

Consilio Institute: White Paper

# CROSS-BORDER DISCOVERY: A GUIDE TO PRACTICAL CHALLENGES FOR US COUNSEL

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# CROSS-BORDER DISCOVERY: A GUIDE TO PRACTICAL CHALLENGES FOR US COUNSEL

## I. Introduction

Economic globalization continues to drive the movement of data around the world within and between multinational organizations. As a result, lawyers in the US handling litigation and regulatory matters for those organizations are seeing a steady increase in activity that crosses international borders. For example, it's quite common for a commercial dispute in a US court to involve witnesses and information located in another country. Similarly, investigations into potential corporate wrongdoing—under the Foreign Corrupt Practices Act, for example—often implicate employees in multiple countries across different continents.

The legal issues surrounding the cross-border movement of data and information are exceedingly complicated. Privacy regulations, blocking statutes, national data security laws, banking secrecy laws, and other international regulatory regimes place a variety of restrictions on the movement of data from foreign jurisdictions into the US for legal matters. Also, different approaches to attorney-client privilege and the protection of trade secrets and other proprietary

information can impact counsel's strategic decisions. US counsel should engage with in-country counsel who have expertise with these laws and experience dealing with cross-border legal matters.

The aim of this paper is not to untangle that knot of complex legal issues. Instead, its purpose is to provide US counsel with practical guidance in navigating the logistical and operational challenges that arise in a typical cross-border matter requiring information from a foreign jurisdiction to be imported into the US for purposes of discovery.

## II. Social and Cultural Challenges

Some of the challenges likely to be encountered involve cultural differences and divergent social and workplace norms in countries outside the US.

First, local personnel who are asked to help gather information may be unfamiliar with the discovery process in the US and its requirements to produce extensive information. US-style discovery—which can be broad, burdensome, and intrusive—simply doesn't exist in many foreign jurisdictions. Unless the custodian is experienced or familiar with the



process, they might be resistant to carrying out instructions from counsel. Education and collaborative communication are often necessary to secure their cooperation.

Language barriers can also pose challenges to effective coordination and project management. Even employees with solid English-language skills can be uncomfortable dealing with legal matters and talking to lawyers in a non-native language. The best practice is to use bilingual personnel who can translate as necessary and help facilitate the process.

If the information collected contains foreign language content, it is critical that the professionals working with the documents are proficient in the language. If search terms or analytic techniques are being used to search and cull the data, people comfortable in both English and the foreign language should be engaged so that they can effectively translate the search criteria while taking into account the nuances of the foreign language. Likewise, document review teams must be staffed with professionals who can demonstrate their facility with the foreign language, and who may need to be licensed in the local jurisdiction. If documents will be presented to a court or regulator, a certified translator should be retained to prepare the translated documents.

In some countries, there may be additional stakeholders in the information collection process that don't exist in the US, such as Works Councils. Works Councils, which are common throughout Europe, represent workers at the local level and are similar to a US labor union. If there is a Works Council in place, you may need to consult with the Council or allow them to be involved before you interview an employee or collect information in their possession. There may also be circumstances where you need to notify a local data protection authority or other regulator before embarking on a data collection from employees.

Finally, another significant cultural difference in many countries as compared to the US is the approach to the work week and holidays. Working "overtime," working outside standard workday hours, and working

on weekends are much less common outside the US. Similarly, employees in other countries are more likely to take extended vacations with no expectation that they will be asked to check e-mail or do other work while on leave. US counsel need to take these different work expectations into account when planning custodian collections in foreign jurisdictions.

### III. Technical Challenges

Another set of challenges that counsel might have to address in a cross-border matter involves more technical issues.

Some foreign languages, including certain Asian and Cyrillic script languages, use different alphabets and grammatical constructions, which can present technical issues when processing electronic documents using standard western tools and protocols. In some instances, the characters may be entirely pictographic, so the tools we commonly use in the US to process, search, analyze, and review information may not be able to capture these differences. The de facto standard for character encoding for western languages—Unicode—does not

## Consider Additional Stakeholders

In some foreign jurisdictions, stakeholders that simply don't exist in the US may need to be included in the discovery process, such as Works Councils, Data Protection Officers, and national and local data privacy regulators.

always accommodate Asian languages (often referred to as “CJK,” for Chinese, Japanese and Korean). Each country has its own distinct code sets, some of which utilize multiple code sets, such as Japan. Also, some bespoke email programs used in Asia generate unusual file types that are unrecognizable by western tools. You may need to consider different tools, or possibly adjusting the settings of your tools, to accommodate these languages.

Also, systems and software used in other countries may be different than what US counsel and legal technologists are familiar with. It is important to identify the name and versions of software being used so that the appropriate forensic tool can be used to execute a data collection. Similarly, different communication platforms are often used outside the US—WeChat in China, Viber in Europe, and imo in Qatar, for example—which require expertise in conducting data collections from these systems. It’s advisable to engage with in-country experts, such as the client’s Information Technology staff or local forensic experts, who are familiar with these systems. These experts can ensure that you are accurately, completely, and defensibly collecting the information needed, also complying with the applicable discovery specifications and ESI protocols in the US jurisdiction.

Once a data collection is exported to the US and stored on local systems, counsel should consider whether

the technical information security protocols in place where the data are hosted are sufficient to satisfy the requirements of the exporting country. For instance, if data are coming from the EU, counsel will need to ensure that any provider of eDiscovery services in the US offers adequate evidence of its “Technical and Organisational Measures” to protect personal data as required by the EU’s General Data Protection Regulation. To effectively assess the information security of imported data, you may need to engage with InfoSec experts.

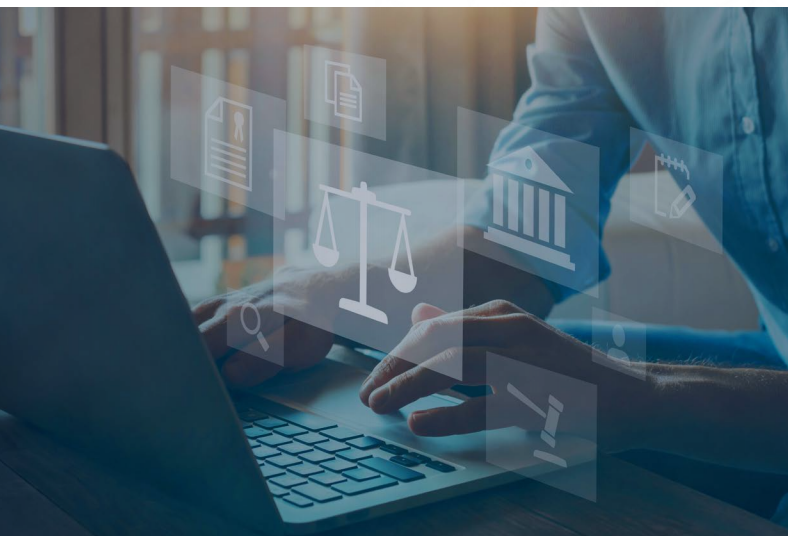
#### IV. Timing Challenges

As counsel experienced with cross-border discovery can attest, the process is almost always slower than domestic discovery efforts. US lawyers need to take this into account when building out realistic timelines for discovery projects, especially when negotiating agreements with opposing counsel or securing scheduling orders from the court or regulator.

One of the most significant factors contributing to time delays—not to be underestimated—is navigating different time zones. Consider an “urgent” request sent by counsel in California at 11:00 am pacific time on Friday to the litigation team in Europe. That request likely won’t be received and acted on until Monday morning local time, which can be frustrating to counsel accustomed to near-immediate responses from her US-based team. Also, keep in mind time zones when running up against deadlines—a document production delivered electronically at 5:00 pm in Mexico City will miss a 5:00 pm deadline in Washington, DC.

Also, the slower pace of work and more regularized work hours in some foreign countries can contribute to discovery delays. In the US, a litigation support professional is expected to work late, or on a weekend, if necessary to meet a discovery deadline; the same cannot necessarily be expected of team members in international locations.

Finally, if physical storage media containing electronic information—or other tangible items of evidence—need



to be sent to the US, the process of overseas shipping and clearing US customs can introduce significant delays

## V. Cost Challenges

Not only is cross-border discovery slower than in the US, but typically it's more expensive. Counsel should set expectations appropriately when preparing discovery budgets for clients in these matters.

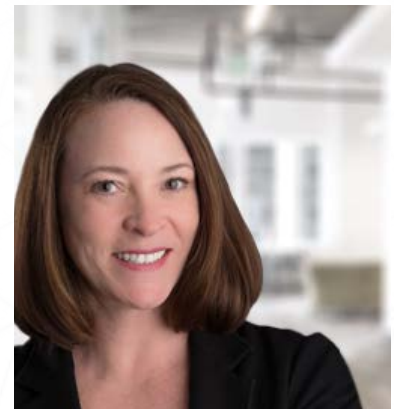
The foreign resources required to carry out discovery processes are generally more expensive than domestic resources in the US. This holds true for the labor costs of personnel as well as technology fees. One of the factors driving up prices is the relative scarcity of these resources—because many foreign jurisdictions don't have a US-style discovery process, there are fewer professionals and service providers experienced in this area. Also, the volatility of exchange rates can contribute to wide, and unpredictable swings in the cost of a project.

## VI. Conclusion

US counsel handling matters for large multinational organizations are almost certain to encounter the need for cross-border discovery. And, as the world's economies continue to reach across international borders, even counsel representing small and mid-size companies will more frequently face the prospect of gathering information found in other countries. At the same time that counsel are expected to come up to speed on the thorny legal issues raised, they must also be prepared to deal with the very practical, logistical challenges discussed above. But the challenges are not insurmountable. By engaging with experienced, knowledgeable professionals in the local jurisdictions, and by preparing ahead of time for the inevitable process complications, US counsel can successfully navigate these difficult—but oftentimes interesting and exciting—international matters.

## ABOUT THE AUTHOR

Maureen O'Neill is the Senior Vice President of Strategic Client Experience. Drawing on more than 25 years of experience providing dedicated client service as an attorney and consultant, Maureen engages with Consilio's customers to ensure a best-in-class client experience. She works cross-functionally across the company to develop and deploy best practices that embed Consilio's commitment to service excellence, and to deliver the highest levels of quality and value. She seeks opportunities to create differentiating moments for clients—from bespoke educational sessions to loyalty programs to peer networking events—to foster client satisfaction and loyalty. Maureen also serves as Consilio's Diversity & Inclusion Officer. She leads the development and implementation of the company's strategies, policies, and programs for ensuring a diverse, inclusive, and equitable workplace.



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