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Service of Judicial Documents in Latin America

Beverly May Carl

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SERVICE OF JUDICIAL DOCUMENTS IN LATIN AMERICA

BY BEVERLY MAY CARL*

Through application of our longarm statutes, it is often possible for an American court to take jurisdiction over a defendant domiciled abroad, if he has done business, entered a contract, or committed a tort here, and if the due process requirements of *International Shoe Co. v. Washington,*[1] as well as its offspring,[2] have been satisfied. However, even where a jurisdictional basis acceptable to both the U.S. court and the foreign nation concerned exists, legal difficulties can arise concerning the method used to notify the defendant of the pending trial.

For instance, suppose one wishes to bring suit in Colorado against an American defendant domiciled in Mexico. Assume further that the defendant entered contracts and engaged in business in Colorado to the extent that both Mexican and U.S. laws would concede that a sufficient jurisdictional basis exists for the court in Colorado to hear the case. How does one legally serve (*i.e.*, give notice to) the defendant in Mexico?

Latin American legal systems traditionally require that legal documents be served by a government official or through some other official channel. Under a civil law system, the power of the sovereign is deemed to be exercised even at this early stage of litigation. Hence private parties, without the intervention of the state, are unable to perform such acts. Within the Latin Ameri-

* Professor of Law, Southern Methodist University. Ms. Carl, who is Chairman of the Committee on Private International Law of the American Bar Association, served as a member of the U.S. Delegation to the Specialized Conference on Private International Law of the Organization of American States, where the Letters Rogatory Convention was drafted.

[1] 326 U.S. 310 (1945).

[2] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

can nations, the normal mode of serving documents in other nations has been through diplomatic channels.[3]

In contrast, U.S. laws usually do not require intervention by the state (or court) to perform such acts. Often parties or their lawyers can serve the documents. As a result American law tends to be liberal in recognizing a broad variety of means of making service abroad, such as by mail, by personal delivery by anyone over 18 years of age who is not a party to the acton, and by a qualified attorney.[4] However, such acts, when carried out inside the territory of a civil law country, without the intervention of its government, may be viewed by it as an illegal infringement upon its sovereignty. Thus, a Colorado lawyer using one of the methods set forth in our Federal Rules of Civil Procedure to serve a defendant in Mexico may be performing an act on Mexican territory which the Mexican authorities would consider illegal.

But assume the opposite situation, where a Venezuelan lawyer needs to serve a defendant domiciled in Texas. His courts will recognize the service as legally effective only if made through the appropriate official of the foreign government. Thus, the very liberality of our laws in permitting more informal means of service has, in the past, resulted in a lack of understanding by our governmental institutions of foreign courts' need for service through official channels. For many years, the U.S. Department of State refused to forward foreign requests for service, received through diplomatic channels, to the appropriate parties or their representatives. Although this situation has now been remedied,[5] foreigners wishing to serve persons within the United States may still be confused, as the result of our complex federal-state system, about the identity of the proper local authority to perform the actions sought. Moreover, the local American officials seldom perform these activities and frequently do not understand the formal needs of the foreign court.

A major step toward solution of these problems was taken by the ratification of the Hague Convention on Service Abroad[6]

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[3] M. OWEN, STUDY ON INTERNATIONAL PROCEDURAL LAW, O.A.S. Doc. OEA/Ser. K/XXI.1, CIDIP/5 (1974) 41.

[4] *See, e.g.*, FED. R. CIV. P. 4(e), (i).

[5] 28 U.S.C. § 1781 (1970).

[6] *Done*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; *reprinted in* FED. R. CIV. P. 4, Notes [hereinafter HAGUE SERVICE CONVENTION].

(hereinafter referred to as the Hague Service Convention). This Convention, which has now been adopted by nineteen countries,[7] requires that each nation establish a "Central Authority" to whom requests from foreign nations for service may be sent. In the United States, the federal Department of Justice has been designated as the Central Authority. Hence an attorney from Denmark who wishes to serve an individual domiciled in Denver does not have to ascertain whether the documents should be sent to some state court, to a particular federal district court, or to a certain officer thereof. Rather, the foreign attorney may simply forward the documents, together with the appropriate forms, to the U.S. Department of Justice, which in turn transmits them to the appropriate local official and eventually returns the executed documents to Denmark. Conversely, a U.S. lawyer wishing to serve a person in Denmark may simply forward the requisite documents to the Central Authority designated by the Danish Government.[8] Alternative modes of service are still valid under the Hague Service Convention, if the state of destination does not object.[9]

I. The Western Hemisphere Approach

In January 1975 the Organization of American States (O.A.S.) convoked the Specialized Conference on Private International Law for the purpose of negotiating treaties in the area of transnational judicial assistance and conflicts of laws. Twenty nations of the Western Hemisphere participated in that Conference. One of the products of the Conference was the Inter-American Convention on Letters Rogatory (the Letters Rogatory Convention or Convention),[10] designed to establish an orderly method of serving judicial and extrajudicial documents in the Western Hemisphere nations. The Convention is open to adherence, not only by the participating states, but also by other nations, including those which are not members of the O.A.S.

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[7] Barbados, Belgium, Botswana, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Israel, Luxembourg, Malawi, Norway, Japan, Portugal, Sweden, Turkey, United Kingdom, and United States. Treaties In Force, Jan. 1, 1974, at 347; interview with Robert Dalton, Legal Adviser's Office, U.S. Dept. of State, Aug. 18, 1975.

[8] *See* Fed. R. Civ. P. 4 Notes, for a list of the Central Authorities for each nation.

[9] Hague Service Convention art. 10.

[10] O.A.S. Doc. OEA/Ser. A/21 (SEPF) [hereinafter Letters Rogatory Convention]. The Convention is printed as an appendix to this paper.

The U.S. delegation to the O.A.S. Conference would have preferred that the Latin American states simply ratify the Hague Service Convention. To the Americans it seemed desirable to have the Latin American nations added to that widely spread group of countries which have already ratified this multilateral convention. Moreover, this convention has proved itself workable in practice. Nevertheless, it became crucial to take into account the fact that most of the Latin American nations probably did not intend to ratify the Hague Convention, for diverse reasons. Brazil and Argentina are the only Latin American countries which are members of the Hague Conference on Private International Law, and they did not participate in the drafting of this convention. The official languages of the Hague Convention are French and English. Spanish and Portuguese, spoken by most people in Latin America, are not even mentioned.

In addition, Latin American nations have long held the view that there exists a system of Inter-American regional international law, distinct from the so-called universal or generalized international law. In keeping with that philosophy, many of these countries wanted to form a separate Inter-American convention on this subject. Similarly, a number of the Latin American delegates at the negotiating Conference felt that the Hague Service Convention was unduly complex for the nations of this hemisphere. Since there did not appear to be any significant reason why the United States could not be a member of both the Hague Service Convention and an Inter-American convention on the same topic, the U.S. delegation did not object to this approach.

II. SCOPE OF THE CONVENTION

The Convention, because it was the first to be negotiated at the Conference, is cast in terms of letters rogatory and may be applied both to serving documents and to taking evidence abroad. The U.S. delegation wished to defer the subject of evidence to a subsequent convention because it was felt that obtaining evidence involved complex issues[11] which should be handled

[11] As the Americans saw it, some of the special problems involved in an evidence convention included: The right of a witness to invoke privileges under U.S. law and under foreign law; the right of commissioners and/or consuls to obtain evidence; and the right to insist that a foreign judge permit the use of cross-examination.

in a separate convention. However, many Latin American delegates feared there might not be time to do a separate evidence convention. Thinking in terms of their own concepts of civil law, they saw no reason why the two subjects could not be included in the Letters Rogatory Convention. As a compromise, it was agreed that both subjects could be included in the Letters Rogatory Convention, with a right to make a reservation against the Convention covering evidence. Article 2(b) authorizes such a reservation.[12] Subsequently, the Conference did produce a separate convention on taking evidence abroad.[13] If the United States ratifies the Inter-American Convention on Letters Rogatory, it should unquestionably make an article 2(b) reservation. Thus, for the purposes of this discussion, this Convention should be viewed as encompassing service only. Its scope will then parallel that of the Hague Service Convention.

III. Comments on Specific Sections

Article 1. This provision states that the Convention shall apply to "letters rogatory" in English and to both "exhortos" and "cartas rogatorias" in Spanish. The two Spanish terms were included because in some Spanish-speaking nations, the label "exhortos" is used for "letters rogatory," while in others the phrase employed is "cartas rogatorias." No such problem existed for the French or Portuguese language.

Articles 2 and 3. These articles limit the scope of the Convention to formal procedural acts only, such as the service of a summons or other judicial documents. Under article 3, acts of a compulsory nature are specifically excluded. Hence, attachments, garnishments, and restraining orders would not fall within the purview of the Convention. It was deemed advisable to defer dealing with these kinds of judicial action, which raise more complex questions, for a later convention. Article 2(b) permits application of this Convention to obtaining evidence from abroad unless a reservation is made.

Article 4. The state of destination will be required to execute a letter rogatory from a member nation if it has been transmitted through one of the channels stipulated in this article: To

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[12] *See* text of Convention, appendix.

[13] The Inter-American Convention on Taking Evidence Abroad (1975), 14 Int'l Legal Mat. 328 (1976).

wit, diplomatic or consular agents, judicial channels, the Central Authority of the state of origin, or the Central Authority of the state of destination. Unlike the Hague Service Convention, the Letters Rogatory Convention does not expressly mandate that each member designate a Central Authority.[14] Nevertheless, the establishment of a Central Authority might be considered compulsory by implication since paragraph 2 of this article requires each member to advise the General Secretariat of the O.A.S. of the identity of its Central Authority.

Under the Hague Service Convention, the Central Authority comes into play only for the state of destination. The Inter-American Convention would make the Central Authority in the state of origin another proper channel for transmission of letters rogatory.

Articles 5, 6, and 7. Member states are obligated under article 5 to execute letters rogatory sent through the designated channels from other member nations, if the proper formalities have been observed. The first formality mentioned is "legalization," which refers to a series of official authentications required for legal documents in international transactions.[15] Member states are not required to execute the letters rogatory unless they have been legalized. However, when they are transmitted through consular or diplomatic channels or through the Central Authority, no legalization is necessary.[16] Similarly, legalization is not required for letters rogatory issued by courts in "border areas" of the contracting states.[17]

In addition, the state of destination is obligated to execute a letter rogatory only if the letter rogatory and its appended documentation have been translated into the language of the state of destination.[18] It was agreed during the negotiations on this Convention to waive the requirement of an "official" translation, since some nations, such as the United States, do not have "official" translators.

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[14] HAGUE SERVICE CONVENTION art. 2.

[15] *See* Amram, *Toward Easier Legalization of Foreign Public Documents*, 60 A.B.A.J. 310 (1974); *The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 9 INT'L LAW. 755 (1975).

[16] LETTERS ROGATORY CONVENTION art. 6.

[17] *Id.* art. 7.

[18] *Id.* art. 5(b).

Article 8. This provision deals with the documentation that must accompany the letter rogatory if the state of destination is to be required to execute it. The provisions of this article were included in order to help satisfy procedural due process requirements.

Article 9. This provision is designed to separate the issue of notice or service from that of jurisdiction. Such division is the usual practice under civil law. In contrast, Anglo-American law frequently tends to intertwine these two issues, as, for example, where personal service on a defendant is considered sufficient to confer jurisdiction upon a court. As a result of the intermingling of these two ideas, one U.S. judge, early in this century, refused to execute a Mexican letter rogatory because, he pointed out, under Mexican law the Mexican court could exercise jurisdiction merely on the ground that Mexico was the place of the contract.[19] The U.S. judge was concerned that a court in the United States might subsequently be expected to recognize and enforce a judgment resulting from the Mexican proceeding. Because he feared that issuing the letter rogatory would be tantamount to conferring jurisdiction on the Mexican court, he refused to grant the Mexican request.[20]

This situation has now been remedied, for federal courts at least, by a statute[21] authorizing such courts to honor a request from a foreign tribunal to aid in serving a judicial document and stipulating that such help does not require recognition or enforcement in the United States of any judgment resulting therefrom.

Article 9 of this Convention reaches the same result as the American statute by stating that the execution of a letter rogatory does not imply ultimate recognition of the jurisdiction of the state of origin. Accordingly, there is no obligation, either as a matter of law or of comity, for the state of destination to enforce any judgment resulting from the foreign proceedings.

Article 10. This article states that the procedural laws and standards of the state of destination govern the execution of the letters rogatory. Although the Convention does not clearly indi-

[19] *In re* Letters Rogatory out of First Civil Court of City of Mexico, 261 F. 652 (S.D.N.Y. 1919).

[20] *Id.* at 653.

[21] 28 U.S.C. § 1696 (1970).

cate, in the case of a federal system, when the word "state" refers to a nation-state and when it refers to a constituent state thereof, it appears that the language of article 10 is sufficiently broad to encompass both, depending upon which court system is handling a given case.[22]

Article 11. The state of destination is given jurisdiction to determine any issue arising out of the execution of the letters rogatory. Again, the word "state" should be interpreted as described in the discussion of article 10.

If the court of destination concludes that it does not have jurisdiction to execute the letter rogatory, it shall ex officio forward the documents and a summary of the procedural history ("antecedents") to the appropriate court or authority within the state of destination. This rule prevents the documents from being returned to the state of origin merely because they were initially directed to the improper authority within the state of destination.

Article 13. Consular or diplomatic agents are also authorized under this provision to execute letters rogatory, if such action is not contrary to the laws of the state of destination.

Article 14. This article is basically directed towards nations which are involved in economic integration schemes, such as the Latin American Free Trade Association or the Andean Common Market. Such countries are permitted to conclude more liberal arrangements among themselves concerning letters rogatory and such liberalized arrangements do not have to be extended to other member states of this Convention.

Article 15. This article authorizes member states to continue or to enter agreements with more liberal provisions on letters rogatory. It also authorizes the continuance of practices between states concerning letters rogatory which may be more liberal than those prescribed by the Convention. Hence service by mail or by a private person would still be legal, if the state of destination does not object.

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[22] This article also permits the use of special procedures when so requested by the state of origin, provided the use thereof is not contrary to the laws of the state of destination. This provision is not likely to be of much significance in the case of the service of documents. It could be useful in the taking of evidence, such as cross-examination, from abroad, but, as already indicated, it is recommended that the subject of evidence be handled in another convention.

Article 16. This article allows a member state to declare that the Convention shall also apply in criminal, labor, arbitration, and contentious-administrative cases, as well as other matters.

Article 17. This provision states that the state of destination may refuse to execute a letter rogatory which is manifestly contrary to its public policy ("ordre publique"). This public policy exception, usually undefined, is one that appears in many international conventions. Because of the vagueness of its terms, scholars have long objected to it as simply offering an escape hatch to undermine a treaty obligation. The Hague Service Convention in article 13 did narrow the area within which a state could refuse to comply with a request for service to situations where compliance would infringe upon the destination state's "sovereignty or security." Unfortunately, since it did not prove possible to insert this more restrictive language in the Inter-American Convention, one can only hope that member states will narrowly construe this public policy exception.

Articles 18 through 20, 22, and 23. These are standard provisions for O.A.S. conventions which relate to signing, ratification, accession, entry into force, denunciation, and deposit.

Article 21. This article allows member states, which have two or more territorial units in which different systems of law apply, to declare that the Convention applies to some, but not to others, of its territorial units. This is a standard provision currently being inserted in all the Hague Conference private international law conventions at the request of Canada. Such clause will allow Canada to accede to these conventions, but to exclude, for example, Quebec from coverage if that province so desires.

IV. Possible Problems

A. *Administrative Machinery*

The basic administrative structure needed to implement an international convention on service has already been established in the United States under the Hague Service Convention, and it appears that this structure could be extended to accommodate the Letters Rogatory Convention without too much difficulty. There is, however, one potential difference in the operation of these two conventions. Under the Hague Service Convention, our Central Authority, the U.S. Department of Justice, is used only

when the United States is the state of destination. When the documents originate within the United States, they are sent directly to the Central Authority of the foreign nation of destination. Under article 4 of the Inter-American Convention, it appears that the U.S. Department of Justice might also be designated as the Central Authority for documents originating in the United States. This would mean a lawyer in Chicago could send his request for service on a Mexican resident to the U.S. Department of Justice and let that Department forward the documents to the appropriate Mexican authorities. Would this be imposing an unreasonable burden on the U.S. Department of Justice? Since the Justice Department's main task would be simply to forward the document to the proper Mexican body, such as Mexico's Central Authority, it is suggested that the answer is "no."

B. *Definition of Term "Letters Rogatory"*

Under applicable U.S. regulations,[23] a "letter rogatory" is a "formal request from a court" of one country to "a foreign court to perform some judicial act," such as to serve a summons or take evidence. Under the mechanisms established by this Convention, the request might come not only from a court, but also from diplomatic or consular agents or from a Central Authority. Likewise, under article 13, a letter rogatory, under certain conditions, may be directed to and executed by diplomatic or consular agents. Fortunately, this definition can be easily revised through action by the executive branch to reflect these alternative routes.

The regulations further state: "In United States usage, letters rogatory have been commonly utilized only for the purpose of taking evidence."[24] This statement will need revision to encompass service of documents.[25]

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[23] 22 C.F.R. § 92.54 (1975).

[24] *Id.*

[25] The consequences of a failure to amend the definition become apparent when it is noted that at least one court has narrowly construed the term to deny the execution of a letter rogatory for the purpose of service:

> Letters rogatory have been . . . long familiar to our courts, and . . . exclusively limited by understanding and in practice to proceedings in the nature of commissions to take depositions of witnesses . . . .

In re Letters Rogatory Out of First Civil Court of City of Mexico, 261 F. 652, 653 (S.D.N.Y. 1919).

However, as discussed at text accompanying note 20 *supra*, the basis of that court's objection went to the fear that execution of the letters rogatory would confer jurisdiction

C. *Language Requirements*

Unlike the Hague Service Convention, the Letters Rogatory Convention does not contain an appendix of stipulated forms which must be used; to wit, the "Request," "Certificate," and "Summary."[26] Moreover, the Inter-American Convention requires that the letters rogatory and the appended documentation be translated into the language of the state of destination,[27] whereas the Hague Service Convention requires only that the blanks in the stipulated forms be completed in English, French, or the language of the destination state.[28]

However, the Hague Service Convention was intended as a world-wide mechanism to which nations with a variety of different languages might adhere. Hence, it was mandatory to include some provisions restricting the number of languages and the quantity of translations the member state might demand. In contrast, the nations within the Inter-American system all use one of the major western tongues (English, Spanish, French, or Portuguese) as their official languages. Thus, the need to translate the "appended documentation" should not constitute an insurmountable burden.

D. *Excessive Formalities*

Several commentators have objected that the Convention requires unnecessary fomalities. For example, under articles 5 and 8, the complaint, as well as any supporting exhibits, must be

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on the Mexican court. This danger has been expressly eliminated by article 9 of the Convention.

Moreover, 28 U.S.C. § 1696 (1970) specifically authorizes the use of letters rogatory for the purpose of service. It is true that this section describes a "letter rogatory" as coming from a "tribunal." However, that section also permits such service on behalf of foreign proceedings "upon application of any interested person." This language would seem sufficiently broad to include requests originating with diplomatic or consular agents or the Central Authority. Surely, if our law is liberal enough to allow private individuals to request such judicial assistance, no violence would be done to the statute by granting the same capacity to these official bodies.

[26] For samples of these forms, see FED. R. CIV. P., 4, Notes.

[27] LETTERS ROGATORY COVENTION art. 5.

[28] HAGUE SERVICE CONVENTION art. 7. The Hague Convention also contains requirements as to the language which must be used for the forms themselves. *Id.* art. 6. As to language requirements in service cases, *see, e.g.*, Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973); Julen v. Larson, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).

translated and attached. Americans tend to think that a short summary of the complaint should suffice when the foreign official is merely being asked to serve a document. However, Latin American attorneys negotiating the Convention, who tend to be more attached to formalities than U.S. attorneys are, considered such complete documentation in their own language an absolute essential.

Another objection is to article 5's requirement of legalization in most cases. This series of chain authentications strikes Americans as a long, complicated, and superfluous process. It would seem preferable to treat the signature of a public official as authentic, unless some reason arises to question its authenticity. This is the modern approach taken in many nations, especially in Europe. Recently, the American Bar Association recommended that the United States adhere to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents.[29]

Nevertheless, in Latin America the passion for formalities in regard to legalizations still prevails. Delegates from the Latin American nations did concede to the views of the United States in the case of legalizations for letters rogatory from courts in border regions,[30] and for letters rogatory transmitted through diplomatic or consular channels or through the Central Authority.[31] They also agreed in article 5(b) that the translators did not have to be "official" translators. Having made those concessions, they were unwilling to permit further inroads on their ideas of requisite formalities.

It has been suggested that, because of the excessive formalities required, the United States should refuse to ratify this Convention. This position, however, fails to take into account that Latin American officials and courts presently require translated documents and legalizations. Moreover, under the present chaotic system, a U.S. attorney or judge cannot be certain to whom such materials should be sent. Finally, even after the proper papers are placed in the hands of the appropriate foreign authority,

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[29] *Done*, Oct. 5, 1961, 527 U.N.T.S. 189.

[30] LETTERS ROGATORY CONVENTION art. 7.

[31] *Id.* art. 6.

there is no international legal requirement that he execute the request.

E. *Default Judgments*

The Hague Service Convention contains special provisions concerning default judgments, which can help satisfy American due process requirements.[32] No such provisions are contained in the Letters Rogatory Convention. However, since article 9 of the Convention relieves courts from the necessity of recognizing the jurisdiction of the state orginating the letter rogatory, U.S. courts would not be obligated to enforce any objectionable judgment which might result therefrom.

In any event, no U.S. court has the power to prevent the court of another nation from handling a case in a situation where our due process requirements may be considered lacking. The capacity of U.S. judicial bodies to object effectively to such proceedings comes into play only when they are subsequently asked to recognize and enforce a judgment from a foreign nation. Since the "full faith and credit" clause[33] of the United States Constitution does not apply to foreign-nation judgments,[34] a U.S. court can and should refuse to enforce a judgment from another country where basic due process requirements have not been satisfied.[35] The Letters Rogatory Convention would not change this result. Thus, the absence of special provisions on default judgments in this Convention does not appear to offer any threat of infringement on our constitutional protections.

V. RECOMMENDATIONS

Ratification of this Convention by the United States should be subject to the following understandings.

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[32] HAGUE SERVICE CONVENTION arts. 14, 15.

[33] U.S. CONST. art. IV, § 1.

[34] Hilton v. Guyot, 159 U.S. 113 (1895).

[35] Most American courts, it should be noted, will enforce a judgment from a foreign nation, if the other country had adjudicatory jurisdiction in the international sense, and if fair procedures were utilized. Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720 (1970); Von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968). *See also*, Uniform Foreign Money-Judgments Recognition Act, 13 UNIFORM LAWS ANN. 271, enacted in Alaska, California, Illinois, Maryland, Massachusetts, Michigan, New York, and Oklahoma.

A. *Limitation of Scope to Service of Process*

For reasons already discussed,[36] the United States should make a reservation under article 2(b) that the Convention shall not apply to taking evidence or obtaining information in other nations.

B. *Restriction of Coverage to Civil Matters and Arbitration*

As permitted under article 15 of the Convention, our accession should include a declaration that the Convention shall apply to arbitration cases, but not to criminal, labor, or administrative cases. Application to arbitration cases would be consistent with the liberal attitude our law has shown toward recognition of foreign arbitration awards and with our ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[37] It might be noted that Mexico has also recently ratified that Convention, and that the O.A.S. Conference produced an Inter-American Convention on International Commercial Arbitration.[38] Because of the unique nature of our criminal and labor law systems, it is suggested that those cases should not be included within the purview of the Convention.

Obviously, the term "contentious-administrative" is one which gives lawyers difficulties. Consultations with administrative law experts have convinced this writer that the Convention should not encompass such cases where the United States is concerned. First, it is not clear at what stage of an administrative proceeding the Convention would come into play. For example, would it apply to *ex parte* proceedings? Next, it is possible that some foreign governments might undertake certain types of administrative investigations to which we would deem it inadvisable to render any governmental assistance. Finally, it is claimed that U.S. administrative agencies usually have available to them other means of notifying persons over whom they wish to exercise jurisdiction, such as attachment of their assets in the United States.

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[36] *See* text accompanying notes 11-13 *supra*.

[37] *Done*, June 10, 1958, *entered into force* Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3; *reprinted in* 9 U.S.C.A. § 201, Notes.

[38] 14 INT'L LEGAL MAT. 336 (1976).

C. *Application to the Entire United States*

There appears to be no valid reason for the United States to invoke the authority contained in article 21, excluding certain states or territories from coverage of the Convention. Rather, it should be effective throughout the fifty states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Panama Canal Zone. This can be accomplished under the supremacy clause of the United States Constitution[39] and the doctrine enunciated in *Missouri v. Holland.*[40]

D. *Revision of the Code of Federal Regulations*

Applicable federal regulations[41] will need to be revised to make it clear that the term "letters rogatory" includes the service of documents and that such documents may originate, not only with a foreign or international tribunal, but also with diplomatic or consular agents, or the "Central Authority" of any nation. Likewise, this provision should indicate that under certain conditions letters rogatory may be directed to and executed by diplomatic or consular agents.

CONCLUSION

The 19th Conference of the Inter-American Bar Association in October 1975 passed a resolution recommending that its member associations and individual members urge their governments to ratify this Convention.[42] Likewise, there are indications that the Mexican Government is favorably inclined toward ratification.

The picture within the United States is less clear. The two American Bar Association committees studying the Convention are split. The Private International Law Committee voted overwhelmingly in favor of ratification, but several members of the Committee on Transnational Judicial Assistance have expressed strong objections. As of the time of writing this article, the U.S.

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[39] U.S. CONST. art. VI.

[40] 252 U.S. 416 (1920). In upholding a treaty which had been entered into for the protection of migratory birds and a subsequently passed domestic statute to the same effect, the Court noted that the treaty power may override the control which a state might normally exercise over its inhabitants and become binding on the states. *Id.* at 434.

[41] 22 C.F.R. § 92.54 (1975).

[42] Resolution No. 2.

Department of Justice has indicated it will recommend against adoption of the Convention. Whether this position is unalterable is not known.

The objections focus on several points: (1) The Latin American nations should adopt the Hague Service Convention, because it is a better convention; (2) the English used in the Letters Rogatory Convention is not the most felicitous; (3) the Convention does not absolutely mandate the establishment of a Central Authority; (4) it requires too many formalities; and (5) it does not contain the default provisions of the Hague Service Convention.

For reasons already given, these arguments seem accurate, but irrelevant. The Hague Service Convention may be a better convention, but it is unlikely that Latin American nations will adopt it. The English translation of the Letters Rogatory Convention may be less than superb, but it is probably functional. U.S. common law judges have long shown themselves capable of reasonable interpretations of less-than-artful phrases in contracts and statutes, where the drafters' native language was English. Surely they will not abandon this same common sense when faced with a document that was negotiated in four languages, each version of which had to be "equally authentic."

Naturally, the designation of a Central Authority is vital to the proper operation of the Convention. As previously mentioned,[43] one can argue such designation should be considered compulsory by implication under article 4, paragraph 2. But legal obligations aside, it is in the self interest of the member nations to do so. Imagine the difficulties a Columbian judge must have trying to figure out where to send papers which concern a defendant residing in Odessa, Texas. Columbia needs the United States to designate one Central Authority even more than we need Columbia to do so.

In regard to criticism of the many formalities required under the Letters Rogatory Convention, the Convention does nothing to make matters worse; and it offers at least some improvement by eliminating the requirement for legalizations in certain cases and for "official" translations. Finally, although it might have been better to include the default provisions of the Hague Service Con-

[43] *See* text accompanying note 14 *supra*.

vention, it was not possible to convince the Latin Americans of their importance. Because article 9 at least maintains the existing amount of protection, the lack of default provisions should not be a bar to ratification.

The Inter-American Convention on Letters Rogatory is far from perfect. Nevertheless, it appears that we can live with it and that it is better than the status quo. Currently, there is no orderly way to serve documents in Latin America. This Convention will, at least, require the member nations to execute our requests for service and will advise our lawyers what they must provide in the way of documents, translations, and legalizations to ensure execution. The Convention is a sufficient improvement over the present situation to warrant ratification by the United States.

APPENDIX

INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

OAS Official Documents OEA/Ser. A/21 (SEPF);
Treaty No. 43 (1975)

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:

I. USE OF TERMS

Article 1

For the purposes of this Convention the terms "exhortos" and "cartas rogatorias" are synonymous in the Spanish text. The terms "letters rogatory", "commissions rogatoires", and "cartas rogatorias" used in the English, French and Portuguese texts, respectively, cover both "exhortos" and "cartas rogatorias".

II. SCOPE OF THE CONVENTION

Article 2

This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate authority of one of the States Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad;

b. The taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect.

Article 3

This Convention shall not apply to letters rogatory relating to procedural acts other than those specified in the preceding article; and in particular it shall not apply to acts involving measures of compulsion.

III. TRANSMISSION OF LETTERS ROGATORY

Article 4

Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be.

Each State Party shall inform the General Secretariat of the Organization of American States of the Central Authority competent to receive and distribute letters rogatory.

IV. REQUIREMENTS FOR EXECUTION

Article 5

Letters rogatory shall be executed in the States Parties provided they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to be duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination.

Article 6

Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required.

Article 7

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

Article 8

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

c. Where appropriate, information on the existence and address of the court-appointed defense counsel or of competent legal-aid societies in the State of origin.

Article 9

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it.

V. EXECUTION

Article 10

Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.

At the request of the authority issuing the letter rogatory, the authority of the State of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested, provided this procedure or the observance of those formalities is not contrary to the law of the State of destination.

Article 11

The authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory.

Should such authority find that it lacks jurisdiction to execute the letter rogatory, it shall *ex officio* forward the documents and antecedents of the case to the authority of the State which has jurisdiction.

Article 12

The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties.

The State of destination may, in its discretion, execute a letter rogatory that does not indicate the person to be held responsible for costs and other expenses when incurred. The identity of the person empowered to represent the

applicant for legal purposes may be indicated in the letter rogatory or in the documents relating to its execution.

The effects of a declaration *in forma pauperis* shall be regulated by the law of the State of destination.

Article 13

Consular or diplomatic agents of the States Parties to this Convention may perform the acts referred to in Article 2 in the State in which they are accredited, provided the performance of such acts is not contrary to the laws of that State. In so doing, they shall not perform any acts involving measures of compulsion.

VI. GENERAL PROVISIONS

Article 14

States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.

Article 16

The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and "contentious-administrative" cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.

Article 17

The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public").

Article 18

The States Parties shall inform the General Secretariat of the Organization of American States of the requirements stipulated in their laws for the legalization and the translation of letters rogatory.

VII. FINAL PROVISIONS

Article 19

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 20

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 21

This Convention shall remain open for accession by any other State. The instrument of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 22

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after desposit by such State of its instrument of ratification or accession.

Article 23

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 24

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the information mentioned in the second paragraph of Article 4 and in Article 18, and the declarations referred to in Articles 16 and 23 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.