

Existing Rules and Procedures

American litigators are accustomed to hearing the federal judiciary, and an increasing number of state judges as well, say, whenever a discovery question is raised, that they believe in “liberal” discovery. Indeed, there is a popular lawyers’ fantasy in which a judge who has become bored with the usual litany explains to counsel at the first pre-trial conference that he believes in “conservative” discovery, that a man’s private documents, for example, are his castle and that no drawbridge will be lowered over the moat without some semblance of a reason articulated in advance.

But there is one area in which, by common perception, something like this fantasy is the norm, the obtaining of pre-trial discovery and relevant trial evidence outside the United States for use in American litigation. When American litigants wish access to witnesses, documents or things located beyond this nation’s territorial boundaries, they must accommodate their desires to the fact that their local discovery principles and practices differ from the litigation rules and traditions which are the norms in most other nations.

I. Foreign Attitudes Toward American Discovery

Foreign sovereigns and their officials frequently express concern when American discovery procedures or those of any other state extend to their territory, their citizens, and their various other interests. These concerns based on territorial sovereignty are heightened, however, in the case of American pre-trial discovery because of the way in which its procedures often are controlled in practice almost entirely by counsel rather than by a court exercising day-to-day supervision. The resulting virtually boundless sweep of the pre-trial procedures presently permitted by many American courts is so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created, which sometimes causes discovery which would be considered proper, even narrow, in this country to be regarded as a fishing expedition elsewhere.

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Under American procedural rules, pre-trial discovery involves both the process by which counsel learn about the facts in issue and the methods by which they preserve testimony, obtain written admissions and authenticate documents for introduction at trial. Both processes may be at work simultaneously, and pre-trial discovery procedures ordinarily overlap with, and can be co-extensive with, the preparation of relevant evidence in a form suitable for introduction at trial. However, since Rule 26(b)(1) of the Federal Rules of Civil Procedure and its state analogues permit discovery of anything which “appears reasonably calculated to lead to the discovery of admissible evidence,” the scope of discovery may be very much broader than the limits of competent and material evidence. This type of overlapping is substantially unlike the situation in either Civil-Law or other Common-Law jurisdictions, so that non-American courts and commentators face both conceptual and linguistic difficulties in understanding American discovery procedures and meshing them with their own processes. Broadly speaking, they distinguish between “discovery” and “evidence” when they discuss American procedures.

In other Common-Law countries, where the use of pre-trial procedures differs from current American practice in permitting little discovery of matters not themselves relevant for trial, American “discovery” often is spoken of as the portion of pre-trial discovery *not* within the realm of competent, material and admissible evidence. To such commentators, the two spheres are mutually exclusive.¹

Civil-Law systems, on the other hand, do not share the Common-Law concept of a trial as a separate, isolated episode of litigation, so that the Common-Law notion of pre-trial testimony or discovery of documents which is preliminary to, but not necessarily an integrated part of, a judicial proceeding is an unfamiliar one. Civil lawyers sometimes experience difficulty in analyzing when an “action” has “commenced” in a Common-Law court and may use the term “discovery” to mean all proceedings occurring in a Common-Law system which are not conducted by a court, without regard to whether all or a part of the discovered material would be admissible in evidence at a trial.

Due to these conceptual and linguistic factors, it sometimes is difficult to determine the extent to which foreign reluctance to cooperate in American pre-trial discovery procedures is the result of misunderstandings and the extent to which it is based on a dislike for the philosophies which underlie them.

The clash of perspectives is particularly intense in the Civil-Law countries, where an American litigant encounters the doctrine of “judicial sovereignty” — the set of rules and customs by which the courts do not merely

¹See, e.g., *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* [1978] 1 All E.R. 434, 442, 450 (H.L. 1977) (E), 17 I.L.M. 38, 39, 44 (1978).

supervise private parties' role in the gathering of evidence but themselves take the primary role in obtaining and presenting evidence. American counsel conducting an unsupervised deposition or the inspection of documents in American fashion in a Civil-Law country may be improperly performing a public judicial act which is seen as infringing the foreign state's judicial sovereignty unless special authorization has been granted.

The skepticism with which some nations view what they see as overly intrusive unsupervised discovery procedures or as efforts to give extraterritorial application to American antitrust and securities laws over the past thirty years has led to the enactment of foreign "protective" or "blocking" legislation designed expressly to limit the sweep of American discovery. Typical of this development are such statutes as the Province of Ontario's Business Records Protection Act,² the United Kingdom's Shipping Contracts and Commercial Documents Act,³ and Canada's 1976 Uranium Information Security Regulations.⁴

In contrast to this restrictive approach taken by foreign governments with regard to discovery of their citizens in a relatively small number of highly publicized and rather political cases,⁵ there is an important countertrend toward a broadening of the scope of discovery available outside the United States under certain circumstances. This countertrend is based on an increasing but still imperfect familiarity with American discovery procedures on the part of foreign officials and lawyers and a perceived willingness of foreign courts to be helpful where possible in applying them in ordinary civil and commercial matters. It parallels a gradually increasing awareness on the part of American courts and attorneys that they must tailor their discovery procedures in the light of foreign rules and perceptions.

²Business Records Protection Act, 1947, *as amended by*, 1 ONT. REV. STAT. c.44 (1960); *see also*, Business Concerns Act, QUE. REV. STAT. c.278 (1964); Netherlands Economic Competition Act of June 28, 1956, *as amended by*, Act of July 16, 1958, art. 39.

³Shipping Contracts and Commercial Documents Act, 1964, c.87.

⁴Uranium Information Security Regulations, STAT. O.&R., 76-644 (P.C. 1976-2368, Sept. 21, 1976), promulgated under authority of Atomic Energy Control Act, CAN. REV. STAT. (1970) c.A-19; *see also* Australia's Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976; *see generally* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 VA. J. INT'L L. 747 (1974). The current attitude of the Antitrust Division of the Department of Justice toward recent increases in legislation of this sort is reflected in Shenefield, *Extraterritorial Import of U.S. Antitrust Laws*, [1978] TRADE REG. REP. (CCH) ¶ 50,386 (remarks delivered Aug. 9, 1978).

⁵*E.g.*, *In re Grand Jury Subpoena Duces Tecum* Addressed to Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960); *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434 (H.L. 1977) (E).

II. Situations in Which Discovery Abroad Is Necessary

Discovery abroad may be necessary in American litigation under a variety of circumstances. Perhaps the most common situation is the one in which discovery of evidence suitable for use at trial is needed from a nonparty witness located abroad, over whom no American court has any semblance of personal jurisdiction.⁶ In addition, there is a growing trend toward favoring use of discovery abroad as a preferred method for obtaining information from foreign parties to United States litigation under certain circumstances.

One such situation is that in which a named defendant is a foreign firm whose amenability to personal jurisdiction in the United States is asserted on the basis of the presence of an American subsidiary or some other arguable *prima facie* evidence of necessary minimum contacts. It is generally accepted that, after an appropriate preliminary showing, the American tribunal has sufficient jurisdiction at this point to authorize discovery of the foreign national to determine the validity of any jurisdictional defense which it may interpose;⁷ but the methods by which such discovery is to be conducted sometimes vary. The customary approach has been for American counsel to treat the foreign entity as though it were domestic and greet it with the usual barrage of deposition notices and document production requests to be complied with in the American forum. Such an opening salvo often is seen as nothing more than an invitation to the foreign party to negotiate narrower voluntary arrangements, and it is certain to be resisted with resulting skirmishing and delay.

One argument with which this sort of opening barrage is being resisted with increasing frequency is the suggestion that such preliminary discovery not only should be narrowed to manageable proportions at the outset but should proceed abroad, where the witnesses and documents are located. If the discovery is obtained abroad through letters rogatory or a similar procedure, it is argued, a foreign court can rule upon the applicability of its own government's protective statutes, secrecy laws, or rules of privilege which often are involved.

⁶If the witness is an American citizen or resident located abroad, a jurisdictional basis for the issuance of a subpoena directing appearance in this country may be found in 28 U.S.C. § 1783. There is no reported record of the use of this power to direct an American subpoena to a resident alien located outside the United States, however.

⁷*E.g.*, *River Plate Corp. v. Forestal Land, Timber & Ry. Co.*, 185 F. Supp. 832 (S.D.N.Y. 1960); *Silk v. Sieling*, 7 F.R.D. 576 (E.D. Pa. 1947); *United Va. Bank v. European Am. Banking Corp.*, MDL No. 264, 76 Civ. 2137 (CHT) (S.D.N.Y. March 2, 1978) (Magistrate's opinion); *cf.* *Investment Properties Int'l Ltd. v. IOS Ltd.*, 459 F.2d 705 (2d Cir. 1972); *but see* *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); Shenefield, *supra*, note 4 at 55, 856-55, 857.

This does not mean, however, that a party is entitled to discovery regarding possible jurisdiction merely because he requests it. *Socialist Workers Party v. Attorney Gen.* 375 F. Supp. 318 (S.D.N.Y. 1974); *Int'l Terminal Operating Co. v. Skibs A/S Hidlelfjord*, 63 F.R.D. 85 (S.D.N.Y. 1973).

This line of argument springs primarily from the Second Circuit's 1960 decision in *Ings v. Ferguson*,⁸ which involved conflicting expert testimony concerning whether a Canadian statute prohibited requested document disclosure. The court held that principles of comity suggested that the discovery should be sought through letters rogatory, so that a Canadian court could pass upon the matter.

The same approach has been adopted by other courts in a variety of comparable situations;⁹ and while some American judicial antipathy to the letters rogatory procedure no doubt remains, this procedure now is being accepted more readily as an ordinary part of American pre-trial processes. The recent cases indicate a trend toward increased willingness on the part of American courts to accord the courts of a foreign nation an opportunity to pass upon the appropriate scope of discovery where the legitimate interests of that nation are involved. This attitude has been encouraged by growing awareness of the increasing availability of procedures for obtaining discovery abroad.

III. Today's Methods for Obtaining Discovery and Evidence Abroad

An important factor in increasing the availability of appropriate procedures for discovery abroad is the multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, commonly known as the

⁸282 F.2d 149 (2d Cir. 1960); *see also* Application of Chase Manhattan Bank, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

⁹*E.g.*, United Va. Bank v. European Am. Banking Corp., MDL No. 264, 76 Civ. 2137 (CHT) (S.D.N.Y. March 2, 1978) (Magistrate's opinion) (discovery of a defendant German bank ordered to proceed by letters rogatory rather than American notice of deposition); Leasco Data Processing Equip. Corp. v. Maxwell, 63 F.R.D. 94 (S.D.N.Y. 1973) (English witness); Volkswagenwerk A.G. v. Superior Court, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (3d Dist. 1973) (German party); *see also* Celanese Corp. v. Duplan Corp., 502 F.2d 188 (4th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) (French witness); River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F. Supp. 832 (S.D.N.Y. 1960) (English and Argentine parties); *see also* Kurt M. Jachmann Co. v. Hartley, Cooper & Co., 16 F.R.D. 565 (S.D.N.Y. 1954) (English parties, written interrogatories); Isbrandt v. Moller, 7 F.R.D. 188 (S.D.N.Y. 1947) (Danish party).

Similar issues involving the preferability of letters rogatory for discovery in an international context under certain circumstances were raised within the past year in at least two other cases, Davis Walker Corp. v. Blumenthal, No. M8-85 (S.D.N.Y. 1978) (Japanese witness) and Evans v. Johns-Manville Sales Corp., No. 1-126-77 (Cir. Ct. Knox Co. Tenn. 1977) (English party) (asbestosis cases). In both instances, the matters in issue were resolved before the court ruled upon this argument.

Such a use of the letters rogatory procedures, where they are available, can avoid the dilemma presented to an American court which orders discovery over objection based on a foreign statute or doctrine, is confronted with inability or failure to comply, and then must face the difficult issue of appropriate sanctions (if any) for contempt. *E.g.*, *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992; Arthur Anderson & Co. v. Fine-silver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); *see generally* Societe Internationale v. Rogers, 357 U.S. 197 (1958); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

Hague Evidence Convention.¹⁰ American draftsmen played a leading role among the twenty-five nations which participated in the drafting of the Convention, and it presently is in force between the United States and nine other countries with which American litigants often are involved, including Britain, France, the Scandinavian nations, Czechoslovakia and Portugal.¹¹ West Germany, Italy and Spain have signed the Convention but have not yet completed ratification of it,¹² and the negotiating states also included parties as diverse as Japan, Israel, Egypt, and Turkey.

In addition to the Evidence Convention, two other primary sources should be consulted: 28 U.S.C. § 1783, which governs subpoena of an American citizen or resident located in a foreign country, and Rule 28(b) of the Federal Rules of Civil Procedure, which applies to depositions in foreign countries and is the applicable guideline when the more comprehensive Evidence Convention does not apply.

Outside the Evidence Convention countries, general statements are of limited utility. Each nation's procedures and attitudes are likely to be somewhat different, and consultation with experienced foreign counsel in the relevant country is of great value whenever possible; indeed, such specialized local advice is no less important even when an Evidence Convention nation is involved. Individual United States embassies and legations, as well as the Office of Special Consular Services of the United States Department of State, also can help with information concerning local requirements.¹³ But even in countries which are not parties to the Convention, the basic discovery tools are likely to be those available under the Convention.

The Convention is of particular utility and importance because it codifies and standardizes certain procedures which are built upon a long tradition of

¹⁰23 U.S.T. 2555, T.I.A.S. No. 7444, 8 I.L.M. 37 (1969). The Convention entered into force for the United States Oct. 7, 1972. Useful background material can be found in the Hague Conference Rapporteur's explanatory report, which is published with the President's transmittal message to Congress at 12 I.L.M. 323 (1972), and the *Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law*, 8 I.L.M. 785, 804 (1969).

¹¹7 MARTINDALE-HUBBELL LAW DIRECTORY 4384 (1978). The Convention presently is in force among Czechoslovakia, Denmark, Finland, France, Luxembourg, Norway, Portugal, Sweden, the United Kingdom and the United States.

¹²Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 119, 131 (1978).

¹³Inquiries from interested parties or their attorneys or from courts may be addressed directly to the respective American embassies and legations in foreign capitals or to the Department of State, Washington, D.C. 20520.

Certain general information also is available in 22 C.F.R. §§ 92.49-71 (1977) (role of U.S. consular officials in deposition and letters rogatory procedures abroad) and 22 C.F.R. §§ 22.1 and 22.6 (1977) (fees and charges).

For a general survey of the recent attitudes of various individual foreign nations to U.S. discovery, see Note, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368, 374-375 (1975).

bilateral judicial cooperation.¹⁴ These basic procedures are likely to be available upon different terms or in different forms in non-Convention countries, too; and even in Convention states they may be amplified by bilateral agreements or limited by specific declarations or reservations. These reservations and declarations currently are printed in their entirety in only one source book: Volume 7 of the *Martindale-Hubbell Law Directory*. They are a particularly important source to be consulted when a Convention country is involved.

The Convention continues the traditional three-part division of methods of obtaining evidence abroad:¹⁵ by *notice* to appear before an American consular official or foreign officer, the designation of a private *commissioner*, or by a *letter rogatory*—called, in the English text of the Convention, a letter of request. Each of these three methods of proceeding is described, as well, in Federal Rule 28(b). Both the notice and the commissioner procedures are designed primarily for situations in which a foreign witness will cooperate voluntarily by testifying or producing documents, while the letter of request technique ordinarily is used when the compulsory power of a foreign court is to be employed.

The Evidence Convention may be used for the obtaining of testimony, in oral or written form, in English or a foreign language, frequently in the form of Common-Law examination and cross-examination; it also can be used to obtain the production of documents or the performance of any other “judicial act” of a sort which pertains to the taking of evidence.¹⁶ Since the Evidence Convention is the broadest and most completely elaborated set of procedures, and since it is gaining substantial adherence, its provisions and the decisions interpreting it presumably will be used increasingly as the guidelines for understanding some of the murkier byways of arrangements in which an American litigant may find himself in almost any jurisdiction.

The method to be used—notice, commission, or letter of request—will depend upon whether a witness is willing to comply voluntarily and also upon the type of internal procedures which the particular foreign nation has specified or customarily makes available to implement each method.

¹⁴Such cooperation long has existed among common law nations, and civil law jurisdictions also have a substantial tradition of cooperation with one another. The Evidence Convention attempts to bridge the two separate traditions.

¹⁵See generally Note, *Taking Evidence Outside of the United States*, *supra* note 13; H. SMIT, INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE (1965); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

¹⁶Hague Evidence Convention, art. 1, *supra* note 10. The Convention does not extend, however, to other matters for which letters rogatory sometimes have been used, such as the service of documents or the execution of judgments. These matters are the subjects of additional international agreements. *E.g.*, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done November 15, 1965, 20 U.S.T.

A. *The Volunteer Witness*

Assuming that voluntary compliance can be expected, counsel might first consider simply paying the witness's expenses to travel to the United States or some other place, such as London, where the authorities have no objection to litigants proceeding informally with a private American deposition by agreement. Rule 29 of the Federal Rules authorizes such consensual measures, which are by far the quickest way to proceed.

If this is not feasible, notice or commission should be investigated. Under the notice concept, an American litigant may simply give notice of the taking of testimony, as he would in a federal suit under Rule 30, for example, without action of any court. He may specify oral or written examination before either an American consular official in the foreign country involved or an official of the foreign state authorized to administer oaths. The commission procedure contemplates a prior order by a United States court designating a particular person or category of officials as the court's "commissioner" for this purpose. The designation automatically empowers the commissioner to administer oaths; but under Rule 28(c), the commissioner before whom the evidence is taken may not be affiliated with a party or his attorney. It is ordinarily unnecessary for a foreign court to become involved in either the notice or commission procedure.

While these methods of obtaining discovery or trial evidence frequently are praised for the advantages they offer in speed and convenience, their usefulness is limited by two important considerations: they ordinarily cannot be used to compel discovery from an unwilling witness, and many nations either forbid their use or limit it with a variety of restrictions which negate their advantages. These problems are being eased in the Convention countries, since the Convention now assures that both notice and (in all nations except Denmark and Portugal) commission procedures are available in each of them on a relatively standard basis.¹⁷ Significant local variations remain, however, and the reservations and declarations printed in Volume 7 of the *Martindale-Hubbell Law Directory* should be consulted.

In Convention countries, the norm now is that a consular official may take the testimony of nationals of his own country, in an action pending in the courts of that country, pursuant to notice within the borders of the country to which he is accredited unless there is a general restriction by the host nation,¹⁸ but that he ordinarily must have the permission of the host country with respect to testimony of its nationals or those of a third state.¹⁹ In the case of commissioners, an institution which basically was not avail-

361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, 16 INT'L LEGAL MATS 1339 (1977), which entered into force for the United States February 10, 1969.

¹⁷7 MARTINDALE-HUBBELL LAW DIRECTORY 4384-4387 (1978).

¹⁸Hague Evidence Convention, art. 15, *supra* note 10.

¹⁹*Id.* art. 16.

able at all in Civil-Law nations prior to the Convention, the norm is that host country permission is required under all circumstances.²⁰ A primary benefit of the Convention is that participating countries may grant blanket permission for various activities of consular officials or commissioners, and a number have done so.²¹

If a non-Convention state is involved, the same type of examination of local requirements must be made; but here, finding the operable norms may be more difficult. In some Civil-Law countries, foreign private commissioners are not authorized under any circumstances;²² and the rules governing consular taking of testimony on notice—even the testimony of the consul's own nationals—can be quite restrictive. In addition, only the local rules of procedure may be permissible. The authorizations of Federal Rule 28(b) are meaningless if they cannot be matched with a right to act in the specific foreign nation in question. The best guides are a knowledgeable foreign lawyer or an inquiry addressed to the State Department.²³

Under the Convention, and also in some non-Convention states by bilateral agreement, an American consular official or private commissioner may be authorized to ask the local courts for compulsion against a recalcitrant witness.²⁴ This practice ordinarily is quite limited, however.

Both the notice and the commission procedures are designed essentially to create situations in which a foreign sovereign authorizes Americans to go about their discovery on its soil, often in their own language and style of proceeding, with the voluntary cooperation of a witness, under a system of consents which ordinarily need not involve local authorities but which protects local sovereignty.

Although the notice and commission system seems quicker and simpler than the letters of request approach, in practice it often is not preferable. The degree of local consent, and the conditions on it, can make the necessary investigation of and compliance with the rules in a particular state highly complex and time-consuming. And in the end, usefulness of notice or a commissioner almost always depends upon a willing witness.

B. *Compelling Testimony*

Under the Convention, a failure to secure a witness's voluntary cooperation with the notice or commission procedure does not preclude starting

²⁰*Id.*

²¹The states which have given blanket permission thus far are Czechoslovakia, Finland, the United Kingdom and the United States.

²²*E.g.*, Switzerland. For a discussion of some past problems with the taking of testimony there, see Jones, *supra* note 15, at 528-529.

²³See *supra* note 13. As requests for specialized services of this sort increase, it will be necessary for members of the bar who rely upon them to do what they can to assure adequate United States Government funding of the services.

²⁴Hague Evidence Convention, *supra* note 10, art. 18. Such procedures ordinarily are available only in Common-Law jurisdictions. See Jones, *supra* note 15, at 528, n. 37.

over again with a letter of request;²⁵ but since cooperation frequently cannot be safely assumed, and since American lawyers and many foreign governmental officers are more familiar with it, the letter route often is used in the first instance. If the witness's cooperation is uncertain, it is reasonable to proceed simultaneously with both a commission and a letter, if both are permitted by the foreign state.

Here the Evidence Convention is of primary importance in codifying a system which goes beyond the customs of comity—one in which the recipient nation's "executing" authorities ordinarily must assist an American court with such compulsory force as its own courts would have in a pre-trial evidentiary situation. The Convention also clarifies the types of exceptions which may be made to this international obligation of cooperation and sets up a series of highly useful mechanical procedures. The result has been a great advance in standardization of procedure and predictability for American litigators.

Since a letter is a request of an American judge for the assistance of a foreign judicial authority, a party must of course present his discovery proposal first to the United States court for approval.²⁶ If approved, the judge's letter of request then is translated (if necessary) and transmitted to the appropriate foreign authority for action. In each Convention nation, there is a designated Central Authority—comparable to the Department of Justice, which coordinates United States assistance to foreign courts—which must receive a copy of the letter and will coordinate responsive action. In transmitting letters to courts in non-Convention states, the requesting court must either discover in advance the identity of the court or officer to whom the letter should be sent or ask the assistance of American diplomatic authorities to see to the letter's delivery to the appropriate foreign court (addressed in blank as provided under Rule 28).²⁷

Rule 28(b) does not specify the contents of a letter of request, stating only that it shall be issued on application and notice "and on terms that are just and appropriate." The looseness of this language is potentially misleading, especially when contrasted with the precise and detailed requirements for a letter to a Convention nation which are specified in Article 3 of the Convention. The letter must state, among other things, the "nature" of the proceeding, including "all necessary information in regard thereto," and "the evidence to be obtained." It may specify a precise set of procedures to be used by the foreign court—for example, where foreign practices or reservations do not bar the way, the use of or translation into English, examination and cross-examination by counsel for the parties, and verbatim transcription.

²⁵Hague Evidence Convention, *supra* note 10, art. 22.

²⁶FED. R. CIV. P. 28(b). An American court has inherent power to issue letters rogatory. *United States v. Reagan*, 453 F.2d 165, 172 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972); *United States v. Staples*, 256 F.2d 290, 292 (9th Cir. 1958).

²⁷See 28 U.S.C. § 1781.

Prior to the Convention, and even today in many Civil-Law countries, only the foreign state's own procedures would be available to a requesting judge, so that there frequently will be a magistrate's examination in a foreign language pursuant to written questions framed in the letter, without active participation of counsel and without a verbatim record; but under the Convention—if the letter expressly requests it and a party is willing to pay the added cost²⁸—these Civil-Law magistrate procedures may be varied somewhat. Any special form of procedure which is not totally “incompatible” with local procedures or “impossible of performance” may be used, even if it would deviate from the local Civil-Law practice.²⁹ This could include, for example, the videotaping of the taking of evidence or even a deposition conducted by counsel as in the United States. Although the extent to which our procedures are “impossible of performance” abroad is not yet fully resolved, this represents a significant advance in obtaining discovery in Civil-Law Convention nations.

If a typical American-style deposition is undesirable because of costs or other reasons, or is made difficult by reservations to the Convention concerning languages, or is “impossible of performance” in a Civil-Law jurisdiction, the letter may either specify the precise questions to be put to the witness or give a more general statement of subject matter for the examination;³⁰ and it may in any event specify documents or property to be produced pursuant to the foreign state's compulsory process.³¹ Evidence taken in this form may be transcribed verbatim or, if this is not requested, may be summarized by the examining officer. Evidence taken and prepared in the latter manner may well suffice for an American litigant's purposes, since under Rule 28(b) testimony taken in a form other than a verbatim transcript of examination and cross-examination still may be admissible in a federal court.

The letter also should expressly advise the foreign authority of any privileges under American law, such as the Fifth Amendment privilege against self incrimination, to which the witness would be entitled.³²

The drafting of the letter should be of great importance to the American court and to counsel for the parties. If the letter is too sweeping, in the tradition of American “box-car” discovery, it almost surely will run afoul of foreign sensitivities.³³ The Convention provides, as do various foreign

²⁸See Hague Evidence Convention, *supra*, note 10, arts. 4, 14, which concern experts and interpreters and the costs of “special procedures.”

²⁹*Id.* art. 9.

³⁰*Id.* art. 3(f).

³¹*Id.* art. 3(g).

³²*Id.* arts. 11, 3.

³³See, e.g., *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* [1978] 1 All E.R. 434 (H.L. 1977) (E); Court of Appeal opinions in the same matter reported at [1977] 3 W.L.R. 430 (C.A.), 17 I.L.M. 784 (1977), and subsequent Court of Appeal opinions found at [1977] 3 W.L.R. 492 (C.A.).

“protective” statutes, that a state may refuse to provide assistance to an American court in what is called the “pre-trial discovery of documents as known in Common-Law countries”³⁴—which is understood abroad to mean essentially the all-too-customary American “first wave” type of discovery request addressed only to the location of “leads” to relevant evidence. A distinction thus is drawn by many foreign states between “discovery” and the taking of admissible evidence for use at a trial, with only the latter likely to be permitted. Reservations of this type have been made by the United Kingdom and *all* of the continental parties to the Convention.³⁵ The greater the specificity and explanation of the request, generally speaking, the higher the likelihood of its being enforced abroad.

As an aid in meeting this specificity requirement, a model letter of request was drafted in 1978 by representatives of the Convention states’ central authorities. Copies are available from the United States Central Authority, the Department of Justice.

Letters of request ordinarily must be in the language of the recipient state; but the Convention specifies that, unless a state has made a reservation to the contrary, a letter sent in English and requesting the taking of evidence in English will be honored as to choice of language.³⁶ Many states unfortunately have made such reservations;³⁷ but in those states which have not, this opportunity simplifies one of the most costly and time-consuming aspects of discovery abroad, the frequently required use of official translators for each piece of paper involved. In a non-Convention nation, and for those Convention states with a language reservation, the need for translations, often by appropriately certified personnel, remains the rule.

In addition to the limitation on pre-trial document discovery, the Convention specifies several other limitations on the letter of request procedure. First, the letter must comply with the terms of the Convention—it must, for example, relate to a civil or commercial matter.³⁸ Second, the letter is not to be used to obtain evidence which is not intended “for use in judicial pro-

Foreign courts have noted that statements concerning the “necessity” of particular discovery which are contained in letters drafted entirely by American counsel for signature by a United States judge may not be accepted at face value. *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, *supra* note 1, 17. I.L.M. at 40, 55. As Lord Justice Fraser’s opinion put it, “[I]t would be wrong to place reliance upon [such a] recital because it was drafted by the legal advisers of Westinghouse with the object of meeting the requirements of the English courts, and it cannot be regarded as stating the considered opinion of the American court.” 1 All E.R. at 469.

³⁴Hague Evidence Convention, art. 23, *supra* note 10.

³⁵7 MARTINDALE-HUBBELL LAW DIRECTORY 4384-4387. The success of efforts by U.S. Government spokesmen to convince others that American “discovery” is not an aberration from international norms which requires special limitations has thus far been limited.

³⁶Hague Evidence Convention, art. 4, *supra* note 10.

³⁷7 MARTINDALE-HUBBELL LAW DIRECTORY 4384-4387 (1978). The exclusion of English has been declared by all of the non-English speaking states among whom the Convention presently is in force, with the exception of Czechoslovakia and Luxembourg.

³⁸Hague Evidence Convention, art. 1, *supra* note 10. Neither of these terms is defined.

ceedings, commenced or contemplated.”³⁹ In addition, it must call for the performance of judicial acts;⁴⁰ for if it asks for assistance beyond the functions of the judiciary in the foreign country, cooperation may be denied.⁴¹ Finally, cooperation may be withheld if the action requested would be prejudicial to the foreign state’s sovereignty or security.⁴²

Besides these limitations, the Convention specifies privileges and immunities for the witness. These include both the rights provided under the executing state’s own laws and those available under the laws of the requesting state, if these requesting-state privileges are expressly set forth in the letter or are otherwise brought to the executing authority’s attention by the requesting authority.⁴³ Finally, a foreign nation may by declaration make available to a witness a type of personal privilege which may not be customary in either that state or the state of the requesting court.⁴⁴

The use of letters rogatory or letters of request has been limited in the past by a feeling among many American lawyers—often based on little first-hand experience—that such letters involve undue delay, complexity and problems resulting from linguistic and cultural differences. As the procedures become more nearly standard from nation to nation and are more widely known in this country, this situation can be expected to change.

IV. Some Practical Questions

There are several practical questions which the American litigant seeking discovery abroad might have in mind when he investigates the existing rules and procedures applicable to the country in question:

1. How much do you really need to know which could not be obtained elsewhere (*i.e.*, from other parties or witnesses, or commercial investigation sources, or voluntarily by bringing the witness to you)?
2. Can your needs be made narrow enough to avoid foreign notions that you are launching a fishing expedition, or do you really intend to fish?
3. Is there a particular discovery device, such as an oral deposition, which is of overriding importance under the circumstances? How does the foreign jurisdiction treat use of this device? Is there a substitute, such

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* art. 12(a).

⁴²*Id.* art. 12(b). Execution may not be refused “solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject matter of the action or that its internal law would not admit a right of action on it.”

⁴³*Id.* art. 11.

⁴⁴*Id.* A frequently cited example is a French privilege under which a doctor of medicine is said to be forbidden to make any disclosure respecting his patients, including even their names. See *Report of the U.S. Delegation, supra* note 10, 8 I.L.M. at 811-812. When France ratified the Convention, however, it made no declaration of such a privilege; nor has any other state yet utilized this opportunity to make a declaration of privilege.

as videotaping of a foreign magistrate's examination from written questions?

4. What is your timetable? In view of the current attitude of authorities in the country in question toward discovery for use in American litigation, will your progress abroad be rapid or slow in comparison to what you expect in your American jurisdiction?

5. Finally, are the issues likely to be raised in opposition to your efforts such as you would wish to pursue in part in the foreign jurisdiction (which may or may not be the other party's home territory) and through foreign counsel? Or, if there is a choice, would you prefer to try to fight them out initially before an American judge by seeking, if possible, to compel the discovery here?

* * *

Although so-called "liberal" discovery as we know it is not the rule abroad and probably never will be, today's rules and procedures do represent a movement toward it.