

Taking a deposition abroad--it's not mission impossible

15/09/2015

Dispute Resolution analysis: Adam Miller, John Troost, and Elizabeth Bailey of BuckleySandler LLP consider the procedures available for taking factual witness depositions outside the US for use in the US courts (including pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters), and address some of the potential difficulties which may be encountered along the way.

Imagine that your client, a multi-national enterprise, is the target of an investigation by the US government into violations of the Foreign Corrupt Practices Act. All of a sudden, plaintiffs' lawyers are circling in federal and state courts, looking to make a civil case out of any alleged improprieties. Now imagine that some of the key third-party witnesses your client may need to exonerate itself live and work abroad, beyond the subpoena power of any US court. Sound like a hopeless situation? Not necessarily. Rule 28(b) of the Federal Rules of Civil Procedure (FRCP) (and many corresponding state rules of civil procedure) allows depositions to be conducted overseas for use in US courts.

The procedures that govern these overseas depositions are set forth in a patchwork of treaties, conventions, and foreign laws, which vary from country to country. Together, these rules may give your client a lifeline to gather the testimony of its crucial overseas witnesses. This article will guide you in how to take advantage of that lifeline, while pointing out some of the potential pitfalls (and there are many) that you may encounter along the way. We focus on third-party witnesses because US courts generally may compel a party to make witnesses within its control available for deposition in the US.

Is your witness willing to testify voluntarily?

Your first priority will be to determine whether or not your overseas witness is willing to testify voluntarily--that is, whether the witness will testify without being ordered to do so by a court. Not surprisingly, it is generally much easier to depose a willing witness than one who must be compelled.

The path to deposing a willing witness

If your witness is willing to testify voluntarily, your next step should be to visit the 'Legal Considerations' web page for the US Department of State's Bureau of Consular Affairs. This page provides a general overview of the applicable rules for depositions in every foreign country. A brief check here may save you a lot of time and money by letting you know right away that you may not be able to conduct a deposition in the country where your witness is located. For example, the page for China states that 'China does not permit attorneys to take depositions in China for use in foreign courts'. If you encounter such an obstacle, your best option is probably to ask your willing witness to travel to another, more hospitable country for the deposition.

Even in countries that permit voluntary depositions, there are usually at least a few local rules that must be followed. While some countries will allow you to proceed with the deposition almost as if you were in the US, others have rules requiring procedures so cumbersome that you might decide it's not worth going forward in that country. On one end of the spectrum, for example, Hong Kong and England allow you to conduct voluntary depositions with very few restrictions. Your main challenge in setting up depositions in places like that will be the logistics, including arranging for court reporters and reserving conference room space.

In many other countries, you will find more significant roadblocks. In Germany and Japan, for example, voluntary depositions must take place at a US embassy or consulate. Additionally, Japan requires attorneys travelling for a deposition to obtain a special 'deposition visa'. As another example, France, which also requires depositions to be conducted at a US embassy or consulate, requires that those depositions be held open to the public. Moreover, the US embassy or consulate may charge fees for arranging a deposition on its premises, and, in some countries, those fees run into the thousands of dollars.

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Because the range of restrictions on depositions varies so much by country, you will have to conduct country-specific research to determine the applicable procedures in the country where your witness is located. A good resource for this country-specific research, in addition to the 'Legal Considerations' page discussed above, is the website for the US embassy in the particular foreign country, which is accessible by going to <http://www.usembassy.gov/> and following the 'US Citizen Services' link. These resources will provide you with the lay of the land for voluntary depositions in your country so that you can make an informed decision about whether a deposition in that country will be worth pursuing.

The path to deposing an unwilling witness

If your witness is not willing to testify voluntarily, you will face more obstacles to pulling off a successful deposition, but it can still be done. You will need to enlist the help of a court in the foreign country to compel the witness to testify. You can ask for the foreign court's help through the procedures established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ('Hague Convention'). However, the Hague Convention has not been adopted by all countries, and some countries that have adopted it have done so with significant limitations. Alternatively, you can also attempt to obtain the local court's assistance through a letter rogatory. For a number of reasons, you will be much better off using the procedures of the Hague Convention, if they are available.

How the Hague Convention can help you depose a witness

The Hague Convention enables you to enlist the help of a foreign court to compel the deposition of an overseas witness in countries that are parties to the agreement. Fifty-seven countries are parties to the Hague Convention. Thus, your first step when dealing with an unwilling overseas witness should be to determine whether the country where your witness is located has signed on to the Convention. You can find this information on the website for the Hague Conference on Private International Law.

The Hague Convention has established a procedure for 'letters of request', which are letters from a court in one country to a court in another requesting judicial assistance. A letter of request can be used to ask a foreign court to compel a witness within its jurisdiction to attend a deposition. To use the Hague Convention, you must start by asking the US court to issue a letter of request seeking the deposition of your overseas witness. The letter of request must follow a set format and include the specific language required by the Hague Convention. You can find more information on these requirements at the Hague Convention's website, as mentioned above. Courts generally are required to issue a letter of request 'on appropriate terms after an application and notice' (FRCP 28(b)). Once the US court agrees to issue the letter of request, the letter should be sent to the relevant foreign country's 'central authority.' Each party to the Hague Convention must designate at least one central authority, whose role is to process letters of request and ensure that they are directed to the appropriate court in the foreign country. Updated contact information for each country's central authority is available on the Hague Convention's website. Once the central authority receives the letter of request, it will forward the letter to the appropriate judicial authority in that country with the power to execute the letter.

By default, the foreign country's law will govern the execution of the letter of request. However, as part of the letter of request, you may ask the foreign court to use specific procedures when executing it. Article 9 of the Hague Convention requires the foreign court to accommodate these special requests unless they are incompatible with the laws of the foreign country. Attorneys taking overseas depositions often specially request that the witness be given an oath to testify truthfully, that a verbatim transcript of the testimony be prepared, and that counsel for both sides be given the opportunity to question the witness. You should note, however, when making special requests, that the foreign court is entitled to charge you for executing those procedures. By contrast, if no special requests are made, the foreign court must bear the costs of the deposition.

Foreign courts are obligated by the Hague Convention to carry out a letter of request unless the request falls within a formal reservation to the Hague Convention by the foreign country. Many countries have issued a reservation under art 23 of the Hague Convention stating that they will not execute letters of request for pre-trial discovery 'as known in the Common Law countries'. Although this reservation technically only applies to document discovery, it highlights the reluctance of many foreign countries to sanction the more wide-ranging discovery practiced in the US. Thus, your letter of request should be tightly connected to the facts of your

case so that a foreign court cannot construe the letter of request as a 'fishing expedition'. You can find a full list of all reservations made by each party to the Hague Convention at its website.

How to obtain a letter rogatory

While dozens of countries have signed onto the Hague Convention, most countries, including Japan and Canada, are not parties to it. If your witness is in one of those countries, you must ask a US court to issue a letter rogatory. A letter rogatory, like a letter of request, is a request by a court in one jurisdiction for assistance from another court with jurisdiction over the witness. However, unlike with letters of request pursuant to the Hague Convention, a foreign court is not compelled by treaty to execute a letter rogatory. Possibly for this reason, letters rogatory often take more than a year to execute, and they should be considered an option of last resort.

Your first step is to move the US court to issue the letter rogatory to the foreign court. As with a letter of request, the US court must issue the letter rogatory on terms that are 'appropriate' (FRCP 28(b)). The letter rogatory should request the foreign court's assistance in compelling the deposition of your witness. The judge in the US court must sign the letter rogatory, and it should be translated into the language of the foreign court. The letter rogatory should then be delivered to the US State Department, which will send the letter through diplomatic channels to the appropriate authority in the foreign country. If the foreign court executes the letter rogatory, the response to the letter will be returned back through the same diplomatic channels to the US court.

The format and required text for letters rogatory are not set by treaty, as they are for letters of request under the Hague Convention. Nonetheless, you should review the US State Department's 'Legal Considerations' website for specific suggestions on the format and text. You should also note that you will be required to pay a fee of \$2,275 in order to process your letter of request, and you may be required to put down an additional deposit as well. You should contact the State Department to determine whether a deposit will be required in your situation.

The procedures governing the deposition of an unwilling witness

Whether you have compelled your deposition pursuant to the Hague Convention or a letter rogatory, it is likely that the procedures governing the deposition will be different than those that would govern the deposition if it were in the US. You generally should not expect to be able to show up at your scheduled deposition and start asking questions, even if you speak the local language. In many countries, including France, Germany, and Japan, a judge will preside over the deposition and pose questions to the third-party witness. Instead of memorializing the testimony in a transcript, the judge may prepare a written summary of the testimony. In these situations, you should definitely attach to your letter of request or letter rogatory a list of proposed questions for the judge to put to the witness. It is also important to ask for a written transcript of the proceedings so that the record is clear. In these situations, consulting with experienced counsel in the country at issue can be an invaluable resource.

The impact of foreign 'blocking' statutes and privilege law

Two final obstacles that you may have to contend with during your compelled deposition are foreign 'blocking' statutes and foreign privilege law. Blocking statutes are foreign laws that prohibit citizens of a foreign country from disclosing certain kinds of information in response to discovery requests. Many countries, including France, Germany, and Canada, have enacted forms of blocking statutes. The French blocking statute, for example, which was first enacted in 1968, restricts witnesses from revealing information to foreign authorities that would threaten the country's 'essential economic interests' (Law No 80-538 of July 16, 1980). These blocking statutes are intended to give foreign parties litigating in US courts a tool to resist broad discovery requests by allowing the foreign party to argue that it would be against the law for it to comply with the requests. US courts have not been sympathetic to this argument, and often require the foreign party to comply with discovery requests to the same extent as a domestic party. For third party witnesses, however, these blocking statutes can often be used to avoid testimony because they are interpreted and enforced by foreign courts, which are generally more sympathetic to arguments that discovery requests coming from the US are overly broad.

In addition to blocking statutes, foreign witnesses may also invoke foreign privileges that in some cases are broader than those available to US witnesses. For example, in Germany, a third-party witness holds a privilege against answering questions that would cause direct financial damage to the witness (Code of Civil Procedure, § 384). In addition, a German witness holds a privilege against disclosing banking secrets (Code of Civil Procedure, § 383). Local counsel will be an invaluable resource for information on the specific contours of privilege law in the foreign country.

Using the deposition in US court

At last, you've done it--you have deposed a foreign witness, and you (hopefully) have the transcript to prove it! But before you march triumphantly into court with your hard-earned evidence, there is one more gauntlet for you to run--getting the evidence admitted in a US court. Fortunately, FRCP 28(b)(4) provides that:

'Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.'

In other words, it's okay if the foreign court deviated somewhat from how the deposition would have been conducted in the US so long as the procedures used were not so incompatible with the 'fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable' (see *US v Salim*, 855 F.2d 944, 953 (2d Cir 1988)).

As the world grows smaller and American legal disputes continue to expand into the international sphere, foreign discovery concerns will continue to arise in federal and state proceedings. While obtaining a foreign deposition is certainly not easy, establishing a level of comfort with the necessary questions and considerations can only help your practice.

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