International Litigation: Outbound Cross-Border Discovery—Focus on Hague Evidence Convention, Switzerland, Canada (Ontario), Netherlands, and England and Wales

By Clara Flebus

The International Litigation Committee presented the second installment of its "Cross-Border Discovery" Continuing Legal Education series on June 7, 2022. The program discussed "outbound" cross-border discovery. In the scenario contemplated, parties to a proceeding in the United States seek to obtain evidence (documentary or testimonial) located in Switzerland, Canada (Ontario), the Netherlands, and England and Wales. The session examined collection of evidence via the Hague Evidence Convention, highlighted jurisdiction-specific obstacles to evidence production, and explored additional injunctive mechanisms to trace and secure assets abroad.[1]

The panel featured experts from all four foreign jurisdictions: David Rosenthal, a partner at the Swiss firm Vischer; Samaneh Hosseini, a partner at the Canadian firm Stikeman Elliott; Wouter de Clerck, a partner at the Dutch firm Legaltree; and Sam Roberts, a partner at the English firm Cooke, Young & Keidan. This fascinating around-the-world learning tour was moderated by Gretta Walters, who is a partner at Chaffetz Lindsey in New York City, handling domestic and international commercial and investment disputes.

Hague Evidence Convention

Gretta Walters provided a general overview of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (also known as "Hague Evidence Convention"), which provides a system for discovery of evidence located outside the jurisdiction of a country signatory to the multinational treaty. Currently, the Hague Evidence

Convention counts 64 contracting states and is a widely accepted means of obtaining cross-border evidence.

Under art. 1 of the Hague Evidence Convention, "a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." Each contracting state, as agreed in art. 2, has established a "central authority" to process letters of request seeking evidence in that state. A letter of request needs to be drafted following essential requirements prescribed in art. 3. It must include the names of the parties to the underlying proceeding and a detailed description of the nature of the proceeding for which the evidence is sought. The request must specify, *inter alia*, the evidence to be obtained, documentary or testimonial, the names and contact information of the people to be examined, and the questions to be posed.

When an action is litigated in the United States, the Hague Evidence Convention permits a party to ask a U.S. court to submit a letter of request to the designated central authority of a contracting state in which the evidence is sought. The letter of request becomes a court-issued document addressed to a judicial authority in a foreign country and seeking a specific action such as the production of documents or witness testimony. Since the letter of request comes directly from the court, it is a quicker method to obtain evidence abroad than letters rogatory, which are typically transmitted via diplomatic channels, a time-consuming means of transmission.

In addition to the requirements set forth in the Hague Evidence Convention, letters of request must comply with laws and procedures of the foreign jurisdiction. Importantly, U.S. lawyers should be mindful of requirements imposed by each country regarding the manner in which a request must be drafted and what evidence can be obtained.

Switzerland

David Rosenthal discussed issues arising when collecting evidence in Switzerland as part of pre-trial discovery in the United States. The best option, Rosenthal stated, is trying to agree on voluntary direct production, without using the Hague Evidence Convention, to save time. With respect to obtaining documents, Swiss "blocking" statutes, data-protection law, and secrecy obligations may represent a big obstacle. Simply put, a considerable portion of information pertaining to identifiable individuals and entities may not be freely shared with the United States and its production requires broad redactions. Specifically, art. 271 of the Swiss Penal Act prohibits "official acts" from being performed for or on behalf of a foreign authority on Swiss soil. Such acts include the collection of evidence, including by remote access to servers in Switzerland. Hence, art. 271 may prohibit the production of documents of a party located in Switzerland if: (i) the party cannot freely disclose the documents (according to recent Swiss Federal Court precedent, in principle, any information related to identifiable third parties that is not public should be considered not freely disclosable); (ii) the production occurs under threat of criminal or quasi-criminal sanctions (e.g., contempt of court); or (iii) the production is by non-parties to a proceeding. As a result, redacting the documents may end up being the most time-consuming phase of document production. If personal data is produced, further steps are necessary, such as a protective order ensuring the confidentiality of the personal data.

If voluntary production is insufficient, the second-best option to gather evidence located in Switzerland is the "commissioner" procedure delineated in art. 17 of the Hague Evidence Convention. A U.S. court appoints one or both counsel in the proceeding, or a third-party, as commissioner acting on behalf of the court. The Swiss authorities typically approve this process in approximately two months. Then, the commissioner can travel to Switzerland and collect evidence pursuant to U.S. rules. For example, the commissioner can take depositions or cross-examinations and gather documents, as long as there is no compulsion, everyone participates voluntarily in the process, and the production of evidence complies with Swiss data-protection law and secrecy obligations. Remote collection is possible, too.

A third option is to use a letter of request under the Hague Evidence Convention. A U.S. lawyer should expect a Swiss court to apply its own procedural rules once it receives the request. The process may take several months and for that reason is utilized more frequently to obtain documents from third parties, but overall is not pursued often.

Canada (Ontario)

Samaneh Hosseini focused on procedures to gather evidence in the common law province of Ontario. Canada is not a signatory to the Hague Evidence Convention and, surprisingly, there is no treaty between the United States and Canada governing the process of obtaining evidence across the border. Hosseini explained that there are no rules prohibiting voluntary disclosure, although some privacy laws may apply depending on the nature of what is being disclosed. Accordingly, parties should always try to agree on voluntary disclosure as their first option.

In Ontario, if the parties do not agree to voluntarily disclose, discovery for use in a U.S. proceeding is gathered through letters of request/letters rogatory. These "letters of request" are not processed in the same manner as the requests made under the Hague Evidence Convention. A U.S. lawyer needs to obtain a letter of request from a U.S. court and enforce the request through a Canadian court. Enforcement

of a letter of request remains in the discretion of the Canadian judge. The application to the Canadian court involves a relatively expedited procedure, but it can take several months to prepare the submissions, serve the papers, and have the matter heard.

There are statutory prerequisites for the Canadian court to exercise its jurisdiction, which are not hard to meet. The application must indicate that: (i) the foreign court (i.e., U.S. court) is desirous of obtaining the evidence; (ii) the witness whose evidence is sought is within the jurisdiction of the court where the application is made; (iii) the evidence sought is in relation to a civil, commercial or criminal matter pending before the foreign court; and (iv) the foreign court is a court of competent jurisdiction.

If the statutory jurisdictional requirements are met, Canadian courts apply a non-exhaustive list of discretionary factors to determine enforceability of the request sought. Notably, the scope of discovery in Canada is narrower than it is in the United States. Overbroad requests are generally denied. Alternatively, the court may exercise its discretion to limit the request to what the court considers to be truly relevant. The factors a court will weigh in favor of enforcing a letter of request include: (i) the evidence sought is directly relevant to the foreign dispute; (ii) the evidence sought is necessary for trial and will be adduced at trial if admissible; (iii) the evidence is not otherwise obtainable; (iv) the order sought is not contrary to public policy (i.e., it does not violate privilege, confidentiality, trade secrets or other highly commercially sensitive information); (v) the documents sought are identified with reasonable specificity (i.e., no fishing expedition-style requests); (vi) the order sought is not unduly burdensome having in mind what the relevant witness would be required to do and produce were the action tried in Canada.

These factors must be addressed in the material supporting the application. Generally, discovery of non-parties is subject to a higher standard—a showing that the evidence held by the non-party is relevant to an issue in the action and it would be unfair to try the case without it. The taking of oral evidence is typically ordered under the local court rules, unless the letter of request asks for a specific procedure. In Canada, the party requesting discovery will use it only in the action for which it has been requested, not for other purposes such as commencing a different lawsuit. In addition, Canada is a "loser pays" regime, and the party successfully resisting enforcement of a letter of request is generally entitled to a portion of its costs.

The Netherlands

Wouter de Clerck examined three procedures a U.S. lawyer needs to consider when the evidence to be collected for a U.S. proceeding is located in the Netherlands. First, the conventional route is to send a letter of request to the Dutch court under the Hague Evidence Convention. However, U.S. lawyers should be aware that the Netherlands has made a reservation under art. 23 of the Hague Evidence Convention, declaring that "it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." A request of this type may be rejected by the Dutch central authority (the Hague District Court), or it can be forwarded to the executing authority (a Dutch local district court), where the parties may present their positions regarding those portions of the request that are challenged as contravening the art. 23 reservation. The Dutch local district court may conclude that portions of the letter of request need to be stricken.

The specifics of the Dutch letter of request process are as follows. The Hague District Court (central authority) receives the letter from the foreign requesting authority and checks if the letter complies with the requirements set forth in the Hague Evidence Convention. The letter of request is then sent to a Dutch local district court (executing authority), which forwards the letter to the respondent. Although the local court must act "forthwith," there may be delays in this phase. Upon receiving the request, the respondent communicates with the local court regarding scope, timing and execution of the letter of request, and may file objections to the evidence requested. The local court notifies the applicant of any objections made, schedules hearings, issues a court report of witness hearings, collects and sends the documents produced to the Hague District Court, which, in turn, forwards the results to the foreign requesting authority.

Importantly, the letter of request must contain specific information relating to the documents sought. Under art. 843 of the Dutch Code of Civil Procedure, "a party with a legitimate interest may request from another party a copy, extract or inspection of certain documents regarding a legal relationship to which it or its predecessor is a party." Thus, the request must describe in detail the "legal relationship" that constitutes the basis for seeking discovery of a document. Article 843 comes into play not only with respect to drafting letters of request, but also when employing other discovery tools discussed below. In addition, art. 843 applies to requests for documents from third parties.

A second method to collect documents in the Netherlands is the filing of a Dutch injunctive relief action, pursuant to art. 843, asserting a document production claim. This avenue constitutes a quick alternative to letters of request, which take about six months. The U.S. party makes a direct application to a Dutch injunctive relief judge seeking production of specific documents and explaining the reason they are needed. Typically, this process yields results in about six to ten weeks.

However, injunctive relief is only available for the production of documents, not for hearing witnesses.

A third discovery tool to be considered is an ex-parte application for attachment of evidence, which is brought before the Dutch courts and seeks leave to "secure" evidence, such as electronically stored information, held by a counterparty or third party on Dutch territory. The application requires a showing of danger that the evidence may be destroyed. This method is complementary to the letter of request or the injunctive relief action, and only serves to attach the evidence, not to produce it. Depending on the circumstances, the attachment application should be made before seeking to obtain the evidence by letters of request, which have a long processing time. The procedure to secure the evidence can be accomplished in a matter of days. Counsel makes an application to the local court, which reviews it promptly. If the application is granted, counsel may contact a bailiff or IT specialist who will "attach" the documents at the location of the respondent. The bailiff or IT specialist will then hold the documents as a custodian.

England and Wales

Sam Roberts addressed mechanisms to gather evidence for use in a foreign trial, as the United Kingdom is a party to the Hague Evidence Convention, but has made an art. 23 reservation against requests for pre-trial discovery of documents. Evidence for use at trial, as opposed to "mere information," can be obtained through letters of request, and the jurisdiction of a requesting court need not be a party to the Hague Evidence Convention, but the evidence must be given as witness testimony and will be given in the form of a deposition before an examiner of the court. Requests for documentary evidence must be framed narrowly, avoiding expressions such as "any" or "all" documents, and the documents must be capable of being produced by the witness giving evidence. When documentary evidence is sought, the request must include a description of the documents sufficient to allow the competent authority executing the request to identify them.

As soon as the letter of request is issued by the requesting court, counsel can make an application to the English court for an order executing that letter, without waiting for the letter of request to be transmitted through official channels. The application can be done ex-parte, but the process remains slow. In addition to the documents, counsel may ask for the opportunity to examine the witness in front of an examiner of the court or a quasi-judge appointed by the court as an examiner. However, there are limits to the authority of an examiner: she cannot declare a witness hostile and cannot rule on issues of privilege or admissibility, which are determinations reserved for the trial judge to make. This procedure is also available in aid of foreign-seated arbitrations.

Another important mechanism to be considered if there is an urgent situation is an application for a free-standing freezing order (also known as Mareva injunction) in aid of a foreign proceeding. Freezing orders are usually accompanied by orders requiring the respondent to disclose documents. Although the disclosure sought in the application must be for the purposes of preserving and tracing assets, and not for producing evidence to be used at trial, it can subsequently be possible to get the English court's permission to use that disclosure for the purposes of trial. This can be effective in appropriate circumstances.

Conclusion

The variety of mechanisms available to obtain evidence abroad and their proper utilization underscores the importance of seeking the advice of local counsel early in the process. The committee would like to thank our expert panelists for their contribution: David Rosenthal (drosenthal@vischer.com); Samaneh Hosseini (shosseini@stikeman.com); Wouter de Clerck (wouter.declerck@legaltree.nl); and Sam Roberts (sam.roberts@cyklaw.com). Programs in the cross-border discovery series are offered free of charge to members of the International Litigation Committee and law students. Please contact Committee Co-Chair Clara Flebus (clara.flebus@gmail.com) to join the committee and participate in our future activities.

Clara Flebus is an appellate court attorney in the New York Supreme Court, where she also focuses on the disposition of international arbitration-related matters. She co-chairs the International Litigation Committee of the Commercial and Federal Litigation Section. Flebus holds an LL.M. degree in international business regulation, litigation and arbitration, and is a prolific writer who authors articles regularly on arbitration, commercial litigation, and court procedures for various bar journals and other legal publications.

Endnotes

1. An article summarizing the first cross-border discovery program focusing on inbound requests for evidence was published in the prior issue of NYSBA *Commercial and Federal Litigation Section Newsletter*, vol. 28, no. 2, page 17.

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