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THE WALLS COME TUMBLIN' DOWN:

Cross-Border and Overseas Discovery in International Litigation

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Cross-Border and Overseas Discovery in International Litigation

The world today is a global village. The rapid advance in technology has only made it easier for companies and corporations to conduct business across the borders of their domestic countries. Trade, transactions and partnerships occur every day between entities from different countries. Of course, with increased interactions, there can be an increasing number of problems, sometimes resulting in litigation. When litigation ensues between parties in different countries, it can be more difficult to unearth the discovery materials that litigants are used to receiving in proceedings involving parties within the United States. There are multiple methods litigants may employ to obtain cross border discovery.

Hague Evidence Convention

The preferred method of seeking discovery from foreign jurisdictions is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention). There are 63 signatory countries to the treaty. The convention establishes two procedures by which a party can seek discovery, via (i) Letters of Request, and (ii) diplomatic or consular agents and Commissioners.

The process can be time consuming, as it requires the litigant in the United States to have the request transmitted officially to the foreign country and wait for a response from receiving authority within that country approving the request and transmitting it to the entity actually preparing the response.

Letters Rogatory[i]

A letter rogatory is a formal request from a court in which an action is pending to a foreign court asking for assistance to perform a judicial act. In assessing whether to pursue this avenue, a party should keep the following observations in mind: (1) The process is unpredictable, cumbersome, and slow; (2) once prepared by counsel, a letter rogatory must be signed by a U.S. judge and authenticated, if required by the foreign jurisdiction, and then conveyed through diplomatic channels; and (3) letters rogatory are merely a request to the foreign jurisdiction to assist, and the foreign jurisdiction is not obligated to comply.

The Walsh Act[ii]

The Walsh Act, 28 U.S.C. § 1783, allows the subpoena of a U.S. citizen or resident who is in another country, for in-person testimony or a document if the court finds that such testimony or document is necessary in the interest of justice" and if they cannot be obtained through any other means.

The Walsh Act was enacted nearly 100 years ago to ensure access to evidence from the perpetrators of the Teapot Dome scandal, who were fleeing the country.

The Act has low hurdles to discovery in civil cases.[1] A party applying for a Walsh Act subpoena in a civil case needs to show the evidence sought (1) "is necessary in the interest of justice"; and (2) "cannot be obtained by other means." 28 U.S.C. § 1783(a). While these might sound like high hurdles, they generally are not.

For the first element, courts disagree on what is "necessary to the interests of justice." Some courts say an applicant must show that "a 'compelling reason' exists" to order production of evidence.[2] Other courts describe the element requiring only proof that the evidence would be "relevant" under Federal Rule of Civil Procedure 26.[3] Under either standard, courts find that evidence is "necessary to the interests of justice" if it goes to a core issue in the litigation.

For the second element, courts recognize that the phrase "cannot be obtained by other means" does not require impossibility, but merely impracticability.[4] This means that an applicant needs to show that it would be

impractical to obtain the evidence from another source. For example, this might entail proof that the target of the subpoena is the only party with access to a full set of documents.

While not available for use in all instances, as the target of the subpoena must be a U.S. citizen or resident, the Walsh Act can generally be a faster way to obtain discovery than the procedures required by the Hague Evidence Convention.

28 U.S.C. § 1782[iii]

Section 1782 of Title 28 of the United States Code is a federal statute that allows a litigant to a legal proceeding outside the United States to apply to an American court to obtain evidence for use in the non-US proceeding.

Section 1782(a) reads as follows:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. ... The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

In essence, an applicant under Section 1782 merely needs to show three things:

- it is an "interested person" in a foreign proceeding,
- the proceeding is before a foreign "tribunal", and
- the person from whom evidence is sought is in the district of the court before which the application has been filed.

The type of evidence that may be obtained under Section 1782 includes both documentary evidence and testimonial evidence.

For many years, district courts and appellate courts disagreed as to the interpretation of Section 1782. The case law concerning Section 1782 was largely clarified in 2004, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which held that:

- section 1782 discovery may be sought by any "interested person",
- such discovery may sometimes be sought even prior to the initiation of formal proceedings outside the United States, and
- a "tribunal" within the meaning of the section is any tribunal that acts as a "first instance decisionmaker."

The court also largely did away with any requirement of "discoverability" before the non-US tribunal. In

essence, *Intel* held that section 1782 discovery is available to a non-US litigant almost as freely as discovery is available in connection with a lawsuit that is pending entirely before a court in the United States.

International discovery is an unfolding issue in the U.S. legal system. Pending concerns include cost-shifting procedures and navigating comity concerns while balancing national interests of the U.S. and other countries. As globalization and related litigation increases, many more laws, statutes and edicts are expected to unfold, both domestically and internationally, and businesses, corporations and governments will do well to be versed in the evolution of discovery laws.

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[i] American Bar Association, Getting Discovery Across Borders. https:// www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/getting-discovery-across-borders, last accessed February 22, 2023.

[ii] The Walsh Act: Discovery from U.S. Citizens Living Abroad, Robinson+Cole. https://www.natlawreview.com/article/walsh-act-discovery-us-citizens-living-abroad, last accessed February 22, 2023.

[iii] Section 1782 Discovery, Wikipedia. https://en.wikipedia.org/wiki/Section_1782_discovery; last accessed February 22, 2023.