

Getting the Discovery You Need When It Is on the Other Side of the World

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As globalization continues to expand, domestic retailers and suppliers are increasingly purchasing products manufactured by foreign entities. Doing business with foreign manufacturers raises new issues and concerns for domestic retailers and suppliers, especially in the context of product liability litigation. One important consideration is how a domestic retailer or supplier will obtain the evidence necessary to build its defense when the documents and knowledgeable individuals are located in a foreign country. This is an especially significant concern when the foreign manufacturer is not a party to the domestic litigation.

There are no easy solutions for domestic litigants needing to acquire documents from a non-party in a foreign country. Although the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters purports to facilitate obtaining evidence abroad, there are still fundamental problems associated with domestic litigants attempting to obtain documents and depositions in a foreign country. Most foreign countries simply do not allow anywhere near the breadth of discovery that is typical in domestic litigation. In fact, American discovery practices are viewed with hostility in many other countries and in some cases are even illegal. Accordingly, there are many procedural hurdles to obtaining documents and depositions from a foreign entity and it is important to consider the rules, procedures, laws, and customs of the foreign jurisdiction when seeking discovery from abroad.

Considerations for Obtaining Evidence Located Abroad

A first step for a domestic retailer or supplier named as a defendant in a product liability case where the product was manufactured by a foreign entity, is to tender the defense and/or seek indemnification from the foreign manufacturer. However, if the tender demand is denied or goes unanswered, the retailer or supplier is basically on its own to build its case. The

best case (but not entirely likely) scenario is that the foreign manufacturer will, after the litigation has commenced, informally agree to voluntarily cooperate and produce documents and corporate representatives for depositions. Understandably, other countries view American discovery practices as foreign. They may view our discovery practices as intrusive or offensive. Recognizing and dealing with this at the beginning of a business relationship will likely save everyone money, time, and misunderstandings down the road.

The Hague Convention on Taking Evidence

If an informal agreement does not yield results, the international community has instituted a number of formal discovery processes that facilitate the exchange of discovery across international borders. The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (Hague Convention) is a multilateral treaty entered into force in the U.S. in 1972. The Hague Convention seeks to facilitate the gathering of evidence from foreign jurisdictions by setting forth procedures by which such evidence can be obtained. One of the goals is to improve judicial cooperation in civil or commercial matters and to facilitate transmission and execution of Letters of Request. *Convention of Taking Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241.

Evidence may be compelled under the Hague Convention through the use of Letters of Request. *Id.* At art. 1. A Letter of Request is issued under the authority of U.S. courts and asks the foreign state to allow evidence to be produced. *Id.* at art. 1, 3. The Letter of Request is sent to the foreign country's Central Authority; the Central Authority then transmits the Letter of Request to the authority competent to execute the request in that country. *Id.* at art. 2, 3.

A Letter of Request must include: the requesting authority and the executing authority (if known to the requesting authority), names and addresses of the parties to the proceedings and their representatives, nature of the proceedings, and evidence to be obtained. *Id.* In addition, where appropriate, the Request should also include the names and addresses of persons to be examined, questions to be asked or a statement of the subject matter to be inquired into, documents or other property to be inspected, any requirement that the evidence be given on oath or affirmation, and any special method or procedure to be followed. *Id.* The evidence is produced under the authority of the United States of America's judicial system, but is subject to the foreign state's procedures and limitations. *Id.* at art. 1, 9. The Letter of Request must be translated into the official language of the foreign country or accompanied by a translation into that language. *Id.* art. 4. *Under Article 9, the Letter of Request may seek a special method or procedure to be followed in executing the request; however, the foreign country does not have to follow this request if that method or procedure is incompatible with the laws of that country or is impossible to perform "by reason of that country's internal practice and procedure or by reason of practical difficulties."* *Id.* at art. 9.

A signatory to the Convention is required to honor a Letter of Request so long as its sovereignty or security is not prejudiced and the request is not a function of its judiciary. There are still broad exceptions in the Hague Convention that may hinder the discovery process for U.S. litigants. As noted above, there are several exceptions available for a foreign country that does not want to follow specific methods or procedures, such as, an American-style deposition. *Id.* at art. 9. *One of the biggest barriers for domestic litigants is the opt-out provision contained in Article 23, which states that a "contracting state may at the time of signature, ratification, or accession, declare that it will not execute Letters of Request issued for the purposes of obtaining pre-trial discovery of documents as known in common law countries."* *Id.* at art. 23. *Similarly, as a reaction to what is perceived as America's intrusive pre-trial discovery practices, many countries have enacted blocking statutes, which make it illegal to produce documents or give testimony. Restatement (Third) of the Foreign Relations Law of the United States, §*

442 cmt. 4.

While the Hague Convention attempts to resolve differences between foreign discovery practices and facilitate the exchange of evidence, there are still barriers for domestic litigants to obtain evidence from abroad. The opt-out provision in Article 23 and the blocking statutes are just some of the hurdles. Since there is no specific time frame for a request to be executed, the requests can take months or much longer. Furthermore, this process is likely to produce less information than anticipated because of antipretrial discovery policies of many foreign countries. The reality is the process can be frustrating, expensive, and time consuming. To increase the chance of receiving necessary documents, the Letters of Request should highlight the importance of the documents, define with particularity and precision the documents sought, and emphasize the lack of alternative ways to gain the information. The retailer or supplier should avoid making broad general requests for "all information" or "any and all documents." In addition, consulting with a local attorney in the relevant jurisdiction is necessary to determine the applicable rules, limitations, and procedures.

Finally, if a retailer or supplier needs to obtain evidence from a foreign jurisdiction that is not a signatory to the Hague Convention, it must use the traditional Letters Rogatory. These requests are even more time consuming and uncertain because they are limited to the discovery methods and procedures used in that country.

Avoiding the Uncertainty and Frustration of the Hague Convention

While the Hague Convention is intended to facilitate discovery in foreign jurisdictions, in practice it can be cumbersome, time-consuming, costly and unproductive. Now that retailers and suppliers are increasingly purchasing products from foreign manufacturers, the best practice is to address these potential issues at the beginning of the relationship and include a provision in the contract regarding litigation and discovery issues.

In addition to including indemnification and liability and recall insurance provisions in the contract, the retailer or supplier should insist on an agreement that in the event of litigation, the foreign manufacturer will cooperate in the litigation by producing documents and witnesses for depositions. The provision could include an agreement that any necessary witnesses will be deposed

and documents will be produced in accordance with the Federal Rules of Civil Procedure. Taking it a step further, retailers and suppliers may seek to include an obligation that the foreign manufacturer create and maintain records of quality control, testing, and inspections, and provide them to retailer or supplier on a regular basis (every six months or once a year). Then the retailer can maintain the documents as part of its quality assurance file and easily access the documentation in the event of future litigation.

It may be advisable to consult a local attorney to ensure the contract provisions are not running afoul of any foreign laws, procedures, or customs. If the foreign manufacturer is unwilling or at least hesitant to cooperate with discovery, this may be caused by its home country prohibition on such discovery methods. Therefore, the retailers and suppliers should explore alternative methods and procedures for discovery. By negotiating with the foreign manufacturers at the beginning of the relationship, retailers and suppliers can avoid problems down the road if litigation becomes an unfortunate reality. One way to do this is by agreeing on procedures for document production, witness production and cost sharing provisions in the beginning of the relationship.

Conclusion

Retailers and suppliers who purchase products from foreign manufacturers face additional hurdles in discovery when foreign manufacturers are involved. Foreign countries may be unfamiliar or unaccustomed to the U.S.'s broad discovery practice. While there are several paths to try to obtain evidence from a foreign non-party, the most cost-effective and least time-consuming approach is to address these issues at the beginning of the manufacturer/retailer relationship and come to an agreement before litigation becomes an issue.



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