Proof of Foreign Law and Facts

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INTERNATIONAL litigation is an inevitable consequence of technological changes that have made the world a smaller place. American clients have accidents and disputes wherever they go, and the airplane allows them to go anywhere. When those incidents take place in foreign countries, the resulting litigation is complicated by the clash of two systems of law and procedure. This paper explains the processes available to remove two obstacles to trouble free litigation. Part I analyzes the problems associated with the use of foreign law in domestic courts. Part II discusses the mechanisms available to obtain foreign facts for use in domestic courts.

I. FOREIGN LAW (Non-United States Jurisdictions)

A. The Legal Framework

Review of American approaches to the pleading and proof of foreign law reveals three alternative frameworks within which the lawyer may be forced to operate. Over time, the trend has been away from the treatment of foreign law issues as questions of fact, to treatment as matters properly susceptible to judicial notice.
and to codification of procedural rules expanding the options available to counsel and the court. Because this path of evolution has not been followed in all jurisdictions, the three schemes merit individual attention.

1. Foreign Law As A Fact

Questions of foreign law were questions of fact at common law and continue to be so in some states. Important consequences flow from this categorization: the "fact" of foreign law must be pleaded; the issue may be tried to a jury rather than a judge; in proving the fact of foreign law, exclusionary evidence rules will apply; deference to lower court findings of fact will shield foreign law issues from de novo review by reviewing courts; and holdings on questions of foreign law in any one case will not have the force of stare decisis in later cases.

Under the fact approach, failure to plead foreign law, like failure to plead any other essential fact, seriously risks dismissal of a party's pleadings. If the complaint is not dismissed, some presumption will be invoked to determine the content of the governing law. Whatever the substance of that presumption, reliance

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9 See C. McCormick, LAW OF EVIDENCE 779 (2d ed. 1972). See also 9 J. WIGMORE, EVIDENCE § 2573 (3d ed. 1940). Miller concludes that practice in most states deviates in one or more respects from the common law approach. Miller, supra note 2, at 626 n.50. However, in many states, this deviation may involve nothing more than transfer of the issue from jury to judge. See, for example, the Illinois practice discussed in the text accompanying notes 26-27, infra.

* See Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif. L. Rev. 23, 25-29 (1957); Miller, supra note 2, at 620-24.

5 Stern, supra note 4.


7 Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725 (1951), lists at least three pre-
on what may be a totally inaccurate assumption about the substance of foreign law can never constitute adequate representation if the means exist to accurately ascertain the law. Moreover, the attorney who believes that his decision to ignore foreign law will force the court to presume applicability of some more favorable law may be thwarted by opposing counsel's introduction of inaccurate or incomplete evidence of foreign law—leaving the case not to be decided by the presumption, but rather by a misstatement of foreign law.

The concept of entering litigation without a clear understanding of the legal doctrines that should, or could, govern the outcome is anathema to any skilled trial attorney.

The most long-standing criticism of the fact approach has centered on the assumptions that might be employed by a court: (1) that the law of the foreign country is the same as that of the forum; (2) that the parties have, by their silence, acquiesced in the application of the forum law; (3) that the foreign law must, as the law of a civilized country, accept some fundamental principles of justice, usually those necessary to support the claim. The first two are thin disguises for lethargic avoidance of the foreign law problem. See, e.g., Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U.L. REV. 602 (1975). Dangerous subjectivity inheres in the third. See, e.g., Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958). Compare Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956) (directing a verdict for defendant on plaintiff's claim for auto accident injuries for plaintiff's failure to allege or prove that Arabian law included rudimentary tort law principles) with Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962) (presuming that, as a civilized country, Turkey must recognize a fundamental duty of care).

See, e.g., Alexander, *supra* note 7, at 609-10 and n.37 (illuminating several examples of erroneous presumptions, including presumed equivalence between Chinese property law and the community property laws of California). See also Lutwak v. United States, 344 U.S. 604, 621 (1953) (strains judicial credulity to presume that common law and civil law were the same when history indicated otherwise).

See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations 6-3, 6-4, 6-5, 7-8, 7-23. These presumptions have been described as "refuges of the desperate" and said to "only mark cases that were not or could not be prepared." McKenzie, *The Proof Of Alien Law*, ABA PROCEEDINGS, SECTION ON INTERNATIONAL AND COMPARATIVE LAW 50 (1959).

The interpretation offered by opposing counsel need not be incorrect to thwart a party's reliance on a presumption. Introduction of any proof by the defendant to show that foreign law is at variance with the presumption will destroy the presumption. The plaintiff may then be forced to gather and offer the evidence he should have offered originally, but may have neither the time nor the resources to do so after his presumption has been shattered. See Sommerich & Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 140-41 (1953) (presumptions "may only postpone the time when the plaintiff will be required to introduce proof of the foreign law or lose his case").
tered on the alleged impropriety of delegating questions of "law" to juries. Juries, it is argued, are not well-versed in principles of statutory construction and have not traditionally been required to decide the weight and meaning of apparently conflicting precedents. This criticism is, to a great extent, also true of trial judges as well, and thus argues not only for a transfer of this consideration from jury to judge, but also requires close scrutiny by reviewing courts—a process sometimes thwarted by strict adherence to the fact approach. In addition, it is argued that juries, unlike judges, are unable to inform counsel of the inadequacy of evidence on the particular issue of foreign law and cannot request further evidence on the issue.

Jurisdictions treating foreign law as a question of fact have had to grapple with the application of rules of evidence designed for more traditional fact issues. While these rules have often been modified to ease the burden of proving foreign law, vestiges of rigid evidentiary rules remain and must be carefully considered in jurisdictions retaining the "fact approach."

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11 See 5 Moore's Federal Practice ¶ 44.1.05 (2d ed. 1978) (referring to "scholarly comment from Story to Wigmore"); 9 J. Wigmore, Evidence ¶ 2558 (1940); Advisory Committee Note, 10 Fed. R. Serv. 2d lxvii (1967).

12 It has been argued that since demeanor of expert witnesses is rarely determinative of the accuracy of their testimony and the analytical process of synthesizing past decisions and applying the resulting doctrines is a talent cultivated in appellate rather than trial courts, appellate courts should have power to completely review all lower court findings on foreign law issues. See Nussbaum, supra note 2, at 1028-29; Note, Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation, 72 Harv. L. Rev. 318, 319-20, 322 (1958). But see, e.g., Domke, Expert Testimony in Proof of Foreign Law in American Courts, 137 N.Y.L.J. Nos. 48 & 49 (1957) (emphasizing the importance of cross-examination of expert witnesses).


14 See Miller, supra note 2, at 621-22; Stern, supra note 4, at 31-38.


16 To avoid problems with the Best Evidence Rule parties must justify the simultaneous introduction of statutes and expert testimony about those statutes on the basis of the need to show the construction of the statutes—an issue on
Appellate courts, by virtue of their scope of review, invariably scrutinize a lower court's factual findings less closely than trial court decisions on questions of law. Classification of foreign law issues as fact questions thus creates a presumption in favor of the lower court's rulings when based on conflicting evidence, even if the reviewing court might have decided the issue differently.

Denial of res judicata, or stare decisis, weight to decided questions of foreign law can result in expensive repetition of time-consuming testimony and inconsistent adjudications of the same issue. Although stare decisis imposes no ban on the power of which parol testimony will not be excluded for failure to meet the Best Evidence Rule. Cf. Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904) (introduction of Mexican statutes did not preclude expert testimony on their proper construction). A state may, however, find that when an expert's construction of the statutory or common law of a jurisdiction is based only on decisions of that jurisdiction's courts, the printed opinions are the required best evidence and the expert's testimony on those decisions is inadmissible. See Ader, Foreign Law in Illinois Courts, 58 ILL. B.J. 420, 427 (1970).

17 See, e.g., Note, Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation, supra note 12. See also 5 Moore's Federal Practice § 44.1.03 (2d ed. 1978) (noting difference between review of foreign law issues under a clearly erroneous standard (fact approach) and complete review (matter of law)).

Of course, whether categorized as a matter of fact or law, it is hard to imagine that an appellate court would or could do anything but defer to the trial court's discretion, when the only issue is a pure credibility contest between conflicting expert opinions, unless the expert assists in the preparation of the appellate brief, better explaining the strengths of the testimony he put in the record and the weaknesses of the expert testimony introduced by his opponent.

18 See, e.g., Remington-Rand, Inc. v. Societe Internationale Pour Participations Industrielles et Commerciales S.A., 188 F.2d 1011 (D.C. Cir. 1951) (reviewing matters of foreign law under clearly erroneous standard because, until 1963, such matters were matters of fact); In re Schluttig's Estate, 36 Cal. 2d 416, 424, 224 P.2d 695, 700 (1950) (applying “substantial evidence” test). Compare First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968) (taking advantage of Federal Rule 44.1's classification of foreign law as a matter of law to make its own determination of foreign law, reversing the district court).

19 Cf. In re Estate of Krachler, 199 Or. 448, 263 P.2d 769 (1953) reviewing inconsistent construction of reciprocal rights of inheritance under the law of National Socialist Germany in In re Schluttig's Estate, 36 Cal. 2d 416, 224 P.2d 695 (1950), In re Miller's Estate, 104 Cal. App. 2d 1, 230 P.2d 667 (1951), and Estate of Leefers, 127 Cal. App. 2d 550, 274 P.2d 239 (1954). The most direct lesson from the decisions chronicled in Krachler is that courts should not give too much precedential weight to previous decisions on similar matters of law, since the changes in position in the Krachler series of cases resulted primarily from the introduction in each succeeding case of material not considered in the previous decisions. See Stern, supra note 4, at 28 n.39. However, two additional conclusions can be drawn: first, foreign law issues that may seem unique in any given case may well have arisen before, making precedential weight an
courts to change positions, it does make a decision on an issue of law a more deliberate process, requiring a court to search for and evaluate those instances in which the same questions might already have been decided. More importantly, it enables the parties to structure their negotiations, claims, and defenses with a degree of certainty attainable only when there is some assurance that an issue will be decided the same way it has previously been decided by the courts. Treatment of foreign law issues as questions of fact minimize whatever certainty might be attained by treating them as matters of law, and adhering to case precedent.

2. Foreign Law As A Subject For Judicial Notice

As a result of some criticism in allowing juries to be the arbiters of foreign law, and in an attempt to expand the sources of information available in deciding these questions, many states have provided, by statute, that questions of foreign law are proper subjects for judicial notice. It is important to distinguish between making foreign law a matter for judicial notice and making it a matter for the judge. The latter approach is a half-way measure exemplified by the Uniform Judicial Notice of Foreign Law Act (The Act). As regards foreign law (non-United States jurisdictions), the Act is not a judicial notice statute. One who believes he has escaped the hazards of the fact approach because a particular state has adopted the Act is sadly mistaken. The Act is primarily concerned with the "foreign" law of a sister state, rather than important issue; second, courts must explain in their opinions how foreign law issues were resolved so that later courts may properly decide whether new evidence has been uncovered, rendering the prior decision erroneous.

2 Even under the fact approach, some courts did give precedential weight to prior court decisions that had interpreted similar foreign law issues. See Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2d Cir. 1965) (relying heavily on a discussion of Greek law in an earlier case); Biddle v. Commissioner, 33 B.T.A. 127 (1935), aff'd, 86 F.2d 718 (2d Cir. 1936), aff'd, 302 U.S. 573 (1937) (relying on the Ninth Circuit's prior construction of a British tax law); People v. Russian Reinsurance Co., 225 N.Y. 415, 175 N.E. 115, 117 (1931) (following an earlier New York court construction of Russian corporate law).

21 See 9 J. WIGMORE, EVIDENCE § 2558 (3d ed. 1940); Sass, supra note 1, at 341-42 & n.25.


23 Section 5 of the Act provides: "§5. Foreign Country—The law of a jurisdiction other than those referred to in Section 1 [U.S. states and territories] shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice." Id. at 569.
the law of a foreign country. As regards the substantive law of a foreign country, it does no more than make the matter a subject for determination solely by the court. Thus, in jurisdictions adopting the Act, one must plead the foreign law (since the court cannot take judicial notice of it) and then prove the law, as pleaded, with evidence that meets traditional tests of admissibility. The parties cannot rely upon the court to eliminate these evidentiary hurdles.

Illinois experience illustrates these problems. Both parties to a fairly recent case had included in their pleadings descriptions of the Venezuelan laws they thought applicable and controlling. The trial court dismissed two of the counts of plaintiff's complaint for failure to state a cause of action under the Venezuelan law. The appellate court reversed, holding that, under the Act, that issue would be decided by the judge and could not be so decided without of assistance of evidence—preferably from experts. Mere agreement by the parties as to the "verbiage or wording" of the statutes was an insufficient basis for judicial notice of their meaning.

The message is clear: there can be no decision at the pleading stage based only upon a statement of the foreign law without evidence of proper interpleadings, presumably evidence presented in the form of expert testimony; and the evidence offered must also meet the test of admissibility. The trial court's findings on that issue, when based on conflicting evidence, will then be entitled to deference upon review. Thus, in the states following the approach of the Act, only the identity of the fact finder has been changed.

Some states have adopted statutes other than the Uniform Act

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26 See Ader, supra note 16, at 427.
that genuinely provide for judicial notice of the laws of foreign countries. New York has experimented with both permissive and mandatory approaches to judicial notice of foreign law. The New York statute currently requires a court to take judicial notice on the matter of foreign laws only:

if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at trial, but a court may require or permit other notice.

The same statute allows a court to take judicial notice even if not specifically requested by the parties. Decision on the issue is reviewed as a matter of law only, and evidence otherwise inadmissible, generated by the court or the parties, may be considered in determining that issue.

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29 See Sass, supra note 1, at 341 n.25.


21 N.Y. Civ. Prac. Law § 4511 (McKinney 1963), currently in effect; other states adopting mandatory statutes include Massachusetts, Mississippi, North Carolina and Virginia. Sass, supra note 1, at 342.

Although the Massachusetts statute (M.A. Ann. Laws ch. 233, § 70 (Michie/Law Co-op 1979)) is written in mandatory language ("the court shall take judicial notice of the law of a foreign country whenever the same shall be material"), the courts have held that attention must be drawn to the foreign law before the statute becomes mandatory. Commercial Credit Corp. v. Stan Cross Buick, 343 Mass. 622, 180 N.E.2d 88 (1962). It is arguable that the requirements of a request and materiality, under the Massachusetts statute, and of a request, notice, and "sufficient information," under the New York statute, make these supposedly mandatory statutes quite discretionary.


23 Id. In Frummer v. Hilton Hotels, Int'l, Inc., 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Sup. Ct. 1969), a negligence action for injuries sustained in a London hotel, plaintiff's motion for a new trial was granted on the basis of a very favorable English statute that the plaintiff had failed to present to the court. The court invoked the permissive portion of section 4511 to judicially notice that the English statute imposed a standard of comparative negligence rather than the New York standard of contributory negligence; a new trial was granted in the "interest of justice." The interests of justice would also seem to require that defendant be compensated for plaintiff's costly oversight.


The New York statute thus illustrates the essential nature of the judicial notice approach: judges looking to the sources they find appropriate to decide questions of law when they feel that justice requires them to take such notice. The greatest criticism of this approach is its lack of safeguards. Conceivably, a judge

On judicial notice, see generally C. McCormick, Law of Evidence §§ 328-335 (1972).

Schlesinger distinguishes four situations in which judicial notice might be used: (1) When the parties each offer conflicting interpretations of the foreign law and must support their interpretations with sources an American court might find inadmissible. Here the statute serves as a safety valve, relieving the parties of technical proof requirements which would otherwise prevent a complete analysis of the foreign law issues; (2) When one of the parties presents evidence on foreign law but the court decides to apply domestic law and refuses to make any findings regarding the foreign law. The statute may allow the appellate court to conduct its own study of foreign law and direct entry of final judgment. Without the statute the court would have to remand for a new trial; (3) When neither party presents evidence on foreign law in the trial court and the issue becomes important on appeal. Judicial notice is again a safety valve, relieving the parties of the burden of a retrial, if the foreign law is easily ascertainable by the appellate court; (4) When neither party presents evidence on the foreign law issue (although either may have pleaded it) and the trial court finds that foreign law should govern and wonders whether to use the discretion provided by a judicial notice provision to notice the foreign law. R. Schlesinger, Comparative Law 181-84 (3d ed. 1970). The fourth situation presents the difficult problems. First, there is a greater risk of determination without the benefit of full adversary proceedings. Second, there are valid questions about whether the party whose claim or defense depends upon foreign law is entitled to have the court do the homework not done by that party.

Sommerich and Busch make a strong case for use of the adversary process (rather than independent judicial research), citing problems of fairness, language, inadequate facilities, unfamiliar concepts and processes of legal reasoning as obstacles to any endorsement of unrestricted judicial notice. O. Sommerich & B. Busch, supra note 1, at 66-69. See also Alexander, supra note 6, at 616 n.65; Wyzanski, A Trial Judge's Freedom and Responsibility, 7 Rec. of N.Y. City B. A. 280, 294 (1952) (calling for judges to lay matters before the parties for comment before finalizing any decision on judicial notice); Schoch, Book Review, 1 Am. J. Comp. L. 295, 297-98 (1952) (emphasizing the importance of cross-examination). But see Commissioners' Comments to Uniform Interstate and International Procedure Act, 13 Uniform Laws Ann. 311-12 (1975) (discounting the likelihood of unfair surprise through independent judicial investigation). The courts may attempt to compensate for some of these dangers by invoking powers of judicial notice when the risk of error is fairly small (for example, when the foreign legal system is similar, better research facilities are available, and no language barrier is present), while refusing to judicially notice foreign law when such indicia of reliability are not present. Compare Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) (independent research of English law), with Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956) (refusing to judicially notice Saudi Arabian law). See also Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949). Sitting in admiralty, the court drew such a distinction between "safe" judicial notice and "unsafe" judicial notice:
may apply foreign law without adequate notice to the parties of their opportunity to address the issue, or without adequate explanation of why his interpretation of the law is being chosen over that of the parties. A trial attorney would be remiss in believing that because there is no express advance pleading requirement in such a scheme, he need not fully brief the issue for pretrial and trial presentation. On the contrary, it is in exactly such an environment of uncertainty that parties must be especially careful to fully address issues that may not otherwise stand the test of adversary argument.

It is true that this Court has on several occasions held international rules which had passed into the 'general maritime law' to be subject to judicial notice. But where less widely recognized rules of foreign maritime law have been involved, the Court has adhered to the general principle that foreign law is to be proved as a fact. Id. at 396-97 (citations omitted). The Court's distinction approximates, perhaps as accurately as is possible, Professor Morgan's definition of judicial notice as taking cognizance of things which are generally known or are reasonably ascertainable as certain. See E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 36 (1956). Few foreign country law issues meet Professor Morgan's standard for matters properly susceptible to judicial notice. Stern, supra note 4, at 39-48. Sister state laws and the laws of treaties to which the United States is a party usually better fit the definition and are thus more often decided on the basis of judicial notice. See 9 J. WIGMORE, EVIDENCE § 2573 (3d ed. 1940).

Judicial notice, even under a mandatory scheme may not be triggered until the parties bring foreign law to the attention of the court. See note 31, supra, discussing the Massachusetts statute. See also Wall Street Traders, Inc. v. Sociedad Espanolade Construction Naval, 236 F. Supp. 358 (S.D.N.Y. 1963), a libel in admiralty, dismissed for failure to prove Spanish law. The court held that an alternative to dismissal was judicial notice of the applicable Spanish law, but refused to take such notice. "The reason for the general rule that the federal courts will not take judicial notice of foreign laws ... is that the ends of justice will be better served if the court has the aid of counsel in interpreting that law." Id. at 359 n.6.

Cf. Ruff v. St. Paul Mercury Ins. Co., 393 F.2d 500, 502 (2d Cir. 1968) (test of the limits of flexibility of the reasonable notice requirement under Federal Rule 44.1; if no notice to adversaries in the district court, the appellate court cannot take judicial notice of the foreign law).

See, e.g., Currie, supra note 7, at 34. "It cannot perform magic and it can easily get out of hand. Judicial notice cannot dispense with the necessity of work to find the rule of decision." Id. As Alexander has pointed out, "judicial notice has merely become another technique for avoiding the foreign law problem." Alexander, supra note 7, at 618. While nothing can be certain, lawyers have a responsibility to avoid situations in which they knowingly risk a range of alternatives so wide as to include chances that the court may ignore foreign law entirely, may erroneously presume its content, or may do a half-baked job of research in totally unfamiliar materials and come to a conclusion without basis in foreign or domestic law.
3. Foreign Law As Law

Federal Rule of Civil Procedure 44.1,39 and the Uniform Interstate and International Procedure Act,40 liberalize the required pleading of foreign law, permit proof of foreign law by any relevant means, allow independent judicial research, and make the question of foreign law a matter of law for purposes of appellate review. Rule 44.1 is entirely consistent with Federal Rule 8(a) (requiring a short plain statement of the claim) and settles an old dispute41 over whether the requirement of fully pleading foreign law was inconsistent with the concept of notice pleading. Reasonable written notice is the minimum standard in the rule, and such notice may appear in the pleadings, or elsewhere. The Advisory Comments emphasize that the rule imposes no time limit; submissions as late as trial, or on appeal, might be entertained, al-

39 See generally Peritz, Determination of Foreign Law Under Rule 44.1, 10 Tex. Int'l L.J. 67 (1975); Schmertz, The Establishment of Foreign and International Law in American Courts: A Procedural Overview, 18 Va. J. Int'l L. 697 (1978). For thorough treatment of the issues by one of the rule's draftsmen, see Miller, supra note 2. The text of the rule is as follows:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling or a question of law.

FED. R. CIV. P. 44.1.

40 13 UNIFORM LAWS ANN. 279. The Uniform Act is intended to supersede the Uniform Judicial Notice of Foreign Law Act, but has been adopted in very few of the jurisdictions that adopted the Judicial Notice Act. Id. The text of article IV of the Act is an almost verbatim copy of the language of Federal Rule 44.1.

41 See Peritz, supra note 39, at 69. Two Second Circuit decisions, one year apart, had left the federal courts confused about the extent to which pleading of foreign law was required. See Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955). Compare Telesphore Couture v. Watkins, 162 F. Supp. 727 (S.D.N.Y. 1958) (pleading required) with Luckett v. Cohen, 145 F. Supp. 155 (S.D.N.Y. 1956) (pleading unnecessary). Some of this confusion continued even after the adoption of Rule 44.1. Admur v. Zim Israel Navigation Co., 310 F. Supp. 1033 (S.D.N.Y. 1969). Since notice under Rule 44.1 need not necessarily appear in the pleadings, it is technically not a pleading requirement; but even when given after the pleadings, such notice is little different from a Rule 15 amendment to the pleadings. The focus of the debate should be on defining the degree of specificity that makes such notice reasonable. On this issue, see text accompanying notes 77-83 infra.
though unjustifiably late submissions would undoubtedly not be considered.\footnote{43}.

The scope of materials that may be considered by the judge in ascertaining foreign law is broadened by the rule.\footnote{43} The materials need not meet the requirements for admissibility in the Federal Rules of Evidence.\footnote{43} A sharp contrast between the federal rule and some state approaches can obviously result. It is possible that in a given state court, evidence necessary to prove foreign law might be inadmissible. A federal court in the same state, applying federal procedure, could consider that same evidence to resolve the issue.\footnote{48}

Whenever possible, the parties should obtain the most reliable evidence attainable, at reasonable costs. In proving foreign law as a fact, however, few sources are available at reasonable cost.\footnote{49}

\footnote{43} As the Notes explain:

[In some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. Advisory Committee Notes to Rule 44.1, \textit{supra} note 11.]

Although Second Circuit decisions have been read by at least one author to imply an opportunity for consideration of foreign law for the first time on appeal, \textit{see} Peritz, \textit{supra} note 39, at 71-73, Ruff v. St. Paul Mercury Ins. Co., 393 F.2d 500, 502 (2d Cir. 1968), denied a plaintiff the opportunity to raise such issues on appeal when they had not entered the record below. The court's editorial remarks suggesting that Liberian law would not have helped plaintiff even if noticed, suggest that the court made (and perhaps would make in other cases) a cursory check to establish that no flagrantly unjust result would occur. Regardless of the nuances of the Second Circuit opinions, as a matter of planning, the rule is clear—foreign law issues are like evidentiary objections or complaints regarding instructions; failure to act forcefully at the proper time will probably effect a waiver of any right to raise the issue on appeal.

Pretrial laziness with foreign law issues is inadvisable, but not likely to be as deadly. While the Rule gives the trial court discretion to refuse to recognize unreasonably late notice, reported cases show only liberal pretrial treatment of foreign law problems. \textit{See}, e.g., First Nat'l Bank v. British Petroleum Co., 324 F. Supp. 1348 (S.D.N.Y. 1971); Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp., 283 F. Supp. 184 (S.D.N.Y. 1968) (presuming that New York law applied for the purposes of a summary judgment motion, while inviting parties to use the remaining time before final judgment to plead Dutch law). \textit{See also} note 17, \textit{supra}.


\footnote{45} Precisely this result was reached in Ramirez v. Autobuses Blancos Flecha Roja, 486 F.2d 493 (5th Cir. 1973).
The judge, in following Rule 44.1, is not bound by the traditional rules of evidence in deciding that issue. Reasonableness in the matters considered by the judge, within his discretion, seems a sufficient standard for admissibility under the Rule.\(^\text{46}\) It also would substantially reduce the cost of that proof.

The Rule also allows the judge to consider matter not introduced by the parties.\(^\text{47}\) While some judges had exercised this wide latitude of discretion before promulgation of the Rule, such conduct is now expressly allowed by the Rule. Experience, however, reveals a marked judicial preference for refusing to decide foreign law issues that have not been presented by the parties.\(^\text{48}\)

The Rule's express characterization of the issue as a matter of law makes partial summary judgment on the issues of foreign law an effective device for early resolution of disputes regarding the content and the meaning of the foreign law that is to govern the action.\(^\text{49}\) Other flexibility\(^\text{50}\) inherent in the Federal Rules combines with Rule 44.1 to make foreign law a very manageable issue in the

\(^{46}\) See Advisory Committee Notes to Rule 44.1, supra note 11.

\(^{47}\) Fed. R. Civ. P. 44.1.

\(^{48}\) See Pollack, Proof of Foreign Law, 26 Am. J. Comp. L. 470 (1978). Judge Pollack (of the Southern District of New York) believes that "[r]esearching foreign law is not an appropriate way for federal judges to spend their time." Id. at 471. Answering the suggestion that Rule 44.1 expressly authorizes the court to conduct such research, he states, "Yes, it does—but it doesn't require it to. Trial judges usually can't. Indeed, they usually shouldn't. And they probably won't." Id. (footnotes omitted). See also cases cited at notes 56-58 infra.


Classification as a matter of law, of course, also subjects the issue to complete appellate review. See, e.g., Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979); Kalmich v. Bruno, 553 F.2d 549 (7th Cir. 1977); Gillies v. Aeronaves De Mexico, S.A., 468 F.2d 281 (2d Cir. 1972).

federal courts, or jurisdictions following the federal rules' approach. For example, parties to a case involving foreign law are well advised to make use of requests for admission under Rule 36. Such requests may relate to matters "of fact or of the application of law to fact, including the genuineness of any documents." Thus, the request may be framed to require an admission of the proper application of foreign law to certain facts in a given case, or a very specific denial of that foreign law clearly distinguishing that which is admitted from that which is denied. The Rule, and the courts applying it, take a dim view of responses that plead ignorance, requiring a party to state that he has made reasonable inquiry and that information obtainable is insufficient to enable him to admit or deny. A court is likely to treat weak claims of insufficient information as admissions.

Admissions and stipulations may also be especially valuable when a party wishes to avoid the burdens of the application of rigid evidence rules requiring extensive proof of authenticity of foreign statutes or decisions. The flexibility of the Federal Rules should be used to avoid delay and expense in dealing with foreign law issues.

Parties should not assume that all of the practice under the fact and judicial notice approaches has disappeared. The federal bench has made their belief very clear that Rule 44.1 imposes no more duty upon judges to independently find the law than was true before the adoption of the Rule. Failure to give notice and prove the foreign law may thus continue to result in adverse judgments,

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51 Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955).
53 See Advisory Committee Notes to Fed. R. Civ. P. 36.
54 Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955).
55 See Miller, supra note 2, at 668 n.210.
56 Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252 (2d Cir. 1975); Bartsch v. Metro-Goldwyn-Mayer, 391 F.2d 150 (2d Cir. 1967).
or in the invocation of the variety of presumptions discussed earlier. 88

B. Using The Framework

Litigators know that even if the trial is far in the future, settlement negotiations and pretrial motions cannot occur without a clear understanding of the law applicable to a given case. The attorney who fails to ascertain the foreign law as soon as that law appears likely to govern, may later find that foreign law would have given him the grounds for an immediate motion to dismiss, the basis for an affirmative defense or a valid third-party claim, or for terms of a favorable settlement, thereby avoiding future costs and expenses.

1. The Primacy Of The Expert

Since trial attorneys are likely to be much less comfortable with the laws of another country than with those of another state, a foreign law expert must be obtained as soon as practicable. There is no sound reason to delay obtaining expert testimony, since such testimony will almost always be required. 89 Early understanding of the foreign law minimizes the opportunity for mistaken approaches, and maximizes the opportunity to utilize procedures that will settle foreign law disputes early in the progress of the case. While judicial decisions reveal a willingness to certify as experts persons with widely varying qualifications, 90 (including law

88 See, e.g., Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948 (9th Cir. 1977) (applied Hawaiian law when foreign law was not raised); Ahto Walter v. Netherlands Mead N.V., 514 F.2d 1130 (3d Cir. 1974) (Netherlands law presumed to be the same as the law of the forum); Bowman v. Grolsche Bierbrouwerij B.V., 474 F. Supp. 725 (D.C. Conn. 1979) (presuming the law of the Netherlands was the same as the law of Connecticut when defendants had given notice of, but no evidence in support of, their reliance on the law of the Netherlands).


90 United States courts do not require the expert to be a lawyer or to have practiced law in the foreign country. Nicolas Eustathiou & Co. v. United States, 154 F. Supp. 515 (E.D. Va. 1957) (expert need not have passed the Greek bar
librarians, magistrates, merchants, and foreign bureaucrats) lawyers and law professors schooled in the law of the relevant jurisdiction are likely to provide the best testimony. They tend to have more impressive qualifications, understand the foreign law as an entire system, and are being asked to do what they do best—evaluate statutes and decisions, and describe the current status of the law on a particular subject.

Use of the expert witness in proving foreign law is not significantly different from the use of technical experts in almost any kind of civil case. The expert's function is twofold: first, to prove the existence of the foreign law by answering direct questions regarding the enactment, promulgation, persistence and terms of foreign statutes, constitutions, codes, and decisions; and second, to testify about the application of that law to the instant case.


There is, however, some minimum threshold of expertise required. Experts cannot be certified on the basis of mere willingness and general custody of law books. Bostrom v. Seguros Tepeyac, 225 F. Supp. 222 (N.D. Tex. 1963), aff'd in part and rev'd in part on other grounds, 347 F.2d 168 (5th Cir. 1965).

In re Estate of Johnson, 100 Cal. App. 2d 73, 223 P.2d 105 (1950) (L.A. County Law Librarian, with doctorate degrees in German and civil law and experience testifying in various courts about the law of 20 foreign countries, allowed to testify about Norwegian law); In re Estate of Spoya, 129 Mont. 83, 282 P.2d 452 (1955) (testimony of law librarian as to the Yugoslavian law of estates accepted).

See, e.g., Pickard v. Bailey, 26 N.H. 152 (1852) (Canadian magistrate allowed to testify as to mode of executing notorial instruments in Canada).

In re Estate of Faber, 168 Cal. 491, 143 P. 737 (1914) (licensed factor engaged in buying and selling property in Turkey could testify as to absence of community property laws in Turkey).

See, e.g., Masocco v. Schaaf, 234 A.D. 181, 254 N.Y.S. 439 (1931) (Secretary of the Italian Consulate in Buffalo, N.Y. allowed to testify about the validity of an Italian marriage).


Use of an American trial lawyer with knowledge of the foreign law has other strategic advantages. Domke, supra note 60, at 6.

On the use of expert witnesses generally, see McCormick, supra note 3, §§ 13-18.
using a hypothetical question whenever necessary. The key differences from traditional expert testimony are that the foreign law expert will very often submit only written testimony, and the expert is often permitted to testify without the requirement of a hypothetical question, expressly applying his construction of foreign law to the case before the court. The former difference results primarily from the frequent resolution of the issue on briefs before trial without significant disputes. The latter occurs because the testimony is usually directed to the judge and has more of the character of a legal presentation rather than traditional trial evidence.

The expert should always be called upon to carefully explain the rules of construction and adherence to precedent, prevailing in the foreign jurisdiction. When literal translation distorts the meaning of the relevant legal provisions, the expert should explain the problem and illustrate the impropriety of literal translation with examples of other perhaps seemingly irrelevant but more dramatic examples of the manner in which the law’s “true” meaning would be lost in literal translation. When, as in many civil law jurisdictions, the weight given different interpretations of that law differ, depending upon the official or “accepted” status of the commentary or treatise in which the interpretations appear, the expert should thoroughly explain this phenomenon.

Finally, when dealing with the laws of Iran, Afghanistan, or other nations similarly situated, it should be remembered that counsel is entitled to ask the witness how, and why, the law might

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69 Judge Pollack expresses a strong preference for exclusive reliance on written expert testimony, discounting the value of cross-examination of legal experts. Pollack, supra note 48, at 473-75. Contra, Domke, supra note 60, at 7. (discussing the kinds of flaws in expert testimony that only cross-examination can reveal).

70 The papers submitted are usually in the form of affidavits that look much like appellate briefs except for the expert’s signature and biographical information.

71 See Domke, supra note 60, at 7; McKenzie & Sarabia, supra note 68, at 371. In civil law countries, at times “the observations in a commentary may be of the first order of precedence in providing the interpretation to be placed upon a provision in the code.” Id.

72 McKenzie & Sarabia, supra note 68, at 367-69.

73 See note 71, supra.
be given a new interpretation that is totally unlike that which has previously prevailed and which has been the basis for an opposing expert's conclusions. The theory underlying this approach is that the United States court is not trying to decide the case as it would have been decided the last time the foreign court heard a similar case, but rather is attempting to decide the case as the foreign court would decide this case if heard at this time.

C. Drafting The Pleadings

In actually pleading or giving notice of the foreign law on which a party's claim is based, a party must fairly apprise his opponent not only of his intent to rely upon foreign law, but also of the substance and effect of that foreign law. The problem lies in defining substance and effect. At a minimum, a party must include citations to the relevant statutory or decisional law. It is often wise to append copies of the statutes or decisions to the pleadings if the number and length of such decisions are not unmanageable. This practice is less advisable in fact oriented jurisdictions, since it may be thought to constitute an improper pleading of evidence. In addition, experts will undoubtedly put the fact of

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74 But see Couch v. Mobil Oil Corp., 327 F. Supp. 897 (S.D. Tex. 1971):
In the interest of effective justice this court should not apply Libyan law, for the complexities of interpreting the laws of a country that is in political upheaval and unrest is tenuous at best.
The efficient aids of Fed. R. Civ. P. 44.1 are of little assistance in such a case.

(arguing that domestic judges make, rather than find, foreign law and do not necessarily seek to determine how the foreign court would decide a case).


78 Courts often have limited access to foreign law resources. McCormick, supra note 3, at 779 n.75; Pollack, supra note 48, at 471. Moreover, as Judge Pollack notes "if you cannot cite Fallos de la Corte Suprema—the Argentine Supreme Court reports—like Federal Second: you must furnish a copy of the case in translation." Id. at 475.
such statutes and decisions in the record during their testimony.\(^7\)

Under the prevailing notice pleading approach, the parties should concentrate on being direct and clear in their references to foreign law in the pleadings. John McKenzie’s formulation\(^8\) is still apposite in many cases:

[F]irst in logic would be establishment of the system of judicial precedent; second, the force and effect of precedent; third, the existence of decisions; fourth, the existence of precedent therein and the terms thereof; and finally, the correlation in time and space of this precedent and the relationship of the parties litigant.\(^9\)

In most situations, McKenzie’s formulation is necessary to structure the argument, but need not be entirely reproduced in the pleading. A pleading alleging the key statutory provisions or decisional holding (e.g., adoption of a strict liability theory, acceptance of respondeat superior, or delineation of the elements of assumption of risk), the citation for such authorities, and a paragraph applying this law to the facts should suffice. The most important aspect of current notice pleading is its flexibility to accommodate both the simple and the complex; if the approach suggested is insufficient in any particular case to fairly notify the opposing party of the theory of liability and allow him to file appropriate responsive pleadings or prepare for trial, a Rule 12(e) motion or demand for a bill of particulars, may be filed and further specificity will be ordered.\(^8\)

II. FOREIGN FACTS

A second set of procedural problems must be addressed in most international litigation. When the incidents giving rise to the litigation occur in a foreign country, American trial lawyers must

\(^7\) McKenzie, supra note 9, at 51. The safe course, when in doubt, is undoubtedly to plead in full because (1) the judge may appreciate it, and (2) pleading of evidence is not a fatal defect while failure to plead enough may be. Id.

\(^8\) McKenzie & Sarabia, supra note 68, at 362.

\(^9\) Id.

usually not only find foreign law, but must also marshal foreign facts. As a result, lawyers trying international cases in American courts will often be bound by both domestic and foreign procedural systems and must learn to synchronize the two.

Once a foreign country becomes a focal point for American attorneys, voluminous amounts of paper will begin to pass between counsel in the United States and parties, or witnesses, in the foreign jurisdiction. Thus, a brief discussion of service of documents in foreign countries is a necessary antecedent to any consideration of the taking of evidence abroad.

A. Service In A Foreign Country

The Hague Convention On The Service Abroad of Judicial and Extra-Judicial Documents (Service Convention),\(^83\) provides a highly useful structure for the service of papers to parties, witnesses or others in foreign countries. Essential to the operation of this system is the designation, by each of the countries that signed the agreement, the contracting countries,\(^84\) of a Central Authority for the receipt from foreign parties of all papers requiring service.\(^85\) The United States' Central Authority is the Civil Division of the Justice Department. The Central Authority is designated only for the receipt of requests. In other words, American attorneys need not send requests through our Central Authority.

\(^83\) In force, Feb. 10, 1969, 20 U.S.T. 361, T.I.A.S. No. 6638, reprinted in 4 INT'L LEGAL MATERIALS 341 (1965) [hereinafter cited as Service Convention]. See also Act of Oct. 3, 1969, Pub L. No. 88-619, 78 Stat. 995, reprinted in 3 INT'L LEGAL MATERIALS 1081 (1964). While fully applicable to most air disaster litigation that is obviously civil in nature, this Convention has no applicability to non-civil matters. Because definitions of civil actions vary from country to country—meaning all that is not criminal, or all that is not criminal or tax-related, or all that does not concern a criminal, tax, or administrative matter—the Convention may not govern some actions outside the subject matter of this symposium.

\(^84\) The countries that had adopted the Service Convention as of 1979 included: Barbados, Belgium, Botswana, Denmark, Egypt, Finland, France, Federal Republic of Germany, Israel, Japan, Luxembourg, Malawi, Netherlands, Norway, Portugal, Sweden, Turkey, United Kingdom, and the United States. Austria, Greece, Italy, Ireland, Spain, Switzerland and Yugoslavia are signatories whose governments have not yet formally ratified the convention. 7 MARTINDALE-HUBBELL LAW DIRECTORY 4501 (1980). Given that international documents are sometimes difficult to obtain, the Martindale-Hubbell collection of selected international conventions (7 MARTINDALE-HUBBELL LAW DIRECTORY 4497-518) is a handy resource.

\(^85\) Service Conventions, arts. II-VI, supra note 83.
to a foreign Central Authority; they simply complete a form that is sent by the United States Marshal directly to a foreign Central Authority.\textsuperscript{86}

By its terms, the Service Convention is not applicable when the address of the party to be served is unknown.\textsuperscript{87} According to a recent meeting of delegates from the contracting countries, however, Central Authorities make every attempt to deliver such documents despite an absent address.\textsuperscript{88} Delivery may be informal; involving no more than a call requesting the addressee to voluntarily pick up the documents; or formal, involving either the form of service prescribed by the state addressed or a particular method requested by the parties.\textsuperscript{89} A particular method is almost never selected and most countries, with the exception of the United States, reduce costs by resorting to process servers only after the addressee has refused to voluntarily accept the document.\textsuperscript{90}

Most informal delivery service is rendered free of charge.\textsuperscript{91} Although practices vary, most formal service is on a fixed-fee basis.\textsuperscript{92} The costs of translating documents can be considerable and countries almost always require translation if formal service is to be effected.\textsuperscript{93} Such translation is not usually required for informal service.\textsuperscript{94} In sum, whenever possible, informal delivery by the Central Authority offers effective service at the lowest cost. There is no sacrifice in the efficacy of the service when informal

\textsuperscript{86}The forms are provided by the United States Marshal's office whether the relevant action is pending in state or federal court. The forms and their usage are clearly explained in a recent memorandum from the Department of Justice to all United States Marshals. See Department of Justice Instructions for Serving Foreign Judicial Documents in the U.S. and Processing Requests for Serving American Judicial Documents Abroad, 16 INT'L LEGAL MATERIALS 1331 (1977) [hereinafter cited as Department of Justice Memo].

\textsuperscript{87}Service Convention, art. I, supra note 84.

\textsuperscript{88}Reports of the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, 17 INT'L LEGAL MATERIALS 312, 321-23 (1978) [hereinafter cited as Reports on the Service Convention].

\textsuperscript{89}Id. at 323.

\textsuperscript{90}Id. The United States always provides formal delivery through the United States Marshal. Id.

\textsuperscript{91}Reports on the Service Convention, supra note 88, at 324. See, e.g., Department of Justice Memo, supra note 86, at 1336.

\textsuperscript{92}Reports on the Service Convention, supra note 88, at 324.

\textsuperscript{93}Id. at 323.

\textsuperscript{94}Id.
delivery is used. Including a second copy of the document, to be returned after the first copy is served, assures the sender of a certificate of service identifying exactly which of the potentially numerous documents has been served.

Service of process is almost never a proper function for United States diplomatic or consular personnel. Foreign service officers are, however, directed to promptly inform American litigants of local procedures for serving process, availability of local counsel, or other general information.

The Service Convention does allow persons competent to serve documents in the country of origin to effect service through direct communication with persons similarly competent in the country of destination. Choosing to ignore the free use of the United States Marshal route involves an extra middleman, extra cost, and sometimes a violation of foreign law. One should not conclude, however, that elimination of all middlemen by using the mail is necessarily the most desirable option. While many countries do not object to service directly by mail, such action is viewed in some countries as an infringement upon governmental sovereignty, and thus, legally ineffective. Use of the Central Authority is clearly the safest route. The form to be used for service under the Hague Service Convention is available from the United States Marshal.

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85 Failure to translate may, however, vitiate the service. See Department of Justice Memo, supra note 86, at 1336 n.6. This problem, of course, is not inherent in the use of informal service, but rather results from failure to translate.

86 See Reports on the Service Convention, supra note 88, at 324.

87 The exceptions to this rule are extremely narrow. See 22 C.F.R. § 92.85-94 (1979).

88 Id. § 92.94.

89 Service Convention, art. 10(b), supra note 83, at 362.

90 Service may be viewed as a judicial function to be performed only with proper permission. See Department of Justice Memo, supra note 86, at 1338 n.10: "Ignorance or disregard of this salutary rule has led to a damage suit . . . against an Assistant U.S. Attorney who served a subpoena at a private residence in the Bahamas, and to a criminal indictment of an SEC attorney who served an administrative subpoena in France." Id.

91 Fed. R. Civ. P. 4(i)(1)(D) of course, authorizes use of the mail in federal court actions.

92 Switzerland objects even to service by mail. See Department of Justice Memo, supra note 86, at 1337; see also Reports on the Service Convention, supra note 88, at 317.
B. Obtaining Evidence In Foreign Countries

Although the literature on this subject often distinguishes between the procedures to be used when dealing with voluntary witnesses and those to be used with involuntary witnesses (prescribing letters rogatory for the latter and depositions upon notice or commission for the former), such a classification is sometimes misleading. A more general distinction is between procedures followed when the assistance of a foreign court is required and those procedures followed when such assistance is not required.

1. Obtaining Evidence Without The Assistance Of A Foreign Court

Regardless of whether the witness is voluntary, if he is an American national or resident, a United States court can assert jurisdiction over him and issue a subpoena compelling him to attend a deposition or to produce documents. Failure to comply with such a court order may precipitate imposition of sanctions, including fines up to $100,000 which may be satisfied, if the court so directs, by sale of property levied upon or seized.

If a foreign witness is willing to comply with requests for evidence, the process of obtaining that evidence is usually simplified. Voluntary assistance often means that the witness can be persuaded to travel to the United States for deposition by American attorneys under the traditional format of American discovery practice. When this option is impractical or too expensive, depositions may be taken in the foreign country under Federal Rules 28(b)(1) or 28(b)(2), or comparable state rules.

Rule 28(b)(1) provides for depositions in foreign countries before persons authorized to administer oaths either by United States law or the law of the foreign country. This procedure is a liberalization, under the 1963 amendments to the Rules, of

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106 See, e.g., CAL. CIV. PROC. CODE § 2018(b) (West Supp. 1980); Uniform Interstate and International Procedure Act § 3.01, 13 UNIFORM LAWS ANN. 301 (1975). The Uniform Act is almost identical to the Federal Rules provisions.
107 FED. R. CIV. P. 28(b).
the previous requirement that such depositions take place only before consular personnel.\textsuperscript{108}

One practical problem, however, does in fact arise. Ordinarily, consular personnel are likely to be of little, if any, assistance in guiding the attorney on the procedures used in the taking of depositions in foreign jurisdictions.\textsuperscript{109} It has been my personal experience, as well as the personal experiences of others both within and outside our firm, that the only certain way to obtain a proper transcript of depositions of witnesses taken in a foreign jurisdiction is to have a certified court reporter from your particular jurisdiction travel to the location of the deposition to both attend and transcribe the entire proceeding. Although this may appear to be an unnecessary cost and expense, it has been our experience that alternative methods are quite unsatisfactory and often result in the retaking of the deposition. The intended advantage of the notice procedure is the ability of the parties to take a deposition without application to either a United States or foreign court.

The notice procedure may fail to satisfy the trial lawyer's needs in at least four situations. First, the seemingly voluntary witness may fail to remain voluntary through the date of his deposition. Second, his voluntariness may be irrelevant because the particular foreign country views the notice procedures as affronts to the sovereignty of that foreign government.\textsuperscript{110} Switzerland, and other

\textsuperscript{108}1963 Advisory Committee Notes to Rule 28(b), reproduced in 4 Moore's Federal Practice \S 28.01(6) (2d ed. 1979).

Consular personnel may still be used for taking depositions in foreign countries. 22 C.F.R. \S 92.51 (1979). The parties may serve written notice of an intent to take the deposition before the consular authority and the deposition will usually proceed without court order. Id. \S 92.52. In countries that do not object, parties may instead notice a deposition before the appropriate foreign official who performs such functions. Consular personnel may not comply with a request that would violate foreign law, but are directed to inform the parties of alternative means of obtaining testimony whenever efforts to take depositions are frustrated by foreign law. Id. \S 92.55.

\textsuperscript{109}See Doyle, Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, Proceedings of the ABA Section of Int'l & Comp. L. 37 (1959).

\textsuperscript{110}Such views are serious matters. Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953). Jones describes the unfortunate experience of two Dutch lawyers who were arrested and jailed for engaging in conduct indistinguishable from the traditional American deposition on notice. Only the apologies of the Dutch government secured
civil law countries, have taken such an approach, forbidding the
taking of depositions in this manner. 111 Third, the parties may find
that the voluntariness of the witness, combined with sometimes
limited opportunities for cross-examination, may result in the
creation of useless or prejudicial evidence. 112 For example, if the
defendant's witnesses are quite willing to testify but are likely to
give very biased testimony, and, under the foreign law, the plain-
tiff has no right to cross-examine, the evidence could be of no
value and perhaps should not be generated. 113 This type of prob-
lem could cause a party to reject the simple notice procedure of
Rule 28(b)(1) for obtaining evidence. Fourth, while the witness
may be voluntary, the parties may find that judicial intervention
will be required to expedite a deposition that is expected to be
punctuated by extensive objections. While this fourth objection
does not necessarily require assistance of the foreign court (since
appointment of a specific commissioner by the domestic court
might solve the problem), 114 the simple procedure envisioned by
Rule 28(b)(1) will not suffice.

their release. Id. at 520. Jones explained some of the civil law resistance on the
basis of misunderstanding and confusion. Id. at 526-29. In the twenty years since
Jones wrote, many civil law countries have not changed these restrictive policies.
See note 111 infra. Cf. note 101, supra (damage suit brought against attorney
for service without judicial approval).

111 As of 1975, Denmark, Iran, Liechtenstein, Luxembourg, Switzerland,
Venezuela and Zambia were listed as having taken this position, while Austria,
Bolivia, Bulgaria, the Central African Republic, Chad, Dahomey, Egypt,
Finland, Gabon, Haiti, Honduras, Hungary, Kuwait, Liberia, Monaco, Poland,
Saudi Arabia, Turkey, the Republic of South Africa, the Union of Soviet Socialist
Republics, and Yugoslavia allowed Rule 28(b) depositions only if the deponent
were an American national. Note, Taking Evidence Outside of the United States,

112 Unless special request is made, even under the favorable regime of the
Hague Convention on the Taking of Evidence Abroad in Civil and Com-
mercial Matters, infra note 135, foreign country procedure will be followed in
the deposition.

113 See Oscar Gruss & Son v. Lumberman's Mut. Cas. Co., 422 F.2d 1278
(2d Cir. 1970). The facts suggested caused the court to deny a request for
letters rogatory to the Swiss government to take a deposition in Switzerland.
Id. at 1282. While such a situation might be alleviated when letters rogatory
are used in Switzerland pursuant to the Evidence Convention (see text accom-
panying notes 135-39, infra), the problem remains when notice or commission
procedures are attempted or when letters rogatory are used in a country that is
not a party to the Evidence Convention.

114 Appointment of a commissioner would usually not solve the problem
(since the commissioner normally does not have powers of compulsion) unless
Rule 28(b)(2) allows depositions before commissioners—persons commissioned by the court to administer oaths and take testimony. As with depositions on notice under Rule 28(b)(1), this procedure is principally designed for deposing witnesses whose voluntary compliance is expected. Although the reported cases, and most commentaries, do not suggest that the compulsory process of foreign courts may be enlisted in taking depositions by commission, when armed only with a commission and presented with a suddenly unwilling witness, one should always test whether a commission may be enough to cause a foreign court to issue subpoenas. At least one practitioner claims to have succeeded in such a request.

The commission procedure can claim only two advantages over the notice procedure. First, a consular officer may be commissioned to depose a witness on written interrogatories without counsel being present, thus presenting a means of obtaining evidence from a willing witness without a trip abroad. Second, if the parties have some reason for selecting a particular person to take the testimony, the commission procedure facilitates such an approach.

Judge Merhige, handling the consolidated pretrial discovery in thirteen cases involving the Westinghouse uranium contracts, appointed the Dean of the William and Mary Law School as special master to preside over discovery depositions in England. Although Judge Merhige eventually decided to personally preside over the depositions and does not appear to have expressly based his authority to appoint the Dean on Rule 28(b)(2), the rule could be used for such a procedure in a case presenting similar prob-

the parties have agreed to abide by the commissioner’s rulings, in which case his commission is more like an appointment as a master under Rule 53. If the court will give subpoenas on the basis of the commission this weakness is eliminated. (See notes 117-19, infra.)


116 Doyle, supra note 109, at 39.

117 Id.

118 Consular personnel may be commissioned, 22 C.F.R. § 92.55 (1979). In Powers v. Monark Freight Sys., Inc., 7 F.R. Serv. 30.34 (N.D. Ohio 1943) the deponent was a member of the United States armed services stationed in England, and the commission ordered the taking of the deposition by an officer to be selected by the Adjutant General, since, for security reasons, the Army could not reveal his location.
lems, especially when the deponent is an American national.\textsuperscript{119} Except in this type of case, the commission procedure usually has no significant advantage over the notice procedure; and even in this procedure the problems of usurping judicial functions in civil law countries remain.

2. Obtaining Evidence Through The Assistance Of Foreign Courts

The assistance of foreign courts is obtained through the use of letters rogatory. The most often quoted definition states that:

[L]etters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times.\textsuperscript{120}

Quite simply, letters rogatory are letters of request; they enlist the aid of foreign courts to accomplish results that United States courts cannot achieve.

Until amended in 1963, Rule 28 denied the use of letters rogatory to parties that could not demonstrate the inadequacy of the notice or commission procedures.\textsuperscript{121} In some states this unnecessary and burdensome requirement may still remain.\textsuperscript{122} In the federal system, however, a flexible approach is dictated by Rule 28(b), requiring a consideration of all the circumstances and imposing no restriction on the use of these methods in combination.\textsuperscript{123}

\textsuperscript{119} For example, if the witness were subject to a section 1783 subpoena, he could be required to appear before a person who has been commissioned to take his deposition under Rule 28 and appointed a Special Master under Rule 53. In the case of persons not subject to compulsion by United States courts, the specific appointment of a commissioner to rule on discovery objections would usually have little effect, unless the parties had agreed to abide by his rulings, since the commissioner usually cannot compel the witness to acknowledge his orders. \textit{But see} note 116, supra. Doyle suggests that this approach, or something approximating it, has been utilized. Doyle, supra note 109, at 39 n.3.

\textsuperscript{120} See Tiedemann v. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941).


\textsuperscript{123} See 1963 Advisory Committee Notes to Rule 28, supra note 108. "[I]t may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails." \textit{Id.} Doyle reports having used both together. Doyle, supra note 109, at 42.
The most obvious reasons for the use of letters rogatory are the need to compel testimony by involuntary witnesses and the desire to properly defer to the rules of those countries that forbid actions by the parties without prior foreign court approval. This device is also necessary whenever the parties wish to modify the procedures normally provided by the foreign court, as in the case of requests for cross-examination, direct examination by counsel instead of the court, or verbatim transcription of the proceedings in civil law countries, or other jurisdictions, that do not normally provide such options.

The district judge is given discretion in fashioning the specific request to be made. In a proper case, a party's motion for issuance of the letter may be denied. When the evidence to be obtained through the letter is essential to the claim of a party, however, this discretion has been limited.

Rule 28(b) makes adequate provision for consideration, as a matter of evidence, of the procedures used in obtaining evidence abroad. The rule is clear that a foreign court's deviation from traditional means of taking depositions in the United States (for example, verbatim transcript, testimony under oath, cross-examination) need not automatically result in exclusion of the evidence from the United States proceeding for which it was sought. Such aspects of the character of the evidence will usually only go to its reliability. In an extreme case, however, the rule does not deny the court an opportunity to exclude the evidence as being

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123 See notes 127-28, infra.


125 See Zassenhaus v. Evening Star Newspaper Co., 404 F.2d 1361 (D.C. Cir. 1968) (finding error in district court refusal to issue a letter requesting a Burma court to secure testimony of a key witness for the plaintiff).


insufficiently reliable and unduly prejudicial.\textsuperscript{131}

Practice with letters rogatory reveals many modifications and adaptations on the part of federal courts; conditions are very often imposed upon the granting of a motion for issuance of a commission or letter rogatory. Appointment of the Dean of the Law School in the Westinghouse case is a good example.\textsuperscript{132} In \textit{Leasco Data Processing Equipment Corp. v. Maxwell},\textsuperscript{133} the district court conditioned the issuance of letters rogatory upon the advancement of opposing counsel's expenses, coerced the parties into taking all foreign depositions on one trip abroad, and delayed issuance of the letter until other motions that might reduce the number of parties in the case could be heard.\textsuperscript{134}

In addition to benefiting from the flexibility of United States courts, parties now have a tool, in the form of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Evidence Convention),\textsuperscript{135} for encouraging foreign courts to modify their usual procedures. Under the Evidence Convention, a letter may request the use of procedures not traditionally invoked by the foreign court (\textit{e.g.}, cross-examination).\textsuperscript{136}

One of the most important issues concerning implementation of the Evidence Convention concerns the extent to which the Convention requires contracting countries to accommodate such requests.\textsuperscript{137} By the terms of the Convention, such requests can only be denied if "totally incompatible" with local procedures or "impossible of performance."\textsuperscript{138} It has not yet been suggested that simple inconsistency with traditional civil law practice satisfies


\textsuperscript{133} 63 F.R.D. 94 (S.D.N.Y. 1973).


\textsuperscript{136} Evidence Convention, art. 9, \textit{supra} note 135, at 2561.

\textsuperscript{137} See Carter, \textit{supra} note 103, at 15.

\textsuperscript{138} Evidence Convention, art. 9, \textit{supra} note 135, at 2561.
either of these requirements. Expressions of willingness to accommodate these requests—even to the point of overhauling procedural codes so that clear authority will exist to satisfy such requests—support an optimistic viewpoint on this question.

Unfortunately, experience also reveals disappointing obstacles to achievement of the intended results of Rule 28(b) and the Hague Evidence Convention. The single most significant obstacle has been the limited acceptance of American notions of discovery by most foreign countries. The hostility to "broad" and "liberal" American discovery is indicated by the House of Lords' 1956 decision in Radio Corp. of America v. Rauland Corp.: "It is an endeavor to get in evidence by examining people who may be able to put the parties in the way of getting evidence. This is what we should call mainly fishing proceedings, which is never allowed in the English courts."

Indeed, the Report of Special Commission on the Operation of the Convention recently suggested a device for assuring that requests for special procedures will be accommodated:

[The possibility to employ a commissioner coming from the requesting State, which most of the Contracting States allow for, provides a way of assuring compliance with a special method or procedure which is easier than doing the same thing by means of special instructions in the Letter of Request.

Reports on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 17 INT'L LEGAL MATERIALS 1417, 1430 (1978) [hereinafter cited as Report on the Evidence Convention]. The importance of this statement lies not in any suggestion that special procedures may be surreptitiously introduced into the process through use of a special commissioner (such an attempt would be an abuse of the mechanism), but rather in the fact that this statement came from a group of delegates of the contracting countries and, to the extent those delegates can speak for their judicial systems, therefore indicates that requests for special procedures are unlikely to receive hostile treatment.

See Borel & Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States, 13 INT'L LAW. 35, 39 (1979):

The French Government recognized that the Hague Evidence Convention would be rendered largely ineffective insofar as Common-Law countries are concerned unless French judicial authorities could comply with such requests even though they are not normal procedures under French law and custom. Consequently, the French Code of Civil Procedure has been amended to include new provisions [facilitating such requests].


[1956] 1 Q.B. 618.

Id. at 649.
That hostility was recently reiterated in *Rio Tinto Zinc Corp. v. Westinghouse.*\(^4\) In the *Westinghouse* opinions, the Lords lashed out at a typical "boxcar" discovery request. The meaning of the decision is somewhat complicated by its conclusion that the evidence was being sought, at least in part, for a pending criminal investigation into the same subject matter as the civil suit.\(^5\) Moreover, the decision has been categorized by at least one commentator as one of a group of "political cases" that does not accurately reflect a trend toward greater cooperation with American discovery,\(^6\) and subsequent requests in the *Westinghouse* matter have been fruitful.\(^7\) The decision, however, clearly expresses the distaste of foreign countries for American discovery requests seeking material that the parties cannot promise is intended for actual admission at trial.\(^8\)

The fact remains that the Hague Convention has at times appeared, even to the United States delegation to that Convention, to be characterized as a one-way street for United States litigants.\(^9\) Most of the parties to the Hague Convention issued declarations at the time of signing expressly stating an unwillingness to comply with "pretrial" discovery requests.\(^10\) Much of this formal opposition seems predicated upon misunderstandings about whether American "pretrial" discovery provides a license to almost unlimited investigation even before the institution of any suit.\(^11\) Hopefully, a greater awareness of the beneficial purposes of expansive discovery, and a better understanding of its limits, will effect greater compliance by foreign governments with American requests.

In formulating such requests, at least two major precautions are appropriate. First, do not disguise the purpose of the request.

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\(^{14}\)[1978] 1 All E.R. 434.

\(^{15}\) Report on the Evidence Convention, *supra* note 139, at 1420.

\(^{16}\) *Carter, supra* note 103, at 7-9 nn.5, 9.

\(^{17}\) *See Merhige, supra* note 132.

\(^{18}\) *Carter, supra* note 103, at 6-7.

\(^{19}\) Report on the Evidence Convention, *supra* note 139, at 1421.

\(^{20}\) *Id. See also* Article 23 of the Evidence Convention and declarations of reservation issued under the provision, *supra* note 135, at 2568.

Foreign courts will look behind the request to the actual nature of the evidence sought in determining whether the request will be granted. At the same time, whenever valid, point out the importance of the evidence and your firm intention to use such evidence at trial.

Second, circumscribe your request as much as possible. Once any part of your request is perceived as an overboard fishing expedition, that quality pervades the entire request being examined by the receiving court. You should assist the United States court, once your motion for issuance of a letter is granted, to draft an appropriate letter containing a narrow request and emphasizing the domestic court's belief in its importance for trial.

Finally, although under the Convention, a letter of request must be executed by a "competent authority," such authority need not necessarily be a judicial authority. If commissioners or lawyers would be competent to issue the request if competent in their own jurisdictions, then the same authorities are competent to issue the letter of request to a foreign authority. Deference to the country of destination is essential in all such requests, including, in particular, a promise of reciprocity. Stipulations of domestic counsel will increase the likelihood that the request will emanate from a United States court, an authority much more likely not only to command the respect of the foreign authority, but also one in a position to promise acceptable reciprocity.

CONCLUSION

Although the foregoing discussion of the methods of proof of foreign law and foreign facts reflects differing areas of emphasis, the cornerstone for proof in all areas discussed is the thorough preparation by trial counsel of each of these issues in a particular case. Whether the forum court requires proof of foreign law as a fact, makes it a matter of judicial notice, or follows a codified procedural rule, trial counsel must thoroughly prepare his expert testimony on that issue. In obtaining and proving foreign facts


154 Compliance with such requests is, after all, only a matter of judicial comity.
thorough preparation by trial counsel with respect to the best available method of obtaining and preserving that proof is essential in order to adequately prepare a particular issue for trial. This includes not only a decision as to the discovery method to be followed in United States jurisdictions, but also some familiarity with the local rules of the foreign jurisdiction in order to insure that the procedures chosen will be compatible with local law. Therefore, as is the case with all issues in each case, the thorough preparation by trial counsel in the proof of either foreign law or foreign facts is the key to the success.