FOREIGN DISCOVERY: WHERE TO START?

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"I need to subpoena a witness in London for a deposition." "I need to get documents from a company in Munich." Litigators face such situations more and more often, but often, they don't know where to start. The law of international judicial assistance is rich and complex, but there are a few points every in-house lawyer who hires litigators should know.

1. AMERICAN COURTS GENERALLY CANNOT COMPEL THIRD PARTIES ABROAD TO TESTIFY OR TO PRODUCE DOCUMENTS.

We're familiar with this rule in state court litigation, where lawyers understand the need to obtain a subpoena in the state where the witness lives. Prior to the 2013 amendments to the Federal Rules of Civil Procedure, federal court litigators knew that federal subpoenas for witnesses in another district should be issued in the name of the court where the witness was located. The same principle that applies in interstate cases applies in international cases. A U.S. subpoena generally can be served only within the United States. So, obtaining evidence abroad only rarely means serving a U.S. subpoena on a witness abroad.

2. FOREIGN COURTS CAN COMPEL THIRD PARTIES WITHIN THEIR JURISDICTION TO PROVIDE EVIDENCE.

Thus, often the right thing to do is to ask the foreign court for assistance, or more precisely, ask the American court to ask the foreign court. While the U.S. is liberal about such things and allows foreign litigants to ask U.S. courts for help directly, most foreign courts are not so liberal and will only respond to requests from the U.S. court itself. Many countries, including the United States, are parties to the Hague Evidence Convention, a treaty that provides a simplified means for making such requests. The basic procedure is to draft the letter of request, make a motion in the U.S. court to issue the letter of request, and then transmit it to the central authority that the foreign state has designated to receive the request. The authority then—assuming the letter of request passes muster under the Convention—will pass the request on to the appropriate court, which will take the evidence and return it to the U.S. In non- Convention countries, the procedure is similar, but the U.S. court issues letters rogatory instead, and there is no central authority designated to receive them. In some cases (notably Canada), the U.S. lawyer, working with a foreign lawyer, can approach a court directly for assistance. In other instances, the letters rogatory must be transmitted through the diplomatic channel—a costly and time-consuming process that should be a last resort.

3. YOU MAY NEED PERMISSION, EVEN WHEN THE WITNESS IS WILLING.

Why go through all this trouble if the witness is willing to testify? Why not just hire a stenographer and take the deposition in a law office abroad, or even take it by video? Some countries, such as the United States, have no objection to foreign lawyers taking evidence in their territory without permission. But in many countries, particularly civil law countries, taking evidence without permission is forbidden or even criminal, even when the witness is willing. In Evidence Convention countries, the Convention provides that a commissioner can take evidence from a willing witness, provided he has the foreign state's permission (unless the foreign state has declared that no prior permission is required). Procedures for requesting that permission vary, but in a typical case, a U.S. court will issue a commission to take the evidence, and then the commissioner or counsel representing one or both of the parties, with help from counsel in the foreign state, will request permission from the appropriate court or ministry.

4. YOU CAN'T ALWAYS GET WHAT YOU WANT.

Although the introduction of the idea of proportionality into U.S. discovery practice has, at least in theory, reined in the scope of American domestic discovery practice, the scope of our discovery practice is unheard of abroad, even in other common-law countries. Many Evidence Convention countries have declared, as the Convention allows them to do, that they will not execute requests for the pretrial discovery of documents at all or that they will only execute requests that seek documents identified with sufficient particularity. Letters of request must be drafted with these limitations in mind, and counsel have to make peace with the reality that they may not get the breadth of documentary evidence they are used to getting in domestic cases. Lawyers have to temper their expectations about testimony, too. The default in many countries is that the judge questions the witnesses or at least leads the questioning. Many countries do not routinely administer oaths or transcribe testimony verbatim. The Convention allows U.S. courts to request that the foreign court adopt special procedures for taking testimony, and thus a letter of request can ask for the use of procedures more familiar to U.S. lawyers. But the Convention does not require foreign courts to agree to the special measures requested if they are incompatible with the foreign law or if they are impractical for the foreign court to use. In practice in many countries, the foreign judge will ask the questions and counsel—either the U.S. lawyers or foreign lawyers working with them—may be able to ask other questions or to follow up. Fortunately, U.S. courts will make allowances when considering whether evidence taken abroad under foreign rules is admissible. But that flexibility is not limitless. Part of the practice of international judicial assistance is appreciating the inherent limitations you face, which vary from country to country, and thinking hard about the balance between what you want, what you need, and what you can get.

5. START EARLY.

In many Convention countries and some non-Convention countries, it's reasonable to expect a three-to-six-month timeframe to obtain evidence. In some countries, particularly non- Convention countries where a traditional letter rogatory is necessary, the process can take more than a year. The problem of time is made worse by the need, in some cases, to sequence discovery—for instance, to need some discovery domestically in order to be able to make the document requests in your letter of request specific enough to meet the foreign court's standards. So, litigators should not delay thinking about discovery abroad.

6. WORK WITH FOREIGN COUNSEL.

It is always a good idea to retain lawyers in the foreign jurisdiction. In many cases, once you have the letter of request or the letters rogatory, it is possible to approach the foreign court directly rather than transmitting the request through governmental or diplomatic channels. But in such cases, you will likely need a foreign lawyer to prepare the application and appear at any necessary hearings. If the discovery is opposed by the foreign witness, then you will have to have counsel to argue the issue. And sometimes, the foreign lawyers, not U.S. counsel, may have to take the lead in questioning the witnesses.

7. WORK WITH KNOWLEDGEABLE U.S. COUNSEL.

Ideally, the lawyer you hire to handle a case will be knowledgeable about taking foreign discovery. But if he or she is not, a cost/benefit analysis will show that often it makes sense to outsource some of the work of obtaining evidence abroad to U.S. lawyers with experience in the area. For lawyers unfamiliar with the process, the cost in time and money of figuring out what to do and how to do it can make obtaining the evidence uneconomical in the context of the lawsuit. Consider suggesting that litigation counsel outsource the drafting of the letter of request and coordination with the foreign lawyer to a lawyer who does not need to learn the field from scratch and who can do the work much more efficiently than you could. Of course, even if you bring on a lawyer to consult, litigation counsel, and ideally the foreign lawyer, will need to be involved in drafting the letter of request since you know your case and what you need and since the foreign lawyer knows what the foreign courts will and will not do.

International judicial assistance is more important today than ever before. Knowing the basics can help you make decisions that will help your team get evidence it couldn't get in any other way.

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