

International Discovery: Obtaining Foreign Evidence for Use in a US Trial

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International Discovery

How to Get the Evidence You Need From Foreign Non-Parties

Agenda

1. Discovery in Canada
2. Discovery in Asia
3. Discovery in Latin America
4. Discovery in the EU

International Discovery

Overview of Discovery in Canada

1. Overview of Canadian Procedure

- Not a party to the Hague Convention
- Need Letters of Request (“Letters”)
- Two step process for Letters:
 1. US motion
 2. Canadian application
- Letters are discretionary



2. US Motion



- Brought in US proceeding venue
- With or without notice
- Consult Canadian lawyers when drafting affidavit and Letters
 - Court may “look behind” Letters for sufficiency
 - Letters will be limited to terms

3. Drafting US Affidavit and Letter

- Letters and affidavit should both state:
 - Assistance necessary in the interests of justice
 - Cannot otherwise be obtained
 - Intended for use in US proceeding
 - Substantial likelihood of obtaining evidence through Letters



4. Canadian Application - Procedure

- Requirements in federal and provincial evidence acts
- Four statutory preconditions:
 1. US proceeding pending or underway
 2. Letter granted
 3. Enforcement of Letter is necessary
 4. Evidence relates to substantial issue



5. Discretionary Factors

1. Relevance
2. Necessary for trial
3. Not otherwise obtainable
4. Not contrary to public policy
5. Reasonably specific
6. No undue burden



6. Applying Discretionary Factors

1. Relevance

- Avoid overly broad requests
- Irrelevant requests will be rejected



6. Applying Discretionary Factors

2. Necessary for Trial

- Evidence may be sought for pre-trial proceedings



6. Cont. Applying Discretionary Factors

3. Not Otherwise Obtainable

- No other evidence of same value
- Attempts have been made
- Witness is unique



6. Cont. Applying Discretionary Factors

4. Not Contrary to Public Policy

- Mandatory (others are “guideposts”)
- Court may narrow or set terms



6. Cont. Applying Discretionary Factors

5. Reasonably Specific

- Avoid broad categories
- Show how evidence will be used
- Must allow identification and location



6. Cont. Applying Discretionary Factors

6. No Undue Burden

- Timing of request
- Proportionality
- Offer to reimburse



7. Deposition Tips and Traps

- Canadian law applies
- May pay deponent's costs
- May answer incriminating questions
- Implied undertaking rule
- US counsel can conduct in Canada
- Deposition by videoconference possible



8. Conclusion

- Involve Canadian lawyers early
- Canadian Courts will consider US process, affidavit and Letters
- Draft Letters to obtain your desired result (e.g. US counsel conducting deposition in Canada)
- Failed applications could result in significant cost consequences



International Discovery

Overview of Discovery in Asia

INTRODUCTION

- Rise of business between US and Asian countries
- Increased need for documents located in Asia to be used in US litigation
- Expansion of global discovery and privacy laws
- Increase in regulatory investigations and compliance related inquiries



BACKGROUND ISSUES / CHALLENGES

- Cultural understanding of litigation and discovery
- Data privacy and protection laws
 - Conflicts with US discovery
- Translation and non-Romanized languages
- Data collection and onward transfer
- Data security
- Paper documents



APEC PRIVACY FRAMEWORK

- 9 Principles: (1) Preventing Harm; (2) Notice; (3) Collection Limitation; (4) Uses of Personal Information; (5) Choice; (6) Integrity of Personal Information; (7) Security Safeguards; (8) Access and Correction; (9) Accountability
- APEC Cross Border Privacy Rules System (CBPR)
- Art. 29 WP and APEC Joint Opinion on BCRs and CBPRs

CHINA



- State Secrets Laws
- Data collection and transfer issues
- Data security
- Data privacy law developments
- *In the Matter of BDO China Dahua CPA Co., Ltd.*
- *Wultz v. Bank of China Ltd.*

HONG KONG



- Common law
- Practice Direction SL1.2
 - Hong Kong Court of First Instance decision in *Chinacast Education Corp v. Chan Tze Ngon*
- Guidance Note on Personal Data Protection in Cross Border Data Transfer
 - HK Privacy Law Section 33 restricts transfer of personal data outside of HK, but has not yet been brought into force

JAPAN



- Civil law
- Not a signatory to the Hague Convention
- Act on Protection of Personal Information
 - 2015 Amendments
- Discovery regulations being discussed
- Data processing operations located in country and servicing the region

SINGAPORE



- Common law
- Practice Direction 3
 - Development of discovery in local legal system
- Personal Data Protection Act

SOUTH KOREA

- Civil law
- Personal Information Protection Act
- Collection and data transfer
- Data security
- Unfair Competition Prevention and Trade Secret Protection Act



A PATH FORWARD - PRACTICAL TIPS

- Balance data protection and discovery needs
- Obtain local counsel
- Attempt to limit or tier discovery
- Local processing and review
- Use of consent
- Confidentiality orders



SEDONA INTERNATIONAL PRINCIPLES

- *The Sedona Conference® International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation*
 - Six main Principles
 - Cross-Border Data Safeguarding Process and Transfer Protocol

International Discovery

Overview of Discovery in Latin America

Latin American

Check For Multilateral Treaties

- **1970 Hague Evidence Convention**
- **Inter-American Convention on Letters Rogatory**
- **Vienna Convention**
- **Foreign country regulations**

Latin American

Number of Latin American Countries in each Convention

Inter-American Convention on Letters Rogatory	Vienna Convention on Consular Relations	Hague Evidence Convention
17	20	5

Non-Treaty Countries

- **Check foreign laws**
- **Where usually found:**
 - Law of the Judicial System (Ley del Órgano Judicial)
 - The Code of Civil and Commercial Procedure (Código Procesal Civil y Mercantil)

Treaty Country (Peru)

- **Hague Convention is not in effect between Peru and the U.S.**
- **International judicial assistance between Peru and the U.S. governed by:**
 - Inter-American Convention on Letters Rogatory
 - Vienna Convention on Consular Relations (VCCR)

Discovery in Peru

- **May use Letters Rogatory in accordance with:**
 - Inter-American Convention on Letters Rogatory (“The Convention”)
 - Additional Protocol to the Inter-American Convention on Letters Rogatory (“The Protocol”)
- **May seek judicial assistance in Peru**

Letters Rogatory

U.S. Court Approval

- **Bring motion or application (if no proceeding) in court where U.S. litigation is pending**
- **Can be brought without notice to the non-party**
- **Usually issued at hearing**

Letters Rogatory

Prepared on forms in one of four official languages of the OAS

English

French

Spanish

Portuguese

Or in the official language of the State of Origin

Letters Rogatory

- **Must bear seal of judicial authority**
- **Copy delivered to person notified**
- **Copy remains in possession of the State of Destination (Peru)**
- **Requests must be complete, clear, and specific**

Form A

REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS PURSUANT TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM A

LETTER ROGATORY ¹

<p>1</p> <p>REQUESTING JUDICIAL OR OTHER ADJUDICATORY AUTHORITY</p> <p>Name _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>	<p>2</p> <p>PLAINTIFF: vs. DEFENDANT:</p> <p>DOCKET No: _____</p>
<p>3</p> <p>CENTRAL AUTHORITY OF THE STATE OF ORIGIN</p> <p>Name: _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>	<p>4</p> <p>CENTRAL AUTHORITY OF THE STATE OF DESTINATION</p> <p>Name: _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>
<p>5</p> <p>REQUESTING PARTY</p> <p>Name: _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>	<p>6</p> <p>COUNSEL TO THE REQUESTING PARTY</p> <p>Name: _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>

PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY	
<p>Name: _____</p> <p>Address Line 1: _____</p> <p>Address Line 2: _____</p> <p>Address Line 3: _____</p> <p>Address Line 4: _____</p>	<p>Is this person responsible for costs and expenses? Yes <input type="checkbox"/> No <input type="checkbox"/> If not, check in the amount of \$ _____ is attached. (Or proof of payment is attached.)</p>

The Central Authority signing the letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the protocol to the Inter-American Convention on Letters Rogatory:

- * A. Requests their prompt service on: _____

The undersigned authority requests the service be carried out in the following manner:

- * (1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above mentioned Convention; or

- * (2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or
- * (3) If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

- * B. Requests the delivery of the documents listed below to the following judicial or administrative authority:
 Authority: _____

- * C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate of the attached Form C.

Done at _____ this _____ date of _____, 20__

Signature and stamp of the judicial or other adjudicatory authority of the State of origin	Signature and stamp of the Central Authority of the State of origin
--	---

Title or other identification of each document to be delivered:

¹ Complete the original and two copies of this form; if A (1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.
 *Delete if inapplicable

Form B

ANNEX TO THE ADDITIONAL PROTOCOL
TO THE INTER-AMERICAN CONVENTION OF LETTERS ROGATORY

FORM B
ESSENTIAL INFORMATION FOR THE ADDRESSEE¹

To (Name and address of the person being served) _____

You are hereby informed that (Brief statement of nature of service) _____

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I*
FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

B. The remedies sought or the amount in dispute is as follows:

C. By this service, you are requested:

D. * In case of service on you as a defendant you an answer the complaint before the judicial or other adjudicatory authority specified in Form A, Box 1 (State place, date and hour): _____

* You are being summoned to appear as: _____

¹ Complete the original and two copies of this form in the language of the State of origin and two copies in the language of the State of destination.

* Delete if applicable.

* If some other action is being requested of the person served, please describe: _____

E. If you fail to comply, the consequences might be: _____

F. You are hereby informed that a defense counsel appointed by the Court or the Following legal aid societies are available to you at the place where the proceeding is pending.

Name: _____

Address: _____

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II *
FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE
AUTHORITY

To: _____

(Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned authority with the following information.

The documents listed in Part III are being furnished to you to facilitate your reply.

*Delete if inapplicable.

III
LIST OF ATTACHED DOCUMENTS

(Attach additional pages if necessary)

Done at _____ this _____ day of

_____, 20 _____

Signature and stamp of the
judicial or other adjudicatory
authority of the State of origin

Signature and stamp of
the Central Authority
of the State of Origin

Form C

ANNEX TO THE ADDITIONAL PROTOCOL
TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM C

CERTIFICATE OF EXECUTION¹

To: _____

(Name and address of judicial or other adjudicatory authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

- * A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date: _____

At (Address) _____

By one of the following methods authorized by the Convention.

- * (1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above mentioned Convention, or

- * (2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent, or

- * (3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination; (Specify method used)

¹ Complete the original and one copy in the language of the State of destination.
*Delete if inapplicable

- * B. That the documents referred to in the letter rogatory have been delivered to:

Identity of person _____

Relationship to the addressee _____
(Family, business or other)

- * C. That the documents attached to the Certificate have not been served or delivered for the following reason(s):

- * D In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement.

Done at _____ the _____ day of _____ 20__

(Signature and stamp of Central Authority of the State of destination)

Where appropriate, attach originals or copies of any additional documents proving service or delivery, and identify them

*Delete if inapplicable

Sending Letter Rogatory

- **Outgoing letters sent to the designated Central Authority for the U.S.**
- **Department of Justice Office of International Judicial Assistance forwards to the Peruvian designated Central Authority (the “Ministry of Foreign Affairs”)**
- **Peruvian Central Authority makes sure all legal requirements are met**
- **Right to refuse**

Sending Letter Rogatory

- **The Letter Rogatory transmitted to the appropriate authority**
- **Delivered to non-party according to appropriate authority's rules**
- **Process typically takes between four to six months**
 - Can take up to two years depending on complexity

Depositions/Witness Testimony

- **In Peru, a judge appointed by the Superior Court is responsible for taking the deposition of a witness**
- **The judge will ask questions prepared by the U.S. party**

Vienna Convention on Consular Relations

- **Substantially the same as the procedure under The Convention**

International Discovery

Overview of Discovery in The EU

Introduction

- Europe and the EU
 - Regional and national laws and regulations
 - Recent and ongoing developments
- Legal and Cultural Considerations
 - Scope of US Discovery
 - Common v. Civil Law Jurisdictions
 - Data Protections and Privacy
 - Cross-Border Data Flow Restrictions
 - Existing laws in context of modern technology

Europe and The EU



EU Judicial System



- Most EU member states:
 - Civil Code jurisdictions
 - Limited or no party discovery
 - Personal data protection laws
 - US discovery (especially eDiscovery) seen as excessive and invasive

EU Statutes and Regulations



- Data Protection Laws
- Blocking Statutes
- Other legal and regulatory considerations:
 - Labor laws, Works Councils, Telecom laws...

EU Data Protection

The EU Directive*

- Being replaced by omnibus regulation in ~2018
- Overarching framework for personal data protection
- Enacted in national Data Protection Acts (DPAs)
- Administered by national authorities
- Article 29 Working Party
 - non-binding interpretive guidelines e.g. WP 158
- Broad protection of Data Subjects' "personal data" from "processing" and transfer by Data Controllers

*Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

EU Data Protection

- Protects the “personal data” of Data Subjects by restricting Data Controllers in two principal ways:
- Processing
 - Fair and Lawful requirements
- Transfer
 - Permitted within EEA & countries with “adequate” protection
 - Mechanisms for transfers to the US:
 - » Consent
 - » Invalidated October 2015: EU/US Safe Harbor
 - » Model Contracts -- ?
 - » Binding Corporate Rules -- ?
 - » Under review: EU/US Privacy Shield

EU Data Protection

General Data Protection Regulation (GDPR)

- EU-wide regulation replacing the EU Directive
- Status:
 - Near-final draft December 2015
 - Effective by June 2016
 - 2-year transition period
- Broadly similar principles, higher stakes:
 - Enhanced data subject rights
 - Fines: up to 4% worldwide annual turnover
 - Broader application: geographic; data “processors”
 - Compliance requirements

EU Data Protection

Best practices:

- The Sedona Conference®
 - International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation (EU Edition)
- 6 principles
- Model Protective Order
- Data safeguarding process and transfer protocol

Blocking Statutes

General Protection:

- National sovereignty
- Economic interests
 - E.g. France, Switzerland

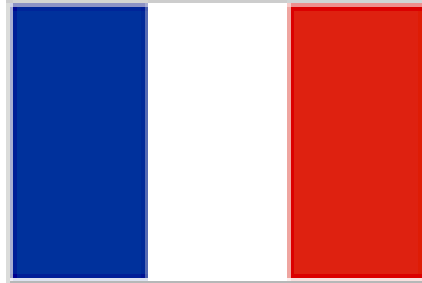
Industry-specific protection

- E.g. Banking Secrecy laws

Subject-specific protection

- E.g. Antitrust investigations

French Blocking Statute



- "Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek, or communicate, in writing, orally or in any other form, documents or information of an economic, financial or technical nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures."
- Applies to "French nationals and directors, representatives, and employees of companies acting in France."
- "Christopher X" case

The Hague Convention of 1970*



- International treaty
 - Trumps signatories' national blocking statutes
- Process for obtaining civil matter discovery via
 - Letter of request
 - Specifies content and procedure
 - Diplomatic channels

Hague Convention Considerations

- Not all EU members are signatories
 - National courts may still honor letter of request
- Article 23 exceptions to pre-trial discovery
 - e.g. France, Germany
- Lengthy, uncertain process in many countries
- Local practice requirements
 - Consult local counsel
- US courts
 - *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987)

Practice Tips

- Identify non-US data sources early
- Be prepared to educate the court, adversary
- Anticipate time required
- Limit or tier discovery
- Leverage WP 158, Sedona Principles
 - *In re Predaxa* (S.D. Ill. 2013)
 - *Trueposition v. Ericsson* (E.D. Pa. 2012)
 - *AccessData v. ALSTE* (D. Utah 2010)
 - *In re Activision Blizzard* (Del. Ch. 2014)

US: Legal Trends

- Growing awareness among US Judiciary
- Professional bodies educating, creating work product, in dialogue with EU authorities
 - ABA International Litigation--international discovery group
 - The Sedona Conference
- 2015 FRCP rule amendments
- EU companies seeking discovery under US laws
 - 28 U.S.C. § 1782

QUESTIONS



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