

Darned If You Do? Navigating Conflicts between International Data Protection Laws and US Discovery

Wednesday, April 11, 2018

Presented By the IADC Business Litigation Committee and In-House and Law Firm Management Committee

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Hypothetical Client



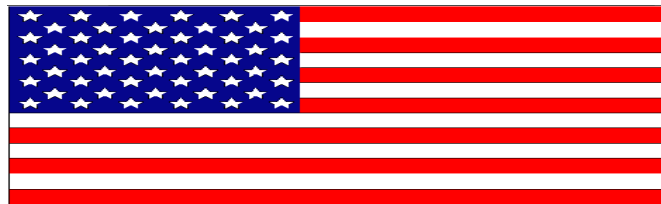
FWM S.A.S.

**Parent Company, Global
HQ, R&D Division**



FWM AG

**Global Marketing
Division**



FWM Inc.

**North American
Distribution and Sales**

Hypothetical Case

- FWM has received reports of widget failures that caused customer-built equipment to fail.
- Some failures have led lead to equipment catching fire.
- Several customers have filed lawsuits in the United States.

Hypothetical Case

- In some cases, FWM Inc. is the sole named defendant.
- In others, FWM S.A.S. and FWM AG have also been named.

Hypothetical Case

- FWM S.A.S. and FWM AG possess relevant documents and ESI in France and Germany.
- FWM staff have indicated concern about the legality of preserving, reviewing, and producing this data for the widget litigation.

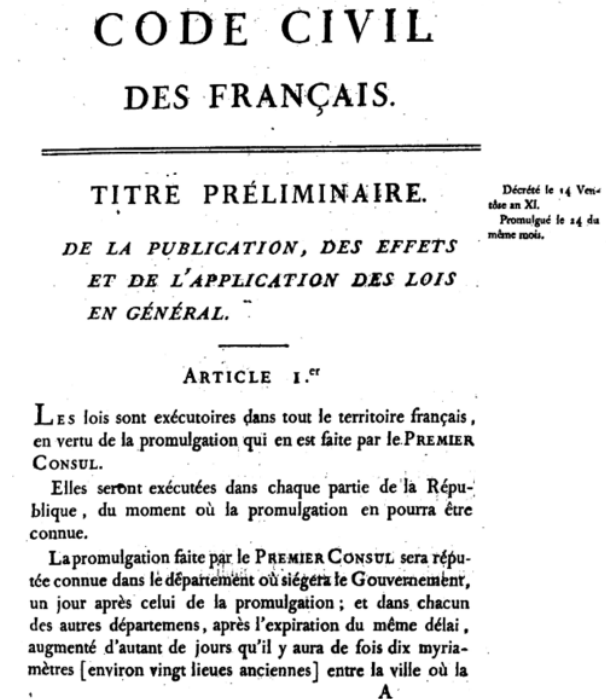
Agenda

- Obstacles to Foreign Discovery
- Avoiding or Limiting Foreign Discovery Conflicts
- Mitigating and Resolving Unavoidable Conflicts

Obstacles to Foreign Discovery

Different approaches to litigation

- Civil Law jurisdictions
 - No formal discovery process.
 - Production of evidence is supervised by the court.
 - Parties typically disclose only evidence needed to support their case.



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Data Protection—GDPR

- Limits collection, use, storage, and disclosure of “personal data.”
- Specific legal basis required to preserve, review or produce documents that contain personal data.



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Data Protection—GDPR

- Limits export of personal data to countries outside Europe whose laws do not offer “adequate protection” for personal data.
 - These transfers require use of defined legal mechanisms (e.g. EU model contracts) or a specified derogation.
 - One derogation permits transfers that are “necessary for the establishment, exercise or defence of legal claims.”



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Foreign Blocking Statutes

- Some countries have enacted laws that restrict or prohibit the transfer of documents or information for use in foreign judicial proceedings.
- Violations can often be criminally punished.



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Foreign Blocking Statutes

- Example: French blocking statute
 - Generally unlawful to request, search or communicate documents “for the purpose of constituting evidence for or in the context of foreign judicial or administrative proceedings.”
 - Exception for production through French legal procedures or international agreements such as the Hague Evidence Convention.



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Foreign Labor, Employment, and Telecommunications Laws

- Can limit collection, processing, and transfer of employees' communications and documents.
- Can require consultation with and/or approval of works councils.
- Often strictly limit or prohibit the collection and processing of "private," non-business, communications and data.



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Avoiding or Limiting Foreign Discovery Conflicts

Possession, Custody or Control of foreign documents and ESI?

- Does party have “control” over documents located overseas for purposes of Rule 34 or Rule 45?
- Courts use different tests.
- Analysis is nuanced and fact-specific.

Possession, Custody or Control of foreign documents and ESI?

- “Legal Right” Test
 - *In re Citric Acid Litig.*, 191 F.R.D. 1090, 1107 (9th Cir. 1999) (“Control is defined as the legal right to obtain documents upon demand.”)

Possession, Custody or Control of foreign documents and ESI?

- “Practical Ability” Test
 - *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007) (“If a party has access and the practical ability to possess documents not available to the party seeking them, production may be required.”)

Is foreign discovery relevant and proportional to the needs of the case?

- 2015 FRCP amendments narrow scope of discovery in ways that can limit or avoid foreign discovery conflicts. Under Rule 26(b)(1), discovery must be:
 - Relevant to a party's claim or defense; and
 - Proportional to the needs of the case.

Is foreign discovery relevant and proportional to the needs of the case?

- *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 565-66 (D. Ariz. 2016)
 - Court declined to order discovery of communications generated by defendant manufacturer's foreign subsidiaries
 - Most of the relevant communications originated in the United States and would be captured by the manufacturer's domestic search and production efforts.
 - Non-U.S. discovery was likely to be substantially burdensome and of marginal importance to resolving issues in the litigation.

Minimizing and Resolving Foreign Discovery Conflicts

International Comity and *Aerospatiale*

- *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S.D. Iowa*, 482 U.S. 522 (1987)
 - Foreign blocking statutes do not deprive American courts of the power to order parties to produce evidence, even though the act of protection may violate the statute.
 - Resort to Hague Evidence Convention procedures is not mandatory, nor is there a rule of “first resort,” to those procedures.
 - But courts should “take care to demonstrate due respect” for:
 - Problems confronted by foreign litigants on account of their nationality or the location of their operations; and
 - Any sovereign interest expressed by a foreign state.

International Comity and *Aerospatiale*

- Since *Aerospatiale*, courts have employed multifactor test to weigh the problems and interests of foreign discovery requests:
 - The importance to the litigation of the documents requested;
 - The degree of specificity of the request;
 - Whether the information originated in the United States;
 - The availability of alternative means of securing the information; and
 - The extent to which compliance or noncompliance with the request would undermine the interests of the foreign state or the United States.

Practical tips for minimizing and resolving conflict

- Raise foreign legal barriers to discovery with opposing counsel and the court as early as possible.
 - *Doster v. Schenk*, 141 F.R.D. 50, 53 (M.D.N.C. 1991) (German litigant who “fail[ed] to take advantage of the discovery conference procedure” waived right use of the Hague Convention procedures for conducting discovery).
 - *Am. Home Assurance Co. v. Societe Commerciale Toutelectric*, 104 Cal. App. 4th 406, 433, 128 Cal. Rptr. 2d 430 (2002) (French party who initially refrained from seeking a protective order or raising any formal objection based on Hague Evidence Convention, and selectively participated in discovery outside the Convention, waived right to rely on Convention).

Practical Tips for minimizing and resolving conflict

- Account for foreign discovery challenges in scheduling, and consider using phased discovery to defer discovery from foreign sources.
 - *See Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) (deferring discovery of defendant's French CEO's documents because documents in France "would likely be covered by the French privacy and blocking laws.")

Practical Tips for minimizing and resolving conflict

- Structure review and production efforts to minimize the processing and transfer of foreign data.
- See, e.g., Article 29 Data Protection Working Party, Working Document 1/2009 on Pre-trial Discovery for Cross-Border Civil Litigation.
 - Redact or anonymize personal data where identity of data subjects is not relevant to the claims or defenses.
 - When personal data are needed, filtering of relevant documents should be performed locally in the country in which the personal data is located.

Practical Tips for minimizing and resolving conflict

- Use protective orders and stipulations to protect foreign data that must be produced.
 - Consider “upgrading” standard protective orders to specifically address foreign legal requirements (e.g., that apply to transfer and processing of European personal data).
 - See, e.g., The Sedona Conference, International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition), 20-21, Appendix C (January 2017) (model US federal court protective order)

Practical Tips for minimizing and resolving conflict

- Consider resort to Hague Evidence Convention Procedures to avoid violating foreign law.
 - Chapter I procedure: letters of request
 - Chapter II procedure: taking of evidence through diplomatic officers, consular agents, or private commissioners.

Practical Tips for minimizing and resolving conflict

- Where conflicts remain, make a case under *Aerospatiale*.
- Be prepared to submit declarations or other detailed evidence to establish:
 - Existence of conflict;
 - Risks of violating foreign law;
 - Availability and efficacy of alternative methods for securing evidence from abroad.

Useful Resources

The Sedona Conference, [International Principles on Discovery, Disclosure & Data Protection in Civil Litigation](#) (Transitional Edition) (January 2017).

Timothy P. Harkness, Rahim Moloo, Patrick Oh and Charline Yim, [Discovery in International Civil Litigation: A Guide for Judges](#), Fed. Judicial Center Int'l Litigation Guide (2015)

Article 29 Data Protection Working Party, [Working Document 1/2009 on Pre-trial Discovery for Cross-Border Civil Litigation \(WP 158\)](#)

Questions for Presenters?



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