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Obtaining Evidence Abroad

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OBTAINING EVIDENCE ABROAD

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I. INTRODUCTION

Dean Bostick, distinguished members of the panel, and ladies and gentlemen, good morning. I have been asked to talk to you about the problems in obtaining evidence abroad. To say the least, the complexities of the international political situation in the world today make obtaining evidence abroad extremely difficult. The rapid changing of governments from one form to another as young nations grow and older nations experience revolution make the task impossible.

This talk will avoid a discussion of whatever problems exist in true international litigation. True international litigation may be defined as that body of law devoted to disputes between nations and governmental bodies which are addressed in nonterritorial world courts or those courts accepting the disputes under their own system of jurisprudence. My remarks will focus on the problems in obtaining evidence in a country other than the United States for use in a suit within the United States. A tabular listing of information relating to what can and cannot be accomplished in the way of obtaining evidence in various foreign jurisdictions would be of immense value to the practitioner. It is impracticable to undertake this task, however, because there are over 350 jurisdictions in the world, each with potentially different rules on obtaining evidence abroad. Even if such a listing were made available, any information obtained from various governmental, private, or academic sources which purports to set out foreign procedures would only be an approximation of the procedures in effect at the time the practitioner undertakes to obtain the evidence. A general overview, although possibly superficial, will furnish some idea of what to do and what not to do when

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See generallly Baade, *International Civil and Commercial Litigation: A Tentative Checklist*, [1973] TEX. INT'L L.J. 5; United States v. First National City Bank, 396 F.2d 897, 901-05 (2d Cir. 1968).

seeking evidence from abroad.

First and foremost, the practitioner must comply with foreign law. Even when the practitioner has investigated the applicable foreign law, he or she may nevertheless be ignorant of the correct law if given misinformation by either the United States consul office or the various diplomatic departments within the United States. A frequent cause of illegal conduct in foreign nations is the dissemination of erroneous information that results from the quick changes in governments and the apparent lack of communication among the agencies of the United States Government.

I am reminded of a recent experience during my vacation in Mexico. I wanted to purchase a plate for my wife's plate collection and stopped at a little shop in the airport. The señorita showed me several plates, and I inquired about the price of one. This particular plate cost 5000 pesos. I quickly told her that 5000 pesos was more than I wanted to pay. She immediately asked me how much money I had, and I told her I would offer 1000 pesos, which was the total amount of pesos I had. The señorita refused and made a counteroffer of 4000 pesos. Four thousand pesos was roughly twenty-seven dollars at the time I was in Mexico. Rather than bargain further I offered her twenty dollars. She accepted the offer and while she was wrapping the plate I told her to stop because I did not have a twenty dollar bill. I explained to her that I had some singles, fives, and a few fifties. She said she would make change to keep the sale and displayed a bankroll of approximately 5000 dollars. She had hundreds, fifties, twenties, tens, and fives. I told her I only wanted dollars in change because selling pesos to a United States bank would create a loss. The exchange took place, and my wife is very happy with the plate. The point of the story is that just as I was unaware of Mexican law at the time of the plate sale, most United States lawyers violate foreign law in obtaining evidence abroad because of ignorance.

II. Depositions on Notice

The simplest method of obtaining evidence abroad is to use Article 9 of the Hague Treaty. The signatories to the Hague Treaty are Czechoslovakia, Denmark, France, Finland, Luxembourg, Norway, Portugal, Sweden, the United Kingdom, West Germany, Italy, the Netherlands, the United States, Barbados, Singapore, and Israel. In these countries, evidence may be obtained under rules similar to United States evidentiary rules. Courts in these sixteen nations will compel reluctant witnesses to appear.

In addition, the following countries have expressed some degree of interest in the Hague Treaty and have sent observers to meetings in which progress of the Convention is monitored and discussed: Australia, Austria, Belgium, Egypt, Canada, Ireland, Japan, Spain, and Switzerland. Whether any of these countries will sign the treaty in the near future remains questionable. The countries expressing interest are Australia, Austria, Belgium, Egypt, Canada, Ireland, Japan, Spain, and Switzerland.

As in United States procedure, all types of evidence can be obtained abroad by attaching to the deposition writings, pictures, blueprints, drawings, and various materials identified and described by the deponent. How can a piece of evidence weighing one thousand pounds be attached to the deposition transcript? If properly prepared a witness can identify pictures of the evidence as accurate and true portrayals of the object. The examination may then proceed as if the evidence were actually at trial. The pictures attached to the transcript may be removed and given to the judge or jury.

The federal rules and most state codes provide that a deposition may be taken by written stipulation if it may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions. Mechanically, any person authorized to administer an oath can be used, but there are some caveats to remember. If the practitioner chooses to have the deposition reported by a citizen in the foreign jurisdiction, he may find that the citizen is not bilingual and not as proficient in the English language as needed. In addition, many problems are created when the transcript is completed. Language barriers obviously will exist if an answer is given in one language and transcribed into another language. The answer may not be precisely the same when transcribed and, under certain circumstances, may be entirely different than that sought to be communicated by the deponent. If the testimony is taken through an interpreter, one can readily see that the possibility for error is increased. Errors can and usually do occur. In our office, we generally arrange to take our own reporter. He or she will administer the oath, take the testimony, mark exhibits to be attached to the deposition, and skillfully transcribe the two conversations occurring at the same time, a frequent problem that arises during the taking of depositions. A person in a foreign jurisdiction who is qualified to administer the oath and has stenographic experience certainly cannot approach the expertise of a United States court

reporter.

III. Deposition by Commission

Rule 28(b) of the Federal Rules of Civil Procedure provides that a deposition may take place by notice, commission, or letters rogatory. Commissions, either open or closed, are the second method used to take depositions abroad. In a closed commission, written questions are submitted to the deponent and his responses are recorded. In an open commission, the commissioner makes the inquiries. The commissioner may be and usually is a United States consul officer authorized to administer an oath in the country in which he serves. One of the advantages of taking a deposition by commission is that the commissioner generally has power to subpoena witnesses. One of the disadvantages, however, is the commissioner's unfamiliarity with United States law and trial practices. For example, the commissioner may accept an answer that is not responsive or which includes opinion, hearsay, or speculation. If the commissioner permits an attorney to take the deposition, so much the better, but one cannot be assured of this occurring. It must be remembered that a deposition by commission does not force a witness to testify, but simply forces him to appear before the commissioner. Unfortunately, a witness may not be punished for refusing to testify. Another drawback for deposition by commission is that written interrogatories in a closed commission are not the same as written interrogatories in the United States. The commissioner asks the submitted questions, and the answers are given orally and recorded. Questions for cross-examination must be submitted at the same time as the direct questions. Obviously, not much can be accomplished within this structure unless the issue is a simple one.

IV. Letters Rogatory

The third method of taking a deposition abroad is the letter rogatory, a request from one court to another for judicial assistance. Although no statute authorizes federal courts to issue letters rogatory, the Judicature Act of 1789 permits the procedure. This method of obtaining evidence abroad is useless. A letter rogatory is time-consuming because it is permitted only when the notice or commission mechanism does not work or cannot be used. In practice, a foreign judge will examine the deponent under the rules of the foreign jurisdiction and send a summary of

the testimony. These judges seldom permit attorneys to suggest questions and do not allow attorneys to participate. Permitting an attorney to participate would be a violation of that country's sovereignty. Requests for letters rogatory are sent through the State Department. Delays in that department and in the foreign jurisdiction itself have lasted as long as a year and a half.

V. Reasons for the Difficulty

Differences in legal systems hamper the process of obtaining evidence abroad. Many countries outside the United States do not allow depositions to be taken unless local law is observed because, as civil law countries, they consider a simple matter such as the administration of an oath and the asking of questions a violation of their sovereignty. Judges in civil law countries are civil servants empowered to find facts. They are, in reality, a branch of the legislature. The deposition in civil law countries is an inquisitorial proceeding and not an adversarial proceeding such as we have in the United States. The thought of an outsider who is not a judge taking a deposition to find facts is contrary to the jurisprudence of these countries. The judicial function is considered usurped because a deposition outside the court is unknown. Before seeking to take a deposition abroad, therefore, the practitioner should check with a local lawyer regarding the local law and be sure the deposition does not constitute a violation. As an example of the potential problems that may occur, a lawyer in the Federal District Court of Chicago was taken into custody by Swiss officials for taking a deposition in an office in Zurich. Taking a deposition is a criminal violation of Swiss law, punishable by a jail sentence. This was also the fate of two Dutch attorneys after local authorities discovered that illegal oral depositions were being taken on Swiss soil.

Obtaining the admission or use of the deposition at trial is a problem that exists even if the deposition is taken by a commissioner or any person authorized to take testimony in a foreign country. One can well imagine the results of a deposition taken by a local judge unfamiliar with our own trial practice. Will that deposition be of any use when it is transcribed and filed in a United States court?

One caveat may be important. United States courts as a general rule will not participate in the circumvention of another country's laws. It may be difficult to obtain even tacit judicial approval of a stipulation if the court is made aware of the prohibitions of the

foreign law. Unfortunately, a great gulf exists between what is written and what is practiced abroad, and it is difficult to determine a United States court's attitude toward an attempt to take evidence abroad via a de facto rather than a de jure procedure. There are both recorded and unrecorded examples of attorneys taking depositions in countries that technically did not allow them or using procedures that were in some way extrajudicial. Being aware of these possibilities probably is the key to success for the practitioner who seeks to obtain evidence abroad.

A few words should be said about obtaining evidence in another manner. Foreign public documents of a country can be proved under Rule 902(3) of the Federal Rules of Evidence by a person authorized under that foreign law to make the attestation, provided there is a final certification as to the genuineness of the signature and official position of the executing person. Foreign law is generally proved as a fact in a lawsuit, and any expert in the law of any country may be used to testify. The weight of his testimony is for the jury to determine.

One must keep in mind that some countries view a commission as an unlawful device infringing on national sovereignty because it attempts to extend extraterritorial jurisdiction. Many nations severely restrict the scope, availability, and practice of commissions on their soil. Some countries, including Canada, have resisted attempts to apply United States antitrust law to national corporations and have disallowed requests for evidence that would be inadmissible under local procedural rules. Attorneys must be aware of these restrictions and any possible exceptions to them before making what might be a futile gesture in applying to a United States court for a commission overseas.

Another problem with evidence obtained abroad is that the lack of cross-examination in depositions taken by a commission, letters rogatory, and in some cases notice, has been held to be grounds for reversal. Because counsel will more often than not be deprived the opportunity of cross-examination in the civil system, and because attorneys are reluctant to submit evidence for which there has been no cross-examination, civil law evidentiary depositions will probably be found inadmissible in state courts and perhaps also in the federal courts of this country. Those attorneys practicing under federal law, however, may find the task a little easier. Rule 28(b) seeks to admit evidence in spite of these objections. Evidence obtained in response to a letter rogatory need not be excluded merely because the response is not a verbatim tran-

script, is not taken under oath, or has any similar departure from the requirements for depositions taken within the United States. The question then becomes what are the limits of these similar departures. To date, no precise or reliable definition has been formulated. In theory, Rule 28(b) was written with civil law countries in mind, and courts are taking a case by case approach to the problem.

Practitioners should not be dismayed if a country is not a signatory to the Hague Treaty, because the admissibility problem may still be overcome. British Commonwealth countries, as well as former Commonwealth members, are familiar with the adversary nature of common law proceedings. The practitioner will find that obtaining a deposition by stipulation, commission, or letter rogatory which will be admissible in most United States courts will not be difficult if some precautions are taken.

I hope my remarks have adequately pointed out the problems in obtaining evidence abroad. Despite the great increase in communication and trade among nations, obtaining evidence abroad remains a formidable task.