, Sweden, Thailand, the United Kingdom, and Uruguay. Durland, *Policies of Various Countries on the Taking of Voluntary Depositions by Commission*, in 2 Colum. Univ. Project on Int'l Procedure, Commission on Int'l Rules of Judicial Procedure.

57 4 MOORE, *op. cit. supra* note 51, ¶ 28.04, at 1923.

4. *Taking Testimony Under Letters Rogatory (Rule 28(b)(2))*

The taking of testimony by directly enlisting the aid of a foreign tribunal through a letter rogatory[58] has been resorted to sparingly in American practice.[59] Although Rule 28(b) states that "commissions or letters rogatory shall be issued only when convenient . . . ," they have in practice been issued only when it has been proved to the court's satisfaction that either notice or commission procedures could not be employed successfully.[60] The positive aspects of employing this procedure are that compulsory process and sanctions against perjury are generally available,[61] since the testimony will in most instances be taken before the court.[62] On the negative side, the problems which may be encountered are all but staggering.[63] For example, in most civil-law countries, where testimony is to be taken on oral examination,[64] a judge rather than counsel conducts the examination.[65] Testimony of certain witnesses may be forbidden, as illustrated by the civil-law practice of not allowing a party to the litigation to be examined as a witness.[66] In addition, there may exist broad privileges unknown to American practice which will excuse the deponent from testifying in regard to certain matters.[67] In some countries the perjury deterrent

58 Although statutory authorization for the issuance of letters rogatory has in the past been rare, both federal and state courts have frequently held that they have inherent power to issue them. *E.g.*, De Villeneuve v. Morning Journal Ass'n, 206 Fed. 70 (S.D.N.Y. 1913); Hite v. Keene, 137 Wis. 625, 119 N.W. 303 (1909).

59 See note 77 *infra.*

60 United States v. Matles, 154 F. Supp. 574 (E.D.N.Y. 1957); The Edmund Fanning, 89 F. Supp. 282 (S.D.N.Y. 1950). *But see* United States v. Paraffin Wax, 2255 Bags, 141 F. Supp. 402 (E.D.N.Y. 1959) (motion to take testimony by letter rogatory granted when letter from State Department stating it was the only means by which testimony in Switzerland could be taken was submitted).

61 This may not always be true. For example, Germany and the Netherlands will not take the testimony of a witness under compulsory process even when requested by letter rogatory if there is no treaty to serve as a basis for such action. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 103, 105 (1940). This may also be the case in France and Switzerland. See Doyle, *Taking Evidence by Deposition and Letter Rogatory and Obtaining Documents in Foreign Territory*, ABA SECTION ON INTERNATIONAL AND COMPARATIVE LAW 39 n.4 (1959).

62 In most civil-law countries examination of witnesses is exclusively a judicial function. SCHLESINGER, *op. cit. supra* note 24, at 224.

63 See Moses, *International Legal Practice*, 4 FORDHAM L. REV. 244 (1935); Jones, *supra* note 56, at 530.

64 Many courts will refuse to grant oral interrogatories unless it can be shown that written interrogatories would be inadequate. Beiber-Isaacs Co. v. Philadelphia Fire & Marine Ins. Co., 125 Misc. 494, 211 N.Y. Supp. 435 (Sup. Ct. 1925). *But see* Bennet v. Kelly, 283 App. Div. 945, 130 N.Y.S.2d 191 (1954) (granted where testimony complex); Tutundgy v. Tutundgy, 253 App. Div. 839, 1 N.Y.S.2d (1938) (granted where witness hostile).

65 SCHLESINGER, *op. cit. supra* note 24, at 219-25.

66 *Id.* at 223. Article 11 of the Hague Convention of 1905 makes the issuance of compulsory process optional with the state where the testimony is to be taken. 33 AM. J. INT'L L. SPEC. SUPP. 80 (1939).

67 In Japan, for example, attorneys, doctors, and government officials may refuse to testify as to certain acts unless the consent of the government is first obtained. There is also a broad privilege against testimony that would tend to disgrace the witness, his

may not be present, for the witnesses may not be allowed to be sworn, or may be allowed to be sworn only with their consent and after their testimony.[68] A verbatim transcript of the testimony may not be available, since the only written record in most civil-law proceedings consists of a summary of the witnesses' testimony made by the presiding judge. Testimony reproduced and preserved in this manner may be unacceptable by American standards of evidence.[69] Compounding these problems are the difficulties created by having to translate the questions and testimony, and the lengthy time lag likely to result because of the necessity of transmitting the request through diplomatic channels.[70] A final complication is that some foreign courts refuse to honor a letter rogatory unless it has been issued by a court of record and general jurisdiction which could reciprocate the favor for the foreign court.[71] Although there have been cases where letters rogatory have been honored without a promise of reciprocity by the requesting court, these exceptions should not be relied upon.[72]

5. *Treaty Provisions for Taking Testimony*

An examination of the law of the foreign country may not be necessary if the problems of taking depositions have been effectively dealt with by treaty. However, of the twenty-three American consular treaties now in effect, only that with Mexico expressly authorizes consular officers to take the depositions of foreign as well as American nationals.[73] In all other cases where the testimony of a foreign national is desired, recourse must be had to the internal law of the foreign country, under which interpretations of treaty provisions have produced varying results.[74]

6. *Revised Rule 28(b)*[75]

Many of the problems discussed above may be obviated by revised Federal Rule of Civil Procedure 28(b), which provides:

"In a foreign country depositions may be taken (1) on notice before

family, or his employer. Address by George Yamaoka, reprinted in LETTERS ROGATORY—A SYMPOSIUM 29 (Grossman ed. 1956).

68 SCHLESINGER, *op. cit. supra* note 24, at 219-20; Jones, *supra* note 56, at 531.

69 The Mandu, 11 F. Supp. 845 (E.D.N.Y. 1935).

70 For a description of the general procedure an American attorney must follow, see Address by Lucien R. LeLievre, reprinted in LETTERS ROGATORY—A SYMPOSIUM 11, 40 (Grossman ed. 1956). Once the request enters the diplomatic stream there is no telling how long it may be before the request is eventually complied with. There have been cases where this process was not completed within two years. See Jones, *supra* note 56, at 530.

71 *Id.* at 533 nn. 53 & 54; Note, 58 YALE L.J. 1193 (1949).

72 Jones, *supra* note 56, at 533.

73 Consular Convention with Mexico, Aug. 12, 1942, art. VII, 57 Stat. 800, T.S. No. 985: "Consular officers, in pursuance of the laws of their respective countries may . . . take and attest the deposition of any person whose identity they have duly established."

74 *E.g.*, Italy has interpreted its Consular Treaty with the United States to permit a consular official to take the voluntary testimony of Italian nationals. Discussion by Samuel M. Fink, in LETTERS ROGATORY—A SYMPOSIUM 56 (Grossman ed. 1956).

75 See 4 MOORE, *op. cit. supra* note 51, ¶ 28.03. Section 3.01 of the Uniform Interstate

> a person authorized to administer oaths in the place in which the examination is held, either by the law of the United States or the law of that place, or (2) before a person appointed by commission, or (3) under a letter rogatory. A person appointed by commission has power by virtue of his appointment to administer any necessary oaths and take the testimony. A commission or a letter rogatory shall be issued on application and notice and on terms and with directions that are just and appropriate. It is not requisite to the issuance of a letter rogatory that the taking of the deposition by commission or on notice is impractical or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken whether by name or descriptive title . . . . Evidence obtained in response to a letter rogatory shall not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirement for deposition taken within the United States under these rules."

The revision of Rule 28(b) attempts to liberalize existing practice in two basic respects. First, it considerably broadens the possibilities of utilizing the notice procedure by sanctioning the taking of testimony before foreign officials authorized to administer oaths in the country where the examination is held. It will thus be possible to take the testimony of a foreign national on notice where that country's law requires testimony to be taken before one of its own officials. This provision will also prove useful in those countries whose concepts of sovereignty preclude the taking of any testimony, even that of American nationals, before an American consular official. It will be of little value, however, where the foreign country views the entire process of interrogating the witness as the duty of the judge and therefore prohibits any procedure in which the attorneys directly participate.

The second basic change embodied in the new rule gives a boost to the letter rogatory as a method whereby testimony may be obtained abroad, and is more a change of attitude than of law. By providing that a letter rogatory may be issued, even where notice and commission procedures may also be available, the revision attempts to eliminate the antagonism to the use of the letter rogatory which has developed among practicing judges. Under the new rule a letter rogatory may be utilized to obtain service of compulsory process on a witness who may be unwilling voluntarily to testify, or a letter rogatory may be carried by the attorney as a precautionary measure where there is a possibility that a cooperative witness may experience a change of heart after the American attorney has arrived on the scene. Of course, this flexibility may be illusory if it is necessary to transmit the letter rogatory through slow-moving diplomatic channels, as opposed to direct presentation of the letter by the commissioner or attorney

and International Procedure Act contains a parallel provision to be used in state proceedings.

to the foreign court. Another justification for the issuance of a letter rogatory may be simply that it is the least expensive method of obtaining the desired testimony.[76]

This more liberal attitude toward the issuance of letters rogatory will be of small benefit, however, if American courts continue to exclude the testimony taken because the method used by the foreign court fails to meet other procedural requirements. This obstacle has been removed in large part by the "no exclusion" policy expressed in the last sentence of the rule. Thus, the fact that the written record of the testimony consists of a summary made by the presiding judge is no longer a sufficient ground to preclude its introduction into evidence. However, the language used, "evidence obtained . . . shall not be excluded merely for the reason . . . ," implies that such evidence may still be excluded if the court believes there exist other sufficient reasons for doing so. Where the court may be even slightly suspicious of the worth of a particular witness' testimony, the fact that there is no verbatim transcript, or that there are other departures from accepted American procedure, may be a deciding factor in convincing the court to exclude the evidence. If the rule is to have its intended effect, the courts must demonstrate that they will exercise their discretion in these matters fairly. Until American judges indicate that they share the changed attitude toward the use of the letter rogatory held by those responsible for the revision of the rule, it is very unlikely that the letter rogatory will enjoy increased popularity as a method of obtaining testimony abroad.[77]

Notwithstanding the possibility of a strict interpretation of the "no exclusion" provision, the revision as a whole is an important step toward furthering judicial cooperation between the United States and other countries. American recognition that the civil-law method of taking testimony may be perfectly adequate may induce some civil-law countries to grant concessions to American procedures presently regarded as unacceptable when performed on foreign soil. An example of the kind of cooperation which should be sought in this area is embodied in a provision found in the Hague Convention of 1905[78] as well as in many of the British bilateral treaties on judicial assistance.[79] It provides that each country, when re-

[76] The rule gives a federal court discretion to prescribe any terms that are just and appropriate for the taking of testimony abroad. This usually means that the requesting party will be required to bear the transportation, living expenses, and counsel fees of his adversary. River Plate Corp. v. Forestal Land, Timber & Ry., 185 F. Supp. 832 (S.D.N.Y. 1960); United States v. Matles, 154 F. Supp. 574 (E.D.N.Y. 1957). Where the testimony is taken on notice before an American consular official or by commission expenses will be determined by 22 C.F.R. § 22.1 (Cum. Supp. 1964).

[77] In 1958 and 1959 there were, respectively, eight and fourteen letters rogatory transmitted to foreign courts through diplomatic channels. During this same period there were, correspondingly, 389 and 342 cases in which depositions were taken abroad and consular fees paid. DeVries, *International Unification of Law and Judicial Assistance*, 9 AM. J. COMP. L. 371, 372 (1960).

[78] Hague Convention of 1905, art. 14, 33 AM. J. INT'L L. SPEC. SUPP. 151 (1939).

[79] "[I]f a wish that some special procedure should be followed is expressed in the Letter of Request, such special procedure shall be followed insofar as it is not incompatible

quested, shall take the testimony of the witness according to the procedure specified by the requesting state so long as it is not positively prohibited from doing so by its own laws.

B. *Testimony Taken in the United States in Aid of Foreign Litigation*

Even in the absence of a consular treaty expressly according the right, the United States does not object to the taking of voluntary testimony of foreign or American nationals by any procedure authorized by the foreign country.[80] Where the witness is willing, recourse to an American court for authorization to proceed is not necessary. However, where the witness will not voluntarily testify, or where the requesting country's laws require judicial participation in the proceeding, assistance from American courts becomes necessary. The usual manner of requesting this assistance is through a letter rogatory. Authority for complying with the request is found in section 1782 of the Judicial Code, which provides:[81]

> "The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.
>
> "The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States."

Although this section fails to make specific mention of the letter rogatory as a method of taking testimony within the United States, there has been no question as to the availability of that procedure.[82] When a letter rogatory is honored, it may also be assumed that the court will issue compulsory process if the witness will not voluntarily testify.[83] However, the value of this procedure to the foreign litigant is diminished by two factors. The first—the lack of a simple method for transmitting letters rogatory to the proper court and the failure of the United States executive to intervene—

with the law of the country of execution." Convention on Legal Procedures in Civil and Commercial Matters between Great Britain and Yugoslavia, Feb. 27, 1936, art. 7(d), Brit. T. Ser. No. 28. The principle is also approved by the HARVARD DRAFT CONVENTION ON JUDICIAL ASSISTANCE, which incorporated it in art. 4, § 10. 33 AM. J. INT'L L. SPEC. SUPP. 80 (1939). *But see* BUSTAMANTE CODE art. 391, 33 AM. J. INT'L L. SPEC. SUPP. 152 (1939), which provides:

> "The one receiving the letters requisitorial should comply, as to the object thereof, with the manner of the one issuing the same, and as to the manner of discharging the request he should comply with his own law."

80 McCusker, *supra* note 37, at 809.

81 For a description of the confused status of American law on this subject prior to the 1948 enactment of § 1782, see Jones, *supra* note 56, at 540.

82 De Villeneuve v. Morning Journal Ass'n, 206 Fed. 70 (S.D.N.Y. 1913); 8 WIGMORE, EVIDENCE § 2195, at 78 n.2 (3d ed. 1940).

83 Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211 (8th Cir. 1906); *Ex parte* Taylor, 110 Tex. 331, 220 S.E. 74 (1920).

has already been discussed in connection with service of process.[84] The second factor impeding the use by foreign litigants of letters rogatory is that section 1782 requires that the taking of depositions conform to domestic proceedings. The adversarial procedure of examining a witness may impose expenses upon the parties which exceed the amount involved in the litigation.[85] Furthermore, the requesting state may prefer that the testimony be elicited in an inquisitorial proceeding under the direction of the presiding judge. It has been suggested that these difficulties can be overcome by application of Rule 30(c), which permits the parties to agree on any method for reducing the testimony to writing,[86] and Rule 29, which permits the parties to stipulate that depositions may be taken "in any manner."[87] Even assuming that a district judge would examine the witness himself according to the method stipulated, it is not likely that the foreign litigant would be sufficiently familiar with the Federal Rules to avail himself of these provisions. A more direct and therefore more desirable approach would permit the judge to comply with any instructions transmitted along with the letter rogatory, or informally requested by the parties or foreign consular officials presenting the request to the court.

The language of section 1782 also raises some problems when testimony is to be taken before a commissioner nominated by the foreign court or a consular official in the United States. The language, "the deposition . . . may be taken before a person authorized to administer oaths . . . ," can be interpreted to authorize testimony to be taken only before those persons who by state or federal office have authority to administer oaths, *e.g.*, a notary public, United States Commissioner, or the clerk of the court.[88] It can be argued, however, that by virtue of appointment by the court pursuant to section 1782 the appointee becomes empowered to administer the necessary oaths.[89] The latter interpretation is to be preferred, for the court could then appoint a consular officer or any other designated person who may be familiar with the procedural requirements of the foreign country. Another problem under the existing statute is whether it applies to testimony sought in aid of matters before an investigating magistrate or *juge d'instruction*, a judicial officer who performs functions similar to those of an American

84 See notes 37-41 *supra* and accompanying text.

85 Taking into account witness fees, travel expense, and the fees of stenographers, counsel, the commissioner, and translators, the expenditures may exceed $100 per day. SMIT & MILLER, INTERNATIONAL COOPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICE AND PROCEDURES PREVAILING IN THE UNITED STATES 13 (Colum. Univ. Project on Int'l Procedure 1961).

86 FED. R. CIV. P. 30(c).

87 FED. R. CIV. P. 29.

88 See Discussion and Paper by Harry L. Jones in LETTERS ROGATORY—A SYMPOSIUM 85 (Grossman ed. 1956).

89 The United States District Courts for both the Eastern and Southern District of New York have on occasion appointed persons suggested by the consul even though previous to the appointment they were not authorized to administer oaths by United States law. Address by Lucien R. LeLievre, *supra* note 70, at 17.

grand jury. In the past, letters rogatory in aid of these proceedings have been honored,[90] and the interpretative problem seems limited to whether assistance is available for proceedings in a foreign administrative tribunal or quasi-judicial agency. There is no insurmountable interpretative difficulty, however, and it is suggested that a liberal construction would best effectuate congressional intent.

Proposed Revision of Section 1782

The Commission on International Rules of Judicial Procedure proposed in its fourth annual report[91] the addition of a new subsection to section 1782 which would provide:

> "(a) The district court in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or international tribunal, for taking the testimony on statement or producing the document or other thing. To the extent that the order does not prescribe otherwise the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Procedure.
>
> "A person may not be compelled to give his testimony or statement or to produce the document or other thing in violation of any legally applicable privilege.
>
> "(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding of a foreign or international tribunal before any person and in any manner acceptable to him."[92]

Enactment of this provision would significantly improve present procedures for rendering judicial assistance to a foreign litigant attempting to obtain testimony in the United States.[93] Desirable flexibility would be achieved by the provision that a request for assistance may either be contained in a letter rogatory or be made directly by a party to the litigation or a person designated by foreign law to act in his behalf. Subsection (a) would also

90 *Id.* at 13-17.

91 *Fourth Annual Report* 25.

92 For parallel provisions to be adopted by the states, see UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.02.

93 See Advisory Committee's comments in *Fourth Annual Report* 45.

resolve ambiguities existing under the present section by making it clear that any person appointed by the court has, by virtue of the appointment alone, the power to administer any necessary oath. It also makes it clear that assistance may be obtained for use in foreign proceedings other than those associated with conventional courts, such as proceedings before foreign administrative courts, quasi-judicial proceedings, and those conducted by an investigating magistrate. An important innovation in American procedure would be brought about by the provision authorizing a court, in its discretion, to prescribe that the testimony be taken according to the practice and procedure requested by the foreign country. Implicit in this proposed provision is the idea that closer judicial cooperation between countries can be brought about only if it is first recognized that differences in practice and judicial concepts exist and that procedures which provide for the broadest possible accommodation to foreign practice must be established.

III. CONCLUSION

The new amendments to the Federal Rules, together with the proposed amendments to sections 1781 and 1782 of the Judicial Code,[94] would enable the United States to offer methods of judicial assistance to foreign litigants which are as flexible and complete as those available anywhere in the world. If these procedures were put into practice, the United States could justifiably seek greater assistance abroad for litigants before its own courts. It is probably true that some concessions to American procedures can be gained simply through increased understanding in the United States and other countries of the conceptual differences which account for the differences in procedure and practice. This understanding may be promoted by greater exchanges of views between countries through participation in international conferences on judicial procedure and from increased attention to these problems by scholars of comparative law. For example, a foreign country might withdraw its objections to testimony taken before a commissioner appointed by an American court when it understands that he is not regarded in our country as performing official sovereign acts; or it might permit service of process by a private party once it is assured that service of process may be performed within the United States by "non-sovereign" individuals.

Impatience with the improvements which come only through gradually increased and informal understanding, and the desire for certainty which is so important in such a complicated field as judicial assistance, however, suggest that cooperation could best be secured through formal written

94 The necessity for revision of the Judicial Code takes on additional importance when one considers the emphasis that civil-law countries place on written code provisions as a source of law. Many of the present difficulties encountered by Americans seeking assistance abroad may be due to their inability to point to any written provisions in the law of this country demonstrating that similar aid is available to foreign litigants seeking assistance here, although in practice such assistance may actually be available.

agreements. The fact that practices vary so greatly from country to country militates in favor of seeking bilateral solutions, as opposed to the multipartite approach represented by the Hague Convention of 1905. Despite the variety of foreign procedures, however, there is a common theme central to most foreign systems which must somehow be accommodated if negotiations are to be successful, namely, the frequent requirement that the courts or government officials of the foreign country take part in order to secure the performance of the desired acts. Even in the United Kingdom there is no procedure for taking testimony merely on notice or by stipulation of the parties completely independent of a court order.[95] Although the United States is seeking concessions to its own practices of allowing the parties the greatest possible freedom to accomplish these acts without official intervention, it may be possible to achieve most of its basic objectives only by taking the long way around and assenting to some participation by foreign officials in their performance. At best, all that may be necessary is a court order or similar approval granted on direct application of the interested party which would authorize him to proceed according to American procedures, with perhaps the additional benefit of having compulsory process available. There may be cases where, having once brought to the attention of the proper official the act which is sought to be performed, the party may be prohibited from performing it himself, but this will probably happen only when performance by the requesting party violates the internal law of the country, and it would be prohibited notwithstanding a treaty. On the other hand, by permitting the foreign court or official to participate in some manner, however slight, in the proceedings, the United States may concede the battle of whether the acts are sovereign or non-sovereign, but it will have achieved increased freedom for United States litigants to accomplish these acts in the manner most familiar to them and most likely to be acceptable to an American court. In the interim, what is needed most by American attorneys is an up-to-date compilation of the procedures available in each country, an estimate of the time and expense of employing these procedures, warnings as to particular problems which may be encountered, and suggested solutions to these problems. A readily accessible reference work of this sort would not only expedite the entire process of accomplishing necessary acts on foreign soil but would also reduce the possibility of an attorney innocently committing acts abroad which may offend a foreign government. It is this innocent, but sometimes intentional, failure to respect procedures implementing the foreign country's characterization of the acts performed on its soil which has been perhaps the greatest single impediment to increased cooperation between the United States and other countries in the field of international judicial assistance.

Richard F. Gerber

[95] Harwood & Dunboyne, *Service and Evidence Abroad Under English Civil Procedure*, 10 INT'L. & COMP. L.Q. 284, 286 (1961).