INSIDE THE MINDS

Complying with International Discovery Regulations

Leading Lawyers on Understanding Rules for Discovery in Foreign Countries

ASPATORE

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

Discovery Risks for Non-US Entities: Adapting to US Rules of Engagement

Barb Dawson

Partner

Snell & Wilmer LLP

Dr. Martin Wagener

Head of the Legal Department

Audi AG

ASPATORE

Introduction

In an increasingly global marketplace, non-US companies find that they face the risk of litigation in the United States with ever-growing frequency. This litigation may be an expected consequence of contracting with US entities or an unexpected consequence of unforeseen events affecting US parties. Recent examples range from product liability for toys manufactured in China to environmental issues related to mining accidents and oil spills to claims arising from global financial market shifts. As seen with Siemens and Walmart, the risks may arise from discovery and disclosure well before any claims are tried. With a global economy, the unique hazards of US litigation cannot be ignored.

When any lawsuit is received, a party must promptly assess both the substance and procedural status of the case. While dispute resolution systems around the world present some common challenges and areas of uncertainty, a number of unique aspects of US litigation discovery and disclosure may dramatically affect the related risk assessment. The good news is that some risks can be reduced by the choices a party makes. The bad news is that the options are not necessarily obvious or available indefinitely, increasing the need for timely legal advice.

This chapter addresses factors non-US companies should consider when assessing potential risk related to the US litigation process, focusing on the treacherous areas of discovery and disclosure including document preservation and e-discovery. The chapter identifies the questions to ask US counsel about the litigation process and highlights areas where options exist. No amount of planning will remove all of the uncertainty surrounding US litigation, but a clear understanding of issues and options may at least render the associated risk more manageable.

Assessing the Options to the Court of the Plaintiff's Choice: Must this Dispute be Resolved in the United States?

Before addressing the details of discovery and disclosure under US rules, one may question whether the US court is the proper venue at all. Before a US court may exercise jurisdiction over a defendant, the due process clause of the US Constitution requires that the defendant receive a notice

reasonably calculated to apprise it of the pendency of the action and provide an opportunity to present objections. Rule Four of the Federal Rules of Civil Procedure governs service of process in US district courts and analogous state rules prescribe the procedure in state courts. US courts will dismiss the case if the plaintiff fails to properly serve the defendant.

To serve a party abroad, you must follow the provisions of the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention, or the Convention). This Convention creates a mechanism for service of process within the signatory nations. It sets out the circumstances when default judgment may be entered against a defendant who was served abroad and failed to appear, and provides for relief from such a judgment. The US Supreme Court interpreted the Hague Convention as "mandatory in all cases to which it applies" and "pre-empt[ing] inconsistent methods of service prescribed by state law." Service of process that does not comply with the Convention is invalid, even if it otherwise comports with the federal and state law, and even if the defendant had actual knowledge of the lawsuit.

In the United States, the Convention is triggered whenever the internal law of a forum US state requires a party to serve process by transmitting the documents (i.e., complaint and summons) abroad. Conversely, the Convention does not apply "where the forum state's law does not define the applicable method of serving process on a foreign corporation as requiring the transmittal of documents abroad…." It also does not apply when plaintiff serves defendant, or defendant's agent, in the United States. The presence of a subsidiary is "not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise." Finally, the Convention does not apply when the defendant's location is unknown.[1]

[1]Mark Davies et al., *Service of Process Abroad: A Nuts and Bolts Guide,* 122 F.R.D. 63, 71 (1989*); see, e.g., Vega Glen v. Club Mediterranee S.A.*, 359 F. Supp. 2d 1352 (S.D. Fla. 2005); *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 694–95 (1988);Davies, *supra* note 1, at , 73, 74 (1989) (Therefore attorneys drafting contracts with the foreign companies should include an appointment of a foreign party's agent for service of process in the United States.); *Schlunk*, 486 U.S. at 705 n.*(citing *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 U.S. 333, 336–37 (1925)); Marjorie A. Shields, Annotation, *When is Compliance With Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Art. 1 et. seq., Required,* 18 A.L.R. Fed. 2d 185 (2007) ("[W]here the whereabouts of a foreign defendant are unknown … service by publication is permissible.").

The Convention sets out comprehensive requirements for service. The plaintiff must send the documents and the Request for Service Abroad of Judicial or Extrajudicial Documents to the "Central Authority" of the country where the defendant is domiciled. Once it receives the documents and the request, the central authority will serve the foreign defendant with the process.

For a non-US defendant, early issues in litigation include:

- Is service under the Convention required?
- Is there any reason to waive the service requirements?
- Is there reason to fight service as improper?
- Is there a basis for pursuing dispute resolution in another country instead of the United States? If so, what are the chances of obtaining the right to proceed exclusively (or at least first) in a non-US court?

These early questions are critical given the differences in court process and procedure as discussed below. In some circumstances, a party may reasonably conclude that it is worth fighting for a familiar jurisdiction with the language, discovery, and other practices of one's own forum. In other circumstances, the prudent course may be to aggressively litigate in the United States with the goal of creating a track record that will preclude additional frivolous claims in the future.

Moreover, the rules in this area are potentially in flux as US legislation focuses on ways to bring non-US parties with US business ties into the jurisdiction of US courts. For example, US laws increasingly require foreign manufacturers and producers importing products into the United States to designate an agent in the United States for acceptance of service of process. Such legislation could change the rules in this area and/or test the limits under the Convention.

Discovery and Disclosure Rules if the Case Proceeds in a US Court

For all parties, the American process of disclosure and discovery may cause discomfort, and for non-US parties, it likely presents the most unfamiliar part of the litigation process. At the outset of the case, many courts impose

automatic disclosure requirements. For example, Federal Rule 26 requires that parties voluntarily participate in "initial disclosure," "disclosure of expert testimony," and "pre-trial disclosures."[2] While state court systems vary, extremes exist under which relevant information that is helpful—and unhelpful—must be voluntarily produced to the opposing party early in the case.[3] Also, parties are able to ask for the production of information from the other side, a process viewed as a "fishing expedition." Accordingly, the topic of court-required disclosure is an essential item on the agenda for discussion with US counsel.

Once a case is under way, discovery may begin. The formal discovery process encompasses written requests for information (e.g., interrogatories and requests for production of documents, electronically stored and other information), and deposition of witnesses including party representatives, non-parties, and designated experts. The scope of discovery may largely drive the pre-trial cost related to a matter. A corporate defendant facing an individual plaintiff is apt to find discovery demands to have an adverse, lopsided impact. The mass of information and related intrusion of discovery at a corporation is often much greater than the impact on the individual party who may have no documents or hesitancy to testify, and may have plenty of time and desire to focus on the case. Specific inquiries about the permitted and expected scope of discovery are likely to assist the risk management analysis.

The events of discovery are also likely to surprise non-US corporate executives who may find that a plaintiff's attorney is seeking—and entitled to pursue—production of his hard copy records, electronic files, in-person deposition testimony, and sworn responses to some pointed, written interrogatory questions. No one enjoys such surprises, and a non-US litigant should work with US counsel to anticipate them. Collateral issues must also be considered, particularly if potential criminal or other governmental claims may follow. There may be serious ramifications of public disclosure with respect to sensitive information, going well beyond the scope of the specific litigation. While a corporation's own designation

[2] FED. R. CIV. P. 26.

[3] *Compare* ARIZ. R. CIV. P. 26.1(a) & (b) (2010) (automatic disclosure) *with* Alaska R. Civ. P. 26 (same) *with* CAL. CODE CIV. PROC. § 2017.010 (2009) (disclosure upon request) *and* N.Y. C.P.L.R. § 3101 (McKinney 2010) (same).

of information as "private" will not automatically prevent its production, US courts may allow the parties to make a confidential, non-public disclosure of information in well-justified cases.

On the flipside, the potential of using discovery against one's opponent—particularly a corporate opponent—may yield some value not typically in play in non-US dispute resolution. For example, if one party knows that its opponent likely has internal rules or regulations that are ignored in practice or e-mail exchanges that suggest a corrupt culture, pursuit of such information under the comparatively liberal US rules may yield case changing results. This possibility should be explored as well.

As the volume, scope, rules of engagement, and local practices related to each of these areas vary drastically based upon the particular state or federal court, these topics may drive decisions to attempt to move a matter from one court to another. An honest assessment of which party bears more risk in broad discovery, coupled with knowledge of the forum options and ease of venue change, should drive strategy decisions. Parties new to the US system should also consider practical discovery limits. For example, in a dispute between two contracting corporations, the first to ask for sensitive business information in discovery should anticipate a boomerang effect, with the same or more extreme requests retaining to be answered. A court is less likely to find such discovery objectionable if the complaining party indeed started the battle by serving such requests itself.

The Must-Know Area of Document Preservation and e-Discovery: What Must Be Saved and Why?

A discussion of US litigation requirements related to discovery and disclosure would be woefully incomplete without comprehensive coverage of the hazards surrounding document preservation obligations and e-discovery. With the seminal case of *Zubulake v. UBS Warburg LLC*, , which sent shockwaves through corporations everywhere, the US expectations relating to this area changed forever.[4] While the full scope of issues related to this area cannot be addressed in a single chapter, key questions to ask US counsel include the following:

[4] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

- *What are the applicable court rules related to document preservation and e-discovery?* The rules tend to be more defined in federal compared to state courts, and yet variations in both systems exist.[5]
- *What are the actual practices to be expected under these rules?* This question is just as important as the form of the rules themselves. Even in federal court, where the rules are more specific, local practice varies as to the ability of the parties to stipulate to and agree upon different procedures in the case. Practices continue to evolve as counsel becomes more experienced in this area.

Every litigant in the US court system should be aware of the serious consequences that can flow from the mismanagement of electronic evidence. Rules applicable to spoliation of evidence—the willing or negligent destruction of evidence necessary in the case—have led courts to sanction parties for losing electronic data.[6] Consequences range from the

[5] *Compare* FED. R. CIV. P. 26(a)(1)(requiring automatic disclosure of "electronically stored information"), *and* FED. R. CIV. P. 26(b)(1)(defining the scope of discovery as encompassing "the existence, description, nature, custody, condition, and location of any documents", *and* FED. R. CIV. P. 26 (b)(2)(B)(limiting discovery of electronically stored information),*with* ARIZ. R. CIV. P. 26.1(a)(8) (2010)(requiring automatic disclosure of electronically stored information), *and* ARIZ. R. CIV. P. 26(b)(1)(B) (2010) (authorizing courts to enter orders setting requirements or limitations on discovery of electronically stored information and orders setting measures for preservation of such information) *and* CAL. CODE CIV. P. § 2017.010 (2009) (defining the scope of discovery), *and* CAL CODE CIV. P. § 2017.730 (2009) (authorizing courts to enter orders allowing use of technology), *and* CAL. CODE CIV. P. § 2017.710 (2009) (providing a broad and non-exhaustive definition of "technology"), *and* N.Y. C.P.L.R. 3101(a) (McKinney 2010) (defining the scope of discovery), *and* N.Y. Comp. Codes R. & Regs, § 202.70, R. 8(b) (2010) (requiring counsel to "confer with regard to anticipated electronic discovery issues" before the preliminary pre-trial conference).

[6] *See, e.g., Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) (holding that developer's destruction of source code after receipt of complaint warranted entry of default judgment); *United States v. Philip Morris USA, Inc*., 327 F. Supp. 2d, 21, 24 (D.D.C. 2004); *Mosaid Techs. Inc. v. Samsung Elecs. Co.,* 224 F.R.D. 595, 599 (D.N.J. 2004); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc*., No. 502003CA005045XX0CAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1095 (Fla. 4th DCA 2001); *Thompson v. US Dep't of Hous. & Urban Dev.,* 219 F.R.D. 93, 100 (D. Md. 2003); *Convolve, Inc. v. Compaq Computer Corp*., 223 F.R.D. 162, 176 (S.D.N.Y. 2004)(stating that a court can impose the sanction of adverse inference for the destruction of electronic evidence), *order clarified* 2005 WL 1514284 (S.D. N.Y. 2005); *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, 217 (S.D.N.Y 2003); *Philip Morris USA, Inc*., 327 F. Supp. 2d at 25–26 (sanctioning defendant for its employees' destruction of electronic evidence by excluding its witness and by imposing monetary penalty).

exclusion of related evidence to entry of judgment against the party responsible for the spoliation. The significant hazards and traps for the unwary arising in this area lead to the following essential questions:

- What must we preserve?
- What notice should we provide to ensure that preservation occurs?
- Who should receive the notice?
- What should be done to confirm that documents—electronic and hard copy—have been properly preserved?
- How and when must we collect the documents?
- Who should handle these tasks?
- What are the proper roles of counsel—inside and outside—and others in this process?
- To what extent is our work protected from discovery or disclosure under a privilege or otherwise?
- What do we do if the expectations under these US rules conflict with the laws of other countries by which we are bound?

While general legal guidance is available in the ever-growing body of law post-*Zubulake*, many of these questions raise fact-specific issues. One must dig into the case facts in order to know who must preserve what. The good news is that preservation may differ from review; in other words, the early critical task is to ensure that evidence is not inadvertently destroyed and the more time intensive review of all relevant records often may be handled subsequently in a less hurried way.

The courts have largely employed discovery standards based on a principle of reasonableness.[7] Parties with good document maintenance systems in place—before issues arise—are in the best position to comply with the

[7] *See, e.g., Zubulake*, 220 F.R.D. at 217 (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991); *Philip Morris USA, Inc.,* 327 F. Supp. 2d at 24–25(The court found it "astounding" that Philip Morris employees deleted e-mails, contravening the company's internal policy for document preservation and the court's order. The court sanctioned Philip Morris for the destruction of e-mails); *Martin v. NW Mut. Life Ins. Co.*, No. 804CV2328T23MAP, 2006 WL 148991, at *1 (M.D. Fla. Jan. 19, 2006) (The court sanctioned the plaintiff for failing to produce requested documents where the plaintiff's accountant "failed to understand the scope of the [plaintiff's] demand [to retrieve all the documents] or the obligations it imposed.").

applicable requirements. The question of whether compliance with US requirements creates separate issues under the laws of the country in which the documents reside may be a driving factor with no easy solution.

Money Matters: Compensation of Counsel and Insurance Coverage May Affect Discovery Decisions

Under any legal system, the human factor of compensation to counsel exerts a marked effect on behavior. In the US system—where the plaintiff's counsel may be paid on contingency instead of on an hourly basis—the impact of this factor is magnified. The impact of contingency arrangements has added such drama to the system that it has been the subject of such US movies as *A Civil Action*, *The Sweet Hereafter*, and *The King of Torts*. It is important to understand the likely plaintiff payment scenario and the ethical rules related to attorney compensation, as these factors will drive the conduct of the plaintiff's counsel in investing in expansive discovery and disclosure demands to some degree.

Understanding the payment options for one's own defense counsel is also fundamentally important. Here, again, not only will a solid appreciation for the customary arrangement help with assessment of options, but also with an understanding of ethical limits. While a full discussion about alternative fee arrangements is beyond the scope of this chapter, this issue must be studied on an ongoing basis, as commonplace practice in the United States is changing.[8]

One should also question the availability to either side of fee—or cost—recovery in general, as well as in individual discovery disputes. Unlike some other countries that follow the common law tradition, the United States

[8] *See, e.g.,* Ashby Jones, *Flat-Fee or Hourly Billing, It Doesn't Matter: Lawyers Will Work Hard*, WALL ST. J. L. BLOG (Jan. 26, 2010 11:45AM), http://blogs.wsj.com/law/2010/01/26/flat-fee-or-hourly-billing-it-doesnt-matter-lawyers-will-work-hard (reporting about a flat-fee deal between a client corporation and a lawyer); Edward Poll, *Flat Fees and Contingency Fees – Do They "Fix" Hourly Rates?*, LAW PRACTICE TODAY (June 2007) *available at* http://www.abanet.org/lpm/lpt/articles/fin06071.shtml (last visited June 13, 2012) (describing alternatives to hourly rates); Poonam Puri, *Lawyers as Gatekeepers, Investors and Advisors: An Analysis of Innovation in Legal Fee Arrangements (and Implications for the Lawyer-Client Relationship and the Public Interest)* (W.G. Hart 2001 Legal Workshop, July 17, 2001) *available at* http://ssrn.com/abstract=271749 (last visited June 13, 2012)(reporting that some law firms accept equity in their clients as compensation for legal services).

rejects a general rule that the loser in the litigation must pay the winner's legal fees; however, specific state laws often provide for an award of fees against the loser in some commercial cases, whether the cases arise in state or federal court. The rules here will vary potentially with the source of the dispute, the specific claims, and the applicable law, among other things.[9] Also, exceptions exist for specific discovery disputes where fees may be awarded to encourage compliance with rules. The value of such fee and cost recovery may drive specific behavior related to discovery and disclosure as well as bigger picture decision making about settling problematic litigation.

Finally, the availability of insurance coverage for all, or any, of the litigation expenses and exposure, including potential costly discovery, should be investigated promptly upon notice of claim. Early notice to a carrier may significantly reduce the potential that a company will need to fight an additional battle with an insurer over timely notice of an otherwise covered matter.

How the Risk of Punitive Damages May Drive Discovery

Any conversation regarding what may drive discovery, both in and outside of the United States, would be incomplete without a discussion of damages. While much of the US system is in sync with the other court systems when it comes to damages, its punitive damages principles pose a relatively unique threat. Given that punitive damages are awarded in circumstances where the findings are deemed to warrant punishment of a party,[10] they do not directly relate to the loss incurred by the plaintiff. Rather, they depend on the status of the party being punished and the amount of damages that is determined necessary and appropriate to catch the wrongdoer's attention and correct its future behavior. "Smoking gun documents,"—such as e-mail exchanges that executives never expected to be disclosed—may trigger punitive damage consideration. Consequently, discovery in this area is highly desired by plaintiffs and often shocking to non-US defendants.

---

[9] For discussion about the loser-pays reforms in the United States, *see* Walter Olson & David Bernstein, *Loser-Pays: Where Next?,* 55 MD. L. REV. 1161 (1996).

[10] *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 US 1, 19 (1991) ; *see also* 7 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 81:78 (2d ed. 2009)

Likewise, the destruction of documents—such as the erasing of electronic data—is a high-risk area that could trigger punishment. As this concept of damages is not shared everywhere, its underpinnings and the circumstances on which it may be invoked should be understood by US litigation defendants. Otherwise, such defendants run the risk of suffering a catastrophic and unexpected loss well beyond the financial scope of the dispute.

As the US Supreme court observed, "punitive damages overall are higher and more frequent in the United States than they are anywhere else."[11] A Department of Justice study that examined punitive damages in the seventy-five largest US counties found that punitive awards equaled or exceeded $1 million in 12 percent of the 365 civil trials.[12] In nine of these trials, punitive damages amounted to $10 million or more.

Examples of massive punitive awards are easy to find. In a VIOXX® trial, the jury awarded $229 million in punitive damages to a single plaintiff.[13] In an anti-discrimination suit against Novartis, one of the world's largest pharmaceutical companies, a New York jury awarded plaintiffs $250 million in punitive damages.[14]

The US Supreme Court has taken an interest in punitive damages awards, expressing discomfort with the idea of crippling punishment in the context of a civil (as opposed to criminal) dispute. The Supreme Court has held that punitive awards exceeding compensatory damages by more than a single-digit multiplier are unlikely to satisfy constitutional limits.[15] Even with these limits, the hazards surrounding punitive damages and the discovery they allow should not be taken lightly. The mere threat of punitive damages

---

[11] *Exxon Shipping Co.*, 128 S. Ct. at 2623 (citations omitted).

[12] THOMAS H. COHEN, U.S. DEP'T OF JUST., CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: PUNITIVE DAMAGE AWARDS IN LARGE COUNTIES, 2001, (March 2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pdalc01.pdf.

[13] Alex Berenson, *The Overview: Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES (Aug. 20, 2005), *available at* http://query.nytimes.com/gst/fullpage.html?res=9A03E6D8103EF933A1575BC0A9639C8B63&sec=health&spon=&pagewanted=1.

[14] Emily Friedman, *Jury Finds Novartis Liable for $250M in Female Discrimination Complaints*, ABC NEWS (May 19, 2010), *available at* http://abcnews.go.com/Business/novartis-pharmaceuticals-corp-found-guilty-gender-discrimination/story?id=10689070.

[15] *Exxon Shipping Co.*, 128 S. Ct. 2605, 2626 (2008)

opens the door to discovery about a party's internal communications and net worth that can be game changers, as the ramifications of such discovery may extend beyond any one case.

Win or Lose: Consider Discovery Related to Judgment Enforcement and the Role of the US Affiliate

Just as a win or loss on paper is never the end of the matter, the risk assessment is not complete without consideration of judgment enforcement, which might drive additional discovery. In general, US judgments tend to be enforced internationally if the non-US state determines that:

1. the US court had jurisdiction;
2. the defendant was served properly;
3. the proceedings were not marked by fraud; and
4. the US judgment is not against the foreign state's public policy.[16]

Given the potential for such enforcement of a judgment from a court in the United States on non-US soil, the question of whether a separate US affiliate is advisable frequently arises.

In general terms, the advantage of having a separate US entity is the potential to limit risk of exposure—arising from US business and related litigation—to just that entity; however, in certain instances, plaintiffs may ask courts to pierce the corporate veil and assert jurisdiction against the foreign parent. When this happens, extensive discovery that may be seen as intrusive by the defending party may be allowed. Courts employ three

[16] BERND HONSEL, GERALD G. PAUL, & WOLFGANG A. DASE, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 23:51 (2010)(noting that"… [w]hile . . . requirements vary widely from country to country, judgments which do not involve multiple damages or punitive damages generally may be enforced, in whole or in part, upon recognition as authoritative and final ….").

J. ANDREW MURPHY & FERDINAND CALICE, PRACTICING LAW INSTITUTE, EQUIPMENT LEASING – LEVERAGED LEASING, ENFORCEMENT OF JUDGMENTS OF US COURTS IN FOREIGN JURISDICTIONS § 24:5 (2010) (Foreign jurisdictions may also consider whether "proper proceeding or judgment in the foreign country," and "the procedure in the US court conflicts with fundamental principles of fairness and due process in such foreign country.").

different approaches to evaluate the relationship between the foreign parent and the US entity.[17] Under the "corporate formalities approach," courts ask whether the parent and the subsidiary maintained formal corporate separation. Under the "control" approach, courts examine the degree of the parent's control over the subsidiary. Under the "hybrid approach," courts examine formality of the separation and the degree of the parent's control over the subsidiary. At bottom, courts typically allow discovery to answer whether "sufficient grounds" exist to treat the subsidiary as the parent's alter ego.

Advanced planning warrants consideration of the proper corporate structure when an entity is global in its reach. If the entity is doing business in the United States—or even with US entities or residents—it arguably has exposure to US litigation. If so, the establishment of an appropriate US entity, separate from the non-US parent, may be wise, but still does not necessarily guarantee complete immunity from discovery.

Conclusion

In both the state and federal systems, US litigation presents discovery and disclosure hazards that may become larger than the underlying claims themselves. While non-US parties may have some vague sense of this unique risk area, the specifics should be addressed at the beginning of any new case. At that time, there may be venue, planning, and preservation options that could evaporate later.

The range of discovery issues and options that might arise will largely be driven by the particular claims, facts, and court, but some common considerations seem to be pervasive. As discussed, basis questions always tend to exist around the choice of court, specific disclosure, and discovery

[17] *See, e.g.,* David Aronofsky, *Piercing the Transnational Corporate Veil: Trends Developments, and the Need for Widespread Adoption of Enterprise Analysis*, 10 N.C.J. INT'L L. & COM. REG. 27, 57 (1985); Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CAL. L. REV. 731, 733, 744–45 (2008).; *but see,* Detlev F. Vagts, *The Multinational Enterprise: A New Challenge For Transnational Law*, 83 HARV. L. REV. 739, 743 (1969-1970) ("[t] he home country (in particular the United States) finds it hard to resist the temptation to extend it authority over the foreign subsidiaries and to treat them as mere extensions of the [foreign] parent.").

rules in that forum, preservation obligations, and bigger picture drivers such as insurance coverage, compensation of counsel, and damage scope, as well as possible ramifications beyond the US borders and particular party in a corporate family. While the risks in US litigation cannot be eliminated, they often can be managed if fully understood.

Key Takeaways

- Consider whether to challenge US jurisdiction over a dispute, or at least whether the particular venue is proper. A rapid review of the alleged facts and claims against the backdrop of due process and other applicable rules is key. Additionally, service is often subject to challenge depending upon where the defendants are located and whether Hague Convention and other applicable rules have been followed.
- Take the time to thoroughly educate a foreign client on the pitfalls and US approach to court-required disclosure. Warn clients about regulations such as Federal Rule 26, dealing with voluntary participation in "initial disclosure," "disclosure of expert testimony," and "pre-trial disclosures."[18] Also educate them on the value and dangers of discovery tools that may reach what much of the world would consider to be sensitive, private information. Be sure to discuss collateral issues such as potential criminal or other governmental claims that may arise because of exposure of previously undisclosed information or practices, as well as public relations fallout.
- Make clear to clients their responsibility to preserve and properly manage electronic evidence. Spoliation of data can lead to sanctions, exclusion of data, and judgments against the responsible party.
- Work to prevent difficulties and further unpleasant surprises later in the process by investigating the availability of insurance coverage for litigation expenses and exposure. Make sure the client knows the proper process and requirements for notifying the insurer of the possibility of a claim, to protect coverage.

[18] FED.R.CIV.P. 26.

- Discuss the potential damages and exposure not overlooking factors such as attorneys' fees and punitive damages that have US specific rules.
- Advise the client to consider how its US affiliates and holdings might be affected, as post-judgment enforcement should not yield surprises.

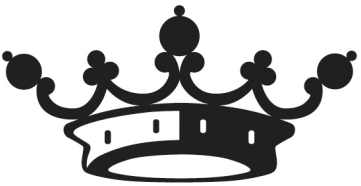
Barb Dawson *is a partner at Snell & Wilmer LLP, where she co-chairs the international and commercial litigation practice areas. She focuses her practice in complex business litigation and internal investigations, representing both domestic and non-US-based entities. Ms. Dawson chaired the board of directors of Lex Mundi, a global affiliation of 160 leading law firms in more than one-hundred countries.*

Dr. Martin Wagener *is head of the legal department and general counsel of AUDI AG, headquartered in Ingolstadt, Germany. He oversees more than forty attorneys at law in the legal departments of the Audi group, and has more than two decades of experience in working with US litigation and law firms. Mr. Wagener served on the client advisory council for Lex Mundi.*

ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE