

Navigating Cross-Border Litigation

Practical advice to help guide your next international dispute to a problem-free resolution



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Litigation

Litigation reflects today's global economy. Disputes arising in complex business deals do not respect national borders. Whether you represent U.S. companies doing business abroad or foreign companies entering the U.S. market, you should prepare yourself for the subtleties and traps of cross-border litigation, whether in an international arbitration forum or in court.

PREPARE FOR CHOICE-OF-LAW CONUNDRUMS

International cases, where the parties' actions occurred in both the U.S. and on foreign soil, are rife with issues that require consideration of a foreign jurisdiction's law. Spotting early whether a client's position is advantaged or disadvantaged by the application of foreign law can be critical.

Areas in which courts wrestle with whether U.S. or foreign law governs include: deciding the application and scope of the attorney-client privilege, work-product doctrine, or other immunities as ap-

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plied to particular foreign communications; deciding whether a U.S. or foreign statute of limitations applies to particular claims; and deciding whether U.S. or foreign law governs the substantive claims in matters involving no choice-of-law provision.

It should not be assumed that U.S. law will necessarily govern all aspects of a case. One's adversary (or a court unprompted) may propose the application of foreign law to important issues, and the practitioner should be prepared in advance to respond.

EXTRATERRITORIALITY CHALLENGES

In cases involving alleged wrongful conduct that occurred solely abroad, a threshold issue to consider is whether federal or state law has extraterritorial application to that conduct. For example, in trade secrets cases, when the accused misappropriation occurred abroad and arguably was not a wrongful use or acquisition within the United States, misappropriation claims have been attacked on the ground that the governing statute does not apply to such extraterritorial conduct.

In recent cases, the U.S. Supreme Court has reiterated the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." In *Morrison v. National Australia Bank*, the court held that in "Foreign-Cubed" securities class actions — private actions brought on behalf of foreign purchasers of foreign companies' securities that were sold on foreign exchanges — may not be litigated in United States courts under §10(b) of the Securities Exchange Act. And in *Microsoft v. AT&T*, the court held that copying in Japan of a master software disk supplied from the U.S. did not constitute infringe-

ment under the U.S. patent laws.

The lesson is obvious, but easily overlooked. Where the core conduct or transactions occurred abroad, consider whether any cause of action is subject to attack on the ground that the subject law does not apply extraterritorially.

DISCOVERY CULTURAL DISCONNECT

Our civil discovery rules are unique in their breadth. Lawyers from civil law jurisdictions and international arbitrators alike are aghast at the intrusiveness and expense of U.S.-style discovery and discovery motion practice. With rare exceptions, depositions are unknown in the rest of the world. Pretrial discovery in other countries is generally limited to document disclosures, and even then, the scope of such disclosures is much narrower than in the United States.

This clash in discovery systems can lead to challenges for the attorney advising a foreign client or the U.S. corporate counsel advising its foreign subsidiaries and affiliates. Steps that are second nature to U.S. litigators, like document preservation notices or document collections, will come as a surprise to any party who has not been through a U.S. lawsuit. As a result, expect to spend a significant amount of time educating the foreign client as to the ground rules, purpose and goals of discovery and how it can be powerfully used at trial or in motion practice to win or defeat claims.

DEPOSITIONS AND DOCUMENT DISCOVERY ABROAD

While the normal tools of discovery are available against foreign parties over whom jurisdiction is established, there are important nuances in the application of those tools.

Depositions: Depositions abroad can present significant logistical and procedural hurdles. In some places, such as the Peo-

ple's Republic of China, depositions (with rare exception) are not allowed even if the parties stipulate. In Japan, depositions can only be taken at the U.S. embassy or U.S. consulate, where there is a long waiting list (sometimes up to six months) to reserve a deposition room. In addition, depositions in Japan are subject to a number of other strictly enforced rules that are a trap for the unwary.

It is advisable to consult the "Judicial Assistance" page of the U.S. Department of State's website for a given foreign country. These pages are an invaluable resource on whether depositions are allowed in a country, and, if so, what rules apply. When a foreign country places onerous restrictions on, or prohibits the taking of, depositions, the most practical work-around may be to seek opposing counsel's agreement to conduct the depositions in the United States or in another country near the witness with less severe rules.

Production of Documents: In high-technology cases or other cases involving the exchange of highly sensitive information, counsel should examine whether foreign export control laws or state secrets regulations restrict or otherwise regulate the production of technical data or other documents from that country. Foreign local counsel may be needed to assist in that determination, and pending the resolution, responses to discovery requests should include an objection based on any foreign blocking statutes.

In *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 544 n.28 (1987), the Supreme Court endorsed a balancing test to decide whether foreign blocking statutes excuse non-compliance with discovery orders. Because U.S. courts generally are reluctant to excuse noncompliance, counsel for foreign parties need to press at the outset of litigation for solutions with foreign regulators or tribunals that will allow full or partial production of the requested information.

Application of the Attorney-Client Privilege: Foreign parties can and do avail themselves of the protections of the attorney-client privilege, but understand that

challenges to privilege assertions are sometimes made when the privilege is applied to internal company communications with in-house legal professionals who are not U.S. or foreign-qualified lawyers. Courts have used a variety of approaches to decide whether the privilege should apply, and as noted above, choice-of-law issues can arise as part of that analysis.

Some courts examine whether the in-house legal professional serves as the functional equivalent of a U.S. lawyer, in which case the privilege may be recognized. Here, the inquiry is focused on whether the professional has legal training, is employed to give legal advice to corporate officials on matters of legal significance to the corporation, and intends the communication to be kept in confidence. Still, other courts have applied a more bright-line approach in denying application of the privilege in these situations.

TAKE TIME TO PREPARE FOREIGN WITNESSES

Foreign witnesses, particularly those from Asia, are not accustomed to the adversarial nature of our court system. In some cultures, directly contradicting another person can be viewed as discourteous, and conflict in interpersonal relationships is to be avoided. Left unprepared, your foreign witness's polite finessing of a hostile U.S. cross-examiner might be viewed by the U.S. jury as either evasiveness, or worse, an admission. You might consider counseling your foreign witnesses that it is acceptable to say: "No, counsel, I disagree with your statement." Mock cross examinations, useful for first-time U.S. witnesses, are doubly useful for foreign witnesses bewildered by the seemingly hostile or, in their eyes, boorish nature of U.S. court proceedings.

SELECT YOUR TRANSLATOR CAREFULLY

When testimony from foreign witnesses requires translation, it is important to select a strong translator whether you are representing or examining the witness.

We have sat through examinations where the translator, although competent, could

not provide the crispness or clarity needed when every word mattered. For this reason, when the other party is supplying the primary translator, you should consider bringing your own check translator to challenge errors in translation. Moreover, the professional demeanor and appearance of the translator can play a role in how a witness is perceived by the trier of fact. Finally, since translation doubles the amount of time needed for an examination, the patience of judges and juries will be tested when poor interpretation requires questions to be re-asked or testimony repeated — all the more reason to choose an interpreter who comes highly recommended or whom you have seen at trial or deposition in other matters.

ENCOURAGE OUTSIDE-THE-BOX THINKING

Over the years, we have learned that foreign counsel, even those who are top tier in their respective countries, sometimes take a "question asked, question answered" approach. They are excellent at researching questions posed to them by the U.S. client or U.S. litigator, but sometimes fail to flag other questions that should be asked or point to alternative, and perhaps superior, strategic paths. It has been our experience that U.S. lawyers are sometimes more accustomed to taking a big-picture, problem-solving approach, ascertaining the client's problem and goals and then reasoning backwards from there to chart the road map to victory. Our advice when retaining foreign counsel is to not assume they will approach problem solving in the same way you would and to thoroughly vet the problems and questions in advance and during your consultation.

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