International Cooperation in litigation between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube

Arthur R. Miller

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/864

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube

This article analyzes the existing pattern of cooperation between the United States and Switzerland in such matters as service of documents, obtaining evidence, proof of foreign official records, and proof of foreign law and the broader problems of international judicial cooperation between countries operating under divergent legal systems and traditions. The author concludes that several recently adopted and additional proposed reforms in state and federal practice provide a number of procedures that should accommodate the needs of litigants and tribunals in foreign countries and give American litigants and tribunals much needed flexibility to enable them to secure assistance from abroad. The hope is expressed that other nations will note and adopt these or similar reforms in an effort to reduce the confusion and complexity that currently exist in this area.

Arthur R. Miller*

After a long history of "juridical isolationism," recent years have witnessed unprecedented activity in the United States in

*Associate Professor of Law, University of Minnesota. Formerly Associate Director of the Columbia Law School Project on International Procedure and one of the draftsmen of the Uniform Interstate and International Procedure Act.

Much of the research on Switzerland's practices of international cooperation in litigation reflected in this paper is the result of collaborative work performed for the Columbia Law School Project on International Procedure by the author and Professor Dr. Max Guldener, Professor of Civil Procedure, University of Zurich and President, Court of Cassation of the Canton of Zurich. The fruits of that venture will be published, along with comparable reports on the practices of international cooperation in a number of other West European countries, in a book, edited by Professor Hans Smit of
the field of international judicial cooperation. In 1962, the Uniform Interstate and International Procedure Act, a model statutory format for cooperation, was offered to the states by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. The following year rule 4 and rule 28 of the Federal Rules of Civil Procedure were amended in order to facilitate serving process and procuring

Columbia Law School, entitled INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE.

The author is very much indebted to the Honorable Dr. C. Markees, head of the Section on Extradition and International Cooperation in Litigation of the Swiss Federal Department of Justice and Police. Dr. Markees was kind enough to furnish information not otherwise available on official Swiss views and policies. Obviously, the opinions voiced herein are the responsibility of the author and do not reflect the position of Dr. Guldener, Dr. Markees, or of any of the private or governmental organizations with which they or the author have been associated.

1. Prior to the recent spate of developments described in text, the involvement of the United States in this area was confined primarily to a number of bilateral treaties and conventions containing provisions dealing with such subjects as the performance of notarial acts, the attestation and authentication of official records, and, in some cases, the taking of testimony. These international agreements are enumerated in Appendix A to SMIT & MILLER, INTERNATIONAL CO-OPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES 79–85 (1961) [hereinafter cited as SMIT & MILLER]. The United States also entered into two multilateral agreements dealing with certain aspects of international judicial assistance prior to the Second World War. The first is a Protocol Embodying a Declaration on the Juridical Personality of Foreign Companies, which was opened for signature in 1936 but has been agreed to only by Venezuela and the United States. The second is a Protocol on Uniformity of Powers of Attorney to be Utilized Abroad, dated 1940, and ratified by Brazil, Colombia, El Salvador, Mexico, Venezuela, and the United States. Also prior to the Second World War, the United States considered initiating negotiations with several Latin American nations with a view toward a general convention and embarked on a program to improve procedures in litigation with international elements. At approximately the same time, a Draft Convention on Judicial Assistance was prepared by the Harvard Research in International Law. See 33 Am. J. INT’L L. (Supp. 1939). This country’s entry into the war precluded further activity toward achieving a multilateral convention.

2. See 9B UNIFORM LAWS ANN. 74 (Supp. 1964). The new act is designed to supplant the Uniform Foreign Depositions Act, currently in force in 18 states, the Canal Zone, and the Virgin Islands, 9B id. 28, the Uniform Judicial Notice of Foreign Law Act, enacted by 27 states and the Virgin Islands, 9A id. 201, and the Uniform Proof of Statutes Act, now in force in 20 states and the Virgin Islands, 9B id. 187. See also 9B id. 75. Arkansas, with the exception of article III, and the Virgin Islands have adopted the Uniform Interstate and International Procedure Act. ARK. STAT. ANN. §§
evidence in a foreign country. A year later, in 1964, a number of sections of the United States Criminal Code and the United States Judicial Code were amended by Congress to eliminate several deficiencies in the federal government's practices of international judicial cooperation. Currently, consideration is being given to the amendment of the Federal Rule of Civil Procedure governing proof of foreign official records and the addition of a new rule dealing with the determination of foreign law. Unless these proposals are delayed by the Judicial Conference or the Supreme Court of the United States, they probably will become effective in 1966. The maturation of American attitudes and procedures in the realm of international cooperation in civil litigation reflected by these changes and proposed changes is a much needed response to the growing number of instances in which it has been necessary to seek assistance from abroad in aid of a lawsuit with transnational contacts pending before a court in this country and a comparable increase in the requests for assistance from lawyers and tribunals in foreign countries received by our State Department, other state and federal governmental organs, and members of the bar.


6. The impetus for the changes described in text was provided by the Commission and Advisory Committee on International Rules of Judicial Procedure, which was established by Congress to investigate and study judicial assistance and cooperation between the United States and foreign countries and to make recommendations for the improvement of existing practices. Act of Sept. 2, 1958, 72 Stat. 1748; see Jones, Commission on International Rules of Judicial Procedure, 8 Am. J. Comp. L. 341 (1959); Wilkey, Progress in International Judicial Assistance: The New Commission on International Rules of Judicial Procedure, in 1 INTER-AMERICAN BAR ASS'N, PROCEEDINGS OF THE ELEVENTH CONFERENCE 115 (1959). Drafting and research assistance was provided the Commission and Advisory Committee
Any attempt to further the cause of cooperation in civil litigation on an international basis presents an interesting exercise in procedural accommodation. The basic problem is easy to state. How does one legal system adjust its procedural mechanisms both to provide an effective response to the needs of another legal system and to obtain a meaningful response to its needs from that system when one or more of the procedural norms and philosophical bases upon which the two nations operate differ drastically? The ramifications of this conundrum and the potential combinations and permutations that must be taken into account in attempting complete accommodation assume overwhelming dimensions in view of the fact that individuals and officials in one country may be called upon to render assistance or to seek assistance from any one of the more than one hundred nations that presently exist in the world. One response to the problem is that recently attempted by the United States: Unilateral reform of the domestic procedures for rendering and requesting judicial assistance in the hope that by maximizing the flexibility of one's own system the exigencies of a wide spectrum of situations can be met.

The purpose of this paper is to examine various facets of Swiss and American practices of international judicial assistance. Comparison of the practice of a civil-law country with that of a country with a common-law heritage should expose the range of difficulties that may arise when a request for cooperation is made and executed between nations with divergent legal backgrounds. Although Swiss practice has certain insular aspects, it does mirror—or exaggerate—many of the salient characteristics of the civil-law approach to international cooperation. To the extent that Swiss attitudes are exemplary of what may be encountered abroad, this paper also should offer a number of insights into the effectiveness of the recent American innovations in the field of international
judicial cooperation already adopted and those currently being considered by providing a microcosmic examination of how these reforms may be expected to function in practice.

I. BACKGROUND

Switzerland is a confederation consisting of 25 cantons, 19 undivided or whole cantons and six half cantons, each of which has its own government and exercises almost complete control over its internal affairs. French, German, and Italian are all “official” or “national” languages. Authority with respect to matters left to the confederation rests in a bicameral parliament (Bundesversammlung), consisting of a Council of States (Ständerat) composed of cantonal representatives and a National Council (Nationalrat) elected according to population, a federal council (Bundesrat) whose seven members rotate in the presidency for one-year terms, and a Supreme Court of the Confederation (Bundesgericht).

The adjudicatory authority of the Bundesgericht is primarily appellate and is limited to questions of federal law, which includes many disputes of a private law nature. The Bundesgericht also has original competence over controversies between the confederation and a canton or, in a number of purely federal cases, between two cantons, and between private individuals when both parties agree to submit the controversy to the court and it involves a federal matter and a certain amount of money. In these cases, the Bundesgericht sits both as a court of original jurisdiction and as a court of last resort.

Each canton has its own district courts, usually called Bezirksgerichte, which are courts of first instance having general civil and criminal jurisdiction, and its own court of appeals. Requests for Swiss cooperation generally are channelled to the cantonal court.
of first instance. With rare exception, the Bundesgericht does not assist in the service of judicial documents or in obtaining testimonial or documentary evidence on behalf of foreign courts or litigants, although it may seek aid from a foreign court in connection with one of its own proceedings. Consequently, Swiss practices of judicial cooperation must be examined at the cantonal court level.

Switzerland’s practices relating to international cooperation in litigation are influenced by its federal system of government, a strong conception of sovereignty, and a national policy of neutrality, which has enabled it to avoid becoming embroiled in Europe’s wars since the establishment of the Confederation in 1848. These factors are largely responsible for the difficulties American tribunals and litigants have experienced in obtaining Swiss assistance on behalf of litigation in this country. It should be emphasized at the outset, however, that the Swiss government and the cantonal authorities are not reluctant to grant cooperation; viewed from the perspective of an American litigant, the major obstacle appears to be Switzerland’s insistence upon strict compliance with its own procedures and Switzerland’s desire to guard against any encroachment upon its sovereignty or any other national policy. As a result, it frequently is impossible or prohibitively expensive, in terms of time or money, to procure any useful aid from the Swiss authorities.

This paper’s description of Swiss practice is based primarily on the law of the canton of Zurich, in which Switzerland’s largest city and commercial center, the city of Zurich, is situated. The law of

Zurich may be considered typical of cantonal practice, especially those cantons with a German population, although the practices of international judicial cooperation vary from canton to canton and usually reflect the French, German, or Italian heritage of a particular area. Furthermore, the small or thinly populated cantons have had little or no experience in these matters and prediction of how they might react to certain requests for aid is hazardous.

II. INTERNATIONAL COOPERATION SOUGHT BY THE UNITED STATES AND PROVIDED BY SWITZERLAND

A. SERVICE OF DOCUMENTS IN SWITZERLAND

An American attorney accustomed to the simplicity of service by a privately employed process server or a sheriff or marshal may feel somewhat frustrated by the restraints imposed on service of process in Switzerland. Only legal documents issued in connection with proceedings before a foreign tribunal that are of an informational nature, such as papers notifying the recipient of a tax deficiency or of probate matters, may be served privately in Switzerland without the assistance or intervention of the federal or cantonal authorities. These documents may be served by any person and in any manner appropriate under the practice of the tribunal that issued them. Documents relating to any phase of civil litigation that do not attempt to command the addressee to appear or perform an act are within this class of legal papers. Thus, to the extent that a summons is drafted so that it can be construed as an invitation to appear rather than a peremptory direction to that effect, private service may be proper. The Swiss also permit consular officials to serve documents on their nationals without invoking the aid of the Swiss authorities, provided no compulsion is used in the course of making service. "Compulsion" embraces either the use of actual force or the threat of force or penalties.

11. However, some Swiss authorities have taken the position that private service may be used only when no procedural consequences under the applicable foreign law result from the service. Letter From the Swiss Federal Department of Justice and Police to Professor Hans Smit of Columbia Law School, Nov. 7, 1963; Letter From the Swiss Federal Department of Justice and Police to Dr. Max Guldener, July 4, 1962. If this view accurately reflects Swiss practice, private service of a summons, no matter how deftly the papers are drafted, probably is inadvisable. The absence of judicial authority on the point has led at least one Swiss commentator to express doubt as to the conclusion reached by the Department of Justice and Police. Letter From Dr. Max Guldener to the Author, July 28, 1962.
under Swiss or foreign law. Thus, for example, an American consular official may not forcibly enter the home of the addressee, even if he is a citizen of the United States, to deliver the documents or threaten the addressee with penalties under Swiss or American law for refusing to accept delivery.

With these two exceptions, the Swiss insist that service in connection with proceedings in a foreign country be made by Swiss officials pursuant to a formal request, accompanied by the documents to be served, presented to the Police Division of the Swiss Federal Department of Justice and Police through the diplomatic channels of the foreign country or forwarded directly by the foreign tribunal requesting aid when that procedure is authorized by treaty. If the request is approved, the Federal Department of Justice and Police will forward the documents for service to the appropriate district court in the canton in which the person to be served resides. In some cases, the documents will be channelled by the Federal Department of Justice and Police through the Ministry of Justice of the canton in which the service is to be made.

The insistence upon submission of requests for service through diplomatic channels to the Police Division of the Federal Department of Justice and Police is based upon Swiss officialdom's desire to know the nature of any document served within Switzerland in connection with a foreign proceeding. The need to examine the contents of foreign documents is in turn defended as an integral element of Swiss sovereignty and essential to the national policies of neutrality and protection of commercial and industrial secrets. The theory appears to be that if requests for service were

12. Cf. RIEZER, INTERNATIONALES ZIVILPROZESSRECHT 684 (1949). The papers to be served by the consular official may draw attention to adverse procedural consequences that will attend a failure to act on the basis of the information embodied in the documents. Ibid.


14. Article 273 of the Swiss Penal Code (Strafgesetzbuch) provides: "Whoever attempts to obtain a trade or business secret in order to disclose it, or whoever discloses such a secret to a foreign official or private organization, or to a foreign business firm, or to their agents, shall be punished with imprisonment. . . . The judge may also levy a fine." Article 47 of the Swiss Law of Banks and Savings Associations of Nov. 8, 1934, 10 BS 337 states:

Whoever willfully, . . . in his capacity [as one of a group of enumerated bank officers and employees] . . . violates his duty of silence or professional secrecy, or whoever induces or attempts to induce a person to
not channelled through and scrutinized by appropriate Swiss officials, there would be no effective way to insure that the service of the foreign documents was not contrary to Swiss public policy.

This reluctance to permit a foreign litigant or official to perform a judicial act within Switzerland without official intervention also is reflected in the way the Swiss government has construed some of the international agreements it has entered into dealing with the service of foreign judicial documents. As a member of the Hague Convention on Civil Procedure of 1905, and an adherent to the 1954 amendments to that Convention, Switzerland is obligated to permit a request for service to be sent from the court of a member nation directly to that nation’s consulate in Switzerland. Nevertheless, by a reservation embodied in a circular note dated April 28, 1909 addressed to the other members of the Convention, Switzerland has insisted that requests for service proceed through diplomatic channels. In somewhat inconsistent fashion, Switzerland has entered into special agreements relating to the transmittal of requests for judicial cooperation in civil matters with Germany, France, Italy, Austria, Belgium, and Poland permitting requests to move from court to court or from court to the competent authority at the place of service. Moreover, Switzerland’s extradition treaties with France, Luxembourg, Monaco, Salvador, Spain, and Yugoslavia authorize the same methods to be used to transmit requests for service of documents in criminal cases.15

The Swiss insistence upon official intervention also is based upon article 271 of the Swiss Penal Code, which prohibits anyone from committing an act in Switzerland on behalf of a foreign country “that is a matter of authority” without first obtaining the permission of the Swiss government.16 The question of what constitutes an offense shall be fined not more than 20,000 francs [about $5000], or shall be imprisoned for not more than six months, or both. . . .

15. Declaration Between Switzerland and Belgium, Nov. 29, 1900, 12 BS 289; Declaration Between Switzerland and Germany, Dec. 13, 1878, and April 30, 1910, 12 BS 292 et seq.; Declaration Between Switzerland and France, Feb. 1, 1913, 12 BS 293 et seq.; Declaration Between Switzerland and Austria, Dec. 30, 1869, 12 BS 316 et seq.; Declaration Between Switzerland and Poland, Sept. 18, 1928, 12 BS 333 et seq.; Protocol Concerning the Execution of the Treaties Between Switzerland and Italy, concluded on July 22, 1868, 11 BS 681.

16. The German text of article 271(1) is:

Wer auf schweizerischem Gebiet ohne Bewilligung für einen fremden Staat Handlungen vornimmt, die einer Behörde oder einem Beamten zukommen, wer solche Handlungen für eine ausländische Partei oder
stitutes an act of "authority" apparently is determined with reference to Swiss notions of sovereignty. Swiss courts have never had occasion to apply article 271 to the service of documents in connection with proceedings pending before a foreign tribunal; the instances in which the provision has been applied involve either egregious encroachments upon Swiss sovereignty or obvious attempts to circumvent Swiss law. Nonetheless, some Swiss scholars believe that its proscriptions apply to service by a foreign official or by a person acting on behalf or under the imprimatur of a foreign tribunal, and the Swiss Federal Department of Justice and Police has taken the position that article 271 forbids service without the intervention of the Swiss authorities even when made by one private party on another or when the papers are sent by the attorney for one party to the attorney for the other party.

17. The leading Swiss decision on the subject was rendered under a predecessor of article 271 of the present Penal Code. It involved Germans residing in Germany who were owners of shares of a Swiss joint-stock company. The German fiscal authorities, who suspected the shareholders of evading German taxes and violating German regulations on the holding of capital in foreign countries, requested the Reichstreuhandgesellschaft (apparently a private enterprise) to examine the books and papers of the Swiss company and to report to the German fiscal authorities and the German shareholders—the report to the latter was on purely private matters. The Reichstreuhandgesellschaft sent an agent to Switzerland who, after examining the books of the company, was arrested and jailed. The Supreme Court of the Confederation found him guilty of the offense specified in article 971 and held it immaterial that the agent was not proved to be a German official, inasmuch as he acted in the interests of the German fiscal authorities. The Court considered the examination of books on behalf of fiscal authorities to be an act normally carried out by governmental officials and therefore an act that could not be performed in Switzerland by a foreign official or by a private person on behalf of a foreign authority. Kämpfer v. Staatsanwaltschaft Zürich, Bundesgericht, March 6, 1939, 66(I), S.B.G. 89. Since service of documents is an act normally performed by officials in Switzerland, it is easy to see how the Kämpfer case can be viewed as authority for the proposition that service of process by an American litigant, attorney, or official, or even by a Swiss citizen acting at the request of someone interested in the foreign litigation, is a violation of article 271 of the Swiss Penal Code. The conclusion apparently is not altered by the fact that the country in which the proceeding is pending permits service of process to be made by a private person.

18. Letter From the Swiss Federal Department of Justice and Police to Dr. Max Guldener, July 9, 1962. Switzerland is not unique in requiring service on behalf of foreign litigation to be made by its own officials. See Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 69 YALE L.J. 515, 536-37 (1953); Longley, Serving Process, Subpoenas and Other Documents in Foreign Territory, ABA SECTION OF INTERNATIONAL AND
However, the absence of direct judicial authority on the point makes it extremely difficult to predict whether the Federal Department's conception of the crime defined in article 271 is accurate.

Because of Switzerland's attitude toward service of process on behalf of foreign litigation within its borders, it is advisable for an American litigant or court to attempt service in Switzerland by forwarding a request for assistance through United States and Swiss diplomatic channels to the Swiss Federal Department of Justice and Police. The absence of an agreement between the United States and Switzerland makes resort to diplomatic channels necessary; the Federal Department of Justice and Police probably will not act upon a direct written or personal application for transmittal of a request for service even though foreign service from party to party or court to court may be permitted by the American court. Several of Switzerland's treaties with other nations do authorize the Department to forward a direct request for service to the appropriate authority in the canton in which the person to be served resides. The practice under these treaties calls for the request to state that the type of service asked for is permitted by the court seeking the service and to describe the nature of the foreign proceedings and the document to be served. In order to permit correction of deficiencies in a request made under one of these treaties, it usually will be submitted to the Department of Justice and Police through the embassy of the foreign country.

The most appropriate vehicle for transmitting a request for service through United States and Swiss diplomatic channels is letters rogatory. Although letters rogatory have been used in this country primarily for obtaining testimonial evidence from abroad,


The risk that an American litigant will attempt service without the intervention of the Swiss authorities is lessened somewhat by the fact that the natural persons to make such service, the United States consular officials in Switzerland, are prohibited from doing so unless specifically authorized by federal statute or regulation. 22 C.F.R. §§ 92.85, 92.92 (1965). The Consular Convention With the United Kingdom, June 6, 1951, art. 17(g), [1952] 3 U.S.T. & O.L.A. 3426, 3440, T.I.A.S. No. 2494, and the Consular Convention With Ireland, May 1, 1950, art. 17(g), [1954] 5 U.S.T. & O.L.A. 949, 982, T.I.A.S. No. 2984, permit United States consular officers to make service. See also the discussion of §§ 1783 and 1784 of the United States Judicial Code in note 20 infra.
it is the customary procedure for making extranational service in a number of countries. The recent addition of rule 4(i)(B) to the Federal Rules of Civil Procedure provides the federal courts with explicit authority for attempting service in a foreign country by letters rogatory; a comparable provision is found in section 201(a)(4) of the Uniform Interstate and International Procedure Act. Lack of a service-by-letters-rogatory provision does not necessarily preclude a state court from using the letters rogatory device. A number of states authorize their courts to order service in any appropriate manner when service by the more traditional


20. The other methods of service abroad authorized by Federal Rule of Civil Procedure 4(i) and Uniform Interstate and International Procedure Act § 2.01 are personal delivery in the manner prescribed by the law of the place of service, any form of mail requiring a signed receipt, and as directed by the court. With the possible exception of the last, these methods all involve the type of “official” action that the Swiss consider repugnant to their notions of sovereignty and public policy and their construction of article 271 of the Penal Code. Rule 4(i) was added to the federal rules in 1963, and is discussed in Kaplan, supra note 3, at 635–37; Comment, Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony, 62 Mich. L. Rev. 1375, 1380–82 (1964). The deficiencies in prior federal practice are set out in Smit & Miller 40–45; Smit, supra note 18, at 1032–43. See also Christenson, International Judicial Assistance and Utah Practice, 7 Utah L. Rev. 478, 491–87 (1961).

Section 1783 of the United States Judicial Code permits a federal court to subpoena “a national or resident of the United States who is in a foreign country” to appear before the court or to produce specified documents or other things whenever the court finds that it “is necessary in the interest of justice.” The statute states that service of the subpoena is to be made “in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.” This provision is reinforced by § 1784 of the Judicial Code, which provides that noncompliance with a subpoena issued under § 1783 may be punished by contempt. The predecessors of these statutes were enacted in 1926 largely because two key witnesses in the Teapot Dome Scandal had taken refuge in France and refused to answer questions propounded to them by means of letters rogatory. See Dickinson, The Recall of Witnesses Under the Walsh Act, 25 Am. J. Int’l L. 723 (1931); Current Legislation, A Statutory Attempt To Authorize Personal Service Abroad in Certain Cases, 27 Colum. L. Rev. 204 (1927). The same circumstances that led to the enactment of these statutes gave rise to their first judicial construction. In Blackmer v. United States, 284 U.S. 421 (1932), the Supreme Court upheld two contempt fines, each of $30,000, against one of
methods is shown to be impossible or impractical. Even in the absence of a catch-all provision of this type, a state court may rely on its inherent power to take whatever reasonable action is necessary for the effective administration of justice as a basis for issuing an order directing that letters rogatory be forwarded to Switzerland through proper channels.

Letters rogatory, although sent through diplomatic channels to the Swiss Federal Department of Justice and Police, should be addressed to the appropriate district court in the canton in which the person to be served resides. They should identify the documents to be served, contain a copy of the documents translated into the official language of the court that will make the service, indicate whether the addressee is a party to the American litigation or has some other relationship with it, set forth the substance of the proceedings on behalf of which the service is requested, the recalcitrant witnesses who had failed to respond to a subpoena. At the suggestion of the Commission and Advisory Committee on International Rules of Judicial Procedure and the Columbia Law School Project on International Procedure, §§ 1783 and 1784 were completely revised in 1964, Pub. L. 88-619, §§ 10, 11, 78 Stat. 997, to eliminate certain deficiencies and to take account of the 1963 addition of rule 4(i) to the Federal Rules of Civil Procedure. See H.R. Rev. No. 1052, 88th Cong., 1st Sess. 11-12 (1963); S. Rev. No. 1580, 88th Cong., 1st Sess. 9-10 (1964). See also Smit, International Litigation Under the United States Code, 65 COLUM. L. REV. 1015 (1965).

21. E.g., N.Y.C.P.L.R. § 308(4); see 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 308.17, 313.10 (1963).

22. A number of courts have expressed the view that they have inherent power to issue letters rogatory to obtain evidence. E.g., United States v. Staples, 256 F.2d 290, 292 (9th Cir. 1958); Matter of Pac. Ry. Comm'n, 32 Fed. 241, 256-57 (C.C.N.D. Cal. 1887); Martinelli, Petitioner, 219 Mass. 58, 106 N.E. 557 (1914); Christenson, supra note 20, at 495; Note, Use of Letters Rogatory Under Federal Rule of Civil Procedure 28(b), 46 IOWA L. REV. 619, 621 (1961). See also Decauville Auto. Co. v. Metropolitan Bank, 194 App. Div. 478, 485, 108 N.Y. Supp. 1027, 1032-33 (1908); Ex parte Taylor, 110 Tex. 331, 220 S.W. 74 (1920); Hite v. Keene, 137 Wis. 625, 629, 119 N.W. 303, 305 (1909). The same reasoning should apply to letters rogatory to secure the service of judicial documents.

Service in a foreign country is not dependent upon statutory authorization. A "long-arm" statute or any statute that permits the acquisition of jurisdiction over a person for acts committed or having consequences within a state even though the defendant may not be within the state generally will be construed to permit service outside the United States unless it specifically negates that possibility. See Magnaflux Corp. v. Fecster, 383 F. Supp. 552 (N.D. Ill. 1963); Lulevich v. Hill, 62 F. Supp. 612 (E.D. Pa. 1949); Ewing v. Thompson, 393 N.C. 564, 65 S.E.2d 17 (1951). See also Chapman v. Superior Court, 163 Cal. App. 2d 491, 332 P.2d 23 (1958); Sperry v. Fiegers, 184 Misc. 438, 86 N.Y.S.2d 830 (Sup. Ct. 1949); Rushing v. Bush, 260 S.W.2d 900 (Tex. Ct. Civ. App. 1953).
and contain a general promise of reciprocal treatment should the
Swiss court ever be in need of aid. Whenever the sending court
is not certain which Swiss court should execute the letters, they
may be addressed: "To the Appropriate Judicial Authority in
Switzerland." If the translation is absent or not in the official
language of the addressee court, the defect can be rectified
by the Department of Justice and Police or an American embassy
or consulate in Switzerland.

A properly channelled request for service will be forwarded for
execution by the Federal Department of Justice and Police unless
compliance would be inconsistent with Swiss public policy. The
grounds for refusing to honor the request are: (1) service would
infringe upon the sovereignty or impair the public security of
Switzerland; (2) the character of the foreign proceeding is inco-
sistent with Swiss conceptions of fundamental rights or natural
justice (for example, persecution for political or religious activi-
ties); (3) the foreign proceeding involves the breach of a military,
political, or fiscal duty;23 (4) the courts of the requesting state
or nation have refused to grant reciprocal treatment to Swiss tri-
bunals; and (5) service is requested in a criminal proceeding in-
volving acts not punishable under Swiss law.24 These objections,
which are recognized by the Hague Convention as appropriate
reasons for refusing to comply with a request for service from a
Convention nation, are not explicitly provided for in either the
federal or cantonal statutes but have been developed over a num-
ber of years and applied to requests from nations with which
Switzerland has no treaty. If the Department of Justice and
Police concludes that the request is not inconsistent with Swiss
public policy, it will forward the request even though there is no
convention between the United States and Switzerland obligat-
ing the Swiss to provide assistance and irrespective of whether
the request emanates from a court or administrative tribunal or
the proceeding is civil or criminal.

The cantonal court to which the letters are forwarded will make
a second appraisal as to whether the execution of the request will
violate public policy. In the absence of a treaty, the local court

23. Sections 10 and 11 of the Eidgenössisches Auslieferungsgesetz (1892)
generally are viewed as prohibiting assistance in connection with political and
fiscal crimes.

1956). Courts in this country also take account of public policy before asking
for or rendering judicial assistance. E.g., The Signe, 57 F. Supp. 819 (E.D. La.
1941). See also The Regent, 35 F. Supp. 985 (E.D.N.Y. 1940); The Kotkas,
may apply its own notions of what constitutes an appropriate objection to rendering aid. As a practical matter, however, once the request has been approved by the Federal Department, there is only a minuscule chance that it will be rejected at the cantonal level. When there is a treaty between Switzerland and the nation requesting aid, the cantons are bound by any construction given the treaty by the Bundesgericht. 25

The cantonal court will execute the letters by making service of process in precisely the same manner as it would if the litigation were pending before it; usually this will mean service by mail. 26 The documents will be placed in an envelope prominently marked Gerichtsurkunde (legal document), the envelope will be addressed to the person to be served, a return receipt will be attached to it, and the envelope will be forwarded by registered mail. The special envelope apprises the postman that its contents are important and whenever possible he will hand it to the addressee personally, to an adult member of the addressee’s family living in the same household or an adult employee of the addressee, or, if the addressee is a party to the litigation, to his attorney. 27 Swiss law requires registered mail to be delivered to a person who can establish his identity, 28 which usually is accomplished by showing an identity card or a passport or a written statement of a trustworthy person known to the postal authorities. Business organizations generally file a power of attorney with the postal authorities nominating persons in their employ who are authorized to accept registered mail. Any person receiving registered mail must sign and date the receipt. The mail carrier will then detach the receipt from the envelope and return it to the Swiss court. 29

26. Gerichtsverfassungsgesetzes (Statute on the Organization of the Judiciary) [hereinafter cited as GVG] of Zurich §§ 186–97, 206, (Zürcher Gesetzes-
sammlung der ab 1 Januar 1961 in Kraft Stehenden Einlasse des Kantons Zürich (Official Collection of the Statutes of the Canton of Zurich in force on January 1, 1961), vol. 6, at 177 et seq.).
28. VZV art. 103; AS 1956, at 48.
29. VZV art. 50; AS 1956, at 20. The fee for service is determined by the court but rarely will exceed 20 Swiss francs (about $5.00).
be served lives in the vicinity of the court or in an area in which mail service is infrequent. In these cases, a court officer (Weibel) will make personal delivery of the documents and execute a written attestation to that effect. If the person to be served cannot be reached by mail or personal delivery, the court may order service by publication. Recourse to publication rarely will be necessary because the various registries maintained by the Swiss usually permit the location of all citizens and residents of Switzerland without difficulty.

Regardless of which of the three methods of service described above is used by the Swiss court, American notions of due process will not be offended. Service by mail is becoming increasingly popular in the United States; a number of statutes expressly provide for its use and several courts have accepted it even in the absence of statute. The Swiss requirements that the envelope be specially marked and that the recipient acknowledge receipt in writing make it reasonable to assume that the addressee will receive actual notice. Service by personal delivery, of course, is the traditional method in this country and is unobjectionable. Some concern over the possible use of service by publication would be understandable in light of recent decisions by the United States Supreme Court expressing dissatisfaction with that method of service. Practically speaking, however, the risk that publication will be used in a manner that is offensive to due process probably is minimal inasmuch as a Swiss court will employ pub-

30. Both Federal Rule of Civil Procedure 4(i) and § 2.01(a) of the Uniform Interstate and International Procedure Act permit service pursuant to letters rogatory only when the method employed by the foreign authorities is "reasonably calculated to give actual notice," which is a reformulation of the standard established by the Supreme Court in Milliken v. Meyer, 311 U.S. 457, 464 (1940). This caveat was included to warn a party requesting service that he could not assume that service in accordance with foreign law or service effected by foreign officials automatically would be valid in view of the number of nations in the world with concepts of jurisdiction that differ markedly from our own.


lication only if the person to be served cannot be reached by mail or by personal delivery, which most courts in the United States would consider to be an appropriate situation for employing the procedure.\textsuperscript{35}

Since the Federal Department of Justice and Police will examine the contents of a request for service of process to see if it is consonant with Swiss law, the cantonal court to which the request is forwarded can assume that its execution is compatible with Swiss public policy. As a result, the executing court probably will comply with a request that the documents be served in a special manner, such as by personal delivery rather than by registered mail. Similarly, there is every prospect that if a certain form of proof of service is needed to satisfy the American court's service requirements, a request to provide it will be honored. A special request regarding service and proof of service will not be necessary when the letters issue from a federal court or a court in a state that has adopted the Uniform Interstate and International Procedure Act. Rule 4(i)(1)(A) and rule 4(i)(2) of the Federal Rules of Civil Procedure and section 2.01(a)(2) and section 2.01(b) of the uniform act validate service and proof of service made in accordance with the law of the place where service is effected. In most states, however, personal delivery and a sworn affidavit by the process server are still necessary.\textsuperscript{36}

There are several reasons why an American litigant should not attempt to make service on behalf of litigation in the United States without intervention by the Swiss authorities except, as noted at the outset of this discussion, in those instances in which private service is proper. The Swiss government regularly issues an official protest whenever service is attempted in a manner that it considers contrary to Swiss law or policy.\textsuperscript{37} Of course, there is no effective method of preventing service in Switzerland by mail sent from this country. Even if the recipient of the document should complain, there is no one in Switzerland against whom

\textsuperscript{35}See N.Y.C.P.L.R. 315; 1 Weinstein, Korn & Miller, New York Civil Practice \textsuperscript{7}(7) 315.01-02 (1983).

\textsuperscript{36}In a number of foreign countries, process servers will be unwilling to execute a sworn affidavit of service or to make return in any manner that deviates from local law. See Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 537 (1953); Longley, supra note 18, at 35. In order to avoid the possibility that service in a foreign country would be quashed solely because proof was not made in accordance with the requirements of the requesting court, the federal rules and the uniform act were made as flexible as possible.

a sanction can be exerted. The absence of an effective sanction against the person who posted the documents does not alter the fact that if the attempted service goes awry and the intended recipient complains to the Swiss government, the United States State Department will be subjected to the embarrassment of apologizing for the "inadvertent" violation of Swiss law by one of our citizens. The danger of attempting personal service within Switzerland without official approval is much more apparent. If the putative recipient of the document complains, the process server may well find himself subjected to the sanctions provided by article 271 of the Swiss Penal Code. Finally, it probably is unwise to employ any method of service not recognized by Swiss law whenever there is some likelihood that subsequent recognition of the judgment will be sought in Switzerland. Although Swiss courts will recognize a judgment in an action commenced by service that gave the defendant adequate notice and an opportunity to defend, recognition may be denied if the service was made in a manner contrary to Swiss public policy. No controlling authority exists on this point, however, and the fear of nonrecognition may prove to be ill-founded.

B. Obtaining Testimonial Evidence in Switzerland

Anyone in Switzerland may voluntarily give a narrative statement for use in foreign litigation without intervention by the Swiss authorities. In addition, a voluntary statement in the form of answers to written questions submitted to the declarant may be procured privately. A statement may be taken before a private person, a foreign consular officer, or a Swiss notary public. If the witness does not object, an oath may be administered before he gives his statement or he may be asked to acknowledge a transcript of the statement. An acknowledgment by the declarant that he has made the statements set forth in the transcript of a private examination may be notarized.

The value of the voluntary-statement procedure is somewhat emasculated by a number of limiting factors. For example, anyone who wishes to obtain a voluntary statement must act in a very circumspect fashion. Physical force, the threat of physical

38. See ibid.
force or sanctions under Swiss or foreign law, and all other forms of coercion are prohibited. Another deficiency is the absence of sanctions against a witness who furnishes a false statement. Under Swiss law testimony can be given only before a court or, in criminal cases, before a public prosecutor; accordingly, a false statement before a private person, a notary, or an attorney, none of whom is authorized to administer oaths under Swiss law, is not punishable as perjury in Switzerland.40

The Swiss government has taken the position that an oral examination on behalf of foreign litigation cannot be conducted privately within Switzerland. This attitude is based on the view that because a witness ordinarily is interrogated by a governmental official in Switzerland it is an act of "authority" under article 271 of the Penal Code and cannot be undertaken by a private person or an official of another country whenever the litigation is pending before a court outside Switzerland.41 As a result, an American litigant cannot ordinarily obtain testimonial evidence from someone in Switzerland simply by giving notice of the examination to the other parties or by obtaining the appointment of a commissioner, as permitted by rule 28(b) of the Federal Rules of Civil Procedure42 and section 3.01 of the Uniform Interstate and International Procedure Act and a number of state statutes.43

40. Strafgesetzbuch (Penal Code) of Switzerland § 307 [hereinafter cited as SGB].
41. See text accompanying notes 16–18 supra; Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 520 (1953). The Swiss position is based on the premise that a pretrial deposition is equivalent to the examination of a witness in court, which is an official act, and the fact that such examinations are conducted privately in this country is of no moment. An individual who is willing to submit to an oral examination cannot waive the Swiss government's rights under article 271. See Galleski, supra note 24, at 41–42. One practical solution is to transport the witness, if he is willing, to a nearby country that is not as queasy on the subject of sovereignty and examine him there.
These procedures are available only when the witness is willing to tender a written statement or respond to written questions; the assistance of the Swiss authorities must be obtained whenever the witness refuses to give a voluntary statement. Even though the propriety of the position taken by the Swiss government has not been conclusively established by the courts, Switzerland's strong views on national sovereignty make it unwise for an American attorney to attempt anything that has not been officially declared permissible without the consent of the Swiss authorities. Restriction is especially appropriate in the case of commissions since the court that appoints a commissioner to take testimony invests him with a quantum of official power, which, if exercised within Switzerland, would be particularly repugnant to that country's notions of sovereignty.

Letters rogatory ordinarily represent the only practical way to obtain assistance in compelling testimony from a witness in Switzerland. Since the commission procedure is unknown in Switzerland.


44. See generally Smit, International Co-operation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity, 9 Neth. Inst. L. Rev. 137, 143–46 (1962), in which the author argues that if article 271 applies in this context, the Swiss government should disclaim any intention of invoking it.

45. See id. at 144–45; Evans, Oral Depositions in Foreign Countries, 4 Fed. B. News 167, 172 (1937). It is unlikely that a United States consular officer in Switzerland would execute a commission because current State Department regulations prohibit his acting unless the local law or authorities permit him to take a deposition. 22 C.F.R. § 92.55 (1965). See Fink, Discussion, in LETTERS ROGATORY 50, 54 (Grossman ed. 1956). See also NuSSBAUM, op. cit. supra note 39, at 37; Heilpern, supra note 43, at 37 n.9. The Consular Convention With Mexico, Aug. 12, 1942, art. VII, 57 Stat. 800, 809, T.S. No. 985, permits United States consular officials to take the testimony of any person, whether or not an American national.

INTERNATIONAL COOPERATION

zerland, a person appointed by an American court who directly requests a Swiss court to compel the attendance and testimony of a witness will receive no aid. Letters rogatory are a prerequisite to judicial assistance except when there is a substantial likelihood that the testimony will be lost unless taken immediately. In this circumstance, a Swiss court may perpetuate the witness' testimony even though no suit in which the testimony may be used is pending.47 A foreign litigant may avail himself of this procedure by applying directly to the Swiss court.

Letters rogatory requesting that testimony be taken in Switzerland must meet the same formal requirements and be forwarded to the Swiss Federal Department of Justice and Police through the same channels as are letters rogatory requesting service of documents.48 In civil, in contradistinction to criminal, cases written interrogatories must be attached. If the letters are in proper form and their execution is not objectionable to Swiss public policy,49 they will be forwarded by the Department of Justice and Police to the competent cantonal authority in the district in which the person to be examined resides.50 In a busy district court, such as that in the city of Zurich, practically all letters are handled by the same judge. In those cantons in which the public prosecutor is empowered to examine witnesses, he may

denied, 272 App. Div. 757, 70 N.Y.S.2d 135 (1947). Presumably such efforts have proved to be unavailing. Letters rogatory also are the only feasible way of securing testimonial evidence from certain other countries. See Danisch v. Guardian Life Ins. Co. of America, 19 F.R.D. 235, 237 (S.D.N.Y. 1950) (Poland); Ali Akber Kiachif v. Philco Int'l Corp., 19 F.R.D. 277, 278 (S.D.N.Y. 1950) (Iran); Moezie v. Moezie, 192 A.2d 808, 810 (D.C. Ct. App. 1963) (Iran); Comment, 62 Mich. L. Rev. 1375, 1388 n.56 (1964). The federal letters rogatory practice prior to the 1963 amendment of rule 28(b) is described in Note, 46 Iowa L. Rev. 610 (1961). If the witness is a national or resident of the United States and his testimony is material to the merits of the action, a federal court may order the issuance of a subpoena requiring him to appear in this country or to produce specified tangible evidence. 78 Stat. 997, 28 U.S.C.A. §§ 1783, 1784 (Supp. 1964); see note 20 supra. Since the subpoena will have to be served by letters rogatory in order to avoid the objections noted in text, the intercession of the Swiss authorities will not be avoided.

47. Zivilprozeßordnung (Code of Civil Procedure) [hereinafter cited as ZPO] of Zurich §§ 311 et seq.


49. The elements of this policy are enumerated in the text accompanying notes 23-24 supra.

50. In the absence of a treaty obligation, the execution of letters rogatory is a matter of discretion for the cantonal court to which they are directed.
be the official who executes requests issued in connection with foreign criminal proceedings.\textsuperscript{51} The witness will be ordered to appear in accordance with the local practice for summoning witnesses.\textsuperscript{52} If the witness fails to appear or refuses to testify, he may be fined — usually no more than 100 francs (about 20 dollars).\textsuperscript{53} Should he persist in his refusal, he may be punished by confinement for up to three months.\textsuperscript{54} In the case of a recalcitrant witness in a criminal proceeding, a warrant to appear may be issued and executed by the police. The only excuse for the witness not to testify is a valid exercise of a Swiss privilege or his infancy or lack of competence.\textsuperscript{55}

Practices relating to the administration of an oath to the witness vary from canton to canton.\textsuperscript{56} The Swiss Constitution prohibits compelling anyone to perform a religious act,\textsuperscript{57} and since an oath is viewed as a religious act in Switzerland no one is obliged to swear before giving testimony. In some cantons the oath is considered to be contrary to Christian doctrine and no attempt will be made to administer one, although the witness must affirm the truth of his testimony.\textsuperscript{58} In other cantons, such as Schwyz, the administration of the oath is a ceremony of great solemnity, which often includes darkening the courtroom, lighting candles, and permitting the witness to confer with his clergyman. The failure of the witness to swear an oath does not affect the application of the perjury sanctions because false testimony is punishable whether or not confirmed by oath.\textsuperscript{59}

There is a great divergence in cantonal practice regarding the nature of the witness’ oath or affirmation. In some cantons he is asked to swear a promissory oath before testifying; in others the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Strafprozessordnung} (Code of Criminal Procedure) [hereinafter cited as SPO] of Zurich § 128.
\item At least one American attorney apparently has found Swiss courts uncooperative in executing American letters rogatory. See Doyle, \textit{supra} note 10, at 39 n.4. A lack of information prevents evaluation of Mr. Doyle’s experience. Some nations refuse to provide compulsory process to execute letters rogatory in the absence of a treaty. See \textit{2 Hackworth, International Law} 103, 105 (1941).
\item Zürich \textit{ZPO} § 196.
\item SGB art. 292.
\item See text accompanying notes 66–74 infra.
\item See generally \textit{Guldener, Das Schweizerische Zivilprozessrecht} § 46 (1948).
\item \textit{Bundesverfassung der Schweizerischen Eidgenössenschaft} (Federal Constitution of the Swiss Confederation) of May 29, 1874, art. 49.
\item This is true in the canton of Zurich.
\item SGB art. 307. A witness found guilty of false testimony may be imprisoned for up to five years.
\end{enumerate}
\end{footnotesize}
witness will swear an affirmative oath after the examination. The oath usually takes the form of a short reply to a question posed by the court or the repetition of a formula.60 No established form of words is used throughout the country, although the time-honored cliche "the truth, the whole truth, and nothing but the truth" is embodied in most of the oaths employed by the various cantons. In Zurich, the testimony is recorded and then read and confirmed by the witness.61 Since this is done at the close of the examination when the record is in the form of shorthand notes, the witness cannot confirm by signature. The custom in criminal matters is to have a witness who is examined by the public prosecutor sign the record. In the canton of Berne, the witness signs a transcript prepared after he gives his testimony.62

A witness will be examined on behalf of a foreign tribunal in accordance with the practice of the Swiss court executing the letters rogatory.63 The court will not appoint local counsel for the witness or for the foreign parties. If counsel for either side desires to be present, it would be prudent to request notification of the time and place of the examination in the letters rogatory even though the executing court usually will give such notice to the requesting court. The interrogatories attached to the letters rogatory will be put to the witness by the court. Additional questions may be propounded whenever the court thinks it appropriate to do so and whenever the information elicited from the witness in response to the original interrogatories requires elaboration. Should counsel for one or more of the foreign litigants be present, they may request the judge to ask supplementary questions.64 Unfortunately, all questions must be posed by the court, thereby eliminating any possibility of an adversary examination of the type traditional in the United States.65 In view of the judge's complete control over the examination, it is important that the letters adequately describe the nature of the proceedings, delineate those aspects of the case to which the witness' testimony is expected to be most relevant, and contain a request that if Ameri-

60. For representative provisions relating to the oath, see Code de Procédure Civile (Code of Civil Procedure) [hereinafter cited as CPC] of Fribourg arts. 210, 222; Geneva CPC art. 231; Lucerne CPC art. 170.
61. Zürich GVG art. 165.
62. Berne ZPO art. 256.
64. One who wishes to be recognized as counsel for a foreign party must submit a written power of attorney to the court.
can counsel attend the examination, they be permitted to suggest supplementary questions. If counsel do not plan to attend the examination, they should consider the advisability of including a statement in the letters requesting the executing authority to ask any additional questions he considers to be appropriate.

A Swiss court will examine a witness only if he is competent to testify under Swiss law. In civil actions, except those involving family matters, a witness is incompetent if he is a party or a descendant, ascendant, brother, sister, husband, or wife of the party taking the testimony or when there exists a corresponding affinity by marriage between the witness and the party. Although a party is not a competent witness, he may be interrogated by the court in his capacity as a party. The only difference between interrogation as a party and testimony as a witness is that a party is subject to lighter penalties for perjury. Under the law of most cantons, a witness also is incompetent if he is under a certain age or of unsound mind or lacks the necessary sensory perception to warrant listening to or considering his testimony.

In addition to the possibility that the witness’ lack of competence under Swiss law may prevent successful execution of the letters rogatory, a witness, regardless of his nationality, may avoid a complete examination by asserting any relevant Swiss privilege. Swiss privileges appear to be as broad as, if not broader than, those recognized in the United States. In civil matters, a witness may decline to answer questions pertaining to information confided to him in his capacity as an attorney, notary, 

---

66. Zürich ZPO § 185. Not all cantons declare relatives to be incompetent as witnesses. E.g., Berne ZPO §§ 243, 244.
67. Zürich ZPO § 172; Zürich SPO § 150.
68. See SGB art. 306. The maximum penalty for false testimony is five years of penal servitude. SGB art. 307. The maximum penalty for making a false statement is three years of penal servitude. SGB art. 306. In Swiss litigation, the court is not required to use the results of party interrogation as evidence in the proceeding pending before it. Furthermore, the court is free to use the interrogation without applying the sanctions for false testimony. See Zürich ZPO § 182. According to § 182 of the Zurich Code of Civil Procedure, a civil fine, which is in the nature of a disciplinary measure rather than a criminal sanction, may be imposed on a party who has made false statements. There are no sanctions against a defendant who gives false testimony in criminal proceedings.
69. Berne ZPO § 244 requires the witness to be at least 12 years of age.
70. Berne ZPO § 244.
member of the medical profession, clergyman, or government official and, at the discretion of the court, a witness may be released from any obligation to testify as to professional, commercial, or industrial secrets.\textsuperscript{72} A witness is not obliged to testify in aid of a Swiss or foreign proceeding when he is a descendant or ascendant or the brother, sister, husband or wife of any party or when there exists a corresponding affinity by marriage between the witness and a party.\textsuperscript{73} Unlike the more limited rule on competence, the witness need not be related to the party taking the testimony to claim this privilege. Furthermore, a witness may not disclose state secrets and may refuse to testify on the ground of self-incrimination. If a witness testifies with regard to privileged matters without the permission of the person whom the privilege is designed to protect, the witness may be liable for any resulting damages.\textsuperscript{74} Nevertheless, the testimony will be taken, recorded, and forwarded to the requesting court.

Swiss judges appear to be quite receptive to reasonable special requests from foreign courts. Thus, although a citizen of the United States normally will not be permitted to invoke privileges recognized under our law but not under Swiss law, a request in the letters that the witness' claim of certain privileges be honored or that his examination not extend to specified matters probably will be respected. Similarly, if a particular form of oath is requested, the Swiss court is likely to administer it provided the oath is not contrary to the law of the canton in which the testimony is taken.

In many cantons it currently is the practice to record all proceedings in shorthand, and before too long dictaphones and tape recorders probably will be in use. However, in a number of cantons it is still the practice for the court to dictate a summary of the testimony and have the witness acknowledge it. In these cantons a verbatim transcript of the examination is available if requested. However, the value of a verbatim transcript may be somewhat impaired if the witness testifies in a language other than the official language of the court or if the testimony is given in Romansch, which, although sometimes written, has no generally recognized orthography. In both of these situations, the testimony will be recorded in the official language of the court with the result that discrepancies between the words spoken by the witness and what is captured on the transcript are highly probable.

\textsuperscript{72} Zürich ZPO §§ 187, 188; Zürich SPO § 130.
\textsuperscript{73} Zürich ZPO § 186; Zürich SPO § 129.
\textsuperscript{74} SGB arts. 320, 321.
Because the Swiss court will use its own procedures when it executes letters rogatory, the response may not comply with the requesting court's requirements for taking and recording depositions. For example, if, as is possible, the witness is not placed under oath before testifying or the record of the examination is not a verbatim transcript but is a summary of the witness' testimony dictated by the judge who conducted the interrogation and acknowledged by the examinee, the examination would not satisfy the rules applicable to the taking of depositions in force in virtually all of the jurisdictions in the United States. In order to eliminate the possibility that the contents of letters rogatory executed in Switzerland would be rendered inadmissible solely on the ground that the examination was not taken or recorded in accordance with the deposition and discovery practice of the federal courts, a sentence was added to rule 28(b) of the Federal Rules of Civil Procedure stating:

Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

A comparable provision was inserted in section 3.01(b) of the Uniform Interstate and International Procedure Act.

Despite the risk that the product of an examination in Switzerland conducted under circumstances that differ from our own procedures may not be as trustworthy as the evidence that emerges from the crucible of our own system, it must be remembered that the testimony elicited by the Swiss court may be all that is available to the American litigants. The addition to rule 28(b) and its counterpart in the uniform act can be justified on the pragmatic ground that in many instances it is better to admit and consider the Swiss testimony than to proceed without any evidence at all. Moreover, there probably is little


76. This is the implication to be drawn from The Mandu, 11 F. Supp. 845 (E.D.N.Y. 1933). The cases cited in note 80 infra are to the contrary.

reason to be skeptical about a Swiss judge's summary of the witness' testimony or the responses of a witness who was not placed under oath. The judge who conducts the examination is trained in the art of interrogation and if the nature of the action is clearly described in the letters rogatory, his summary will accurately reflect the substance of the witness' testimony. Similarly, the absence of an oath should not cause apprehension about the quality of the evidence inasmuch as all Swiss witnesses are informed of the seriousness of giving testimony and of the potential imposition of sanctions for false testimony.78

There is an additional safeguard. Neither the federal rule nor the uniform act requires the American court to admit in evidence testimony received from Switzerland in response to letters rogatory when it does not conform to American standards. The two provisions merely state that exclusion should not be premised entirely on some disparity between Swiss and American practice. Thus, a court in this country is free to discount the probative value of a Swiss examination or to reject a part or the entirety of any testimony that is obtained or recorded under circumstances at odds with the procedural norms of the American court or, for that matter, in violation of the usual procedures of the executing court.79

The absence of a counterpart to the sentence now found in federal rule 28(b) and the uniform act does not mean that testimonial evidence obtained in response to letters rogatory must be rejected whenever it was taken or recorded in a manner that deviates from the requesting court's deposition procedure. A number of state and federal decisions rendered long before the amendment to rule 28(b) and the promulgation of the uniform 78. See id. at 813-14; Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1051, 1058-59 (1961).

79. See Rhodes v. Industrial Comm'n, 77 Utah 405, 206 Pac. 600 (1931). Courts in this country traditionally have permitted the trial judge to exercise this type of discretion. See generally Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961); Danisch v. Guardian Life Ins. Co., 19 F.R.D. 235 (S.D.N.Y. 1956); Bator v. Hungarian Commercial Bank, 875 App. Div. 282, 90 N.Y.S.2d 85, modifying 194 Misc. 232, 87 N.Y.S.2d 700 (Sup. Ct. 1949); Tomaka v. Pennsylvania R.R., 13 Misc. 2d 272, 177 N.Y.S.2d 583 (Sup. Ct.), aff'd mem., 7 App. Div. 2d 831, 181 N.Y.S.2d 780 (1958). Although most courts consider the relevant question to be the weight that should be given to the response to letters rogatory rather than whether or not to send it, some courts have refused to issue letters rogatory to countries whose political philosophy is at variance with our own on the theory that the response would be untrustworthy. E.g., Sochanezak Estate, 29 Pa. D. & C.3d 609 (Phila. County 1963).
act permitted such testimony to be admitted in evidence without any statutory or rule basis for the practice.  

In the absence of any special directions, letters rogatory are returned by the executing court to the Swiss Federal Department of Justice and Police and then pass through diplomatic channels to the country that requested the testimony. Since the forwarding, execution, and return of the letters rogatory will consume considerable time, a sufficient period for this process to be completed should be allotted in planning for trial. It is not unusual for three months to elapse between transmission of the request and receipt of the response.

C. Obtaining Tangible Evidence in Switzerland

Curiously, the Swiss courts have never had occasion to pass upon the propriety of complying with a request from a foreign country for assistance in obtaining documentary or other forms of tangible evidence in the absence of a treaty obliging the Swiss courts to do so. Even in the famous Interhandel litigation, the Swiss courts were not requested to assist in the production of evidence for use in the United States, which has no treaty or convention with Switzerland pertaining to document discovery. Thus, it cannot be stated categorically that an American request for assistance will be honored. In spite of the lack of judicial authority on the point, there is little doubt, in view of the assistance in obtaining testimonial evidence that traditionally has been rendered by Switzerland in the absence of treaty, that such a request will be executed and that the power to do so eventually will be recognized by the courts.

Documentary and other tangible evidence may be obtained from Switzerland in the same manner as testimonial evidence is procured. Thus, if it can be obtained voluntarily, the person seeking discovery need not become involved with the Swiss

---


81. In Interhandel, the Swiss government ultimately permitted the United States Justice Department to discover documents in Switzerland. For one aspect of this protracted litigation, see Societe Internationale v. Rogers, 357 U.S. 197 (1958).

82. Production of documents in domestic litigation is provided for in Zürich ZPO §§ 228, 230, 231.

83. See text accompanying notes 40–80 supra.
INTERNATIONAL COOPERATION

authorities, but if compulsion is necessary, the assistance of the Swiss authorities must be secured through the appropriate diplomatic channels.84 Other examples of the similarity in the procedures for obtaining testimonial and tangible evidence include the application of the rules relating to privileges, the instances in which the Federal Department of Justice and Police will not permit the execution of letters rogatory, and the formal requirements regarding the contents and forwarding of letters rogatory.85

As in the case of testimonial evidence, the manner and extent to which a request for tangible evidence will be honored is governed by Swiss law, which imposes several limitations on the scope of the evidence that a Swiss court will compel a person to furnish. First, the production of a document under the control of a nonparty who is outside the canton in which the letters rogatory are being executed cannot be compelled. However, if the documents are within Switzerland, the court executing the letters rogatory can request a court in the canton in which the documents are located to compel production. The Swiss court also is free to follow several other courses of action. It may return the letters rogatory to the American court that issued them with

84. If the tangible evidence located in Switzerland is in the custody or under the control of a party, the American court in which the action is pending can compel the party to obtain its production. See Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir. 1961); 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 795 (Wright ed. 1961). In those jurisdictions that permit document discovery from a witness, the same result can be achieved by serving the witness with a subpoena duces tecum. See 2B id. § 1005; 5 MOORE, FEDERAL PRACTICE ¶¶ 45.05[1], 45.07 (2d ed. 1963); Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1051, 1053 (1961). See also FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS §§ 3.10–13 (1964); Gill, Problems of Foreign Discovery, in BREWER, ANTITRUST AND AMERICAN BUSINESS ABROAD 474–88 (1933); Note, Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal, 37 N.Y.U.L. Rev. 295 (1962). In the case of tangible evidence in the possession, custody, or control of witnesses who are abroad, the only provisions of federal law authorizing an American court to attempt to secure its production are §§ 1783 and 1784 of the Judicial Code, 28 U.S.C. §§ 1783, 1784 (1958), as amended, 78 Stat. 997–98 (1964). See H.R. REP. No. 1052, 88th Cong., 1st Sess. 11–12 (1963); S. REP. No. 1580, 88th Cong., 2d Sess. 9–10 (1964); note 20 supra. Section 3.01 of the Uniform Interstate and International Procedure Act also authorizes “a deposition to obtain testimony or documents or other things . . . [to] be taken outside this state.” Despite the lack of specific authority, American courts have not hesitated to attempt to secure production by means of letters rogatory. See Branyan v. Koninklijke Luchtvaart Maatschappij, 13 F.R.D. 425 (S.D.N.Y. 1955); Smit, supra, at 1054.

85. See text accompanying notes 23–24, 66–67 supra.
sufficient information as to the whereabouts of the documents to enable new letters to be sent, or return the letters to the Federal Department of Justice and Police with a suggestion that they be rerouted to a cantonal court that has power to compel production, or forward the letters to such a court itself. In light of these possibilities and the relative undesirability of having the letters returned unexecuted, explicit instructions should be included in the letters covering the contingency that the court initially receiving them will be unable to act.

A Swiss court has more effective power to compel the production of tangible evidence located outside the canton if the evidence belongs to or is under the control of a party. In domestic litigation the court can invoke several presumptions regarding the content of the evidence against a party who fails to comply with a discovery order. However, since these presumptions apply only to proceedings pending before Swiss courts, they are of limited value in acquiring tangible evidence in Switzerland for use in American litigation.

A second potential limitation on effective discovery of tangible evidence in Switzerland is that several cantonal codes of procedure expressly provide for the production of documents but fail to refer to other types of tangible evidence. There does not seem to be any substantial question about the propriety of compelling the production of nondocumentary tangible evidence in proceedings pending before the courts of these cantons, and the same scope of discovery undoubtedly will be applied to a request emanating from a foreign tribunal.

Perhaps the most significant limitation from the point of view of an American litigant is that production of tangible evidence will be ordered only to the extent and on the same conditions that it is permitted in domestic actions. Although the court will not attempt an independent determination of the relevancy of the documents requested, it will investigate to be sure that the prerequisites for production applicable to proceedings in the cantons

86. E.g., Zürich ZPO § 228. Article 55 of the Federal Code of Procedure does provide for the production of documents, other things, and movables in domestic proceedings. This code applies only to proceedings before the Bundesgericht.

ton executing the request have been met. There are two types of prerequisites in civil litigation. The courts in some cantons will order documents produced only upon a showing that the evidence may help to establish facts pertinent to the lawsuit. An American request probably will encounter little difficulty in cantons using this standard. In other cantons the test is more stringent, however. Production will be ordered only if the person on whose behalf the request is made is a party to the document, or has an interest in it or its subject matter. For example, a party to a written contract or a beneficiary under a will can secure a copy of the contract or the will but a stranger to the instrument cannot. The same rule is applicable to the discovery of books and records of a business enterprise under the Swiss Code of Obligations.

The requirement that the person seeking a copy of the document must have a direct interest in it or its subject matter will frustrate the needs of an American litigant in many instances. For example, in a lawsuit between A and B, a copy of correspondence between B and C may be obtained from C only if its production is requested by B. Of course, if A believes that the letters will be helpful to his case, he may be able to get them by asking the court to make the request in the name of B or by ordering B to secure the production of the correspondence. A Swiss court probably will honor a request to compel C to produce the correspondence if the letters make it appear that the request emanated from B. If the desired correspondence ran between C and D, neither A nor B could procure it unless the Swiss court was shown a nexus between one of the parties to the American action and the documents. Conceivably, if the American court has jurisdiction over C or D, it could compel that person to produce the correspondence or frame its request for aid so that it appears to originate with the person over whom the court in this country has jurisdiction. Since such a request is tantamount to document discovery on behalf of a witness, the Swiss court may not honor it.

88. See, e.g., Berne ZPO arts. 235, 236.
89. See, e.g., Einführungsgesetz zum Zivilgesetzbuch (Law on the Introduction of the Swiss Civil Code) of Zurich § 232. This statute deals with problems of cantonal law created by the introduction of the Civil Code.
91. An American court’s power to compel a person over whom it has jurisdiction to produce evidence that is outside the court’s jurisdiction is discussed in note 84 supra.
In order to enable the Swiss court to pass on the propriety of compelling discovery on behalf of a court in this country, the request for production must delineate the evidence sought with a fair degree of precision. The requisite specificity is very similar to, but somewhat more demanding than, that usually insisted upon in the United States. Each document must be described sufficiently to identify it; blanket descriptions of classes of documents will not suffice, although it probably is permissible to designate groups of related documents in general or generic terms to avoid repetition or unnecessary detail when it will not impair the ability to identify the papers.

The procedure for securing tangible evidence in criminal matters appears to be much simpler than it is in civil cases. In domestic proceedings, a Swiss court or a public prosecutor has the power to order and enforce the production of any paper or object likely to have a bearing on the criminal act being investigated or prosecuted. This permissive attitude also applies when the tangible evidence is requested by a foreign court. Consequently, the letters rogatory need only demonstrate the relevance of the tangible evidence to the criminal action pending before the American tribunal.

D. Obtaining Proof of Swiss Official Records

Except for the registries pertaining to ships, airplanes, trademarks, patents, and design patents, which are main-


95. Bundesgesetz über die Luftfahrt (Federal Law on Aviation), of Dec. 21, 1938.


tained by the Confederation, Switzerland's official records are kept in cantonal registries. Federal law requires the cantons to maintain records of births, deaths, marriages, and real property. In addition, a commercial registry (\textit{Handelsregister}) containing the names of persons authorized to act on behalf of any business or commercial enterprise is maintained on a cantonal level. The cantons also keep a registry of residence and citizenship, although federal law does not require them to do so. Because of its lack of official status, a copy of an entry in this registry usually is not accorded the same evidentiary weight by a Swiss court as is a copy of a record in registries established pursuant to federal law.

An attested copy of any record filed in a Swiss registry may be obtained by applying at the office in which the original is kept. The person requesting a copy need not establish any particular interest in the document except when the record is in the real property registry. Even in that case, the required showing is not an extensive one; a statement that the record is needed in litigation concerning the property probably will suffice. Swiss recordkeepers usually are authorized by the statutes creating the various registries to prepare copies of the records in their charge. Despite the absence of specific statutory authority for doing so, the custodian also will attest summaries of records kept by him or prepare a statement that upon proper search no entry or record of a specified tenor could be found. Authentication of the attested copy, which will be necessary if the record is to be used in the federal or most state courts, can be obtained either from the cantonal Ministry of Justice or the Federal Secretariat.

\begin{itemize}
\item \textit{Zivilgesetzbuch} (Civil Code) \cite[arts. 39-51, 942.]
\item SO arts. 927-56.
\item ZGB art. 970.
\item \textit{E.g.}, \textit{Grundbuchverordnung} (Ordinance on Real Estate Register) art. 185.
\item A statement signed by the Swiss officer having custody of official records to the effect that a record of a specified tenor cannot be found, when accompanied by a consular certificate, is admissible under Federal Rule of Civil Procedure 44(b) and a number of comparable state provisions. See also Uniform \textit{Interstate and International Procedure Act} \textsection 5.04. The non-existence of a particular foreign official record also may be established by the oral testimony of someone who has personally examined the pertinent record. See \textit{Jackson v. United States}, 250 F.2d 897 (5th Cir. 1958).
\item See \textit{Reglement für die Bundeskanalz} (Regulation on the Federal Secretariat), of July 25, 1920, art. 15, I BS 339.
\end{itemize}
who furnished the attestation was competent under the law of the canton or the Confederation to attest to the facts set forth in the document. The official preparing the attestation often will be willing to secure the authentication himself, which will expedite the procedure and eliminate any confusion as to the identity of the appropriate authentication authority.

Swiss procedures for providing, attesting, and authenticating copies of federal and cantonal official records are reasonably well suited to the needs of American litigants. Inasmuch as Swiss recordkeepers have authority to prepare and attest copies, the party seeking a facsimile of a Swiss official record will be able to satisfy provisions found in many statutes in this country requiring that a copy of a foreign official document be attested by the "legal custodian" of the original. In a number of countries the problem is more serious than in Switzerland because there is no "legal custodian" of official records or because the record-keeper is not authorized to prepare attested copies of official records.

Difficulty is most likely to be encountered in Switzerland when one attempts to procure a copy of a Swiss official record attested and authenticated in a form that will enable a United States consular official to certify that the signature on the attested copy is genuine, that the person who signed it holds the office he claims to hold, and that the official had the necessary authority to issue


the attested copy of the document. A consular certificate to this effect is required by the present text of rule 44(a) of the Federal Rules of Civil Procedure and by a number of state statutes. Since there are frequent changes in the personnel of cantonal offices, foreign consulates are furnished only with a specimen of the signatures of Swiss federal and cantonal ministers. As a result, there is no expeditious way for a United States consular official who is asked to prepare a certificate to obtain the necessary information regarding the authority and incumbency of the attesting official or the genuineness of his signature. The consular official's lack of information and the problems that may confront him cannot be blamed on any deficiency in Swiss attestation and authentication procedures or on Swiss unwillingness to assist foreign litigants in obtaining copies of official records. Rather it reflects an unnecessary degree of formality in some of our rules for the proof of foreign official documents.

In recognition of the need to simplify our own procedures, the draftsmen of the proposed revision of federal rule 44(a) and

---


109. In addition to the logistical burden involved in procuring a copy of the attesting official's signature, the question of whether he had authority to prepare the copy may present the consular official with a difficult issue of foreign law.

section 5.02 of the Uniform Interstate and International Procedure Act decided to eliminate the need for certification of the authority of the attesting official and to permit chain certification of the attested copy.\textsuperscript{111} Chain certification allows a consular official to issue his certificate on the basis of his knowledge concerning a signature appearing on any certificate in a chain of certificates initiating with the certificate relating to the original attestation and proceeding up the authentication hierarchy; each official in the chain certifies the signature on the preceding certificate.\textsuperscript{112} Chain certification of a Swiss official record is likely to include an attestation by the local recordkeeper, a certification by the cantonal Ministry of Justice, one by the Federal Secretariat in some instances, and a final certification by a consular official of the United States or, when permitted, by a Swiss consular official stationed in the United States.\textsuperscript{112}

A number of Swiss records are published in federal or cantonal official gazettes, which, although privately printed, have the status of official publications. For example, all entries in the commercial registry maintained in each canton are published in the \textit{Handelsamtsblatt}. Similarly, the legislative reports are published in the official gazettes. Federal administrative opinions relating to various types of disputes appear in a publication prepared by L. 88-619, § 7(a), 78 Stat. 996 (1964), but its substance has been preserved. The former practice under §§ 1741, 1742, and 1745 and the effect of the 1964 amendments are analyzed in Smit, \textit{International Litigation Under the United States Code}, 65 \textit{COLUM. L. REV.} 1015 (1965).

\textsuperscript{111} See the Advisory Committee's Note to the proposed amendment of Federal Rule of Civil Procedure 44(a), \textit{COMm. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, op. cit. supra} note 106, at 125-26, and the Commissioners' Note to § 5.02 of the Uniform Interstate and International Procedure Act, \textit{9B UNIFORM LAWS ANN.} 96-97 (Supp. 1964).

\textsuperscript{112} At least one federal court already has sanctioned the use of a chain certification, although it may have done so inadvertently. New York Life Ins. Co. v. Aronson, 38 F. Supp. 687 (W.D. Pa. 1941). See also 22 C.F.R. § 92.37 (1965) (permitted "where unusual circumstances, or the laws or regulations of the foreign country require it"); The Denny, 127 F.2d 404 (3d Cir. 1942).

\textsuperscript{113} In the event that a Swiss recordkeeper refuses to comply with a request for an attested copy of a particular record in his custody, he may furnish an attested summary of the contents of the record. Both the proposed amendment of federal rule 44(a) and § 5.02 of the uniform act permit such a document to be admitted in evidence if reasonable opportunity is given to all parties to investigate its authenticity and accuracy. Summaries of official documents have been held inadmissible in the past. \textit{E.g.}, United States v. Grabins, 119 F.2d 863 (2d Cir. 1941). See generally \textit{5 WIGMORE} § 1678.
the Federal Department of Justice and Police. The exception to the hearsay rule for official records reprinted in official publications, which is recognized by both state and federal courts in this country, permits the use of excerpts from any of these publications in judicial proceedings in the United States without further proof of their authenticity.

Although judgments rendered by Swiss courts usually are not published, copies are made available to the parties and to law students. In addition, judgments of general interest rendered by the higher courts of some cantons and the federal tribunals frequently are published. Other unpublished Swiss records that may

114. The publication is called VERWALTUNGSENTSCHEIDUNGEN DER BUNDESBEHörDEN (Administrative Decisions of Federal Agencies). One volume is published for each year's decisions. The last volume published to date deals with the year 1958 and contains 107 opinions and decisions selected by the heads of various departments.

115. See, e.g., UNIFORM INTERSTATE AND INTERNATIONAL PROCEEDURE ACT § 5.02; UNIFORM PROOF OF STATUTES ACT § 1; IOWA CODE § 632.57 (1962); NEB. REV. STAT. § 25-1289 (1956); N.J.R. CIV. P. § 4:45-1(a); N.D. CENT. CODE § 31-08-10(3) (1960); TENN. CODE ANN. § 24-628(3) (1951); S.D. CODE § 30.0701 (Supp. 1960); OREG. REV. STAT. § 43.830(4) (1961); S.D. CODE § 36.0701 (Supp. 1960); TENN. CODE ANN. § 24-617 (1955). See also 5 WIGMORE § 1684. A number of states permit the use of official publications by virtue of their adoption of Federal Rule of Civil Procedure 44.

116. On federal practice, see United States v. Aluminum Co. of America, 1 F.R.D. 71 (S.D.N.Y. 1939); 2B BARRON & HOLZOFF, FEDERAL PRACTICE AND PROCEDURE § 992 (Wright ed. 1961); 5 MOORE, FEDERAL PRACTICE ¶ 44.03 (2d ed. 1964).

117. There is some uncertainty as to whether the party attempting to introduce a publication as an official publication must prove its status by independent evidence or by having the publication authenticated by a foreign official. See generally Smit, INTERNATIONAL ASPECTS OF FEDERAL CIVIL PROCEDURE, 61 Colum L. Rev. 1031, 1051-62 (1961). The approach apparently adopted by the state courts is to admit any publication that purports to be official without further proof. See UNIFORM PROOF OF STATUTES ACT § 1; 5 WIGMORE § 1684. Although Federal Rule of Civil Procedure 44(a) is silent on the point, the practice in the federal courts appears to be the same. See 5 MOORE, FEDERAL PRACTICE ¶ 44.08 (2d ed. 1964). But cf. Ninth Circuit Conference Comm. on the Federal Rules of Civil Procedure, Report, in 36 F.R.D. 209, 229-30 (1965). The text of the proposed amendment of rule 44(a) does not specifically deal with this question but it was the intention of the draftsmen of the revised rule and the Advisory Committee that publications purporting to be official be accepted as such. The Committee is considering adding an express statement to this effect in its notes.

118. The Swiss reluctance to publish judicial judgments is based in part on a feeling that the information they contain is private and should remain secret. Even when a judgment of a cantonal court is published it is unlikely to identify the parties. The reports of the Supreme Court of the Confederation are more likely to do so.
be needed in litigation in this country are the various quasi-official documents that must be executed before a notary and retained in his files. These include matrimonial property regimes, contracts creating joint-stock companies, and instruments relating to real property. The records of a notary are considered private and can be examined or copied only by persons with an interest in the document, which limits their availability for use in this country in much the same way as the scope of document discovery is limited in certain Swiss cantons.

E. Determining the Law of Switzerland

The pleading and proof of foreign law has been a subject of continuing interest and commentary in this country. As a result, a number of jurisdictions have experimented with different methods for resolving an issue of foreign law that is germane to domestic litigation. These innovations have eliminated much of the formality that was characteristic of the pleading of foreign law under common law and code pleading, simplified the process of proving foreign law by permitting greater use of judicial notice and allowing the trial judge greater freedom in admitting evidence and investigating source material relevant to issues of foreign law, and made the ultimate determination of foreign law a matter for the judge and subject to review on appeal rather than leaving it to the jury.

119. In Zurich, the notary is an official. See Gesetz Betreffend die Organisation der Notariatskanzleien (Law on the Organization of Notary Offices) of Zurich (1909). In Berne, Basle, Geneva, and Fribourg, he appears to be a practicing attorney. In many cantons the notary has the same social status as a judge.

120. To become a notary, the candidate must be a Swiss citizen, of good character, and qualify by passing an examination. See generally Gesetz Betreffend die Organisation der Notariatskanzleien of Zurich (1909). The examination is as difficult as that given to potential advocates.

121. See text accompanying notes 87–92 supra.


123. At common law, foreign law was viewed as a question of fact that had to be pleaded and proved by the party whose cause of action or defense
INTERNATIONAL COOPERATION

The pleading, proof, and determination of a point of Swiss law rarely will involve direct cooperation between the United States and Switzerland; by and large it simply presents the American attorney with a problem of ascertaining and construing the authoritative materials on Swiss law relevant to his client's lawsuit. In terms of the number and quality of research tools available, the Swiss situation does not differ materially from that of any other country in Western Europe. Various elements of Swiss law are printed in official publications. In 1949, all federal statutes and legislative material in effect on December 31, 1947, were published in fifteen volumes.124 The more recent enactments
depended on it. See Cuba R.R. v. Crosby, 293 U.S. 473 (1912); SommeRiCH & BUSCH, FOREIGN LAW: A GUIDE TO PLEADING AND PROOF 11-17 (1959); 9 WIGMORe $ 2573. In 1920 Massachusetts departed from the common-law rule by permitting its courts to take judicial notice of foreign law. Mass. Ann. Laws ch. 232, § 70 (1938). In 1956, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Judicial Notice of Foreign Law Act, § 6 of which contains a provision requiring the substance of foreign law to be determined by the court rather than the jury. The Uniform Judicial Notice of Foreign Law Act is now in force in a majority of the states and a number of other states permit or require the use of judicial notice on an issue of foreign law. E.g., N.Y.C.P.L.R. 4511(b). See 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 4511.05–.06 (1964); SommeRiCH & BUSCH, Judicial Notice of Law Under New York Civil Practice Law and Rules, N.Y.L.J., Dec. 17, 18, 1962, p. 4. A more comprehensive statutory treatment of the subject now appears in article IV of the Uniform Interstate and International Procedure Act, which eliminates pleading as a formal requirement, permits the court to consider "any relevant material or source" in determining foreign law, and leaves the determination of the issue to the court, subject to review on appeal.

In the past the federal courts have not been inhibited by a specific rule on the proof of foreign law and have taken judicial notice of it on a number of occasions. See Liechti v. Roche, 198 F.2d 174 (5th Cir. 1952); Jansson v. Swedish Am. Line, 185 F.2d 812, 216 (1st Cir. 1950) (dictum); Mexican Nat'l Ry. v. Slater, 115 Fed. 593 (5th Cir. 1902), aff'd, 194 U.S. 120 (1904). The absence of a clear rule on the pleading of foreign law has led to considerable confusion, however. Compare Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955), and Pedersen v. United States, 191 F. Supp. 95 (D. Guam 1961), with Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1956). See also Walton v. Arabian Am. Oil Co., 283 F.2d 541 (2d Cir.), cert. denied, 365 U.S. 872 (1960). The pleading question as well as several other uncertainties will be dealt with in a proposed addition to the Federal Rules of Civil Procedure of a new rule 44.1, which is substantively identical to article IV of the Uniform Interstate and International Procedure Act. See ComM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, op. cit. supra note 106, at 127–31. See generally Miller, Proof of Foreign Law in the Federal Courts, 1962 (unpublished memorandum on file with the Columbia Law School Project on International Procedure).

124. Bundesbeschluss über Herausgabe einer Bereinigten Eidgenössischen Gesetzessammlung für die Jahre (Federal Resolution on the Publication of a
can be found in the Official Collection of Federal Statutes (Amtliche Sammlung der Eidgenössischen Gesetze), which is a collection of federal statutes compiled in annual volumes.

A modicum of direct aid is available from the Swiss authorities. If the text of a statute, regulation, or local enactment cannot be found in the official publications described above, the Federal Department of Justice and Police will provide and authenticate a copy upon request. Moreover, although judgments of Swiss courts are considered private and usually are not published, Swiss courts have the power to forward a copy of a judgment to a foreign court. The Department of Justice and Police also may be willing to give an opinion on settled questions of Swiss law. Since a legal opinion will not be given by the Department in the absence of a statute or a series of judicial decisions directly in point, an American litigant is well advised to retain the services of a person conversant with Swiss law whenever the issue of Swiss law requires any measurable degree of analysis or prediction. Inasmuch as most of the more recent American statutes on the proof of foreign law permit the court to use oral or written testimony to determine an issue of foreign law without regard to its admissibility under the rules of evidence, a Swiss expert's opinion can either be given in open court or take the form of a written narrative or written replies to particular interrogatories. Should the Swiss expert be resident in Switzerland, letters rogatory requesting his examination on enumerated facets of Swiss law probably will be honored by a Swiss court.


125. See note 118 supra.

126. See Uniform Interstate and International Procedure Act § 4.02; N.Y.C.P.L.R. 4511(d); Va. Code Ann. § 8-273 (1990); W. Va. Code Ann. § 5711 (1961). Federal courts traditionally have been reluctant to permit the use of letters rogatory to obtain expert testimony on foreign law when such testimony could be obtained in this country. See American Infra-Red Radiant Co. v. Lambert Indus., Inc., 32 F.R.D. 872 (D. Minn. 1963); United States v. Dunn, 55 F. Supp. 835 (S.D.N.Y. 1944). See also Holliday & Sons, Ltd. v. Schultzzeberge, 57 Fed. 660 (C.C.S.D.N.Y. 1893). The imprimatur placed upon the use of all material relevant to an issue of foreign law by proposed federal rule 44.1, coupled with the greater acceptance of letters rogatory under the recent amendment to rule 28(b), which rejects the cases holding that letters rogatory are unavailable if the desired testimony could be obtained in some other fashion, casts considerable doubt on the precedential value of these cases.
III. INTERNATIONAL COOPERATION SOUGHT BY SWITZERLAND AND PROVIDED BY THE UNITED STATES

A. SERVICE OF DOCUMENTS IN THE UNITED STATES

Although documents of every description may be served outside Switzerland in connection with civil, criminal, and administrative proceedings, the federal and many of the cantonal procedural codes do not specifically provide for the manner in which extranational service should be made. The procedure in approximately half of the cantons calls for the party residing abroad to authorize a resident of Switzerland to accept service on his behalf.128 A complaint presented by a nonresident plaintiff will not be accepted by the Swiss court unless such an appointment has been made. When the defendant is a nonresident and his whereabouts are known, a request for an appointment will be mailed directly to his residence whenever the court is informed by the Department of Justice and Police that the country in which he is located does not object to the service of such a request by mail. Otherwise it will be delivered by a Swiss consular official or through diplomatic channels. Because a Swiss court's jurisdiction depends upon the identity of the parties or the nature of their conduct rather than on service of process, an action may proceed without an appointment by the defendant.

All documents are served upon the appointee in accordance with the procedures for domestic service of the canton in which the action is pending.129 The two most commonly used methods are service by registered mail, return receipt requested,130 and personal service by a court official (Weibel).131 Regardless of which method is used, the documents will be delivered to the

128. See, e.g., Aargau ZPO § 99; Fribourg ZPO § 18; Graubunden ZPO § 63; Lucerne ZPO § 56; St. Gallen ZPO § 125; Schwyz ZPO § 98; Solothurn ZPO § 14; Thurgau ZPO § 76; Wallis ZPO § 98. Section 29 of the Bundesgesetzes über die Organisation der Rechtsplege (Federal Law on the Organization of the Administration of Justice) [hereinafter cited as OG] provides: "Parties with residence abroad have to choose a domicile for service in Switzerland on which valid service may be made. Service on parties not complying with that duty may not take place or may be made by publication." A brief description of Swiss notions of jurisdiction appears in Nussbaum, Bilateral Studies in Private International Law: American-Swiss Private International Law 47-51 (3d ed. 1988).

129. Swiss codes do not differentiate between service on an agent on behalf of a principal residing in Switzerland and on behalf of a principal residing abroad.

130. Zürich GVG §§ 190, 194, 206.

131. Zürich GVG §§ 190, 206.
agent, if possible, at his residence or place of employment. If the agent is not present when service is attempted, the documents will be left with an adult member of his family who lives in the same household, an adult employee of the addressee, or, on rare occasions, his attorney.

When a serious attempt to locate a nonresident defendant has proven to be futile and an agent has not been appointed, the Swiss court may employ service by publication. Usually the court will insist that a search for the defendant be made by the Swiss consulate in the country in which he is likely to be found, and by any other appropriate means, before it will order service by publication. For this reason and because the residence registries maintained in Switzerland and in many other countries will enable the defendant to be located without difficulty in the vast majority of cases, recourse to service by publication is infrequent. The order authorizing service by publication will designate the newspapers to be used—usually the official gazettes and any other publication that is widely distributed where the nonresident is likely to be found.

In those cantons in which no provision is made for the appointment of a Swiss resident as an agent for service on a nonresident or service on a specially appointed agent is not viewed as appropriate, the court generally will ask a competent foreign authority by written request, letters rogatory, or any other method that is acceptable or provided for by treaty, to make service. As long as the request is executed in a manner that is valid under the law of the place where the service is made, the service will be sufficient for purposes of the Swiss action. The formal request procedure may not be used in those countries that do not object to private service. Instead, Swiss consular officials will handle the service of the documents on Swiss nationals and on nationals of countries other than the country in which service is made. Usually the person to be served will be asked to come to the Swiss consulate to receive the documents, although service by mail or by personal delivery outside the consulate may be used under certain circumstances. Another method of extra-territorial service that may be employed by a Swiss court when it is certain that no objection will be raised by the authorities in the place of service is registered mail, return receipt requested.

182. See, e.g., OG § 29(4).
183. The codes do not explicitly require letters rogatory to be used but provide that witnesses be examined by the court of their residence. E.g., Zürich ZPO § 194.
Although Switzerland is a member of the Hague Convention on Civil Procedure, which permits requests for service to be channelled from the court in one country to the consulate in the country of service, it has filed a reservation requiring signatory countries to use diplomatic channels when they make service in Switzerland.\footnote{134} This reservation has an inhibiting effect on Swiss courts when they attempt service in another convention nation. Special treaties with Austria,\footnote{135} Belgium,\footnote{136} France,\footnote{137} Germany,\footnote{138} Italy,\footnote{139} and Poland\footnote{140} simplify matters for the Swiss by permitting requests for service to proceed from court to court. Because service in Switzerland always is made by the court or a court officer, the Swiss view it as an act of "authority."\footnote{141} Consequently, the Federal Department of Justice and Police believes that private service abroad of a legal document threatening the imposition of penalties would infringe upon the judicial sovereignty of the country in which the service is made and insists that documents served abroad contain only a simple invitation to appear and an indication of the legal consequences of a failure to appear. These limitations seem both unnecessary and ineffective inasmuch as many countries, including the United States, do not object to the service of documents threatening penalties and since service by or at the behest of a Swiss official, court, or administrative tribunal does not become less of an encroachment upon another nation's sovereignty over judicial matters when no penalties are threatened.\footnote{142}

\footnote{134} Bundesblatt der Schweizerischen Eidgenössenschaft 1910 I, at 294, No. 2.
\footnote{135} Declaration Between Switzerland and Austria, Dec. 30, 1899, 12 BS 316 et seq.
\footnote{136} Declaration Between Switzerland and Belgium, Nov. 29, 1900, 12 BS 299.
\footnote{137} Declaration Between Switzerland and France, Feb. 1, 1913, 12 BS 298 et seq.
\footnote{138} Declaration Between Switzerland and Germany, Dec. 13, 1878, and April 30, 1910, 12 BS 292 et seq.
\footnote{139} Protocol Concerning the Execution of the Treaties Between Switzerland and Italy, concluded on July 22, 1866, 11 BS 681.
\footnote{140} Declaration Between Switzerland and Poland, Sept. 18, 1928, 12 BS 393 et seq.
\footnote{141} See the discussion in text accompanying notes 16–18 supra of article 271 of the Swiss Penal Code and its impact on the availability of private service of documents in Switzerland on behalf of foreign litigation.
\footnote{142} Since most nations do not object to service of foreign documents threatening penalties, it may be appropriate to conclude that service by a Swiss official does not infringe upon a country's sovereignty until after that sovereign has made it clear that it objects to such service. See Smit, Inter-
When service is made by a foreign official pursuant to letters rogatory, the Swiss court will accept any proof of service that is permitted by the procedure of the court that effected service. Thus, for example, a receipt signed by the person to whom the document was delivered or an affidavit of the person who made the service will be sufficient. Service by registered mail is established by presenting a signed return receipt and service by publication is proven by a copy of the notice that appeared in the newspapers.

Although service in the United States occasionally is made by consular officials or registered mail, most Swiss courts are unaware that service in connection with litigation in Switzerland may be made privately in this country. Preoccupation with their notions of sovereignty has resulted in automatic utilization of the formal request procedure by the Swiss and has obscured this country's extremely permissive attitude toward the commission of acts on behalf of foreign litigation within its borders. In the absence of a statute providing otherwise, neither the federal government nor any of the states objects to service of foreign judicial documents within the United States without the intervention or prior approval of an American official; service may be made by any person, including a consular official of the foreign government, and in any manner that does not involve a breach of the peace.\(^4\)

In the event that the would-be recipient of the documents is reluctant to accept delivery or should the Swiss court or consular official deem it advisable to have service made under the auspices of an American official, courts in the United States generally have been amenable to rendering direct aid. It must be noted, however, that two decisions at odds with our otherwise liberal attitude do exist. In In re Letters Rogatory Out of First Civil Court of City of Mexico,\(^4\) a federal court, in 1919, refused to comply with a request for service on a United States citizen contained in letters rogatory issued out of a Mexican court. An even older


decision by a New York court, *Matter of Romero*,\(^{145}\) is to the same effect. The primary rationale offered by the two courts is that an American judge should not order service pursuant to letters rogatory when it might render a United States resident subject to an *in personam* judgment in a foreign country. One commentator has suggested that the courts were apprehensive about granting the request for service because it might obligate them to enforce any judgment rendered against the American citizen by the foreign court.\(^{146}\)

Unquestionably, these refusals to honor the Mexican requests were unfortunate from the perspective of judicial comity between the two nations and probably were incorrect when rendered. Neither court would reach a similar conclusion today for a number of reasons.\(^{147}\) The service of process requested of the federal and New York courts fulfilled only a notice function under Mexican law and did not represent an attempt to obtain a jurisdictional nexus over the defendant. Therefore, the American courts were mistaken in believing they were aiding a foreign court in procuring jurisdiction over a United States citizen. Inasmuch as jurisdictional notions now prevalent in this country permit a court to assert personal jurisdiction over a defendant even though he cannot be served personally within the territorial boundaries of the jurisdiction in which the court is sitting, a contemporary request for service from a foreign country similar to the requests involved in the cases under discussion could not be rejected as inconsistent with our notions of jurisdiction and due process. Moreover, the fear that aiding a foreign court to effect service somehow binds an American court to enforce the resulting judgment is more apparent than real. There is no reason why a court in this country cannot comply with the request for service and then dismiss a subsequent suit on the judgment whenever the foreign court acquired jurisdiction under its own statutes under circumstances that are offensive to American concepts of due process.

The current attitude in this country regarding judicial assistance in serving documents on behalf of a Swiss or any other

---

146. 44 Colum. L. Rev. 72 (1944).
foreign court probably is exemplified by section 2.04 of the Uniform Interstate and International Procedure Act and by section 1696 of the United States Judicial Code, which was enacted in 1964. These two provisions authorize an American court to order service of a document issued in connection with a foreign proceeding on any person who is domiciled or can be found within the court’s jurisdiction. The order may be made in response to an application by an “interested person” or to a request contained in letters rogatory. The issuance of such an order does not, of itself, require the recognition or enforcement of any foreign judgment ultimately rendered in the action. Because the federal statute applies to all of the United States district courts, there is at least one tribunal in every state empowered to order service at the request of a foreign court. In states in which both the federal and state courts offer assistance, the person seeking service can choose the source of aid on the basis of relative cost and efficiency. It should be reemphasized, how-

152. The court issuing the order under the statute or the uniform act is given discretion to order the manner in which the service is to be made. As a result, the applicant or the letters rogatory may request that service and proof of service be made in the manner most compatible with the needs of the litigants and the law governing the particular foreign action.
153. See text accompanying notes 171–76 infra.
ever, that judicial assistance is unnecessary whenever service can be made by mail, privately, or through the Swiss consulate; recourse to section 1696 of the Judicial Code or section 2.04 of the uniform act is necessary only when the coercive effect of a court order and service by a court official is helpful in ferreting out a recalcitrant recipient of the papers or is required by foreign law. 164

B. Obtaining Testimonial Evidence in the United States

When testimony from a Swiss national who is in a foreign country is needed in an action pending before a Swiss court, a Swiss consular official in the consular district in which the witness is located may invite him to the consulate to give a state-

164. Although the enactment of § 1696 and § 1782 of the Judicial Code, which are discussed in the text accompanying notes 162–70, infra, undoubtedly was within Congress' power to regulate interstate and foreign commerce, there is an unresolved question as to whether these statutes violate the provision in Article III of the United States Constitution limiting the judicial power of the United States to cases or controversies arising under the Constitution or the laws of the United States. See generally WAXMAN, FEDERAL COURTS §§ 12–16 (1963). To uphold the constitutionality of §§ 1696 and 1782 of title 28, it may be appropriate to use by analogy the analysis employed in Tutun v. United States, 270 U.S. 568 (1926) to validate the congressional delegation to the federal courts of the power to naturalize. If the interests of the person or foreign tribunal requesting a federal court to issue an order directing service or the taking of testimony are viewed as adverse to the interests of the person to be served or examined, then the application for assistance under § 1696 or § 1782 may be viewed as a "case" or "controversy." Although the hypothesized "case" or "controversy" admittedly has a certain metaphysical quality, the analysis suggested above does derive some support from the text of the statutes themselves. Both § 1696 and § 1782 permit the trial court to grant or deny the application for an order. Moreover, the person to be served or examined has a right to challenge the order either by contesting the application or, if the order has issued, by moving to quash it. All in all the situation seems to warrant the following paraphrase of a portion of Mr. Justice Brandeis' opinion in Tutun: In passing upon an application under § 1696 or § 1782, the court is exercising judicial judgment in a proceeding instituted and conducted according to the regular course of judicial procedure. Assuming that an application under § 1696 or § 1782 is a case or controversy, the question of whether it arises under the Constitution or laws of the United States remains. This problem can be met by viewing the two statutes as delegating to the courts the power to develop a body of law defining when the issuance of orders would be consonant with the federal policies embraced in these provisions. Cf. Textile Workers Union v. Lincoln Mills, 333 U.S. 448 (1948). If this is the case, it seems reasonable to conclude that every application under § 1696 or § 1782 presents a case or controversy arising under the laws of the United States.
By and large, however, testimony from persons beyond the territorial competence of a Swiss court is obtained by letters rogatory. Depositions in a foreign country pursuant to stipulation, on notice, or by commission, so common in American practice, are unknown in Switzerland. The only exception to the Swiss use of letters rogatory occurs when the foreign country whose assistance is needed requires that testimony for use in Switzerland be taken in some other manner. Faced with the alternative of complying with the foreign jurisdiction’s restrictions or not complying with them and proceeding without the benefit of any testimony that might have been procured, the Swiss court will acquiesce and employ whatever manner is insisted upon by the other country.

Although Swiss law does not expressly authorize the issuance of letters rogatory to obtain testimony, all tribunals apparently are assumed to have inherent power to issue them. The Swiss have shown little hesitancy in using letters rogatory to obtain testimonial evidence on a variety of subjects and have imposed few limitations on their availability. Indeed, letters have been used to obtain statements from persons who could not qualify as witnesses under Swiss rules of competency. In practice only civil and criminal tribunals and investigating magistrates issue letters with any frequency. Administrative tribunals have felt little need to obtain testimony outside Switzerland and in those instances in which it would have been helpful, the Swiss administrative proceedings usually have involved tax or fiscal matters, making it unlikely that a request for assistance would be honored.

Inasmuch as the various cantonal procedural codes do not provide for letters rogatory, the form and content of the letters will vary from court to court. As a general rule, however, letters issued by a Swiss court will state the nature of the proceedings and the facts that gave rise to the lawsuit, the particular information desired by the Swiss court, the name, address, and status of the person to be examined, a reference to the treaty pursuant to


156. Letters rogatory are issued even when a court in one canton seeks the testimony of a person residing in another canton. In this situation the letters usually will proceed from the court in one canton to the appropriate court in the other canton. On occasion, the court in the canton in which the examination is to take place will invite the court in which the action is pending to come and take the testimony itself. When this occurs, the procedure employed is that of the court at the place of examination, which limits the effectiveness of the examination especially when the two cantons have divergent procedures and different official languages.
which the request is made or an offer of reciprocity if no treaty is applicable,\textsuperscript{157} and a description of the Swiss privileges that the executing court should permit the witness to invoke. In civil proceedings, the specific questions to be propounded to the witness usually are attached.

Swiss letters rogatory may be forwarded in a number of different ways. Several Swiss treaties eliminate one or more of the typical steps in the transfer of documents through diplomatic channels but none of them authorizes private delivery; the most unencumbered procedure permitted is transmission from court to court.\textsuperscript{158} In the absence of a treaty, normal diplomatic channels are used. The one exception to this rule is that letters addressed to courts in the United States traditionally have been forwarded to the Swiss consulate for presentation to the appropriate American court because of the unwillingness of the United States State Department to receive and transmit letters rogatory from abroad.\textsuperscript{159} The recent enactment of a statute expressly giving the State Department authority to receive and transmit letters rogatory from a foreign tribunal has eliminated the need for this special procedure and the Swiss may abandon the practice of using their consulates in this country as intermediaries.\textsuperscript{160}

\textsuperscript{157} The promise of reciprocity is especially important if the letter is directed to a court in a state that will not honor foreign letters unless the law of the jurisdiction seeking aid provides for the rendering of comparable assistance to the courts of the state in which the letters are to be executed. \textit{E.g.}, Va. Code Ann. § 8-316.2 (Supp. 1964); Wis. Stat. § 926.24 (1963).

\textsuperscript{158} See notes 139–40 supra. In criminal matters, letters rogatory may proceed from the Swiss investigating magistrate or public prosecutor to a foreign public prosecutor or court.

\textsuperscript{159} See McCusker, supra note 148, at 810. See also 2 Hackworth, \textit{International Law} 99–100 (1941); Christenson, supra note 147, at 496–97. The State Department's position was reflected in the regulations in force prior to 1965. See 22 C.F.R. § 92.67(d) (1958).

\textsuperscript{160} Pub. L. 88-619, § 8, 78 Stat. 996, 28 U.S.C.A. § 1781 (Supp. 1964). The current State Department regulations take account of this change. 22 C.F.R. § 92.67(e) (1965) states:

A letter rogatory may be submitted to the clerk of the court of which assistance is sought, either in person or by mail. This may be direct by international mail from the originating foreign court. Alternatively, submission to the clerk of court may be effected in person or by mail by any party to the action at law or his attorney or agent, or by a consular officer or agent in the United States of the foreign nation concerned. To the extent that it can, the Department of State will extend procedural guidance to foreign diplomatic representatives in these matters, and will forward communications on their behalf to appropriate Federal authorities in the executive branch, and to executive authorities in the States. However, the Department of State is without
As is true of the service of foreign judicial documents in the United States, a Swiss court need not send letters rogatory through diplomatic channels or to a Swiss consulate to secure testimonial evidence from a witness in this country. If the witness is willing, his testimony can be taken for use in Swiss litigation without any official intervention. Since, as noted below, testimony taken without the intervention of an American court might be of limited value in Switzerland, the party seeking testimonial evidence may desire some form of judicial compulsion even though the witness is willing to be examined. Should this be the case or should the witness be unwilling to testify, judicial assistance is available without the use of letters rogatory or any other formal governmental request. Section 1782 of the United States Judicial Code and section 3.02 of the Uniform Interstate and Authority to Compel Courts to Comply with Requests Embodied in Letters Rogatory, Review the Conditions Which Courts May Attach to Fulfillment of Requests, or Override Their Findings on Points of Reciprocity, Public Order, Costs, and the Like. 161. See text accompanying notes 149–54 supra.

161. See text accompanying notes 149–54 supra.

162. See McCusker, supra note 143, at 609.


The present version of § 1782 permits assistance to “a proceeding in a foreign or international tribunal.” The words “proceeding” and “tribunal” make it clear that aid may be given to investigating magistrates and quasi-judicial bodies as well as to courts trying civil and criminal actions. See generally LéLievre, in Letters Rogatory 18–17 (Grossman ed. 1958). The inclusion of these words is intended to reverse federal court decisions rendered prior to the enactment of § 1782 refusing to execute foreign letters rogatory in criminal cases. See In re Rogatory From Examining Magistrate of Tribunal of Versailles, 20 F. Supp. 582 (D. Md. 1939); 2 Hackworth, International Law 108–10 (1941). The requirement of confrontation in criminal proceedings in the sixth amendment to the United States Constitution arguably prevents the taking of depositions in aid of foreign criminal proceedings.
International Procedure Act,\textsuperscript{164} as well as a number of state statutes,\textsuperscript{165} permit a court to order a person within its jurisdiction to give testimony on behalf of a foreign proceeding.\textsuperscript{166} Aid under these provisions is available to the Swiss with a minimum of formality. Both the federal statute and the uniform act permit an ex parte application to be made by any interested person as well as by letters rogatory. Thus, a Swiss court or one of the parties to the Swiss action can send its request directly to the appropriate American court or to the Swiss consulate for presentation to the appropriate American court and thereby eliminate any involvement by the diplomatic corps of either country. If the federal or state court to which application is made believes that the examination would be in the best interests of the Swiss action and would not be contrary to our own public policy, it will order the person whose testimony is sought to appear before a person named by the court.

A statement by a witness in a foreign country will qualify as testimony in Switzerland only when it was taken in accordance with the law of the country in which it was obtained and only when that law provides that the witness may be punished for perjury if any portion of his statement is false. Therefore, the witness must be examined before a person authorized to hear witnesses by the law of the place of examination; it is of no consequence that the person who conducts the examination is not empowered by Swiss law to hear witnesses in Switzerland. The Swiss willingness to accept the application of the law of the place when the accused is not present. The better view is that the sixth amendment applies only to criminal proceedings tried before United States courts and not to criminal proceedings tried abroad. \textit{Cf.} \textit{Ex Parte La Mantia}, 206 Fed. 330, 332 (S.D.N.Y. 1913). \textit{But see} Zimmel's \textit{Case}, 13 Pa. County Ct. 460 (1899).

One experienced commentator states that letters rogatory have been executed in criminal cases without difficulty. \textit{Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform}, 62 \textit{Yale L.J.} 515, 541-42 (1953). The constitutionality of § 1782 is briefly discussed in note 154 supra.

\begin{itemize}
\item \textbf{165.} \textit{E.g.,} \textit{Mass. Ann. Laws ch.} 225, § 45 (1856); \textit{Mont. Rev. Codes Ann.} § 93-2705-3(3) (Supp. 1981); \textit{N.Y.C.P.L.R.} 3102(e); \textit{Wis. Stat.} § 896.24 (1963). A number of states have enacted the \textit{Uniform Foreign Depositions Act}, § 3 of which, although quite liberal, is not as permissive as either the federal statute or the Uniform Interstate and International Procedure Act. See \textit{Christ v. Superior Court}, 211 Cal. 593, 296 Pac. 612 (1931). See also \textit{Saxt & Miller} 17-20.
\item \textbf{166.} Courts in this country generally have held that they possess inherent power to execute letters rogatory in the absence of express statutory authorization. \textit{E.g.,} \textit{Electric Reduction Co. v. Crane}, 239 Miss. 18, 120 So. 2d 765 (1960); \textit{State ex rel. Everett v. Bourne}, 21 Ore. 218, 27 Pac. 1048 (1891).
\end{itemize}
of examination extends to the administration of an oath to the witness. If an oath is not required by the law of the foreign country, the testimony will be accepted even if the courts in the canton in which the action is pending normally place witnesses under oath. There will be no difficulty in satisfying Swiss standards for testimonial evidence when assistance is given under section 1782 of the United States Judicial Code or section 3.02 of the Uniform Interstate and International Procedure Act. Both of these statutes provide that an examination for use in foreign litigation should take place before a person appointed by the assisting court and that the person appointed by the court has the power to administer any necessary oath. Furthermore, the making of false statements before a person authorized to administer an oath normally is punishable as perjury in the United States.

Swiss courts are also extremely flexible with regard to the manner in which the foreign examination is conducted and recorded. Thus, the requesting court will not object if the judge or official conducting the examination interrogates the witness beyond the scope of the questions that accompany letters rogatory. Of course, when the Swiss court believes that the additional questions and the answers given are irrelevant or improper, it is free to disregard the witness' responses. A verbatim transcript of the testimony is unnecessary; the testimony may be summarized by the person taking it and, if the jurisdiction in which the examination was taken does not require a signature, the testimony need not be signed by the witness, although the record should be read to the witness and confirmed by him in some manner.

A reasonable request from a Swiss court that the testimony be taken or recorded in a particular way usually will be honored by the American court rendering aid. To provide maximum flexibility and responsiveness to the needs of foreign tribunals, both the federal statute and the uniform act permit the court that issues an order directing the taking of testimony to specify the procedures to be employed on the examination; use of the practice and procedures of the requesting tribunal is expressly authorized. In the absence of a special request, the court ordering the

167. The statement in the statute and uniform act that the person appointed by the court has power to administer an oath is designed to eliminate some uncertainty on the point. See Jones, in LETTERS ROGATORY 73, 81-88 (Grossman ed. 1956); Smith, International Aspects of Federal Civil Procedure, 61 COLUM. L. REV. 1031, 1037 (1961).


169. See H.R. REP. No. 1052, 88th Cong., 1st Sess. 10 (1963); S. REP. No. 1580, 88th Cong., 2d Sess. 8-9 (1964); UNIFORM INTERSTATE AND INTER-
examination normally will direct that its own deposition procedures be used. Even if the requesting court has no objection to the use of American procedures, it might be advisable, since the American process of party examination and cross-examination is both time consuming and expensive, to request that the examiner merely summarize the witness' narrative or that the witness be permitted to provide written responses to the interrogatories accompanying the request. Similarly, the Swiss court may wish to have the examination conducted before a Swiss consular official or a Swiss attorney to insure that the witness' testimony will be of maximum utility in the Swiss action.\textsuperscript{170}

Although testimonial evidence given in accordance with American procedures is acceptable, the weight to be given to the testimony will be determined by the Swiss court. If the deposition and discovery procedures of the assisting court were employed properly and appear to the Swiss court to be fair, the testimony procured in the United States will be accorded the same weight as comparable testimony in Switzerland. If the American court's procedures were not followed in some material respect, however, the testimony may be downgraded or entirely rejected.

In states such as New York, it is of little moment whether aid is sought from the state or federal courts since they both provide foreign tribunals with effective assistance in obtaining testimonial evidence. If the witness is a resident of or can be found only in a state whose courts will not compel him to testify or will limit the scope of examination in a material way or refuse to execute letters rogatory from a foreign country, then aid obviously should be sought from one of the federal district courts in that state. Expense rarely will be a basis for choosing a forum since costs are approximately the same in the state and the federal courts. The federal courts generally impose only a 25 cent fee for filing papers\textsuperscript{171} and do not charge the 15 dollar filing fee required for the institution of a civil action.\textsuperscript{172} In some state courts, however, applications for [legal terms such as 'injunction'] must be made for an order compelling testimony.

\textsuperscript{170} The rules of a number of United States district courts provide that the court must appoint anyone named in the foreign request to take the testimony unless there is good cause to withhold the designation. \textit{E.g.,} Eastern and Southern Districts of New York, General Rule 19; Northern District of New York, General Rule 39.


\textsuperscript{172} 28 U.S.C. § 1914(a) (1958).
the full index or filing fee will be levied. These fees rarely are substantial, however.

The respective territorial jurisdiction of the federal and state courts may be of some importance in deciding on a proper forum for an examination in aid of Swiss litigation. Under section 1782 of the United States Judicial Code, the request for aid is made in the United States district court in the judicial district in which the witness resides or may be found. The statute does not indicate where in the district the witness may be compelled to appear and the judge probably has the power to order that the examination be taken anywhere in the district. It is highly unlikely, however, that the court would impose a more onerous burden on the witness than is imposed on witnesses in civil actions pending in the district courts. This means, according to rule 45(d)(2) of the Federal Rules of Civil Procedure, that unless the court orders otherwise a resident of the judicial district may be examined only in the county in which he resides, is employed, or transacts his business and a nonresident of the judicial district may be examined only in the county in which the subpoena to appear was served or within 40 miles of the place of service. The territorial limitations imposed upon most state courts are similar to those of the federal courts. For example, in the New York Supreme Court, as in the federal courts, a witness can be required to attend an examination within the county in which he resides, is regularly employed, or has an office for the regular transaction of business, except that if the witness' residence, place of employment, or office is in New York City, he may be compelled to attend anywhere in the city. New York practice differs from federal practice in the case of a nonresident witness in that the examination is not limited to the county of service or within 40 miles of the place of service but also may be held in the county in which he is regularly employed or has an office for the regular transaction of business.

C. Obtaining Tangible Evidence in the United States

The Swiss federal and cantonal procedural codes do not provide explicitly for obtaining the production of tangible evidence

173. See, e.g., the historical and practice notes to ILL. ANN. STAT. ch. 110, § 101.19-8 (1956).
175. N.Y.C.P.L.R. 3110(3).
176. Ibid. See generally 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3110.06-07, .09 (1983).
located outside the canton in which the litigation is pending. This statutory silence has not caused any practical difficulties. Should the necessary document or object be under the control of a party, the Swiss court may compel him to produce it, and if he should refuse to do so it may presume that the evidence would have been detrimental to his position in the litigation. Furthermore, if direct compulsion is unavailable or unavailing, production of the evidence undoubtedly may be requested by letters rogatory addressed to a court in a foreign country or another canton. The scope of the request will be limited by any restrictions on the use of tangible evidence found in the procedural code of the requesting canton.

Approximately the same assistance available to a Swiss court in obtaining testimonial evidence from the United States will be rendered in connection with tangible evidence situated in this country. The most expeditious course of action for a Swiss litigant to pursue whenever voluntary compliance is expected is to make a direct request of the person in control or possession of the evidence. Whenever compulsion is necessary or desirable, any federal court will furnish it upon request under section 1782 of the Judicial Code. Because of the extremely liberal attitude of the federal courts toward document discovery, Swiss litigants or courts should be able to secure the production of at least as much documentary evidence as can be obtained under the pretrial discovery procedures in force in the various cantons in Switzerland. The only significant limitation on the discovery of tangible evidence available under section 1782 is that production will not be directed in contravention of "any legally applicable privilege." The quoted words are intended to permit the person who is subject to a production order issued by a federal court to invoke any relevant privilege under federal, state, or foreign law.

Assistance identical to that available from the federal courts will be rendered by the courts of any state that has enacted section 3.02 of the Uniform Interstate and International Procedure Act and by the courts of any state that has adopted the deposition and discovery provisions of the Federal Rules of Civil Procedure and permits foreign litigants to obtain evidence in the same manner as is normally employed in actions pending before the

177. See text accompanying notes 161–70 supra.
courts of that state.\textsuperscript{180} The same probably is true in states that have enacted the Uniform Foreign Depositions Act; however, because that statute speaks of “testimony of a witness” it may not apply to tangible evidence. On the other hand, tangible evidence undoubtedly can be obtained in those states that have adopted the Uniform Foreign Depositions Act and permit the use of a subpoena duces tecum in aid of an examination of a witness.\textsuperscript{181} In California, the legislature has added a paragraph to its enactment of the Uniform Foreign Depositions Act that specifically allows the use of a subpoena duces tecum for the production of documents described in the subpoena if it is shown by affidavit that they are relevant to the subject matter involved in the foreign action.\textsuperscript{182} The California statute further requires that the applicable foreign law permit the “deposition” of a witness taken under such circumstances to be “used.” Whether this language means that an explicit procedure for compelling the production of documentary material must exist under the law of the foreign jurisdiction is not clear.

Some state courts will refuse or be reluctant to compel the production of documentary evidence in aid of Swiss proceedings. For example, in Massachusetts deposition and discovery in domestic actions is available only on a rather limited basis and the Massachusetts provision permitting the taking of a deposition for use in another country makes local practice applicable without indicating whether a subpoena duces tecum is available.\textsuperscript{183} If a Swiss litigant needs tangible evidence situated in a state such as Massachusetts, he is well-advised to seek assistance from the federal district court in that state.

D. Obtaining Proof of United States Official Records

The manner in which foreign official records may be proved in Swiss proceedings is not described in the various Swiss procedural codes. The courts have filled this lacuna by exercising considerable flexibility and discretion in permitting various types of proof of foreign records and by making compliance with any particular requirements unnecessary in the majority of cases. Among the different forms of proof that have been accepted are official publications, attested and authenticated copies, attested but unauthenticated copies, and even unattested and unauthenticated

\textsuperscript{180} E.g., Ariz. R. Civ. P. 29(k).
\textsuperscript{181} E.g., Minn. Stat. § 597.18 (1961); Minn. R. Civ. P. 45.02.
copies. The evidentiary weight accorded a particular copy will depend upon its quality and the presence or absence of a reasonable basis for objecting to its use. Thus, the court will accept a copy of a record appearing in a publication that purports to be official without any proof that it actually is if the publication is of recent vintage and no serious contest develops over its status. The same is true of copies, extracts, or summaries of documents kept in foreign official registries. Additional methods of proof are permitted by the bilateral treaties relating to official records that Switzerland has entered into, some of which dispense with authentication. The treaty with Germany, for example, states that the seal of a court or a specified executive authority in each country is sufficient proof of a document's authenticity.

When formal proof of a foreign official record is necessary, the normal procedure is to have it attested over the signature of the keeper of the original record, have the attestation authenticated by the foreign ministry or state department of the country in which the record is kept, and then superimpose a certificate of the Swiss consulate in that country. If the record is maintained by a state of the United States or by a comparable governmental unit in any country with a federal form of government, it is desirable to have the record authenticated by the state Secretary of State. If the signature or seal on the state authentication is known to the Swiss consulate, it need not be authenticated by the United States State Department or its counterpart. Because of the absence in the Swiss codes of any specific strictures relating to the proof of foreign official records, there is virtually no information on the proper form or contents of the various attestations and authentications that may be needed by Swiss litigants. The liberal attitude of the Swiss courts regarding proof of foreign records indicates that the precise wording of the certificates probably is of little moment.

A Swiss litigant, court, or consular official will not encounter any difficulty in obtaining a copy of an official record in the United States in a form acceptable for use in Switzerland. Despite the fact that existing federal and state procedures for certifying and authenticating documents are primarily geared to domestic needs, they are sufficiently flexible to meet the exigencies of foreign litigation. Since the Supreme Court decision in United

---

184. Treaty With Germany, Feb. 14, 1907, 12 BS 401; Treaty With Austria, Aug. 21, 1916, 12 BS 404; Treaty With Czechoslovakia, Dec. 21, 1926, 12 BS 337.

185. Treaty With Germany, Feb. 14, 1907, 12 BS 401.
States v. Percheman, it has been the general rule in this country that the custodian of official records has implied authority to prepare and attest copies of documents under his control. Thus, a foreign litigant can obtain an attested copy of any official document by applying to the person with lawful custody of the original. Although the custodian's implied authority to attest extends only to literal copies and does not include summaries of the substance and effect of the original or statements as to the nonexistence of a given document, most states have enacted statutes permitting the custodian of official records to attest summaries as well as statements that a search has not revealed the existence of a record of a specified tenor.

Each department and agency within the executive branch of the federal government has a procedure for authenticating documents. Some of these procedures are prescribed by the United States Code, although in most instances they are based on regulations promulgated under a legislative delegation of authority to the agency or department. Thus, for example, copies of the official records of the General Services Administration may be procured and authenticated at the office of its General Counsel or, in the case of records kept in a regional office, at the office of the Region Counsel.

The Authentication Officer of the Department of State will authenticate documents of various federal departments and agencies. The usual practice is to obtain a copy of the docu-

---

186. 32 U.S. (7 Pet.) 51 (1833). See also Church v. Hubbart, 6 U.S. (2 Cranch) 186 (1804).
188. See Wood v. Knapp, 109 N.Y. 109, 2 N.E. 632 (1885); 5 Wigmore § 1678.
189. E.g., N.Y.C.P.L.R. 4521. See also Uniform Rules of Evidence 63(17)(b). These statutes are largely interstitial in nature and refer only to specified documents or classes of documents. The net result is a morass of petty legislation on the subject. See generally 5 Wigmore §§ 1688 n.12, 1678.
ment from the agency that has the agency’s seal affixed to it and to have the Department of State authenticate the seal of the issuing agency. The Department of State also will authenticate records of state governments that contain the state seal and private documents that have been notarized and authenticated by a state Secretary of State. If requested by any Swiss authority, a United States consular official will certify the seal of the Department of State.

Although his authority to do so sometimes is not clear, a state Secretary of State generally will authenticate copies of state documents that have been attested by their custodians. As has been noted, the United States Department of State will authenticate documents issued under the seal of any state but this will be necessary only when the signature or seal of the state Secretary of State is unknown to the Swiss consulate. Since Swiss courts permit a foreign record to be established by means of an official publication, there is no reason for a Swiss litigant to procure authenticated copies of the original of any item reproduced in the Federal Register or in any comparable federal or state official publication.\footnote{194. 22 C.F.R. § 92.41(c) (1965).}

E. Determining the Law of the United States

The inefficient common-law system of pleading and proving foreign law is unknown in Switzerland.\footnote{195. Proof of foreign law in Switzerland is discussed generally in Guldener, Das Schweizerische Zivilprozessrecht § 15 (1948); Nussbaum, Bilateral Studies in Private International Law: American-Swiss Private International Law 58-59 (2d ed. 1958).} Thus, the largely unremonerative task of pleading foreign law, either in substance or in effect or \textit{in haec verba}, is not required in Switzerland as it is in common-law jurisdictions in the absence of ameliorating legislation. Moreover, a Swiss advocate may submit any material that he believes helpful and make any argument that he deems appropriate to the resolution of an issue of foreign law. Swiss courts are completely free to determine foreign law on the basis of whatever materials they want to use and, probably to a greater degree than American courts, are at liberty to investigate and research issues of foreign law in order to supplement the material elicted by the parties.\footnote{196. In broad terms, the practice under proposed rule 44.1 of the Federal Rules of Civil Procedure and article IV of the Uniform Interstate and International Procedure Act is expected to be similar to the existing Swiss practices relating to the proof of foreign law. See text accompanying notes 122–24 supra.} The determination of the law of con-
tinental countries generally will not be difficult for a Swiss court because most of them, especially courts of the Confederation and in the larger urban centers, have adequate libraries on the law of the nations of Europe. Should the parties or the court fail to produce satisfactory proof of the substance of foreign law, the court may hire an expert to render a written opinion. Swiss courts rarely will rely on the opinions of experts employed directly by the parties. The costs of the expert will be paid by the person who bears the burden of proof on the issue of foreign law or as otherwise ordered by the court. Frequently, the expert will be the attorney for the Swiss consulate in the country whose laws are involved. The parties will be notified of the court’s decision to employ an expert and his identity; they may comment on his qualifications and present additional material they believe pertinent to the foreign law issue.

In order to simplify the process of proof, attorneys frequently stipulate that the law of a foreign country is identical to Swiss law. The effect of such a stipulation is to give the court authority to apply local law. If the parties do not stipulate and then fail to prove the substance of the applicable foreign law, Swiss law will be applied, except in a criminal case when the issue appears to be determinative. A failure on the part of the prosecutor to prove foreign law under these circumstances requires the acquittal of the defendant. When the applicable law is difficult to ascertain but its substance is known to be related to the law of a third country that can be ascertained by the Swiss court, the law of the third country may be applied. Thus, for example, should the parties fail to prove the law of Hong Kong, reference may be made to the law of Great Britain.

Neither the executive nor the judicial branch of the United States Government nor its state counterparts is authorized to assist Swiss litigants or tribunals in determining the substance of United States federal or state law as applied to facts involved in litigation pending in Switzerland. In the case of the federal and most state judiciaries, such assistance would violate constitutional or legislative prohibitions against advisory opinions.

197. Determinations of foreign law by the cantonal district court are subject to review by the cantonal court of appeals but are not subject to further review by the Supreme Court of the Confederation since that court is required to decide questions of Swiss law only. OG art. 43.

The failure of the state and federal executives to offer aid probably is due to a lack of legislation providing some governmental department with the necessary funds and authority to render aid. Undoubtedly, this absence of legislation reflects a certain degree of apathy toward such a venture. Furthermore, there is no institution in the United States comparable to the famous German (Max Planck) Institute for Foreign and International Private Law that will prepare opinions on United States law at a reasonably modest cost. The possibility of providing such a service through one or more of the law schools or bar associations in the United States has received some consideration but to date there have not been any affirmative steps in that direction.\textsuperscript{109} It also has been suggested that the United States enter into treaties for the reciprocal exchange of legal information and opinions but, again, nothing tangible has developed.\textsuperscript{200}

At the present time, therefore, a Swiss court or litigant in need of assistance in determining some facet of the law of the United States or one of its states that is relevant to an action pending in Switzerland is advised to secure the services of someone who is expert in the field of American law in dispute. From the viewpoint of expense and what will be deemed sufficient by a Swiss court, a written opinion or answers to specific written interrogatories probably is preferable. If a Swiss advocate desires oral advice in order to prepare his case for trial or negotiation or if oral testimony in court is deemed advisable, the costs of an expert can be minimized by seeking the services of an American attorney resident in Switzerland or a neighboring country.

CONCLUSION

This paper has attempted to describe the rudiments of the practices of the United States and Switzerland in the realm of international judicial cooperation. Secondarily, the compara-


tive study has been designed as a vehicle for inquiring into the extent to which the municipal law of these two countries, one with a common-law tradition and the other rooted in the civil law, has taken account of the needs of litigants and tribunals in the other. In light of the recent welter of activity and reform in this country regarding international judicial assistance, it is particularly appropriate that the tensile strength and malleability of the changes already effected and those almost certain to become effective be tested by examining how they react to the pressures exerted by a spectrum of requests for aid from a particular jurisdiction.

The details seem to yield at least two general conclusions. The first is that our procedures appear to be well conceived to meet the basic needs of tribunals and litigants in a nation whose practices differ radically from our own. The 1964 amendments to the United States Code and the promulgation of the Uniform Interstate and International Procedure Act, which hopefully will achieve widespread acceptance throughout the states in the near future, provide a format for rendering assistance that is flexible enough to permit a foreign litigant or court to serve documents, obtain testimonial or tangible evidence, or procure a properly attested and authenticated copy of an official record in a manner or form appropriate to the particular needs of the proceeding pending abroad. Only assistance in proving the law of the United States has not been provided on either the federal or state level. The second generalization is roughly the converse of the first. The reforms already adopted in this country and those still being considered appear to offer an American litigant or court in need of assistance from abroad a set of tools with which to extract whatever aid another nation will render and enough flexibility to take advantage of any private action tolerated by a foreign country. Without intending to minimize a task that often will present a difficult, if not insuperable, problem of determining the law or official position of a foreign country, the new system has made the American judge’s or attorney’s task one of ascertaining which of a number of devices available to him is appropriate for use in a particular country to achieve a particular objective. The American judge or attorney no longer is confronted with the problem of fitting his conduct within the letter of an inflexible or myopic domestic procedure for seeking judicial cooperation that is completely out of kilter with the practice of the assisting nation.

Our willingness to establish a comprehensive unilateral framework for international judicial cooperation probably is a result
of two factors. The first is that the organizations charged with responsibility for proposing reform in this area recognized that it was politically unfeasible, as well as procedurally unsound, to have the United States enter into bilateral treaties with all of the countries of the world from whom someone in this country might seek or receive a request for assistance; they committed themselves at an early point to a policy of unilateral reform as being the most expeditious way of improving conditions for American litigants and in the hope that other nations would extend reciprocal treatment or follow this country's lead and undertake similar internal reforms. The second factor is that once the basic theory of the revision was agreed upon, the path to realizing the reforms was relatively unobstructed primarily because the proposed changes proved to be harmonious with the flexible and open character of our own system. Since private service of judicial documents and unrestrained discovery, except when judicial intervention is needed to curb abuse, has been accepted in this country as normal or at least not inconsistent with our current procedural philosophy, there is no reason to object to the service of documents or to discovery proceedings on behalf of foreign litigation by private persons, commissioners, and consular officials absent a breach of the peace or public order. Moreover, since our own judicial system recognizes a number of different ways to make service and secure information for trial, it would be inconsistent if our courts or State Department balked when asked to execute letters rogatory or to prepare a judicial summary of the witness' testimony rather than a verbatim transcript.

Although some softening in the attitude of certain official Swiss positions may be perceptible, to date there has been no formal Swiss accommodation to the particular needs of American litigants or any attempt to offer them the same type of freedom of action now available to Swiss litigants in the United States. 202


202. Some of the primary points of divergence between the procedural philosophy of the United States and that of civil law countries are succinctly set out in De Vries, International Unification of Law and Judicial Assistance,
The cumbersome, time consuming letters rogatory process remains the one relatively “safe” way to effectuate service or obtain evidence. Nevertheless, it would be a mistake to view Switzerland’s refusal to allow Americans to serve process and conduct examinations privately too harshly or as an indication that our decision not to obtain a bilateral convention was erroneous. Since the Swiss position stems from their conception of sovereignty and a strong belief that official intervention is essential to their economic well-being and security rather than any reluctance to render aid, uncontrolled private excursions throughout Switzerland for the purpose of serving process and procuring testimonial and tangible evidence, which would be desirable from the perspective of an American litigant, would be a complete departure from established national policy. When the magnitude of the change in existing Swiss philosophy and attitudes that would be necessary if Switzerland adopted practices as flexible and permissive as those in this country is compared with the relative lack of dislocation caused by our recent changes, the Swiss hesitancy to accommodate becomes more understandable, even if it does not become more palatable.\textsuperscript{203} Moreover, it is unrealistic to believe that the Swiss would have compromised their national policies at the conference table. Their reservation to the Hague Convention\textsuperscript{204} is ample evidence that it is unlikely that they would have entered into a treaty offering American courts and litigants substantially greater freedom of action within Switzerland than they now possess. Indeed, our greatest hope for securing an alteration in Swiss attitudes may well be the possibility that should this country’s experiment in unilateral reform prove to be successful, it will not be overlooked or go unrewarded.


\textsuperscript{203} While our recent reforms were consistent with this country’s willingness to permit private litigants to perform acts having judicial consequences, a comparable shift in position by the Swiss would be inconsistent with their view, and the view of most civil law countries, that principal authority for all judicial acts is and should be in the hands of public officials. See generally SCHLESINGER, COMPARATIVE LAW 215–27 (2d ed. 1959).

\textsuperscript{204} See text accompanying notes 14–15 supra.