Non-Party Discovery Under The Hague Convention – The Fine Print

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The increasingly global economy means that commercial transactions with international components are now commonplace in industries that were formerly confined to local markets. As a consequence, companies are finding themselves embroiled in cross-border disputes where relevant evidence is located abroad. Those involved in such disputes may be surprised to learn that the broad discovery to which they are accustomed will often be unavailable where the documents or testimony sought are located outside U.S. borders. Accordingly, a company contemplating an international transaction would be wise to set up document retention procedures and to enter into access to records and audit agreements to avoid the practical difficulties that may exist with obtaining U.S. style discovery in the event a dispute does arise.

Discovery Under the Federal Rules of Civil Procedure

Federal courts have the power under the Federal Rules of Civil Procedure to compel individuals and entities over whom they have personal jurisdiction to respond to broad-ranging pretrial discovery. Such discovery generally encompasses all matters that are relevant and not privileged, including matters likely to lead to the discovery of admissible evidence, and the Rules provide a variety of means for obtaining such discovery. A federal litigant can obtain discovery from all other parties to a given action, as well as from non-parties with relevant information who are located in the United States. Where the discovery is sought from a foreign party, notions of international comity factor into the equation, and federal courts, in their discretion, can limit the scope of discovery. Nonetheless, a party to a federal lawsuit can usually take comfort in the fact that it will be afforded fairly broad discovery from other parties to that action, as well as from non-parties located in the United States.

On the other hand, litigants seeking documentary or testimonial discovery from non-parties located outside the United States will have fewer and more circumscribed discovery tools at their disposal. Historically, the sole procedure for obtaining documents or testimony from a foreign non-party was to petition a U.S. government official to submit a "letter rogatory" to a governmental official of the country where the information was located, and then to let the diplomatic channels take over. This old-fashioned mechanism has been largely replaced thanks to the United States' accession to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, better known simply as the "Hague Convention". Now, when a domestic litigant seeks documents or testimony from a non-party witness located in a fellow "Contracting State," the litigant can use the Hague Convention procedures in an attempt to get the sought-after information.

The Ostensible Reach of the Hague Convention

In addition to the United States, the United Kingdom, France, Israel, Italy, Germany, and more than twenty other nations have ratified the Hague Convention. Generally speaking, the Hague Convention was enacted to enable litigants to enlist the assistance of the laws and procedures of other Contracting States to obtain evidence to be used in "civil or commercial matters." Under the Hague Convention, evidence is generally obtained pursuant to a "letter of request" transmitted through a central authority in the receiving country (that is, the country where the evidence is located). By its terms, the Hague Convention exists to facilitate the transmission and execution of such letters of request, and to increase the ease by which litigants in Contracting States can obtain evidence located in other Contracting States. To a large extent, the Hague Convention has

accomplished these stated goals.

The Hague Convention reveals a willingness by its signatories to respect foreign procedures for obtaining evidence. In fact, the Hague Convention provides only two grounds upon which a receiving state can refuse to execute a letter of request: "(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or (b) the State addressed considers that its sovereignty or security would be prejudiced thereby." Moreover, in executing a letter of request, the receiving country is required to compel the responding person or entity to comply with the terms of the letter to the same extent that that country would force compliance with orders issued in internal proceedings.

The willingness to respect other countries' procedures has also been expressed by Contracting States themselves. For example, England's R.S.C. (the equivalent of the Federal Rules of Civil Procedure) Order 70, Note 2 provides that "[i]t is the duty and pleasure of the English court to do all that it can to assist the foreign court . . . Just as the English court ought to give full faith and credit to a foreign judgment so it should give full faith and credit to the request of a foreign court for evidence to assist its proceedings."

At first blush, then, the Hague Convention appears to provide litigants with quite significant powers to obtain discovery from non-parties located abroad. However, U.S. litigants should be careful to read the fine print.

The Reality of Hague Convention Discovery

In actuality, while the Hague Convention does enable domestic litigants to obtain *evidence* located in other Contracting States, American-style pre-trial *discovery* is not available from most such countries. Each Contracting State had the opportunity when ratifying the treaty to declare that letters of request under the Hague Convention will not be executed to enable foreign litigants to obtain pre-trial discovery. Most Contracting States made just such a declaration, and thereby prohibited or greatly curtailed the use of letters of requests for purposes of obtaining pre-trial discovery.

For example, England (whose "pleasure" it is to "do all that it can to assist the foreign court") declared that it would not execute letters of request issued to obtain pre-trial discovery of documents or deposition testimony. This means that, to obtain documents pursuant to a letter of request under English procedure, an American litigant must establish that the documents will actually be used as evidence at trial and identify with particularity the documents it seeks, perhaps even including a separate description of each individual document. This limitation can pose substantial difficulties, especially when the domestic party does not know exactly what documents exist. In addition, Hague Convention depositions taken in England are limited to witness examinations for use at trial. To many unwitting litigants' chagrin, attempts directed at most Contracting States to obtain documents or testimony for pre-trial discovery purposes will be rejected.

Conclusion

The wide-ranging discovery available to litigants in U.S. federal courts is a uniquely American invention. Notwithstanding the Hague Convention, American litigants typically will not be afforded broad pre-trial discovery from non-party witnesses abroad. The inability to obtain such discovery can potentially be devastating to the prosecution or defense of a lawsuit. Accordingly companies should consider including in their contracts document depository provisions, access to records provisions, and/or pretrial discovery provisions governing the rights of the parties. Though such provisions cannot replace the access to witnesses and documents one would have if the dispute were confined to the U.S., particularly with respect to third-party discovery, such provisions can decrease, if not altogether alleviate, the need to rely on the Hague Convention should the transaction end in litigation.

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