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102 Ethical Issues in CrossBorder Discovery

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Prior to joining Dell Mr. Vockell was general litigator for Vinson & Elkins, LLP - Austin. He began his legal career as clerk for U.S. District Judge Sam Sparks.

Mr. Vockell is pat president of the Austin Chapter of Federal Bar Association. He helped initiate Dell Legal's pro bono policy and committee. He has served as the first Pro Bono Chair for ACC's Austin chapter and helped to create the pro bono program for the chapter. Mr. Vockell is Commissioner for Texas Access to Justice Commission and he serves as Treasurer of Volunteer Legal Services of Central Texas. He has spoken at various local, state, and national CLEs on litigation best practices, e-discovery, cost-control, and pro bono.

He received his JD from the University of Texas at Austin, where he served as Law Review notes editor, and he was an Order Of Coif.

Chapter 20

The International Aspect of ESI Production

by Joseph Perkovich

§ 20:1 Introduction

The present chapter mainly addresses international jurisdiction in the production of electronically stored information (ESI) pursuant to civil discovery. It takes the perspective of the United States as the domestic jurisdiction and deals chiefly with civil proceedings in the U.S. possessing foreign affects. The practitioner in U.S. civil litigation may expect to confront three facets of discovery of ESI either physically stored outside of United States jurisdiction or otherwise subject to concurrent jurisdiction and, thereby, foreign legal impediments to disclosure. These concern: i) court control of discovery practice, ii) extraterritoriality of U.S. procedural law, and iii) foreign compulsion.

The present discussion concerns federal law pursuant to the Federal Rules of Civil Procedure (FRCP or Civil Rules) as substantively amended in 2006[1] and does not entail a comparative discussion of U.S. state jurisdictions in so far as distinctions and departures from the federal rules can be found in state authorities.[2] State courts (and their litigants) typically look to the federal rules and related decisional law for guidance in this field and are likely to continue to do so for the most part.[3] It can be anticipated that state law will diverge from federal ESI discovery law infrequently and mostly at the margins. Due to the heavy international activity underlying many disputes in federal courts, this general deference to the federal positions should be even more pronounced when transnational issues are involved.

§ 20:2 Court control of discovery practice

Since the establishment of the FRCP one-half century ago, Rules 16 and 26 through 37 have fostered a singular breadth in pretrial discovery, distinguishing U.S. federal courts from other national jurisdictions.[1] These Civil Rules have gone on to entail a substantially wider scope than that found in the disclosure

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[Section 20:1]

[1]2006 Amendments took effect on December 1, 2006. Further amendments took effect on December 1, 2007. These 2007 Amendments were "part of a general restyling of the Civil Rules . . . intended to be stylistic only." Advisory Committee Notes to 2007 Amendment of Rule 1.

[2]Other U.S. jurisdictions, as a general matter, have less developed law in this area than in the federal system. It also should be noted that several states have expressly incorporated the substance of these federal rules (e.g., Minnesota http://www.courts.state.mn.us/documents0/Public/Rules/RCP__effective__7-1-2007.pdf and New Jersey http://www.judiciary.state.nj.us/rules__toc.htm). See also §§ 25:1 et seq.

[3]See, e.g., Bank of America Corp. v. SR Intern. Business Ins. Co., Ltd., 2006 NCBC 15, 2006 WL 3093174 (N.C. Super. Ct. 2006); VISION POINT OF SALE, INC., Plaintiff, v. Ginger HAAS and Legacy Inc., Defendants., 2004 WL 5326424 (Ill. Cir. Ct. 2004) (interpreting and applying Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 92 Fair Empl. Prac. Cas. (BNA) 684, 56 Fed. R. Serv. 3d 326 (S.D. N.Y. 2003)).

[Section 20:2]

[1]Congress authorized these Rules in 1934 (48 Stat. 1064 (1934), 28 U.S.C.A. §§ 723b, 723c (Supp. 1938). The Rules took effect on September 16, 1938 (Rule 86), after three years of work by the Advisory Committee appointed by the Supreme Court of the United States. For a helpful overview of this process, see Charles E. Clark and James W. Moore, A New Federal Civil Procedure: I. The Background, 44 Yale L. J. 387 (1935). For earlier examples of extraterritorial jurisdiction, see U.S. v. Sisal Sales Corp., 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927).

requirements of other prominent common law systems.[2] Further, the rules have evolved in the utmost contrast to the procedure in typical civilian law jurisdictions, where pretrial discovery by parties is not permitted and considered anathema to the judge's sovereign function as gatherer of evidence.[3] In *Hickman v. Taylor (1947)*, the U.S. Supreme Court provided the pithy statement still informing its federal discovery rules: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[4] The subsequent jurisprudence reflects that this principle, in essence, guides discovery affecting foreign interests in the same manner as it informs purely domestic discovery.[5]

However, the legal principle of reasonableness requires U.S. courts to remain cognizant of the potential foreign affects of U.S. discovery when exercising this manner of jurisdiction.[6] Decisions have established conditions under which foreign law or foreign governmental interests can have legal affects on discovery pursuant to U.S. proceedings.[7] However, even in cases with the strongest foreign affects, a U.S. court with jurisdiction to

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[2]For instance, the English Civil Procedure Rules (CPR) contemplate document "disclosures" limited to documents on which a party relies or which are adverse to his or an adversary's case or support another party's case. See CPR Rule 31.6.

[3]See, e.g., Manual for Complex Litigation, Fourth, Federal Judicial Center (2004), § 11.494 Extraterritorial Discovery; Andre R. Fiebig, Obtaining Discovery Abroad, Aba Section of Antitrust Law, p. 1 (2d ed. 2005).

[4]Hickman v. Taylor, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451, 1947 A.M.C. 1 (1947).

[5]See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 540, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (hereinafter, Aérospatiale, 482 U.S. 522) (quoting *Hickman, 329 U.S. at 507*).

[6]See, e.g., McKesson Corp. v. Islamic Republic of Iran, 138 F.R.D. 1, 3 (D.D.C. 1991), on reconsideration in part, 1991 WL 178105 (D.D.C. 1991); Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 530, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987); U.S. v. Toyota Motor Corp., 569 F. Supp. 1158, 1162, 83-2 U.S. Tax Cas. (CCH) P 9468, 52 A.F.T.R.2d 83-5752 (C.D. Cal. 1983); Richbell Information Services, Inc. v. Jupiter Partners L.P., 32 A.D.3d 150, 816 N.Y.S.2d 470, 475, (1st Dep't 2006).

[7]Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 211, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) ("The findings below, and what has been show to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.") (hereinafter Société Internationale); see also Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 139, 67 Fed. R. Serv. 3d 1346 (2d Cir. 2007) ("If Russian law prohibits appellant from

adjudicate will not be deprived of its jurisdiction related to discovery;[8] rather, the foreign elements will merely factor into the U.S. court's exercise of its power to compel discovery or to sanction for noncompliance with its discovery orders.[9] It should also be noted that the use of discovery in establishing personal jurisdiction over a nonconsenting foreign defendant further distinguishes the reach of United States judicial rules. As shown below, a discovery sanction to persons resisting personal jurisdiction can include a finding that establishes certain jurisdictional facts.[10] U.S. courts thereby can exercise jurisdiction over the merits in cases where the record lacks the otherwise applicable requirements for in personam jurisdiction over a given defendant.[11] In such cases, of course, the forum's applicable judicial rules concerning discovery shall apply. Thus, international ESI discovery regarding personal jurisdiction (or Rule 37(b) sanctions) may beget discovery as to the merits.

The Civil Rules leave federal courts to factor, on one side, their very robust power to compel production of discovery maintained

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obtaining and producing the documents even with the agreement of IPT's board and an appropriate protective order in the district court, then the matter is at an end. However, if Russian law prohibits production simply because board approval—or waiver of a confidentiality agreement as to production in the United States under a proper protection order—is necessary, then the issue of appellant's control of IPT arises.").

[8] *Société Internationale, 357 U.S. at 205* (foreign compulsion barring production does not preclude "a court from finding that petitioner had 'control' over [certain records], and thereby from ordering their production" pursuant to Civil Rule 34).

[9] See In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 1977-2 Trade Cas. (CCH) ¶ 61724, 24 Fed. R. Serv. 2d 477 (10th Cir. 1977) (noncompliance with discovery not sanctioned due to Canadian restrictions on production of certain records stored in Canada and good faith, yet unsuccessful, effort of defendant to obtain waiver from authorities); Trade Development Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972) (affirming district court's finding that Swiss law prohibition of disclosure warranted, "as a matter of comity," that the district judge not compel the defendant to disclose account holder information, "particularly since in his view the identity was not essential to the issue on trial").

[10] Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982).

[11] The factual inquiry for in personam jurisdiction derives from the long-arm statute of the state in which the federal court sits and must also comport with federal due process strictures. See, e.g., Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1981 A.M.C. 2937, 30 Fed. R. Serv. 2d 1020 (5th Cir. 1980) (citing Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 18 Fed. R. Serv. 2d 1102 (5th Cir. 1974)). The *Third Circuit's Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.* decision provided a split with the Fifth Circuit's Familia De Boom decision and thereby supplied the expressed impetus for the Supreme Court's granting certiorari in the former litigation. *Insurance Corp. of Ireland, 456 U.S. at 700*.

abroad or otherwise subject to foreign law and, on the other side, their duty to duly regard conflicts with foreign laws precluding or limiting such disclosure. In recent years, the explosive growth in the reliance on electronic data integrated in webs of geographically dispersed communication networks has increased the volume and variation of material beyond U.S. borders yet susceptible to the scope of discovery in U.S. litigation. At the same time, the amount and nature of information stored on U.S. territory yet subject to concurrent jurisdiction of another state is similarly increasing. Foreign compulsion may apply not only to ESI abroad but to U.S. situated information with a foreign origin or a connection to a foreign legal relationship (e.g., banker-client confidentiality), making illegal or otherwise limiting under the foreign jurisdiction any production or disclosure of the information in discovery conducted in the U.S. court. The exponential proliferation of electronic mail is a very obvious source of the sort of growth and geographic dispersal precipitating these issues of concurrent jurisdiction, as is the ascent of traffic on the World Wide Web. Trading platforms of integrated capital and financial markets located in traditional centers such as New York, London, Shanghai, and Tokyo and emerging loci like Singapore, Shenzhen, and Dubai are other manifestations of such vast streams of data generation and cross-border exchanges capable of posing jurisdictional conflicts in civil litigation.

Civil Rule 34 establishes that parties may request from any other party any document or information within the scope of discovery, as it is set out under Rule 26(b), and "in the responding party's "possession, custody or control."[12] Federal courts have broadly construed the long-standing Rule 34 holding concepts of possession, custody, or control.[13] Courts have interpreted control to encompass circumstances where "the party has the right, authority or practical ability to obtain the documents from a nonparty to the action" and that the term "does not require that the party have legal ownership or actual physical possession of the documents at issue."[14] Because the reach of "control" determines the applicability of federal discovery rules and does so without regard to the geographic location of relevant ESI, the occurrence

[12]Fed. R. Civ. P. 34(a)(1).

[13]See, e.g., Camden Iron and Metal, Inc. v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991) (finding the requisite "control" of a subsidiary over its parent corporation's documents where intra-corporate relationship reflects the subsidiary's mere ability to obtain the requested information).

[14]In re NTL, Inc. Securities Litigation, 244 F.R.D. 179, 195, 68 Fed. R. Serv. 3d 1145 (S.D. N.Y. 2007), order aff'd, 2007 WL 1518632 (S.D. N.Y. 2007) (citing Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146–47 (S.D. N.Y. 1997)); see also, e.g., In re Flag Telecom Holdings, Ltd. Securities Litigation, 236 F.R.D. 177, 180, 64 Fed. R. Serv. 3d 1043 (S.D. N.Y.

of the kind of concurrent jurisdiction problem outlined above can be expected to grow with increasing application of the Civil Rules in the ESI context. From case to case, clarity of the effects on ESI of concurrent jurisdiction or extraterritorial discovery will be determined by application of the Civil Rules in accordance with extant precedents otherwise governing discrete foreign and international law questions.

The 2006 Amendments to the Civil Rules, of which so much has been said elsewhere, implicate this globalization and impact pivotal elements of conflicts and also extraterritoriality regarding U.S. discovery rules. The Advisory Committee on Civil Rules authored these Amendments which the U.S. Supreme Court ultimately approved without comment.[15] That Committee's recognition of the critical differences between paper and electronic information—the latter's dynamic nature as compared to the former's static; the latter's susceptibility to unconscious or inadvertent alteration or destruction—precipitated the broad revisions to the FRCP. A basic impetus for the 2006 Amendments is that virtually "all document discovery is or will soon be e-discovery."[16] Further, all discovery law must apply to ESI and, in many respects, has been and will continue to be changed by the material differences between ESI and traditional records.

Most of the Amendments merely augmented existing language to define and expressly include "electronically stored information" as an element subject to discovery, addressed matters of production format, contemplated inaccessibility of storage as a basis for not producing information or producing with cost-sharing or shifting, or emphasized early coordination of discovery matters among parties.[17] In addition to these more orientational or ministerial changes, the Advisory Committee took the bolder step to reformulate essential elements of the FRCP.

The core factors animating these bolder reformulations can be distilled to this: The nature of ESI raises preservation issues not posed by traditional records, problems emanating from these preservation issues can lead to spoliation, and spoliation can au-

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2006); Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd., 233 F.R.D. 338, 341, 63 Fed. R. Serv. 3d 566 (S.D. N.Y. 2005).

[15]April 12, 2006 Order of the Supreme Court of the United States Adopting and Amending Rules.

[16]Shira A. Scheindlin, Moore's Federal Practice, E-discovery: The Newly Amended Federal Rules of Civil Procedure, Part I (2006).

[17]See generally Advisory Committee Notes to 2006 Amendments to the Federal Rules of Civil Procedure (see Notes to Fed. R. Civ. P. 16, 26, 44, 34 and 45).

thorize sanctions.[18] Preservation, spoliation, and sanctions are rendered more complex in transnational ESI discovery than in the exclusively domestic context because a U.S. court, in its exercise of extraterritorial jurisdiction, must reconcile foreign and international law with the operation of the court's own discovery procedure. Further, the underlying facts of the organization and management of the physical components of ESI (e.g., data servers) dispersed across national boundaries can be expected to complicate this judicial task further by weaving into the court's inquiry many facts involving often-esoteric technical elements.[19] Despite these overarching concerns, the 2006 Amendments are silent as to foreign or international implications for the operation of the Civil Rules. Decisional law speaking to these muted issues should be expected to accumulate in the coming years.

In addition to navigating discovery in the context of overlapping and competing jurisdictions (as outlined above), divining the discovery scope and attachment date of a preservation duty is of acute importance to multinationals managing complex, cross-border information environments. Crucial legal consequences flow from the pivotal two-part question concerning preservation: At what moment and to what information has the duty to preserve attached?[20] The inherent difference between ESI and traditional forms of discovery elevates the significance of this inquiry. Historically, spoliation has required the affirmative step of destroying something—that is, a manila file does not shred itself and an automobile does not tow itself to the junkyard; rather people perform these destructive steps.[21] In contrast to the prior conventional understanding that destruction, the typical predicate for spoliation, results from a purposeful act, ESI destruction most frequently occurs without an actor taking affirmative steps to select information and destroy it. Indeed, the "Safe Harbor" rule of the 2006 Amendments is premised on the recognition that routine, automated information destruction has been needed in virtually any electronic information system. Civil Rule 37(e),[22] a new rule added to the FRCP under the 2006 Amendments is known as the Safe Harbor provision because it accounts

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[18]Scheindlin, Moore's Federal Practice, E-Discovery, at Part I.

[19]See Brooke Pietrzak & Joseph Perkovich, Extraterritorial ESI Preservation, N.Y.L.J., Nov. 5, 2007, S8.

[20]See, e.g., Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001); Kronisch v. U.S., 150 F.3d 112, 126 (2d Cir. 1998).

[21]See, e.g., West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 42 Fed. R. Serv. 3d 1161 (2d Cir. 1999).

[22]Fed. R. Civ. P. 37(e) was enumerated paragraph (f) at the time of its introduction in the 2006 Amendments. The 2007 Amendments, which were

for this necessity for routine destruction. When the "good faith operation of an electronic information system" is responsible for the loss of otherwise discoverable information, this Safe Harbor protects a party from sanctions. However, this protection should be understood as limited to information destroyed by routine operations before the duty to preserve such information had attached in the given litigation context. Destruction from failure to interrupt routine operations after the preservation duty attaches does not enjoy this Safe Harbor protection and thus may precipitate Rule 37 spoliation sanctions.[23] It is settled that the duty to preserve is triggered "when a party should have known that the evidence may be relevant to future litigation."[24] Determination of the trigger date is a fact issue for the trial court,[25] although courts may avoid, where feasible, ruling as to a hard date.[26] Especially because a trigger date often precedes the filing of suit, the spoliation case law possesses implications discovery of ESI abroad.

The specter of Rule 37 sanctions for spoliation of ESI destroyed abroad due to nonintervention upon routine, good-faith business operations raises jurisdictional questions under international law as reflected in U.S. jurisprudence and preeminent commentary.[27] As discussed below, the reach of U.S. discovery rules to warrant sanctions in certain instances calls into question the international jurisdiction and reasonableness of applying U.S. judicial rules to

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limited to a mere "restyling" of the Civil Rules re-enumerated many rules, including 37.

[23]See Fed. R. Civ. P. 37(b)(2)(A).

[24]Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001) (citing Kronisch v. U.S., 150 F.3d 112, 126 (2d Cir. 1998). See also Silvestri v. General Motors Corp., 271 F.3d 583, 51 Fed. R. Serv. 3d 694 (4th Cir. 2001); Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112, Prod. Liab. Rep. (CCH) P 11662, 24 Fed. R. Evid. Serv. 516 (8th Cir. 1988).

[25]See Broccoli v. Echostar Communications Corp., 229 F.R.D. 506, 62 Fed. R. Serv. 3d 817 (D. Md. 2005)

[26]See, e.g., Reino de Espana v. American Bureau of Shipping, 2007 WL 210018 (S.D. N.Y. 2007) (denying reconsideration of sanctions against plaintiff, Spain, stating that a precise "trigger-date" was unnecessary given that plaintiff failed to initiate its hold until six months after filing action and a year after marine casualty).

[27]Cf. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164, 124 S. Ct. 2359, 159 L. Ed. 2d 226, 2004-1 Trade Cas. (CCH) ¶ 74448 (2004) (statutory construction ordinarily avoids "unreasonable interference with the sovereign authority of other nations") (citing Restatement Third, Foreign Relations Law of the United States §§ 403(1), 403(2) ("limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State"); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612, 1993-1 Trade Cas. (CCH) ¶ 70280 (1993) (Scalia, J., dissenting) ("identifying rule of construction as derived from the principle of 'prescriptive comity.' ").

punish the failure to take affirmative preservation measures outside U.S. territorial jurisdiction. That prospect is a very different matter from whether sanctions are appropriate when a litigant takes affirmative steps to destroy discoverable material outside the jurisdiction. This novel provision raises whether it is always reasonable under international law to impute, based on domestic rules, notice of a duty to take steps to preserve discoverable information stored abroad.

Thus, clarity with respect to preservation duties and scope is of patent importance in transnational litigation. The noted "sea change" for practitioners in their meet and confer requirements under the 2006 Amendments to Civil Rule 26(f) should be used to foster clarity in that critical area.[28] The 2006 Amendment to Rule 26(f)(2) requires that parties "discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Under the "Discovery Plan" subsection (26(f)(3)), the revised rule entails that the "plan must state the parties' views and proposals on: . . . (C) any issues about disclosure or discovery of electronically stored information . . ." The emphasis on attending to discovery, and, in particular, ESI preservation, at the immediate outset of litigation should redound to the benefit of litigants possessing foreign or international issues concerning their preservation and discovery requirements under the federal judicial rules. Further, in cases concerning ESI sited abroad or otherwise subject to concurrent jurisdiction, the planning and reporting should include in the court's initial scheduling order pursuant to Rule 16(b) an express consideration of the foreign and international facets of implicated ESI. The initial scheduling order, it is submitted, should supply groundwork for sufficiently comprehensive court control of the discovery practice in such cases.[29]

The presence of the aforementioned issues of foreign and international law typically militates against litigants using interparty discovery requests rather than court orders. A judicial order often will be the soundest, and in certain situations, the only way to proceed in obtaining information discoverable under U.S. rules yet also subject to a foreign system's concurrent jurisdiction.[30] Frequently, the foreign law implicated in these matters is of a public law nature and can raise heightened

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[28]Scheindlin, Moore's Federal Practice, E-Discovery, at Part II.

[29]See Fed. R. Civ. P. 16(c)(2)(L) (matters for pretrial conference consideration include "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

[30]But cf., e.g., Treppel v. Biovail Corp., 2008 WL 866594 (S.D. N.Y. 2008) (discovery of ESI maintained in Canada and Barbados produced apparently without defendant raising jurisdictional or foreign law issues).

concerns above those respecting merely the legal interests of private parties in a civil litigation. Obtaining discovery, in many cases, will entail judicial assistance from a foreign court and thereby need the application of the U.S. court seized of the underlying matter. Further, the extraterritorial application of a preservation duty can raise jurisdictional questions under international law that are most satisfactorily addressed through formal measures taken prior to litigating spoliation questions rather than after the destruction of information occasioned in the absence of any formal notice to responsible persons outside U.S. territorial jurisdiction.

The Restatement (Third) of Foreign Relations Law, § 442, "contemplates that, in civil litigation in the United States affecting foreign interests, courts control discovery practice from the outset of the litigation pursuant to Rule 16 of the Federal Rules of Civil Procedure and comparable State rules."[31] This comment relates to subsection (1) of § 442. "Requests For Disclosure: Law Of The United States." This section of the Restatement, even in tentative draft form,[32] has long provided a framework for pursuing discovery abroad.[33] While drafted in the 1980s prior to the global ascendance of electronic telecommunications networks, the prescriptions in § 442 should become more necessary in the realm of ESI discovery than in the earlier period of paper records. Subsection 1(c) of § 442 has proven to be of particular importance in its enumeration of five factors for a U.S. court to weigh in "deciding whether to issue an order directing production of information located abroad."[34] Practitioners should anticipate an increase in litigations raising questions of reasonableness in the

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[31]Restatement (Third) Of Foreign Relations Law (hereinafter, "Restat. (Third) For. Rel.") § 442 Requests for Disclosure: Law Of The United States, Comment a (1987).

[32]*Aérospatiale, 482 U.S. at 544 n. 28* (quoting the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986); see also Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 37, 9 Fed. R. Serv. 3d 301 (N.D. N.Y. 1987); S & S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 616 (M.D. Tenn. 1986).

[33]See, e.g., In re Rubber Chemicals Antitrust Litigation, 486 F. Supp. 2d 1078, 1082, 2007-1 Trade Cas. (CCH) ¶ 75721 (N.D. Cal. 2007); In re Air Crash at Taipei, Taiwan, on October 31, 2000, 211 F.R.D. 374, 377 (C.D. Cal. 2002); In re Auction Houses Antitrust Litigation, 196 F.R.D. 444, 446, 2000-2 Trade Cas. (CCH) ¶ 73069, 48 Fed. R. Serv. 3d 43 (S.D. N.Y. 2000).

[34]Restat. (Third) Foreign Relations § 442 (1)(c). See, e.g., Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1474–1478, 22 Fed. R. Serv. 3d 703 (9th Cir. 1992) (considering each of the five factors in turn, deeming the "balance of national interests" as the most important); Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 1281–1283, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (comparing Restat. (Second) § 40 balancing test with addition in Restat. (Third) § 442 of "good faith" crite-

issuance of judicial orders for discovery of information stored abroad or otherwise subject to concurrent foreign jurisdiction.

Close judicial supervision, as the Supreme Court espoused in *Aérospatiale* and as numerous subsequent courts have subscribed, is called for in order to "prevent discovery abuses" abroad.[35] Such judicial supervision will continue to encompass any order for discovery of information which raises comity interests or is argued to be subject to foreign compulsion. In those cases, a flexible and "higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation" will supplant the normally applicable discovery scope of mere relevance to a party's claim or defense.[36] Thus, procedure has evolved to entail departures from the Civil Rules' general authorizations to conduct discovery through demands, and courts have assumed greater control and responsibility with regard to discovery conduct in extraterritorial situations. In keeping with the FRCP, the complexity often found in ESI discovery should generally continue to strengthen that development.

As outlined above, other legal systems may affect the application of U.S. process in discrete, consequential ways. This is true despite the vast breadth of in personam jurisdiction and, in many areas, subject-matter jurisdiction, under U.S. law and the inveterate, universal conflict of laws rule that the procedural law of the forum governs any given proceeding regardless of the source of the applicable substantive law.[37] Its comparatively vast breadth makes U.S. jurisdiction rather prone to conflicts with foreign

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rion; see also Easterbrook, J., concurring opinion discussing method for applying § 442).

[35]*Aérospatiale, 482 U.S. at 546*. See also In re Anschuetz & Co., GmbH, 838 F.2d 1362, 1364, 10 Fed. R. Serv. 3d 1296 (5th Cir. 1988) (on remand from Supreme Court to rule in keeping with Aérospatiale); Adams v. Unione Mediterranea Di Sicurta, 2002 WL 472252 (E.D. La. 2002) ("Under the reasoning of [Aérospatiale], this court must avoid placing any excessive burden on the foreign defendant who contests jurisdiction"); Bodner v. Paribas, 202 F.R.D. 370 (E.D. N.Y. 2000) (quoting Aérospatiale in support of district court's duty to "supervise pretrial proceedings particularly closely to prevent discovery abuses" and thus oversee discovery despite French blocking statute and bank secrecy laws); Madanes v. Madanes, 186 F.R.D. 279, 286, R.I.C.O. Bus. Disp. Guide (CCH) P 9823 (S.D. N.Y. 1999) (quoting Aérospatiale in support of need for district court to supervise pretrial proceedings with due respect to national interest of Argentina in suit "among Argentine nationals over their family's assets").

[36]In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1146, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979) (rehearsing the determinations in Société Internationale, 357 U.S. 197 (1958)); see also Restat. Foreign Relations § 442, Reporters' Note 2. See Fed. R. Civ. P. 26(b)(1) for scope of discovery criteria.

[37]See Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1941) ("It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the lex

systems. As explained below through the remainder of this part, particular external affects thus modify the application of procedural rules and commend certain steps over others available to courts concerning discovery of ESI abroad or with a foreign law connection.

§ 20:3 Discovery sanctions against foreign defendants not consenting to personal jurisdiction

The comparatively slight legal impediments to bringing an action in a U.S. court against a party anywhere in the world warrants consideration of the role ESI discovery may play in a district court's assumption of personal jurisdiction over a foreign, nonconsenting defendant. Civil Rule 4(f) bases for process service in a foreign country permit a variety of ways, including electronic means, of providing a defendant with service of a summons and notice of a pending action.[1] While most foreign parties in suits in U.S. courts do not raise a serious question as to their satisfaction of the broad and long-standing "minimum contacts" due process standard for personal jurisdiction, some foreign defendants will.[2] Discovery rules to precipitate the assumption of in personam jurisdiction over a recalcitrant foreign defendant remain at the disposal of a plaintiff bringing a suit in a domestic court.

The resistant foreign defendant objecting to the district court's jurisdiction and choosing to address the issue directly (rather than by ignoring the initial proceeding and addressing jurisdic-

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fori, or the law of the court invoked, regardless of the law under which the substantive rights of the parties accrued. For seven centuries, at least, courts and lawyers have broadly stated or assumed to be axiomatic the rule that substantive rights are fixed and immutable whilst the procedural devices by which such rights may be vindicated and enforced depend solely upon the law of the forum."). See also Collins, Dicey & Morris: The Conflict Of Laws, 157 (Sweet & Maxwell, 13th ed. 2000) (citing Ailes's classic characterization of this rule).

[Section 20:3]

[1]Under Fed. R. Civ. P. 4(f)(3), courts have the power, subject to international agreements, to "unilaterally define an appropriate method for service." See In re International Telemedia Associates, Inc., 245 B.R. 713, 720, 35 Bankr. Ct. Dec. (CRR) 201, 46 Fed. R. Serv. 3d 188 (Bankr. N.D. Ga. 2000) (service by electronic mail on a party deemed to take "frequent and unexpected travel" was found to be "fully authorized" by the Civil Rules) (quoting Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 460, 41 Fed. R. Serv. 3d 347 (S.D. Fla. 1998)). See also BP Products North America, Inc. v. Dagra, 236 F.R.D. 270, 65 Fed. R. Serv. 3d 611 (E.D. Va. 2006) (granting plaintiff's request for an order of alternative service by publication in two Pakistani newspapers).

[2]See, e.g., In re Vitamins Antitrust Litigation, 120 F. Supp. 2d 45, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000) (where antitrust defendants resisted jurisdiction, special master was free to compel personal jurisdictional discovery via the FRCP rather than the Hague Convention).

tion through a subsequent enforcement action)[3] can expect the choice between, on the one hand, complying with a discovery order and litigating the merits of personal jurisdiction upon producing discovery or, on the other hand, not complying and risking an adverse inference order establishing the jurisdictional facts as claimed by the plaintiff.[4] Case law reflects the consequences likely to befall defendants who litigate the jurisdictional issue in the first instance yet, through dilatory tactics and other half-measures often in the manner of belated motions to dismiss, fail to comply with ordered discovery.[5]

While a defendant's challenge to the court's personal jurisdiction places the burden on the plaintiff to evidence sufficient facts that the defendant's activities satisfy due process,[6] that burden may be reversed, in effect, with ease via the imposition of jurisdictional discovery, which is entitled upon making a prima facie case of personal jurisdiction.[7] If the defendant fails to comply with such ordered discovery, sanctions establishing "facts that form the basis for personal jurisdiction over a defendant" can result.[8] A federal court may impose Rule 37 sanctions for failure to comply with such a discovery order even absent a record establishing the "minimum contacts" needed for personal jurisdiction under *International Shoe Co. v. Washington*.[9] Thus, a U.S. court can assume in personam jurisdiction over a nonconsenting foreign defendant on the basis of that defendant's failure to

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[3]See § 20:4.

[4]Fed. R. Civ. P. 37(b)(2)(A)(i).

[5]See, e.g., Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877, 882, 31 Fed. R. Serv. 2d 937 (3d Cir. 1981), judgment aff'd, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982); Knox v. Palestine Liberation Organization, 229 F.R.D. 65, 70 (S.D. N.Y. 2005); Volkart Bros., Inc. v. M/V Palm Trader, 130 F.R.D. 285, 288, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

[6]See, e.g., General Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001).

[7]See, e.g., In re Vitamins Antitrust Litigation, 120 F. Supp. 2d 45,56–57, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000) (district court adopted special master's recommendation of jurisdictional discovery against Japanese defendant under the FRCP and same against Belgium defendant notwithstanding marked comity concerns due to hostility to U.S. discovery in Japanese and Belgian systems); see also, e.g., Best Van Lines, Inc. v. Walker, 490 F.3d 239 (2d Cir. 2007) (citing First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 175 (2d Cir. 1998)); Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 186 (2d Cir. 1998)).

[8]Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 695, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982).

[9]International Shoe Co. v. Washington, 326 U.S. 310 (1945).

comply with a discovery order given in connection with its objection to jurisdiction.[10]

Litigation of jurisdictional discovery will beget a "minimum contacts" analysis in order to establish personal jurisdiction as a predicate for discovery sanctions or, in the case of a defendant's cross-motion, grounds for dismissal.[11] As provided in Civil Rule 4(k), this analysis typically entails connecting minimum contacts with the state where the district court sits.[12] Personal jurisdiction comprises "general jurisdiction" and "specific jurisdiction," one of which must be shown to exist with respect to any given defendant.[13] Specific jurisdiction is established upon a defendant's "purposefully directed activities" at the forum,[14] out of which the cause of action arises.[15] Specific jurisdiction may result from a showing of communication activity (e.g., telephone calls, mail) between the foreign defendant and the plaintiff while the latter is within the applicable state jurisdiction.[16] Thus, a plaintiff, because of the likelihood of possessing his own copy of email communications or other records of electronic exchanges (e.g., bank transactions), may benefit from ESI discovery but will often already possess information upon which the party would seek to establish the court's specific jurisdiction over the defendant.

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[10]Lawrence Collins, 35 Int'l & Comp. L.Q. 766, 785 (1986) (considering the effect of Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982)).

[11]See, e.g., Womack v. Nissan North America, Inc., 2007 WL 5160790 (E.D. Tex. 2007); Volkart Bros., Inc. v. M/V Palm Trader, 130 F.R.D. 285, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

[12]Fed. R. Civ. P. 4(k)(1). See also Fed. R. Civ. P. 4(k)(2). The "federal long-arm statute" provides effective service and thus jurisdiction for a claim arising "under federal law" so long as exercising such jurisdiction is consistent with the United States Constitution and laws even though the foreign defendant lacks sufficient contacts to satisfy due process with respect to any particular state. See also, e.g., In re Complaint of Rationis Enterprises, Inc. of Pananma, 210 F. Supp. 2d 421, 2002 A.M.C. 1848 (S.D. N.Y. 2002) (jurisdiction found where service made under Civil Rule 4(k)(1)(B) on foreign defendant's office within 100 mile "bulge area").

[13]Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414–415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[14]Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[15]See., e.g., CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265, 24 Media L. Rep. (BNA) 2100, 39 U.S.P.Q.2d 1502, 1996 FED App. 0228P (6th Cir. 1996) (citing Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110, 1116–117, 28 Fed. R. Serv. 3d 1455, 1994 FED App. 0158P (6th Cir. 1994) (personal jurisdiction in Ohio district court established over Texas defendant based on contract with Ohio plaintiff and defendant's repeated delivery of "computer software, via electronic links, to the CompuServe system in Ohio").

[16]See, e.g., O'Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312 (3d Cir. 2007).

However, while the plaintiff may possess much or even all of the ESI evidence supporting the contention of specific jurisdiction, the matter of whether the ESI is of a sufficient measure and nature to precipitate specific jurisdiction is another question.[17] It is also quite conceivable that substantial ESI relating to "the operative facts of the controversy,"[18] and thereby relevant to the establishment of specific jurisdiction, would exist outside of the possession or control of the plaintiff. Further, given the recognition that data stored on a server situated in a given state jurisdiction can contribute substantially to a finding of in personam jurisdiction in a district court in that state, the prospect of discoverable ESI relating to a given controversy in the same jurisdiction may be expected in some cases.[19]

The second type of personal jurisdiction is general jurisdiction, which results from "systematic and continuous" activity.[20] "Even if a cause of action is unrelated to the defendant's forum activities, jurisdiction may still be asserted if corporate activities within the forum are sufficiently substantial."[21] However, even rather extensive commercial intercourse in the jurisdiction by the foreign defendant is unlikely to elevate to establishing general jurisdiction.[22] Further, the distinction between doing business with a state (e.g., license agreements with two television networks and a handful of vendors in California) and the higher

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[17]See, e.g., Machulsky v. Hall, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) ("minimal email correspondence" along with a single purchase did not establish minimum contacts); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 726, 27 Media L. Rep. (BNA) 2153 (E.D. Pa. 1999) (exchange of three e-mails between plaintiff and defendant regarding defendant's Web site did not "amount to the level of purposeful targeting required under the minimum contacts analysis"). But see, Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, R.I.C.O. Bus. Disp. Guide (CCH) P 8251, 25 Fed. R. Serv. 3d 440 (3d Cir. 1993) (minimum contacts found where defendant directed at least 12 communications to the forum in his individual and corporate capacities).

[18]*CompuServe, 89 F.3d at 1267* (citing *Reynolds, 23 F.3d at 1119*).

[19]See, e.g., CompuServe, Inc. v. Patterson, 89 F.3d 1257, 24 Media L. Rep. (BNA) 2100, 39 U.S.P.Q.2d 1502, 1996 FED App. 0228P (6th Cir. 1996).

[20]International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).

[21]Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240 (9th Cir. 1984) (citing Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 446–447, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio L. Abs. 146 (1952) (citing *International Shoe, 326 U.S. at 318–319*)). See also Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 149 (3d Cir. 1992) (general jurisdiction "may be invoked when the claim does not 'arise out of or is unrelated to the defendant's contacts with the forum.') (quoting Dollar Sav. Bank v. First Sec. Bank of Utah, N.A., 746 F.2d 208, 211 (3d Cir. 1984)).

[22]*Helicopteros, 466 U.S. at 418* (finding no general jurisdiction in Texas over helicopter transportation company that, over a four year period, purchased

standard of doing business in that state to an extent sufficient to establish minimum contacts has been articulated.[23] Notwithstanding the high threshold for establishing general jurisdiction, ESI discovery may aid a plaintiff's effort to establish the needed jurisdictional facts by disclosing the resistant defendant's relationships with other entities and the manner and location of the defendant's information management and storage.[24] Further, the mere burdening of a foreign defendant with discovery obligations can expose that defendant to the variety of litigation risks related to ESI discovery.

Due process must be satisfied with respect to any sanction establishing jurisdictional facts against the defendant which the plaintiff had sought via its jurisdictional discovery.[25] The considerations here are slight, as such Rule 37 sanctions will not violate *International Shoe* "notions of fair play and substantial justice"[26] when the trial "court merely adopts the presumption — based on a defendant's non-compliance — that that party's factual allegations in opposition to personal jurisdiction are untrue."[27] Rule 37 sanctions establishing jurisdictional facts are considered to violate due process "only if such jurisdiction is determined as a 'punishment' for that party's non-compliance."[28] Where the defendant accumulates a record of repeated delays and discovery order violations, a jurisdictional sanction may be found to specifically relate to the facts at issue in the underlying discovery order.[29]

Under the *Insurance Corp. of Ireland* analysis, the due process "presumption" threshold is readily surpassed when the plaintiff forms specific discovery requests speaking to the resistant defendant's contacts with the jurisdiction and thereby to the

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eighty percent of its helicopters, spare parts, and accessories from Texas sources).

[23]Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082, 1086, 55 U.S.P.Q.2d 1941 (9th Cir. 2000) (holding modified by, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006)).

[24]Cf. Oyuela v. Seacor Marine (Nigeria), Inc., 290 F. Supp. 2d 713 (E.D. La. 2003) (general jurisdiction established against Bahamian corporation that relied extensively on Louisiana-based corporation to administer personnel matters involving foreign seamen).

[25]*Insurance Corp. of Ireland, 456 U.S. at 705–706*.

[26]*International Shoe, 326 U.S. at 320*.

[27]Volkart Bros., Inc. v. M/V Palm Trader, 130 F.R.D. 285, 288, 1990 A.M.C. 1567 (S.D. N.Y. 1990).

[28]*Volkart Bros., 130 F.R.D. at 288*, (quoting *Insurance Corp. of Ireland, Ltd., 456 U.S. at 706*).

[29]Knox v. Palestine Liberation Organization, 229 F.R.D. 65, 70 (S.D. N.Y. 2005) (quoting *Insurance Corp. of Ireland, Ltd., 456 U.S. at 707*).

question of personal jurisdiction.[30] Requests framed to obtain responses which could support a cognizable basis for personal jurisdiction over a given foreign entity (e.g., "vicarious jurisdiction" via "corporate interrelatedness"), followed by the resistant defendant's noncompliance, have satisfied this discovery sanctions requirement.[31] The premium, then, is on the tailoring of requests to frame questions that merely could be answered in a way that would provide a prima facie claim to personal jurisdiction. The proliferation of ESI discovery sources in the form of mailboxes and data networks, it is submitted, has thus increased the jurisdictional exposure of nonconsenting foreign defendants litigating their personal jurisdiction in a domestic court.

In the event of noncompliance with jurisdictional discovery, evidence of a sustained good faith attempt to comply with discovery coupled with, when applicable, foreign affects of sufficient consequence may permit (or even require) a trial court to not employ Rule 37 sanctions to establish jurisdictional facts. Foreign Relations Law balance of interests considerations, as specified in the Restatement (Third) § 442(1)(c),[32] may be brought to bear although such foreign affects are properly addressed at the order stage and should be fully litigated then, when possible.[33]

It is clear from the foregoing that nonconsenting defendants who elect to participate in pretrial proceedings but do so without complying with ordered jurisdictional discovery and providing credible mitigation via Foreign Relations Law do themselves few favors in U.S. courts. The case law reflects a consensus in the importance of staking out early the lack of personal jurisdiction defense and advancing it vigorously and unequivocally.[34] Dalli-

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[30]*Volkart Bros., 130 F.R.D. at 289*.

[31]*Volkart Bros., 130 F.R.D. at 289*.

[32]Cf. Adams v. Unione Mediterranea Di Sicurta, 2002 WL 472252, 3 (E.D. La. 2002) (citing *Aérospatiale, 482 U.S. at 544 n.28* for position that district court "must avoid placing any excessive burden on the foreign defendant who contests jurisdiction.") (quoting Tentative Draft No. 7, 1986 437(1)(c)).

[33]See Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) (citing *Trade Development Bank, 469 F.2d 39–42*; *First National City Bank, 396 F.2d 900–905*; U.S. v. Davis, 767 F.2d 1025, 1033–1036, 18 Fed. R. Evid. Serv. 53 (2d Cir. 1985). But cf., *Banca Della Svizzera, 92 F.R.D. 117 n.3*; Remington Products, Inc. v. North American Philips Corp., 107 F.R.D. 642, 648 n.4, 3 Fed. R. Serv. 3d 241 (D. Conn. 1985).

[34]See, e.g., *Knox, 229 F.R.D. at 70* ("If Defendants instead wished to stand on principle and refuse to accede to the Court's assertion of personal jurisdiction over them [reference omitted], then they should have informed the Court of their decision and allowed it to determine whether jurisdictional sanctions were

ance in the jurisdictional defense should be expected to result in its eventual forfeiture.[35]

Before electing to litigate personal jurisdiction in a given suit, a nonconsenting foreign defendant faces the option of ignoring initial proceedings and, subsequent to a default judgment, litigating the jurisdictional question in an enforcement proceeding either outside the U.S. or in a U.S. court, the latter being more likely in instances where attachable assets are within reach of the U.S. jurisdiction.

As the *Insurance Corp. of Ireland* Court pointed out, a defendant is always free to ignore proceedings, take a default judgment and "then challenge that judgment on jurisdictional grounds in a collateral proceeding."[36] As an alternative to directly litigating personal jurisdiction, a nonconsenting defendant can cooperatively engage the adversary seeking to bring the foreign party into U.S. court, showing respect to the jurisdiction and the plaintiff while clearly not submitting to personal jurisdiction. After first staking out a lack of jurisdiction position, the nonconsenting defendant may benefit from polite and cautious reactions to process and discovery requests, making a clear and consistent record as to the jurisdictional deficiency of the underlying proceedings or, at a minimum, its desire to preserve its jurisdictional position and express its lack of certainty in the procedural implications of direct participation in the domestic proceedings.[37] In the event that default judgment enforcement is undertaken in a U.S. court, the circumspect yet properly engaged foreign defendant may have preserved its ability to fully litigate personal ju-

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appropriate without generating more than year's delay and thousands of dollars in legal expenses.").

[35]See, e.g., Hamilton v. Atlas Turner, Inc., 197 F.3d 58, Prod. Liab. Rep. (CCH) P 15807, 45 Fed. R. Serv. 3d 51 (2d Cir. 1999) ("In the extreme, a defendant, despite having asserted in its answer to the complaint its defense of lack of personal jurisdiction, may be held to have waived its right to challenge personal jurisdiction where it participates in extensive pretrial proceedings over several years before moving to dismiss for want of jurisdiction."); see also In re Complaint of Rationis Enterprises, Inc. of Pananma, 210 F. Supp. 2d 421, 426–427, 2002 A.M.C. 1848 (S.D. N.Y. 2002) ("Thus, by participating in the litigation, including full discovery, while not affirmatively asserting its jurisdictional defense in a timely manner, HMD forfeited that defense.").

[36]*Insurance Corp. of Ireland, 456 U.S. at 706* (citing Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931) (personal jurisdiction ruling has issue-preclusive effect)).

[37]See, e.g., Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 35 Fed. R. Serv. 2d 32 (3d Cir. 1982).

risdiction while requiring its adversary to take considerable steps to reach its assets and thereby force the issue.[38]

In some cases, a judgment creditor is unable to enforce judgment in a U.S. court due to the absence of attachable assets of the judgment debtor. The conflict of laws of a foreign system may bar enforcement claims of a judgment from a U.S. court absent certain procedural criteria. Consideration of the English conflicts rule on this question is illustrative of the general concept. The English position, in outline, is that "[a] foreign judgment is impeachable if the courts of the foreign country did not, in the circumstances of the case, have jurisdiction to give that judgment in the view of English law in accordance with [enumerated jurisdictional] principles."[39] English courts will not enforce a judgment where the given judgment debtor (i) was not present in the U.S. when the given proceedings were instituted, (ii) had not agreed prior to commencement of the proceedings to submit to the jurisdiction of the courts with respect to the subject matter concerned in the proceedings, and (iii) did not submit to the jurisdiction of the court by voluntarily appearing in the proceedings.[40]

Thus, litigation against foreign defendants raises factors regarding prospective enforcement actions in a foreign tribunal that may inform parties' choices at the initiation of proceedings in a U.S. court. In weighing options, a non-consenting foreign defendant is advised to closely evaluate the expanding quality of ESI discovery in the context of litigating personal jurisdiction and, especially, the considerable prospect of Rule 37 discovery sanctions against a foreign defendant objecting to the U.S. court's jurisdiction.

§ 20:4 Rule 16 management of ESI discovery

Where a court has in personam jurisdiction over the parties,

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[38]In Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 35 Fed. R. Serv. 2d 32 (3d Cir. 1982), the solicitors representing an English defendant, the liability insurer to a third-party defendant in a personal injury action in the Eastern District of Pennsylvania, demurred participation in the initial district court proceedings relating to the garnishment action brought by the third-party defendant. The third-party defendant obtained a default judgment against the English defendant followed by writs of execution and garnishment and the attachment of U.S. assets of the English defendant. The district court denied the English defendant's motion to reopen the default judgment but the Third Circuit, based on the English defendant's conduct during the initial proceedings (in which the English defendant did not submit to the court's jurisdiction), vacated the district court's judgment, and remanded the matter so that the English defendant could litigate the controversy, including personal jurisdiction, on the merits.

[39]Dicey & Morris, Rule 42 at 516.

[40]Dicey & Morris, Rule 36 at 487.

the Federal Rules of Civil Procedure, per the 2006 Amendments, emphasize the immediate need, and consequent duty of parties and the trial court, to identify and plan for ESI discovery factors. Since the 1993 Amendments, the deadline under Rule 16(f)(1) for the first discovery conference has been "as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or scheduling order is due under Rule 16(b)."[1] The 2006 Amendments revised Civil Rule 26(f) to expressly require at the mandatory conference a discussion of "any issues about preserving discoverable information."[2] Further, Rule 16(f) requires parties to "develop a proposed discovery plan" which they must submit "to the court within 14 days after the conference."[3] Civil Rule 16(b)(2) requires that the court must issue its scheduling order "as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared."[4] These amendments added that the discovery plan must include "the parties' views and proposals on . . . any issues about disclosure or discovery of electronically stored information . . ."[5] In that vein, revised Civil Rule 16(b) requires the ultimate scheduling order to "provide for disclosure or discovery of electronically stored information . . ."[6] With the aim of decreasing the frequency and consequence of ESI discovery disputes, these changes to Rules 16(b) and 26(f) have focused the attention of the parties on ESI discovery factors at the earliest stage of litigation and, in turn, put to the trial court the prospective ESI discovery issues.[7] As the Advisory Committee (the Amendments' authors) acknowledged, a key impetus for such prioritization was that routine machine operations involve "both the automatic creation and the automatic deletion or overwriting of certain

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[Section 20:4]

[1]Fed. R. Civ. P. 26(f)(1). Note that Fed. R. Civ. P. 16(b)(2) requires that the court must issue its scheduling order "within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared."

[2]Fed. R. Civ. P. 26(f)(2).

[3]Fed. R. Civ. P. 26(f)(1).

[4]Fed. R. Civ. P. 16(b)(2).

[5]Fed. R. Civ. P. 16(f)(3)(C).

[6]Fed. R. Civ. P. 16(b)(3)(B)(iii).

[7]Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 16 and Fed. R. Civ. P. 26, Subdivision (f).

information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes."[8]

As the 2006 Amendments underscore, ESI discovery is different in many ways and, perhaps most significant among these differences with traditional discovery sources, the preservation of electronic information has no paper counterpart.[9] The court control in the manner of the aforementioned conference and scheduling requirements provided in the ordinary course of federal litigation properly extends to the management of particular issues—among these, the novel extraterritorial ESI preservation considerations—precipitated in the trial court's management of its discovery jurisdiction.[10] Extraterritorial discovery in U.S. courts, as a general proposition, entails the exercise of international jurisdiction to prescribe and enforce rules.[11] This exercise of jurisdiction may give rise to conflict with a foreign system's like competences.[12] In order to carry out discovery jurisdiction in accord with the basic international law principle of reasonableness,[13] a U.S. court must ensure control of the extraterritorial discovery process at the outset of civil litigation likely to affect foreign interests.[14] It is the court's obligation to supervise proceedings so as to "prevent discovery abuses" abroad.[15] To that end, U.S. courts weigh interest-balancing factors in "deciding whether

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[8]Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 26, Subdivision (f).

[9]See Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 37, Subdivision (f).

[10]See Restat. (Third) Foreign Relations § 442, Comment a. Discovery as exercise of jurisdiction.

[11]See Restat. (Second) Foreign Relations § 40.

[12]See, e.g., Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 1279–1280, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) ("Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction in light of such factors as . . .") (quoting Restat. (Second) Foreign Relations § 40).

[13]See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164, 124 S. Ct. 2359, 159 L. Ed. 2d 226, 2004-1 Trade Cas. (CCH) ¶ 74448 (2004) (statutory construction ordinarily avoids "unreasonable exercise of prescriptive jurisdiction"); see also, In re Maxwell Communication Corp. plc, 186 B.R. 807, 34 Collier Bankr. Cas. 2d (MB) 1382, Bankr. L. Rep. (CCH) P 76681 (S.D. N.Y. 1995), order aff'd, 93 F.3d 1036, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996).

[14]See, e.g., Evans v. Williams, 238 F.R.D. 1, 3 (D.D.C. 2006).

[15]*Aérospatiale, 482 U.S. at 546*. See also Bodner v. Paribas, 202 F.R.D. 370 (E.D. N.Y. 2000) (quoting Aérospatiale in support of district court's duty to "supervise pretrial proceedings particularly closely to prevent discovery abuses"

to issue an order directing production of information located abroad."[16] This exercise is attributed to the duty of U.S. courts in reference to international comity and occurs despite the unassailable rule that, in any litigation, the procedural law of the forum applies.[17]

When a court determines that extraterritorial discovery considered within a given case may be conducted in accord with international jurisdiction principles, such discovery should take place via court order rather than through the general authorizations litigants in U.S. proceedings have to request in the production of information.[18] While the better practice in suits of a purely domestic variety is to manage ESI preservation without the potentially onerous measure of a preservation order,[19] narrowly crafted orders may warrant stronger consideration with relation to foreign located ESI because of the greater clarity and need for adequate deference (which will vary from case to case) to the foreign jurisdiction.[20] The rationale for conducting discovery through court order rather than mere party requests extends to whether, in a particular instance, a court should grant a motion to compel and also to whether a party should suffer sanctioning when it has failed to comply with ordered discovery.[21] However, the optimal conduct with regard to this question is to give full

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and thus oversee discovery despite French blocking statute and bank secrecy laws); Madanes v. Madanes, 186 F.R.D. 279, 286, R.I.C.O. Bus. Disp. Guide (CCH) P 9823 (S.D. N.Y. 1999) (quoting Aérospatiale in support of need for district court to supervise pretrial proceedings with due respect to national interest of Argentina in suit "among Argentine nationals over their family's assets").

[16]Restat. (Third) Foreign Relations § 442 (1)(c). See, e.g., Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1474–1478, 22 Fed. R. Serv. 3d 703 (9th Cir. 1992) (considering each of the five factors in turn, deeming the "balance of national interests" as the most important); Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 1281–1283, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (comparing Restat. (Second) § 40 balancing test with addition in Restat. (Third) § 442 of "good faith" criterion; see also Easterbrook, J., concurring opinion discussing method for applying § 442).

[17]See Collins, Dicey & Morris: The Conflict of Laws, 157 (Sweet & Maxwell, 13th ed. 2000).

[18]Manual for Complex Litigation, Fourth, Federal Judicial Center (2004), § 11.494 Extraterritorial Discovery.

[19]Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 26, Subdivision (f).

[20]But cf. In re Lernout & Hauspie Securities Litigation, 214 F. Supp. 2d 100, 109 (D. Mass. 2002) (in continuing its discovery stay, district court had "uncertain authority to enforce its preservation orders" overseas).

[21]Cf. Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 521, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) ("Second Circuit Court of Appeals has not adopted the approach of distinguishing the analysis appropriate for deciding

contemplation of these fundamental international jurisdiction factors in the determination of the given initial order as opposed to at a later stage with regard to compliance.[22] Such full contemplation, of course, is not always possible in the early stage of a suit and, in many instances, can only occur after key information is amassed as the litigation progresses.[23] Irrespective of the stage when the determination of the extraterritorial discovery question arises, the foreign compulsion inquiry under U.S. Foreign Relations Law applies.[24] Courts have adduced the contours of five basic elements to this inquiry,[25] which throughout the past five decades has remained fundamentally constant by way of the relevant sections in the Restatement (Second) and Restatement (Third) (viz., § 40 and § 442, respectively).[26]

Thus, in cases concerning ESI sited abroad or otherwise subject to concurrent jurisdiction, the planning and reporting in the court's initial scheduling order pursuant to Rule 16(b) should include an express consideration of the foreign and international facets of implicated ESI. The initial scheduling order, it is submitted, should supply the groundwork, in keeping with Rule 16(c)(2)(L), for sufficiently comprehensive court control of the discovery in "potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[27]

Apart from being required, the emphasis on attending to ESI

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to issue an order compelling discovery from that for imposing sanctions for noncompliance.").

[22]Restat. For. Rel. § 442, Reporters' Notes, Note 2. Supervision of foreign discovery by court. ("Subsection (1) is designed both to achieve greater control of the scope of discovery than is common in wholly domestic litigation, and to advance consideration of the issues set forth in Subsection (1)(c) *to the initial order rather than to the compliance stage*.") (emphasis added).

[23]See In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1146, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979) (deferring consideration of sanctions until later phase of the proceedings and after record is further developed with respect to foreign compulsion).

[24]See Weiss v. National Westminster Bank, PLC, 242 F.R.D. 33, 46, 67 Fed. R. Serv. 3d 1190 (E.D. N.Y. 2007) (citing Restat. For. Rel. § 442(1)(c)); see also British Intern. Ins. Co. Ltd. v. Seguros La Republica, S.A., 2000 WL 713057 (S.D. N.Y. 2000).

[25]See Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 209, 68 Fed. R. Serv. 3d 72 (E.D. N.Y. 2007).

[26]See, e.g., Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (analyzing the similarities and differences between § 40 of the Restat. (Second) and § 442 of the (Third), determining that the main difference was the latter's inclusion of a "good faith" element to the inquiry).

[27]See Fed. R. Civ. P. 16(c)(2)(L) (matters for pretrial conference consideration include "adopting special procedures for managing potentially difficult or

discovery, and, in particular, its preservation, at the immediate outset of litigation should benefit parties in disputes involving foreign or international issues under these judicial rules. The time sensitivity of ESI spoliation concerns has given priority under the FRCP to the planning and scheduling of ESI-related discovery.[28] This priority status may prove to be of keen significance when the ESI, in some part, is maintained abroad or otherwise susceptible to jurisdictional controversy between sovereigns. It is in that basic context that the direct involvement of the court in the conduct of discovery is most necessary in establishing the duties and expectations of the parties and facilitating satisfaction of extraterritorial discovery pursuits, especially when foreign judicial assistance is warranted or required by the foreign sovereign.

Discovery controversies in U.S. courts due to the laws of a concurrent, foreign jurisdiction long predate the ascent of ESI as the main material of discovery. In the former era, the general crux of the disputes about extraterritorial discovery concerned a) whether a U.S. court would compel a party to produce certain information the disclosure of which, it would be argued, was prohibited by foreign law,[29] or b) in the event such production had been compelled and was then not produced, how—if at all—foreign compulsion in the given case informed the court's determination regarding sanctions for such noncompliance.[30]

The current era presents recurrences or variations on those previously manifested questions. For instance, many trial and appellate courts have addressed the extent to which Civil Rule 34(a) notions of "possession, custody, or control" extend abroad. However, the extent to which "control" should be made to apply to various types of ESI maintained abroad by a nonlitigant affiliated with the party subject to the given discovery obligation may be seen to generate distinct considerations. As another example, many courts have had to address foreign laws prohibiting the production of information due to confidentiality and/or privacy.[31]

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protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

[28]See, e.g., Fed. R. Civ. P. 26(f)(2).

[29]See, e.g., Trade Development Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972).

[30]See, e.g., Société Internationale, 357 U.S. 197 (1958); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 22 Fed. R. Serv. 2d 1003 (10th Cir. 1976).

[31]See, e.g., Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310 (E.D. N.Y. 2006), aff'd, 2007 WL 812918 (E.D. N.Y. 2007).

Foreign laws specifically relating to data privacy and/or confidentiality, however may introduce novel questions.[32]

This era of digital telecommunications not only raises variations like the foregoing. It also raises new questions surrounding the affirmative technical measures involved in avoiding the destruction or alteration of information. The necessity of steps to ensure preservation by avoiding the continued automatic functions of ESI sources maintained abroad should be expected to give rise to distinct legal concerns regarding the application of established procedural law concerning, inter alia, the extension to nonparties of some obligation to take affirmative ESI preservation measures, the scope of preservation, and the attachment date of the preservation duty. In relation to the purely domestic discovery context, these issues are well developed by case law applying the various implicated Civil Rules.[33] Foreign law considerations, however, should be anticipated to affect the interpretation of these judicial rules in cases concerning ESI sited abroad. Thus, impediments to discovery caused by foreign compulsion raise an added complexity to discovery planning and scheduling, even exceeding the generally onerous factors of the technical variety that absorb so much in the way of litigators' resources.

In this transnational context, application of the federal rules regarding scope of discovery and the imputed reach of a party to discoverable information raises the implications of concurrent jurisdiction upon the extension of these rules to extraterritorial ESI.

§ 20:5 International jurisdiction limitations on Rule 26(b) scope of discovery

Civil Rule 26(b)(1) encompasses a broad scope: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[1] Relevance under Rule 26(b) includes "any matter that bears on, or that reasonably could lead to other matter that could

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[32]See, e.g., Columbia Pictures Industries v. Bunnell, 2007 WL 2080419 (C.D. Cal. 2007), review denied, 245 F.R.D. 443, 69 Fed. R. Serv. 3d 173 (C.D. Cal. 2007) (magistrate judge granted motion to compel defendants to preserve log data of server maintained in Holland despite anticipated violation of Netherlands' Personal Data Protection Act).

[33]See, e.g., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003).

[Section 20:5]

[1]Fed. R. Civ. P. 26(b)(1).

bear on, any issue that is or may be in the case."[2] In general, a request for discovery requires the receiving party to not only produce information that would be admissible evidence, but also to produce information that "appears reasonably calculated to lead to the discovery of admissible evidence."[3] "Reasonably calculated" has been interpreted to mean "any possibility that the information sought may be relevant to the subject matter of the action.' "[4]

Courts curtail this great breadth when determining the effective scope of discovery for information subject to the concurrent jurisdiction of another state.[5] When discovery is subject to another jurisdiction, the otherwise applicable discovery standard embodied in Civil Rule 26(b) "should be replaced by the higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation."[6] Trial courts have taken the view "that 'it is ordinarily reasonable to limit foreign discovery to information necessary to the action—typically, evidence not otherwise readily obtainable—and directly relevant and material.' "[7] It is within a trial court's discretion to refuse to order a disclosure prohibited by a foreign law when the information sought, while relevant under Rule 26(b) criteria, is of "relative unimportance."[8] Rule 26(b) provides a general limitation to discovery, irrespective of jurisdictional conflicts, when "the

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[2]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350, 98 S. Ct. 2380, 57 L. Ed. 2d 253, Fed. Sec. L. Rep. (CCH) P 96470, 25 Fed. R. Serv. 2d 541 (1978) (citing Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451, 1947 A.M.C. 1 (1947)).

[3]Daval Steel Products, a Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1367, 1992 A.M.C. 891, 21 Fed. R. Serv. 3d 685 (2d Cir. 1991).

[4]Pitney Bowes, Inc. v. Kern Intern., Inc., 239 F.R.D. 62, 65 (D. Conn. 2006) (citing Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Maryland, 122 F.R.D. 447, 449, 27 Fed. R. Evid. Serv. 69 (S.D. N.Y. 1988) (citations and internal quotation marks omitted).

[5]See, e.g., Minpeco, 116 F.R.D. at 522; *In re Uranium Antitrust Litig., 480 F.Supp. at 1146*.

[6]In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1146, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979) (rehearsing the determinations in Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)); see also Restat. For. Rel. § 442, Reporters' Note 2. See Fed. R. Civ. P. 26(b)(1) for scope of discovery criteria.

[7]Evans v. Williams, 238 F.R.D. 1, 3 (D.D.C. 2006) (quoting Restat. (Third) For. Rel. § 442, Comment (a)); see also U.S. v. Toyota Motor Corp., 569 F. Supp. 1158, 83-2 U.S. Tax Cas. (CCH) P 9468, 52 A.F.T.R.2d 83-5752 (C.D. Cal. 1983) ("a more stringent test of direct relevancy, necessity and materiality than is required for comparable requests for documents or information located in the United States") (quoting § 420, Comment (a), Tentative Draft No. 3, 1982 of Restat. (Third) For. Rel. (§ 420 became § 442 (1)(c))).

[8]Trade Development Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972); see also *Strauss, 242 F.R.D. at 212*.

discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."[9]

The 2006 Amendments introduced to Rule 26(b) a new paragraph titled: "Specific Limitations on Electronically Stored Information."[10] These limitations in Rule 26(b)(2)(B) entail that a litigant "need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[11] The matter of accessibility is a technical question, not a legal one relating to jurisdiction or another per se legal basis.[12] The limitations do not relieve a party of its preservation duty in the given circumstances of the suit, as even ESI deemed to be "not reasonably accessible" may still be made subject to discovery through a "good-cause" showing.[13] The principle reflected in this new provision derives from key case law and concerns the technical issues pertaining to ESI storage media.[14] There is no basis for extending these limitations to nontechnical matters such as jurisdiction.[15]

§ 20:6 Control under Rules 34 and 45 and information in the possession of another entity

Jurisdictional conflict, as reflected above, can limit the otherwise expansive scope of discovery under the federal rules. The connected step in determining a party's obligations under these rules is the application of the scope of discovery—via Civil Rule 26(b) and the aforementioned "higher standard" due to international jurisdiction constraints[1]—to the matter of the party's "control" as determined by Rule 34. Rule 34 provides that a party is generally required to produce information within the

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[9]Fed. R. Civ. P. 26(b)(2)(C)(i). See also U.S. v. Vetco Inc., 691 F.2d 1281, 81-1 U.S. Tax Cas. (CCH) P 9428 (9th Cir. 1981).

[10]Fed. R. Civ. P. 26(b)(2)(B).

[11]Fed. R. Civ. P. 26(b)(2)(B).

[12]See Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 26, Subdivision (b)(2).

[13]Advisory Committee Notes to 2006 Amendments, Fed. R. Civ. P. 26, Subdivision (b)(2). In the event of a "good-cause inquiry," a costs and benefits analysis is entailed and the court will be required to assess cost-shifting related to any subsequent production.

[14]See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318–320, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D. N.Y. 2003) ("Zubulake I").

[15]The text of the provision, the prior decisional law, and the Advisory Committee Notes and other related materials support the interpretation of these limitations as confined to purely technical storage matters.

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[1]*In Re Uranium Antitrust Litig., 480 F.Supp. at 1146.*

scope of Rule 26(b) and "in the responding party's possession, custody, or control."[2] Rule 45 entails that a properly issued subpoena will require a nonparty witness to produce information on the same bases of "possession, custody, or control."[3] The application of Rule 34 and, with respect to nonparty witnesses, Rule 45, is self-evident when the legal person from whom discovery is requested itself possesses or maintains custody of the sought information. Application of Rule 34 or 45 is more difficult when the requesting party must rely on the concept of "control" in order to require a party or witness to produce information not in its physical possession but in the repose of another, associated entity.[4]

While the party seeking production carries the burden of establishing that an opposing party has control over documents not in its possession,[5] courts construe the concept of "control" broadly.[6] Although the scope of discovery in certain cases may be limited due to international jurisdiction, whether or not any of the specific information sought by a party is located abroad is immaterial to the application of Rules 34 and 45: "[T]he test for production of documents is control, not location."[7] The broad construal of control, however, can require a party or nonparty witness to produce in a U.S. court information obtained from an entity dismissed from the action for lack of personal jurisdiction.[8] A federal court can, "by means of its power over the party liti-

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[2]Fed. R. Civ. P. 34(a)(1).

[3]Fed. R. Civ. P. 45(a)(1)(C).

[4]Cf. Camden Iron and Metal, Inc. v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991) (defendant produced all such documents in its possession . . . and asserts that it lacks ability to demand similar documents from its parent").

[5]See U.S. Intern. Trade Com'n v. ASAT, Inc., 411 F.3d 245, 254, 28 Int'l Trade Rep. (BNA) 1248 (D.C. Cir. 2005) (hereinafter, ASAT, Inc.); U.S. v. International Union of Petroleum and Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452, 111 Lab. Cas. (CCH) P 11052 (9th Cir. 1989).

[6]In re Flag Telecom Holdings, Ltd. Securities Litigation, 236 F.R.D. 177, 180, 64 Fed. R. Serv. 3d 1043 (S.D. N.Y. 2006) (hereinafter In re Flag Telecom Holdings).

[7]See, e.g., In re NTL, Inc. Securities Litigation, 244 F.R.D. 179, 195, 68 Fed. R. Serv. 3d 1145 (S.D. N.Y. 2007), order aff'd, 2007 WL 1518632 (S.D. N.Y. 2007) (hereinafter In re NTL) (citing In re Flag Telecom Holdings). See also Matter of Marc Rich & Co., A.G., 707 F.2d 663, 667 (2d Cir. 1983) (grand jury subpoena); Dietrich v. Bauer, 2000 WL 1171132 at 2 (S.D.N.Y. 2000), on reconsideration in part, 198 F.R.D. 397 (S.D. N.Y. 2001) (S.D.N.Y. Aug. 16, 2000) (third party).

[8]See Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127 (D. Del. 1986).

gant," order the production of information possessed by a nonparty outside the court's in personam jurisdiction.[9]

"Control" under Rule 34 "does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority or practical ability to obtain the documents from a non-party to the action."[10] Where such practical ability to obtain documents is found in the record, the production of documents will be compelled despite a custodian's asserted lack of "authority."[11] The "nature of the transactional relationship" regarding the corporate entities determine whether a party will be required to produce information maintained by another entity.[12] The specific "form of the corporate relationship" itself does not determine the question of control in any individual case.[13] Where the party to the litigation is the parent corporation and the information requested is possessed by its subsidiary, the requisite control over the subsidiary for the purpose of Rule 34 has been found when the parent possesses a high degree of ownership and exercises a similar degree of control over the subsidiary.[14]

Where the litigating party is the subsidiary and the information at issue is in the possession of the parent corporation, five alternate grounds have provided the requisite control for Rule 34 purposes.[15] Control over another entity for documentary discovery purposes has been found even absent parent/subsidiary intercorporate ties, as "sister corporations" sharing a common corporate

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[9]Uniden America Corp. v. Ericsson Inc., 181 F.R.D. 302, 306 (M.D. N.C. 1998) (citing *Afros S.P.A., 113 F.R.D. at 129*).

[10]*In re NTL, 244 F.R.D. at 195* (quoting Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146–147 (S.D. N.Y. 1997), citing *In re Flag Telecom Holdings, 236 F.R.D. at 180*, Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd., 233 F.R.D. 338, 341, 63 Fed. R. Serv. 3d 566 (S.D. N.Y. 2005); see also Searock v. Stripling, 736 F.2d 650, 653, 39 Fed. R. Serv. 2d 716 (11th Cir. 1984).

[11]*In re Flag Telecom Holdings, 236 F.R.D. at 181*.

[12]Alcan Intern. Ltd. v. S.A. Day Mfg. Co., Inc., 176 F.R.D. 75, 78 (W.D. N.Y. 1996) (quoting Addamax Corp. v. Open Software Foundation, Inc., 148 F.R.D. 462, 467, 25 Fed. R. Serv. 3d 884 (D. Mass. 1993)).

[13]S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469, 472, 47 Fed. R. Serv. 3d 1355 (S.D. N.Y. 2000) (quoting *Afros S.P.A., 113 F.R.D. at 131*).

[14]*Camden Iron & Metal, Inc., 138 F.R.D. at 441* (citing Gerling Intern. Ins. Co. v. C.I.R., 839 F.2d 131, 140, 88-1 U.S. Tax Cas. (CCH) P 9158, 61 A.F.T. R.2d 88-553 (3d Cir. 1988)).

[15]See ASAT, Inc., 411 F.3d at 254 (citing *Camden Iron & Metal, Inc., 138 F.R.D. at 441–442* (citing *Gerling Int'l Ins. Co., 839 F.2d at 140–141)*).

parent may possess a sufficient nexus to compel production.[16] Contractual agreements providing, for instances, document-sharing pursuant to a bankruptcy plan,[17] a claim assignment in a bank debt litigation,[18] or a patent sublicense in an infringement action[19] can also create control by one person over an otherwise unaffiliated entity. However, one district court did not impute "control" to a Dallas office of a U.S. based Ernst & Young general partnership where the subpoena called for documents in the possession of Ernst & Young partnerships organized in Singapore and Thailand and the record reflected that the Dallas office initially obtained requested documents from both foreign entities and that all three Ernst & Young partnerships belonged to a "unified worldwide business entity."[20] In contrast, another district court compelled a plaintiff in a false representation Lanham Act suit to produce information from its German parent relating to technical aspects of its product on the basis that they were "members of a unified worldwide business entity."[21]

Camden Iron & Metal set forth the aforementioned five alternate grounds for establishing that a subsidiary has the requisite control over documentary information in a parent corporation's possession.[22] The plaintiff in *Camden Iron & Metal* sought from both the New York-based defendant and the defendant's Tokyo-based corporate parent copies of communications concerning a disputed scrap metal contract wherein, it was alleged, the defendant's end buyer had indicated it intended to

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[16]See, e.g., *Uniden America Corp., 181 F.R.D. at 307* ("When the order compelling documents is not based on actual control, but on the inferred control and complicity prong, the court will more likely tie the scope of the request to the extent of the complicity."); Alimenta (U.S.A.), Inc. v. Anheuser-Busch Companies, Inc., 99 F.R.D. 309, 313, 39 Fed. R. Serv. 2d 646 (N.D. Ga. 1983); Perini America, Inc. v. Paper Converting Mach. Co., 559 F. Supp. 552, 553, 36 Fed. R. Serv. 2d 9 (E.D. Wis. 1983).

[17]*In re NTL, 244 F.R.D. at 195–196*.

[18]See Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135 (S.D. N.Y. 1997) (assignee of claim against debtor was compelled to produce documents in the possession of the assignor).

[19]See Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D. N.Y. 1992) ("sub-license agreement" and "prior history" of assistance by the unaffiliated entity provided basis for Rule 34 control) (citing Anderson v. Cryovac, Inc., 862 F.2d 910, 12 Fed. R. Serv. 3d 719 (1st Cir. 1988); In re Nifedipine Capsule Patent Litigation, 13 U.S.P.Q.2d 1574, 1575, 1989 WL 111112 (S.D. N.Y. 1989)).

[20]Goh v. Baldor Elec. Co., 1999 WL 20943, at 2–3 (N.D. Tex. 1999).

[21]But cf. Alcan Intern. Ltd. v. S.A. Day Mfg. Co., Inc., 176 F.R.D. 75, 79 (W.D. N.Y. 1996) (compelling plaintiff to produce information from German parent, "members of a unified worldwide business entity," relating to technical aspects of its product in false representation Lanham Act suit).

[22]138 F.R.D. at 441–442.

back out of the sale. The defendant produced all such documents in its custody and asserted that it lacked the ability to obtain same from its parent in Tokyo.[23] However, a litigating subsidiary is deemed to have control over certain of a parent corporation's documents when the record provides that the subsidiary, in the normal course of business, is apt to demand and have access to such documents.[24] In *Camden Iron & Metal*, the Tokyo parent had initiated and acted in the negotiation of the underlying transaction and the plaintiff had evidenced that the defendant, "in the normal course of business," obtained documents from the parent related to the transaction in which, it was found, the parent and subsidiary "acted as one."[25] On that record, the trial court compelled the New York subsidiary to obtain the requested communications and other documents from its parent, finding that the defendant "has easy and customary access to the [parent's] documents involving this transaction" (emphasis added).[26] While the decision was grounded on the subsidiary's access in the normal course of business to the parent corporation's documents, the holding is more narrow than at first would appear. The record reflected a basis for finding that the subsidiary had access to the parent's communications regarding the specific transaction in dispute. The record did not provide a basis for extending such a finding to the parent's communications more generally.

Camden Iron & Metal can supply a basis for compelling electronic mail production from nonparty corporate parents. Notwithstanding the narrow holding compelling the production of communications maintained by the parent in Tokyo about the discrete underlying transaction in that case, the point that "customary access" can apply to a single transaction should be expected to enable the litigant in very many disputes to advance facts to support such a finding. This inquiry is fact-driven and litigants are thus advised to recognize the decisive factors in this line of cases when moving for or opposing such discovery.

Without a record of more than some sharing of documents during the ordinary course of business, and instead, a showing of significant coordination and collaboration as manifested in the dealings of the *Camden Iron & Metal* defendant and its parent,[27] it is submitted that courts are not apt to find the requisite control

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[23]138 F.R.D. at 439.

[24]*Camden Iron & Metal, Inc., 138 F.R.D. at 443* (citing Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919–920, 39 Fed. R. Serv. 2d 1369 (S.D. N.Y. 1984)).

[25]138 F.R.D. at 443.

[26]138 F.R.D. at 443.

[27]See, e.g., Choice-Intersil Microsystems, Inc. v. Agere Systems, Inc., 224 F.R.D. 471 (N.D. Cal. 2004).

to compel production under either Rule 34 or 45.[28] In *U.S. Int'l Trade Com'n v. ASAT, Inc.*, the Circuit Court of Appeals for the District of Columbia applied *Camden Iron & Metal* in ruling on the question of "control" as it related to an International Trade Commission administrative subpoena for documents in the possession of the corporate witness's parent companies.[29] Circuit Judge Rogers distinguished the relationship between ASAT, Inc. and its parent companies from the intercorporate relationships that have properly given rise to a finding of "control" for the purpose of document discovery, finding that:

> the record only vaguely indicates that ASAT, Inc.'s 'principal activities' are 'sales, marketing and customer services,' and it does not provide any context or explanation for why ASAT, Inc. would have access to or even need documents relating to a patent that it has not been assigned. Simply because [ASAT, Inc. and its two parent companies] share some documents during the ordinary course of business is insufficient to deem ASAT, Inc. as having control over the documents underlying the patents at issue.

The Circuit Court concluded that "there must be a nexus between the subpoenaed documents and [the witness's] relationship with its parent companies, taking into account, among other things, [it's] business responsibilities."

Most of the decisions in the *Camden Iron & Metal* line of cases regarding "control" of a subsidiary over a parent's documents concern motions to compel the production of certain instrumental documents (rather than general categories like correspondence), such as blueprints or technical drawings,[30] test results,[31] and specific legal documents.[32] Those cases follow *Cooper Industries, Inc. v. British Aerospace*[33] wherein an American affiliate of a British plane manufacturer was compelled to produce certain blueprints, service manuals, and other documents related to the planes which the American affiliate (defendant, British Aerospace, Inc.) sold and serviced. The court found it was "inconceiv-

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[28]See, e.g., ASAT, Inc., 411 F.3d at 279 (Circuit Judge Rogers, writing for Chief Judge Ginsburg and Circuit Judge Tatel); Pitney Bowes, Inc. v. Kern Intern., Inc., 239 F.R.D. 62, 69 (D. Conn. 2006).

[29]*ASAT, Inc., 411 F.3d at 254.*

[30]See, e.g., Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 39 Fed. R. Serv. 2d 1369 (S.D. N.Y. 1984); Pitney Bowes, Inc. v. Kern Intern., Inc., 239 F.R.D. 62 (D. Conn. 2006).

[31]See, e.g., Alcan Intern. Ltd. v. S.A. Day Mfg. Co., Inc., 176 F.R.D. 75 (W.D. N.Y. 1996).

[32]See, e.g., M.L.C., Inc. v. North American Philips Corp., 109 F.R.D. 134, 1986-1 Trade Cas. (CCH) ¶ 66914 (S.D. N.Y. 1986); U.S. Intern. Trade Com'n v. ASAT, Inc., 411 F.3d 245, 28 Int'l Trade Rep. (BNA) 1248 (D.C. Cir. 2005).

[33]Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 39 Fed. R. Serv. 2d 1369 (S.D. N.Y. 1984).

able that defendant would not have access to these documents and the ability to obtain them for its usual business."[34] However, the mere assertion that a subsidiary is a sales and service agent for its parent company does not make it "inconceivable" that the subsidiary does not have access to the parent's "technical construction drawings" when the record indicates that the parent consistently refused to provide such materials to the litigating subsidiary—or any other of its subsidiaries—in the ordinary course of business because unnecessary disclosure to even related distributors and subsidiaries "would unnecessarily risk the core of [the parent manufacturer's] business."[35]

Digital telecommunication networks have contributed vastly to the coordination of corporate supply chains, distribution arrangements, and myriad other affiliations. Sophisticated databases to access and manage information are often heavily integrated into the corporate relationships of parent companies and their overseas subsidiaries. In this general context of heavy digital data traffic, the profile of such information in ESI discovery is likely to increase as litigants, and their counsel, accumulate more experience. Given that the basic purpose of broad corporate networks is the wide dispersal of information to those making up its "transactional relationships,"[36] the *Cooper Industries* line of cases provide guidance for discovery pursuits directed at such vital corporate information.

Turning to Civil Rule 45, the first thing to note is that it is drafted in a manner nearly identical to Rule 34, incorporating the same terms of "possession, custody and control."[37] Without evidence that the drafters of the rules intended to give different meanings to these same words, courts are "loath to define identical terms in two different rules differently."[38] The 1991 Amendments to the FRCP included a means to quashing or modifying a subpoena under Rule 45.[39] A third party may object to the enforcement of a subpoena on the basis that it imposes an "undue burden."[40] However, in the context of subpoenas seeking production from an entity affiliated with the subpoenaed nonparty witness rather than the witness itself, courts have applied "control" in the same manner as in Rule 34 applications and have not

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[34]*Cooper Industries, Inc., 102 F.R.D. at 919–920*.

[35]*Pitney Bowes, Inc., 239 F.R.D. at 65, 69*.

[36]Addamax Corp. v. Open Software Foundation, Inc., 148 F.R.D. 462, 467, 25 Fed. R. Serv. 3d 884 (D. Mass. 1993).

[37]Fed. R. Civ. P. 45(a)(1)(C); cf. Fed. R. Civ. P. 34(a).

[38]*Addamax Corp., 148 F.R.D. at 468*.

[39]Fed. R. Civ. P. 45(c)(3)(A)(iv).

[40]Fed. R. Civ. P. 45(c)(3)(A)(iv). See, e.g., *Addamax Corp, 148 F.R.D. at 468*.

found this extension of the control concept to other entities unduly burdensome, in and of itself.[41]

Multinational enterprises subject to U.S. personal jurisdiction that fail to identify the reach within their organization of Rules 34 and 45 may be taking on imprudent risk in the event of litigation of substantial commercial value. Under the 2006 Amendments, the Rule 26(f) meet and confer duty has made attorneys responsible for expressly determining the material features of a litigation's ESI discovery plan and doing so promptly upon commencement of a suit. As noted above, this is a key emphasis of the amendments that has even greater consequence for multinational enterprises than for simply domestic concerns. The inherent complexity of the information systems of multinationals presents difficulties in identifying the extent of "possession" and "custody" under Rule 34, let alone the reach of "control" beyond the confines of the given corporate form to affiliated entities.

Thus, in-house lawyers and their outside counsel, as a standing proposition, should have a strong command of the organization of their information environment and the prospective extraterritorial reach of Rule 34 or similar rules in state courts. Further, counsel must plan for the engagement of IT measures needed for the technical implementation of a litigation hold upon ESI abroad.[42] Hold implementation for ESI abroad, however, does not merely raise technical issues. Data protection laws in many jurisdictions touch even the IT measures that a litigant would effectuate under a hold.[43] Prudence requires that clear positions on this sort of foreign law question should be established prior to any particular U.S. litigation.

§ 20:7 Rule 37 sanctions avoidance

The Rule 37 sanctions imposed due to the grave spoliation in the *In re NTL* litigation suggests the significance that questions of "control," especially under Rule 34, may have in connection with ESI destruction or alteration. Magistrate Judge Peck's January 30, 2007, opinion in that litigation recounted a series of grave mistakes and apparent improprieties in the handling of preservation duties in relation to a securities litigation commenced prior

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[41]See, e.g., First American Corp. v. Price Waterhouse LLP, 154 F.3d 16 (2d Cir. 1998); Ssangyong Corp. v. Vida Shoes Intern., Inc., 2004 WL 1125659 (S.D. N.Y. 2004); Dietrich v. Bauer, 2000 WL 1171132 (S.D. N.Y. 2000), on reconsideration in part, 198 F.R.D. 397 (S.D. N.Y. 2001).

[42]See, e.g., In re NTL, Inc. Sec. Litig., 244 F.R.D. at 195.

[43]See, e.g., European Data Protection Directive (95/46/EC) (typical technical steps taken in U.S. discovery might constitute "processing" under the European Directive and thereby transgress the implementing legislation of a particular Member State).

to the defendant's emergence from Chapter 11 bankruptcy via a reorganization plan.[1] The reorganization resulted in the division of the former company into two companies, one to sell off unprofitable assets and defend against the securities litigation up to the extent of the predecessor company's insurance coverage (NTL Europe) and the other to carry on with the predecessor's surviving, viable European telecommunications assets (New NTL).[2] Thus, NTL Europe was the defendant in the formerly stayed securities litigation and New NTL was not a party to the litigation. The discovery process teased out the fact that the NTL bankruptcy plan included an agreement that provided for New NTL to maintain, on servers in the United Kingdom,[3] ESI pertaining to existing or future legal matters.[4] Given that NTL Europe, not New NTL, was to defend existing and future litigations, the untoward appearance of this division of affairs was only compounded by the subsequent conduct of the two NTL entities during the securities litigation discovery before Magistrate Judge Peck.

NTL Europe contended that it did not have control over any relevant ESI because New NTL possessed the ESI pursuant to the bankruptcy plan.[5] NTL Europe further argued, unavailingly, that it could not be responsible for spoliation resulting from New NTL's management of the ESI.[6] Apart from recounting an object lesson in how not to handle preservation responsibilities, this opinion also signals consequences that can befall a party in a litigation where the reach of their control for discovery purposes is, unlike *In re NTL*, actually unclear. Given the great breadth of the discovery notion of "control," it is easy to imagine a nonparty, affiliated company outside the stream of information concerning a lawsuit in a U.S. court but within the range of this notion. The implications concerning spoliation sanctions to U.S. litigants are considerable and thus require vigilance in communicating preservation responsibilities to entities susceptible to the extent of this control concept.

Since destruction of discoverable ESI, by itself, is not spoliation and spoliation entails a finding of culpability, the standard for the requisite culpable state of mind is pivotal in this context. This standard varies among federal circuits, ranging from the

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[Section 20:7]

[1] *In re NTL, 244 F.R.D. at 181.*

[2] *In re NTL, 244 F.R.D. at 181.*

[3] *In re NTL, 244 F.R.D. at 184*

[4] *In re NTL, 244 F.R.D. at 181, 187.*

[5] *In re NTL, 244 F.R.D. at 195.*

[6] *In re NTL, 244 F.R.D. at 195.*

Eighth Circuit's heightened showing of "intentional destruction indicating a desire to suppress the truth"[7] to the Second Circuit "ordinary negligence."[8] In the complicated realm of ESI discovery, ordinary negligence may be satisfied in many circumstances. The foregoing discussion of the reach of "control" underscored the plasticity of the concept. This, coupled with the inherent time sensitivity in ESI preservation measures, commends the zealous application of the revised Civil Rules 26(f), 16(f), and 16(b) to mobilize the trial court to articulate the bounds of discovery and establish expectations early and clearly. Embracing the 2006 Amendments' overarching emphasis on frontloading discovery decisions is generally advised. It is all the more imperative in cases with foreign affects.

§ 20:8 Foreign compulsion comprising blocking statutes, data protection, confidentiality laws, and foreign executive privilege and state interests

Under certain circumstances, foreign laws prohibit a party (or third-party witness) from complying with an otherwise applicable discovery requirement in a U.S. court. Discovery in domestic courts is susceptible to conflicts with foreign laws due to a variety of legal categories that fall under the basic concept of foreign compulsion. Foreign compulsion is defined here as the condition when "foreign law prohibitions on disclosure act as a bar to ordering the production of documents."[1] *Société Internationale*—which provided that "the fear of criminal prosecution is a weighty excuse to nonproduction"[2]—and its progeny have established the contours of this basic concept over the past half-century.[3] While courts, particularly those in the Second Circuit, initially appeared to interpret *Société Internationale* liberally, finding that proof of foreign law prohibitions against disclosure would provide a bar to

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[7]Stevenson v. Union Pacific R. Co., 354 F.3d 739, 746, 63 Fed. R. Evid. Serv. 166, 57 Fed. R. Serv. 3d 617 (8th Cir. 2004) (citing Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1111–12, Prod. Liab. Rep. (CCH) P 11662, 24 Fed. R. Evid. Serv. 516 (8th Cir. 1988)).

[8]See, e.g., Residential Funding Corp. v. Degeorge Financial Corp., 306 F.3d 99, 101, 53 Fed. R. Serv. 3d 1105 (2d Cir. 2002).

[Section 20:8]

[1]Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 521, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987).

[2]Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958).

[3]See, e.g., Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 22 Fed. R. Serv. 3d 703 (9th Cir. 1992); In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 1977-2 Trade Cas. (CCH) ¶ 61724, 24 Fed. R. Serv. 2d 477 (10th Cir. 1977).

compelled production of such information[4] a far more restrictive approach has emerged, and most determinations in recent decades have decided in favor of ordering production.[5] Interests balancing between the United States and the given foreign legal system has become the sine quâ non of the foreign compulsion inquiry.

This interests analysis arises after a foreign law prohibition to discovery is brought to the party's attention pursuant to Rule 44.1, which states that "a party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice."[6] Reasonable notice must be provided to the party requesting discovery that the given foreign law argument will be raised.[7] The party raising the foreign law as a basis for objecting to discovery must then demonstrate that the foreign law "actually bars the production."[8] Failure to raise in the district court the applicability of foreign laws precludes raising it as a defense either on remand or appeal.[9]

The foreign compulsion inquiry has developed, in the main part (and not without its critics),[10] by way of U.S. Foreign Rela-

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[4]*Minpeco at 520–521*. See, e.g., Application of Chase Manhattan Bank, 297 F.2d 611, 612–613 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149, 152, 82 A.L.R.2d 1397 (2d Cir. 1960); First Nat. City Bank of N.Y. v. I.R.S. of U.S. Treasury Dept., 271 F.2d 616, 619, 59-2 U.S. Tax Cas. (CCH) P 9755, 4 A.F.T. R.2d 5748 (2d Cir. 1959)

[5]See, e.g., Weiss v. National Westminster Bank, PLC, 242 F.R.D. 33, 40, 67 Fed. R. Serv. 3d 1190 (E.D. N.Y. 2007); Linde v. Arab Bank, PLC, 423 F.Supp.2d 310 (E.D.N.Y. 2006); Bodner v. Paribas, 202 F.R.D. 370 (E.D. N.Y. 2000). But cf. Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) (settled Swiss bank defendant was not compelled to produce information with respect to nonparty account holders in contravention of Swiss bank secrecy laws).

[6]Fed. R. Civ. P. 44.1.

[7]Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 207, 68 Fed. R. Serv. 3d 72 (E.D. N.Y. 2007) (citing Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co., Ltd., 426 F.3d 580, 2005 A.M.C. 2516 (2d Cir. 2005), cert. denied, 127 S. Ct. 294, 166 L. Ed. 2d 258 (U.S. 2006).

[8]See Weiss v. National Westminster Bank, PLC, 242 F.R.D. 33, 40, 67 Fed. R. Serv. 3d 1190 (E.D. N.Y. 2007) (citing Alfadda v. Fenn, 149 F.R.D. 28, 34, Fed. Sec. L. Rep. (CCH) P 97602, R.I.C.O. Bus. Disp. Guide (CCH) P 8291 (S.D. N.Y. 1993)).

[9]See In re Magnetic Audiotape Antitrust Litigation, 334 F.3d 204, 209, 2003-1 Trade Cas. (CCH) ¶ 74064, 55 Fed. R. Serv. 3d 1178 (2d Cir. 2003).

[10]See, e.g., Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 1283, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (Easterbrook, J., concurring opinion: "I would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste. Although it is easy to identify many relevant considerations, as the ALI's *Restatement* does, a court's job is to reach

tions Law.[11] The current template for this inquiry is found in the Restatement (Third) § 442(1)(c), wherein five factors are enunciated: "In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account" (1) "the importance to the investigation or litigation of the documents or other information requested"; (2) "the degree of specificity of the request"; (3) "whether the information originated in the United States"; (4) "the availability of alternative means of securing the information"; and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."[12]

The first and last of these § 442(1)(c) factors are the most significant.[13] Foreign compulsion requires the replacement of the otherwise applicable discovery standard "by the higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation."[14] The importance to the litigation of the information sought entails that courts may consider the "relative unimportance of the information" to the given proceeding.[15] Documents deemed "vital" to the litigation entail close supervision by the district court of discovery abroad.[16]

The critical element of the inquiry is the interests balancing between the United States and "the state where the information is located." This analysis is typically conducted through a focus on two subinquiries: 1) a comparison of the law implicated, i.e.

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judgments on the basis of rules of law rather than to use a different recipe for each meal.").

[11] *Reinsurance Co. of America, Inc., 902 F.2d at 1282* (recognizing "certain differences in emphasis" between the Restat (Second) and (Third) (§§ 40 and 442, respectively), "the factors to be considered remain largely synonymous and do not alter out determination" for the case at bar) (citing In re Grand Jury Proceedings, Yanagihara Grand Jury, Impanelled June 13, 1988, 709 F. Supp. 192, 196 (C.D. Cal. 1989) ("revisions [to the Restatement] are immaterial for issues before the court, and thus do not alter the comity analysis").

[12] Restat. (Third) For. Rel. § 442 Requests For Disclosure: Law Of The United States.

[13] See, e.g., Minpeco, 116 F.R.D. at 522; Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475, 22 Fed. R. Serv. 3d 703 (9th Cir. 1992); see also, e.g., Madanes v. Madanes, 186 F.R.D. 279, 286, R.I.C.O. Bus. Disp. Guide (CCH) P 9823 (S.D. N.Y. 1999).

[14] *Minpeco, 116 F.R.D. at 522* (quoting In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1146, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979).

[15] See Trade Development Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972)

[16] *Aérospatiale, 482 U.S. at 542*.

the U.S. law applicable to the litigation and the foreign compulsion law prohibiting discovery in regard to the U.S. litigation;[17] and 2) expressions of interests by the U.S. and foreign governments regarding enforcement of the given state's implicated area of law.[18] Cases make a marked distinction between criminal or civil enforcement proceedings (which obtain great deference),[19] and private civil litigations (which enjoy significant, yet less deference).[20] However, domestic courts adjudicating private actions on the basis of the civil remedies contained within criminal statutes such as the Antiterrorism Act of 1992 are apt to obtain the view that United States possesses a greater interest in the enforcement of its laws than the interests of foreign states in enforcing their bank secrecy laws.[21] For that matter, domestic courts presiding over mere tort claims based on terrorist acts abroad are likely to decide that the United States' interest in its tort law outweighs the interests of the bank secrecy laws of states such as Jordan, Lebanon, and the Palestinian territories.[22] However, in a contract dispute a foreign law of corporations bar to the production of corporate board documents may suffice to

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[17]See, e.g., Strauss, 242 F.R.D. at 214–224 (assessing U.S. interests in providing civil remedy pursuant to Antiterrorism Act of 1992 and French interests in upholding bank customer secrecy obligations).

[18]See, e.g., *Weiss, 242 F.R.D. at 50* (English banker-client confidentiality held not to bar discovery where "British government indicated that it does not object to plaintiff's discovery requests."); *Strauss, 242 F.R.D. at 219* (French bank customer secrecy laws held not to bar discovery, as "French government has failed to respond to Credit Lyonnais's three attempts to contact it for guidance in this case."); see also Dexia Credit Local v. Rogan, 231 F.R.D. 538, 548 (N.D. Ill. 2004) (failure to seek guidance of the Belize courts weighed against defense to production pursuant to law of Belize). But cf. *Richmark Corp., 959 F.2d at 1476* (Ninth Circuit affirmed sanctions for discovery noncompliance despite Chinese government's expression of interests in enforcement of its law and warning of enforcement against its national interest in the event of a violation).

[19]See, e.g., U.S. v. Vetco Inc., 691 F.2d 1281, 81-1 U.S. Tax Cas. (CCH) P 9428 (9th Cir. 1981) (U.S. has a strong interest in collecting taxes and prosecuting tax fraud which outweighed Switzerland's interest in preserving business secrets of Swiss subsidiaries of U.S. parent corporations).

[20]See, e.g., Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 16 Fed. R. Serv. 3d 1269 (7th Cir. 1990) (U.S. interest in enforcing private judgment is outweighed by "vigorously enforced" Romanian secrecy law); see also Richmark Corp., 959 F.2d at 1475 (quoting In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 999, 1977-2 Trade Cas. (CCH) ¶ 61724, 24 Fed. R. Serv. 2d 477 (10th Cir. 1977) ("where the outcome of the litigation 'does not stand or fall on the present discovery order,' . . . courts have generally been unwilling to override foreign secrecy laws").

[21]See Weiss v. National Westminster Bank, PLC, 242 F.R.D. 33, 67 Fed. R. Serv. 3d 1190 (E.D. N.Y. 2007); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 68 Fed. R. Serv. 3d 72 (E.D. N.Y. 2007).

[22]See Linde v. Arab Bank, PLC, 423 F.Supp.2d 310 (E.D.N.Y. 2006).

vacate a discovery sanction of a default judgment against a plaintiff on his counterclaims and to warrant further development of the record on remand.[23]

The hardship of compliance is another factor courts may consider with regard to foreign compulsion.[24] Of course, fear of criminal prosecution is a substantial excuse for nonproduction,[25] and courts consider the likelihood of successful enforcement of the foreign law.[26] The prospect of criminal prosecution is given greater weight than the possibility of civil sanctions alone.[27] However, the possibility that foreign law may subject a person to criminal sanctions abroad "does not automatically bar a domestic court from compelling production."[28] Domestic courts may consider steps to diminish the possibility of hardship due to foreign law enforcement by applying confidentiality or protective orders.[29] Good faith is another element that some courts add to the Restatement inquiry outlined above. A good faith effort to obtain some manner of waiver of application of the foreign compulsion is incumbent on a party raising a foreign law defense.[30] The apparent absence of a good faith effort to at least clarify the foreign law, let alone seek a waiver from its application, will weigh in favor of sanctioning noncompliance with ordered discovery.[31]

The kind of law supplying the foreign impediment to U.S. discovery, as the preceding discussion reflects, is not of great significance, generally, in comparison to the domestic court's view of the U.S. law applicable in the given proceeding. However, because some types obtain more serious evaluation by U.S. courts than others (e.g., blocking statutes, which are sometimes referred to as

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[23]Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 139, 67 Fed. R. Serv. 3d 1346 (2d Cir. 2007).

[24]See Reino De Espana v. American Bureau of Shipping, 2005 A.M.C. 2257, 2005 WL 1813017, at 3 (S.D. N.Y. 2005) (Second Circuit courts also consider the hardship of compliance and good faith) (citing *Minpeco, 116 F.R.D. at 522*). *Richmark Corp., 959 F.2d at 1477 (9th Cir. 1992)* (factoring the degree of hardship to the producing party).

[25]Société Internationale, 357 U.S. 197.

[26]See, e.g., *Minpeco, 116 F.R.D. at 526*.

[27]See, e.g., *First Nat'l City Bank, 396 F.2d at 901*.

[28]See, e.g., U.S. v. First Nat. Bank of Chicago, 699 F.2d 341, 345, 83-1 U.S. Tax Cas. (CCH) P 9159, 12 Fed. R. Evid. Serv. 422, 35 Fed. R. Serv. 2d 1001, 51 A.F.T.R.2d 83-750 (7th Cir. 1983).

[29]See Ssangyong Corp. v. Vida Shoes Intern., Inc., 2004 WL 1125659, at 13 (S.D. N.Y. 2004); *Bodner, 202 F.R.D. at 376 (E.D.N.Y. 2000)*; *Madanes, 186 F.R.D. at 289–290 (S.D.N.Y. 1999)*.

[30]See, e.g., In re Grand Jury Proceedings, 691 F.2d 1384, 1388–1389 (11th Cir. 1982).

[31]See, e.g., *Richmark Corp., 959 F.2d at 1479*.

"sham law"),[32] it is worth noting the basic types of foreign compulsion. These include: (a) blocking statutes,[33] (b) privacy & data protection,[34] (c) confidentiality or secrecy,[35] and (d) foreign executive privilege & state interests.[36] As a recent decision of note demonstrates, failure to recognize the material distinctions among kinds of foreign laws can lead to unsatisfactory analysis.

In compelling the preservation and production of log data from a server situated in Holland, the Los Angeles magistrate judge's reasoning in *Columbia Pictures Industries v. Bunnell* collapsed the very different categories of data privacy regulation and blocking statute.[37] It is well rehearsed in decades of case law that the latter category is designed with the sole purpose of thwarting U.S. discovery procedures[38] while the former category is recognized as a clear policy imperative—a strongly held one at that—applicable to purely domestic concerns as well as incidentally

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[32]*Bodner, 202 F.R.D. at 374.*

[33]See, e.g., Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 30, 1 Fed. R. Serv. 3d 167, 79 A.L.R. Fed. 763 (S.D. N.Y. 1984) (French law designed for the sole purpose of shielding French business from U.S. style discovery); Remington Products, Inc. v. North American Philips Corp., 107 F.R.D. 642, 651, 3 Fed. R. Serv. 3d 241 (D. Conn. 1985) (Dutch law designed to preclude U.S. antitrust discovery); In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1143, 1980-1 Trade Cas. (CCH) ¶ 63124, 29 Fed. R. Serv. 2d 414 (N.D. Ill. 1979) (statutes of Australia, Canada, and South Africa enacted to impede U.S. jurisdiction over uranium cartel matters).

[34]See, e.g., European Union Member State statute's expressly implementing the European Data Protection Directive (95/46/EC), such as the Personal Data Protection Act (of the Netherlands) and the Data Protection Act 1998 (of the United Kingdom). See also, e.g., Privacy Act 1988 (of Australia); Personal Information Protection Act 2003 (Japan).

[35]See, e.g., English common law banker-client confidentiality set out in Tournier v. National Provincial and Union Bank of England, [1924] 1 KB 461, 485; see also, e.g., *Strauss, F.R.D. at 206* for reference to Article 1 bis of French law No. 68-678 ("which prohibits . . . disclosure in connection with a foreign judicial proceeding, except pursuant to an enforceable international treaty or agreement").

[36]See, e.g., *Reinsurance Co. of America, Inc., 902 F.2d at 1279* (citing "Romanian law defining 'state secrets' and 'service secrets' " and providing a "rough translation," including: "Art.4. The information, data and documents which according to the present law do not constitute State secrets but are not destined to publicity are Service secrets and cannot be divulged."); *Richmark Corp., 959 F.2d at 1476–1477* (citing People's Republic of China's State Secrecy Bureau's direct expression of interest in the outcome of the discovery dispute in the District of Oregon surrounding enforcement of the "State Secrecy Laws").

[37]Columbia Pictures Industries v. Bunnell, 2007 WL 2080419 (C.D. Cal. 2007), review denied, 245 F.R.D. 443, 69 Fed. R. Serv. 3d 173 (C.D. Cal. 2007).

[38]See, e.g., In re Vivendi Universal, S.A. Securities Litigation, 2006 WL 3378115 (S.D. N.Y. 2006) (citing Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D. N.Y. 2000); see also Bate C. Toms III, The French Response to Extraterritorial Application of United States Antitrust Laws, 15 Int'l Law. 585, 586 (1981).

foreign ones.[39] Preserving server log data for production in the California proceedings, defendants argued, violated the Netherlands Personal Data Protection Act (legislated to implement the European Data Protection Directive)[40] and was thus prohibited as a matter of Dutch law.[41] Given that the hearing record indicated that a factor in the defendants' election to use servers in Holland stemmed from the attractiveness to potential customers of Dutch privacy laws protecting individuals from disclosure of their identities, the district court had a defensible basis, albeit slightly considered in the decision, for compelling preservation and production.[42] A determination to compel preservation and production in violation of an implementing statute of the European Data Protection Directive chiefly on the basis of construing a data protection law (especially one with the pedigree of the Dutch law in question here) as a blocking statute, it is submitted, would be unsatisfactory. Of further interest is the magistrate judge's decision to not sanction defendants for failing to preserve the server data prior to the ruling due to the court's finding that "failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required."[43] Of course, now litigants faced with comparable facts will need to consider that question in their case.[44] Data protections pursuant to the European Directive, as manifested in a member state implementing legislation, present an uncharted domain for discovery in American civil litigation.

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[39]See Article 29 Data Protection Working Party, "Opinion 4/2007 on the concept of personal data." (Working Party was established under the European Data Protection Directive and acts as an Independent European advisory body on data protection and privacy).

[40]Personal Data Protection Act, Preamble ("Whereas it is necessary to implement Directive 95/46/EC of the European Parliament and of the Council of the European Union of 23 November 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of that data (citation omitted) (unofficial translation).

[41]Columbia Pictures Industries, 2007 WL 2080419 at 11–12.

[42]Columbia Pictures Industries v. Bunnell, 2007 WL 2080419 (C.D. Cal. 2007), review denied, 245 F.R.D. 443, 69 Fed. R. Serv. 3d 173 (C.D. Cal. 2007). Defendants' conduct could be colored as "deliberately courting legal impediments" in the general sense used in *Société Internationale, 357 U.S. at 208–209, 211–212*; see also U.S. Commodity Futures Trading Com'n v. Lake Shore Asset Management Ltd., Comm. Fut. L. Rep. (CCH) P 30701, 2007 WL 2915647 (N.D. Ill. 2007) (quoting Société Internationale).

[43]Columbia Pictures Industries, 2007 WL 2080419 at 14.

[44]Cf. *Zubulake, 220 F.R.D. at 220, 220 n. 47 (S.D.N.Y. 2003)* ("Whether a company's duty to preserve extends to backup tapes has been a grey area . . . Thus, UBS's failure to preserve all potentially relevant backup tapes was merely negligent . . . Litigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for 'key players' must be preserved.").

The Directive's notion of "processing"[45] includes the range of conceivable steps related to the typical handling of ESI in the U.S discovery process. Further, virtually every electronic mail exchange can be expected to satisfy the Directive's required nexus of "processing" with "personal data."[46] This evolving area of European law, it is thus safe to assume, will have implications in U.S. proceedings where data maintained within a member state also falls within the given scope of discovery.

§ 20:9 Legal professional privilege in European Commission investigations

Another stark difference between the U.S. position and European law relates to the matter of legal privilege in the context of European administrative investigations. Specifically, European decisional law has articulated a starkly divergent approach to attorney/client privilege than that is otherwise applicable in the common law of certain member states. The considerable difference from U.S. law in this area requires that U.S. practitioners providing services for multinationals with a European presence possess an understanding of the European position, especially as it may apply to ESI production matters.

In connection with a cartel investigation in the plastic additives industry, the European Commission's Directorate General for Competition (the Commission), pursuant to Article 14 of Regulation No 17,[1] raided and seized documents maintained in the Manchester, United Kingdom, offices of Akcros Chemicals Ltd, a subsidiary of Akzo Nobel Chemicals Ltd (Akzo). This price-fixing investigation was coordinated with simultaneous efforts by other regulators, including the U.S. Department of Justice and the relevant authorities in Japan and Canada.[2] Seizures made in this February 2003 raid raised certain privilege issues ultimately litigated in the Court of First Instance of the European Court of

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[45]The directive defines processing as including "collectin, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction" of "personal data" (another defined term). Council Directive 95/46/EC, Art. 2(b).

[46]"Personal data" includes "any information relating to an identified or identifiable natural person." Directive 95/46/EC, Art. 2(a). An e-mail address itself satisfies the "identifiable" concept.

[Section 20:9]

[1]Regulation No. 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (Official Journal, English Special Edition 1959–1962, p. 87).

[2]"Plastic Additives Makers Under Global Antitrust Scrutiny," ICB Americas, February 24, 2003.

Justice (CFI) and of considerable significance to any enterprise maintaining a physical presence in any European Union member state.

The CFI's September 17, 2007, decision in *Akzo*[3] revisited the rationale and holdings in *AM & S v Commission*,[4] the touchstone in European law regarding legal professional privilege (LPP). *AM & S* established under European law the attorney/client privilege between an independent lawyer and his client,[5] but did not extend this privilege to corporate counsel (viz., in-house attorneys).[6] *Akzo* reaffirmed that independent status "must be met by the legal adviser from whom the written communications which may be protected emanate."[7] However, the CFI in *Akzo* also extended the scope of documents that can enjoy LPP under EU law beyond exchanges between an "independent lawyer" and a client. Under *Akzo*, internal documents prepared to record or request legal advice from an "independent lawyer" may obtain LPP.[8] The *Akzo* Court found that, in addition to attorney/client communications with an independent lawyer, "preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may nonetheless be covered by LPP, provided that they were *drawn up exclusively for the purpose of seeking legal advice* from a lawyer in exercise of the rights of the defence."[9]

Further, the *Akzo* Court decided that an enterprise subjected to a Commission investigation can assert LPP and refuse to

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[3]Akzo Nobel Chemicals Ltd v. Commission of the European Communities (T-125/03), 2007 WL 2693857 (CFI 2007).

[4]Australian Mining & Smelting Europe Ltd v. Commission of the European Communities (155/79), 1982 WL 221208 (ECJ 1982).

[5]Australian Mining & Smelting Europe Ltd, 1982 WL 221208 at para. 18.

[6]Australian Mining & Smelting Europe Ltd v. Commission of the European Communities (155/79), 1982 WL 221208 (ECJ 1982).

[7]Akzo Nobel Chemicals Ltd v. Commission of the European Communities (T-125/03), 2007 WL 2693857 (CFI 2007). The *Akzo* Court did not alter the *AM & S* Court's holding that legal advice dispensed by an in-house counsel does not enjoy privilege protection due to the European view that employed attorneys do not possess sufficient independence from their employing enterprise to permit application of LPP. Indeed, had the United Kingdom's antitrust regulatory authority, the Office of Fair Trading (OFT), solely conducted the Akzo raid in Manchester, English common law attorney/client privilege would have applied, thereby extending such privilege protection to internal communications between in-house counsel and other officers or employees of the enterprise. In the event, of course, the OFT participated in the Akzo raid in support of the Commission's operation, thus European law applied to privilege questions pertaining to seized materials.

[8]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 166.

[9]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 123 (emphasis added). It should be noted that the Court went on to specify that "the mere fact

permit investigators to view specific documents arguably covered by the privilege,[10] provided that the subject of the investigation can substantiate that allowing even a "cursory look is impossible without revealing the content" of the affected documents.[11] Implied here, of course, is the rule that the Commission can view documents if it is deemed possible to do so without disclosing the content. A subject's assertion of LPP must be based on supporting information supplied to the Commission such as the identities and roles of the author and recipients of a given writing and its subject matter.[12] The appropriate procedure in the instance of such a privilege assertion is for the Commission to collect the allegedly protected documents and to refrain from viewing the materials pending a formal decision by the Commission on their privilege status. Such a decision thereby permits the subject's referral of the matter to the CFI and, where appropriate and desired, application for interim relief.[13] The manual steps necessary for asserting this protection over paper documents is very straightforward; discrete sheets of paper are placed in a sealed envelope.[14] Given the properties of electronic data and the usual manner in which sources are kept, the appropriate steps are less evident for the exercise of this protection in connection with ESI. While *Akzo* directly concerns LPP applied to electronic mail (paper copies of three e-mails, to be precise), extending the principle in *Akzo* to privilege assertions to electronic files, presumably residing on a server or a hard drive, may engender conflict on the ground during a raid. Absent clarifying decisions in this area, counsel will need to advise from the general bases of *AM & S* and *Akzo* and applicable principles of EU law. It would appear that a subject of a Commission investigation would have footing to assert that a privilege review of ESI is necessary prior to any viewing by the Commission of material otherwise subject to its investigation. In contrast to the immediate intelligibility of paper records, ESI cannot be evaluated without a collection and review process. It is safe to assume that attorney/client communications (and documents otherwise subject to European LPP) will be found among any significant collection of electronic files. A preliminary privilege reviewsearch-based and/or human review—of such material would present the only reliable way to

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that a document has been discussed with a lawyer is not sufficient to give it such protection.

[10]Australian Mining & Smelting Europe Ltd, 1982 WL 221208 at para. 29.

[11]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 82.

[12]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 80.

[13]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 86, citing Australian Mining & Smelting Europe Ltd, 1982 WL 221208 at 32.

[14]Akzo Nobel Chemicals Ltd, 2007 WL 2693857 at para. 83.

preserve the rights emanating from *Akzo* with regard to preventing the Commission from viewing materials for which even a "cursory look is impossible without revealing the content."[15] Given the Commission's long-standing investigative powers under Article 14 of Regulation No 17,[16] the appropriate steps for preserving such material for a preliminary privilege review might entail enlisting a third party to maintain images of hard drives and other data sources in order to permit reconciliation between "seized" ESI and, subsequent to a privilege review, the eventual production of a subset of this seized ESI. Litigation of these details is foreseeable, given the primacy of electronic information in the operations of complex, multinational enterprises and the coinciding pride of place of ESI production in competition law investigations.

A final note of distinction between European and American practices in this area is warranted. The dispute before the CFI in *Akzo* did not concern external legal advice given to Akzo by any attorney not qualified in an EU jurisdiction. Thus, the Akzo decision leaves undisturbed the rule that, with respect to Commission investigations, legal privilege may appertain to advice given by an independent lawyer who is a member of a Bar or Law Society in a Member State.[17] This position thus requires circumspection with respect to the supply of legal advice, especially in the antitrust area, by American practitioners to clients with European concerns. Direct communication between U.S. practitioners and Europe-based clients should be expected to not enjoy privilege protection in connection with a Commission competition law investigation.

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[15]Akzo Nobel Chemicals Ltd., 2007 WL 2693857 at para. 82, 85.

[16]Regulation No. 17 of 6 February 1962, First Council Regulation implementing Articles [81 EC] and [82 EC] (Official Journal, English Special Edition 1959–1962, p. 87).

[17]See Akzo Nobel Chemicals Ltd., 2007 WL 2693857 at para. 174 ("[T]he arguments advanced by ACCA [American Corporate Counsel Association, granted leave to intervene in support of the applicants] regarding the protection afforded to lawyers who are not members of a Bar or Law Society in a Member State are not at all relevant to the present proceedings.").

Scaling the Virtual Tower of Babel: Legal, Historical and Cultural and Legal Challenges to Cross-Border Data Flows

By

Kenneth N. Rashbaum. Esq.[1]

We appear to be in the midst of a sweeping of foundations that had been in place if not for a millennium then for several centuries. . . The increased access to media affects deterritorialization because one is no longer limited to the perspectives offered by one's own home culture."[2]

It is irrelevant where the electronic information is located or who, as among those entities . . . asserts ownership of the information. It is both here and there."[3]

"*The stakes will be rising. We need to stimulate much better compliance (with the E.U. Privacy Directives). . . Privacy is becoming a more and more relevant issue [in the] digital environment."*[4]

These are not, despite all appearances to the contrary, updated excerpts from a conversation between Alice, the White Rabbit and the Red Queen. They are, respectively, statements by a law professor, a Canadian appellate judge and European Data Protection Supervisor Peter Hustinix on the baffling intersections of traditional notions of law, privacy, culture and political boundaries in the age of digital information.

The amount of data crossing borders has increased exponentially as business increasingly globalizes. A great deal of that data is email, which is considered "personal data" in almost

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[2] Berman, The Globalization of Jurisdiction, U. Conn. School of Law Articles and Working Papers. (2002) at 355 and 443, available at http://lsr.nellco.org/uconn/ucpws/papers/13

[3] 2007 FC930 at *13

[4] Opinion of the European Data Protection Supervisor on the Communication from the Commission to the Council on the Follow-up of the Work Programme for Better Implementation of the Data Protection Directive, available at edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2007/07-07-25_Dir95-46_EN.PDF

every country except the United States. The flow of this data crashes against the bulwarks of traditional boundaries and deep-seated jurisprudential philosophies, as well as notions of privacy informed by history and culture. Difficulties go beyond litigation; they also have consequences for enterprises attempting to, say, keep track of employees across the globe by transfer of Human Resources information, or create virtual teams world-wide to tackle the everyday problems of commercial organizations.

Conflicting notions of privacy and pretrial disclosure, and their historical and cultural underpinnings, will be discussed in this paper. It will also highlight attempts to point the way toward convergence, reaching a truce if not exactly harmony. Indeed, the inexorable march toward global globalization through electronic communications and Internet commerce makes a just resolution mandatory

Privacy As A Fundamental Right, Privacy As a Legislated Benefit

Notions of privacy are the bedrock of the data flow dilemma. Beyond the U.S. these concepts of privacy govern disclosure of emails because email is considered "personal data;" that is, it is traceable to an identifiable individual,[5] pursuant to E.U. Privacy Directive EC 95/46/EC and member states' enabling legislation.[6] Many countries outside the E.U. have either adopted this concept intact, or their privacy and data protection laws have evolved to

[5] Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (hereafter "EC Privacy Directive")
[6] European Commission, *Article 29 Working Party Opinion 4/2007 on the Concept of Personal Data*, 01248/07/EN (2007), *available at* http://europa.eu.int.

embrace the notion that electronic communications with the name of the sender on them are entitled to privacy protection. [7]

The fundamental nature of the right to privacy outside the U.S. may be enshrined in a nation's constitution. Article 21 of Japan's constitution states that "the secrecy of any means of communication (shall not) be violated." References to a right to privacy may also be found in the constitutions of Belgium. A data protection and privacy concept known as "Habeas Data" (explained more fully below) may found in the constitutions of Brazil, Peru, Paraguay, Ecuador and Colombia.

The manner in which privacy may be regarded as closely bound to concepts of individual freedom can also be discerned by the very appellations certain countries have given to their national data protection authorities: Commission Nationale de l'Informatique et des Libertes (France); Commission de la Protection de la Vie Privee (Belgium); Guarante per la Protezione dei Dati Personali (Italy); and the Avocatul Populari (Romania) Data Protection and privacy laws directly impact the ability to transfer data between jurisdictions, and thus their historical and cultural underpinnings are the appropriate place to begin our inquiry.

Historical Antecedents

Historical experience and governmental structures inform privacy and data protection law sand must be considered when discussing potential evolution law of cross-border data flows. Privacy International has observed that "to remedy past injustices many countries, especially in Central

[7] See *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A*, 2005 WL 1026461 (S.D.N.Y. 2005), in which the defendant, faced with a court order to produce minutes of a meeting of the Board of Directors, which would have violated Venezuela's Special Law Against Information Systems Crimes, as the minutes evidenced the locations of named individuals (Directors) at a location and on a date certain, accepted an adverse inference instruction. Violation of The Special Law Against Systems Crimes entailed criminal sanctions.

Europe, South America and South Africa (have adopted) laws to remedy privacy violations that occurred under previous authoritarian regimes.[8] It should come as little surprise, then, given their experiences in World War II and the Cold War, that some of the most stringent data protection and privacy laws may be found in France, Germany, Spain, Hungary, Poland and the Czech Republic. In 2008, a number of these countries' Data Protection agencies embarked upon a program of unannounced audits and checks similar to "dawn raids" by U.S. regulatory agencies.[9]

Historical Experience, Or Lack Thereof, Can Inform The Culture of Privacy

It is a criminal offense in France to open another's email without authorization,[10] in stark contrast to the approach to employees' email in the United States. In the U.S., many corporations have protocols which state that any information placed on the corporate network is the property of the corporation and subject to monitoring and/or audit. In *Scott v. Beth Israel Medical Center,* [11]the court held that the plaintiff waived privilege in his communications with his attorney by transmitting those communications over the hospital-s network. The court placed great emphasis on the fact that Dr. Scott had signed an acknowledgement that the network was monitored and could be accessed, and that he had acknowledged in writing that communications over that network were not private.

Many countries in South America have, perhaps in view of past experiences with authoritarian regimes, taken an approach to data protection which would appear to swing as far away from the U.S. viewpoint as possible. Data protection and privacy have evolved into a concept known as

[8] http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559062&als[theme]=Data%20Protection%20and%20Privacy%20Laws, last visited May 11, 2009
[9] What A Difference A Few Months Makes: A changing Landscape for E.U. Data Protection Enforcement, BNA Privacy and Security law Report, Vol. 7, No. 12, 2008 p. 439.
[10] Criminal law Article 226-15.
[11] 2007 N.Y. Misc. Lexis 7114 (October 17, 2007)

"Habeas Data." It works in practice in a way similar to its Latin root: produce the data. The emphasis is on the right of the individual to assess the data maintained about him or her. The data subject, subject to certain conditions, may request access to the data, and ask that it be corrected, amended or, in some cases, destroyed.[12] The mechanism for this scheme results in great difficulty in obtaining data for business processes, litigation or regulatory proceedings from Habeas Data countries like Brazil. As noted in the *Lyondell-Citgo* case, cited earlier, the consequences of these restrictions, for litigation, can be severe.[13]

White the source of Habeas Data is not entirely clear, one may be inclined to view Habeas Data as a natural outgrowth of the authoritarian legacy of many South American countries, since it does not bear any resemblance to European Union data protection solutions.[14] Alternatively, it may be an outgrowth of culture. Japan, which has an entirely different experience with government, has a Data Protection Act which, curiously, follows a similar structure to Habeas Data. Individuals may request revision, amendment or deletion of data concerning them. , and may ask that the use or their personal information cease.[15] The Japanese historical antecedent for this provision may be somewhat to assess, though its roots in the cultural perspective on control of individually identifiable information may be discerned from the structure of the data protection apparatus.

States which have retained regimes which may be said to be authoritarian exercise substantial state control in their privacy and data protection laws, in some cases mitigating both privacy and protection. Russia's Constitution, in Article 23, recognizes rights to

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[12] Guadamuz A, 'Habeas Data: The Latin American Response to Data Protection,' 2000(2) *The Journal of Information, Law and Technology* (JILT). http://elj.warwick.as.uk/jilt/00-2/guadamuz.html at 9-10.
[13] See Footnote 7.
[14] *Id.* at 7.
[15] Personal Information Protection Act (Law 57 of 2003) , Articles 26 and 27.

privacy and data protection, and its three data protection statutes follow roughly the format and some of the terms of the European Privacy Directives.[16] Yet, they comprise exceptions which may be imposed by the central government for reasons of state security; there are over 30 types of classified data within forty-five laws.[17]

Similarly, China's Constitution provides, in Article 40, for the privacy or correspondence, but there significant exemptions for state security. While there are criminal sanctions for opening another's letter, "all international (data) connections to China go through proxy servers at official gateways, which were built with technical assistance from IBM, Cisco and Sun Microsystems. Government officials can spot individual users, monitor network traffic and filter and block content as necessary."[18] It has been reported that the number of those imprisoned as a result of state surveillance has been increasing.[19]

As a corollary, a nation's history of experience with electronic commerce can also inform its data protection and privacy network. "As the South Korean government has a relatively long history of promoting internet use, it has a relatively long history of protecting data privacy," dating back to 1994.[20]

Culture, history and increasing experience with global business will mold laws regarding data protection, privacy and, concomitantly, transfer of data within and from Asia over the next several years, as seen in the ongoing efforts by the Pan Asian e-Commerce Alliance (China, Japan, South Korea and Singapore) to build a commercial e-commerce network.

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[16] Federal Law No. 149-FZ of July 27, 2006; Federal Law No. 152-FZ of July 27, 2006 and Federal law No. 197-FZ, dated December 30, 2001, amended as of June 30, 2006

[17] See, Generally, "Russian Federation," at http://www.privacyinternational.org/survey/phr2003/countries/russianfederation.htm, last visited May 12, 2009

[18] Kim, Y., "Data Security, Privacy In Asia," *The Seoul Times,* May 13, 2009 at http://theseoultimes.com/ST/?url=/ST/db/read.php?idx=6879

[19] *Id.*

[20] *Id.*

And these efforts will have a ripple effect far beyond Asia, since that continent, with 56.5% of the world's population also accounts for 35.8% of the world's internet use.[21] And both figures are increasing.

National Protectionism: Blocking Statutes and Extraterritorial Jurisdiction

The combination of nationalism and protectionism, perhaps derived from an admixture of culture and history, has led some countries to raise barriers to cross-border discovery in the form of blocking statutes. These provisions prohibit the removal of commercial or technical information for use in a foreign judicial proceeding. "Blocking statutes," as described in *The Sedona Conference Framework,* "are frequently invoked in motions for protective orders with regard to discovery requests that would require cross-border transfer of electronic information. A party who discloses such information, even as part of a required investigation, may be guilty of violating blocking statutes of the country from which the data was released. Violation of a blocking statute may result in civil or criminal penalties."[22]

The Sedona Conference has also observed that "A number of civil law countries have also enacted blocking statutes, as a consequence of the Hague Evidence Convention, to prevent the broad reach of discovery from the United States. For example, in 1980 France specifically enacted a section of its penal law that criminalizes discovery within France by private parties for litigation abroad. French Penal Law No. 80-538 provides:

> Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial,

[21] *Id.*

[22] *The Sedona Framework® for Analysis of Cross-Border Conflicts: A Practical Guide to Navigating the Competing Currents of International e-Discovery and Data Privacy* (Public Comment Version August 2008) (hereinafter "Sedona Framework"), available at www.thesedonaconference.org, at 18

> financial or technical nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures.[23]

In January, 2008 the Supreme Court of France indicated to the world that it takes this provision quite seriously when it published its decision affirming a criminal conviction under the statute in the matter of *In re Advocat Christopher X.*[24] Blocking statutes may be found in such civil law jurisdictions as Switzerland and Venezuela, and limited blocking provisions have been enacted in common law countries such as the United Kingdom, Australia and Canada.

If one may say that blocking statues are an exercise in a form of protectionism, perhaps a more extreme form of such sentiment may be found in attempts to exert jurisdiction over information *beyond* a country's borders, in a belief that such reach is necessary to protect the rights and benefits of its citizens. In *eBay Canada v. eBay CS Vancouver Inc. And Minister of National Revenue*[25], Canada's attempt to tax certain eBay transactions was affirmed. eBay is a California corporation, and the servers where the data for the subject transactions were stored were also in California. The court ruled that the data concerning the transactions, and therefore jurisdiction to tax them, was in Canada as well as the United States because it "cannot be said to reside on only one place it is instantaneously available within the eBay entities in a variety of places . . . it is *both here and there."* [26]

In *Yahoo, Inc. v. La Ligue Contre Le Racisme Et L'Antisemisme*[27] the United States, not to be outdone in the exercise of creative jurisdictional jurisprudence in the perceived national interest, asserted its authority over French organizations which had obtained interim orders *in France* to

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[23] *Id.*
[24] Cour de Cassation, French Supreme Court, December 12, 2007 Appeal n. 07-83228
[25] 2007 FC 930
[26] *Id.* at *13 (emphasis in original)
[27] 433 F.3d 1199 (9th Cir. 2006)

direct the company to cease sales of Nazi memorabilia over Yahoo! sites. The basis of the ruling was that the orders directed Yahoo to perform certain acts in California, and thus the organizations had sufficient contacts with the state of California for the district court to exercise jurisdiction.

Moving Beyond Historical and Cultural Barriers

"The frequency and intensity of (cross-border e-discovery conflicts) is heightened by an expanding global marketplace and the unabated proliferation of electronically stored information ("ESI") . . . [28] Yet, there are signs of compromise between the pull of global information flow due to expanding multinational commerce and the tug of increased concerns about technologically-driven demands on privacy.

Perhaps due to recognition of these issues, or maybe just an affinity between common-law countries, the United Kingdom and the United States have exhibited signs of convergence in data disclosure/discovery. In the case of *Digicel v. Cable & Wireless PLC*[29] the High Court for England and Wales was presented with the question (among other issues) of whether the parties should have reached agreement on search terms before the defendant searched utilizing only its own terms. U.K. procedures around pre-trial disclosure, while more liberal than those in the rest of Europe, have traditionally diverged from the more expansive discovery in the U.S. Yet the court in *Digicel*, in ordering the defendant to search again, cited as authority for its holding a

[28] Sedona Framework at 1
[29] [2008] EWHC 2522 (Ch)

U.S. case, *Zubulake v. UBS Warburg*[30], and *The Sedona Principles.* These authorities were cited for, ironically, the *scope of disclosure* in U.K. dispute.[31]

Yet, *Digicel* was not the first instance of a British court hewing close to U.S. perspective. The U.S. takes a more restrictive view of the concept of personal data than the E.U., considering that term to refer to data which describes or otherwise refers to aspects of an individual. In 2003 the Supreme Court of Judicature Court of Appeal (Civil Division) considered the issue of how "personal data" should be construed in *Durant v. Financial Services Authority.*[32] The claimant had previously commenced litigation against Barclays Bank PLC, which he lost in 1993. Durant sought certain data which named him to assist him in reopening his claim, and asserted that the data held by defendant FSA, a data controller for Barclays, in that U.K. legislation gave individuals a right to access of their "personal data." FSA declined on the ground that the information sought was not "personal" within the meaning of the 1998 Data Protection Act, which was the enabling legislation for E.U. Privacy Directive 95/46 EC. The court disagreed, holding that "in conformity with the (the statutes) and the Directive. . . it is likely that in most cases only information that names or directly refers to him will qualify."[33]

The Asia-Pacific region has ascertained a need to find some resolution of e-discovery and cross-border data flow disputes. The Asia-Pacific Economic Cooperation Steering Group has moved forward on its 2004 Privacy Framework, with the intention to "facilitate responsible information flows, which creates an essential basis for increased trade and e-commerce to flourish."[34]. On February 11, 2009 Australia finalized Practice Note 17, which requires that the parties come to a

[30] 217 F.R.D. 309 (S.D.N.Y. 2003).
[31] *13, 2008 EWHC 2552 (CH)
[32] [2003] EWCA Civ 1746
[33] *Id.* at *9.
[34] APEC Fact Sheet, http://www.apec.org/apec/news media/fact_sheets/apec_privacy_framework.html, last visited May 13, 2009

conference similar to the "Meet-and-Confer" in the U.S. and U.K., prepared with a checklist for e-discovery items. The Note also includes an exemplar "Advanced Document Management Protocol."[35]

And the European Commission's Article 29 Working Party, while noting the continuing "tension between the disclosure obligations under U.S. litigation or regulatory rules and the application of the data protection requirements of the E.U., acknowledged in its Article 29 Working Party Working Document 1/2009 that it "sees the need for reconciling the requirements of the U.S. litigation riles and the E.U. data protection provisions."[36] Recognition of the requirements of global commerce and respect for privacy are slowly moving closer together, scaling the walls of history, culture and jurisprudential distinctions. Courts, litigants and business stakeholders, whose expenditures for counsel and consultants to bridge these gaps consistently trend upward, are anxiously watching their progress.

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[35] Federal Court of Australia, Practice Note 17, available at http://www.fedcourt.gov.au/how/practice_notes_cj17.htm

[36] Article 29 Data Protection Working Party *Working Document 1/2009 on pre-trial discovery for cross border civil litigation,* adopted on 11 February 2009, available at http://ec.europa.eu/justice_home/fs/privacy/index_en.htm, at 2.

Step together, step apart: attempts to narrow the international e-discovery gap in 2009
By Ken Rashbaum, Esq., Director, Fios Consulting, Fios, Inc.

Like fifth graders at their first dance, civil law jurisdictions and common law countries have moved hesitantly, and somewhat reluctantly, closer together in recognition of the need to close the gaps which inhibit the flow of data for business purposes and adversarial proceedings. Yes, the girls and boys at this dance, left to their own devices, would stand at opposite sides of the gym and stare, but global commerce, like the supervising teacher, is pushing the sides toward each other.

Discussing the outsourcing of radiology services, Thomas L. Friedman wrote in his 2005 best-selling book *The World is Flat*, "the advantage is that it is daytime in Australia or India when it is nighttime here – so after-hours coverage becomes more readily done by shipping the images across the globe."[1] The ensuing four years since publication of Friedman's book have seen an exponential increase in globalization of business; indeed, most sizable U.S. corporations do business or have facilities outside U.S. borders, and, similarly, most large non-U.S. enterprises do business or have offices within the U.S. Further, we now "exchange information instantaneously with a myriad of portable and wireless devices without regard to borders. . . . And in this 'information age,' where the primary evidence of our global conduct is almost solely electronic, litigation and regulatory investigations are a fertile ground for cross-border e-discovery."[2]

Yet profound differences remain between the U.S. and its counterparts on how to view this flow of information. The first distinction is the perspective on privacy. The U.S. approach to information privacy is segmented, regulated by category of information (e.g., medical, financial) and industry (healthcare, banking), and implemented by legislation and court rulings. Outside the U.S., privacy is considered a fundamental right. Similarly, the U.S. approach to expansive pre-trial discovery is anathema in the civil law jurisdictions, where courts closely supervise "disclosure," and one need only provide data or documents which will support one's case.

A white paper and a working document from the U.S. and Europe may go a long way toward an understanding which could, hopefully, reduce the judicial gridlock in which U.S. courts demand electronic evidence from abroad and non-U.S. judicial authorities decline to provide it, citing privacy and other concerns. The Sedona Conference® in 2008 posted for public comment a white paper entitled *The Sedona Conference® Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery*.[3] The paper analyzes current conflicts between the civil and common-law countries, seeks "to help navigate the turbulent currents of cross-border conflicts between data privacy and discovery, informed by country-specific data privacy, discovery and disclosure rules and practices, and ends its analysis with potential ways in which understanding may be reached."[4]

The Sedona Conference® paper was recognized when it was cited approvingly by the Article 29 Working Party of the European Commission in its *Working Document 1/200 on pre-trial discovery for cross border civil litigation*.[5] The working document takes a somewhat less optimistic perspective than The Sedona Conference® document. Like The Sedona Conference® *Framework*, the *Working Document* begins by acknowledging the "tension between the disclosure obligations under U.S. litigation or regulatory rules and the application of the data protection requirements of

[1] Friedman, *The World Is Flat* (Farrar, 2005) at 16.
[2] *The Sedona Conference® Framework for Analysis of Cross-Border Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery* (2008) at 1.
[3] Public Comment version available at http://www.thesedonaconference.org/. The author is a Co-Editor-in-Chief of the Paper.
[4] *Id.* at 2.
[5] Available at http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/wpdocs/2009_en.htm.

the E.U."[6] The document also notes "the need for reconciling the requirements of the U.S. litigation rules and the E.U. data protection provisions." Yet, after this statement of an intent to harmonize the jurisdictions, the document pulls away by calling into question the notion of European application of a legal hold (which many counsel view as a well-established requirement), stating that there is "difficulty where the information is required for additional pending litigation or where future litigation is reasonably foreseeable. The mere unsubstantiated possibility that an action may be brought before the U.S. courts is not sufficient."[7]

The Sedona Conference® Working Group 6, whose work resulted in the *Framework* document, will hold its annual meeting in Barcelona on June 10-11. Representatives of the European Commission and data protection officials are scheduled to attend and speak. While no official response from either entity will emerge from that meeting, it is anticipated that the ensuing dialogue will make some headway toward reconciling the disparate notions of discovery and privacy that still impede litigation, regulatory proceedings and global business processes.

[6] *Id.* at 1.
[7] *Id. at 8.*

Financial Crisis – Service Providers

e-Discovery Compliance As Domestic And Foreign Litigation Grows

The Editor interviews ***Mary Mack****, Corporate Technology Counsel, Fios, Inc.*

Editor: Some have likened the impact of the financial crisis to the mushroom cloud of a nuclear bomb, with the financial services industry at the point of impact. Has that radioactive cloud of litigation spread to other industries?

Mack: We are now seeing an impact on businesses outside the financial sector. A company in any business with, say, 5,000 employees has multiple exposures to the financial crisis – with many of them presenting litigation possibilities. Companies of this size may invest their surplus cash in commercial paper and any reserves in longer-term debt instruments or in stocks. They may borrow from financial institutions to meet their long- and short-term needs. Their pension plan may also make investments, possibly in toxic securities like collateralized loan obligations (CLOs) or collateralized debt obligations (CDOs) or in the stocks or bonds of companies in the financial services industry. Those companies may bring litigation to recoup some of their losses, which might take the form of class or individual actions. And, they might be sued by their stockholders or pensioners for making unwise investments.

Larger companies could have more direct involvement through a finance subsidiary that may have originated subprime mortgages or bought, sold or even packaged toxic CLOs and CDOs. Mergers and acquisitions may fail or needed capital equipment may be impossible to acquire because lenders are unable or unwilling to fulfill their undertaking to supply the cash needed to complete the transaction – leading to potential litigation.

Employment litigation is reaching all-time highs as companies lay off employees, cut benefits or engage in reductions in force. Bankruptcies and reorganizations will become more common, generating even more litigation. There's a climate of extreme business stress that is moving into the potential for much more litigation – litigation for survival and litigation to clean up the mess after a corporate death.

The TARP bailout plan itself leads to uncertainties that can trigger litigation. New regulations relating to the use of the bailout funds will impose requirements that must be complied with. Congressional oversight will be intense – take, for example, the congressional scrutiny of the $400,000 expenditure by AIG for a meeting of its sales representatives. With government money being spent, oversight and investigations are to be expected.

Editor: What are the e-discovery implications of that spreading cloud of litigation?

Mack: From an e-discovery and compliance standpoint, you should anticipate the onslaught of litigation by being sure that your legal hold and your data collection practices are state of the art. Involve trained data collection people so someone doesn't inadvertently mess up the data. By "mess up" I mean change dates and other aspects of your data. For example, if you are simply looking at a spreadsheet in a deskside review, you might trip an automatic date, which populates the document with "today's date." In other words, the document is no longer as it was before. That inadvertent mistake may also further pollute the data by updating it with other information such as the London Interbank Offered Rate (LIBOR) or the current credit status of the customer.

Before going into somebody's desktop to look at what could be needed later as potential evidence, you should be sure that a data collection protocol is in place and that those accessing the desktop are trained to follow it. Most large corporations will already have such protocols in place and will have trained their personnel in response to the demands of existing litigation. Litigation and government investigations growing out of the financial crisis will also affect companies that may not yet have taken steps to be sure that their data collection and preservation practices are sound – and are robust enough to respond very quickly. With the climate today, companies need to be concerned not only about civil litigation and investigations, but also about criminal proceedings.

In civil lawsuits, the danger is spoliation of electronically stored evidence – not producing, changing or destroying it. Spoliation can lead to a monetary penalty or adverse inference or just weaken your case because such behavior casts doubt on your evidence.

In criminal proceedings, the same practices are not called spoliation; they are called obstruction of justice – something a lot more serious. It's a whole different ballgame, and really calls on the compliance and e-discovery people to talk with each other and make sure that their procedures are robust.

Electronic discovery, because it most frequently accompanies litigation, is a very reactive process, whereas compliance is more proactive. Collaboration between both fields is required in the areas of legal hold and data preservation and collection. Training employees (particularly officers and directors and managers) in the art of keeping information required for litigation or investigation purposes is critical.

Editor: Some people have said that the financial crisis will trigger a feast of investigation by state legislatures, Congress and various regulatory agencies. Do the considerations you have been talking about apply to an investigation, even if there isn't any civil or criminal proceeding taking place at the time?

Mack: Yes. Investigations are generally on a short time fuse; nevertheless, the same degree of care needs to be taken in investigations as in litigation because information developed through e-discovery in connection with an investigation may be needed in a later civil or criminal suit. One of the questions you hear in a deposition is, "Have you ever produced this material before and, if so, to whom?" Another party may want to seek that same material and will argue that it's not burdensome to produce it again. Issue mapping can narrow the response and reduce costs.

Editor: Do you expect to see more SEC- and securities-related proceedings in 2009?

Mack. Yes, particularly those relating to the financial crisis. The SEC got a political bruising for the perception that it was being too soft on the financial industry. In fact, there is some talk about merging the SEC and the CFTC. It's highly likely that under the new administration, the SEC will considerably step up its activities. Also, the financial crisis and market downturns have already triggered an increase in securities class actions and derivative suits, not only against financial institutions, but also against other corporations.

Editor: The rest of the world is also gripped by the financial and economic crisis. Does the mushroom cloud of litigation also darken the rest of the world? If so, what are the implications for e-discovery?

Mack: The economic and financial crisis is global. The intensified litigation activity spurred by the crisis here will be replicated to some extent elsewhere in the world, even though we continue to hold our title as the world's most litigious country by far. And, at present, e-discovery in civil proceedings is significant only in the common law countries. But, with the increased application of criminal sanctions to corporate behavior, we are going to see increasing access by criminal authorities throughout the world to electronically stored information.

In the case of any large company with subsidiaries and divisions scattered throughout the world there is an increasing flow of electronic data across borders, triggering issues in U.S. courts about the discovery of such information irrespective of national boundaries (including information that may be protected by the privacy or blocking laws of particular countries – such as employee emails). If a foreign-based corporation tries to recover in a U.S. court, they're going to need to get up to speed very quickly on the American discovery rules and practices. For more information on the issues surrounding international e-discovery, see my interview on page 19 of the September 2008 issue of *The Metropolitan Corporate Counsel*.

Your service providers should be conversant with questions relating to e-discovery of electronically stored information (ESI) located outside the U.S.

Editor: **With increased globalization, what steps can a company take now to address data privacy and other international e-discovery issues?**

Mack: We recommend as a first step that an assessment be done by us or another e-discovery service provider with international capabilities, which looks at where the company does business, the nature of its litigation portfolio and its exposure to future litigation involving compliance with foreign laws governing e-discovery. If that assessment indicates that outside expertise is required with respect to setting up an international e-discovery compliance program, or with respect to a specific compliance issue relating to discovery of ESI involving international issues, an experienced consultant should be retained to provide such advice.

Ken Rashbaum and Cynthia Bateman, two highly skilled members of Fios' consulting team, are available to help. Ken, with 30 years of experience as a litigator, served as a partner and electronic discovery co-chair with the AmLaw 200 law firm Sedgwick, Detert, Moran & Arnold. He has vast experience counseling multinational corporations in the U.S., Europe and Asia on privacy and data protection matters as they pertain to cross-border data preservation, collection and production of electronically stored information. Cynthia joined Fios after spending more than 13 years with Georgia-Pacific, most recently serving as its global privacy and e-discovery director.

Editor: **What about the language issue?**

Mack: When managing ESI in a litigation or investigation that comes from international parties, being able to address foreign language issues is critical. Fios helps clients collect, process and host foreign language ESI as part of the discovery process. With increasing globalization, due in part to the financial services crisis, demand for this expertise and service has spiked over the past year and will continue to do so for the foreseeable future.

Please email the interviewee at mmack@fiosinc.com with questions about this interview.
Her blog is Sound Evidence, hosted on DiscoveryResources.org.

E-Discovery Issues Heating Up On A Global Basis

The Editor interviews ***Mary Mack,*** *Corporate Technology Counsel, Fios Inc.*

Editor: Why are international issues around e-discovery becoming such a hot issue?

Mack: Globalization is resulting in the long tentacles of the American courts reaching across the world. As a result, both foreign companies and the courts are paying attention to electronic discovery. For example, England, Australia and Canada have promulgated new rules around electronic discovery. Just like when the 2006 amendments to the Federal Rules of Civil Procedure went into effect in the U.S., the new foreign rules around electronic discovery are accelerating actions that need to be taken. In the European Union (EU), we are beginning to see expanded enforcement in the antitrust area and insider trading activities. It's difficult to do this without electronic discovery. Similarly, in product liability or patent litigation, one product can have components from 25 different countries with design, marketing and other critical evidence located across the world. It is challenging to navigate and manage e-discovery when you have parent companies based overseas or U.S.-based companies with foreign subsidiaries. More and more companies with global operations are finding themselves enmeshed in e-discovery that requires a greater understanding of the issues and laws from a global perspective.

Editor: **How does e-discovery in the U.S. compare to e-discovery in foreign jurisdictions?**

Mack: It is different in a fundamental way. The U.S. has the most liberal discovery procedures and customs in general. Other countries are much more parsimonious about what is discoverable and whether or not there is pre-trial discovery. The biggest contrast would be regarding email. In the United States, it would be a rare person who would believe his or her emails were private. In many other countries, emails are treated as private, and they may indeed be protected by law. The British call electronic discovery "e-disclosure."

Editor: **What about the differences in privacy laws?**

Mack: Privacy laws abroad are much stricter than here in the U.S. In the EU, there is the EU Data Protection Directive (Data Directive) that establishes the regulatory framework for personal data. Laws adopted in accordance with the Data Directive vary, so each EU country has its own privacy twists. EU law treats privacy as a fundamental right, whereas, in the United States, we do not have strict privacy laws. We tend to look to the courts to enforce privacy, and the U.S. Supreme Court has not definitively carved out the level of privacy the Europeans take for granted.

In one recent case, a French bank, Société Générale, was loath to look at

Mary Mack

the email of their trader Jérôme Kerviel. Even though he was about to bring down the whole company, they were still afraid of the French privacy laws. That is the big difference between the U.S. and EU countries. In the United States, there is the underlying assumption that just about anything can and should be produced when requested in electronic discovery.

Editor: Is a foreign company or an overseas subsidiary of a U.S. company subject to e-discovery by a U.S. court?

Mack: Yes. There is still very little case law about how U.S. judges should treat foreign parties who fail to produce. In *Enron v. J.P. Morgan,* the court held that a possible violation of the French blocking statute did not prevent e-discovery. The blocking statutes are enacted, in part, by countries with a purpose of thwarting U.S. discovery obligations. The U.S. courts aren't as comfortable with blocking statutes as they might be with privacy statutes and disclosures of state secrets

U.S. judges tend to take the position that if evidence is in a party's custody or control, then it can be produced unless the party has offered a very compelling reason why it should not be. The courts have sometimes used fairness (comity) as a balancing test. If the foreign party doesn't have to produce, the U.S. party should not have to. If the foreign party is unwilling to produce because it may be criminally prosecuted in its home country, a court may deem it fair to shift the burden of proof, create an adverse inference or otherwise balance the scales.

As international e-discovery gathers momentum, the Federal Judicial Conference will most likely address the issues around blocking statutes and privacy laws, spelling out rules as it did with respect to electronically stored information (ESI) that is not reasonably accessible or procedures around privileged material. Some safe harbor protections would be welcome as well.

Editor: Are there any efforts being made by organizations, like the Lawyers for Civil Justice, that are seeking to level the litigation playing field for American companies?

Mack: The Sedona Conference has working groups around international issues. They have a specific one for Canada (Working Group 7). They are examining the issues generally from a global perspective (Working Group 6). Carole Basri, my co-editor of the treatise, *eDiscovery for Corporate Counsel*, published by Thomson Reuters, and I are speaking at the ABA Section on International Law in Brussels in September. The New York State Bar is also taking its international committee over to Stockholm. This will continue the nascent process of global cross-pollination of ideas, concerns and solutions.

There are also initiatives taking place in London and Canada around e-disclosure. A global community of people are educating themselves, much like the U.S. attorneys and judges did in the years running up to the 2006 FRCP amendments. More has been done in the UK and Canada than elsewhere outside the U.S, but the processes and procedures are much more mature in the U.S. The Lawyers for Civil Justice will undoubtedly weigh in.

I continue to think that e-discovery originating elsewhere in the world will not be as burdensome as it is in the U.S. The U.S. has always been more liberal in terms of discovery, even when we were just dealing with paper. Blocking statutes and privacy laws will continue to play a role.

Editor: Are there best practices global companies should be considering in order to be in compliance with U.S. e-discovery laws?

Mack: Global companies need to understand their risk exposure driven by the types of litigation giving rise to e-discovery requests and the ESI they may be compelled to produce, particularly email. If the risk is high, then the assessment moves to what their current policies, practices and resources support well and what needs revising or augmenting. The short list of best practices includes:

1. Assess the organization's risk profile and current policies, practices and resources;
2. Educate, cross-functionally and internationally, the following areas: risk management, compliance, information governance, the attorneys, litigation support, IT and records management;
3. Make sure the content map and discovery response plan take into account the international aspects;
4. Make sure the technology acquisition, information governance, compliance and risk management functions incorporate the international e-discovery compliance requirements;
5. Assess and engage the appropriate law firms and service providers that possess the legal, technical and cultural understanding of international e-discovery best practices before they are needed (providers should be "Safe Harbor Certified").

Editor: Are there technologies or services being developed that will help address the complex international e-discovery issues?

Mack: Yes. Technology continues to advance to help address international e-discovery issues, particularly in the areas of identification, legal hold management, preservation, search and review. Here at Fios, we have a readiness consulting service called ESI Content Mapping to help identify, map and track how potentially relevant ESI is stored, retained and disposed of during the regular course of business. For example, a company's payroll data is stored in New Jersey, its U.S. email is stored in New York and Georgia, and its extra-territorial email is located in Ireland and Japan. Each storage location is managed with different retention and data privacy policies. Understanding the requirements and storage locations governing this ESI is critical when discovery is initiated.

With an ESI Content Map, this information is mapped and tracked to the most prevalent legal issues faced by the organization. Your IT and records management staff is able to make storage and preservation decisions that are in line with the organization's legal compliance requirements. Privacy laws and accessibility can be proactively incorporated into this process. This is critical because, under the FRCP in the U.S., 99 days does not give you a whole lot of time to prepare for a "meet and confer" discovery conference. The unprepared company loses its lever to reduce risk and cost.

"I continue to think that e-discovery originating elsewhere in the world will not be as burdensome as it is in the U.S. The U.S. has always been more liberal in terms of discovery, even when we were just dealing with paper. Blocking statutes and privacy laws will continue to play a role."

Editor: Are there reference sources that would be helpful to our readers who are interested in international e-discovery?

Mack: Fios' webcasts are a good source. My book, *A Process of Illumination: The Practical Guide to Electronic Discovery,* which was just updated and re-released in July, offers a basic overview of the e-discovery process. The Sedona Conference is another great source of information (www.thesedonaconference.org). The Thomson Reuters treatise that Carole and I have stewarded covers the international aspect from a corporate counsel perspective in Chapter 20. Information on all of these can be found on Fios' website at www.fiosinc.com.

Please email the interviewee at mmack@fiosinc.com with questions about this interview. Her blog is soundevidence.discoveryresources.org.

ACC Extras

Supplemental resources available on www.acc.com

E-discovery Part One.
Program Material. March 2008
http://www.acc.com/legalresources/resource.cfm?show=19828

E-discovery Part Two.
Program Material. March 2008
http://www.acc.com/legalresources/resource.cfm?show=19827

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.