

## B. Non-Treaty and Non-Entente Countries

### 1. Civil and Commercial Matters

The requirements of states for the taking of evidence on their territories vary greatly. Some states, e.g. common law states, tend to facilitate the taking of evidence by foreign courts with little formality. If the witness is prepared to testify voluntarily, there is often no obstacle to the taking of his evidence, and the intervention of the host state need not be sought. This system is sometimes called passive judicial co-operation. If compulsion is required, however, an application to the local courts is necessary. Other states, (e.g. certain civil law jurisdictions) have stringent requirements in this regard and reserve evidence-taking activities exclusively to their own government or court officials.

In Canada the rules of practice and the Evidence Acts of the various provinces apply. In Quebec, the Code of Civil Procedure is relevant. These rules of practice and statutory enactments render possible the taking of evidence in most foreign states from unwilling witnesses, through the use of the compulsory powers of the courts of execution.

An application for a commission to take the testimony of a person outside the jurisdiction can be obtained at the discretion of the court concerned. In Ontario, application is made pursuant to Rule 276(1) of the Ontario Supreme Court Rules. The application must be supported by affidavit evidence which establishes that the witness is material and necessary, that the applicant cannot properly proceed to trial without his evidence, and the reasons why the witness cannot attend the trial. The practice and procedure for the examination are found in the Ontario Supreme Court Rules 279-289 inclusive.

It is worth repeating that in common law as well as civil law countries, if the witness must be compelled to give his testimony, the Canadian litigant must not only obtain authority from his own courts to take testimony outside the jurisdiction, but he must also obtain authorization from the foreign court before he can proceed. This latter authority is most often sought by use of letters of request addressed from the Canadian court to the foreign court or "competent authority".

There are normally three methods available for the taking of evidence abroad:

**METHOD I:** Taking of evidence by a person appointed and