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## Lawyers see challenges in cross-border disputes

By Rachael G. Pontikes and Brian Slipakoff

When a business finds itself in a dispute with a company located in a different country, it suddenly faces differences in the law, legal process and culture — all of which create unique challenges for the company and its attorneys. Here are some practical tips on how to overcome the peculiarities that cross-border disputes present.

### 1. How to get documents from an uncooperative foreign third party.

Let's say a third party in the European Union has documents that are relevant to your case. How do you obtain them? Assuming the third party is uncooperative, you can utilize the Hague Convention of March 18, 1970, on gathering evidence from abroad in civil and commercial matters (the Hague Convention).

To initiate discovery under the Hague Convention, you need to have the court in which your case is pending issue a "letter of request," which asks the judicial authority of another country to gather evidence for use in the judicial proceeding in the requesting state. Be aware that courts have often noted that discovery through the Hague Convention can be costly, uncertain and time-consuming.

The availability of the Hague Convention alludes to a more basic question: Does local law allow you to obtain what you are seeking? The European Union has a privacy law entitled the Data Protection Directive (the directive). The directive generally prohibits the international transfer of "personal data" — broadly defined as "any information relating to an identified or identifiable natural person" — unless the country to which the data are to be transferred "ensures an adequate level of protection" equivalent to what it would receive in an EU member state.

Because the EU has not found that the United States provides an "adequate level of protection," the only way "personal data" can be obtained is through the directive's exceptions, one of which is that "the transfer is necessary" for "the establishment, exercise or defense of legal claims[.]"

If you can convince both the entity against whom the discovery is sought and the foreign state that this exception applies, then your discovery should be permitted, with some restrictions. The directive requires, among other things, that any production be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes." In

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sum, you may want to consider starting right away and be persistent. It can take time and effort to compel a third party located in the EU to produce documents.

### 2. How to get foreign third-party business records into evidence at trial.

Even the best possible scenario — a cooperative foreign third party — presents a challenge. Suppose that you have obtained the business records from a foreign third party, but you cannot get a witness to trial to authenticate the documents. If this third party is unwilling to cooperate, you are required to go through the cumbersome Hague Convention procedures set forth above.

Federal Rule of Evidence 803(6)

provides a simpler and more cost-effective procedure for putting foreign third-party business records into evidence: A certification under the penalty of perjury by the "custodian or other qualified witness" that the records meet the requirements of the business records exception.

Because declarants authenticating foreign business records may not be subject to U.S. jurisdiction, it is ineffective in the United States to put the declarant under the penalty of perjury. To put some teeth into the certification requirement, the declaration that would be admissible under Rule 803(6) has to "be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed."

When having foreign business records certified, it is necessary to consult local counsel in the jurisdiction where the records are located to ensure that the certification places the declarant under criminal penalties for perjury in the country in which it is signed. Otherwise, you risk having a document that

you cannot place into evidence.

### **3. How to get facts from foreign witnesses into evidence at trial.**

It can often be challenging and expensive to bring key foreign witnesses to trial to authenticate documents or testify live to the needed facts. Here, Federal Rule of Evidence 804 becomes useful because it permits the admission of certain types of hearsay where the declarant is “unavailable.” Under this rule, where statements are made against interest, including against proprietary or pecuniary interest and the declarant is unavailable, the statement will be admitted as an exception to the hearsay rule.

Under this rule, the declarant is unavailable if he or she is absent from trial and the proponent of a statement has been unable to procure his or her attendance or testimony by process or other “reasonable means.” In practice, this inquiry amounts to whether the testimony could have been procured by “other reasonable means.”

This requirement means that the proponent must not only attempt to compel the attendance of the witness, but also must attempt to depose the witness using reasonable efforts.

Compelling a witness to sit for a deposition under the Hague Convention is a daunting process. Beyond the delays

inherent in the Hague procedure, you have to contend with the limitations of that country’s legal system.

Many civil law countries — including Italy, Spain and Portugal — do not guarantee a party seeking a compelled deposition the right to oral depositions of the kind permitted under Federal Rule of Civil Procedure 30. In light of these limitations, the Hague Convention falls on the “impracticable, but not legally impossible” side of the ledger. Therefore, pursuing discovery through the Hague Convention is not a prerequisite to admissibility under Federal Rule of Evidence 804.