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Foreign Depositions

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I. INTRODUCTION

Commerce reaches across the globe, and, as the world “shrinks,” conflicts between parties in different countries multiply. An attorney with a case pending before a court in the United States may need the testimony of a witness located in a foreign country. To help an American attorney familiarize himself with the procedures to obtain evidence located in foreign countries, this paper examines the applicable procedures for obtaining foreign witness testimony.

II. BACKGROUND INFORMATION REGARDING DISCOVERY CONDUCTED IN FOREIGN COUNTRIES FOR USE IN AN AMERICAN COURT

A. Foreign Attitudes Regarding American–Style Discovery

Pretrial discovery as it is known in the United States simply does not exist in other countries. In America, attorneys lead the discovery process and can discover any evidence “reasonably calculated to lead to the discovery of admissible evidence.”\(^1\) Obviously, this rule allows attorneys to discover evidence that may not be used at trial and even to discover evidence that would be inadmissible at trial. Such a broad scope far exceeds even what is customary in other common law countries.\(^2\)

Other countries operate differently. Foreign courts severely limit pretrial factual inquiry. And, courts themselves, not attorneys, gather the evidence. Courts may limit attorneys’ participation and may decline to use court reporters or to provide verbatim transcripts.\(^3\) Civil law countries describe evidence-gathering as an exercise of “judicial sovereignty.”\(^4\) As such, attempts by non-judicial officials (attorneys) to obtain evidence without governmental participation or consent may be considered unauthorized and may even result in criminal violations.\(^5\)

The differences between these discovery processes flow from the dominant principles guiding each system. In the United States, the guiding principle holds that a complete exchange of relevant information between parties will advance the search for the truth.\(^6\) The prevailing principle in other countries, however, holds that each party must prove its position based upon

\(^1\) Fed. R. Civ. P. 26(b)(1).
\(^3\) Id.
\(^4\) David Epstein, Jeffrey L. Snyder, and Charles S. Baldwin, IV, International Litigation § 10.02 (3d ed. 2000).
\(^5\) Id.
information within its own control. The great variance between these systems leads to hostility in foreign courts towards American-style discovery practices.

B. Controlling Law

An attorney who wishes to obtain evidence in another country must comply with both the proper procedures in the American court and in the foreign country. Both the Federal Rules of Civil Procedure and the Texas Rules of Civil Procedure detail state-side procedures. Actual evidence-gathering is then conducted following the host country’s laws. Thus, the discovery scope may be severely restricted and the process may be radically different compared to American-style depositions.

C. Possible Methods of Obtaining Testimony

Several methods exist for obtaining testimony from a foreign witness. First, a party’s testimony may be obtained through an agreement between counsel to conduct discovery without foreign court intervention. For non-party witnesses, selecting the correct method hinges upon the witness’s willingness to testify. A voluntary witness can testify without the aid of foreign authorities provided the foreign country does not prohibit such testimony. Other methods must be pursued if the witness refuses to testify voluntarily. These methods include: testimony pursuant to a letter of request or a letter rogatory, testimony before a person authorized to administer oaths, testimony before a person commissioned by the court, or testimony before a consular agent or diplomatic officer.

III. Domestic Law Governing an Attorney’s Attempt to Obtain Foreign Witness Testimony

An American attorney must comply with the law of the forum court when seeking foreign witness testimony. The attorney must follow either the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure, or the applicable rules of civil procedure in the state in which you practice.

A. Federal Law

Under Federal Rule of Civil Procedure 28, a deposition in a foreign country may be taken in one of four ways: (1) pursuant to an applicable treaty or convention; (2) pursuant to a letter of request; (3) on notice before a person authorized to administer oaths in the place where the

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7. Id.
9. Epstein, supra note 4 § 10.04.
10. Epstein, supra note 2 at 135.
11. Epstein, supra note 4 § 10.06.
examination is held, either by the law of that place or by the law of the United States; or (4) before a person commissioned by the court.\textsuperscript{12}

1. Pursuant to an Applicable Treaty or Convention

When obtaining evidence pursuant to an applicable treaty or convention, an attorney should follow the procedures set out by the convention or treaty. The most widely recognized foreign evidence convention is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (also known as the “Hague Evidence Convention” or the “Convention”). While this Convention is discussed in detail later, it is an agreement between signatories as to appropriate ways to obtain evidence located in signatories’ countries. Other treaties may govern the relationship between the United States and a particular nation.

2. Pursuant to a Letter of Request

a. Overview

A letter of request is a letter from a United States court to a foreign court, asking the foreign court to perform some judicial act, such as gathering evidence.\textsuperscript{13} It operates on the principle of comity, the recognition foreign courts give to the decisions of other courts.\textsuperscript{14} While no law requires a foreign court to comply, comity ensures compliance in most instances.\textsuperscript{15}

Attorneys frequently use letters of request. They are the only way to obtain evidence in countries that prohibit attorney-taken deposition testimony.\textsuperscript{16} Time-wise, however, a letter of request may significantly delay discovery; six months to a year may elapse between the date a letter is sent and the date it is received after execution.\textsuperscript{17} A letter of request is also costly; a $650.00 consular fee is charged for processing letters of request,\textsuperscript{18} and foreign authorities may also charge a fee.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item[FED. R. CIV. P. 28(b).]
\item[Epstein, supra note 4 § 10.09.]
\item[Richard S. Sanders and Christina N. Smith, Massachusetts Discovery Practice, II. Mass. Continuing Legal Educ. § 18.3.2 (2002).]
\item[Epstein, supra note 4 § 10.09.]
\item[United States Department of State, Preparation of Letters Rogatory (“Letters of request” and “letters rogatory” are considered synonymous.) (Dec. 6 2004), available at \url{http://travel.state.gov/law/letters_rogatory.html} (2004).]
\item[\textit{Id.} This fee is payable to the United States embassy in the foreign country. No consular fee is charged for letters of request issued on behalf of federal, state, or local governmental officials.]
\item[\textit{Id.}]
\end{enumerate}
\end{footnotesize}
b. Specific Requirements

Procedurally, an attorney must comply with state-side requirements. He must first draft a letter of request and file it with the appropriate United States District Court. The court then shall issue a letter of request on just and appropriate terms. The requesting attorney need not show that taking a deposition in another way is either impracticable or inconvenient. Specifically, the letter should be addressed to a named foreign court, if known. If not known, it may be addressed “To the Appropriate Authority in [name of country].” The letter must be issued under the court’s seal and the judge’s signature, but, while this authentication is sufficient for most countries, some countries require further authentication. The letter should be translated into the foreign country’s official language, and the translator should execute an affidavit verifying the translation’s validity.

Once the United States court agrees to submit the request, it sends the letter to the foreign court. This route varies. Some countries permit letters to be sent directly from a United States court to the foreign court. Other countries require submission through diplomatic channels. For such a submission, an attorney should submit the original English version with the court’s seal and judge’s signature, a photocopy of this version, the original translation, and a photocopy of the original translation to the United States Department of State; it is vested with the authority to receive and return letters of request after execution. The Department of State then routes the letter to the United States embassy in the foreign country and from there to the Ministry of Foreign Affairs. Next, the letter is sent to the foreign Ministry of Justice and finally routed to the foreign court. The foreign court will then execute the request. After execution, the letter of request is returned in the reverse manner: to the Ministry of Foreign Affairs, to the United States embassy, to the United States Department of State, and ultimately to the forum court. The requesting attorney is notified, and, at the court’s request, the executed letter and evidence can be returned directly to him.

c. Using a Letter of Request

When drafting a letter of request, an attorney should strive to create a helpful document. He or she should draft a clear and simple letter that summarizes the proceedings and briefly

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21 Epstein, supra note 4 § 10.09.
23 Preparation of Letters Rogatory, supra note 17.
24 Id.
25 Id.
27 Preparation of Letters Rogatory, supra note 17.
28 Id.
29 Id.
describes the parties.\textsuperscript{30} The specific request should be worded to show that it is reasonably related to the matters at issue.\textsuperscript{31} The attorney should avoid language that could be construed as a “fishing expedition,” such as “any and all”\textsuperscript{32} and even the word “discovery.”\textsuperscript{33} While such language is boiler-plate language for discovery requests in the United States, because of foreign opposition to pretrial discovery, specific requests will more likely be honored. If an attorney wishes to make special requests, such as a request for a verbatim transcript or testimony under oath, he should specify that information.

The following essential elements should be included in a letter of request:

(1) a statement that the request for international judicial assistance is being made in the interests of justice;
(2) a brief synopsis of the case, identifying the parties, the nature of the claim, and the relief sought;
(3) a description of the assistance required;
(4) name, address, and other relevant information of the person from whom evidence is to be compelled;
(5) a list of questions to be asked (if applicable);
(6) a statement expressing a willingness to provide similar assistance to the foreign court; and
(7) a statement expressing a willingness to reimburse the judicial authorities for costs incurred in executing the letter of request.\textsuperscript{34}

Before submitting a letter of request, an attorney must ensure that it complies with all the applicable requirements. To this end, the attorney should consider:

(1) Is the letter of request signed by the court and certified by the court’s clerk?
(2) Has the letter been translated into the appropriate foreign language?
(3) Has a duplicate set of the letter and any accompanying documents been provided?
(4) Does the request reflect identifying language such as the name of the case, docket number, and the mailing address of the clerk to whom the executed request should be returned?
(5) Is the request accompanied by a check or money order to cover costs incident to the letter’s execution?
(6) Does the request specify the name and address of the person from whom evidence is to be obtained?
(7) Does the request provide for assurance of reciprocal assistance in similar cases?\textsuperscript{35}

\textsuperscript{30} Epstein, \textit{supra} note 4 § 10.09.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Preparation of Letters Rogatory, \textit{supra} note 17.
\textsuperscript{35} Id.

Epstein, \textit{supra} note 4 § 10.09.
Once a letter is approved and transmitted to the United States embassy, the requesting attorney should contact the embassy for advice.\textsuperscript{36} Often the embassy can provide guidance on local processes and will notify the attorney if the foreign authorities plan to charge processing fees for the letter of request.\textsuperscript{37}

3. On Notice Before a Person Authorized to Administer Oaths

a. Overview

The Federal Rules of Civil Procedure authorize the taking of a deposition on notice before a person authorized to administer oaths. To do so, an attorney designates the person before whom the deposition is to be taken either by name or by descriptive title.\textsuperscript{38}

b. Using a Deposition on Notice Before a Person Authorized to Administer Oaths

Depositions on notice before a person authorized to administer oaths can be conducted by any person authorized to administer oaths, though they most often are conducted by United States consular officers. All consular officers are authorized to administer an oath and take a deposition from any person.\textsuperscript{39} Taking depositions in this way bypasses the need for court intervention.\textsuperscript{40} But foreign law governs and some countries forbid depositions before a consular officer\textsuperscript{41} or require governmental clearance beforehand.\textsuperscript{42}

To proceed with this method, an attorney must follow several steps. First, he must give notice to the opposing party.\textsuperscript{43} Next, he must inquire about the consular officer’s availability and the availability of physical facilities.\textsuperscript{44} Often an attorney must provide the physical facilities for the deposition, and, due to scheduling demands, must schedule the deposition several months in advance.\textsuperscript{45} The requesting attorney also must arrange for the witness to attend and hire a translator and reporter. He must be prepared to pay the consular officer; a consular officer charges set fees for conducting depositions and charges additional fees for his time at the

\textsuperscript{36} Id.
\textsuperscript{37} Preparation of Letters Rogatory, supra note 17.
\textsuperscript{38} FED. R. CIV. P. 28(b).
\textsuperscript{40} Epstein, supra note 4 § 10.07.
\textsuperscript{41} Epstein, supra note 2 at 136. The attorney must follow the notice provisions of either Rule 30(b) or Rule 31(a) of the Federal Rules of Civil Procedure, depending on whether the deposition will be oral or on written questions.
\textsuperscript{42} Epstein, supra note 4 § 10.07.
\textsuperscript{43} Epstein, supra note 2 at 136.
\textsuperscript{44} Epstein, supra note 4 § 10.07.
\textsuperscript{45} Id.

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deposition. Further guidance for attorneys seeking to obtain deposition testimony in this manner can be found at 22 Code of Federal Regulations §§ 92.49-92.71.

When submitting a request to the consular official to conduct a deposition, an attorney should include:

1. the name, address, and phone number of the requesting attorney;
2. a description of the case;
3. the purpose of the deposition;
4. suggested dates;
5. the name of the person to be deposed and his citizenship;
6. a statement that the witness’s appearance is voluntary;
7. the method of taking the deposition (whether on oral questions or written questions);
8. a request for court reporters, translators, and interpreters, if needed;
9. a list of attorneys and other people who will attend the deposition;
10. a statement about whether the consular officer should be present during the entire proceeding or only for the oath; and
11. a check to cover necessary fees and expenses.

Once the deposition begins, the consular officer performs several duties. First, he administers oaths to the witness, stenographer, and interpreter and then examines the witness according to consular regulations. He ensures that the testimony is recorded in accordance with the Federal Rules of Civil Procedure and presides at the entire examination unless the parties stipulate otherwise. Following the deposition, the consular officer ensures that a transcript is prepared and is given to the witness for correction, unless waived by the parties and prepares a certificate that the witness was sworn and that the deposition record is a true record of the testimony given.

4. Before a Person Commissioned by the Court

a. Overview

An attorney may seek to obtain deposition testimony before a person commissioned by the court. This method may only be used to obtain a voluntary witness’s testimony. The court commissions a person on application and notice and on terms that are just and appropriate. The attorney need not show that taking the deposition in another way is impracticable or inconvenient. The commission may be issued to someone either by name or by descriptive title.

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46 Sanders, supra note 15 § 18.3.1. Information provided current as of February 2002.
47 Id.
48 Id.
49 Epstein, supra note 2 at 137.
50 FED. R. CIV. P. 28(b).
51 Id.
and usually contains detailed instructions for its execution.\textsuperscript{52} Once the testimony is taken, the commissioner certifies the answers and returns the evidence according to any special instructions.\textsuperscript{53}

b. Use of a Deposition Before a Person Commissioned by the Court

Commissions may be issued to a private person, although they are often issued to a consular officer.\textsuperscript{54} Commissioning a consular official is necessary in countries that forbid depositions on notice before consular officials in their official capacity.\textsuperscript{55} In addition, since a commission can specify instructions, it ensures that a consular officer will comply with those instructions.\textsuperscript{56}

5. Statutory Barriers to Discovery

Foreign hostility towards American-style discovery led some countries to utilize “blocking” statutes to stop discovery by American attorneys if the evidence sought would not be discoverable under foreign laws. United States courts face a dilemma when a foreign party cannot comply with both American discovery orders and a blocking statute.

The landmark case in this area is Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers.\textsuperscript{57} In Rogers, the plaintiff, a Swiss company, could not comply with a discovery request for banking records located in Switzerland because compliance would constitute criminal violations of Swiss secrecy laws.\textsuperscript{58} The United States Supreme Court held that the plaintiff’s inability to fully comply did not justify dismissal of its case as a sanction for noncompliance, especially since the plaintiff made a good faith attempt to comply.\textsuperscript{59} Following Rogers, American courts have viewed blocking statutes and banking and commercial secrecy laws as affronts to the American judicial process, and, if a foreign plaintiff invokes a blocking statute, the court will likely find that the foreign plaintiff is attempting to circumvent American discovery rules.\textsuperscript{60}

B. Texas Law

Texas law regarding foreign depositions parallels federal law. Therefore, the practical tips stated above also apply to discovery conducted pursuant to Texas law. Texas Rule of Civil

\textsuperscript{52} Epstein, \textit{supra} note 4 § 10.08.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Epstein, \textit{supra} note 2 at 137.
\textsuperscript{57} Epstein, \textit{supra} note 4 § 10.08.
\textsuperscript{58} Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).
\textsuperscript{59} Id. at 200.
\textsuperscript{60} Id. at 205.
Procedure 201 governs foreign depositions. A party may depose a person or entity located in a foreign country on oral examination or on written questions.\textsuperscript{61} The deposition may be taken by: (1) notice; (2) letter rogatory, letter of request, or other such device; (3) agreement of the parties; or (4) court order. Texas allows foreign depositions to be conducted by telephone, videoconference, teleconference, or other electronic means.\textsuperscript{62}

1. **By Notice**

When taking a deposition by notice, a party must take it in accordance with Texas rules and as if the deposition were conducted within Texas, except that the deposition officer may be a person authorized to administer oaths where the deposition is taken.\textsuperscript{63}

2. **By Letter Rogatory, Letter of Request, or Other Such Device**

Texas law distinguishes between letters rogatory and letters of request. It appears that letters of request or other such devices are those issued pursuant to a treaty or convention.

When taking a deposition pursuant to a letter rogatory, an attorney must follow the procedure detailed in Texas Rule of Civil Procedure 201.1(c). The attorney must first motion the court, then the court must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition testimony is impractical or inconvenient.\textsuperscript{64} The letter must: (1) be addressed to the appropriate authority in the jurisdiction where the deposition is to be taken; (2) request and authorize the authority to summon the witness at a time and place stated for examination on oral or written questions; and (3) request and authorize that authority to cause the witness’s testimony to be reduced to writing and returned, together with any items marked as exhibits, to the requesting attorney.

When taking a deposition pursuant to a letter of request or other device, an attorney must follow the procedure set out in Texas Rule of Civil Procedure 201.1(d). First, an attorney must motion the court, and the court must issue a letter of request or other such device in accordance with an applicable treaty or convention on terms that are just and appropriate, regardless of whether any other method of obtaining the deposition is impractical or inconvenient.\textsuperscript{65} The letter or device must: (1) be in the form prescribed by the treaty or convention under which it has been issued, as presented by the movant to the court or clerk; and (2) state the time, place, and manner of the examination.

In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the device’s form, and an attorney must object in writing and serve it on all other parties by that time or else waive the objection.\textsuperscript{66} Evidence obtained in response to a letter rogatory, letter of request, or other device may be admitted in evidence in the case in which the request was made, whether or not the deposition testimony is admitted.

\textsuperscript{61} TEX. R. CIV. P. 201.1.
\textsuperscript{62} Id. at 201.1(g).
\textsuperscript{63} Id. at 201.1(g).
\textsuperscript{64} Id. at 201.1(a).
\textsuperscript{65} Id. at 201.1(c).
\textsuperscript{66} Id. at 201.1(e).
rogatory, letter of request, or other such device is not inadmissible merely: (1) because it is not a verbatim transcript; or (2) because the testimony was not taken under oath; or (3) for any other similar departure from the requirements for depositions taken within Texas.67

IV. HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

A. Overview

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Convention”) represents an agreement between signatory nations regarding evidence-gathering. As previously discussed, civil law countries entrust evidence-gathering to courts, and attorney-led discovery violates this concept. Thus, the Convention was drafted to avoid possible judicial sovereignty violations. It seeks to reconcile discovery procedures in different countries68 and encourage evidence-gathering methods that are both tolerable in the country where the evidence is located and usable in the country where the action is pending.69 The Convention does not, however, obligate a country to honor a request from another country; rather, it provides a formal method for making a request.70

The Convention applies only to “civil or commercial matters” and to evidence for use in a judicial proceeding.71 While the Convention does not define these terms, it appears that the host country has discretion to determine whether a request pertains to civil or commercial matters.72 The host country need only honor requests from a court; legislative or administrative bodies may not seek information pursuant to the Convention.73

The United States joined the Convention in 1970 and has agreements with approximately 48 countries.74 But hostility towards American-style pretrial discovery is evident. Most

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67 Id. at 201.1(f).
70 Preparation of Letter Rogatory, supra note 17.
72 Epstein, supra note 4 § 10.10.
73 Id.
74 United States Department of State, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter Hague Evidence Convention] (Dec. 6, 2004), available at http://travel.state.gov/law/hague_evidence.html. These countries include: Anguilla, Argentina, Aruba, Australia, Barbados, Bulgaria, Cayman Islands, China, Cyprus, Czech Republic, Denmark, Djibouti, Estonia, Falkland Islands, Finland, France, French Guiana, French Polynesia, Germany, Gibraltar, Guadeloupe, Guernsey, Hong Kong SAR, Isle of Man, Israel, Italy, Jersey, Latvia, Luxembourg, Macao SAR, Martinique, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Saint Pierre and Miquelon, Singapore, Slovak Republic, Sovereign Base Areas of Akrotiri and Dhekelia, Spain, Sweden, Switzerland, United Kingdom, United States, and Venezuela.
signatory nations executed declarations restricting pretrial document discovery. And, some countries declared that they will not comply with requests for any pretrial discovery purposes.

B. General Procedures

The Convention sets out three procedures to obtain foreign evidence. An attorney may use a letter of request, arrange for a diplomatic officer or consular agent to take evidence, or, arrange for a commissioner to take evidence.

1. Letter of Request

Attorneys most frequently use letters of request. They are the only means to obtain testimony from an unwilling witness or for use in actions that have not been commenced. In addition, attorneys may request that specific procedures be used, such as placing a witness under oath or preparing a verbatim transcript, and a foreign court must comply with these requests unless the requests conflict with the host country’s laws or are impossible to perform. This represents a significant concession made by civil law countries to American-style discovery practices.

a. Drafting the Letter of Request

Procedurally, an attorney requests the appropriate American court to transmit the letter to the appropriate foreign authority, by motion on notice to opposing counsel, and in accordance with local court rules. The letter of request should specify:

(1) the authority requesting its execution and the authority requested to execute it, if known;
(2) the names and addresses of the parties and their representatives, if any;
(3) the nature of the proceedings; and
(4) the evidence to be obtained.

Where appropriate, the letter of request should also specify:

(1) the names and addresses of the persons to be examined;

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75 Epstein, supra note 2 at 133.
76 Id. These countries include: Argentina, Australia, Denmark, Germany, Italy, Luxembourg, Monaco, Poland, Portugal, South Africa, Spain, and Sweden.
77 Sanders, supra note 15 § 18.3.1.
78 Convention, supra note 68, art. 9, 23 U.S.T. at 243, 847 U.N.T.S. at 2561.
79 Prescott, supra note 68 at 953-54.
80 Epstein, supra note 4 § 10.10.
(2) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(3) the documents or other property, real or personal, to be inspected;

(4) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used; and

(5) any special method or procedure to be followed under Article 9 (relating to the execution of the request).

When drafting the letter of request, an attorney should follow some general guidelines. First, the request should be written in the foreign country’s official language or be accompanied by a translation into that language. Although a country must accept a letter written in either English or French unless the country reserved a right not to, it is prudent to provide an official translation. The attorney should write a neutral case description emphasizing the proceeding’s commercial nature, stating that actual litigation is involved, and explaining that the evidence sought is needed at a trial. Additionally, the attorney should explain the testimony’s significance and state any credibility issues. An attorney may want to explain that a United States judge approved the request to demonstrate domestic approval. Also, although an attorney may list specific questions, generally, it is best not to do so unless the attorney wishes to obtain written interrogatories. Instead, the attorney should state that he seeks a deposition and generally describe his proposed examination, focusing again upon relevancy. Finally, while the Convention does not require an attorney to submit duplicates, it is advisable to do so. Hiring foreign counsel to review the letter of request before submission can eliminate potential problems in the foreign forum. Additionally, if the letter were challenged domestically, foreign counsel could submit an affidavit supporting the letter to encourage domestic approval.

b. Transmitting the Letter of Request

Once approved, the United States court will send the letter to the foreign court via the “Central Authority” in the foreign country. The Convention requires each country to designate a

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83 Id.
84 Id., art. 4, 23 U.S.T. at 242, 847 U.N.T.S. at 2559-60.
85 Id. A country which has more than one official language and cannot accept letters of request in one language for all of the country must declare the specific language which should be used for letters of request in specified parts of its country.
86 Prescott, supra note 69 at 958.
87 Platto, supra note 81 at 182.
88 Goldstein, supra note 6 at A-37.
89 Prescott, supra note 69 at 957.
90 Platto, supra note 81 at 183.
91 Id.
92 Sanders, supra note 15 § 18.3.1.
93 Platto, supra note 81 at 183-84.
Central Authority to receive letters of request. The United States Department of Justice serves as its Central Authority. To further expedite the transmittal process, countries may arrange between themselves for direct contact between courts or between a party and the foreign court.

The Central Authority must determine if the letter complies with Convention regulations; if the letter does not, the Central Authority must inform the requester and specify its objections. The most likely grounds for rejection include:

1. the letter does not emanate from a judicial authority;
2. the letter does not relate to judicial proceedings;
3. the letter requires performance of a judicial act not covered by the Convention;
4. the letter does not include the required information;
5. executing the letter would prejudice the sovereignty or security of the foreign country; or
6. the matter is not a civil or commercial matter.

If accepted, the Central Authority transmits the letter to the appropriate court.

c. Executing the Letter of Request

Local law governs the evidence-gathering procedures and determines the measure of compulsion a court may use to require a witness to testify. But the Convention requires foreign court to follow any special requests stated in the letter unless the request is incompatible with local law or impossible to perform due to internal practices or practical difficulties.

The Convention regulates testimonial privileges. A witness may refuse to testify if he has a privilege or a duty to refuse to testify under: (1) the law of the host country; (2) United States law, where the privilege or duty has been specified in the letter or otherwise confirmed by the requesting authority; or (3) another country’s laws if the foreign country has declared that it will respect privileges and duties existing under such laws.

Convention procedures govern payment for services, notice requirements, and scheduling. Courts may not be reimbursed for taxes or costs but may require reimbursement of fees paid to experts or interpreters or costs incurred in executing a specific requested purpose.

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96 Sanders, supra note 15 § 18.3.1.
97 Convention, supra note 68, art. 5, 23 U.S.T. at 242, 847 U.N.T.S. at 2560.
98 Sanders, supra note 15 § 18.3.1.
99 Epstein, supra note 4 § 10.10.
100 Convention, supra note 68, art. 10, 23 U.S.T. at 243, 847 U.N.T.S. at 2561-62.
101 Id., art. 9, 23 U.S.T. at 243, 847 U.N.T.S. at 2561.
102 Id., art. 11, 23 U.S.T. at 243, 847 U.N.T.S. at 2562.
procedure.\footnote{Id., art. 14, 23 U.S.T. at 243-44, 847 U.N.T.S. at 2563-64.} If constitutionally bound, a court may request reimbursement of fees and costs for service of process, witness fees, and a transcript.\footnote{Id., art. 26, 23 U.S.T. at 246, 847 U.N.T.S. at 2569.} If requested, the Central Authority must give the requesting court notice of the time and place where the evidence-gathering will be conducted.\footnote{Id., art. 7, 23 U.S.T. at 242, 847 U.N.T.S. at 2560-61.} The court should execute a letter of request “expeditiously.”\footnote{Id., art. 9, 23 U.S.T. at 243, 847 U.N.T.S. at 2561.} Thus, while requests pursuant to the Convention are executed somewhat faster than letters rogatory or letters of request not executed pursuant to the Convention due to the Central Authority system, execution still takes between six months to a year.\footnote{Id., art. 33, 23 U.S.T. at 245, 847 U.N.T.S. at 2571.}

The attorney may wish to contact the United States embassy for information concerning interpreters, translators, and audio/video operations. While the embassy will likely have this information, an attorney must arrange to retain these services himself and, since some countries do not have court reporters or interpreters, may need to bring such service-providers to the foreign country.\footnote{Id., art. 14, 23 U.S.T. at 243-44, 847 U.N.T.S. at 2563-64.}

\subsection*{2. Before a Diplomatic or Consular Officer or Before a Commissioner}

The Convention allows an attorney to take depositions before a United States diplomatic or consular officer or by a person commissioned by the court.\footnote{Id., art. 15-17, 23 U.S.T. at 244, 847 U.N.T.S. at 2564, 2565.} But since these methods could offend judicial sovereignty, the Convention provided that countries opposed to allowing evidence to be taken in this way may reserve the right not to allow these methods or to allow them only upon appropriate approval and foreign supervision.\footnote{Id., art. 15, 23 U.S.T. at 244, 847 U.N.T.S. at 2564.} Also, unwilling witnesses may not be compelled to testify under these methods unless the foreign country declared otherwise.\footnote{Id., art. 15, 23 U.S.T. at 244, 847 U.N.T.S. at 2564.} Procedurally, these depositions follow Convention guidelines. A diplomatic or consular officer may take evidence from American nationals, although the host country may require prior permission to be sought from a designated authority.\footnote{Id., art. 16, 23 U.S.T. at 244, 847 U.N.T.S. at 2564-65.} A diplomatic or consular officer may take evidence from a citizen of the host country or another country only with permission from the host country.\footnote{Id., art. 15, 23 U.S.T. at 244, 847 U.N.T.S. at 2564.} A commissioner may take evidence if: (1) a competent authority designated by the foreign country grants permission either generally or in the particular case; and (2) the commissioner complies with the conditions specified in that permission.\footnote{Id., art. 17, 23 U.S.T. at 244, 847 U.N.T.S. at 2565.} A diplomatic or consular officer or commissioner may take any sort of evidence that is not illegal in the host country.
country and may administer oaths or take affirmations. He must: (1) request a person to appear, in the country’s official language or with a translation; and (2) inform the person that he may be legally represented and that he is not compelled to appear or to give evidence. A witness testifying before a diplomatic or consular officer or before a commissioner may invoke the same privileges applicable to a witness testifying pursuant to a letter of request.

While limits apply to depositions taken using these methods, such depositions are potentially less time-consuming and costly than sending a letter of request since they may be done without host country governmental intervention and American discovery procedures may be used to the extent they are not inconsistent with the host country’s laws. Also, they allow an attorney to take the evidence himself under the supervision of the diplomatic officer or consul or as a commissioner appointed by the forum court.

C. Potential Issues When Seeking Evidence Pursuant to the Convention

1. Exclusivity of the Convention

Much debate centered around whether the Convention operated exclusively or if an attorney could rely on other options such as the Federal Rules of Civil Procedure in international discovery matters. In Societe Nationale Industrielle Aerospatiale v. United States District Court, the Supreme Court held that the Convention was not exclusive and that American attorneys need not follow its procedures for all international discovery requests. The Court found that, while the Convention provides minimum standards, it also recognizes and preserves procedures in force in each country. Additionally, the Court held that the Convention should not even be considered the first resort for international discovery. Following Aerospatiale, it appears that most attorneys obtain international discovery pursuant to the Federal Rules of Civil Procedure and not pursuant to the Convention.

2. Problems with Obtaining Useable Testimony

Attorneys struggle to obtain foreign witness testimony in a form that is admissible and effective in a United States court. Blocking statutes may prohibit the disclosure of documents located in the foreign country and foreign courts may hinder testimonial evidence. For

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115 Id., art. 21, 23 U.S.T. at 245, 847 U.N.T.S. at 2567.
116 Id.
117 Id.
118 Prescott, supra note 69 at 961.
119 Id. at 962.
121 Id. at 532.
122 Id. at 542.
123 Goldstein, supra note 6 at A-37.
124 Gregory P. Sreenan and Jeffrey B. Shalek, Blocking Statutes and Their Effect on American-Style Discovery Abroad, 25-Fall Brief 59, 59 (1995).
example, French judges often execute letters of request by questioning the witness themselves while limiting the American attorney to suggesting possible lines of inquiry. With limited knowledge of the case and a short timeframe, it is unlikely that a French judge’s examination would be adequate for an attorney seeking a critical account of events or to test the witness’s credibility. One solution would be invocation of Article 9 to request specific requirements, such as examination by the American attorney. The foreign country must comply with these requests to the extent they do not conflict with the foreign country’s own laws or are impossible.

V. PRACTICAL CONSIDERATIONS FOR AN ATTORNEY CONTEMPLATING A FOREIGN DEPOSITION

A. Potential Resources

Resources are available to help attorneys obtain evidence located in a foreign country. First, attorneys can turn to the Bureau of Consular Affairs of the Department of State. The Bureau of Consular Affairs provides judicial assistance and information regarding evidence-gathering laws for many countries. Its website is particularly easy to navigate and is found at http://travel.state.gov. While the information provided by the Bureau of Consular Affairs should not be relied upon as a legal opinion, a visit to its website can provide a useful first glimpse into the particular processes governing a foreign deposition. Certain country-specific information pulled from this website is provided in the Appendix. Second, an attorney seeking to obtain evidence pursuant to the Hague Evidence Convention can turn to the website maintained by the Hague Conference on Private International Law located at http://hcch.e-vision.nl. In addition to those resources, sample forms are provided in the Appendix and may be adapted for individual discovery requests.

By far, retaining foreign counsel remains the best way to guarantee success. A foreign attorney can explain specific procedures and provide general advice. To hire foreign counsel, an attorney could turn to the Bureau of Consular Affairs of the Department of State. While Foreign Service officers may not recommend particular attorneys, they may provide names or refer inquiries to foreign law directories, bar associations, or other organizations. A list of foreign attorneys is available at its website at: http://travel.state.gov/law/judicial_assistance.html#attorneys. An attorney could also hire a major domestic law firm with a branch office in a particular country to obtain country-specific advice.

125 Goldstein, supra note 6 at A-37.
126 Id.
127 Prescott, supra note 69 at 953.
128 Id.
B. Considerations

When contemplating an international discovery issue, an attorney should also consider the following issues.

1. Is a Foreign Deposition Necessary?

Obtaining evidence located in a foreign country is time-consuming and costly. Therefore, an attorney must be certain that such evidence is truly necessary. If so, the attorney should next determine if a foreign deposition is necessary; pursuing alternative domestic avenues could reveal the same information. Finally, an attorney should determine the appropriate timing, since he will want to have completed sufficient domestic discovery to form a strong factual basis.\(^{131}\) By addressing these threshold inquiries, an attorney may be able to forego a foreign deposition or, at the very least, be prepared to target key points.

2. What Law Applies? Is the Foreign Country a Signatory to the Hague Evidence Convention or to Another Governing Treaty or Convention?

An attorney must determine the governing domestic procedural law. Beyond that, he must determine if the foreign country is a signatory to the Hague Evidence Convention or to another treaty or convention that would control discovery issues. Once determined, the attorney can evaluate whether to proceed under the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure, the Convention, or another treaty or convention. If the Convention applies, the attorney should also determine if the host country made any reservations or declarations limiting the Convention’s general terms.\(^{132}\)

3. What is the Witness’s Relationship to the Case?

The attorney should next evaluate his witness. If the witness is a party, the attorney may be able to agree with opposing counsel pursuant to the Federal Rule of Civil Procedure 29 to conduct a foreign party’s deposition in the same way as a domestic deposition.\(^{133}\) If the witness is not a party, the attorney must make further determinations.

4. Is the Witness a Willing Witness?

An attorney should evaluate whether a witness will voluntarily testify. If so, the attorney may proceed using any legal approach. If not, an attorney must proceed under the more burdensome compulsory evidentiary procedures. An attorney should communicate with a witness or his counsel before seeking deposition testimony in hopes of establishing terms which would convince the witness to testify voluntarily.

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\(^{131}\) Platto, supra note 81 at 182.

\(^{132}\) Sanders, supra note 15 § 18.3.1.

5. What Additional Procedures Must Be Followed?

Once an attorney identifies the best method for obtaining testimony, the attorney should identify any procedural requirements. Since an American attorney may not be aware something is even an “issue,” local counsel could assist in identifying particular requirements. **134**

VI. DISCOVERY CONDUCTED IN THE UNITED STATES FOR USE IN FOREIGN COURTS

Discovery can be conducted by United States courts for use in foreign courts. As the host country, United States law would govern the evidence-gathering. Thus, foreign counsel or a foreign court may seek an American attorney’s advice in navigating the American discovery process.

A. Overview

For depositions conducted in the United States for use in foreign courts, 28 U.S.C.A. § 1782 governs. Any person may voluntarily testify or give a statement for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him. **135** If a potential witness does not voluntarily testify, his testimony can be compelled. The district court of the district where a potential witness resides or is found may order a witness to give testimony or a statement for foreign use. **136** This order may be made pursuant to a letter rogatory or a request made by a foreign or international tribunal or upon the application of any interested person. The order may direct that the testimony or statement be given before a person appointed by the court, who by the appointment has power to administer any necessary oath and take statements or testimony. The order may prescribe using the foreign country’s procedures for taking testimony or statements; to the extent that it does not prescribe otherwise, the testimony or statement shall be taken according to the Federal Rules of Civil Procedure. A person may not be compelled to give testimony or a statement in violation of any legally applicable privilege, **137** including any United States statutory or common law right and possibly including any privilege under foreign law if authoritative proof of the privilege is presented. **138**

B. Interpretation Concerns

American courts have addressed what constitutes a “proceeding in a foreign or international tribunal” under 28 U.S.C.A. 1782. While traditional lawsuits in courts of law are

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134 Epstein, *supra* note 4 § 10.07.
137 *Id.*
included, little authority exists to determine if quasi-judicial proceedings or arbitration proceedings are also included.139

Currently, the circuit courts split on setting the threshold level for discoverability by an American court of material to be used by a foreign court. The First Circuit requires an applicant to show that the information sought is discoverable under foreign law.140 The Fourth and Fifth Circuits require a private litigant to show that the material sought is discoverable under foreign law but do not require foreign courts requesting discovery to do so.141 The Second, Third, and Ninth Circuits do not require proof of discoverability under foreign law, regardless of whether the applicant is a private litigant or a foreign court.142

VII. CONCLUSION

Attorneys face difficulties when obtaining discovery in a foreign country. But armed with knowledge about the international discovery process, an attorney can successfully obtain relevant information usable in an American courtroom.
APPENDIX
MOTION FOR ISSUANCE OF _______ [LETTER OF REQUEST or LETTER ROGATORY]

TO THE HONORABLE COURT:

_______ [Name], _______ [party designation] requests the issuance of a _______ [letter rogatory or letter of request] directed to _______ [name of appropriate official] in _______ [jurisdiction], requesting examination of _______ [name of witness] on _______ [oral examination or written questions], and in support of this motion shows:

I.

This is an action for _______ [describe nature of action].

II.

The witness is _______ [describe witness by residence and relation to action, e.g., a resident of Zurich, Switzerland, and, while a tourist in Houston, Texas, was an eyewitness to the confrontation of plaintiff with defendant on March 4, 1998].

III.

_______ [Name of movant] has good cause to believe that the witness has knowledge of and is competent to testify on _______ [state matters concerning which witness will be examined or, if deposition is to be on written questions, describe or attach written questions].

· WHEREFORE, _______ [name of movant] requests that the Court order the clerk of the court to issue _______ [name of document, e.g., the letter rogatory as attached to this motion or a letter of request prepared as required by the terms of the Hague Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters].

[Signature and certificate of service]
Notice of Taking of Foreign Depositions Before Official

[Rule 28(b)]

[Caption]

To: [names]

Please take notice that the deposition of [name 1], [address] upon oral examination on behalf of [plaintiff] [defendant] [name 2] in the above-entitled action will be taken before [name 3], [title] at [address], on [date], at [time].

Dated: _______

[signature etc.]

Affidavit in Support of Motion for Commission to Take Foreign Deposition

[Rule 28(b)]

[Caption]

I, [name 1], being first duly sworn, deposes and says:

1. I am the [plaintiff] [defendant] in the above-entitled action.

2. The above action was commenced on [date], and is now pending and undetermined in the above court.

3. This is an action brought for the purpose of [describe], and the question involved in this action is [describe].

4. The defense to this action is that [describe].

5. The facts expected to be proved by witness [name 2] are as follows: [state facts].

6. [Name 2], residing at [address] is a necessary and material witness for [plaintiff] [defendant] on the trial of this action, to prove [describe], and I am informed and believe that [name 2] is thoroughly acquainted with the facts in regard to this action.

7. The necessity for the taking of this deposition by commission arises from the facts that [describe].

[signature etc.]

Subscribed and sworn to before me this [date].

Notary Public of [place]

My commission expires [date].
Notice of Time and Place of Taking of Foreign Deposition Pursuant to Commission

[Rule 28(b)]

[Caption]

To: [names]

You are hereby notified that the deposition of [name 1], a witness on behalf of [plaintiff] [defendant] [name 2] in the above-entitled action, will be taken by [name 3] at the office of [name 4] [title], [address], on [date], at [time], pursuant to a commission issued by the District Court of the United States for the ______ District of ______

Dated: ______

[signature etc.]

Record of Deposition Before Officer—Upon Written Interrogatories or Upon Oral Examination With Certificate

[Rule 28(b)]

[Caption]

Deposition of witness [name 1], taken before me, [name 2], [title], at [place], under and by virtue of a commission issued out of the United States District Court for the ______ District of ______ and in accordance with notice, in a certain cause pending there between [name 3], plaintiff, and [name 4], defendant.

[Name 1], of [place], age ______ years and upwards, being by me first duly sworn, deposes and says:

* * *

[place] ss.

I, [name 2], certify that [name 1], the witness, personally appeared before me on the [date], at [time], at [place], and after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence subscribe it and endorsed the exhibit attached to it. And I further certify that I have subscribed my name to each half sheet of it, and to the exhibit.

[Title]

Fee: ______

[Seal]
Motion for Letter Rogatory

[Rule 28(b)]

[Caption]

[Plaintiff] [Defendant] [name 1] moves this court to order the issuance by the Clerk of this Court of a letter rogatory directed to the appropriate authority in [place], requesting the examination of [name 2] as a witness on interrogatories attached to this motion [or, on oral examination] on the ground that this action is an action for [describe] and is pending and undetermined in this Court, and that [name 2] to be examined on the attached interrogatories [by oral examination concerning the following matters: [describe]].

Dated: ______

[signature etc.]

Order Directing Issuance of Letter Rogatory

[Rule 28(b)]

[Caption]

This matter having come on for hearing upon the motion of [plaintiff] [defendant] [name 1] for a letter rogatory for the examination of [name 2] and it appearing that such a letter rogatory is appropriate,

Now therefore, it is hereby ordered that the Clerk of Court shall issue the letter rogatory in the form attached to this order.

Dated: ______

__________________________________________

United States District Judge
Letter Rogatory—Witnesses Not Named

[Rule 28(b)]

UNITED STATES OF AMERICA, )
                           ) ss.
                            )
      ____________ District of ________ )

The President of the United States to any Judge or Tribunal having Jurisdiction of Civil Causes at ______, Greeting: [or, To the Appropriate Judicial Authority in ______]

Whereas a certain suit is pending in the United States District Court for the ______ District of ______, in which [name 1] is plaintiff and [name 2] is defendant, and it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice cannot be completely done between these parties;

We, therefore, request that in furtherance of justice you will by the proper and usual process of your court cause such witness or witnesses as shall be named or pointed out to you by the parties or either of them, or by the agents or attorneys of either of them, to appear before you or some competent person appointed and authorized by you at precise times and places by you to be fixed and there to answer on their oaths or affirmations to the several attached interrogatories [or, and there to answer on their oath or affirmation to the questions propounded to them by the parties, their agents or counsel upon direct and cross examination], and that you will cause their depositions to be committed to writing and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required.

Witness the Hand of [name 3], Judge, United States District Court, ________ District of ________

Dated: ________

__________________
Clerk of the United States
District Court for the ________
District of ________
Letter Rogatory With Authentication—Witnesses Named

[Rule 28(b)]

UNITED STATES OF AMERICA,

) ss.

_______ DISTRICT OF ________

The President of the United States of America to any Judge or
Tribune Having Jurisdiction of Civil Causes at [place], Greeting: [or
To the Appropriate Judicial Authority in (here name the country):]

Whereas, a certain suit is pending in our District Court for the
_______ District of ________, in which [name 1], of [place] is plaintiff,
and [name 2] is defendant, and it has been suggested to us that
justice cannot completely be done between these parties, without
the testimony of [names], all of whom reside at [place], within your
jurisdiction.

We therefore request that in furtherance of justice you will by
the proper and usual process of your Court, cause [names] to
appear before you or some competent person appointed and author-
ized by you, at a precise time and place by you to be fixed, then
and there to make answer on their oaths and affirmation to the
several attached interrogatories and cross interrogatories [or, and
there to answer on their oath and affirmation to the questions
propounded to them by the parties, their agent or counsel upon
direct and cross-examination], and that you will cause their deposi-
tions to be committed to writing, and the papers and other matters,
that any one of these witnesses may produce in evidence, to be
marked as plaintiff’s exhibits, in the manner indicated by the
plaintiff’s attorney in the interrogatories, and to be properly attes-
ted by you and to cause these depositions with all exhibits so
marked and attested to be returned to us under cover addressed to
the Clerk of the United States District Court for the ________
District of ________, in the United States of America, duly closed
and sealed up together with these presents, and we shall be ready and
willing to do the same for you in a similar case when required.

Witness the Honorable [name 2] Judge of the United States
District Court of the ________ District of ________, this [date].

____________________________
Clerk

[Continued on next page]
United States of America

ss.

District of ______

I [any Judge], of the United States District Court for the ______ District of ______ do hereby certify that [name 3], whose signature is attached to the Letters Rogatory attached to this order, was at the date of this order, the Clerk of the United States District Court for the ______ District of ______, the official acts and doings of the Clerk are entitled to full faith and credit, and that the attestation to the Letters Rogatory is in due form of law.

I further certify that the seal attached to the Letters Rogatory is the seal of this Court.

Witness my hand and the seal of the Court at the City of ______ [date].

United States District Judge

United States District Court

_______ District of ______

[date]

I, [name 3], Clerk of the United States District Court for the ______ District of ______, do hereby certify that [name 2], whose name is signed to the accompanying papers is now, and was at the time of signing them, United States District Judge in and for the ______ District of ______.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Court at the City of ______, [date].

Clerk
Model for Letters Rogatory

[Rule 28(b)]

I. (Items to be included in all Letters of Request)

1. Sender
   ___ (identity and address) ___

   ______________________________

2. Central Authority of the Requested State
   ___ (identity and address) ___

   ______________________________

3. Person to whom the executed request is to be returned
   ___ (identity and address) ___

   ______________________________

II. (Items to be included in all Letters of Request)

4. In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

   a. Requesting judicial authority (article 3, a)
      ___ (identity and address) ___

      ______________________________

   b. To the competent authority of (article 3, a)
      ___ (the requested State) ___

      ______________________________

6. Names and addresses of the parties and their representatives (article 3, b)
   a. Plaintiff
      ______________________________

   b. Defendant
      ______________________________

   c. Other parties
      ______________________________

7. Nature and purpose of the proceedings and summary of the facts (article 3, c)

   ______________________________

8. Evidence to be obtained or other judicial act to be performed (article 3, d)

   ______________________________

III. (Items to be completed where applicable)

9. Identity and address of any person to be examined (article 3, e)

   ______________________________

10. Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, f)
    ___ (or see attached list) ___

    ______________________________

[Continued on next page]
11. Documents or other property to be inspected (article 3, g)  
   ____ (specify whether it is to be produced, copied, valued, etc.)  
   ____ (In the event that the evidence cannot be taken in the manner requested, specify taken in such manner as provided whether it is to be by local law for the formal taking of evidence.)  

13. Special methods or procedure to be followed (articles 3, i and 9)  

14. Request for notification of the time and place for the execution of the Request and identity and address identity and address of any person to be notified (article 7)  

15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the letter of Request  

16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, b)  

17. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by  
   ____ (identity and address)  

IV. (Items to be included in all Letters of Request.)  

18. Date of request  

19. Signature and seal of the requesting authority
INTERNATIONAL DEPOSITIONS

The following information can be found at the United States Department of State’s website at http://travel.state.gov. This information reflects current procedures, however, an attorney should always investigate applicable laws before attempting to obtain foreign witness testimony.

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AUSTRALIA

● Applicable Treaties Or Other Agreements

The Vienna Convention on Consular Relations, 21 UST 77; 596 UNTS 261; TIAS 6820 (Article 5);

The United States-United Kingdom Convention to Regulate Commerce (Article IV) of July 3, 1815, 8 Stat 228; TS 110; 12 Bevans 49;

The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 USCA 1781 (1980 Cumulative Suppl) and 23 UST 2555; TIAS 7444. See also the law digest volume of the Martindale-Hubbell Law Directory under selected international conventions.

● Hague Evidence Convention

The Hague Evidence Convention entered into force for Australia December 22, 1992. The United States notified the depositary government, the Netherlands, on July 6, 1993 that the United States had no objection to Australia’s accession to the Convention. The Convention will therefore enter into force between the United States and Australia 60 days after the U.S. notification to the Netherlands, September 6, 1993. The Convention provides a mechanism for the taking of voluntary depositions and compulsion of evidence. The Office of Citizens Consular Services has available a separate information flyer which explains the Convention in greater detail.

● Australia Central Authority

The Australia Central Authority for requests under the Hague Evidence Convention is the Secretary to the Attorney-General’s Department of the Commonwealth of Australia. Pursuant to Article 24, it designates the Registrars of the State and Territory Supreme Courts as additional authorities.

● Australia Reservation and Declarations Re the Convention

On depositing its instruments of accession to the Hague Evidence Convention, Australia made the following reservation and declarations:
- Pursuant to Article 33, it excludes the operation of paragraph 2 of Article 4 regarding acceptance of a letter of request in either English or French, or a translation into one of these languages. Australia will only accept a letter of request in English.

- Pursuant to Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request, subject to prior authorization by the judicial authority executing the Letter of Request;

- Pursuant to Article 15, evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application to the Secretary of the Attorney-General's Department of the Commonwealth of Australia. (The United States is seeking clarification from the Government of Australia as to whether permission will be given by Australia to this action generally or whether permission must be sought on a case by case basis.)

- Pursuant to Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries;

- **Voluntary Depositions Of Willing Witnesses**

  Depositions of willing witnesses (without compulsion) may be conducted in Australia either before U.S. consular officers or before any other person (including an American attorney) who has been issued a commission for the taking of the deposition by a court in the United States.

- **Depositions Before U.S. Consular Officers**

  Articles 15-16 of the Hague Evidence Convention provide for the taking of evidence of willing witnesses by diplomatic and consular officers. Pursuant to Australia's declaration on acceding to the Convention, permission must be obtained from the Australian Central Authority in order to conduct a deposition before a diplomatic or consular officer. (The U.S. is seeking clarification of this point from Australia as to whether such permission will be granted generally, or whether permission must be obtained on a case by case basis.) U.S. law provides that depositions of willing witnesses abroad may be taken on notice or pursuant to a commission before any consul or vice consul of the United States (22 U.S.C. 4215; 4221; 18 U.S.C., Appendix, Rules of Criminal Procedure, Rules 15 and 17; 28 U.S.C., Appendix, Rules of Civil Procedure, Rules 28-31, 22 CFR 92.49 et seq.) It is also possible to arrange for the taking of the deposition of a willing witness on written interrogatories by any consul or vice consul of the United States (22 CFR 58).

- **Depositions Before Commissioners**

  Article 17 provides that a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in aid of proceedings commenced in the courts of another Contracting state if a competent authority in the State where the evidence is to be taken has given its permission either generally or in the particular case for the taking of voluntary depositions by a commissioner (22 CFR 92.53). This would provide for a person named in a commission issued by a court in the United States to conduct
depositions in Australia. Australia did not make any specific declaration on its accession to the Convention as to whether evidence may be taken under this Article without prior permission of the Australia Central Authority. However, in a letter dated November 29, 1983, the Embassy of Australia advised the Department of State that Australia does permit the taking of voluntary depositions of witnesses for use in the United States. The United States is seeking clarification from Australia as to whether this interpretation continues to apply.

- **Scheduling A Deposition At The U.S. Embassy Or Consulates General**

To schedule a deposition of willing witnesses directly or to obtain information about court reporters, stenographers or interpreters, contact the Consular Section, American Citizens Services Section at any of the U.S. Foreign Service posts in Australia. You must make your own arrangements to retain the services of a court reporter or stenographer, although lists of such services may be available from the U.S. consular officer. The Office of American Citizens Services has a separate information flyer entitled "Obtaining Evidence Abroad" which includes detailed information about making arrangements for U.S. consular services for a deposition. When contacting the U.S. consular officer, be sure to use the following instructions:

1. Read 22 CFR 92.49 through 92.71;

2. Furnish the following information by letter, telegram, telefax or telex to the American Services Section of the Consular Section of the American embassy or consulate:
   
   a. Requesting counsel's full name, address, telex, fax and telephone number;
   
   b. A brief description of the nature of the case and the purpose of the deposition;
   
   c. Full name and address of the persons to be deposed as well as their citizenship and a statement that the witnesses' appearance is voluntary;
   
   d. Suggested dates for taking the deposition or a period within which the deposition should be taken;
   
   e. Whether the deposition will be viva voce or on written interrogatories;
   
   f. Whether a qualified court reporter and/or a translator/interpreter will be necessary; if so, whether the requesting party will make the arrangements for them or wishes the consular officer to do so.
   
   g. Who will attend the taking of the deposition (e.g., requesting counsel, opposing counsel, et al.);
   
   h. Whether the consular officer will be required to preside at the entire proceedings or may administer the appropriate oath(s) and withdraw subject to recall.

3. Include in the letter, telegram, or telex authorization for a return collect cable from the consular officer to confirm arrangements.
4. Attach to the letter or forward separately (if telegram, fax, or telex has been sent):

   a. Fees: Effective June 1, 2002, consular fees related to taking depositions or executing commissions to take testimony changed. See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Page 34831-34838; 22 CFR 22.1. A deposit for fees is payable in advance prior to taking of deposition based on consular officer's estimate of time required. Make certified or corporate check payable to "The American Embassy (Consulate General, Consulate) at (City)." (For Example, American Embassy Consulate General Sydney).

   The new fees are:

   Item No. 52(a) - Scheduling/arranging appointments for depositions, including depositions by video teleconference (per daily appointment) - $475 (If an appointment is changed and a new appointment must be scheduled and new arrangements made, a new $475 fee will be charged each time.)

   Item No. 52(b) - Attending or taking depositions, or executing commissions to take testimony (per hour or part thereof) - $235 per hour plus expenses

   Item No. 52(c) - Swearing in witnesses for telephone (teleconference) depositions - $235

   Item No. 52(d) - Supervising telephone (teleconference) depositions (per hour or part thereof over the first hour) - $235 per hour plus expenses

   Item No. 52(e) - Providing seal and certification of depositions - $60.00

   Postage for Return of Transcript - Actual Costs

   b. List of interrogatories and any special instructions;

   c. Commission of the consular officer or notice of the taking of deposition. (See 22 CFR 92.52, 92.53).

5. Make separate arrangements with the witness to insure his or her appearance for the deposition (travel fees, witness fees, etc.) NOTE: This is counsel's responsibility.

6. If counsel intends to utilize video-tape equipment for the purpose of recording the deposition, please note that special customs clearances must be obtained from the foreign country before such video equipment is transported into the foreign country. Absent such clearances, the equipment may be confiscated by the foreign authorities. Also, American equipment may need special adapters to function on different foreign electrical currents. Counsel should also be aware that video-taping is not permitted in many foreign countries.

   • Deposition Procedures Involving Little Or No Participation By Consular Officers

   Counsel may wish to consider stipulating that the consular officer merely administer the oath and withdraw subject to recall. When this arrangement is desired, the notice or
commission should so state incorporating the stipulation of the parties. Some countries permit depositions to be taken before local attorneys, notaries, etc. In such countries, counsel may find this method less expensive as well as simpler and quicker since consular officers have many other duties and sometimes must schedule depositions well in advance. Effective June 1, 2002, the consular fees for a deposition involving little participation by consular officers is $235.00, representing one hour or part thereof of consular officer time. See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Page 34831-34838; 22 CFR 22.1, Item No. 52(b). In addition, there is a $475.00 fee for scheduling/arranging appointments for depositions, including video teleconference depositions (per daily appointment); Item No. 52(a).

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BELGIUM

Belgium is not a party to the Hague Evidence Convention.

Belgium does not distinguish between civil and criminal cases with regard to obtention of evidence there by foreign persons. Nor does it make distinctions based upon the nationality of the deponent. Rather, Belgium distinguishes between those cases which are "purely private" and those which are not.

This means that foreign private persons or attorneys may depose witnesses in Belgium or obtain documentary evidence there pursuant to American deposition procedures, such as deposition on notice, as long as the witnesses testify voluntarily.

However, if any type of American government official or agent of an American court or administrative tribunal were to participate in a deposition, only a Belgian court could conduct the deposition. This is likewise true when any form of compulsion would be necessary. In this regard, a Belgian court could compel the appearance of a person but not his testimony "per se" not the production of documents by him "per se". When the assistance of a Belgian court is need, the latter rogatory procedure should be utilized. Belgium has warned the non-Belgian Government attorneys must seek clearance from the Belgian Government before engaging in formal or informal questioning in Belgium. Clearance for such action must be obtained through the Department of State, Office of American Citizens Services.

One problem with deposing a witness in Belgium is the scarcity of stenographers. This problem is so severe that utilization of a British stenographer or a stenographer from another country should be seriously considered.

Belgium, like the United States is party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (TIAS 10072; 133 UST Part 1). As a consequence, any certification of Belgian notarial on affidavits or of evidence obtained by Belgian courts must be provided by the appropriate Belgian authority which is:

Ministere des Affaires etrangeres, du Commerce exterieur, et de la Cooperation au Developpment (Ministry of Foreign Affairs, External Trade and Cooperation in Development)
Canadian Federal and provincial authorities are also prepared to assist U.S. tribunals and litigants obtain evidence in the form of testimony, statements, or the production of documents for use in American judicial proceedings. Canada is not a party to any multilateral treaty on obtaining evidence, such as the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

- **Deposition of a Willing Witness in Private Civil Matters**

  There are no rules in Canada which prohibit foreign tribunals or litigants from taking evidence from a willing person in private civil matters. Therefore, parties in a private civil case in the United States may arrange to depose a willing witness in Canada without prior consultation with or permission from Canadian federal or provincial authorities. The party seeking to take the deposition must arrange for a court reporter/stenographer and facilities in which to take the deposition; the U.S. Consulates in Canada do not have information on these matters, nor do they have space in which to hold the deposition.

  If the parties involved in the deposition wish to have the witness take an oath before the U.S. Consul at any point in the proceedings, they should contact the U.S. Consul in the American Citizens Services Section of the nearest U.S. Consulate prior to the date of the deposition and ask for an appointment to have the oath administered at the Consulate. Consulates generally do not have the staffing or time to permit a Consul to travel to the site of the deposition. However, by arranging for an appointment to administer the oath, the parties involved in the deposition, including the stenographer, may travel together to the Consulate, be received without the delay of waiting in a long line, and have the oath administered for the standard fee. The parties then return to the location of the deposition and the court reporter/stenographer can enter the oath administered by the Consul into the record.

- **Deposition of a Willing Witness in a State or Federal Matter**

  Although there are no rules in Canada which prohibit foreign tribunals or litigants from taking evidence from a willing person, the conduct of a hearing presided over by a foreign official or pursuant to a federal or state investigation remains subject to the consent of the Government of Canada. Before it will grant its consent to such a hearing, the Department of Foreign Affairs Canada requires assurances that:

  (1) The witness is willing to be examined; (2) The witness's testimony is entirely voluntary, and the witness' failure to appear or respond will carry no liability in any subsequent proceeding; (3) The witness' consent to testify carries no liability or obligation in addition to the testimony itself, apart from perjury or false statements; and, (4) The Department of Foreign Affairs Canada is informed in advance, of the date, time and location of the deposition and the persons involved, including counsel to the witness.
Given these assurances, Canada's Department of Foreign Affairs will grant its consent. However, the Government of Canada retains the right to attach conditions to the conduct of the interview, including the attendance of its officials at such interviews. Federal and state officials who plan to come to Canada to interview witnesses, take depositions, or conduct investigations must coordinate their travel with the Office of American Citizens Services, Department of State, Washington, D.C. 20520-4811, telephone (202) 647-5226, fax (202) 647-3732, which in turn will forward the request to the U.S. Embassy in Ottawa for transmission to the Canadian government.

- **Compulsion of Testimony/Production of Documents**

When a witness is unwilling to testify or when production of documents is required, litigants and tribunals must obtain the required evidence by a letter rogatory/letter of request to the appropriate Canadian court. In these circumstances, the services of a Canadian lawyer will be necessary. Information on preparation of Letters Rogatory is available from the Department of State's automated fax service.

American parties to a proceeding may apply for an order to have evidence taken in Canada under the Canada Evidence Act (Revised Statutes of Canada, 1970, c. E-10) in criminal and civil matters or under the various provincial Evidence Acts in civil matters. Section 43 of the Canada Evidence Act empowers Canadian courts and judges to compel testimony or documentary evidence pursuant to a request from "any court or tribunal of competent jurisdiction...in any foreign country." In civil matters, American parties may also make application for an order to take evidence under provincial statutes, for example, Section 60 of the Evidence Act of Ontario or Article 9-20 of the Special Procedures Act in Quebec.

The procedure for obtaining evidence by compulsion begins with the selection of a Canadian attorney. It is customary for the provincial Attorney General's office to act as the local solicitor for a foreign prosecutor. It is also customary in a civil action for the foreign parties to retain a lawyer in the jurisdiction where they will make a request. Such counsel will make application under the appropriate Evidence Act to the competent court to allow the establishment of proceedings requested in the letters rogatory/letter of request. Both federal and provincial courts usually effect the requested proceeding by appointing the applicant's Canadian counsel as commissioner (in some provinces, the commissioner named by the court can be someone other than counsel entirely) for the purpose of compelling the attendance of witnesses or the production of documents.

The commissioner may enforce his orders in the same manner as those of the court or judge who authorizes the taking of evidence. In a criminal action, the Crown in right of Canada must also grant its permission to the proceedings.

Letters of request issued by American courts must satisfy the Canadian courts that:

1. The letters constitute a formal request from a court in the United States to a Canadian court. A request from the United States Embassy or its Consulates, for example, is not sufficient;
2. The discovery does not violate the laws of civil procedure of the Canadian court, particularly as they concern third parties;
3. The American court has the power
under its enabling statutes and rules to direct the taking of evidence abroad; (4) The American court is a court of law or equity, not an administrative tribunal, before which the matter is pending; (5) The witnesses from whom the American court desires testimony reside within the Canadian court's jurisdiction. (6) The order sought is needed in the interest of justice; (7) The U.S. court will use the evidence at trial and not for the purpose of pre-trial discovery (in civil and criminal matters, pre-trial discovery of non-party witnesses is not normally available. However, Canadian courts have made exceptions to this stipulation where there is no infringement on Canadian sovereignty and justice demands the examination); (8) Compliance with the order will not place the witness in the position of having to commit and offense; (9) The documents in support of such application are under the seal of the issuing court or judge; (10) The witness is not required to undergo a broader form of inquiry than he would if the litigation were conducted locally, and (11) The evidence cannot be secured except by the intervention of the Canadian courts.

The fastest and most effective way to transmit letters rogatory/letters of request is in accordance with the direct procedures described above. However, in some cases, American parties may also transmit such letters to Canadian courts by diplomatic channels. If circumstances warrant the use of diplomatic channels, submit letters rogatory and accompanying documents to the Office of American Citizens Services, Department of State, Washington, D.C. 20520-4811, telephone (202) 647-5226, or to the U.S. Embassy in Canada at 490 Sussex Drive, Ottawa, Ontario, Canada K1N 1G8, telephone (613) 238-5335. Effective June 1, 2002, there is a $650.00 consular fee for processing letters rogatory (See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Pages 34831-34838; 22 CFR 22.1, item 51). Counsel are requested to submit a certified bank check in the amount of $650.00 payable to the U.S. Embassy Ottawa. Corporate or personal checks are not acceptable. Foreign authorities may also charge a fee. Counsel will be notified by the U.S. Embassy and/or the Office of American Citizens Services and Crisis Management in the Department of State if the Embassy is advised by foreign authorities of any applicable local fees. There is no consular fee for letters rogatory on behalf of federal, state or local government officials. (See 22 CFR 22.1, item 53). If the letter rogatory requests compulsion of evidence from more than one witness or service of process on more than one person, multiple fees may be charged if more than one foreign court is required to execute the request due to multiple jurisdictions.

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CHINA

use in foreign courts is problematic. China does not recognize the right of persons to take depositions, and any effort to do so could result in the detention and/or arrest of U.S. citizen participants. This flyer seeks to alert you to the problem so that you may advise appropriate parties.

- **Voluntary Depositions**

Upon its accession to the Hague Evidence Convention, China declared that the provisions of Chapter II of the Convention except for Article 15 will not be applicable. This means that diplomatic and consular officers may take the evidence without compulsion of nationals of the United States. However, Article 15 also contains a provision which states that a contracting state may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State. Traditionally, Chinese authorities do not recognize the authority or ability of foreign persons, such as American attorneys, to take voluntary depositions of willing witnesses, even before a U.S. consular officer, Article 27(1) of the U.S. - China Consular Convention of 1980 notwithstanding. In view of this position, the United States is seeking a clarification from the People's Republic of China regarding its recognition of the right of U.S. consular officers to take voluntary depositions of U.S. citizens in China.

Given China's declaration on accession to the Hague Evidence Convention that it does not consider itself bound by Articles 16-22 of Chapter II of the Convention, China could well deem taking depositions by American attorneys or other persons in China, as a violation of China's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorneys and other participants. (See our Consular Information Sheet for information about arrests and criminal penalties in China.) The right to administer oaths in China is strictly governed by local Chinese law and applicable treaty. A person authorized to administer oaths in the United States may not be recognized by Chinese authorities as empowered to perform that function in China. Even a Chinese "notary" or other person empowered to administer oaths may not be recognized by Chinese authorities as empowered to do so in connection with depositions, given China's strict position on that question. Conducting a deposition in a hotel with oaths to be administered by such a private person could have serious implications for the individual administering the oath, as well as other participants. In 1989, China permitted the taking of a limited deposition in the matter of *U.S. v. Leung Tak Lun, et al.; CR 88-0214-WHO* in an action before the U.S. District Court for the Northern District of California. China has advised the United States that the granting of authority for the taking of that deposition should not be regarded as a precedent. Efforts to obtain permission from the Chinese Ministry of Foreign Affairs to conduct depositions since that time have proven unsuccessful.

China has communicated its views on the subject of obtaining evidence in a series of diplomatic notes to the U.S. Embassy in Beijing. In diplomatic note No. 106 dated November 6, 1981, the Chinese Ministry of Foreign Affairs advised the U.S. Embassy that if a court of the United States requests the depositions of witnesses resident in the People's Republic of China, it is necessary to submit a letter rogatory through the diplomatic channel. The Chinese Ministry of Foreign Affairs reiterated its government's

- **Transmittal Of Letters Of Request In Civil And Commercial Matters For Compulsion Of Evidence**

Requests for compulsion of evidence in civil and commercial matters may be forwarded directly to the Chinese Central Authority. Utilize the model letter of request annexed to the text of the Convention. See our general flyer on the operation of the Hague Evidence Convention.

- **Chinese Central Authority**

Bureau of International Judicial Assistance
Ministry of Justice of the People’s Republic of China
10 Chaoyangmen Nandjie, Chaoyang District
Beijing 100020
China

- **Preparation Of Letters Rogatory For Use In China In Criminal And Administrative Matters**

In diplomatic note No. 106 dated November 6, 1981, the Chinese Ministry of Foreign Affairs advised the U.S. Embassy that a letter rogatory must bear the signature of the judge and seal of the court. Moreover, the letter rogatory should contain the following information: the name of the court making the request, the names of the parties, the subject matter of the litigation, the name and address of the witness, and written interrogatories and cross interrogatories. The letter rogatory and written questions must be accompanied by a Chinese translation. No further authentication is required. For more information, consult our general flyer Preparation of Letters Rogatory.

- **Possible Options Available**

If the witness is willing to be deposed, one option might be to persuade the witness to travel to another country or jurisdiction where it is possible to conduct voluntary depositions. Consult our country-specific judicial assistance information flyers for details about procedures in other countries.
Compulsion Of Testimony Or Documentary Evidence

While it is possible to request compulsion of evidence in China pursuant to a letter rogatory or letter of request (Hague Evidence Convention), such requests have not been particularly successful in the past. Requests may take more than a year to execute. It is not unusual for no reply to be received or after considerable time has elapsed, for Chinese authorities to request clarification from the American court with no indication that the request will eventually be executed. It may be useful to consult local counsel in China for further guidance. But see discussion below regarding the role of lawyers in the Chinese judicial system. See note above regarding preparation of letters rogatory for use in China. Upon its accession to the Hague Evidence Convention, China declared that "in accordance with Article 23 of the Convention concerning the Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, only the request for obtaining discovery of the documents clearly enumerated in the Letters of Request and of direct and close connection with the subject matter of the litigation will be executed." The United States is seeking clarification from the Government of the People's Republic of China regarding its implementation of the Hague Evidence Convention.

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FEDERAL REPUBLIC OF GERMANY (FRG)

Civil Cases

a) In civil cases, where a witness is willing to testify voluntarily, a deposition may be conducted at the American Embassy in Bonn or any of the American Consulates. Depositions may be taken on notice or by issuance of a commission by an American court to a "Consular Officer". See 22 CFR 92.53.

Effective June 1, 2002, consular fees related to taking depositions or executing commissions to take testimony changed. See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Page 34831-34838; 22 CFR 22.1. A deposit for fees is payable in advance prior to taking of deposition based on consular officer's estimate of time required. Make certified or corporate check payable to "American Embassy (name of city)".

Effective June 1, 2002, the consular fees for a deposition involving little participation by consular officers is $235.00, representing one hour or part thereof of consular officer time. See Federal Register, May 16, 2002, Volume 67, Number 95, Rules and Regulations, Page 34831-34838; 22 CFR 22.1, Item No. 52(b). In addition, there is a $475.00 fee for scheduling/arranging appointments for depositions, including video teleconference depositions (per daily appointment); Item No. 52(a).

The new fees are:

Item No. 52(a) - Scheduling/arranging appointments for depositions, including depositions by video teleconference (per daily appointment) - $475 (If an appointment is
changed and a new appointment must be scheduled and new arrangements made, a new
$475 fee will be charged each time.)

Item No. 52(b) - Attending or taking depositions, or executing commissions to take
testimony (per hour or part thereof) - $235 per hour plus expenses

Item No. 52(c) - Swearing in witnesses for telephone (teleconference) depositions - $235

Item No. 52(d) - Supervising telephone (teleconference) depositions (per hour or part
thereof over the first hour) - $235 per hour plus expenses

Item No. 52(e) - Providing seal and certification of depositions - $60.00

Postage for Return of Transcript - Actual Costs

Although technically the consular officer is "taking the deposition", attorneys for either
side may pose all questions orally or in writing. Authority for American Consular
Officers to depose willing witnesses of German or third-country nationality is derived
from Agreements Between the United States of America and the Federal Republic of
Germany, T.I.A.S. 9938.* Any deposition of German or third-country nationals** must
be in accordance with the agreements made in this exchange of diplomatic notes.

b) In civil cases in which a witness must be compelled to testify, a German judge must
pose the questions in a German court proceeding. Nevertheless, an American attorney
may request to be present and may, on occasion, have the flexibility in such a proceeding
to pose additional questions through the German Judge. Just as in requests for service,
requests for evidence from involuntary witnesses must follow the procedures set forth in
the appropriate convention, The Hague Convention on the Taking of Evidence Abroad in
Civil or Commercial Matters, Part VII USCA 1781 (1977 Supp.); Martindale-Hubbell
International Law Digest, Part VII (1993). Essentially, the same rules as those for the
Service Convention (described previously) apply. Although under the Evidence
Convention, the Letter of Request, as well as questions and all other documents must be
translated into German and submitted in duplicate. A model letter of request follows the
text of the Convention.

* Key points under the notes are: (a) that absolutely no compulsion be brought to bear on
the witness to appear or to provide testimony (e.g. the request to give information may
not be called a "summons" nor may the interview be called an "interrogation"); (b)
witnesses must give their expressed consent to be interviewed outside the consulate (i.e.
at their home or place of business); and (c) witnesses have a right to be accompanied by
an attorney.

** The issue of whether non-Germans who do not have a business or residence in
Germany may be deposed is presently in dispute.

For background information, see the Report 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 prepared by the United States Delegation at 17 Int'l. Legal Mat.

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FRANCE

Since October 1974, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters has been in force in France. Arrangements to take evidence in France for use in civil cases before courts in the United States must therefore be made in accordance with the general provisions of that Convention, and be subject to certain specific provisions established by the French Government. The Convention provides three means by which evidence may be taken:-

- Deposition before a local judicial authority by means of letters rogatory (Letters of Request)
- Depositions before a Diplomatic or Consular officer
- Depositions before a person commissioned by the court

- **Deposition Before a Local Judicial Authority by Means of Letter Rogatory (Letters of Request)**

By these means, a judicial authority in the United States requests the competent French judicial authority to obtain evidence or to perform some other judicial act.

Such letters rogatory should be addressed by the court in the United States to the Bureau de l'Entraide Judiciaire Internationale, Direction des Affaires Civiles et du Seeau, Ministere de la Justice, 13, place Vendome, 75042 Paris Cedex 01, France. Documents must be written in French, or accompanied by a translation in French, and should specify:

1. The authority requesting its execution and the authority requested to execute it (name of the court), or the "appropriate judicial authority in France";

2. The name and address of the parties to the proceedings, and their representatives;

3. The nature of the proceedings, and all necessary information pertaining to it;

4. The evidence to be obtained

5. The names and addresses of the persons to be examined;

6. The questions to be put to the witnesses, or a statement of the subject matter on which they are to be examined;
7. The documents or other property to be inspected;

8. Whether the evidence is to be given under oath or affirmation, and any specific form of oath that must be used;

9. Whether any special procedure or method should be followed in taking the evidence.

In the absence of special instructions under items (2) and (9), the French court executing the letters rogatory will follow its own normal procedures.

The court issuing the letters rogatory may ask to be informed of the date and place of the proceedings, and parties to the case and their representatives may be present. Judges of the requesting court may also be present at the proceedings.

There are no fees required for the execution of letters of requests; however, the French court may require reimbursement for any fees paid to experts or interpreters, or expenses incurred as a result of use of special procedures requested by the U.S. court.

- **Depositions Before a Diplomatic or Consular Officer**

Evidence may be taken in France by deposition before a diplomatic or consular officer of the United States (Articles 15 and 16 of the Convention and Title 28 United States Code, Section 2072). Depositions may only be taken by commission issued by the competent court. Depositions on notice for French nationals or third-country nationals living in France will not be approved by the French Ministry of Justice. The Ministry of Justice also will not approve requests to take evidence as pre-trial discovery for cases not yet pending in court.

The commission should be issued to "any consular officer of the United States assigned to (the city where the Consulate is, or in the case of Paris the Embassy), France" rather than to any specific name or title of consular officer. (See attached sample of a commission).

American consular officers may take depositions from witnesses of American nationality on Embassy or Consulate premises, without special restrictions.

Before evidence may be taken from French nationals or third country nationals residing in France, authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The Embassy or Consulate must have all the documents pertaining to the case at least 45 days before the deposition is to be held. The following specific provisions must be met:

- The deposition must be held on Embassy or Consulate premises. If participants wish to hold the deposition elsewhere, they must explain fully why it cannot be held on Embassy or Consulate premises, and the Ministry of Justice will decide whether such a request can be approved.

- The deposition must be open to the public.
- The date and time of the deposition must be communicated to the Ministry of Justice in advance.

- The witnesses must be summoned by written notice in French at least 15 days in advance of the deposition date. The written notice, sent by the Consulate or Embassy, must include assurances that appearances are voluntary, that the witnesses may be represented by a lawyer, and that the parties to the case have consented to the deposition. The Embassy or Consulate will request authorization for the deposition from the Ministry of Justice.

- **Consular fees**

  There is no charge for the use of a hearing room or for advance preparations. Effective February 1, 1998, there is a statutory fee of $200.00 an hour for consular assistance at the deposition. The estimated fee must be deposited in advance in the form of a certified check in dollars, payable to the U.S. Treasury. Any balance remaining after the service has been performed will be refunded, and any additional due is payable either upon completion of the deposition or, in the case of long depositions, at regular mutually established intervals.

- **Stenographers and/or Interpreters**

  Embassies and Consulates are unable to provide the services of stenographers or interpreters. The interested parties must arrange for a court stenographer to take down the testimony and transcribe it, unless the answers are of the "Yes" and "No" type, and space is provided on the interrogatories for the witness to write brief responses. If the testimony is to be taken in any language other than English, the interested parties must arrange for a court interpreter. A list of qualified stenographers and interpreters is available from the Embassy or Consulate where the deposition will be held.

- **Ministry of Justice Authorization**

  In all cases involving witnesses of French nationality or third-country nationals residing in France, the Embassy or Consulate must have the information or documents listed below at least 45 days before the deposition is to be held. This timing is necessary in order to allow sufficient time to obtain authorization from the Ministry of Justice, provide the required advance notice to witness, and finalize internal arrangements for the deposition. All the documents in the following list must be provided, with French translations of each:-

  The commission to take the deposition, referring to The Hague Convention, with precise information on:

  - The name of the court

  - The name of the judge or issuing authority The names of parties to the case and their representatives
- The names and addresses (and telephone numbers, if available) of all witnesses to be summoned.

- The questions to be put to the witnesses, or a statement of the subject matter on which they are to be examined.

- The name of any of the parties, or their representatives, who plan to attend the deposition.

- The names, address, and telephone numbers of the stenographer and interpreter who have been selected, if any.

- Whether the parties to the case have consented to the deposition, and if not, the reasons for any objection which has been made.

A suggested date for the deposition, if there is a preference, in no case less than 45 days after the Embassy or Consulate receives the above information.

A certified check for the estimated consular fees, made out to "U.S. Treasury" is also required.

The Embassy or Consulate will notify all parties planning to attend the deposition of the date set as soon as authorization has been received from the Ministry of Justice.

- **Deposition Before A Person Commissioned By The Court**

Evidence may also be taken in France by deposition before any competent person commissioned by a court in the United States. Authorization must be obtained in advance by the individuals participating in the deposition from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. All information listed under "Ministry of Justice authorization" above should be sent to the Ministry of Justice at least 45 days before the deposition will be held.

In addition, the request for authorization from the Ministry of Justice must include:-

An explanation of the reasons for choosing this method of taking evidence, taking into account the judicial costs involved; and -The criteria for designating the individual commissioned to take evidence.

The Embassy or Consulate does not normally assist in requesting the Ministry of Justice authorization in cases where the commissioner is not a consular officer.

The hearing must be held within the Embassy or Consulate. All of the other provisions and the general procedure described above for depositions before a consular officer must be followed, except that there is no consular fee because the services of a consular officer are not required.

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GREECE

- **Applicable Treaties Or Other Agreements**

  The Vienna Convention on Consular Relations, 21 UST 77; 596 UNTS 261; TIAS 6820 (Article 5).


  Greece is not a party to a bilateral treaty or a multilateral convention concerning the taking of evidence except in certain drug trafficking cases falling under the 1988 UN Convention Against Illegal Trafficking in Narcotic Drugs and terrorist cases under the 1970 Convention against Hijacking.

- **Depositions Of Willing Witnesses**

  In a civil case, a voluntary deposition may be taken before an examining magistrate. American, Greek, or third-country nationals may be deposed in this manner in civil cases. Depositions of willing witnesses abroad in civil cases may also be taken on notice before any consul or vice consul of the United States (22 U.S.C. 4215; 4221; 28 U.S.C., Appendix, Rules of Civil Procedure, Rules 28-31).

- **Scheduling A Deposition At The U.S. Embassy**

  Services of a U.S. consular officer in connection with oral depositions or depositions on written questions must be scheduled in advance directly with the American Citizens Services office of the Consular Section of the U.S. Embassy in Athens via phone or fax as provided below. If the services of a U.S. consular officer are required to administer oaths to the witnesses, stenographer, and any interpreter outside the embassy, additional fees are charged for such services. Consult the Office of American Citizens Service’s general flyer Obtaining Evidence Abroad.

- **Stenographers/Translators**

  Commercial stenographer and interpreter services are available in Greece. Consult the U.S. Embassy/Consulate General for additional information.

- **Host Country Clearance - Participation Of Local, State Or Federal Government Officials From The United States**

  If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness abroad, formal host country and U.S. Embassy clearance is required. This can be obtained by contacting the Office of American Citizens Services. The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for local authorities to make a determination about the official travel.
HONG KONG

Note: Hong Kong became a Special Administrative Region (SAR) of the People's Republic of China on July 1, 1997 in accordance with the 1984 Sino-British Joint Declaration. The People's Republic of China has advised the United States that the Hague Service Convention, the Hague Evidence Convention and the Hague Legalization Convention remain in effect for Hong Kong and that the Hong Kong Central Authorities continue to be located in Hong Kong. Moreover, as noted below, Hong Kong Central Authorities continue to accept document submitted in English and do not require a Chinese translation of documents submitted under the Hague Service or Evidence Conventions. Should any changes develop over time, the Department of State will update this information.

- Applicable Treaties Or Other Agreements

The Vienna Convention on Consular Relations, 21 UST 77; 596 UNTS 261; TIAS 6820 (Article 5); the agreement between the United States and the People's Republic of China regarding the maintenance of the U.S. Consulate General in Hong Kong signed between the United States and China in March 1997; and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 USCA 1781 (1980 Cumulative Suppl) and 23 UST 2555; TIAS 7444. See also the law digest volume of the Martindale-Hubbell Law Directory under selected international conventions. Articles 15-16 of the Hague Evidence Convention provide for the taking of evidence of willing witnesses by diplomatic and consular officers.

- Depositions Of Willing Witnesses

Depositions of willing witnesses abroad may be taken on notice or pursuant to a commission before any consul or vice consul of the United States at Hong Kong (22 U.S.C. 4215; 4221; 18 U.S.C., Appendix, Rules of Criminal Procedure, Rules 15 and 17; 28 U.S.C., Appendix, Rules of Civil Procedure, Rules 28-31.) In Hong Kong, most voluntary depositions are taken in hotels and offices and do not involve participation by the U.S. consular officer. Telephone depositions are permitted.

- Scheduling A Deposition At The U.S. Consulate General

Services of the U.S. consular officer in connection with oral depositions or depositions on written questions must be scheduled in advance directly with the U.S. Consulate General. Contact the American Citizens Services section of the Consular Section of the U.S. Consulate General in Hong Kong via phone or fax as provided below. If the services of a U.S. consular officer are required to administer oaths to the witnesses, stenographer and any interpreter outside the Consulate General, additional fees are charged for such services. Consult the Office of American Citizens Service's general flyer Obtaining Evidence Abroad. Commercial stenographer and interpreter services are widely available in Hong Kong. Consult the U.S. Consulate General for additional information.
- **Host Country Clearance - Participation Of Local, State Or Federal Government Officials From The United States**

If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness in Hong Kong, formal host country/U.S. Consulate General clearance is required. This can be obtained by contacting the Office of American Citizens Services. The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for Hong Kong authorities to make a determination about the official travel.

- **Compulsion Of Testimony, Documentary Or Physical Evidence**

If compulsion of evidence is required, in civil, commercial, and some administrative cases (considered by foreign Central Authority on a case by case basis) the Hague Evidence Convention provides a "Model Letter of Request" which should be transmitted, in duplicate, directly from the court in the United States seeking assistance to the Hong Kong Central Authority. In cases not governed by the Hague Convention, letters rogatory may be used. Consult our general flyer, Preparation of Letters Rogatory. See note below regarding criminal cases.

- **Hong Kong Central Authority**

The Hong Kong Central Authority for requests under the Hague Evidence Convention is the Chief Secretary for Administration of Hong Kong SAR, Central Government Offices, Lower Albert Road, Hong Kong, tel: (011) (852) 8102954. Under the Hague Evidence Convention, the requesting court in the United States transmits the model letter of request, and accompanying documents, in duplicate, directly to the foreign central authority.

- **Translations**

The Hong Kong Central Authority has advised the Hague Conference on Private International Law that requests for compulsion of evidence under the provisions of the Convention must be submitted in duplicate and must be written in or translated into the English language. **No Chinese translation is required.**

- **Transmittal Of A Request**

Under Section 75 of the Hong Kong Evidence Ordinance and Part VIII of Rule 70 of the Rules of the Supreme Court, the letter of request is sent directly from the American court to the Hong Kong Central Authority for the Convention, the Chief Secretary for Administration of Hong Kong SAR.

- **Application To The Hong Kong Court**

The Hong Kong judicial authority will hear an application for assistance, under Section 75 of the Evidence Ordinance, and has the power to render assistance to a foreign court to obtain evidence by compulsion in Hong Kong for civil proceedings in that court. This application can be made directly in a motion to the court by a Hong Kong counsel or
indirectly, pursuant to a letter of request under the Hague Evidence Convention. If application is made directly by local Hong Kong counsel, rather than in the form of a model letter of request from the American court to the Hong Kong central authority, the application must be made ex parte and must be supported by an affidavit made in Hong Kong to which the application is attached. The accompanying affidavit should give evidence in support of the request, name the examiner, and state that he or she is a fit and proper person. It should also state any ancillary arrangements envisaged.

- **Appointment Of An Examiner/Participation Of American Counsel**

  In civil proceedings an examiner is appointed by the Hong Kong court. That examiner is usually a member of the local bar association. Examination may or may not take place in the court. If outside the court, the examiner has complete discretion whether or not to allow the American attorney to question the witness. If the examination takes place in a court, an American attorney would not be allowed to question the witness. The degree of participation by an American attorney in an examination of a witness held outside the court is up to the examiner. However, if the Hong Kong court declined to authorize the examiner of choice, and ordered that the matter be heard before a Hong Kong authority, it is our understanding that direct examination by American counsel would not be possible. Inside a Hong Kong court, the American attorney could be allowed to attend if permission was obtained from the Hong Kong judicial authority in advance. If in attendance, an American attorney would be allowed to take notes and to consult to the extent of whispering or passing notes to local counsel if this had been agreed to by that counsel in advance and so long as no disturbance of the court was created.

- **Pre-Conditions Before The High Court Will Consider A Case**

  Three conditions generally must be fulfilled before the Hong Kong court can exercise the jurisdiction conferred upon it to make any order under the Evidence Order. (However, it may still be worth attempting a request even if all conditions are not met since cases are determined on a case-by-case basis.)

- **General Requirements**

  1. There must be an application to the court (in Hong Kong) for an order for evidence to be obtained in Hong Kong;

  2. The Hong Kong court must be satisfied that the application is made in pursuance of a request by or on behalf of a court, described as "the requesting court" exercising jurisdiction outside Hong Kong;

  3. The Hong Kong court must be satisfied that the evidence requested will be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or where institution before that court is contemplated.

- **General Guidelines For Preparing The Letter Of Request For Use In Hong Kong**

  The letter of request should at a minimum contain references to the following matters:
1. The nature of the proceedings pending or contemplated in the United States;

2. In the case of civil proceedings, a statement that proceedings have been instituted or that they are contemplated;

3. A statement that any particular witnesses' evidence is required for that proceeding and is relevant to that proceeding;

4. The name of any witnesses to be called to be examined;

5. Details of the documents to be produced.

Requesting American counsel may wish to include in the letter of request that they be permitted to participate in proceedings in Hong Kong. It is wise, however, to include other options, such as permission for local Hong Kong counsel representing the plaintiff and the defendant to participate in the questioning of the witness, should the Hong Kong judge decide that American attorneys not be permitted to participate directly. Finally, the letter of request generally includes specific written interrogatories and cross-interrogatories which the Hong Kong judge can put to the witnesses, should the judge determine that counsel for plaintiff and defendant not be permitted to participate, either directly or through designated local counsel and that all questions should be posed by the judge.

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ITALY

When evidence sought is in a foreign country, it is necessary to observe not only applicable state or federal rules, but also the laws and regulations of the foreign country where the evidence is located. Procedures may vary in civil, criminal and administrative cases. Attempting to obtain evidence without following the requirements of the foreign country may result in the arrest, detention, deportation or imprisonment of participants, including American counsel.

- **Depositions Of Willing Witnesses**

  Voluntary depositions may be taken of willing witnesses. Such depositions may be taken on notice or pursuant to a commission or court order before any Consular Officer of the United States. Consular depositions may be conducted in certain cases governed by Articles 15 through 18 of the Convention. Article 15 permits a Consular Officer of the United States to take the voluntary testimony of a U.S. citizen in Italy. Article 16 pertains to the voluntary testimony of an Italian or third country national. The U.S. consular officer abroad would have to secure the permission of the Court of Appeals with jurisdiction over the deponent in the case of non-U.S. citizens.

- **Commissioner**

  Another procedure available to litigants under the Convention (Art. 17) permits a commissioner (for example, a private American attorney) appointed by the American
court to take the testimony of a witness of any nationality without compulsion provided the commissioner first arranges through the U.S. Consular Officer for permission of the Court of Appeals in Italy having jurisdiction over the deponent. Such a commissioner may also apply to that authority for the power to compel testimony, if necessary (Art. 18).

- **Telephone Depositions**

In some cases, the commissioner may opt to take the testimony of a witness by telephone. The deponent is sworn in by a consular officer and the testimony is given in a conference call (the attorney will conduct questioning by phone). The U.S. attorney should work with Italian legal counsel to obtain permission from Italian authorities and make logistical arrangements with the U.S. Consular Officer.

- **Scheduling A Deposition At The U.S. Embassy**

Services of the U.S. Consular Officer in connection with oral depositions or depositions on written questions must be scheduled in advance directly with the U.S. Consulate General. Contact the American Citizens Services section of the Consular Section of the U.S. Embassy/Consulate via phone or fax as provided below. If the services of a U.S. consular officer are required to administer oaths to the witnesses, stenographer and any interpreter outside the Consulate General, additional fees are charged for such services. Consult the Office of American Citizens Service's general flyer Obtaining Evidence Abroad.

- **Stenographers/Translators**

Commercial stenographer and interpreter services are widely available in Italy. Consult the U.S. Embassy/Consulate for additional information.

- **Host Country Clearance - Participation Of Local, State Or Federal Government Officials From The United States**

If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness abroad, formal host country and U.S. Embassy clearance is required. This can be obtained by contacting the Office of American Citizens Services.

The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for local authorities to make a determination about the official travel.

- **Compulsion Of Testimony, Documentary Or Physical Evidence**

If compulsion of evidence is required, in civil, commercial, and some administrative cases (considered by foreign Central Authority on a case by case basis) the Hague Evidence Convention provides a "Model Letter of Request" which should be transmitted, in duplicate, directly from the court in the United States seeking assistance to the foreign Central Authority. See Martindale-Hubbell Law Directory, Selected International Conventions, Vol. VII for the model letter of request form to compel evidence. The
request should include any specific procedures desired by the requesting court, such as verbatim transcripts.

This procedure is completely under the control of the Italian judiciary. If you wish to attend the hearing, you include a statement to this effect in your Letter of Request. Specify that you be notified of date, time, and place. If you desire, you may also request permission to appear before the court to ask additional questions. The court is under no obligation to allow your active participation in the hearing. If such permission is granted, the questions would normally be asked through the magistrate.

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JAPAN

It is our understanding that Japanese law permits the taking of a deposition of a willing witness for use by a court in the United States only if the deposition is presided over by a U.S. consular officer pursuant to a court order or commission, and is conducted on U.S. consular premises, Rule 28 Federal Rules of Civil Procedure; Rule 15, Federal Rules of Criminal Procedure notwithstanding. This understanding is based on extensive discussions between the Department of State and the Japanese Embassy in Washington, and between the American Embassy in Tokyo and the Japanese Ministry of Justice.

Persons travelling from the United States to Japan to participate in depositions must obtain a special Japanese deposition visa from the Japanese Embassy or Consulate in the United States. Any effort to conduct a deposition in Japan in any other way could be viewed as a violation of the judicial sovereignty of Japan and might result in the arrest and/or deportation of the person attempting to take a deposition in Japan outside these procedures. These procedures have been established pursuant to the U.S.-Japan Consular Convention, as a result of extensive discussions between the Department of State and the Embassy of Japan.

Please inform all attorneys, for both the plaintiff and the defense of the above requirements, particularly the special deposition visa.

Special Note for Official Travellers: Any local, state or federal prosecutor, attorney, investigator, etc. attempting to obtain evidence in Japan should contact the Office of American Citizens Services, Department of State for additional, specific assistance. General requirements for local, state and federal government officials are summarized in this flyer. This office will be pleased to assist local, state and federal government officials in making the necessary arrangements to obtain evidence in Japan. Officials travellers are required to obtain their own passports and visas and must obtain the necessary court orders or letters rogatory explained in this information flyer.

• Authority

The taking of depositions of willing witnesses in Japan is governed by:

Article 5(f) and 5(j) of the Vienna Convention on Consular Relations (to which Japan and the United States are parties);
Article 17(1)(c)(ii) of the U.S. - Japan Consular Convention, 15 U.S.T. 768;


It is our understanding that Articles 3 and 72 of the Japanese Lawyer Law may prohibit the taking of depositions in Japan by private attorneys not admitted to practice law in Japan.

- **Depositions of Willing Witnesses**

  Article 17 of the Japan-United States Consular Convention authorizes American consular officers to take depositions in Japan, "on behalf of the courts or other judicial tribunals or authorities of the sending state (United States), voluntarily given, in accordance with the laws of the sending state (U.S.) and in a manner not inconsistent with the laws of the receiving state (Japan)". This general reference to the authority of consular officers to take depositions has been interpreted by the Government of Japan very strictly. Japanese law and practice, and the mutually agreed upon interpretation of the U.S. - Japan Consular Convention concerning obtaining evidence in Japan permits the taking of a deposition of a willing witness for use in a court in the United States only

  (a) if the deposition is presided over by a U.S. consular officer;

  (b) is conducted on U.S. consular premises

  (c) is taken pursuant to an American court order or commission;

  (d) and if any non-Japanese participant travelling to Japan applies for and obtains a Japanese Special Deposition visa.

The Japanese Ministry of Foreign Affairs and Ministry of Justice have advised the United States that these requirements apply in civil, criminal and administrative cases. The Japanese requirement for a court order and special deposition visas would apply in all cases, even though the depositions began in the United States initially. Japan will not accept orders issued by administrative law judges. Examples of court orders obtained from U.S. courts under the All Writs Act, 28 U.S.C. 1651, by various administrative agencies for the taking of depositions in Japan are available from this office upon request. The Ministry of Foreign Affairs has informed the U.S. Embassy that Japan does **not** permit telephone depositions.

**Therefore, depositions may be taken in Japan:**

(1) pursuant to a commission (28 U.S.C. App. Fed. R. Civ. P. Rule 28(b)(2)) to take a deposition issued by a court to any Consul or Vice-Consul of the United States at (Tokyo, Naha, Osaka-Kobe, Sapporo, Fukuoka) or

(2) on notice, provided an order issued by a court in the United States specifically authorizes an U.S. consular officer to take the deposition on notice.
Voluntary Oral Depositions

American attorneys may travel to Japan to participate in depositions on U.S. consular premises (as described in 22 CFR 92.57) provided they have obtained the "special deposition visa" required by Japan. Any effort to conduct a deposition in Japan in any other way might be viewed as a violation of the judicial sovereignty of Japan and could result in the arrest, detention or deportation of the participants. The procedure for scheduling a deposition at the U.S. Embassy or one of the U.S. Consulates in Japan and obtaining the "special deposition visa" is outlined below.

U.S. Federal, State or Local Government Participants

If a U.S., state or local Government official is to participate in a deposition before a U.S. consular officer in Japan, special host country clearance (in addition to the deposition visa) must be obtained for the travel. Such Government officials should contact the Office of American Citizens Services, Department of State, (202) 647-6769, fax (202) 647-2835 to initiate the process of obtaining the host country clearance. The Japanese Government requires 7-10 days to consider such a formal request before host country clearance is answered by the Ministry of Foreign Affairs. Some U.S. Government agencies find it preferable to bring their own court reporters and interpreters to Japan to ensure confidentiality and availability/flexibility.

Voluntary Depositions on Written Questions

Voluntary depositions on written questions may be taken in Japan (28 USC Fed. R. Civ. P., Rule 31, 22 C.F.R. 92.58). Requesting counsel should contact the U.S. Embassy or Consulate to arrange a mutually convenient day or days when the deposition may be conducted. The requirements for an American court order, consular fees and scheduling the Embassy special deposition room based on space availability still apply. Counsel must make all the arrangements for the witness to appear and for stenographic or video services and translators if necessary. The U.S. consular officer will administer the oath to the witness, and if necessary to the stenographer, video tape operator or interpreter/translator, and withdraw, subject to recall. If the witness does not speak or read English adequately, a Japanese translation of the English text should be provided. The questions should be sent directly to the U.S. consular officer at the U.S. Embassy or Consulate. If preferred, the witness may write down the answers to the questions, rather than dictate the answers to the stenographer or video tape operator. The U.S. consular officer will affix a closing certificate after the deposition is completed.

Arranging the Deposition

1. Scheduling With the U.S. Embassy/Consulate: Contact the U.S. Embassy or Consulate and make arrangements to schedule the availability of U.S. consular premises and a U.S. consular officer to conduct the deposition. Note: The American Embassy in Tokyo is generally booked six months in advance.
Please note that for administrative and security reasons, the embassy/consulate's deposition room and consular staff are not available for deposition taking outside of working hours 8:30 a.m. to 5:00 p.m. or on weekends or holidays.

The Embassy/consulate can tentatively schedule a deposition, and hold the dates reserved for three weeks. If the non-refundable scheduling fee ($410.00) is not received at the Embassy/consulate within three weeks, the dates tentatively reserved will be released to others. In addition, the Embassy/consulate cannot confirm a scheduled deposition until both the court order/commission and deposit for the prescribed deposition fee are received at the Embassy/consulate. We suggest that the court order be worded "on or about" a date for maximum flexibility in scheduling. The court order/commission should be addressed to "any consul or vice consul at (Tokyo; Naha; Osaka Kobe; Fukuoka; Sapporo), Japan".

The embassy/consulate does not schedule the appearance of deponents or make arrangements for court reporters/stenographers or interpreters for private attorneys.

(2) Court Order/Commission: Obtain a Commission or Court Order as noted above. The Commission or Court Order should include the name of the case, docket number, names of the witnesses to be deposed, the fact that they are willing (voluntary) witnesses, the dates on which the depositions will be conducted and the fact that the depositions will be attended by counsel before "any consul or vice consul of the United States, at the (United States Embassy (Consulate) in (name of city), Japan. Send the original order, or a certified copy to the U.S. Embassy or Consulate where the deposition is to be conducted by the fastest available means. In addition, names of lawyers and other participants should be provided to the U.S. Embassy in Tokyo since the Japanese Foreign Ministry checks with the Embassy before approving visa issuance.

(3) Special Deposition Visa: Apply for a "special deposition visa" at the Japanese Embassy or Consulate in the United States nearest you. The Consular Section of the Japanese Embassy is located at 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008, tel: (202) 939-6700. Japanese consulates are also located in Anchorage, Atlanta, Boston, Chicago, Detroit, Guam, Honolulu, Houston, Kansas City, Los Angeles, Miami, New Orleans, New York, Portland, San Francisco and Seattle. You will be required to present a photocopy of the commission or court order to the Japanese consular officer when you apply for the "special deposition visa". This special visa must be applied for at least two weeks before departure for Japan. The request should be made on letterhead stationery and include the following information: (a) the name and location of the court; (b) name and occupation of each witness; and (c) a summary of the case. Travellers will also be required to present their U.S. passport, complete Japanese Embassy/consulate visa application forms and to provide the requisite photographs. A photocopy of the commission or order for a U.S. consular officer to take the deposition must accompany the request. Special visas may also be required of deposition participants other than attorneys (American stenographers, interpreters, parties, etc.). Inquiries should be made of the appropriate Japanese consular officer in the United States.
(4) The Japanese Embassy or Consulate in the United States will contact the Japanese Foreign Ministry for permission to issue the "special deposition visa".

(5) The Japanese Foreign Ministry will contact the U.S. Embassy or Consulate to confirm whether the U.S. consular officer has received a photocopy of the American court order and whether the deposition has been scheduled.

(6) The Japanese Foreign Ministry will authorize the Japanese Embassy or Consulate in the United States to issue the "special deposition visa".

- **Consular Fees for Voluntary Depositions**

  The prescribed statutory fee for consular services in connection with depositions (22 CFR 22.1, item 69, as amended 11/1/91) is 140 dollars per hour for consular officer time plus 65 dollars per hour for consular clerical time. A flat fee of $410.00 must be paid to the embassy or consulate before a deposition can be scheduled. **The fee is not refundable if the deposition is later canceled.** The fee covers consular officer and staff time in scheduling the deposition, communicating with requesting counsel by telephone or fax, and coordinating with Japanese authorities to confirm the scheduling of a deposition before Japanese authorities will issue the special deposition visa to persons travelling to Japan to participate in a deposition.

- **Pre-paid Hourly Rate for Consular Time During the Deposition**

  In addition to the non-refundable scheduling fee, there is a fee of $140.00 per hour for consular officer time plus $65.00 per hour for consular clerical time for the length of the deposition. You should notify the embassy/consulate of the estimated length of time necessary to take the deposition, allowing for the additional time required for interpreter/translator services questions and answers. Be aware that the use of interpreters will approximately double the time required. The Embassy or consulate must receive a deposit ($140.00 x the number of hours required for the deposition plus $65.00 clerical fee), which must be deposited in full prior to the taking of the deposition. (22 CFR 22.5(c))

- **Deposition Closing Certificate Fee and Postage**

  In addition, the U.S. Embassy/consulate requires a 65 dollar deposit to cover clerical time involved in consular certification of the completed deposition and for postage. Any unused portion from your deposit will be refunded. As federal regulations prohibit the performance of consular services in advance of payment of statutory consular fees, depositions cannot be convened until all the required funds have been deposited.

- **Payment of Fees**

  Payment should be made by international money order or certified bank check payable to the American Embassy, Tokyo, Japan or to the appropriate American consulate. Personal or corporate checks are not acceptable.
- **Court Reporters/Stenographers/Interpreters**

The U.S. Embassy/consulate does not provide interpreters or stenographers. American attorneys must arrange directly with such persons for their services and payment of their fees. (As noted previously, the Office of American Citizen Services and the U.S. Embassy/consulate can make these arrangements on behalf of U.S. Government officials or state and local Government officials. Contact the Office of American Citizens Services for more information.) At least a week to ten days advance notice or more is desirable so that the assigned interpreter/translator may have time to familiarize himself/herself with the subject concerned. If lengthy depositions are envisioned, arrangements should be made weeks or months in advance.

In accordance with the guidelines for interpreters of the Administrative Office of the U.S. Courts, when taking the testimony of a non-English speaking witness, generally the question is posed in English, the interpreter translates the English question into Japanese; the witness answers in Japanese; the interpreter translates the answer into English and the stenographer records the answer in English. Not all interpreter/stenographer services have the capacity to provide simultaneous translations. The U.S. Embassy/consulate will attempt to accommodate any special instructions which accompany the request for a deposition pursuant to a commission or court order (22 CFR 92.56).

Participants may wish to bring their own court reporters/interpreters from the U.S. with this capability. They must have the Japanese Special Deposition visas and be included in the American court order. If any participant (not a witness) is a Japanese citizen travelling to Japan from the U.S. or residing in Japan, they are not eligible for a Japanese visa, but must be included in the American court order.

- **Video Tape Equipment**

The embassy/consulate does not provide tapes, taping equipment or equipment operators. The embassy/consulate also does not provide commercial rates for tapes, taping equipment or equipment operators. Participants must make all arrangements directly with the service providers. Participants are responsible for obtaining their own clearances from Japanese Customs authorities for bringing equipment into Japan. Check with the Consular Section of the Japanese Embassy or Consulate in the U.S. for details. If you intend to bring equipment to Japan for the deposition, it is advisable to provide the U.S. Embassy/Consulate with details via fax or phone regarding that equipment to ensure that it is compatible to the electrical equipment at the U.S. Embassy/Consulate. After the advance arrangements are completed, please so notify the U.S. Embassy a few days in advance of the actual deposition, so that the Embassy can obtain the necessary clearance from the Security Office for the entry of the equipment and the operators into the Embassy premises.

- **Fees for Interpreters/Stenographers**

Fees for interpreters in Japan range from 90,000 to 100,000 yen per day and stenographic services from 70,000 to 80,000 yen per day plus transcript fees of 3,000 to 3,500 yen per page. The exchange rate fluctuates daily. See also the U.S. Embassy Tokyo, Commercial
Signing, Certifying and Mailing Depositions

Participants to a deposition may stipulate regarding the manner in which the transcript of the deposition (any exhibits) should be signed, certified and mailed. The transcript may be forwarded to counsel rather than to the clerk of court which requested the deposition. Moreover, participants may stipulate that after the deposing of witnesses is completed and the stenographer transcribes the testimony, the transcript may be sent directly to the witness for signature or to counsel for the participants who will make arrangements directly with the witness for signature of the transcript. If required by local or federal rules in the United States, the witness may bring the transcript to the American embassy or consulate for signature before a consular officer, making any necessary corrections in the presence of a consular officer. If required, a consular certification of the deposition may be made at this time.

If you plan to have the deposition taped without subsequent transcription, the embassy/consulate asks that the court order or commission specify whether audio or video tape is to be used. Tapes may be sent directly by the video operator or by the embassy/consulate via registered air mail to either the person stipulated by the participants or directly to the court clerk immediately following completion of the deposition. Any change in the above procedures would have to be agreed to by both parties in the dispute and, if necessary, covered by an amended court order.

Conducting Informal Interviews

While the taking of depositions, under the conditions explained above, is a right secured under the U.S.-Japan Consular Convention, 15 U.S.T. 768, conducting interviews and other informal evidence gathering or investigation techniques are entirely subject to the discretion of the Japanese government. The Japanese Ministry of Foreign Affairs has advised the U.S. Embassy in Tokyo that it considers the conducting of information interviews by in Japan to constitute formal evidence gathering and therefore to be subject to the Japanese law on international investigative assistance. Private litigants may need to obtain a special visa for travel to Japan to conduct informal interviews, inspections or other investigations. Contact the Japanese Embassy or consulate in the U.S. for information. Japanese authorities may require that the request to conduct such interviews be made in the form of a letter rogatory, or in criminal cases, on behalf of the U.S. Government, a formal letter of request. Local, state and federal prosecutors/attorneys seeking to conduct such interviews/inspections should contact the Office of American Citizens Services for additional information.

Compulsion of Evidence

Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. There is not in force between the United States and Japan any other treaty or international agreement on judicial assistance.
Compulsion of evidence in Japan from an unwilling witness can only be achieved on the basis of comity, pursuant to a letter rogatory. See Rule 28(b), Fed. R. Civ. P.; 4 Moore's Federal Practice 28.05-28.8 (2d ed. 1950); Ristau, International Judicial Assistance (Civil and Commercial), Vol. I, 3-36 et seq., International Law Institute, 1984; Article 5(j) of the Vienna Convention on Consular Relations [1963], 21 UST 77 to which the United States and Japan are both parties.

- **Preparation of Letter Rogatory for Use in Japan**

A letter rogatory is a request from a court in one country for assistance from a court in another country. Such requests are executed by Japanese district courts in accordance with the laws of Japan and generally take six months to a year to execute. The Japanese court will compel the witness to appear before a Japanese judge to respond to written questions annexed to the letter rogatory. All proceedings will be conducted in the Japanese language. The letter rogatory should be written in clear, simple language and should be written in the form of a request, not a demand for assistance. Japan requires that requests for international judicial assistance be processed through the diplomatic channel. This means that a request must be transmitted to the Department of State by the requesting court, or by counsel. The Department of State understands that the following conditions must be met before such a request will be honored:

A. The request must be made through diplomatic channels (as mentioned);

B. The letter rogatory should have attached documents showing parties to be examined, the type of evidence to be examined, the name, nationality and address of the persons to be examined and the items with respect to which they should testify [Law W relating to Reciprocal Judicial Aid to be Given at the Request of Foreign Courts - Law 63 of March 13, 1905, as amended];

C. The letter rogatory and all attachments must be translated into Japanese. Japanese courts often reject a letter rogatory if the documents including all attachments are not completely translated into Japanese, or if the quality of the translation is poor;

D. The letter rogatory must assure the Japanese court that compensation for all expenses incurred by the Japanese court will be paid;

E. The letter rogatory must assure the Japanese court that the requesting court will honor similar requests from the Japanese court.

Moreover, Japan requires that any document annexed to the letter rogatory must bear the seal of the requesting court and the signature of the judge. Japan will reject a request if the letter rogatory or accompanying documents bear the signature of the clerk of the court. Japanese authorities do not honor amendments to a letter rogatory which are not under the seal of the requesting court. A separate information flyer regarding preparation and transmittal of letters rogatory is available from the Department of State, Office of American Citizens Services.
• **Fees for Letters Rogatory**

The consular fee for transmittal of letters rogatory (22 CFR 22.1 item 67) is $32.00. Japanese authorities may charge additional fees. The U.S. Embassy in Tokyo requests that a check in the amount of $200.00 accompany letters rogatory for use in Japan, payable to American Embassy Tokyo in the form of a money order or certified bank check. A personal check or corporate check is not acceptable. ($200 is the estimate based on compulsion of testimony of one witness.) Any unused funds will be refunded.

• **Participation of American Counsel in Japanese Court Proceedings Regarding Execution of Letters Rogatory**

Most American attorneys would prefer to participate in the proceeding before the Japanese court. This may well pose a problem in that it appears generally prohibited by Articles 3 and 72 of the Japanese Lawyer Law. The Japanese judge, however, may permit American counsel to participate on a case-by-case basis. For this reason, it may be preferable for you to prepare the letter rogatory in a way which offers the Japanese court alternative ways of executing the request. For example, the letter rogatory could request that:

(a) American counsel be permitted to participate in the proceedings before the Japanese court;

(b) If this is not possible, the letter rogatory could ask that local Japanese counsel representing the American client be permitted to participate in the proceedings;

(c) Finally, if this alternative is not possible, the letter rogatory could enclose written questions to be put to the witness by the Japanese court.

• **Retaining a Foreign Attorney**

You may wish to retain local Japanese counsel for more detailed information about Japanese procedures. Lists of attorneys in Japan are available from the Department of State, Office of American Citizens Services and from the U.S. Embassy and consulates in Japan. See also, the Martindale-Hubbell Law Directory.

• **Transmittal of Letter Rogatory**

The letter rogatory and any accompanying documents should be translated into Japanese and transmitted in duplicate (a certified original in English and a photocopy; a certified translation in Japanese and a photocopy) to the Office of American Citizens Services, East Asia and Pacific Division, Department of State, Room 4811A, 2201 C Street N.W., Washington, D.C. 20520. The Department will transmit the request to the American Embassy in Tokyo, which will transmit the request to the Japanese Ministry of Foreign Affairs. The Ministry of Foreign Affairs will forward the request to the Japanese Supreme Court which will send the letter rogatory to the appropriate Japanese District Court. The Japanese District Court will execute the letter rogatory and send the evidence back through the same channel to the American Embassy in Tokyo which will forward
the evidence to the Department of State for transmittal to the requesting court in the United States. Requesting counsel in the United States will be advised by the Department of State when the evidence is forwarded to the court in the United States.

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MALAYSIA

• Voluntary Depositions


Voluntary depositions may be conducted in Malaysia regardless of the nationality of the witness, provided no compulsion is used. The witnesses may refuse to take an oath or refrain from answering any or all questions. Oral depositions or depositions on written questions may be taken by U.S. consular officers or by private attorneys from the U.S. or Malaysia at the U.S. Embassy or at another location such as a hotel or office, either on notice or pursuant to a commission (22 U.S.C. 4215; 4221; 18 U.S.C., Appendix, Rules of Criminal Procedure, Rules 15 and 17; 28 U.S.C., Appendix, Rules of Civil Procedure, Rules 28-31; 22 CFR 92.55 - 92.66 (general authority).

• Arranging For Consular Assistance

Consult our general flyer, Obtaining Evidence Abroad for a checklist of information inquirers will need to provide to the U.S. embassy or consulate to arrange consular depositions. If the services of a U.S. consular officer are required to administer an oath to the witness, interpreter and stenographer, such arrangements must be made in advance with the U.S. embassy directly. Contact the U.S. Embassy in Malaysia to schedule a deposition of willing witnesses directly on U.S. consular premises, to arrange the participation of a consular officer to administer oaths off-site, or to obtain information about court reporters, stenographers or interpreters.

• Participation By Local, State Or U.S. Government Officials

Local, State or U.S. Government officials must have formal U.S. Embassy and Host Country clearance before traveling to a foreign country to conduct informal interviews related to judicial assistance matters or depositions. If participation of such officials is envisioned, they should contact the East Asia and Pacific Division of the Office of American Citizens Services which will transmit the request for host country clearance to the U.S. Embassy in Kuala Lumpur for transmittal to the Foreign Ministry of Malaysia. Police clearance does not constitute formal host country clearance.
Compulsion Of Evidence (Testimony, Documents, Etc.)

Compulsion of evidence is obtained in Malaysia pursuant to a letter rogatory. A letter rogatory is a request from a court in the U.S. addressed "to the Appropriate Judicial Authority" of the foreign country. For details about the process consult our general information flyer, Preparation of Letters Rogatory. We understand that letters rogatory are executed in Malaysia pursuant to Order 66, Rule 2, Rules of the High Court, 1980; Order 66, Rule 4(1), Rules of the High Court.

Any letter rogatory intended for use in Malaysia should include the following:

-- an offer of reciprocal assistance;
-- a statement expressing willingness to reimburse the Malaysian judicial authorities for costs incurred in execution of the letter rogatory;
-- the seal of the court and signature of the judge;

The letter rogatory must be transmitted by the court in the U.S. from which it originates or by attorneys(s) to this office for transmittal to the U.S. Embassy in Kuala Lumpur. The Embassy will forward the request via diplomatic note to the Foreign Ministry of Malaysia which will refer the matter to the Ministry of Justice which will assign it to a court in Malaysia for execution. Requesting counsel should be aware that when letters rogatory are executed by foreign courts which compel the appearance of a witness to answer written interrogatories, the evidence is taken in accordance with the rules of the foreign court. In most cases an American attorney will not be permitted to participate in such a proceeding. Occasionally a foreign attorney may be permitted to attend such a proceeding and even to put forth additional questions to the witness. Not all foreign countries utilize the services of court reporters or routinely provide verbatim transcripts. Sometimes the presiding judge will dictate his recollection of the witness's responses to his secretary. Generally letters rogatory worldwide, including those sent to the United States, take from six months to a year to execute.

Translations

English is the official language of Malaysia, therefore, no translation of letters rogatory and accompanying documents is required.

Authentication

Malaysia does not require authentication of letters rogatory by the Embassy of Malaysia in the United States.

U.S. Consular Fees

There is a $650.00 fee for consular services related to letters rogatory; the $650.00 deposit check (bank or firm check/no personal checks) is payable to American Embassy Kuala Lumpur and should accompany the letters rogatory and cover letter (including the complete mailing address of the court in the U.S. to which the executed request should be returned).
• Requests From State Or Federal Government Officials

If the service is on behalf of the federal, state or local government, there is no fee (22 CFR 22.1, item 58(a)/ (c). If the letter rogatory is being transmitted at the request of a state or federal official no U.S. consular fee will be charged. However, local authorities in the foreign country may impose fees of their own which must be paid by the state or federal authority in the United States requesting the judicial assistance. You will be contacted if a federal appropriation number and fund code or remittance a check for foreign fees owed by state or local governments in the U.S. are necessary.

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MEXICO

• Voluntary Depositions (Willing Witness)

A deposition of a willing witness can be taken in Mexico before a U.S. consular officer on notice pursuant to a commission (22 U.S.C. 4215, 4221). Arrangements for scheduling a deposition should be made directly with the American Embassy or nearest consulate. The fee for the attendance of a consular officer at a deposition is $200.00 per hour or fraction thereof and cost incurred. If the consular officer is needed only to administer the oath to the witness and the court reporter/translator/interpreter, such arrangements can be accomplished provided both parties agree, in writing, to such an arrangement.

Court reporters are not available in Mexico. Therefore, you must make arrangements to bring your own court reporter. If you elect to take videotape equipment, you must be certain to first obtain customs clearance and permission form the Mexican Embassy or nearest consulate in the U.S., or the equipment will be confiscated.

The U.S. Embassy and consulates have on file the names of translators/interpreters. However, if the matter is sensitive, you may wish to bring your own translator/interpreter.

If you wish to take the deposition on written interrogatories, the U.S. Embassy or consulate can accommodate your request.

• Involuntary Depositions (Unwilling Witness)

Compulsion of testimony or documentary evidence may be made pursuant to a letter rogatory in Mexico. State Department circular pertaining to Letters Rogatory are available at Internet address http://travel.state.gov.

Mexico is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (see Matrindale-Hubbel Law Directory, Selected International Conventions, 1990 Edition). Under this Convention, the requesting court in the U.S. transmits the model letter of request and accompanying documents, in duplicate, with translations in duplicate directly to the Mexican Central Authority to compel evidence. Mexico has designated the Secretaria de Relaciones Exteriores (SRE)
Direccin General de Asuntos Juridicos, Ricardo Flores Magon No. 1, Mexico, D.F., Mexico (telephone 782-34-40) as the central Authority under this convention.

The State Department circular pertaining to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is available at Internet address http://travel.state.gov.

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NETHERLANDS, THE

• Applicable Treaties Or Other Agreements

The Vienna Convention on Consular Relations, 21 UST 77; 596 UNTS 261; TIAS 6820 (Article 5);

Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 USCA 1781 (1980 Cumulative Suppl) and 23 UST 2555; TIAS 7444. See also the law digest volume of the Martindale-Hubbell Law Directory under selected international conventions. Articles 15-16 of the Hague Evidence Convention provide for the taking of evidence of willing witnesses by diplomatic and consular officers.

• Depositions Of Willing Witnesses

Under the Convention, voluntary depositions in civil matters can be taken in the Netherlands without the prior consent of, or notification to, the Dutch government. Depositions can be carried out in three ways:

(1) Before a district court judge, who poses written interrogatories to the witness on behalf of counsel; to arrange for the taking of a deposition before a district court judge, counsel should write to the president of the district court for the particular district in which the deposition is to be taken;

(2) Before a Dutch notaris (a quasi-judge with substantially more powers than those associated with a public notary), who also poses the questions on the attorney's behalf; and

(3) Before a consular officer of the United States (22 USC 4215; 4221; 18 USC, Appendix, Rules of Criminal Procedure, Rules 15 and 17; 28 USC, Appendix, Rules of Civil Procedure, Rules 28-31). While this option may be provided for at the request of both parties, or through a court order, due to other statutory consular responsibilities and limitations of resources, generally speaking, this is not a practical proposition. State Department regulations foresee that, with the consent of the parties, the consul will withdraw following administration of the oaths. Telephone depositions are permitted.

District courts are located in the following Dutch cities: Alkmaar, Almelo, Amsterdam, Arnhem, Assen, Breda, Dordrecht, s'Gravenhage (The Hague), Groningen, Haarlem,
s'Hertogenbosch (Den Bosch), Leeuwarden, Maastricht, Middelburg, Roermond, Rotterdam, Utrecht, Zutphen, Zwolle.

- **Scheduling A Deposition At The U.S. Consulate General**

All U.S. consular services in the Netherlands are provided at the Consulate General in Amsterdam. Public hours are from 8:30 A.M. to 12:00 noon, Monday through Friday, except for Dutch and U.S. holidays. A consular officer is available to administer oaths on the premises during regular working hours. To minimize waiting time, however, appointments can be scheduled by contacting the American Citizen Services Unit of the U.S. Consulate General (tel: 31-20-575-5343; fax: 31-20-575-5330). The fee for the administration of each oath is $55.00. There is a nonrefundable fee of $400.00 for scheduling a deposition. In addition, if a consular officer is required to be present for the taking of a deposition, the fee is $200 per hour plus transportation costs.

After being sworn in, the parties (witnesses, court reporters, and translators) withdraw to a location outside the Consulate General for the taking of the deposition. Should the deposition last more than one day, the parties can be considered as remaining under oath for the entire proceedings, unless counsels find this disagreeable, in which case oaths will need to be readministered as required. A written copy of the oath can be provided for optional attachment to the deposition record. Should this be required, arrangements must be made when scheduling the swearing in of the parties. When a written version of the transcript has been prepared, the witness may return to the Consulate General to sign the document, as necessary.

The use of video and sound recording equipment is not restricted, provided the parties involved are amenable. However, counsels should be aware that the European voltage is 220V and local video equipment (PAL) is not compatible with the NTSC system used in the United States. Consult the Office of American Citizens Service's general flyer Obtaining Evidence Abroad.

- **Stenographers/Translators**

Commercial stenographer and interpreter services are available in the Netherlands. Consult the U.S. Consulate General for additional information.

- **Host Country Clearance - Participation Of Local, State Or Federal Government Officials From The United States**

If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness abroad, formal host country and U.S. Embassy clearance is required. This can be obtained by contacting the Office of American Citizens Services. The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for local authorities to make a determination about the official travel.
**Compulsion Of Testimony, Documentary Or Physical Evidence**

If compulsion of evidence is required, in civil, commercial, and some administrative cases (considered by foreign Central Authority on a case by case basis) the Hague Evidence Convention provides a "Model Letter of Request" which should be transmitted, in duplicate, directly from the court in the United States seeking assistance to the Dutch government. For further information and assistance, contact the Bureau of Juridical Affairs, Ministry of Foreign Affairs, The Hague, Tel: 31-70-348-5787. In cases not governed by the Hague Convention, letters rogatory may be used. Consult our general flyer, Preparation of Letters Rogatory. See note below regarding criminal cases.

**Netherlands Central Authority**

Arrondissementsrechtbank te s'Gravenhage  
Paleis van Justitie  
Juliana van Stolberglaan 2-4  
2595 CL s'Gravenhage (The Hague)  
Netherlands

**Translations**

The Dutch Central Authority has advised the Hague Conference on Private International Law that requests for compulsion of evidence under the provisions of the Convention must be submitted in duplicate and must be written in or translated into Dutch.

**Transmittal Of A Request**

The request should be transmitted to the foreign Central Authority as explained in our general flyer on the operation of the Hague Evidence Convention.

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**NEW ZEALAND**

**Authority**

The taking of depositions of willing witnesses in New Zealand is governed by:

Article 5(f) and 5(j) of the Vienna Convention on Consular Relations (to which New Zealand and the U.S. are parties.)


New Zealand Code of Civil Procedure and the Evidence Act of 1908

U.K. Foreign Tribunals Evidence Act of 1856 and Act of Imperial Parliament Extradition Act of 1870
Voluntary Depositions

Depositions of willing witnesses may be conducted in New Zealand. Such depositions may be taken by U.S. consular officers at the U.S. Consulate General in Auckland or by private attorneys from the U.S. or New Zealand and either on notice or pursuant to a commission. Telephone depositions are permitted. Depositions may be taken on U.S. consular premises or at other locations such as offices or hotels. If the services of a U.S. consular officer are required to administer an oath to the witness, interpreter and stenographer, arrangements for the services of a consular officer must be made in advance with the U.S. Consulate General in Auckland directly. Contact the U.S. Consulate General in Auckland to schedule a deposition of a willing witness directly on U.S. consular premises, to arrange for participation of a consular officer to administer oaths off-site or to obtain information about stenographers or interpreters or video-operators. The Office of American Citizens Services information flyer entitled Obtaining Evidence Abroad includes step-by-step instructions for what information you should fax to the U.S. Consulate General in Auckland to arrange for voluntary depositions.

Participation by Local, State or U.S. Government Officials

Local, State or U.S. Government officials must have formal U.S. Embassy/Consulate General and Host Country clearance before traveling to a foreign country to conduct informal interviews related to international judicial assistance or depositions. If participation of such officials is envisioned, they should contact the East Asia and Pacific Division of the Office of American Citizens Services which will transmit a request for host country clearance to the U.S. Embassy in Wellington for transmitted to the New Zealand Ministry of Foreign Affairs. Police or other law enforcement clearance does not constitute formal host country clearance.

Compulsion of Evidence (Testimony, Documents, Other)

As noted above, New Zealand is not a party to the Hague Evidence Convention. If compulsion of evidence is required, evidence may be requested in the form of a letter rogatory. Information about preparation and transmittal of letters rogatory is available in the Office of American Citizens Services flyer Preparation of Letters Rogatory. In addition, it is our understanding that it may be possible to request compulsion of evidence by contacting a New Zealand attorney directly who may be in a position to file a motion with the appropriate New Zealand court to order compulsion of the witness to appear in the New Zealand solicitor's chambers. A similar method is utilized in the U.K. and by other members of the British Commonwealth such as the Foreign Tribunals Evidence Act of 1856. A New Zealand solicitor/attorney would be in the best position to advise regarding the availability of such an expedited method of compulsion of evidence in New Zealand and procedures to be followed.

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SPAIN

When evidence sought is in a foreign country, it is necessary to observe not only applicable state or federal rules, but also the laws and regulations of the foreign country where the evidence is located. Procedures may vary in civil, criminal, and administrative cases. Attempting to obtain evidence without following the requirements of the foreign country may result in the arrest, detention, deportation or imprisonment of participants, including American counsel.

- **Depositions Of Willing Witnesses**

  Voluntary depositions may be taken of willing witnesses. Such depositions may be taken on notice or pursuant to a commission or court order before any consular officer of the United States. Consular depositions may be conducted in certain cases governed by Articles 15 through 18 of the Convention. Article 15 permits a consular officer of the United States to take the voluntary testimony of a U.S. citizen in Spain. Article 16 pertains to the voluntary testimony of a Spaniard or third country national. The Spanish Central Authority has informed the Hague Conference for Private International Law that a U.S. consular officer in Spain need not secure permission to take a voluntary deposition within consular premises.

- **Commissioner**

  Another procedure available to litigants under the Convention (Art. 17) permits a commissioner (for example, a private American attorney) appointed by an American court to take the voluntary testimony of a witness of any nationality. Commissioners do not need permission from Spanish authorities to take voluntary testimony. Commissioners may apply to the First Instance Court in Spain having jurisdiction over the deponent for the power to compel testimony, if necessary (Art. 18).

- **Telephone Depositions**

  In some cases, the commissioner may opt to take the testimony of a witness by telephone. A consular officer swears in the deponent who gives testimony in a conference call (the attorney will conduct questioning by phone).

- **Scheduling A Deposition At The U.S. Embassy**

  Services of the U.S. consular officer in connection with oral depositions or depositions on written questions must be scheduled in advance directly with the U.S. Embassy/Consulate General. Contact the American Citizens Services section of the Consular Section of the U.S. Embassy/Consulate via phone or fax as provided below. If the services of a U.S. consular officer are required to administer oaths to the witnesses, stenographer and any interpreter outside the Embassy/Consulate General, additional fees are charged for such services. Consult the Office of American Citizens Services general flyer Obtaining Evidence Abroad.
Stenographers/Translators

Commercial stenographer and interpreter services are widely available in Spain. Consult the U.S. Embassy/Consulate for additional information. Court reporters are not easily available in Spain.

Host Country Clearance - Participation Of Local, State Or Federal Government Officials From The United States

If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness abroad, formal host country and U.S. Embassy clearance is required. This can be obtained by contacting the Office of American Citizens Services. The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for local authorities to make a determination about the official travel.

Compulsion Of Testimony, Documentary Or Physical Evidence

If compulsion of evidence is required, in civil, commercial, and some administrative cases (considered by foreign Central Authority on a case by case basis) the Hague Evidence Convention provides a "Model Letter of Request" which should be transmitted in duplicate directly from the court in the United States seeking assistance to the Spanish Central Authority. See Martindale-Hubbell Law Directory, Selected International Conventions, Vol. VII for the model letter of request form to compel evidence. The request should include any specific procedures desired by the requesting court, such as verbatim transcripts.

This procedure is completely under the control of the Spanish judiciary. If you wish to attend the hearing, you must state your wish to be notified of the date, time and place in your letter of request. Specify that you be notified of date, time, and place. If you desire, you may also request permission to appear before the court to ask additional questions. The court is under no obligation to allow your active participation in the hearing. If such permission is granted, the questions would normally be asked through the magistrate.

Pre-Trial Discovery Of Documents

The Spanish Central Authority has informed the Hague Conference for Private International Law that it will not grant requests for pre-trial discovery of documents (Article 23).

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THAILAND

Applicable Treaties

Thailand is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. There is no bilateral consular convention in force between
the U.S. and Thailand, moreover, Thailand is not a party to the Vienna Convention on Consular Relations. Judicial assistance is provided on the basis of comity. There is in force a Mutual Legal Assistance Treaty in Criminal Matters applicable to requests from U.S. prosecutors (see Criminal Matters below).

- **Voluntary Depositions**

Depositions of willing witnesses may be conducted in Thailand regardless of the nationality of the witness. The procedure does not vary in civil, administrative or criminal cases. Depositions may take place on U.S. consular premises or at other locations such as offices or hotels. **Telephone depositions are permitted.** The witnesses may refuse to take an oath or refrain from answering any or all questions. No compulsory measure, either direct or indirect is allowed. In Thailand, most voluntary depositions take place outside of the U.S. Embassy with no U.S. consular involvement. Such depositions may be taken on notice or pursuant to a commission (22 U.S.C. 4215; 4221; 18 U.S.C., Appendix, Rules of Criminal Procedure, Rules 15 and 17; 28 U.S.C., Appendix, Rules of Civil Procedure, Rules 28-31; 22 CFR 92.55 - 92.66 (general authority). Consult the Embassy of Thailand in the United States about Thai Customs regulations pertaining to bringing electronic video or audio recording equipment into the country. The Thai Embassy is located at 1024 Wisconsin Avenue, N.W., Washington, D.C. 20007, tel. (202) 944-3600. There are also Thai consulates in Chicago, Los Angeles, and New York City.

- **Consular Services**

If the services of a U.S. consular officer are required to administer an oath to the witness, interpreter and stenographer, such arrangements must be made in advance with the U.S. embassy or consulate directly. When a deposition takes place at a U.S. embassy or consulate, based on stipulation between the parties, the consular officer usually administers the oaths to the witness(es), interpreter and stenographer and withdraws, subject to recall. Contact the U.S. embassy or consulate in Thailand to schedule oral depositions or depositions on written questions of willing witnesses on U.S. consular premises, to arrange the participation of a consular officer to administer oaths off-site, or to obtain information about court reporters, stenographers or interpreters. Consult our general flyer, Obtaining Evidence Abroad for detailed guidance on arranging voluntary depositions abroad.

- **Host Country Clearance—Participation of Local, State of Federal Government Officials from the United States**

If a local, state, or federal government official from the United States intends to participate in the voluntary deposition of a willing witness in Thailand, formal host country clearance is required. This can be obtained by contacting the Office of American Citizens Services. The request should be made at least ten days prior to the taking of the deposition to allow sufficient time for Thai authorities to make a determination about the official travel.
• Compulsion of Testimony, Documentary or Physical Evidence

If compulsion of evidence is required letters rogatory transmitted through the diplomatic and consular channel may be used. A letter rogatory is a request from a court in the U.S. addressed "to the Appropriate Judicial Authority". See our general flyer, Preparation of Letters Rogatory. Evidence is obtained in accordance with the rules of the foreign court. In most cases an American attorney will not be permitted to participate in such a proceeding. Occasionally local Thai counsel may be permitted to attend such a proceeding and even to put forth additional questions to the witness. Not all foreign countries utilize the services of court reporters or routinely provide verbatim transcripts. Sometimes the presiding judge will dictate his recollection of the witness's responses to his secretary. Generally letters rogatory worldwide, including those sent to the United States, take from six months to a year or longer to execute.

• Translations

No translations of documents are required if the letter of request and accompanying documents are written in English.

• Authentications

Only the seal of the court and the signature of the judge are required. No further authentication is required.

• Requests from State or Federal Government Officials

If the letter rogatory is being transmitted at the request of a state or federal official no consular fee will be charged. However, local authorities in the foreign country may impose fees of their own which must be paid by the state or federal authority in the United States requesting the judicial assistance. You will be contacted if a federal appropriation number and fund code or remittance of monies to the Department of State are necessary.

• Other Treaties


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UNITED KINGDOM (ENGLAND, SCOTLAND, WALES AND NORTHERN IRELAND)

- Voluntary Witnesses
  
  Attorneys from abroad are allowed to depose anyone in the U.K. provided they are willing witnesses. No commission from a court is necessary. The American Embassy in London or the consulates in Belfast or Edinburgh (See III) can render assistance in contracting with local stenographers. Attorneys should not bring court reporters or stenographers with them from the U.S. as the U.K. requires they have work permits. U.K. solicitors may also be retained to take voluntary depositions.

- Compulsion
  
  When compulsion is needed to take testimony, two options exist in the U.K.

  a. Hague Evidence Convention

  The U.S. and the U.K. are both parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C.A. 1781 (1979 Supplement); Martindale-Hubbell Law Directory Volume VII (Selected International Conventions). Under this Convention, evidence is obtained pursuant to a letter of request transmitted through a central authority in the receiving country.

  The Convention provides a model format for the request. The request should be accompanied by a list of the questions to be posed to the witness by the British court. The request can also ask for permission for the American attorney to ask questions of the witness.

  It is at the discretion of the individual court whether to allow this. Each country which is party to the Convention had the opportunity to make reservations and declarations regarding the applicability of each article of the Convention to their country.

  The U.K. has made a reservation regarding the pretrial discovery of documents. All the reservations can be found at the end of the Convention with the Central Authority information. The letter of request must be signed by the judge and sent to the appropriate central authority:

  Central Authority for England and Wales

  Foreign and Commonwealth Office
  Clive House Petty France
  London SW1, England, U.K.
Central Authority for Scotland

Crown Agent for Scotland
Lord Advocate's Department
Crown Office
5/7 Regent Road
Edinburgh EH7 5BL Scotland, U.K.

Central Authority for Northern Ireland

The Registrar of the Supreme Court For Northern Ireland

b. Alternative

Foreign counsel may hire a British solicitor as his agent. In that case the solicitor should be sent the letter of request directly and may then apply for a commission from the British court to take the testimony of the witness.

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FOREIGN DISCOVERY IN SELECT COUNTRIES

The following information was provided by Multilaw members. Multilaw is an international group of 5,000 attorneys located throughout 50 countries. More information is available at Multilaw’s website at http://www.multilaw.com. Multilaw members responded to an informal survey regarding discovery procedures. Their responses should not be relied upon as legal advice, but should be viewed as a general guide.

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<th>What Other Nontestimonial Devices for Prettrial Discovery Exist?</th>
<th>General Advice to Foreign Attorneys Conducting Discovery in Your Country</th>
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<td>Austria</td>
<td>No.</td>
<td>None</td>
<td>General information (such as information on persons and entities; balance sheets presented to the commercial register; information from the registration office; and information on the financial situation of persons or entities) is available.</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes. They are called “Discoveries.”</td>
<td>Interrogatories, document production, and requests for admissions</td>
<td>Speak to a Canadian lawyer. While Canada does have a federal court system, the jurisdiction of the Federal Court of Canada is not nearly as extensive as in America and is restricted to intellectual property, income tax, maritime issues, and certain other areas.</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Yes.</td>
<td>Requests for further information (similar to interrogatories), production of documents, requests for admissions of facts or documents; court-ordered disclosure by nonparties who are conduits for unlawful acts</td>
<td>English courts will generally support a request from a foreign court. Witnesses will be protected from oppressive wide-ranging requests. U.S. counsel may have particular difficulty in framing requests for specific documents in a way that will allow those requests to be granted. An attorney should seek the advice of an English lawyer before submitting the letter to the U.S. court.</td>
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<tr>
<td>France</td>
<td>Yes.</td>
<td>A request can be made by the court, but France does not recognize pretrial discovery.</td>
<td>Seek the assistance of a French attorney. A French attorney accustomed to following French rules will explain precisely how to proceed and will provide reassurance to the French authorities to speed up the process. Depositions are quite rare. France has a blocking statute.</td>
</tr>
<tr>
<td>Hong Kong, S.A.R., China</td>
<td>Yes.</td>
<td>Interrogatories, document production, and requests for admissions</td>
<td>Discovery by consent should be explored. Hong Kong will grant pretrial discovery orders in certain fraud cases but assistance from a domestic attorney is necessary in seeking this order.</td>
</tr>
<tr>
<td>India</td>
<td>Yes.</td>
<td>Production of documents and interrogatories</td>
<td>Foreign attorneys are not allowed to practice in India, though the government is currently considering this matter. If seeking testimony by interrogatories, seek leave of the court before delivering the interrogatories. Additional requests require a court order.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Yes, before a judge.</td>
<td></td>
<td>The proceedings in Luxembourg derive from Latin law and are very different from the common law. An attorney accustomed to the common law must contact a European colleague to avoid problems.</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes.</td>
<td>Interrogatories, discovery of documents, and admissions</td>
<td>Foreign attorneys may not practice law in Malaysia without the consent of the Attorney General and thus must engage local counsel.</td>
</tr>
<tr>
<td>Netherlands, The</td>
<td>No.</td>
<td>A court may examine a witness.</td>
<td>Pretrial discovery is not a concept under Dutch law.</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Yes.</td>
<td>Interrogatories and admissions of facts</td>
<td>Foreign discovery orders may be enforced in New Zealand courts, but depositions are rarely undertaken.</td>
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<td>Panama, Republic of</td>
<td>Yes.</td>
<td>Expert opinions, reconstruction of events, recognition of signatures, reports presentations, and judicial inspections</td>
<td>Foreign attorneys cannot conduct discovery in Panama.</td>
</tr>
<tr>
<td>Switzerland</td>
<td>No.</td>
<td>Only a court may examine witnesses or compel document production.</td>
<td>A person who perpetrates acts on Swiss territory that may only be performed by authorities is subject to imprisonment of up to three years.</td>
</tr>
<tr>
<td>Thailand</td>
<td>Yes, in certain situations.</td>
<td>Requests for admissions, court order to obtain documentary evidence, and court-taken evidence</td>
<td>Seek assistance of Thai counsel. Obtain a Thai work permit. Be prepared to utilize time-consuming diplomatic channels. It is unlikely that witnesses will cooperate and Thai courts will not act without proper diplomatic direction.</td>
</tr>
<tr>
<td>United States of America</td>
<td>Yes.</td>
<td>Requests for admissions, interrogatories, disclosures, and document production</td>
<td>Consult with an attorney who regularly practices in state or federal court.</td>
</tr>
</tbody>
</table>
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