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## International Discovery: Navigating Uncharted Waters

*Christopher Cotton and Laurel Harbour report on U.S. courts approach to cross-border discovery. In cases involving non-U.S. litigants or U.S.-based litigants with operations overseas, tensions between the expectations of U.S. courts and foreign laws increasingly arise in the context of foreign data protection statutes and blocking statutes. The article further suggests possible strategies for companies facing such discovery.*

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**International Association of Defense Counsel**

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**International Discovery: Navigating Uncharted Waters**

*"The extraterritorial application of national laws frequently subjects companies to conflicting or overlapping legal requirements, fosters unpredictability, increases the risks involved in commercial activities, exposes companies to overly burdensome litigation in foreign jurisdictions, and inflates legal and other transaction costs."*

*International Chamber of Commerce*[1]

Litigants in the United States are accustomed to expansive discovery. The Federal Rules of Civil Procedure allow discovery into "any matter, not privileged, that is relevant to the claim or defense of any party"; relevant information need not be admissible at trial if the discovery appears "reasonably calculated to lead to the discovery of admissible evidence."[2] Discovery of such sweeping scope is literally foreign to other civil justice systems. Indeed, engaging in such broad discovery may conflict with legal obligations imposed in those countries. This can leave companies in an impossible quandary where compliance with one country's laws constitutes a violation of another's.[3]

In cases involving non-U.S. litigants or U.S.-based litigants with operations overseas, tensions between the expectations of U.S. courts and foreign laws increasingly arise in the context of foreign data protection statutes and blocking statutes. With the advent of technologies allowing the rapid creation and transmittal of information, and of recent e-discovery amendments to the Federal Rules of Civil Procedure, these tensions will likely increase.

This article discusses the approach U.S. courts have taken to cross-border discovery and suggests possible strategies for companies facing such discovery.

**Data Protection**

Data protection measures outside the United States can be substantial and may conflict with U.S. discovery demands. For instance, European Union Directive 95/46/EC requires Member States to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[4] Where the Commission finds that a third country (like the United States) does not ensure an adequate level of protection, Member States are required to take the measures necessary to prevent any transfer of data of the same type to the third country in question.[5]

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1. Extraterritoriality & Business, International Chamber of Commerce Policy Statement, Document 103-33/5 (Final) (13 July 2006).
2. *See* Fed. R. Civ. P. 26(b) (Discovery Scope & Limits).
3. Extraterritoriality & Business, International Chamber of Commerce Policy Statement, Document 103-33/5 (Final) (13 July 2006).
4. *See* EU Directive 95/46/EC, Article 2: "'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".
5. *See* EU Directive 95/46/EC. *See also* United Kingdom Data Protection Act 1998 (Principle 8): "Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

**Blocking Statutes**

Some countries have enacted "blocking statutes" to prevent the application of another country's laws from having extraterritorial effect. For example, the French Blocking Statute provides:

> Art. I *bis* – Subject to international [agreements] or accords and laws and regulations in effect, any individual is prohibited from requesting, seeking or disclosing, in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature directed toward establishing evidence in view of legal or administrative proceedings abroad or in relation thereto.
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> . . .
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> Art. 3 – Without prejudice to heavier penalties set out by law, any violation to [*sic* ] the provisions of articles 1 and 1 *bis* of this law shall be punishable by imprisonment of two to six months and a fine of FRF 10,000 to FRF 120,000 or by either one of these two penalties. [6]

**Balancing the Competing Interests: Theory vs. Reality**

The Restatement (Third) of Foreign Relations Law sets out several factors courts should consider in evaluating the reasonableness of an international litigant's conduct in the face of conflicting legal requirements:

1. The importance to the litigation of the documents or information requested;

2. The degree of specificity of the request;

3. Whether the information originated in the United States;

4. The availability of alternative means of securing the information; and

5. The extent to which noncompliance with the request would undermine important interests of the U.S., or compliance with the request would undermine important interests of the state where the documents or information is located.[7]

In addition, the Hague Convention[8] sets forth procedures for obtaining discovery abroad, hammered out by the signatories in an effort to provide an alternative means of securing the information. The Hague Convention thus would seem to offer a possible solution to companies bound by both U.S. discovery rules and another country's blocking statute or data protection law. Ratified by the United States and other countries, the Hague Convention recognized the need for improved cooperation in civil and commercial matters among the signatories.[9] The Convention established a system for

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6. Quoted in *In re Vivendi Universal, S.A. Securities*, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006).
7. Restatement (Third) of Foreign Relations Law § 442(1)(c).
8. The Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters.
9. *See* The Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters, Recitals: "The States signatory to the present Convention, . . . Desiring to improve mutual judicial co-operation in civil or commercial matters . . . ." *See* 28 U.S.C. § 1781. *See also id.* Article 11 (providing protection where the law of the State of execution creates a privilege or duty to refuse the production of evidence).

obtaining evidence located abroad that would be "tolerable" to the country executing the request and that would result in the production of "utilizable" evidence.[10] As Justice Blackmun observed:

> The Convention furthers important United States interests by providing channels for discovery abroad that would not be available otherwise. In general, it establishes "methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence."
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> . . . .
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> The Convention also serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems.[11]

In deciding whether discovery should proceed under the Hague Convention or the Federal Rules of Civil Procedure, "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *See In re Vivendi Universal, S.A. Securities*, 2006 WL 3378115 (S.D.N.Y.) at *2 (quoting *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. at 546). Courts have identified four factors in determining whether comity justifies the use of Hague Convention instead of the Federal Rules to obtain discovery:

1. The competing interests of the nations whose laws are in conflict;
2. The hardship of compliance on the party or witness from whom discovery is sought;
3. The importance to the litigation of the information and documents requested; and
4. The good faith of the party resisting discovery. [12]

While several of these factors differ from those set out in the Restatement, both lists include consideration of the interests of the U.S. and the country where the documents are located.

In practice, The Hague Convention has been cold comfort to multinationals facing U.S. demands for discovery of their documents located in other countries. The recent decision in the *Vivendi* litigation, in which the Southern District of New York applied these four factors, illustrates the difficulty persuading a U.S. court to use The Hague Convention and defer to a blocking statute. In *Vivendi*, plaintiffs claiming securities fraud sought to compel Lazard to produce, pursuant to a subpoena duces tecum, 53 categories of documents located in France. Lazard countered that as a matter of comity and in deference to the French Blocking Statute, plaintiffs should be required to obtain the French documents pursuant to The Hague Convention. The court first noted that the party seeking to displace the Federal Rules of Civil Procedure in favor of The Hague Convention bears the burden of demonstrating that it is more appropriate for the Court to follow the Hague Convention.[13] The court then quickly dispensed with France's interest in its blocking statute. Noting that the majority of U.S.

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[10]. *See Societe Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n. 29 (1987).

[11]. *See id.* (Blackmun, J.) (concurring in part and dissenting in part).

[12]. *In re Vivendi Universal, SA Securities*, 2006 WL 3378115 at *2.

[13]. *Id.*

courts had held that "France has little interest in the enforcement of its blocking statute,"[14] the court cited other decisions concluding that the statute was intended to protect French business from foreign discovery[15] and was a "manifestation of French displeasure with American pretrial discovery procedures, which are significantly broader than the procedure accepted in other countries."[16]

The court then turned to the hardship of compliance on Lazard – the possibility of criminal prosecution in France pursuant to the blocking statute. While two French agencies had threatened Lazard with prosecution, the court joined other U.S. courts in holding that the blocking statute "does not subject defendants to a realistic risk of prosecution. . . ."[17] The court also found that the third factor – the importance to the litigation of the documents requested – weighed in favor of applying U.S. discovery rules, noting that it would be "extremely surprising if Lazard did not have at least some relevant documents."[18] With only the fourth factor –the good faith of the party resisting discovery – weighing against the application of U.S. discovery rules, the Court held that The Hague Convention protocols need not be followed and required Lazard to produce the documents it held in France. Other U.S. courts have taken the same approach as the *Vivendi* court.[19]

Given the difficulty of persuading U.S. courts to apply the Hague Convention and defer to foreign legislation which limits discovery, companies should develop strategies to address cross-border discovery. Strategies might include the following:

- Identify blocking statutes and data protection statutes in international jurisdictions critical to company business. While U.S. courts may be unlikely to defer to legislation attempting to restrict discovery, other jurisdictions may be more receptive to arguments that discovery which would violate this legislation should not be permitted.[20]

- When data mapping in anticipation of electronic discovery, evaluate systems for storing documents in critical international jurisdictions, in light of blocking statutes and data protection laws. Is a separate system required for certain data or does the data have to be segregated? What restrictions on the systems are required?

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14. *Id.* at 2.
15. *Id.* at 3 (citing *United States v. Gonzalez*, 748 F.2d 74, 77-78 (2nd Cir. 1984).)
16. *Id*. (quoting *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 508 (N.D. Ill. 1984).)
17. *Id*. (quoting *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000).)
18. *Id*.
19. *See*, e.g. *SEC v. Sandifur*, 2006 WL 3692611 (W.D. Wash. Dec. 11, 2006) (quoting *Nationale Industrielle Aérospatiale*, "American courts are not required to adhere blindly to the directives of countries who oppose unauthorized, American-style discovery even when they have gone so far as to enact 'blocking statutes.'"); *In re Pharmalat Securities Litigation*, 239 F.R.D. 361 (S.D.N.Y. 2006) (quoting *In re Auction Houses Antitrust Litigation*, 196 F.R.D. 444, 446 (S.D.N.Y. 2000), "while courts have taken different approaches to this question, the modern trend holds that the mere existence of foreign blocking statutes does not prevent a U.S. court from ordering discovery although it may be more important to the question of sanctions in the event that a discovery order is disobeyed by reason of a blocking statute."); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); *Valois of America v. Risdon Corp.*, 183 F.R.D. 344, 348-49 (D.Conn. 1997). But *see, e.g. In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 354-55 (D. Conn. 1991) (required use of The Hague Convention where plaintiffs' discovery requests were "excessive").
20. *See* Daniela Levarda, "A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery," 18 FORDHAM INTERNATIONAL LAW JOURNAL 1340 (Apr. 1995) ("Variant national policies, however, such as the propensity of the United States to compel broad extraterritorial discovery, contrasted by the United Kingdom's deference to foreign confidentiality concerns, have preserved a marked disparity in the adjudication of discovery disputes, both on a global and a domestic level.").

- Evaluate data creation with an eye toward data protection and blocking statutes which protect particular types of data. For example, should the forms or data fields containing protected information be revised to permit quicker, more reliable redaction or to eliminate the need for redactions?

- Flag statutes outside the U.S. which present a conflict with federal discovery rules at the Rule 16 discovery conference. Attempt to come to an agreement with plaintiffs about documents covered by applicable statutes in other countries.

- Produce documents in waves, producing first those documents which do not raise conflicts with statutes outside the U.S.

- Include a provision in the protective order regarding the company's obligations under statutes of other countries which impose responsibilities on companies asked to produce documents from that jurisdiction. Determine whether the data protection law, for example, would also restrict dissemination of the data by the plaintiffs receiving the data, and if so, include a provision regarding their responsibility in the protective order.

**Conclusion**

With the exponential growth in electronic documents and data, companies doing business internationally need to be prepared to respond to cross-border discovery. U.S. courts are very likely to follow the federal rules rather than defer to other countries' restrictions on discovery. Just as prudent companies are developing an e-discovery plan, they should develop strategies for cross-border discovery to address the conflicting demands of the U.S. and other countries.