"Lost in Translation"

Strategies for Keeping Foreign Defendants Out of "Discovery Trouble"

By Kurt B. Gerstner

Laws, customs, or practices in foreign defendant clients' countries and language barriers can trip up you and your clients when they are sued in U.S. courts.

Imagine yourself at a hearing on a motion to compel directed at your client, a foreign company that is a defendant in United States litigation. Plaintiff's counsel is completing his argument. He is claiming numerous deficiencies in the information and documents supplied by your client and arguing that there must be more that the defendant has not produced, based on discovery that he has received from American defendants in similar litigation. He concludes with the accusation that your client is intentionally withholding available information and documents and lying when it says that there is nothing more! He asks the court to order further discovery and sanction your client for discovery abuse.

The judge turns her steely gaze on you and asks what you have to say in response to plaintiff's counsel's claim that your client has held back relevant discovery. You stand, clear your throat, and respond that your client has told you that it completed a diligent search for documents and information that is responsive to the discovery requests and your client has produced everything that the client was able to find. The judge asks about your personal involvement in obtaining the discovery and how you know that the information supplied by your client is accurate. A little hesitantly, you concede that you had to rely on your client to search for and supply the information because the client is located in another country, and most of the documents are written in a foreign language. But you tell the judge that you did explain the discovery obligations to your client, and the client seemed to understand what was required. Moreover, you describe the process that your client generally used to find the documents and information, as it has been explained to you, and you conclude by saying that you believe that your client fully complied with its discovery obligations.

While that type of response will be accepted by some judges, there are many other judges who will roll their eyes and remain skeptical of a foreign company's assertion that it has fully complied with its U.S. litigation discovery obligations. This is especially true if the volume and types of discovery provided by the foreign company are significantly less than what would typically be provided by a U.S. company in similar litigation. Notwithstanding your vouching for your client, many judges may be inclined to believe plaintiff's counsel and order further discovery or additional details explaining why the discovery supplied is scant. And if it turns out that the

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production has been deficient, some judges will consider entering sanctions orders.

As lawyers who regularly defend foreign companies in U.S. litigation know, there will always be practical difficulties, such as long distances, language problems, vastly different time zones, cultural differences, and lack of familiarity with U.S. discovery practices, which can potentially interfere with a foreign company's ability to comply fully with its discovery obligations. Plaintiffs' lawyers love to exploit these types of difficulties, as well as potential differences in foreign country document-retention requirements and inadequate discovery preparation by foreign companies. They hope that the foreign defendants will make mistakes when responding to discovery requests and that they can get the defendants sanctioned for discovery violations. They use this tactic as an opportunity to increase the foreign defendant's risk, exposure, and expense, thereby giving the plaintiff increased leverage to secure a favorable settlement, even when the plaintiff has a weak case on the merits.

Defense lawyers need to anticipate these traps and assist their foreign clients to help them avoid getting into "discovery trouble" in their cases in the United States. Given the amount of international trade and commerce that now exists in our global economy, the chances are increasing that lawyers will be defending foreign companies in product liability and other litigation in the United States with greater frequency. This article will discuss some of the discovery challenges inherent in defending foreign companies in U.S. litigation, and it will offer some strategies to help overcome those challenges.

What Do You Mean I Need to Give This Information to My Opponent?

The concept of the large-scale, party-driven discovery that occurs in U.S. litigation does not exist in the legal systems of most other countries. This is particularly true in civil law jurisdiction countries such as Germany, France, China, Japan, and Korea. Most countries in Europe, Asia, and South America are civil law jurisdictions. Discovery in these and some other countries generally is quite limited and focused, and often requires court orders to obtain the limited discovery that may be available. Moreover, in many countries, the documents and information supplied by litigating parties are materials that support the position of the parties supplying those materials. Usually there is no requirement to produce documents and information that will be unfavorable to a company's position. In that same vein, trade secrets and other confidential information and documents are often excluded from production in other countries.

When defending a foreign company in U.S. litigation, it's important to understand that your client may not be familiar with the litigation discovery process—especially if it is a company that has little experience with U.S. litigation. There are many more small- and medium-sized companies that are now engaged in business internationally that are relatively unsophisticated and inexperienced that are dealing with U.S. litigation. These companies will need to be educated about the discovery process, how it operates, how to avoid mistakes, and their obligations to comply with U.S. discovery rules.

Be aware that even foreign companies that are quite large, sophisticated, and experienced in U.S. litigation may be surprisingly naïve or unprepared to address U.S. discovery obligations. As in the United States, employees in foreign companies (including in-house counsel) come and go. In many foreign companies, lawyers and others with significant U.S. litigation and discovery experience often are not available when an experienced lawyer departs the company. Therefore, institutional knowledge can be lost and not fully replaced, with the result that many of the persons charged with addressing litigation discovery matters may have little actual experience and knowledge, even in larger foreign companies.

Even when the discovery process is explained, the concept of providing harmful information and documents or trade secrets can be a hard pill to swallow for many foreign companies. It's important to be very clear and specific when explaining the need to produce such information, the protections that will be in place for the confidential information (such as confidentiality orders), and the very serious ramifications of not providing full discovery.

Making Records and Keeping Records

It is also important to discuss how the foreign company operates in terms of its record-creation and record-retention practices and policies to understand the documents that might exist and where they can be found. Counsel should explain the scope of the search process and help the client to determine which departments and individuals should be considered the most likely custodians of documents and information that will be responsive to discovery in the case. Pay particular attention to documents that may be situated in places other than the official company locations; some custodians may have records stored in their desks or offices, on their phones, personal computers or thumb-drives, or in other locations that might be easily overlooked.

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When determining how documents are created and how they exist, it is also important to understand the laws in your client's country related to document creation and document retention, as well as the local customs and practices concerning document creation and retention in that country. Your assumptions (and a U.S. judge's assumptions) that laws, customs, and practices are similar to what occurs in the United States may be completely wrong. When plaintiff's counsel complains that certain types of documents have not been produced, the simple explanation may be that in your client's country, there are no laws, customs, or practices requiring such documents to be created, and therefore, such documents never were created. But you need to know the legal landscape in

your client's country to be able to present those types of explanations.

Carrying Out a Document Hold and E-Discovery

Because documents are now stored electronically in most cases, counsel also need to explain to clients the concept of document holds and e-discovery. Document holds can be extremely burdensome and can pose technical challenges, especially when documents are contained in active computers that must continue to be used for ongoing business activities. Foreign defendants need to be made aware of the litigation-related, document-retention requirements and the need to suspend promptly normal document-destruction policies for relevant documents to prevent potential spoliation. Counsel should confirm that the client understands the requirements and that the plan or system that the client intends to use to preserve documents for the litigation process is sound and likely effective to keep documents from being altered or lost. Don't leave it up to your client to decide how to conduct the hold without analyzing it to make sure that you understand it and that it will work because, later, you may be called on to explain it to the judge.

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With regard to e-discovery, likely discovery-search terms will need to be selected (often by agreement with plaintiff's counsel), and computer servers from likely custodians will need to be obtained so that computer searches can be conducted along with follow-up reviews designed to confirm responsiveness and privilege objections.

Bear in mind that many, if not most, documents in the possession of your foreign company client will be written in a foreign language that you probably cannot read. Moreover, your law firm computer software and that of your e-discovery vendor in the United States (if you have one) may be useless for finding responsive, foreign-language documents to be produced in your case. There may be few vendors that have the software capable of doing accurate e-discovery searches in some languages—particularly in languages that use non-Romanized letters. For example, there are few vendors with software capable of conducting accurate e-discovery searches for documents written in Japanese, Korean, or other Asian languages.

Narrowing Production and Creating a Privilege Log

You also need to consider how documents will be produced and how to narrow the group of documents to be produced from the much larger constellation of documents found by initial, broad computer searches. Document translations can be very expensive. In many cases it is not practical to translate every document so that you can read each and decide which ones must be produced. Instead, you will need to discuss the document production with your client, develop a detailed protocol or criteria for production and privilege, and then have the documents reviewed (after the initial broad search) by reviewers who can read the foreign language. Those reviewers, following your detailed instructions, will need to narrow down the group of documents to be produced and provide notes on privilege to help you prepare an accurate privilege log.

With regard to preparing your privilege log, bear in mind that some documents will be very clearly privileged and easily identified as such. But many other documents will be less clear, and further explanations likely will be needed by your client, specifically as pertains to the persons involved and the purpose of the document, to determine if it really is privileged and to identify the basis for the privilege on your privilege log accurately. Plan to build time into the process and have a client representative involved who can also read the foreign-language documents to examine the privileged documents and help with creating the privilege log as needed. In the alternative, if in-house or experienced local counsel are available in your client's country, consider having them prepare the privilege log because it will greatly facilitate communications, potentially making the process easier.

Overcoming Language Barriers

At some point you will need to know what the key documents and information relevant to issues in the case are, including the "problem" documents. To do this you will need to work with your client to have the client point out the important documents and explain the content of those documents to you. For particularly important documents, consider having translations made for you so that you can better understand the content of the documents: the translations will become your work product. You should also be thinking about the possibility of producing translations of helpful documents that you might want to use as trial exhibits. But it is important to see actual translations to understand everything that is contained in the documents, rather than relying only on oral representations about the contents, because sometimes there can be problematic language that your client failed to mention when describing document content.

As noted above, to address discovery challenges properly requires considerable communication between defense counsel and the client. Unfortunately, because of language differences, there is a significant risk that important information will be "lost in translation." Ideally, defense counsel should work with in-house or other local counsel who can help to explain important discovery information and instructions to client representatives in their native language (rather than in English) to minimize the risk of misunderstandings and costly mistakes being made for that reason. Often, having important information explained in the foreign language will dramatically improve the client's understanding of what is needed and will save expense in the long run.

If your local counsel in the foreign country has significant U.S. litigation experience, you can benefit from having the local coun-

sel participate directly with the client in the discovery process. Because of the distances involved, your availability to meet with your client will likely be quite limited. But even when you are not available to meet with your client in person, local counsel can easily attend meetings with the client or its records custodians, inquire about locations of documents, conduct some in-person document reviews, and generally engage directly with the client to make sure that the client understands and complies with its discovery obligations. Then if a motion to compel is filed, local counsel can provide an affidavit based on personal knowledge, or even attend the motion hearing to explain what was done by the client and local counsel to comply fully with the client's discovery obligations. That can strengthen significantly the credibility of your client's opposition and also take pressure off you to explain what was done when you have no direct knowledge of the process used by the client.

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Depositions

Depositions are another key source of "discovery trouble" for foreign companies, and they present thorny issues when you are defending foreign companies in U.S. litigation. As with written discovery, depositions generally are not part of the legal procedures available in most foreign countries. Depositions will need to be explained and then considerable effort given to selecting and preparing your client's witness or witnesses to testify during a deposition.

Identifying Witnesses

Plaintiffs' lawyers understand the logistical difficulties of foreign defendants giving depositions, and they count on those difficulties resulting in poorly chosen and poorly prepared witnesses. If at all possible, defense counsel should engage with a client early, to anticipate depositions and begin searching for an appropriate witness to testify on behalf of the company during 30(b)(6) depositions. Consideration should be given to grooming a particular witness to testify regularly on behalf of the company, especially for companies that are frequently involved in U.S. litigation, such as large product manufacturers. Having a good, experienced 30(b)(6) deponent can be very efficient and beneficial, saving considerable time and expense, and avoiding a lot of the mistakes commonly made by a "rookie" witness.

Also remember that although plaintiffs' lawyers often ask in their deposition notices that a company produce the witness with "the most knowledge" about various listed subjects, Federal Rule of Civil Procedure 30(b)(6) does not require a company to produce such a person. Instead, in response to such a deposition notice, the rule requires this:

> The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.… The persons designated must testify about information known or reasonably available to the organization.

As long as the designated witness consents to testify for your client's company, and gets properly educated about the information known or reasonably available to the company, that person can testify. Many state rules of procedure are similar.

Counsel also should try to identify fact witnesses who might be called to testify by plaintiff's counsel and begin vetting them for their ability to testify and the amount of preparation that each will likely require. If defense counsel cannot easily visit the client in a foreign country to meet potential witnesses, consider having your local counsel in that country or region participate in that process rather than simply relying on the client to decide which witness or witnesses will testify. This is extremely important because depositions often will have a life of their own. Inaccurate and unclear deposition testimony, given by a witness who did not understand the questions being asked, or based on incorrect speculation, will be shared by plaintiffs' lawyers and appear again and again in future litigation, requiring repeated correction, clarification, and explanations to correct mistakes made by such poor witnesses.

Handling Location-Related Elements: From Laws to Logistics

If there is to be a deposition of a foreign company defendant, a location needs to be selected. Typically the witness will travel to the United States for a deposition. However, sometimes a court will order—or plaintiff's counsel can be persuaded to—travel to a foreign country for the deposition, or to conduct the deposition by telephone or teleconference.

If your client's deposition will happen in a foreign country, there are a number of issues to consider. First, is it legal to conduct a deposition in that country? You should check with your local counsel or research this. In some countries, although it is not legally sanctioned, depositions might still occur as long as they are being conducted by agreement.

Decisions need to be made about where the deposition will take place if it is to happen in a foreign country. Law firm offices are usually available. Hotel conference rooms are another common location. It might also be possible to conduct a deposition at a U.S. Embassy or Consulate. Your client's offices are a possibility, but generally it would be better to choose another location; your client probably will not relish the idea of having plaintiff's counsel in the client's offices at any time.

Stenographers capable of administering an oath and recording a U.S. deposition are not always available in foreign countries. Often they need to travel to the deposition country from another country, and you will be paying for travel expenses as well as stenographic costs. It's best to get a full cost estimate before committing to a process that would require this, and also consider bringing your own stenographer from the United States as an alternative. If you do plan to use a foreign stenographer, ask

for a sample of that stenographer's previous deposition work to make sure that the stenographer really is competent to produce an appropriate transcript. Also confirm the stenographer's ability legally to administer an oath. *See* Fed. R. Civ. P. 28(b).

If your foreign client will be giving a deposition, you should consider hiring an interpreter. Even with witnesses who speak English fairly well, attorney questioning in a deposition can be very subtle and challenging for any witness. The difficulty is magnified if English is not the witness' native language. Having an interpreter provides the witness with an additional opportunity to understand the question and maybe catch some nuances that the witness missed on hearing the question in English. It also affords a little extra time for the witness to consider the answer before responding, and it allows counsel defending the deposition some additional time to consider an objection. Although it adds to the expense and the time that it takes to finish a deposition, there may be significant benefits to using an interpreter.

Foreign companies that are regularly involved in U.S. litigation matters, such as product manufacturers, also might be prudent to consider grooming a regular interpreter to participate in their company depositions. Regular interpreters have the advantage of learning technical terms that might be unique to a particular company or industry. Over time, regular interpreters will learn the names of company personnel, departments, locations, products, industry practices, and other concepts that might pose translation problems for one-off interpreters. Regular interpreters also tend to become familiar with a regular witness' testimony style, thereby making it easier to accurately interpret for companies that designate the same person to testify on behalf of the company on multiple occasions.

As mentioned above, telephone or teleconference depositions present other options. If the witness will be in a foreign country, and the plaintiff's lawyer in the United States, then there are some important logistical issues to be addressed in that circumstance as well. First, consider time zone differences. If there is a great difference, you should insist that the plaintiff's attorney take the deposition during regular business hours at the witness' location (or as close as possible to the witness' regular working hours) so that your client witness is relatively rested during the deposition. You don't want your witness having to be up testifying in the middle of the night for the witness.

Decisions also have to be made about where the stenographer and the interpreter will be located during a deposition. Having the stenographer in the United States may make it somewhat more difficult for the stenographer to hear the witness, but it makes selecting the stenographer and administration of an oath easier. Be sure to check the case law for any guidance on whether the stenographer must be in the same location as the witness when administering the oath. Ask plaintiff's counsel to stipulate to the arrangement as added insurance that there will be no objections later.

It is best to have the interpreter at the location of the witness, if possible. Defense counsel (or local counsel) also should be with the witness, if possible, because the witness will have questions and may need to speak with counsel privately during breaks. Having counsel with a witness who has not given a deposition in the past also will help to ease the inevitable jitters that the witness will be experiencing.

Deposition exhibits are another logistics issue for a telephone or teleconference deposition. It is best to request that the plaintiff's counsel pre-mark and send all deposition exhibits in advance so that lawyer and witness have a hard copy on hand during the deposition and can locate and refer to them by exhibit number. This saves time and makes it much easier to deal with exhibits so that all parties can easily see and read the documents at the same time during the deposition. Additionally, pre-marking provides the witness with the advantage of knowing which exhibits may be used, in advance of the deposition, and it can aid in the preparation process.

Preparing Witnesses

Deposition preparation is critical. Unfortunately it is often given short shrift when foreign defendants are involved because of the distances involved. Oftentimes, if defense counsel is traveling to the defendant company's offices to prepare a witness, or if the witness is traveling to the United States for a deposition, the preparation occurs only once because of the distance and expense. Usually the preparation takes place a few days before the deposition. During the preparation session, questions frequently arise, and it is not unusual for witnesses to be sending last minute emails and making telephone calls to colleagues, trying to get them to find important information that defense counsel believes will likely come up, so that the witness has that information during the deposition. These last minute preparation processes can be very hectic and stressful to the witness, who is already under the stress of testifying and probably jetlagged. Frequently the witness is unable to get all the information needed to be fully prepared under these circumstances when the preparation occurs once, just before the deposition. For those reasons, this type of last-minute preparation process should be discouraged.

If at all possible, it is best if defense counsel has multiple deposition-preparation sessions with the witness and begins the preparation far enough in advance of the deposition to allow time for the witness easily to do research and gather additional information that may come up during the deposition. That avoids the fatigue factor of trying to cram too much preparation into a short time period, and it gives a witness an opportunity to further educate him- or herself on information that may be important during the deposition.

Also consider conducting some deposition-practice sessions during which you can have the witness practice answering questions such as those that will occur during the deposition. That will help a witness become familiar and comfortable with the process. This is important with foreign witnesses and when dealing with an interpreter, which can be challenging under any circumstance. Also, anticipating the questioning style of a plaintiff's counsel and how best to respond to that style can be very helpful to foreign witnesses. This is especially true because of cultural differences, due to which the witness may find aggressive interrogation styles shocking and difficult to manage.

Practice sessions are also important because they enable defense counsel to evaluate the witness' abilities, as well as

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the witness's factual responses. It is not unusual for counsel to think that she or he knows all of the facts, only to learn new important facts that were revealed only on closely questioning a witness during the preparation session. Knowing those facts before an actual deposition takes place is superior to being surprised during the deposition.

If defense counsel is unable to conduct early deposition-preparation sessions with the witness, consider having local counsel in the country or region where the witness is located begin the deposition-preparation process. Local counsel can help the witness learn the deposition process, practice testifying, start to anticipate the questions likely to be raised, and begin to identify additional information needed by the witness to respond to likely questions from plaintiff's counsel. Local counsel has the luxury of being close to the witness and able to spend a few hours or a day at a time with the witness when the witness is available, thereby permitting multiple shorter preparation sessions well in advance of the deposition, and at minimal expense to the client. That also enables trial counsel to conduct the final preparation session just before the deposition with a witness who is already reasonably well-prepared and comfortable with the process. All of this preparation is likely to help the witness testify more accurately when giving a deposition.

Conclusion

United States lawsuits involving foreign companies are likely to continue increasing as global business increases. Foreign companies that become involved in such litigation, and you, as their attorney, must understand some of the unique challenges faced by companies litigating in a foreign country so that you can manage those challenges properly. And you need to understand the legal cultures and laws in your clients' countries to prepare them to appear in U.S. courts. By so doing, when confronted by the judge during a motion-to-compel hearing, you will be able to say confidently and demonstrate convincingly that your foreign company client has complied fully with its discovery obligations, and the plaintiff's motion should be denied. FD