

**Partnering with Co-Counsel, Clients and Business Personnel to Succeed
in Cross-Border Litigation**

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In a world of advancing technology, increasing connectivity, and access to data anywhere at any time, cross-border litigation occurs with exponential frequency. Litigating across borders not only implicates a variety of unique legal issues, but demands the cooperation and participation of co-counsel, clients, employees, vendors, and business partners in different jurisdictions with correspondingly differing cultures. Securing the cooperation requires an understanding of cultural considerations and mastery of the skills required to appreciate cultural differences in to achieve the overarching goal of efficient management of cross-border disputes. This article provides an overview of the challenges unique to cross-border litigation, outlines strategies for anticipating and addressing these challenges, and provides suggestions for how to maximize the efficacy and efficiency of a litigation team of counsel, co-counsel, vendors, and clients working across borders.

I. Cross-Border Litigation Overview

Before turning to the cultural nuances potentially implicated by litigation involving multiple jurisdictions, it is important to know and understand early in the process the legal issues that are unique to cross-border disputes. Determine whether your jurisdiction is one of the 61 current contracting parties to the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and understand the process it sets out for facilitating cross-border transfers of data or documents via letters of requests exchanged by the requesting and receiving states. Be aware that foreign privacy and data protection laws may compound the complexity of discovery, and particularly eDiscovery, including the accessibility of commingled data available to different employees in different parts of the world. These foreign laws may impose restrictions on the collection, review, and dissemination of various forms of personal data. Familiarity with the E.U.'s Directive on Data Protection, Japan's Act on the Protection of Personal Information, and similar regulations applicable to your cross-border dispute is vital. These laws set forth specific notice requirements for affected individuals prior to document review, restrict collection of personal data, and limit the disclosure or export of such data to other countries.

Tension between United States discovery requirements and foreign data privacy laws may exist. Strategizing early on to develop comprehensive discovery and privacy policies for the litigation will help balance these competing considerations. *See International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)*, The Sedona Conference, at 6-7 (Jan. 2017). Specifically, “[i]n order to demonstrate due respect for foreign data protection and privacy laws, counsel can: (1) identify the cross-border data sources that apply to the matter; (2) diligently research applicable laws that apply to these sources; and (3) confer with specialized Privacy counsel how best to preserve data from these sources in compliance with the law.” *Practical In-House Approaches for Cross-Border Discovery & Data Protection*, The Sedona Conference, Vol. 17, No. 1, at 410 (2016).

II. Soft Skills Avoid Hard Consequences in Cross-Border Disputes

A focus on the importance of lawyers' “soft skills” has steadily emerged in the last few years in scholarship on global interpersonal relationships. *See, e.g., Statement of Solicitor Competence, Solicitors Regulation Authority, available at <http://www.sra.org.uk/solicitors/competence-statement.page>*. While so-called hard skills — that is, solid legal analysis, proficient legal writing, and strong legal argument — are essential to

success in any litigation, disputes across borders call upon the soft skills not taught in law school far more than a dispute based solely within the confines of the United States legal system.

Soft skills focus on self-awareness, social proficiency, leadership, and professionalism. Randall Kiser, *Soft Skills for the Effective Lawyer*, Cambridge University Press (2017), available at http://assets.cambridge.org/97811084/16443/frontmatter/9781108416443_frontmatter.pdf. They include time management, organizational strategies, the ability to understand interpersonal relations and office politics, adaptability to a variety of tasks and work settings, and knowledge of the strategies used to excel in workplace collaboration. Susan Smith Blakely, *Law Firms Shouldn't Overlook Value of Soft Skills*, ABA Journal (Mar. 7, 2019), <http://www.abajournal.com/voice/article/law-firms-shouldnt-overlook-the-value-of-soft-skills>.

Notable soft skills for lawyers involved in cross-border litigation include:

- **Relationship Building:** Success in litigating a cross-border dispute depends in part on your ability to build and maintain positive relationships with co-counsel and clients of varying backgrounds and cultures — i.e., building a team. For example, finding common ground upon which to build a strong relationship with a new client in Greece when you have never visited the country may require upfront research and active listening during your first interactions with the client to ensure you solidify the foundation for a positive relationship.
- **Teamwork:** Once the foundation of a team is in place, the ability to serve as a team leader or as a useful member of the team are key for success in all litigation, but particularly so when tackling cross-border disputes. Different team members in different parts of the world may have specialized knowledge or skills, and recognition of these assets is the first step in maximizing a multi-national team's strengths. For example, local counsel will have familiarity with local rules, juridical preferences, and knowledge of adversaries or opposing counsel local to the area. Identifying these facets of the litigation as local counsel's bailiwick, while assigning other tasks to team members that are best suited to them and their individual skillsets, will help to build out the most effective team possible.
- **Effective Communication:** Effective communication skills in a legal practice go beyond clear brief writing and persuasive oral argument. The need for clarity in communication is never more pronounced than when involved in cross-border litigation. Language barriers may compound the traditional communication encountered each day when managing any other type of case. Translation — both in the traditional sense of translating communication from one language to another, in tandem with the equally important task of translating complex legal concepts into simple, plain terms — plays a major role in communication across borders. Taking the time to consider what to say, and how to say it, is particularly worthwhile when working with a linguistically diverse team.
- **Empathy:** Relating to other members of your litigation team enhances the overall team's ability to work together successfully. The ability to understand or appreciate another team member's point of view — an aid in all negotiation, conflict resolution, and persuasion — may be slightly more complicated if team members hail from different cultures with differing viewpoints. Anticipating these differences and encouraging all team members

to approach variant viewpoints with respect and open-mindedness will foster empathy and benefit the team.

These skills are important to the practice of law generally, but essential to the successful management of cross-border litigation for reasons explored below.

III. Expectations of the Legal Process Vary by Geography

Remaining mindful of team members' differing cultures when partnering with co-counsel or clients to tackle cross-border litigation is important, but understanding that different cultures may hold varying expectations of litigation generally is the first step. For example, in countries where discovery requests are commonplace, individuals are more likely to approach the litigation with a fully formed understanding of information requests, expectations of litigiousness, and related privacy issues. This understanding is likely to translate into fewer questions or hesitations from persons involved in the litigation. In countries where information requests are rare, on the other hand, individuals may perceive the discovery process as intrusive, a waste of resources, or an invasion of privacy. Unfamiliarity with the parameters and rules of litigation generally is likely to yield a greater number of questions for the counsel managing the case, and may result in individuals hesitating to participate in the process or even seeking to withdraw consent from the preparation of discovery responses altogether. *See Practical In-House Approaches for Cross-Border Discovery & Data Protection*, The Sedona Conference, Vol. 17, No. 1, at 403-05 (2016).

Successfully managing a cross-border litigation team, including counsel, co-counsel, in-house attorneys, vendors, and business personnel of the client begins with an understanding not only of the litigation system governing the dispute, but these individuals' *perceptions* of that system and the resulting expectations held by the team. Early discussions with management regarding the team's impressions of the dispute, and the procedures to come, will set the stage for effectively soliciting participation and cooperation in case work-up. An understanding of the team's potentially variant assumptions and perceptions of the general legal process, and how these impressions are likely to impact their behavior towards the dispute, is an essential first step in preparing to unite the team for purposes of litigation. Building a knowledge base of the team's perceptions and expectations of the litigation will provide a springboard from which to implement the strategies noted below for effectively partnering with co-counsel and clients worldwide to succeed in cross-border disputes.

IV. Strategies for Effective Managing Cultural Considerations in Cross-Border Litigation

A. The Obvious Challenge: Language and Communication Barriers

When identifying potential cultural considerations that might impact the team collaborating on a cross-border litigation, language barriers are the initial hurdle. A top translator is indispensable, including one who is able to translate explanations of legal issues and the legal process in simple, non-legal terms. While explaining these issues in non-technical language is most often a valuable tool—particularly when addressing issues with in-house business personnel—it is particularly critical when language barriers are at play. If working with team

members who are part of a certain region of a country or neighborhood of a foreign city, identifying a translator local to that area may also be beneficial. These translators will not only have knowledge of local linguistic phrases, but your team members may be put at ease when interacting with a translator who shares their local accent. These skills are particularly important when a language has multiple variations of the same word, as seen in Japanese, or a given term cannot be directly translated because a language does not have a word for that particular term. These complexities of language may also give rise to unique challenges for eDiscovery; namely, difficulty identifying search terms. Working with translators on both sides of the ‘v.’ will help parties overcome such obstacles.

Eliminating the language barrier with the help of an excellent translator overcomes only one communication challenge. Carefully consider what information to frontload in discussions with cross-border team members. For example, if discussing information requests with a businessperson in a country where they rarely encounter such requests, be sure to address the “why,” or the business or legal reasons behind the requests. For those unfamiliar with particular facets of litigation, including litigation holds, document collections, and responses to interrogatories or discovery requests, early and up-front explanations about why this procedure is required, and what results if the party to the litigation does or does not comply, will help achieve a comfort level in team members. Explaining privacy protections in digestible terms early in the dialogue will also increase team members’ comfort with participation and cooperation in the litigation.

Achieving a comfort level in team members via effective communication is particularly key because the consent of lawyers and business personnel is often required in the discovery process. Circulating a letter or scheduling a call when litigation hold notices are circulated—*i.e.*, when many first learn of the litigation—may be an ideal time to address these issues. Educate local management and IT professionals on the ground in foreign offices and render them allies in your effort to disseminate the understanding needed to make individuals comfortable and ready to cooperate. Some suggest forming a working relationship with local labor unions to share information about the litigation and answer questions, depending on the country from which discovery is requested.

B. Differing Understandings of the Concept of Time

Differing understandings of broader concepts that may impact the work-up of a given case should also be considered when managing a cross-border litigation. Time, for example, has differing meanings in different cultures. Generally, the West is said to place an emphasis on expediency: “Time is money,” “time is of the essence,” and “a New York minute” are common phrases in Western parlance. The idea that “wasting time” is “bad” is also associated with the West. In certain parts of the East, on the other hand, time may be viewed as a negotiating tool or a means through which to establish or reestablish the parameters of a relationship between two business people. One might have a visitor wait for an hour or more after a scheduled appointment time to set the stage for a particular interaction. In some cultures, it is understood, or perhaps expected, that a business superior may make a subordinate wait in this manner. Exploring what time means conceptually to members of the litigation team will help avoid perceived slights where

none were intended, and will prepare team members to anticipate and accept timetables different than those they may typically expect when litigating a dispute only within the United States.

C. Variant Workweek Schedules

When establishing a litigation strategy, ask about what constitutes typical workweek schedules for co-counsel and clients elsewhere in the world. Not all countries subscribe to the 9:00 a.m. to 5:00 p.m. (or 6 p.m. or 7 p.m.) Monday through Friday work schedule adopted in the United States. In the UAE, businesses operate Sunday through Thursday. In Saudi Arabia, businesses operate Saturday through Wednesday. Certain Asian countries are associated with particularly long workweeks when calculated by hours worked, while studies have shown that some European countries have substantially shorter workweeks. Some countries in Europe and South America build breaks into each workday. Certain countries even have regulations in place that dictate certain work-life balance requirements that may be at odds with the traditional United States workweek, or with counsel's initial proposed timetables for case work-up. Company buildings may even be physically closed during off-times, hindering counsel's ability to access data during non-working hours.

Have an open dialogue about traditional workweek schedules in each of the team members' locales, and ensure all members of the team are privy to the data. If working work co-counsel or a client situated in a location with a shorter workweek or with regulatory-mandated restrictions, prepare for the possibility that a project may take longer to complete, and recalculate deadlines based on the team's schedules. If needed, bring in additional staff for time sensitive projects associated with the litigation.

D. Resources: Local Counsel & Vendors

When working with a client or co-counsel in a new locale, there are resources from which one may learn about the cultural considerations at play in this new partnership. Local counsel or vendors might provide on-the-ground guidance not just for local legal issues, but also knowledge of customs and cultural norms. Local counsel could educate you on local workplace basics, ranging from business attire, manner of address, and proper introductions to where to sit in meetings, stand in elevators, and how precisely to exchange business cards. *See generally* Karen Mills, *Cultural Differences & Ethnic Bias in International Dispute Resolution* (Mar. 31, 2006), at 3-8, available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translatingcultures/documents/journals/cultural-differences-and-ethnic-bias-in-international-dispute-resolution.pdf>; *see also* Michael C. Zogby and Yodi S. Hailemariam, *Doing Discovery in Japan? Ganbatte! Privacy, Propriety and Preparation*, *Law Technology News*, at 2 (Mar. 6, 2018). Consider setting a meeting with local counsel to walk through these considerations early on in the litigation and prior to meeting with foreign lawyers and business personnel (the "meeting before the meeting"). Consider also partnering with specialized technological service providers based in the particular country of origin for the litigation.

V. Conclusion

Successful management of cross-border litigation requires more than research and understanding of the applicable law and issues involved in the dispute. Researching, learning, and anticipating potential cultural differences in team members across borders is equally essential. Open dialogues early and often throughout the litigation will facilitate better understanding of these differences, and enable the team to set common expectations and plans of execution.