

Covington Webinar Series

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Cross-Border Discovery Issues for U.S. Litigants

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Agenda

- Introduction (Rippey)
- Key Considerations in Cross-Border Discovery (Cheek)
- International E-Discovery: Conflicts Between E.U. Data Privacy and U.S. Discovery Rules (Hastings)
- Specific Options for Gathering Evidence Abroad (Eichensehr)
- Conclusion (Rippey)

Key Considerations in Cross-Border Discovery

- Different Discovery Norms
- Possibility of Conflicting Obligations
- Know Your Organization
- Identify Compliance Solutions
- Think Both Offensively and Defensively

Practical Considerations: E-Discovery and Data Privacy Rules

- Identify conflicts between data privacy regimes and discovery rules
- Key Considerations:
 - Be Proactive
 - Understand Core Legal Issues
 - Understand Local Law
 - Consider Tools at Your Disposal

Practical Considerations: Seeking Evidence Abroad

- Options:
 - U.S. federal courts, Hague Convention, letters rogatory, Mutual Legal Assistance Treaties
- Key Considerations:
 - Framing the Request
 - Time Constraints
 - Hiring Local Counsel
 - Keep It Simple

International E-Discovery: Conflicts Between E.U. Data Privacy and U.S. Discovery Rules

- Data Privacy Regimes
 - Regional, National & Local Regulations
 - Data Privacy, Blocking Statutes, & Employment Laws
- Divergent views: Discovery and Data Control
- Scope of Data Privacy
 - Comply with data privacy protections of area in which entity operates
 - Cloud computing expands application of data privacy laws

EU Data Protection Directive

- Scope: “Personal Data”
 - Any data or document identifiable to an individual
 - Results in broad application of the Directive
- Restricts Processing of Data
 - Any manipulation of data for discovery purposes
 - Exceptions: Consent, legal obligation, or balancing interests
- Restricts Transfer of Data
 - Transfer outside EU only if adequate protection provided
 - U.S. does not offer adequate protection

U.S. Courts: Domestic Discovery and Data Privacy Laws

- Courts can order discovery of material outside of U.S.
 - *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, n. 29 (1987)
 - “It is well settled that [foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”
- View of U.S. courts regarding non-enforcement of foreign data privacy laws
 - *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D.N.Y. 2007)
 - *Gucci America, Inc. v. Curveal Fashion*, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010)

E-Discovery Solutions to Cross-Border Disputes

- Data Maps and Advanced Planning
- Local Counsel & Local Data Centers
- Communication and Cooperation
- Protective Orders
 - Limiting scope of discovery
 - Providing privacy protections
- Redaction

Specific Options for Gathering Evidence Abroad

- Scope of Discovery
 - Federal Rule of Civil Procedure 26(b): No geographic limitation.
 - “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”

Mechanisms for International Discovery

- Federal Courts' Unilateral Means of Evidence-Gathering
- Hague Evidence Convention and Letters of Request
- Letters Rogatory
- Mutual Legal Assistance Treaties (MLATs)

Federal Courts' Unilateral Means of Evidence-Gathering

- If a federal court has personal jurisdiction over an individual, the court may order the person to produce documents or information relevant to the case before it, even if the information is located outside the United States. Failure to comply can result in sanctions, contempt, or dismissal.
- U.S. courts can compel the testimony of U.S. nationals or resident located abroad by issuing a subpoena. See 28 U.S.C. § 1783; FED. R. CIV. P. 45(b).
- In deciding whether to issue an order, a court should consider the importance of the requested information to the case, alternative means to secure the information, and the extent to which U.S. or foreign state interests will be affected by the production or non-production of the documents.

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and Letters of Request

- Parties include the U.S. and more than 50 other countries.
- Use of the Hague Convention is not mandatory. *Société Nationale Industrielle Aerospatiale v. U.S. District Court for Southern District of Iowa*, 482 U.S. 522, 536 (1987).
- The Hague Convention permits discovery by “letter of request”: a request from a court in one state to the “Central Authority” of the foreign state, which will assist in obtaining the evidence requested.
- The U.S. Central Authority is the Office of International Judicial Assistance in the Civil Division of the Department of Justice.
- Timeframe: 6-12 months from request to return of evidence.

Letters Rogatory

- Letters Rogatory are addressed by the court of the requesting state to the courts of the receiving state and are transmitted via diplomatic channels.
- Execution of letters rogatory is voluntary.
- Timeframe: 12+ months from request to return of evidence.
- The time may be shortened by having local counsel transmit a copy of the letters to the foreign court, which is permitted in some countries. See http://travel.state.gov/law/judicial/judicial_683.html.

Mutual Legal Assistance Treaties (MLATs)

- MLATs provide a treaty-based mechanism for securing evidence in criminal and tax matters.
- MLATs are typically faster than letters rogatory because they use countries' Central Authorities to transmit information.
- MLATs require evidence to be transmitted in a form that is admissible in the requesting state's courts.

Discovery by Foreign Courts of Information Within the United States

- “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.” 28 U.S.C. § 1782.
- A district court may consider factors including: whether the person from whom evidence is sought is outside the evidence-gathering power of the foreign tribunal; the nature of the foreign tribunal; the character of the proceedings; and the receptivity of the foreign government to U.S. federal-court judicial assistance. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

Questions

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