

Chapter 23

Representing European Companies in U.S. Litigation

by *Ricardo Cuesta and Thomas C. White**

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§ 23:1 Scope note

This Chapter discusses factors that U.S. counsel and a European company's in-house counsel should consider in representing the company in litigation in the United States. We will examine the key stages of the case, with an eye to the specific needs that European companies have when they become embroiled in a lawsuit in the United States. These include the topics to be addressed at the outset of a case (*see* § 23:2 to 23:30), such as retention of U.S. counsel,¹ strategic planning,² and those that need to be revisited on a regular basis, such as staffing and billing.³ We will examine each stage of the litigation (*see* §§ 23:31 to 23:60), from service of process,⁴ motion practice,⁵ document handling,⁶ discovery,⁷ including cross-border electronic discovery and issues relating to European data protection and privacy laws,⁸ depositions of the company's executives, managers and employees,⁹

[Section 23:1]

¹See § 23:5. *See generally* Chapter 4 "Selection of Outside Counsel" (§§ 4:1 et seq.).

²See §§ 23:6 to 23:9. *See generally* Chapter 10 "The Planning Process" (§§ 10:1 et seq.).

³See § 23:17. *See generally* Chapter 14 "Billing" (§§ 14:1 et seq.).

⁴See §§ 23:31 to 23:33.

⁵See §§ 23:34 to 23:39. *See generally* Chapter 60 "Pleadings and Pre-Trial Motions in Complex Commercial Cases" (§§ 60:1 et seq.).

⁶See §§ 23:18 to 23:21. *See generally* Chapter 29 "Information Governance" (§§ 29:1 et seq.).

⁷See §§ 23:40 to 23:52. *See generally* Chapter 61 "Discovery and Information Gathering" §§ 61:1 et seq.).

⁸See § 23:44. *See generally* Chapter 82 "Privacy and Security" (§§ 82:1 et seq.).

⁹See § 23:47. *See generally* Chapter 61 "Discovery and Information

trials,¹⁰ attorney-client and other privilege issues,¹¹ among many others.

Throughout our chapter we will identify some of the differences between the legal systems of the United States and continental Europe and, in particular, contrast the different approaches to litigation in Europe and the United States. We do this to assist both U.S. counsel and European inside counsel in gaining an appreciation of the challenges that litigating in a foreign country brings for European companies and their inside counsel.

Our chapter will provide practical advice about problems that commonly arise in litigation. At the end of the Chapter, we provide a practice checklist.¹²

This Chapter focuses on representing European companies in U.S. litigation. Chapter 23 of this treatise¹³ focuses on representing U.S. companies in litigation in American courts where one or more of the other parties is a foreign individual, entity, or state, or where the dispute arise from a transaction that took place abroad. Chapter 23 of this treatise¹⁴ discusses cross-border litigation in courts throughout the world and is not limited to representation of U.S. companies.

§ 23:2 Objective: a mutual education process

A key element of a successful relationship between European inside counsel and their outside U.S. litigators is direct and regular communication. In particular, successful partnering in this context requires that inside and outside counsel learn about one another's needs and limitations to ensure that the company's legal staff will be able to provide U.S. counsel with the resources necessary to conduct the lit-

Gathering" (§§ 61:1 et seq.).

¹⁰See §§ 23:53 to 23:57. See generally Chapter 63 "Trial Preparation and Preparation" (§§ 63:1 et seq.).

¹¹See §§ 23:21 to 23:29. See generally Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

¹²See § 23:61.

¹³Chapter 23A "Litigating International Disputes in American Courts" (§§ 23A:1 et seq.).

¹⁴Chapter 23B "Cross-Border Litigation" (§§ 23B:1 et seq.).

igation effectively.¹ Effective representation also requires that inside and outside counsel frankly discuss the possibility of an early settlement² or explore alternative dispute resolution procedures³ and carefully evaluate the likely costs and risks that the litigation will entail if it is not settled quickly.⁴ The factors that need to be considered include the likelihood that discovery,⁵ including electronic discovery, may involve numerous documents and prove to be costly, possibly implicating European data protection and privacy protection laws,⁶ and that the adverse party will seek to depose members of the company's senior management and key employees with the attendant disruption of the company's business.⁷

In communicating with European inside counsel, it is useful for outside U.S. counsel to bear in mind the negative view that their European inside counterparts often have of litigation in the United States, particularly if the company is a defendant. Many European business leaders and senior inside counsel distrust, and even fear, the U.S. litigation system, yet, as a result of economic globalization, increasingly find themselves embroiled in it.⁸ They sometimes view the lawsuit as an albatross, an expensive, endless, and highly unpredictable undertaking that, at best, will be a significant distraction from their normal duties.⁹

[Section 23:2]

¹See § 23:7; § 23:11; § 23:15.

²See § 23:59. See generally Chapter 65 "Settlement" (§§ 65:1 et seq.).

³See § 23:60. See generally Chapter 57 "Alternative Dispute Resolution" (§§ 57:1 et seq.).

⁴See §§ 23:59 to 23:60.

⁵See §§ 23:40 to 23:52. See generally Chapter 61 "Discovery and Information Gathering" §§ 61:1 et seq.).

⁶See §§ 23:44. See generally Chapter 82 "Privacy and Security" (§§ 82:1 et seq.).

⁷See §§ 23:46 to 23:48.

⁸From the perspective of European inside counsel, the burdens of dealing with U.S. litigation may be compounded by the fact that in-house legal departments of European companies are often smaller than their American counterparts. See § 23:7.

⁹See § 23:3; § 23:13; Janet H. Moore, Cross-Border Litigation: Preparing for Cultural Nuances, 63 *The Advocate* (Texas) 38 (2013). See § 23:13;

**§ 23:3 Objective: a mutual education process—
Common law vs. civil law**

One of the main challenges facing a European company in litigation in the United States arises from the differences between the legal systems of continental Europe and the United States. Litigating in the United States compels the company and its inside counsel to navigate a foreign legal system, often a daunting task. Counsel in the United States should have an appreciation of these differences and we briefly mention some salient ones here.

A defining feature of the civil law system in Europe is that most areas of the law are systematically codified, for example, in a civil code, commercial code, criminal code or code of civil procedure. Case law and the concept of binding precedent are the central features of the Anglo-American legal system.

Legal reasoning is markedly different in the civil and common law systems. Legal reasoning in the common law system is based largely on the doctrine of *stare decisis*, that is, the concept that prior legal cases based on the same or similar facts constitute legally binding authority. Indeed, Justice Oliver Wendell Holmes's aphorism that "[t]he life of the law has not been logic, it has been experience" still applies in the common law.¹ In that vein, legal arguments are usually built upon controlling or analogous precedent and are often fact-specific. Legal reasoning in civil law countries, by contrast, is generally based on principles of legal positivism. Under this school of thought, the law is established through enactments of the legislative branch of government and is deemed to be a "self-contained, rational, deductive system of rules and norms."² Court decisions, especially appellate and supreme court decisions, are important for practitioners in the civil law system but they do not constitute binding precedent for courts and judges. Lawyers in civil law countries approach legal issues by examining whether specific code

§ 23:16.

[Section 23:3]

¹Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

²See Mher Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: the U.S. Supreme Court and the German Federal Constitutional Court*, 14 *German L.J.* 1297, 1322 (2013).

provisions govern the case. The deductive inquiry is holistic and extends to an analysis of related provisions, viewing the code as a whole. Legal arguments are frequently based upon legal commentaries on the code and other scholarly works, which carry great weight.

How lawsuits are commenced in the United States is quite different from continental Europe.³ European company clients are often surprised by the minimal pleading requirements that must be met in order to commence an action in the United States. To commence an action in Europe, the allegations in a complaint must be well substantiated and proof supporting the allegations must be offered with the complaint; otherwise the court may dismiss the action *sua sponte*.⁴

Court proceedings in the United States also differ from their civil law counterparts.⁵ What Americans think of as a trial does not exist in European civil law countries. The concepts of who is a party and who is a witness also differ.⁶ While “oral hearings” before a civil law judge usually take place, they are relatively short and not directly comparable to trials in the United States.

The judge’s role is different in each system. The common characterization of a civil law judge’s role as “inquisitorial” is inaccurate.⁷ A civil law judge plays a more active role than his or her U.S. counterpart. A civil law judge proactively sets out the course of the case, requesting and reviewing documentary evidence, resolving factual and legal issues along the way, calling and interrogating fact witnesses,

³See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

⁴See § 138, 254 *Zivilprozeßordnung* (ZPO) (German Code of Civil Procedure) (requiring substantiation of complaint allegations). In Spain, a party generally cannot present new documents if they were not attached to the initial pleading. See *Ley de Enjuiciamiento Civil* (“Civil Procedure Act”), art. 269.

⁵With respect to the general differences in procedural law between the United States and European civil law countries, see §§ 23:37 to 23:41; §§ 23:45 to 23:46; § 23:53.

⁶See § 23:46.

⁷See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 11 *Duke J. Comp. & Int’l L.* 61, 66-67 (2003) (noting that characterization of German legal system as inquisitorial fails to take into account adversarial influences).

retaining the court's own experts, summarizing oral hearings and witnesses' testimony on the record (verbatim transcripts of court proceedings are rarely, if ever, prepared), and, ultimately, rendering the decision.⁸ By contrast, the trier of fact in the United States, even in large commercial disputes, is often a jury.⁹ Many European lawyers familiar with the American legal scene have a distaste for the jury system, because they believe that it renders U.S. litigation highly unpredictable. Lawyers have a more active role in litigation in the United States than do attorneys in litigation in civil law countries.¹⁰ The more active role of judges in the civil law system is probably reflected by the fact that between 30% and 50% of continental European proceedings are concluded by a decision after a final hearing, whereas only 2-5% of American disputes proceed to trial and a final judgment.¹¹

A stark difference between the legal systems of the United States and continental Europe is the cost of litigation. Litigation in the United States is significantly more expensive than in continental Europe. One study estimated that, as a percentage of revenue, the cost for multi-national corporations to litigate disputes in the United States is between four and nine times higher than the cost of litigation outside the United States.¹² Litigation expenses in the United States consume approximately 75% of payments made by defendants in tort actions.¹³ A primary driver of these costs is pre-trial discovery.

Although there is a limited amount of disclosure in civil law countries, there is no U.S.-style pre-trial discovery in

⁸With respect to the role of a civil law judge, see § 23:39; § 23:45; §§ 23:46 to 23:47 and § 23:53.

⁹See §§ 23:53 to 23:54.

¹⁰See § 23:57.

¹¹David F. Herr et al., *Fundamentals of Litigation Practice* § 4:2 (2019 ed.).

¹²Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (2010) at 3, available at https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf (visited Sep. 28, 2019).

¹³See Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System* at 6 (2018).

European civil law countries.¹⁴ Whereas in the United States discovery is the typical means of obtaining access to an adversary's information, in European civil law countries there is seldom an obligation to provide the adverse party with information under a party's control.¹⁵ A litigation hold, encompassing the obligation to preserve relevant documents once litigation becomes reasonably likely, is also a unique aspect of U.S. discovery rules.¹⁶ Since adoption of the Federal Rules of Civil Procedure in 1937, pre-trial discovery has become the centerpiece of U.S. litigation, accounting for as much as 90% of litigation costs where discovery is actively employed.¹⁷ Document production, interrogatories, and depositions do more than "eliminate surprise" in litigation—they make large-scale U.S. litigation very expensive. European clients often are also offended by what they consider to be its highly invasive nature. In a culture where there is greater emphasis on privacy and data protection than in the United States, the European business and legal communities resent this most intrusive feature of American litigation and counsel in the United States should be prepared to address this concern.¹⁸

Significant differences also exist with respect to attorneys' fees and court filing costs. In some European countries, attorneys' fees are governed by statute and are a function of the monetary demand at issue.¹⁹ Whereas the contingency fee is quite common in the United States, making the at-

¹⁴For a discussion of the limited disclosure available in the civil law system, see § 23:40.

¹⁵See § 23:40.

¹⁶See § 23:18; § 23:43.

¹⁷*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007) ("[D]iscovery accounts for as much as 90 percent of litigation costs when discovery is actively employed"). See generally Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.), for a discussion of pre-trial discovery in the United States.

¹⁸See § 23:29; § 23:44; see generally Chapter 82 "Privacy and Security" (§§ 82:1 et seq.), for a discussion of European Union data protection standards.

¹⁹Attorneys' fees in Germany are governed by statute. See Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte [RVG] (Law on the Remuneration of Attorneys. The amount of attorneys' fees recoverable in litigation generally depends upon the monetary demand in

torney a co-venturer with the client, who shares the risk of defeat, such fee arrangements are generally not permitted in civil law countries.²⁰ Moreover, mandatory fee-shifting procedures are common in European legal systems whereby the losing party generally bears the costs of the lawsuit, including the prevailing party's attorneys' fees, value added taxes (VAT) on such fees, expert's costs and court filing fees.²¹ Court filing fees for instituting a lawsuit in Europe can be considerable by United States standards. For example, in Germany, court filing fees depend on the monetary amount at issue in the action. Commencing an action for the equivalent of a 500,000 Euro claim in a German court would entail up-front court costs (Gerichtskosten) in the amount of 3,536 Euros (approximately \$4,000).²² The filing fee for bringing an action in a United States district court, by contrast, is \$350.²³ European countries' filing fees are not uniformly more expensive, however. For example, Spain's government recently instituted court filing fees, only to have most of them annulled by the Constitutional Tribunal, on the theory that they prevented and impaired an effective right to legal protection and justice.²⁴ The right to effective judicial protection is deeply ingrained in the Spanish constitutional and

the action and the stage of the litigation. §§ 2 para. 1; 13 para. 1 RVG. The statutory attorneys' fees cover all activities of the attorney, regardless of the time actually spent on the matter. § 15 para. 1 RVG. For example, statutory attorneys' fees for bringing an action seeking 500,000 Euros in Germany, including representing the client outside of court proceedings, amount to 10,121 Euros, exclusive of expenses, VAT and court filing fees. See generally § 23:17.

²⁰For example, § 49b para. 2 Bundesrechtsanwaltsordnung (BRAO) (German Federal Law on Attorneys) generally prohibits contingency fee arrangements, except where it is the only viable method for the client to obtain legal redress. See § 4a RVG. The contingency fee or success fee agreement ("*pacto de quota litis*") was traditionally forbidden in Spain until the Supreme Court ruled in 2008 that such a prohibition violated the Anti-Trust Law (Sentencia del Tribunal Supremo November 4, 2008).

²¹See, e.g., § 91 Zivilprozessordnung (ZPO) (German Code of Civil Procedure), according to which the court, as part of its final ruling, is required to apportion attorneys' fees and other costs in relation to how each party fared on its claims and/or defenses. See also § 23:17.

²²§ 3; 12 para. 1; 34 Gerichtskostengesetz (GKG) (German Court Costs Law).

²³28 U.S.C.A. § 1914(a).

²⁴Sentencia del Tribunal Constitucional (S.T.C.), June 21, 2016

social regime, which can be observed in the fact that filing fees vary between 100 to 300 Euros, with most appeals being free of cost.²⁵

Another important difference between the United States and civil law systems in Europe is the absence of U.S.-style class actions in Europe. In the United States, a class action permits a representative party to institute a lawsuit on behalf of members of a class without their consent.²⁶ The absent members of the class are not parties to the lawsuit. Nonetheless, the court may award the entire class damages, without proof of damage in individual cases, and the resulting judgment is binding on all class members. In recent years, efforts to establish “group actions” and “collective redress actions” have taken hold in the U.K., Italy, Portugal, Denmark, Finland, Sweden, the Netherlands, Poland and Spain. Other European countries, such as Germany, permit certain groups of consumers, *i.e.*, purchasers of securities, to bring a group action or a model lawsuit for similarly situated individuals.²⁷ Efforts are also underway at the European Union level to harmonize the rules regarding collective redress actions.²⁸

In Spain, for example, class actions were instituted in

(Boletín Oficial del Estado [B.O.E.]-A-2016-7905 140/2016) (Spain).

²⁵See *Ley de Tasas Judiciales (Law on Court Filing Fees)*, (L.T.J., BOE-A-2012-14301, 2012) (Spain). See generally Gabriel Doménech Pascual, *Las tasas judiciales a juicio: Comentario crítico de la Sentencia del Tribunal Constitucional 140/2016, de 21 de julio*, InDret 1/2017 (Jan. 2017), <http://www.indret.com/pdf/1276.pdf> (analyzing some of negative consequences of the cancellation of the filing fees, as well as performing a comparative analysis with some other European jurisdictions).

²⁶Fed. R. Civ. P. 23. See generally Chapter 60A “Class Actions” (§§ 60A:1 et seq.).

²⁷See *Kapitalanleger-Musterverfahrensgesetz, BGBI. 2012 I. S. 2182 (KapMuG) (German Model Lawsuit Act for Capital Investors)*. In 2018, Germany also passed legislation allowing group actions on behalf of consumers. See Dr. Henner Schläfke et al., *Bundestag passes model declaratory lawsuit legislation with last-minute changes* (June 29, 2018), <https://www.noerr.com/en/newsroom/news/bundestag-passes-model-declaratory-lawsuit-legislation-with-last-minute-changes>.

²⁸In June 2013, the European Commission published its policy on collective redress, including its recommendations to the European Member States on the implementation of national laws establishing a right to collective redress in “mass harm” situations. See 2013 O.J. (L 201) 60-65. The recommendations include an opt-in system, a preliminary court certification prior to admission of a collective action, maintaining the loser-

2000, and consolidated within the Civil Procedure Act (CPA).²⁹ This addition to the legal structure enabled consumer associations and groups to defend the collective interests and rights of consumers and users.³⁰ The Spanish system, like many other civil law jurisdictions, distinguishes between collective rights, which are generally consequential to a preexisting legal relationship (such as consumers pertaining to the same bank or insurance company), and diffused rights, made common by a particular shared transaction or violation—though both fall under the protection of class actions.³¹ Also as in many civil law countries, in Spain consumer groups and associations play a significant role in collective actions, as they have standing to bring class action lawsuits on behalf of the consumers.³² In Spain, these associations are funded privately by the members that compose them, but can also apply for public subsidies. Additionally, in their filed collective suits, they represent not only the interests of their members but of all the affected consumers.³³

While punitive damages may be imposed in litigation in the United States, in the civil law system in Europe punitive

pays-rule and prohibiting the recovery of punitive damages. The Commission's recommendation proposes that E.U. Member States implement collective litigation mechanisms in their respective national laws within two years. As of 2018, however, only six member states had followed the EU's recommendation of establishing a collective litigation mechanism in mass harm situations. *First EU collective redress mechanism to protect consumers*, European Parliament (June 12, 2018 1:56 PM), <https://www.europarl.europa.eu/news/en/press-room/201812051PR21088/first-eu-collectiv-e-redress-mechanism-to-protect-consumers> (last visited Oct. 30, 2019).

²⁹See LEY DE ENJUICIAMIENTO CIVIL (Code of Civil Procedure), (L.E. Civ., B.O.E.-A-2000-323) (Spain).

³⁰See *id.*, at art. 7.3. See also Alejandro Ferreres Comella, *Las Acciones de Clase ("Class Actions") En la Ley de Enjuiciamiento Civil*, ACTUALIDAD JURÍDICA URÍA Y MENÉNDEZ / 112005, <https://www.uria.com/documentos/publicaciones/1380/documento/articuloUM.pdf?id=3210>. See also Robert A. Weninger, *The VW Diesel Emissions Scandal and the Spanish Class Action*, 23 COLUM. J. EUR. L. 91. (2016).

³¹See LEY DE ENJUICIAMIENTO CIVIL (Code of Civil Procedure), (L.E. Civ., B.O.E.-A-2000-323), art. 7.3 (Spain).

³²See LEY DE ENJUICIAMIENTO CIVIL (Code of Civil Procedure), (L.E. Civ., B.O.E.-A-2000-323), art. 7.3 (Spain).

³³See LEY DE ENJUICIAMIENTO CIVIL (Code of Civil Procedure), (L.E. Civ., B.O.E.-A-2000-323), art. 7.3 (Spain).

damages remedies are generally not available.³⁴ Indeed, many civil law countries treat awards of punitive damages as violative of public policy, and refuse to recognize or enforce judgments from the United States providing for such damages, although the trend in some European countries has been to recognize such judgments if certain conditions are met.³⁵

Important differences also exist with respect to the attorney-client privilege, the attorney work product doctrine, and other related protections.³⁶ European inside counsel's understanding of "professional secrecy protections" may not match U.S. outside counsel's understanding of the protections afforded by the attorney-client privilege and work product doctrine, and the expectations of both as to which communications may have to be disclosed in litigation in the United States may vary accordingly.

§ 23:4 Objective: a mutual education process—U.S.'s federal/state dichotomy; application of foreign law

The United States' dual federal and state legal system is often a surprise to European clients. The fact that federal law or the laws of one or more of the 50 states may be determinative in a U.S.-based dispute (regardless of whether the litigation is in federal or state court) often complicates matters. Indeed, the fact that the United States has 50 state bars, each with its own separate admission requirements, could necessitate retaining additional outside law firms for the litigation team.

Despite the complexity of the federal/state legal system and the enormous volume of litigation in the United States,

³⁴This dichotomy also exists within the United States: Louisiana, whose state law system is based upon the civil law, generally prohibits punitive damage awards, unless specifically authorized by statute. See 1 John J. Kirchner and Christine M. Wiseman, 1 *Punitive Damages, Law and Practice*, § 4:6 (2d ed. 2013).

³⁵*E.g.*, decision of the Bundesgerichtshof in Zivilsachen (German Supreme Civil Court) BGHZ 118, 312 (upholding denial of recognition of award containing punitive damages). See § 23:58.

³⁶See generally §§ 23:21 to 23:25; §§ 23:27 to 23:28; Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

on an international level the courts here process this vast caseload at a respectable pace. For example, at the United States district court level in 2019, the median time interval between the filing and disposition of all civil cases was 12.2 months.¹ Generally, the rate of disposition of cases in federal courts in the United States is similar to that of other industrialized countries.² Of course, the complexity of a case will frequently determine its duration.

European inside counsel tend to be familiar with a number of European legal systems. This is a natural byproduct of the close geographical proximity of various national legal systems and decades of European commercial and political integration. European inside counsel are also familiar with civil law conflict of laws principles that are often codified and, thus, are relatively predictable.³ European inside counsel are often surprised by the nature of U.S. conflict of laws rules, developed through case law in fifty states and in numerous federal decisions rather than through systematic statutory guidelines.

Some European inside counsel also believe that U.S. courts are relatively inexperienced in applying foreign law and that courts in the United States have a tendency to pay little heed to applicable international treaties or foreign law. In

[Section 23:4]

¹U.S. District Courts—Federal Court Management Statistics—Profiles—During the 12-Month Periods Ending June 30, 2014 Through 2019, available at https://www.uscourts.gov/sites/default/files/data_tables/cms_na_distprofile0630.2019.pdf.

²In Germany, for example, in 2011, at the Regional Court (Landgericht) level, civil cases, on average, were terminated in 8.2 months. Rechtspflege-Gerichte und Staatsanwaltschaften, Statistisches Bundesamt, Section 5.2 (2012). At the Municipal Court (Amtsgericht) level, civil cases, on average, were terminated in 4.7 months. Rechtspflege-Gerichte und Staatsanwaltschaften, Statistisches Bundesamt, Section 3 (2012). International statistical comparisons are difficult to draw, however, since civil actions in the United States also include a considerable number of prisoner petitions and social security matters, types of litigation not decided by the Regional Courts in Germany, but, rather, by specialized courts.

³In Germany, for example, conflict of law principles are codified in the Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB) (Introductory Law to the German Civil Code) and the Gesetz zur Neuregelung des Internationalen Privatrechts, BGBl. 1986 I S. 1142, as amended (German Law on the New Regulation of Private International Law).

this context, the public debate in the United States in recent years about whether U.S. judges should be permitted to consider or cite to foreign law at all is viewed as a troubling development for many European companies and their inside counsel.⁴

§ 23:5 Selection of U.S. outside counsel

European companies with little or no presence here rarely litigate in the United States. For such companies, the selection of U.S. outside litigation counsel can be a daunting task.¹ In compiling a list of potential outside counsel, the European company likely will consult a number of sources: senior management with U.S. contacts, the chief legal officers of other companies in Europe, other European outside counsel who may have relationships with law firms in the United States, the European offices of multinational U.S.-based firms, and inside counsel at U.S. affiliates of the company, among others.

In compiling such a list of candidates, and, later, in paring it down, the company's representatives—be they senior management, the chief legal officer, or, possibly department heads—should ask themselves a number of questions: What are the company's goals and what is the most efficient way to handle the litigation? Is it a "bet the company" case or a routine matter that should not require an unusual expertise or time commitment? What are the candidate's communication skills? Will the law firm have a mindset conducive to "partnering" with the European client and its inside counsel? Does the firm have experience in representing European companies? Does the firm have experience with international litigation or with foreign law? Does the candidate have experience in the particular type of litigation that is involved?

If the European company is sued in the United States, are

⁴See § 23:49 with respect to determining foreign law pursuant to Fed. R. Civ. P. 44.1. See also generally *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865, 1874, 201 L. Ed. 2d 225, 2018-1 Trade Cas. (CCH) ¶ 80408, 100 Fed. R. Serv. 3d 1269 (2018) (holding that court of appeals erred in deeming the Chinese government's interpretation of its own law as binding).

[Section 23:5]

¹See generally Chapter 4 "Selection of Outside Counsel" (§§ 4:1 et seq.).

other companies in the same industry defendants as well? In that case, selection of common counsel could save costs, avoid duplication of work, and develop a common strategic approach to the litigation. That approach would make sense if, for example, a European company and its U.S. subsidiaries were parties to the litigation in the United States. However, in other scenarios, *i.e.*, where unrelated companies from the same industry are parties to the litigation, coordination among separate counsel and a joint *défense* agreement might be a more realistic option.²

Past experience and a good track record count. If the European company already has (good) experience with a United States law firm in another matter, it is highly likely that the same law firm will be engaged for similar new matters: a cooperative relationship already exists, United States outside counsel has knowledge of the internal structures of the company, and work product from other cases may be used again, increasing efficiency and reducing the risk of inconsistent arguments in court proceedings.

Company representatives should obtain billing rates and references, they should be certain that there are no conflicts of interest,³ and, above all, they should be comfortable that a close working relationship is likely to develop.

The factors that play a role in the selection of outside U.S. counsel are complex and there is no one-size-fits-all solution.⁴ Those selecting U.S. outside litigation counsel should certainly satisfy themselves that, regardless of the size of the firm that is chosen, an experienced partner in whom those doing the selecting have confidence will take personal charge of the case, assure efficiency and establish effective and open lines of communication, and that the law firm will make a serious commitment to the case. In most instances, this will mean selecting U.S. outside counsel with a successful history of representing European companies.

²See § 23:26; see also Chapter 9 "Engagement Letters (Including Written Corporate Policies and Procedures)" (§§ 9:1 et seq.) for a discussion of joint defense agreements.

³See generally Chapter 32 "Conflicts of Interest" (§§ 32:1 et seq.).

⁴Similar factors and considerations that arise when a U.S. company selects and retains international counsel are discussed in Chapter 22 "Counsel for International Legal Work" (§§ 22:1 et seq.).

§ 23:6 Strategic planning

Consider this scenario: An experienced U.S. litigator receives a telephone call from the chief legal officer of a large European company. Inside counsel informs the U.S. lawyer that the company has learned from a co-defendant that it has been named a defendant in a complex, multi-party complaint filed in a U.S. federal court. Service of the summons and complaint has not yet been effected. The company would like to retain the U.S. lawyer's firm to defend it. The firm has not represented the company in prior matters. The American lawyer obtains a copy of the complaint from the courthouse, e-mails it to the client, and arranges to fly to Europe for two days of strategic planning meetings.¹ What preliminary considerations should the U.S. lawyer and European inside counsel address at those meetings?

§ 23:7 Strategic planning—Preparatory work

It is clear from the outset that numerous difficult issues—factual and legal—will have to be developed quickly. (We will review many of these issues in Sections 23:8 to 23:30 of this Chapter.) However, it is not enough merely to identify those issues initially. Specific plans must be drawn up immediately for the completion of all work that can be anticipated. There are a number of reasons for this.

First, European-based companies generally tend to have smaller legal departments than comparable U.S. corporations. Thus, the number of legal department personnel that the chief legal officer of a European corporation can make available to work with U.S. outside counsel is often quite limited.

Second, to the extent that the development of factual issues will require the time and effort of non-legal personnel, arrangements will have to be made to free up such people for these tasks. In a corporate culture where the legal depart-

[Section 23:6]

¹It is not unusual for U.S. outside counsel to meet initially with senior management of the European company. Often, this will occur as the company goes through the process of selecting outside counsel. See § 23:5. For purposes of this Chapter, we assume that once U.S. outside counsel has been selected, management of the relationship has been delegated to European inside counsel.

ment may not have the intra-corporate influence that U.S. litigators are used to in domestic companies, this can often be a delicate matter, particularly if the work, as it often does, requires the involvement of senior management.

Third, U.S. counsel must be mindful of the challenges that litigation in the United States creates for European inside counsel. Inside counsel may need to explain to the company's executives, directors, and employees involved with the litigation the big differences between the company's home legal system and the legal system in the United States, the significant costs that will likely be incurred, and the demands resulting from the litigation.¹ Documents essential for the litigation may have to be identified, located, and translated into English and witnesses may need the assistance of interpreters, adding costs.² Litigation needs will have to be coordinated with employees' and executives' existing work schedules.³ The time difference between Europe and the United States adds an additional layer of complexity.⁴

Fourth, a litigation hold must be sent to relevant employees to make certain that potentially relevant electronically stored information and paper and other documents are preserved.⁵ To guarantee that the litigation hold functions as intended, U.S. counsel and European inside counsel should also coordinate with the company's IT personnel.⁶

Fifth, requests by U.S. lawyers for information—documents, electronically stored information, archival and file searches, lists of potential witnesses, corporate histories, organizational charts, minute books, names of potential experts—without sound explanations of the reasons for these requests and how they may be used in the litigation are almost guaranteed to perplex and possibly even offend both inside counsel and the non-legal company managers or other

[Section 23:7]

¹See § 23:3.

²See §§ 23:18 to 23:20.

³See §§ 23:8 to 23:9.

⁴See § 23:9; § 23:12.

⁵See § 23:20; § 23:43. See Chapter 81 "Electronic Discovery" (§§ 81:1 et seq.) for discussion of litigation holds.

⁶See § 23:19.

employees to whom the assignments may be given.⁷ This is a common complaint by European inside counsel, and their non-legal business colleagues—that U.S. lawyers, insensitive to the client's relative lack of familiarity with litigation in the United States, tend to make demands of them unaccompanied by cogent reasons for the requests. This reaction is understandable, especially given the absence of discovery in civil law systems and the comprehensive data protection laws in many European countries.⁸

Sixth, expectations and tasks should be clearly defined at the outset. For example, some companies might find it useful to get general memos from their U.S. lawyer regarding U.S. law while others, who have previously been engaged in litigation in the United States, will not need such general information and will consider them an unwanted expense. U.S. counsel must walk a fine line, feeling out the client's needs and keeping costs in check. Some companies need advice and help regarding jurisdictional discovery, including the search for information, while others have some experience in that respect, do the search on their own, and deliver the information to outside counsel for the preparation of the motion.⁹

In other words, for partnering between European inside counsel and U.S. outside counsel to succeed, outside counsel must invest in the necessary preparatory work. Establishing good lines of communication with inside counsel, setting clearly defined goals and responsibilities and keeping costs in check as much as possible are key elements of such a successful partnership.

§ 23:8 Strategic planning—Timetables

While outside counsel often will not know at the time of the initial strategy meetings how much time they will be able to obtain to prepare the client's answer or initial motion, it is critical throughout the litigation to establish clear—and realistic—schedules for all tasks and to revisit

⁷Most of these requests for information relate to motion practice and pre-trial discovery. See generally §§ 23:34 to 23:51; Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.).

⁸See § 23:3; § 23:29. See also Chapter 82 "Privacy and Security" (§§ 82:1 et seq.).

⁹With respect to jurisdictional discovery, see § 23:37.

these timetables frequently. This is, of course, a two-way street. Not only will outside counsel expect factual material from the client in time to utilize it in drafting various pleadings, but inside counsel will expect to receive drafts of all papers to be submitted to the court sufficiently in advance to review the drafts, comment on them, and otherwise participate fully in the process.

As a practical matter, in creating timetables, it is important for both inside and outside counsel to be aware of one another's schedules, work habits, and other similar factors that must be taken into account.¹ In addition, where client or expert declarations are to be written in a language other than English, adequate time must be built into the schedule to allow for the preparation, review, and, if necessary, revision of English translations that will be the principal filings in the action. In some cases, this can be daunting, time-consuming, and very expensive work.² To ease this burden, it is often advisable to have European inside counsel, at an early stage of the proceedings, determine which company employees with relevant knowledge will be capable of submitting their declarations in English.

§ 23:9 Strategic planning—Logistics

Counsel in the continental United States are generally working from five to ten hours behind their European counterparts. This time difference can become a significant communication barrier. Europeans sometimes find it frustrating that they cannot speak to their U.S. litigation counsel until relatively late in the day in Europe. By the same token, U.S. counsel often wish they could speak to their European

[Section 23:8]

¹For example, if the European client is also conferring with European outside counsel on the U.S. litigation, additional time may have to be factored into the schedule to receive their input as well. See § 23:12. To facilitate scheduling, U.S. outside counsel should obtain country-specific calendars, showing European national and religious holidays.

²See § 23:35, particularly with respect to preparing client declarations.

clients later than mid-day in the U.S. Procedures should be agreed upon at the outset to deal with this thorny issue.¹

§ 23:10 Communication

The success of any partnership between inside and outside counsel is directly related to the nature and quality of their communications with one another.¹ This need for effective communication is even more pronounced in the representation of European companies by U.S. outside litigation counsel, for the reasons described in Sections 23:11 to 23:14.

§ 23:11 Communication—Team leaders

At the initial strategy meeting, one of the essential tasks is to lay the groundwork for a seamless working relationship between the inside and outside team leaders. If the subject matter of the case is unusually sensitive and/or the stakes are very high, then the respective team leaders may well be the client's chief legal officer and the U.S. litigator who was first contacted about the retention. If the matter is less critical, other members of the inside and outside teams may be asked to take on leadership roles. If so, these lawyers either should attend the initial strategy meeting or, if that is not practicable, should be included in a face-to-face meeting as soon as possible. Similarly, once the make-up of the inside and outside legal teams is set, early face-to-face contact should be encouraged, despite the additional expense. Working together over a period of several days in the early stages of a case—either in Europe or the United States—often facilitates the development of esprit de corps and promotes efficiency.

Written communications from U.S. outside counsel to European inside counsel should be drafted in a clear and concise way so that they can be used directly by non-legal

[Section 23:9]

¹For some practical suggestions, see § 23:12; see also § 23:7.

[Section 23:10]

¹See generally Chapter 13 "Communication Methods and Skills" (§§ 13:1 et seq.).

company personnel.¹ Where possible, it is important to avoid overly technical legal terminology since it cannot be assumed that company personnel will be familiar with esoteric terms of art from a foreign legal system. For example, where European inside counsel or the company's legal staff is not familiar with U.S. legal terminology, more descriptive terms may aid the communication process (e.g., using "application to the court" instead of "motion" and "sworn statement" instead of "affidavit"). Some U.S. terms like "director," "company," "employee," and "agent" may have a number of possible meanings in a European context that differ from their commonly understood meanings in the U.S.

§ 23:12 Communication—Methods and frequency of communication

The team leaders should agree on both the methods and frequency of their communications. Generally, an effort should be made to maintain contact at the senior level with some degree of regularity. In some cases, particularly when a great deal of work is necessary on both sides of the Atlantic under deadline pressure, it may be useful for outside counsel to e-mail to European inside counsel on a regular basis status reports or executive summaries providing an overview of the current work on all on-going projects, the work that still needs to be done, who is doing it, and by when it must be completed.¹ Alternatively, this report might be given in the course of a regularly scheduled conference telephone call with specific details as to how the work has been allocated between inside and outside counsel.

It is generally useful to agree in advance on protocols for communications: What is the preferred method? Telephone?

[Section 23:11]

¹To avoid a possible waiver of the attorney-client privilege and work product protections, the communications should not be distributed broadly to personnel who have no need to see them. See generally §§ 23:21 to 23:28; Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

[Section 23:12]

¹E-mail communications from U.S. counsel should contain a statement that the communication is subject to the attorney-client privilege and/or is protected by the attorney work product doctrine. See § 23:22; § 23:27.

E-mail? To whom should communications be addressed? Who should be copied? Should outside counsel in Europe be copied on some or all communications? Agreeing in advance will facilitate a smooth working relationship.

To ease the inconveniences that may arise from the time differences, a number of practices may be employed. For example, before leaving the office for the day, U.S. counsel can send an e-mail to the client summarizing an issue that needs to be addressed immediately. The e-mail will be in Europe the next morning when inside counsel arrives at work. He or she can then respond by the time U.S. counsel arrives at work. It is also helpful to schedule conference telephone calls on important issues a day or two in advance. European inside counsel generally also prefer that important meetings in the United States involving U.S. counsel—for example, with co-counsel or adversaries—be scheduled in the afternoon. This makes it easier for outside and inside counsel to confer in the morning, immediately prior to the meeting, with the result that inside counsel's input and instructions are as timely as possible.

Finally, it is suggested that all members of the inside and outside teams have an up-to-date list of home, office, cellular telephone, and e-mail addresses, and that ground rules be established at the outset concerning when telephone calls are appropriate.

§ 23:13 Communication—Cultural considerations

Effective communication between U.S. counsel and European inside counsel and corporate managers requires a sensitivity to cultural differences that may, particularly at the inception of the relationship, play an important role. While many European executives and inside counsel admire the friendliness and openness that often characterize social interactions in the United States, the lack of formality in a business setting may be unsettling to them. In most European countries, being on a first name basis is something that is generally reserved for friends, and is usually “offered” by the elder person. It may thus be inappropriate, at least at the inception of the retention, for U.S. counsel to call European clients or inside counsel by their first names. Also, academic titles, such as “Dr.,” should be noted, and used in addressing these individuals, both orally and in writing.

On the other hand, many European inside counsel, at least with larger corporations, are quite familiar with U.S. law: some might even have studied law in the United States or otherwise had experience with U.S. law and litigation. This should be taken into account by U.S. outside counsel in order to avoid unnecessarily simplistic explanations. Also, U.S. outside counsel should not send general memos on U.S. law to European inside counsel if they are not asked for.

§ 23:14 Communication—Outside counsel in Europe; pros and cons

Though many European companies do not utilize outside counsel as often as U.S. companies do (indeed, many European corporate legal departments prepare and closely manage their own litigation), when they become involved in litigation in the United States, European companies often consult with local European outside counsel, particularly if that outside counsel has experience working with U.S. lawyers on litigated matters. The principal argument against interposing European outside counsel between European inside counsel and the U.S. litigators is that adding another layer of lawyering may lead to inefficiency and increase costs. An intermediate approach is to have the European company retain outside counsel, but only for selected functions, such as advising on local European law. In addition, developments in the U.S. litigation may require the assistance of European outside counsel, for example, where it is anticipated that foreign law may apply in the U.S. proceeding, or where issues arise relating to conflict of laws,¹ discovery abroad,² foreign data protection and privacy laws,³ or foreign attorney-client privilege laws.⁴ Where such issues may arise, the role of European outside counsel, if any, should be discussed with European inside counsel and agreed upon at the outset.

§ 23:15 Staffing

Staffing requirements depend not only on the complexity

[Section 23:14]

¹See § 23:4.

²See §§ 23:40 to 23:51.

³See § 23:29; § 23:44.

⁴See §§ 23:22 to 23:25.

and importance of the U.S. litigation but may also be affected by the support that European inside counsel and the company's legal staff can provide. There is considerable variety among European inside counsel and staff serving as in-house legal advisors. Large European companies typically have seasoned inside counsel and staff who may also be members of that country's bar.¹

Not all European inside counsel are attorneys, however. In some cases, especially in smaller enterprises, an in-house legal advisor may not have completed a formal legal education or be a member of the bar. Others may have a law degree but not be a member of the bar.² Where litigation is pending in the United States or where it is reasonably anticipated, the European company must exercise care in its communications with such in-house legal advisors as these communications may not be afforded the same privileges and protections that communications with licensed attorneys bring.³

For these reasons, as well as the complexity of a broad range of issues often implicated in transnational litigation in the United States,⁴ it is advisable for U.S. outside counsel to carefully consider staffing for such cases including by utilizing more senior, experienced attorneys than would usually be appropriate in a domestic case.⁵ This should create a level of comfort on the part of the U.S. team leader in his or her firm's ability to communicate promptly and effectively with inside counsel, to grasp quickly complex issues that may arise, and to provide wise counsel on an ongoing basis.

In addition to staffing the case with more experienced lawyers, outside counsel should consider selecting for the

[Section 23:15]

¹See § 23:23.

²See Roy D. Simon Jr., Simon's NY Rules of Prof. Conduct § 1.6:38 (2019) (noting that "in at least 19 of the 28 members of the European Union (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, the Slovak Republic, Slovenia, and Sweden) in-house counsel are prohibited from becoming members of the bar . . .").

³See §§ 23:21 to 23:28.

⁴See generally Chapter 10 "Litigating International Disputes in American Courts" (§§ 10:1 et seq.).

⁵See Chapter 18 "Law Firm Staffing" (§§ 18:1 et seq.).

team litigators equipped with the interpersonal skills and cultural insight necessary to make a particularly good impression on the client, especially when visiting the company's offices overseas. A litigator with a "bull in a china shop" demeanor might not be appropriate in staffing these cases.

The size and make-up of the outside counsel team will obviously depend on the broad strategy adopted for the case, its complexity, the stakes involved and on budgetary considerations.⁶

§ 23:16 Staffing—Language issues

Even where the outside U.S. legal team includes individuals fluent in the client's language, U.S. counsel should encourage European clients to conduct all correspondence in English, where possible. This avoids burdening the clients with unnecessary translation costs, and also assists the communication process within the outside counsel team. Where the client's personnel are not comfortable communicating in English, a working method that may be acceptable is for each group—the client and outside counsel—to send written communications in its native language. Experience has shown that European clients often have no difficulty understanding written English.

§ 23:17 Budget and billing

The budget and billing for the litigation require attention at the outset.¹ While this is true in almost every case, it is even more critical at the beginning of a relationship with a European company involved in the U.S. legal system.

There are a number of reasons for heightened sensitivity to these aspects of the representation. First, the European client is going to incur fees that are likely to be very substantial in comparison to the fees it is accustomed to pay-

⁶See § 23:17.

[Section 23:17]

¹See generally Chapter 11 "Budgeting and Controlling Costs" (§§ 11:1 et seq.); Chapter 14 "Billing" (§§ 14:1 et seq.).

ing in Europe for outside legal work.² Second, most U.S. law firms bill clients on a monthly basis and expect to be paid within 30 days. By contrast, in Europe it is not uncommon for legal fees to be billed—and paid—on an irregular basis or even not until a matter is concluded.³ Third, while most U.S. law firms generally bill on an hourly rate basis for defending a litigation, billing methods in Europe tend to vary and in some countries are governed by statute.⁴

Whatever budget is estimated initially must be revisited from time to time in order to take into account the developments in the case. For example, many litigations involve high start-up costs as the outside counsel team is assembled, documents are studied, potential declarants and witnesses are interviewed, a strategy is agreed upon and implemented, and pleadings or motions are researched, drafted, and served. Thereafter, there may be a lull in the work—with a corresponding abatement in costs—as the adverse party and its counsel react to these papers.

Similarly, throughout the course of the litigation there will be periods when the work will be intense and more costly, and periods when it will ease up, sometimes dramatically. The client needs to be able to anticipate this ebb and flow. Whenever possible, U.S. outside counsel should anticipate the client's concerns about billing and propose strategies for controlling costs in a professionally responsible way.

Typically, U.S. law firms utilize engagement agreements that set forth in general terms the subject of the retention, the basis upon which bills will be rendered (*e.g.*, hourly rates, including the ranges of rates for different categories of time-keeper),⁵ the fact that the client will also be expected to pay

²See generally § 23:3.

³For example, statutory attorneys' fees in Germany, aside from a retainer, are due "when the mandate has been performed or the matter has been closed." § 8 para. 1 Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (RVG) (German Law on Attorneys' Fees), translation available at https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html#p0051. See § 23:3.

⁴See § 23:3.

⁵See generally Chapter 8 "Fee Arrangements" (§§ 8:1 et seq.).

for disbursements⁶ (e.g., photocopies, facsimiles, long distance telephone charges, overnight delivery services, messenger services, filing fees), and the time within which it is expected that statements will be paid.⁷ These agreements should be used with European clients just as they are with domestic clients.⁸

Many lawyers shy away from discussing billing and budgetary matters with clients. Such reticence is counterproductive. When the client is a European company, particularly one not accustomed to working with U.S. litigation counsel, it is advisable not only to be clear and direct about these matters, but to revisit them as often as necessary until a level of comfort is reached for this aspect of the relationship.

§ 23:18 Document handling

It is important that outside and inside counsel discuss at the outset the role documents are likely to play in the litigation and, in particular, the extent to which potentially harmful documents may have to be disclosed to the adverse party.¹ In effect, an evaluation of all potentially relevant categories of documents must be made promptly. This assessment should include information on the locations of documents, the language they are written in, the ways in which they are stored and organized, and the identity of their custodians, including the company's information technology personnel.²

Discovery of electronically stored information frequently

⁶A Spanish in-house counsel with little experience dealing with U.S. law firms will find it very difficult to understand why certain charges (like photocopies or phone calls) may have to be reimbursed.

⁷See generally Chapter 9 "Engagement Letters (Including Written Corporate Policies and Procedures)" (§§ 9:1 et seq.).

⁸General retainer agreements are also commonly used by European outside counsel. See Chapter 14 "Billing" (§§ 14:1 et seq.) and Chapter 15 "Expenses and Disbursements" (§§ 15:1 et seq.). Others prefer a more flexible approach, and treat each retention of outside counsel on an individual basis. Detailed billing guidelines, though seldom used by European companies, are becoming more common.

[Section 23:18]

¹See § 23:42; see also Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.).

²See § 23:19.

plays a major role in litigation in the United States³ and this topic should be broached at the beginning of the engagement with European inside counsel, along with the development of a document discovery plan.⁴ In that regard, an important topic is the implementation of a litigation hold to prevent the destruction of relevant documents.⁵ European companies, especially those that have not litigated in the United States in recent years, are often not familiar with litigation holds. It is important for U.S. outside counsel to make European inside counsel aware of the potential sanctions that could be imposed on the European company if it fails to fulfill its obligation to preserve relevant documents.

U.S. counsel should be aware that the “culture” of document retention in civil law countries is different from the approach in the United States.⁶ The European view is influenced by the fact that no pre-trial discovery mechanisms exist in civil law systems comparable to those in the United States.⁷ Indeed, some European countries refuse to comply with formal requests from courts in the United States for judicial assistance where the purpose of the request is to obtain pre-trial discovery of documents.⁸ However, such limitations only apply where judicial assistance is sought through the Hague Evidence Convention⁹ and will not insulate the company against demands by a litigant in the

³See generally Chapter 81 “Electronic Discovery” (§§ 81:1 et seq.).

⁴See § 23:20; §§ 23:42 to 23:43; see generally Hon. Shira A. Scheindlin and Jonathan M. Redgrave, Chapter 26, “Discovery of Electronically Stored Information,” in Haig, *Business and Commercial Litigation in Federal Courts* §§ 25:1 et seq. (4th ed. 2016) (§ 25:54 discussing discovery plan relating to digital information); Robert M. Abrahams and Scott S. Balber, Chapter 27, “Document Discovery,” in Haig, *Commercial Litigation in New York State Courts* §§ 27:1 et seq. (4th ed.) (discussing duty to preserve electronic records).

⁵See § 23:20; §§ 23:42 to 23:43.

⁶See Chapter 29 “Information Governance” (§§ 29:1 et seq.).

⁷See § 23:3; § 23:40.

⁸See §§ 23:41 to 23:42.

⁹Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 26, 1968, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). See § 23:41.

U.S. litigation seeking the production of documents under U.S. discovery rules.¹⁰

§ 23:19 Document handling—Document custodians

Document custodians can be of great importance as litigation unfolds.¹ In particular, if they are long-time employees of the company they may have a wealth of knowledge concerning documents under their supervision, including documents that may be vital to the company's position in the litigation. Their role may be especially critical if vast amounts of written materials have been retained and stored rather than destroyed. Document custodians are often the best sources of information about retention and destruction policies² as well as which persons may have had access to certain documents. Indeed, document custodians are prime subjects for depositions, and may also be needed as declarants for motions or even as trial witnesses.³ They should be identified and interviewed promptly.

U.S. counsel should impress upon European inside counsel the need to establish contact and, indeed, a level of trust with the company's document custodians. In light of the fact that document custodians play an important role in making certain that a litigation hold⁴ is, in fact, implemented and continues to be in place during the litigation, U.S. outside counsel must follow up on a relatively regular basis and confirm that the document custodians of the European company are properly maintaining relevant records.⁵ This may be a cultural shift for European inside counsel and the company's management who have not previously been involved in litigation in the United States, but the importance of establishing a good working relationship with the document custodians can hardly be overstated, particularly

¹⁰See § 23:42.

[Section 23:19]

¹See § 23:7; § 23:42.

²See Chapter 29 "Information Governance" (§§ 29:1 et seq.).

³See § 23:35; § 23:47.

⁴See Chapter 81, "Electronic Discovery" (§§ 81:1 et seq.) for discussion of litigation holds.

⁵See § 23:20.

in light of the sanctions that loom if relevant documents are destroyed during the litigation.⁶

§ 23:20 Document handling—Procedures

Once the outside and inside counsel teams have established the universe of potentially relevant documents—including their locations, formats, and custodians, and, in particular, any documents that may have been destroyed recently or are about to be destroyed in the normal course—a number of procedures should be followed.

It is important to let appropriate company managers know promptly about the need to preserve all potentially relevant documents and files under their supervision.¹ In particular, automatic electronic destruction programs—including the erasure or overwriting of computer back-up tapes and other programs that may delete e-mails or other electronic records—will need to be suspended for relevant documents immediately once it is reasonably likely that a claim against the client may lead to litigation.² This will require consultation with the client's information technology systems managers and, possibly, with outside consultants.³

Careful consideration must be given by inside and outside counsel to the European company's existing document retention policies and the extent to which they are mandated under local law. For example, European businesses frequently view the applicable statute(s) of limitation as the only guide to document retention. European inside counsel and the company's document custodians may not appreciate other policy considerations, such as those resulting from the need to segregate attorney-client communications,⁴ or may not appreciate the litigation risks resulting from the company's failure to preserve documents pursuant to a liti-

⁶See § 23:18.

[Section 23:20]

¹See § 23:19; § 23:43; Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.); Chapter 81 "Electronic Discovery" (§§ 81:1 et seq.).

²See § 23:43.

³See § 23:19.

⁴See §§ 23:22 to 23:26. See generally Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

gation hold.⁵ The company's document retention policies may therefore need to be adjusted to accommodate the needs created by the company's involvement in litigation in the United States and may also need to be adjusted to address potential future litigation in the United States.⁶

In addition, a plan must be developed and implemented for reviewing the documents, including debriefing the custodians.⁷ The documents need to be reviewed for a "privilege cut" by a team sufficiently skilled and knowledgeable to segregate not only documents that fall under traditional protections of United States law, such as the attorney-client privilege and attorney work product doctrine, but also documents that are protected under applicable European privacy and data protection laws.⁸

Finally, if large numbers—or even all—of the relevant documents are in a language other than English, outside U.S. counsel will need to get a sense almost immediately of the nature of the documents and how to develop a plan for "triage," so that the most important documents can be identified and translated.⁹ The fact that many relevant documents are in a foreign language may buttress the company's arguments for dismissal on *forum non conveniens* grounds.¹⁰

§ 23:21 Privileges and protections

One of the murkiest areas that must be addressed in initial planning discussions between European inside counsel and U.S. outside counsel is the application to European companies and their inside counsel of various privileges and protections commonly invoked in U.S. litigation. We discuss in Sections 23:22 to 23:29 some of the implications of these privileges and protections for European companies that find themselves litigating in the United States.

⁵See §§ 23:42 to 23:43. See Chapter 81 "Electronic Discovery" (§§ 81:1 et seq.) for discussion of litigation holds.

⁶See generally Chapter 29 "Information Governance" (§§ 29:11 et seq.).

⁷See § 23:19.

⁸See § 23:29. See Chapter 82 "Privacy and Security" (§§ 82:1 et seq.).

⁹With respect to translation costs, see § 23:16.

¹⁰See § 23:38.

§ 23:22 Privileges and protections—Attorney-client privilege

U.S. litigators are quite familiar with the attorney-client privilege, often used to justify a refusal to provide information in response to discovery requests. Generally, under applicable U.S. law, for the privilege to apply, four elements are necessary: (i) a communication, (ii) made between privileged persons, (iii) in confidence, (iv) for the purpose of seeking, obtaining, or providing legal assistance for the client.¹ The privilege is rooted in the belief that a lawyer “may give reasonably informed professional advice only when the client gives information in confidence to the attorney.”² In the United States, the privilege covers not only communications with outside counsel but those with inside counsel as well.³

§ 23:23 Privileges and protections—Attorney-client privilege—European inside counsel

U.S. outside counsel should be aware of the fact that the rules governing the attorney-client privilege in Europe are more varied and complex than the rules governing communications with in-house counsel in the United States.¹ Whether communications between the European company’s management or employees and the company’s European in-house counsel are protected by the attorney-client privilege in litigation in the United States can be a difficult issue to resolve and may involve a number of factors, discussed below in this Section.

[Section 23:22]

¹See, e.g., N.Y. C.P.L.R. § 4503(a). See generally Chapter 33 “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.).

²Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 5 (6th ed. 2017).

³See *Upjohn Co. v. U.S.*, 1981-1 C.B. 591, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶ 63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981).

[Section 23:23]

¹See generally Chapter 33 “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.).

As a general matter, in most European countries communications between an attorney and his or her client are protected by rules governing professional secrecy.² Such professional secrecy rules are akin to protections afforded by the attorney-client privilege in the United States. However, not all courts in the United States deem the two to be equivalent or hold that the communication with a European lawyer is subject to an evidentiary privilege in a proceeding in the United States.³ The issue is further complicated by the fact that there is quite a bit of variety in Europe on the rules governing in-house counsel and, in particular, as to whether in-house counsel may be members of the bar. In some European countries, inside counsel may be licensed attorneys but need not necessarily be members of the bar in order to be engaged as in-house counsel.⁴ Some European countries preclude in-house counsel from being licensed at-

²See, e.g., § 2 Berufsordnung für Rechtsanwälte (BORA) (German Attorneys' Professional Code of Conduct), *translation available at http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_engl_stand_1_11_2011.pdf*, imposing a duty of confidentiality regarding "all information that becomes known to the Rechtsanwalt [attorney] in the course of his professional activity and also after the Rechtsanwalt has ceased to act for a client," and § 383 para. 1 no. 6 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure), providing German attorneys with the right to refuse to testify relating to matters protected by professional secrecy laws. The right of professional secrecy also attaches to documents prepared by attorneys in Germany; see § 23:28. Other European civil law countries have similar professional secrecy provisions; see, e.g., Article 9.1 of the Italian Attorneys' Code of Conduct-Duties of Secrecy and Confidentiality, which imposes a secrecy obligation on Italian attorneys not to disclose confidential client information. Art. 5 of the Spanish Código Deontológico de la Abogacía imposes a duty of secrecy in relation to information provided by the client, a counterparty, or opposing counsel. This obligation remains even if the client relieves his attorney of that obligation (<https://www.abogacia.es/wp-content/uploads/2019/05/Codigo-Deontologico-2019.pdf>) (visited October 2, 2019).

³See *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 67 (S.D. N.Y. 2010) (stating that "it is unsettled whether Italian attorney-client confidentiality provisions are comparable to the attorney-client privilege in the United States" and holding that the professional secrecy obligation under Italian Attorneys' Code of Conduct-Duties of Secrecy and Confidentiality is deemed not to be evidentiary privilege); see also *Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117 (S.D. N.Y. 2013), order aff'd, 982 F. Supp. 2d 260 (S.D. N.Y. 2013) (communications with Dutch in-house counsel not licensed to practice law held not privileged).

⁴In Germany, in-house counsel (Syndikusanwalt) may be licensed at-

torneys and thus they may not be subject to the same ethical and disciplinary rules as other attorneys in their jurisdictions.⁵ Determining the applicable rules for European in-house counsel must be done on a country-by-country basis.⁶

U.S. outside counsel should also be aware of two leading decisions of the European Court of Justice regarding management's communications with European in-house counsel. In *AM & S Europe Ltd. v. Commission of the European Communities*, the European Court of Justice squarely addressed the issue whether, in the context of an E.U. antitrust investigation, communications between a corporate client and its in-house counsel were protected by the attorney-client privilege.⁷ The Court of Justice held that in-house counsel are generally not covered by the same attorney-client privilege that protects client communications with outside counsel.⁸ The court's decision was based, in part, on the assumption that "once an attorney is employed by a company, he no longer has the ability to remain free from improper influence by the client" and, therefore, pre-

torneys but are precluded from representing their company employers in court and administrative proceedings. §§ 46 para. 1, 46c para. 2 Bundesrechtsanwaltsordnung (BRAO) (German Federal Law on Attorneys). Similarly, Dutch in-house counsel may be licensed attorneys but need not be. See *Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117 (S.D. N.Y. 2013), order aff'd, 982 F. Supp. 2d 260 (S.D. N.Y. 2013).

⁵See Nathan M. Crystal and Francesca Giannoni-Crystal, *Using Occam's Razor to Solve International Attorney-Client Privilege Choice of Law Issues: An Old Solution to a New Problem*, 41 N.C. J. Int'l L. 275, 314 (2016).

⁶See Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 12.2 (3d ed. 2020) (providing a survey of six European countries); *In-House Counsel and the Attorney-Client Privilege* (2007) (providing a survey of in-house counsel rules in over 100 countries), available at the European Company Lawyers Association (ECLA) website, <https://ecla.online/wp-content/uploads/2017/12/in-house-counsel-attorney-client-privilege-cla.pdf> (visited July 24, 2019).

⁷Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575.

⁸The restrictive interpretation of the attorney-client privilege in *AM & S* has generated considerable criticism, particularly from the European Company Lawyers Association (ECLA). See the ECLA website, available at <http://www.ecla.online/> (visited July 24, 2019).

sumably is not providing "independent" legal advice to company personnel.⁹

In 2010, in another case involving an antitrust investigation by the European Commission, *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd.*, the European Court of Justice held that communications between a company's management and an employee of the company's legal department were not privileged and had to be disclosed to the Commission.¹⁰ At the time the e-mails at issue in that case were sent, the in-house attorney was a member of the Netherlands Bar. The plaintiff companies in *Akzo Nobel* argued that because of that fact, the in-house attorney was subject to the rules of professional ethics and discipline applicable to all members of the Netherlands Bar and, in effect, was acting as an independent attorney. The European Court of Justice rejected that argument, noting that independence means the absence of any employment relationship between the lawyer and the client, which was not the case in *Akzo Nobel*. The court noted that in-house counsel cannot ignore the commercial strategies pursued by their employer and may be required to undertake tasks in furtherance of those strategies. It is because of the "in-house lawyer's economic dependence and the close ties with his employer that he does not enjoy a level of professional independence comparable to that of an external lawyer."¹¹

The *Akzo Nobel* and *AM & S* decisions have settled the issue that, at least within the context of an E.U. regulatory investigation, a company's internal communications with its in-house counsel are not privileged communications. The *Akzo Nobel* and *AM & S* decisions may have practical implications for pre-trial discovery in United States litigation, as discussed further in this Section, below.¹²

Although the *AM & S* and *Akzo* cases have deprived communications with in-house counsel in cases of E.U. regula-

⁹Allison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 *Case W. Res. J. Int'l L.* 145, 155 (1995).

¹⁰Case 550/07 P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Comm'n of the European Communities*, 2010 E.C.R. 8301.

¹¹Case 550/07 P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Comm'n of the European Communities*, 2010 E.C.R. 8301, 49.

¹²See also discussion, § 23:28; § 23:42.

tory investigations of the protections of the attorney-client privilege, some European courts have expressly affirmed that, under the laws of their countries, such communications are potentially protected by the professional secrecy rules or the attorney-client privilege.¹³ Thus, the law regarding the attorney-client privilege relating to in-house counsel under E.U. law and the law of the various E.U. Member States is still developing. The holdings of *Akzo Nobel* and *AM & S* should be understood in light of their specific context—E.U. antitrust investigations. With respect to litigation in the United States, a more solid basis for determining whether communications with the European company's in-house counsel are protected by the attorney-client privilege is the national laws of the country in which European inside counsel is located or where the communications took place.

§ 23:24 Privileges and protections—Attorney-client privilege—Conflict of laws

Since the rules governing attorney-client privilege relating to communications with inside corporate counsel vary considerably in the United States and Europe, the representation of European companies in U.S. litigation often raises a difficult threshold conflict of laws question with respect to determining the law applicable to such communications.¹ The conflict of laws analysis employed by courts in the United States in resolving the question usually centers on an inquiry into with which country the communication “touches base.”²

Under the “touch base” analysis, the court applies “the law

¹³For example, the 2013 decisions of the Brussels Appeals Court and the Netherlands Supreme Court held that communications with in-house counsel in those countries are, under certain circumstances, protected by the respective country's attorney-client privilege rules; see discussion in § 23:25.

[Section 23:24]

¹The choice of law determination may have important practical implications, since the ability to obtain such communications in discovery may depend on which country's laws apply and whether a U.S. court will recognize a foreign privilege.

²See *In re financialright GmbH*, 2017 WL 2879696, at *3 (S.D. N.Y. 2017); *Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117 (S.D. N.Y. 2013), order aff'd, 982 F. Supp. 2d 260 (S.D. N.Y. 2013); *Astra Aktiebolag v. Andrax Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98, 64 U.S.P.Q.2d 1331 (S.D.

of the country that has the “predominant” or “the most direct and compelling interest” in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.”³ The standard in these cases has been summarized thusly: “any communication touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving [a foreign country] will be governed by the applicable foreign statute.”⁴ Where the communication “touches base” with the foreign country, and is privileged under that country’s laws,⁵ U.S. courts have generally, as a matter of international comity, recognized the privileged character of the communication.⁶ However, some courts have required that, in order for the privilege to be recognized in litigation in the United States, the foreign

N.Y. 2002); *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331 (E.D. N.Y. 1996); *Bayer AG and Miles, Inc. v. Barr Laboratories, Inc.*, 33 U.S.P.Q.2d 1655, 1994 WL 705331 (S.D. N.Y. 1994); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D. N.Y. 1992); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298, 24 U.S.P.Q.2d 1676 (E.D. N.Y. 1992).

³*Knauf Insulation, LLC v. Johns Manville Corporation*, 2019 WL 4832205, at *2 (S.D. Ind. 2019); *see also* *In re financialright GmbH*, 2017 WL 2879696, at *3 (S.D. N.Y. 2017); *Veleron Holding, B.V. v. BNP Paribas SA*, 2014 WL 4184806, at *4 (S.D. N.Y. 2014).

⁴*Knauf Insulation, LLC v. Johns Manville Corporation*, 2019 WL 4832205, at *2 (S.D. Ind. 2019) (quoting *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98, 64 U.S.P.Q.2d 1331 (S.D. N.Y. 2002)).

⁵*See Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117, 119 (S.D. N.Y. 2013), order *aff’d*, 982 F. Supp. 2d 260 (S.D. N.Y. 2013) (communications with Dutch in-house counsel not licensed in the Netherlands not privileged); *AstraZeneca LP v. Breath Ltd.*, 2011 WL 1421800 (D.N.J. 2011).

⁶*See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 2005 WL 1925656, at *2 (S.D. N.Y. 2005) (where privileged communication took place in foreign country or involved foreign attorneys or proceedings “this court defers to the law of the country that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum”). *But see Masillionis v. Silver Wheaton Corp.*, 2018 WL 1725649, at *2–3 (C.D. Cal. 2018) (declining to apply Canadian privilege law even though “[v]irtually all the documents at issue in this case are legal opinions on Canadian law written by Canadian lawyers on behalf of a Canadian company and given to Canadian auditors and financial consultants” because the opinions had been disclosed to an American accounting firm to comply with U.S. law).

privilege must be comparable to the evidentiary privilege protecting the attorney-client relationship under U.S. law.⁷

For the practitioner, application of the “touch base” analysis in transnational cases can be unpredictable. As mentioned above, the test for determining whether a communication “touches base” with the United States or with a foreign country depends on which country has the most “compelling” or “predominant interest” in whether the communication should remain confidential.⁸ That standard has been interpreted to mean that the communication “touches base” with the United States if it clearly relates to litigation pending in the United States: communications concerning legal proceedings in the United States or advice regarding American law are governed by U.S. law, while communications relating to foreign legal proceedings or foreign law are generally governed by foreign privilege law.⁹ In order for such communications to “touch base” with the United States, they must have a “more than [] incidental” connection to the United States.¹⁰ “Conversely, communications [solely] regard-

⁷See *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 492–93 (S.D. N.Y. 2013), on reconsideration in part, 2013 WL 6098484 (S.D. N.Y. 2013) (Chinese duty of confidentiality deemed not to be evidentiary privilege); *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D. N.Y. 2010) (Italian attorney’s professional secrecy obligation deemed not to be evidentiary privilege); *Astra Aktiebolag v. Amgen Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98, 64 U.S.P.Q.2d 1331 (S.D. N.Y. 2002) (fact that, pursuant to Korean law, Korean attorney may not testify in court regarding confidential communications received from client does not demonstrate existence of privilege held by client); *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 188 F.R.D. 189, 200, 52 U.S.P.Q.2d 1897 (S.D. N.Y. 1999) (confidentiality protection afforded to French patent agents under French law not comparable to evidentiary privilege under U.S. law).

⁸See, e.g., *AstraZeneca LP v. Breath Ltd.*, 2011 WL 1421800 (D.N.J. 2011) (in patent infringement action, communications between defendant’s Swedish in-house counsel and defendant’s Swedish employees did not “touch base” with United States because they did not relate to prosecution of United States patent applications, involve United States proceeding or involve communications with United States attorneys).

⁹*Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117, 118 (S.D. N.Y. 2013), order aff’d, 982 F. Supp. 2d 260 (S.D. N.Y. 2013); see also *Gucci America, Inc.*, 271 F.R.D. at 65.

¹⁰See *AstraZeneca LP v. Breath Ltd.*, 2011 WL 1421800 (D.N.J. 2011) (holding that communications of Swedish in-house counsel relating to two foreign applications that later served as basis for claim of priority in

ing a foreign legal proceeding or foreign law 'touch base' with the foreign country."¹¹

Whether communications "touch base" with the United States or with a foreign jurisdiction is fact-specific. Where certain documents are located or where a particular person is situated at the time of the communication was sent or received are, by themselves, not determinative for the "touch base" analysis since other factors, such as where litigation is pending, need to be considered. For example, e-mail communications between the in-house counsel of a New York corporation and the in-house counsel of the corporation's affiliate in Italy regarding litigation strategy for parallel actions pending in New York and in Italy relating to trademarks registered in the United States, including gathering evidence outside the United States, "touch base" with the United States, resulting in the issue of privilege being governed by U.S. law.¹²

Also, where the analysis leads to the application of foreign law, whether the communication is, in fact, privileged under foreign law may be a question beyond the expertise of U.S. outside counsel, and, indeed, unsettled.¹³ European inside counsel may also be surprised to learn that, despite the fact that the communication may be protected by the attorney-client privilege under foreign law, a court in the United States may not recognize that privilege because, as mentioned above, it may not deem it to be an "evidentiary privilege comparable to that afforded attorneys in the United States."¹⁴ Also, where discovery is sought through the procedures of the Hague Evidence Convention, additional

United States patent proceeding were merely "incidental connection" and thus did not "touch base" with United States).

¹¹*Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 65 (S.D. N.Y. 2010).

¹²*Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D. N.Y. 2010); *but see AstraZeneca LP v. Breath Ltd.*, 2011 WL 1421800 (D.N.J. 2011) (communications of Swedish in-house counsel relating to foreign patent applications which served as priority applications to United States patents deemed merely to have "incidental connection" to United States, resulting in privilege issue being governed by Swedish law); *see also In re China Medical Technologies, Inc.*, 539 B.R. 643, 651-52 (S.D. N.Y. 2015).

¹³*See* § 23:23.

¹⁴*Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D. N.Y. 2010) (noting that Italian professional secrecy laws relating to attorney-client

complicating factors may arise since the Convention provides that a witness may assert a privilege available under the law of either the requesting state (*e.g.*, the United States) or the country executing the discovery request (*e.g.*, the European country in which the evidence is gathered).¹⁵

§ 23:25 Privileges and protections—Attorney-client privilege—Practical efforts to protect the privilege

There are a number of steps that U.S. outside counsel can undertake to protect the confidentiality of communications with European inside counsel and the client company. To protect against a possible waiver of the privilege, it may be necessary to limit the number of persons at the client's headquarters who have access to privileged information, to limit participants at meetings where confidential or highly sensitive information is discussed, and to limit, on a need-to-know basis,¹ the persons to whom such information is sent, including e-mails and other electronic messages such as digitally recorded voicemail.² Protecting the confidential nature of attorney-client communications contained in electronic communications, such as e-mail, can become

communications were not the equivalent of an evidentiary privilege under U.S. law); *see also* *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 188 F.R.D. 189, 191, 52 U.S.P.Q.2d 1897 (S.D. N.Y. 1999) (simply because "a [foreign] statute requires a party to keep clients' affairs secret does not mean that a privilege exists") (internal quotation marks omitted).

¹⁵Article 11 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note); *see generally* § 23:41.

[Section 23:25]

¹*See* *Norton v. Town of Islip*, 2018 WL 5017744, at *8 (E.D. N.Y. 2018) (noting that privilege is a fact-specific inquiry and that party asserting privilege over confidential material bore the burden of demonstrating that "the documents were distributed on a need to know basis . . ."); *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 147, 2002-2 Trade Cas. (CCH) ¶ 73728, 58 Fed. R. Evid. Serv. 1443, 53 Fed. R. Serv. 3d 98 (D.C. Cir. 2002) (holding that the standard for determining whether requested documents were kept confidential, as prerequisite for claiming attorney-client privilege, is whether documents were distributed on a need to know basis or to employees that were authorized to speak or act for company).

²*See generally* Francine F. Griesing, *Protecting Against Loss of Attorney-Client Privilege in Complex International Transactions*, 21 Prob. & Prop. 54, 59 (2007).

important because such electronically stored information could become part of discovery in litigation in the United States,³ a fact of which European inside counsel, and the client's management and relevant staff, may not be aware.⁴

Despite the possible uncertainties regarding application of the attorney-client privilege in international cases, it is advisable that written and e-mail communications between European inside counsel (or, where appropriate, non-lawyer employees of the company), on the one hand, and U.S. outside counsel, on the other hand, bear the following endorsement:

PRIVILEGED AND CONFIDENTIAL; ATTORNEY-CLIENT COMMUNICATION

If the communication is also attorney work product,⁵ the following should be added:

ATTORNEY WORK PRODUCT

The privileged nature of such communications should be protected by European inside counsel against inadvertent disclosure. For example, privileged communications should be segregated from other, non-privileged, business communications, and European inside counsel should avoid disclosing them to company employees or others not within the ambit of the privilege.⁶ Nevertheless, the company's executives, directors and, possibly, staff, need to be kept informed about the litigation. Where permitted by national laws, the privileged nature of communications between U.S. outside counsel and European inside counsel should be buttressed by the inclusion of licensed attorneys on the European inside counsel's team.⁷

European in-house counsel should also be cognizant of the fact that a United States court may not deem internal communications, such as those between the European company's

³See generally Chapter 81 "Electronic Discovery" (§§ 81:1 et seq.).

⁴See §§ 23:42 to 23:44.

⁵See § 23:27.

⁶U.S. outside counsel should inform European inside counsel that disclosure to individuals outside the attorney-client privilege may constitute a waiver of the privilege. See, e.g., Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 390-636 (6th ed.).

⁷See §§ 23:23 to 23:24.

management and its European in-house counsel, to be automatically protected by United States privilege rules and the work product doctrine.⁸ In order to help establish that such communications firmly “touch base” with the United States and are governed by United States privilege rules, and not by potentially weaker European professional secrecy laws, the communication should include some notation (*e.g.*, in the “re” line of an e-mail or memorandum) that it refers to pending or anticipated litigation in the United States or that it relates to legal issues in the United States. Outside counsel in the United States should, where possible, be copied on such communications.⁹

As a practical matter, and from the standpoint of protecting the confidentiality of communications with European inside counsel from disclosure in U.S. litigation, the best approach is to satisfy the requirements for application of the attorney-client privilege under United States law.¹⁰ This entails the involvement of outside legal counsel, either in the United States or in Europe, in such communications. Care should be taken to ensure that the purpose of the communication between U.S. outside counsel and European inside counsel is the rendering of legal services by a licensed attorney.

Whether the person to whom the communication is made is, in fact, admitted to practice as an attorney may not always be determinative of whether the attorney-client privilege attaches. At least one court has held that even if the communications at issue were made to an in-house counsel who is not a licensed attorney, the privilege may be successfully claimed if the client reasonably believed that the person to whom the communications were made was, in fact, an attorney.¹¹ The “reasonable belief” test, for example, may be satisfied where the client is aware that the person hired has

⁸ See § 23:24.

⁹ *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D. N.Y. 2010) and discussion; see also § 23:24.

¹⁰ See § 23:22; see generally Chapter 33 “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.).

¹¹ *Gucci America, Inc. v. Guess?, Inc.*, 2011 WL 9375 (S.D. N.Y. 2011); cf. *Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 117 (S.D. N.Y. 2013), order aff’d, 982 F. Supp. 2d 260 (S.D. N.Y. 2013) (reasonable belief exception only applies to excusable mistake of fact, not to mistake of law, such

a law degree and is hired to do legal work, notwithstanding the fact that the person hired is not a member of the bar.¹² However, this test turns on the facts. It may not be met, for example, where the communications are with an in-house counsel who was a lawyer by education but not a licensed attorney and never held himself or herself out to be a lawyer or performed tasks, such as appearing in court, that would have suggested that he or she was a licensed attorney.¹³ In any event, U.S. counsel should be aware that the reasonable belief argument will be successful only in "limited circumstances" where the underlying facts justify its application.¹⁴

Whether one can successfully use the reasonable belief argument to bring communications with in-house counsel within the ambit of the attorney-client privilege depends upon a country-specific analysis, *i.e.*, whether the laws of the country in which the communications are made deem them to be protected by professional secrecy rules.¹⁵ For example, communications to in-house counsel in Germany¹⁶ who are licensed attorneys are protected by German professional secrecy rules. In Spain, there are professional secrecy rules protecting communications with in-house counsel regarding their corporate responsibilities.¹⁷ However, in the wake of

as which country's privilege law applies to the communication).

¹²Gucci America, Inc. v. Guess?, Inc., 2011 WL 9375 (S.D. N.Y. 2011).

¹³Anwar v. Fairfield Greenwich Ltd., 306 F.R.D. 117 (S.D. N.Y. 2013), order aff'd, 982 F. Supp. 2d 260 (S.D. N.Y. 2013).

¹⁴Anwar v. Fairfield Greenwich Ltd., 306 F.R.D. 117, 120 (S.D. N.Y. 2013), order aff'd, 982 F. Supp. 2d 260 (S.D. N.Y. 2013).

¹⁵See Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 12.2 (3d ed. 2020) (providing a survey of six European countries); *In-House Counsel and the Attorney-Client Privilege* (2007) (providing a survey of in-house counsel rules in over 100 countries), available at the European Company Lawyers Association website, <https://ecla.online/wp-content/uploads/2017/12/in-house-counsel-attorney-client-privilege-ecla.pdf> (visited July 24, 2019); see generally § 23:23.

¹⁶See § 2 Berufsordnung für Rechtsanwälte (BORA) (German Attorneys' Professional Code of Conduct); § 383 para. 1 no. 6 Zivilprozessordnung (ZPO) (German Code of Civil Procedure), providing German attorneys with the right to refuse to testify relating to matters protected by professional secrecy laws; see generally § 23:23.

¹⁷The Spanish attorney-client privilege is codified in various places. See LEY ORGÁNICA DEL PODER JUDICIAL (Law on the Judiciary), 542.3 (L.O.P.J., B.O.E.-A-1985-12666, 1985) (Spain) ("Lawyers must keep secret all

Akzo,¹⁸ the Spanish tax authority is considering reforming its tax regulations to require in-house counsel to disclose all information pertaining to their corporation's national and international transactions and dealings.¹⁹ One way to avoid uncertainty as to whether communications by employees of the European company with in-house counsel fall within the attorney-client privilege is to limit sensitive communications to in-house counsel who are licensed attorneys or to include outside counsel on such communications.

An additional complication when it comes to protecting the confidentiality of communications with European inside counsel is the possibility that the privilege may have been waived because of a forced disclosure of the privileged communication in Europe. For example, the disclosure of communications between a European company and its European inside counsel required by European regulatory authorities—such as those that were at issue in the European Court of Justice's decisions in the *AM & S* and *Akzo Nobel* decisions—may have repercussions for the European company in litigation in the United States.²⁰ In the U.S. litigation, the opposing side may argue that because the communication was disclosed to a third party, the privilege was waived for the purposes of the United States litigation. However, at least

facts or notices they know for reason of any of the modalities of their professional acts, not being subject to being obligated to declare against themselves"); (CÓDIGO PENAL (Criminal Code), 199 (C.P., B.O.E.-A-1995-25444, 1995) (Spain); ESTATUTO GENERAL DE LA ABOGACÍA (General Statute of the Legal Profession), 32 (E.G.A., B.O.E.-A-2001-13270, 2001) (Spain); CÓDIGO DEONTOLÓGICO DE LA ABOGACÍA ESPAÑOLA (Deontological Code of the Legal Profession), 5 (C.D.A.E., REAL DECRETO [R.E.] 658, 2001) (Spain).

¹⁸Case 550/07 P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Comm'n of the European Communities*, 2010 E.C.R. 8301. *See generally* § 23:23.

¹⁹*See* Patricia del Águila Barbero, *El secreto profesional del abogado de empresa, un derecho aún por definir*, WOLTERS KLUWER (Jan. 21, 2019) https://cincodias.elpais.com/cincodias/2019/01/18/legal/1547814676_649873.html; Elia Esteban Garcia-Aboal, *Cuestionado el secreto profesional de los abogados de empresa*, ABC (Jan. 11, 2019) https://www.abc.es/economia/abci-secreto-profesional-201901111715_noticia.html.

²⁰*See* Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575; Case 550/07 P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Comm'n of the European Communities*, 2010 E.C.R. 8301; *see discussion in* § 23:23.

one U.S. court has explicitly rejected this argument.²¹ Moreover, the U.S. Federal Trade Commission and Department of Justice have indicated that they will not seek information from European competition authorities if that information would be privileged under U.S. law, and that any inadvertent disclosure from the European authority to such U.S. government agencies would be treated “as inadvertently produced privileged information.”²²

At least one United States court has held that, based on international comity, the protection of E.U. confidentiality laws outweighs the discovery interests of parties in United States litigation, and such documents do not need to be produced.²³ Where E.U. or other European governmental authorities demand production of or seize sensitive documents, the European company and its inside counsel should document the company’s objections to their production or seizure. If such documents are later deemed to be subject to the attorney-client privilege, that privilege may be lost because failure to make a timely objection may constitute a waiver.²⁴

§ 23:26 Privileges and protections—Joint defense agreements

Joint defense agreements are increasingly common in large, multi-party litigations in the United States. The joint defense privilege is also known as the “common interest

²¹See *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (S.D. N.Y. 2010) (holding that communications between general counsel of U.S. corporation and in-house counsel of Italian affiliate were privileged).

²²See *Model Waiver of Confidentiality 2*, https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf. See also Aldon F. Abbott and Ashley Gum, U.S. Privilege Following *Akzo Nobel v. European Commission* (Oct. 3, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/10/us-privilege-following-akzo-nobel-v-european>.

²³See *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2011-1 Trade Cas. (CCH) ¶ 77519, 2010 WL 3420517, at *6 (E.D. N.Y. 2010); see discussion in § 23:23.

²⁴See, e.g., *U.S. v. Ary*, 518 F.3d 775, 785 (10th Cir. 2008) (defendant waived work product protection and attorney-client privilege for documents seized by government from defendant pursuant to search warrant, where defendant waited six weeks to assert protection).

rule.” It protects the confidentiality of communications from one party to the attorney for another party where a joint defense or strategy is undertaken by the parties and their counsel. Joint defense agreements also have been implemented in U.S. litigations involving European defendants.¹

For the same reason that care must be taken to ensure that the members of European inside counsel’s team are covered by the attorney-client privilege,² in considering the possible implementation of a common strategy with co-defendants, outside U.S. counsel and European inside counsel must satisfy themselves that all persons who are privy to joint defense communications are, indeed, within the ambit of the privilege.

It may be advisable to place a legend on written and e-mail communications among attorneys within the scope of a joint defense privilege; however, there is always a risk that the privilege does not apply between and among the co-defendants in a subsequent legal proceeding. If a dispute arises between former co-defendants who were parties to a joint defense agreement, the information shared on the basis of the joint defense agreement may no longer be privileged for the subsequent litigation.

§ 23:27 Privileges and protections—Attorney work product

In addition to the immunity from disclosure accorded to qualifying attorney-client communications, U.S. law also offers a conditional protection to trial preparation materials.¹ The work product protection was first articulated by the U.S. Supreme Court in *Hickman v. Taylor*, and is predicated on the lawyer’s need to “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties

[Section 23:26]

¹See § 23:3.

²See § 23:22.

[Section 23:27]

¹See Fed. R. Civ. P. 26 (b)(3)(A). See generally Chapter 33 “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.) (§§ 33:24 to 33:30 discussing work product doctrine).

and their counsel.”² For litigation in federal courts, it is set forth in Fed. R. Civ. P. 26(b)(3)(A).

Generally, to be protected as work product, materials must be generated in the course or, at least, in anticipation, of litigation.³ A document is considered to have been prepared in anticipation of litigation where “in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.”⁴ In order for the documents and materials to be protected from discovery, they need not be gathered by or at the direction of an attorney.⁵ The protection is not absolute. Discovery of work product may be permitted if the requesting party demonstrates that it has a “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”⁶

Since the attorney work product doctrine is a product of the common law, its precise counterpart is not found in civil law countries and European inside counsel may not be familiar with it. That may require U.S. outside counsel to explain the scope of the protection, contrast it to the protection afforded by the attorney-client privilege and note the differences from protections afforded to comparable materials in Europe.⁷ The rationale of the attorney work product doctrine, *i.e.*, that the proper preparation of a client’s case requires a certain degree of privacy and confidentiality, is, of course, equally present in civil law countries. For example,

²Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed. 451, 1947 A.M.C. 1 (1947).

³See Fed. R. Civ. P. 26 (b)(3)(A) (protecting from disclosure “documents and tangible things that are prepared in anticipation of litigation or for trial”).

⁴See Schaeffler v. U.S., 806 F.3d 34, 43, 2015-2 U.S. Tax Cas. (CCH) P 50555, 116 A.F.T.R.2d 2015-6708 (2d Cir. 2015) (emphasis in original) (quoting U.S. v. Adlman, 134 F.3d 1194, 1202, 98-1 U.S. Tax Cas. (CCH) P 50230, 39 Fed. R. Serv. 3d 1189, 81 A.F.T.R.2d 98-820 (2d Cir. 1998)).

⁵Fed. R. Civ. P. 26(b)(3)(A) (protecting from disclosure “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney consultant, surety, indemnitor, insurer, or agent. . . .”).

⁶Fed. R. Civ. P. 26(b)(3)(A)(ii).

⁷With respect to the attorney-client privilege under U.S. law, see §§ 23:22 to 23:25.

in Germany, an attorney's documents are subject to an evidentiary attorney-client privilege.⁸ This evidentiary privilege applies whether the documents are prepared in anticipation of litigation or not. Also, in such civil law countries, unlike the attorney work product doctrine in the United States, there is no comparable exception for discovery of such materials because the materials are "otherwise discoverable" or because of the requesting party's "substantial need" for the information.⁹ In general, the protection of an attorney's documents and work product under a European evidentiary exception is broader than the protection afforded by the attorney work product doctrine.¹⁰

Despite the broader scope that a European evidentiary privilege may provide to documents prepared in anticipation of litigation, once it is likely that the European company will be a litigant in the United States, it is advisable that such documents be prepared at the direction or on behalf of U.S. counsel. There are several reasons for doing so. A court in the United States may not deem the evidentiary privilege afforded to lawyers in civil law countries to be the equivalent of the common law attorney work product doctrine.¹¹ Indeed, a court in the United States may hold that the protections afforded by the attorney work product doctrine are governed by U.S. law, *i.e.*, Fed. R. Civ. P. 26(b)(3), and not foreign law.¹² If the documents and materials are gathered at the direction of European inside counsel or staff in the company's

⁸See § 43a Bundesrechtsanwaltsordnung (BRAO) (German Federal Law on Attorneys); § 383 para. 1 no. 6 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure).

⁹*Cf.* Fed. R. Civ. P. 26 (b)(3)(A)(i) to (ii).

¹⁰See Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 12.2.5-6 (3d ed. 2020).

¹¹For example, at least one court has questioned whether the foreign attorney-client secrecy obligation is, in fact, an evidentiary privilege providing protection comparable to the protection that applies to the attorney-client relationship in the United States. See *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 67 (S.D. N.Y. 2010) (holding professional secrecy obligation under Italian Attorneys' Code of Conduct-Duties of Secrecy and Confidentiality not to be evidentiary privilege).

¹²See *United States Securities and Exchange Commission v. Herrera*, 324 F.R.D. 258, 262 (S.D. Fla. 2017) (quoting *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 702 n.10, 39 Fed. R. Serv. 3d 1236 (10th Cir. 1998)) ("[u]nlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal stan-

legal department, a court in the United States may deem them to be prepared for business reasons unrelated to any anticipated litigation and, thus, outside the ambit of the work product protection.¹³ Although most courts undertake a case-by-case analysis to determine whether the documents and materials were prepared in anticipation of litigation, some courts have taken the strict view that documents prepared before an attorney first became involved were made in the ordinary course of business and were not protected as work product.¹⁴ Although an attorney's participation does not automatically make documents and materials protected work product, it provides some support for a claim that the documents and materials were prepared in anticipation of litigation.¹⁵ On the other hand, once litigation has commenced, U.S. counsel's commentary on the litigation and legal advice relating to it will almost certainly be protected attorney work product.¹⁶

Because of the foregoing considerations, initial strategy discussions between European inside counsel and U.S. outside counsel must include arrangements to accord maximum work product protection to materials generated by attorneys and those working under their supervision as the litigation proceeds.¹⁷ The greater the involvement of U.S. litigation counsel and the greater the nexus between the gathered documents and material to the anticipated or ongo-

ing litigation, the more likely the materials will be protected under the standard embodied in Fed. R. Civ. Pr. 26(b)(3).¹⁸ See generally § 23:24 with respect to conflict of laws and the attorney-client privilege.

¹³See, e.g., *Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874 (D.N.J. 2010) (holding that a bank's internal investigation relating to "suspicious activity report" not protected under attorney work product doctrine).

¹⁴*Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 1972 A.M.C. 871, 15 Fed. R. Serv. 2d 1343 (N.D. Ill. 1972). *Contra* *Harriman v. Maddocks*, 518 A.2d 1027 (Me. 1986) (explicitly rejecting *Thomas Organ's* "conclusive presumption" that "no document authored prior to the consultation of any attorney may be deemed to have been prepared in anticipation of litigation").

¹⁵See 1 *Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine*, 877-81 (6th ed. 2017).

¹⁶See, e.g., *Thorne Research, Inc. v. Atlantic Pro-Nutrients, Inc.*, 2016 WL 1122863, at *3 (D. Utah 2016) (finding that document "created in response to counsel's inquiry and as part of counsel's strategy concerning the current litigation" was protected by work product doctrine).

¹⁷See § 23:7.

ing litigation, the more likely that the material will be protected.¹⁶

§ 23:28 Privileges and protections—Attorney work product—Internal company investigations

An issue that sometimes arises for European companies is whether documents or information generated by an internal company investigation are protected from discovery in litigation in the United States.¹ Management at European companies and their inside counsel sometimes incorrectly assume that such investigations are purely internal affairs, protected by European business secrecy or data protection laws, would not be discoverable in civil litigation in Europe and are off limits to discovery in a lawsuit in the United States.²

A rude awakening sometimes occurs when such internal investigations become the focus of discovery in litigation in the United States. It is therefore important for outside counsel to educate European in-house counsel, and company management, on a basic tenet of discovery rules in the United States—that “business documents prepared in the ordinary course of business, or that otherwise would have been prepared absent the prospect of litigation, do not receive work product protection.”³ Without any nexus to anticipated

¹⁶Courts in the United States have upheld the attorney-client privilege and the protections afforded by the attorney work product doctrine where the communications and preparatory materials are gathered by foreign non-lawyers at the direction or on behalf of U.S. counsel. *See Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 72 (S.D. N.Y. 2010) (finding that, regardless of whether in-house counsel of Italian affiliate was a licensed patent attorney, in-house counsel of Italian affiliate acted at the direction of U.S. counsel, and therefore work product privilege applied to communications of in-house counsel of Italian affiliate); *see generally* § 23:22.

[Section 23:28]

¹With respect to the attorney work product doctrine, *see* § 23:27; *see generally* Chapter 33 “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.); (§ 33:32 discussing waiver issues related to internal investigations). *See also* Chapter 35 “Internal Investigations” (§§ 35:1 et seq.).

²*See generally* § 23:3; § 23:29; § 23:44.

³*Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 74 (S.D. N.Y.

or ongoing litigation, the results of such investigations may not be protected work product.⁴

Moreover, the fact that the internal investigation may relate to anticipated or ongoing litigation does not necessarily mean that the documents and materials gathered will be protected attorney work product. In order to gain such protection, litigation must be the primary motive of the internal investigation.⁵ Documents generated because of the prospect of litigation, even if they are not prepared at the behest of counsel, are attorney work product,⁶ while documents created before litigation is anticipated are not attorney work product.⁷ In brief, to be work product, the document must “fairly be said to have been prepared or obtained *because of* the prospect of litigation,” whereas “documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation,” are not protected.⁸

However, the results of an internal investigation that is not connected to anticipated or ongoing litigation may nonetheless be protected from discovery in litigation in the United States pursuant to the attorney-client privilege.⁹ That would apply, for example, if the investigation is undertaken at the behest of counsel in order to provide the company with legal advice. The documents and materials of such an investigation would be protected without regard to whether litigation

2010) (citing *U.S. v. Adlman*, 134 F.3d 1194, 1202, 98-1 U.S. Tax Cas. (CCH) P 50230, 39 Fed. R. Serv. 3d 1189, 81 A.F.T.R.2d 98-820 (2d Cir. 1998)).

⁴Fed. R. Civ. P. 26(b)(3)(A); see *Geller v. North Shore Long Island Jewish Health System*, 2011 WL 5507572 (E.D. N.Y. 2011).

⁵See 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 877-81 (6th ed. 2017).

⁶*Noveletsky v. Metropolitan Life Ins. Co., Inc.*, 2012 WL 4510964, at *8 (D. Me. 2012).

⁷Fed. R. Civ. P. 26(b)(3)(A).

⁸*Schaeffler v. U.S.*, 806 F.3d 34, 43, 2015-2 U.S. Tax Cas. (CCH) P 50555, 116 A.F.T.R.2d 2015-6708 (2d Cir. 2015) (emphasis in original) (quoting *U.S. v. Adlman*, 134 F.3d 1194, 1202, 98-1 U.S. Tax Cas. (CCH) P 50230, 39 Fed. R. Serv. 3d 1189, 81 A.F.T.R.2d 98-820 (2d Cir. 1998)) (holding that documents sought in the course of IRS investigation were protected by the work product doctrine).

⁹With respect to the attorney-client privilege, see generally §§ 23:22 to 23:25.

is anticipated or pending since the attorney-client privilege, in and of itself, does not depend on the prospect or existence of litigation. The protection under the attorney-client privilege can therefore attach at an earlier date than may be available under the work product doctrine and documents may be privileged even though they may not qualify as attorney work product.¹⁰

As a practical matter, if the European company intends to conduct an internal investigation concerning a matter that may lead to litigation, the investigation should be conducted at the request of counsel.¹¹ Such a request should be documented and, in particular, such documentation should set forth that the investigation is made in order to provide legal advice to the company.

§ 23:29 Privileges and protections—Data protection and privacy laws

An important issue for European companies is how information protected by European and national data protection and privacy laws¹ will be treated in litigation in the United States. For cultural and historical reasons, personal privacy and the right to determine to whom and under what circumstances access to personal data may be granted are highly cherished in Europe. Indeed, under the Charter of Fundamental Rights of the European Union, the protection of personal data is deemed to be a fundamental human right.² European courts have held that privacy rights are constitu-

¹⁰*Geller v. North Shore Long Island Jewish Health System*, 2011 WL 5507572, at *3 (E.D. N.Y. 2011) (“[C]ommunications among non-attorneys in a corporation may be privileged if made at the direction of counsel, to gather information to aid counsel in providing legal services.”) (alteration in original) (quoting *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 72 (S.D. N.Y. 2010)).

¹¹Such counsel should be admitted to practice law and not, for example, European inside counsel or other legal staff who are not members of the bar; see § 23:23.

[Section 23:29]

¹See Chapter 82 “Privacy and Security” (§§ 82:1 et seq.).

²Article 8, Charter of Fundamental Rights of the European Union, 2000/C, 364/01, provides, in pertinent part: “[e]veryone has the right to the protection of personal data concerning him or her” and “[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down

tionally protected.³ The protection of personal data and privacy shields not only against incursions by the state but protects against any violation of this fundamental right, including in the workplace.

A successful partnership with European inside counsel and the European company client requires that U.S. counsel be sensitive to the role that privacy protection plays in Europe. In particular, U.S. outside counsel must develop an understanding of the relevant data protection and privacy laws that may possibly play a role in the litigation in the United States. There are multiple layers of laws that could come into play, at the European Union level and in each member state of the E.U. Significant efforts have been undertaken in the E.U. to harmonize the various member states' data protection laws. A number of E.U. provisions govern this area, beginning with Regulation (EU) 2016/679 (GDPR).⁴ Despite the E.U.'s harmonization efforts in the area of data protection laws, a good amount of variation exists among the individual member states' laws. In addition to such E.U. and national data protection laws, the European company and European inside counsel may be subject to specific national laws governing the protection of business and trade secrets.⁵ Some of these business and trade secrets protection laws make it a criminal offense to divulge such secrets.⁶

U.S. counsel should anticipate that in the litigation in the

by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." The Charter is available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (visited Sep. 28, 2019).

³See Bundesverfassungsgericht (German Federal Constitutional Court), decision of Dec. 15, 1983, BVerfGE 65, 1.

⁴Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (DOUE núm. 119, de 4 de mayo de 2016; An English language version is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>.

⁵See, e.g., § 384 Zivilprozessordnung (ZPO) (German Code of Civil Procedure); § 93 para. 1 Aktiengesetz (AktG) (German Stock Company Law); § 39 Bundesdatenschutzgesetz (BDSG) (German Federal Data Protection Act).

⁶See, e.g., Art. 197.1 of the Spanish Criminal Code contemplates one

United States discovery requests will be propounded seeking documents and information that may be impermissible to produce under local, national European law.⁷ By statute, U.S. law enforcement authorities are empowered to discover electronic data located in other countries, even if doing so would violate privacy laws like the GDPR.⁸ For example, the unauthorized disclosure of personal information of customers of a company, the financial, medical or business records

to four years of imprisonment for those who disclose e-mail messages without their owner's consent. (Codigo Penal as amended by Ley Organica 1/2015 march 30, 2015). § 203 Strafgesetzbuch (StGB) (German Penal Code); § 404 para. 1 no. 1 Aktiengesetz (AktG) (German Stock Company Law); §§ 3; 43; 44 Bundesdatenschutzgesetz (BDSG) (German Federal Data Protection Act); Art. 271 Schweizerisches Strafgesetzbuch (StGB-Ch) (Swiss Criminal Code), Dec. 21, 1937, SR 311.0 (discussed in *S.E.C. v. Stanford Intern. Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011)).

⁷See § 23:44; see generally Paul J. Bschorr and John F. Collins, Chapter 23 "Discovery Strategy and Privileges," in Haig, *Business and Commercial Litigation in Federal Courts* §§ 23:1 et seq. (4th ed. 2016) (discussing "[i]nformation protected under laws of foreign country; blocking and secrecy laws"); Benjamin L. Klein, Trust, Respect, and Cooperation May Keep Us Out of Jail: A Practical Guide to Navigating the European Union Privacy Directive's Restrictions on American Discovery Procedure, 25 *Geo. J. Legal Ethics* 623 (2012); Monique Altheim, E-Discovery in US Civil Litigation and EU Data Protection, available at <http://ediscoverymap.com/2011/03/how-to-conduct-ediscovery-in-the-europe-an-union/> (March 6, 2011) (visited Sep. 28, 2019); Edward McNicholas, Corporate Compliance with Complex Cross-Border and National Security-Related Personal Data Demands, 1006 *PLI/Pat* 379 (2010).

⁸See 18 U.S.C.A. § 2713 (2018) (requiring disclosure of information to U.S. authorities "regardless of whether such communication, record, or other information is located within or outside of the United States."). The passage of this law, referred to as the "CLOUD Act," prompted the European Data Protection Board ("EDPB") and the European Data Protection Supervisor ("EDPS") to issue a joint statement advising European companies to "generally refuse direct requests and refer the requesting third-country authority to an existing mutual legal assistance treaty or agreement." European Data Protection Supervisor and European Data Protection Board, *Initial legal assessment of the impact of the US CLOUD Act on the EU legal framework for the protection of personal data and the negotiations of an EU-US Agreement on cross-border access to electronic evidence* 3 (July 10, 2019), https://edpb.europa.eu/sites/edpb/files/files/file2/edpb_edps_joint_response_us_cloudact_annex.pdf. See also Jennifer Daskal, *Microsoft Ireland, CLOUD Act, and International Law-Making 2.0*, 71 *Stan. L. Rev. Online* 9 (2018) (noting that the CLOUD Act mooted *United States v. Microsoft*, which presented the issue of whether the Stored Communications Act applied to information stored abroad but accessible within the United States).

of these individuals, or the business secrets of an enterprise may run afoul of data protection laws, and even result in criminal liability. Even an Internet protocol address, insofar as it may identify a natural person, may be data protected under European data protection laws. As mentioned, the privacy expectation of European employees extends to private communications undertaken in the workplace, which European courts have expressly recognized.⁹

To the extent U.S. discovery rules govern the litigation, U.S. outside counsel may consider being prepared to object to requests that violate European and national data protection and privacy rules and seek an appropriate protective order, arguing that the substantive law of the place where the party and the information are located should govern.¹⁰

An additional strategy for a European litigant in the United States confronted with discovery requests seeking information and documents that may be protected by European data laws and other protections, such as bank secrecy laws, is to issue a request, such as a letter of request pursuant to the Hague Evidence Convention, to the respective European authorities seeking authorization to produce the information and documents in the litigation in the United States. The European company litigant should insist that the letter of request be submitted to the European authorities by the United States court, and not the party itself, as this will

⁹See Matthew A. Chivvis, Consent to Monitoring of Electronic Communications of Employees as an Aspect of Liberty and Dignity: Looking to Europe, 19 Fordham Intell. Prop. Media & Ent. L.J. 799 (2009) (discussing U.S. and European approaches to whether privacy protections apply in the workplace); Erica M. Davila, International E-Discovery: Navigating the Maze, 8 U. Pitt. J. Tech. L. & Pol'y 5 (2008) (discussing decision of European Court of Human Rights, *Copeland v. U.K.*, 62617/00 [2007] ECHR 253 42 (Apr. 2, 2007), holding that employer monitoring of telephone calls and e-mails by employee from work violates Human Rights Convention); see also Berman, Expectation of Privacy in Electronic Communications, N.Y.L.J. Oct. 28, 2008, page 3 (col. 1).

¹⁰See *In re Mercedes-Benz Emissions Litigation*, 2020 WL 487288, at *8 (D.N.J. 2020) (affirming ruling of Special Master that required "disclosing names, job positions, titles, or professional contact information of relevant current or former employees" of a German company pursuant to a protective order); *EnQuip Technologies Group, Inc. v. Tycon Technoglass, S.R.L.*, 2010-Ohio-28 (Ohio Ct. 2010) (denying motion for protective order sought by foreign defendant manufacturers because they did not establish with particularity why European data protection law precluded compliance with specific discovery requests).

lend greater weight to such a request with the European data protection authorities.¹¹

§ 23:30 Insurance

Although some courts have held that a law firm may not be accountable for failing to investigate a client's insurance coverage or to alert a client to the potential availability of insurance to cover litigation expenses,¹ prudence dictates that U.S. outside litigation counsel consult with European inside counsel at the outset as to whether the company may be insured for the matter at hand. U.S. outside counsel should address whether coverage may exist under insurance policies issued in the United States, the client's home country, or in a foreign country since it is possible that multiple insurance policies may be implicated by an insured event or occurrence. Counsel must determine whether insurance exists not only at the primary insurance layer, such as provided by a commercial general liability insurance policy, but must also ascertain whether coverage exists at an excess layer.²

It is not sufficient to rely upon insurance binders or certificates of insurance. Rather, the complete policy, including declarations pages, general terms and conditions, and all endorsements must be reviewed. It is also advisable to involve the client's European risk manager or insurance agent or broker in obtaining and reviewing copies of the rel-

¹¹With respect to letters of request under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, see § 23:41. With respect to discovery of electronic records located in Europe; see generally § 23:42.

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¹See, e.g., *Darby & Darby, P.C. v. VSI Intern., Inc.*, 95 N.Y.2d 308, 716 N.Y.S.2d 378, 739 N.E.2d 744, 57 U.S.P.Q.2d 1155 (2000) (no duty to advise client of novel theory of insurance coverage). See generally Chapter 25 "Representing a Client with Insurance" (§§ 25:1 et seq.); Chapter 25A "Insurance for Business Disruptions and Other First-Party Claims" (§§ 25A:1 et seq.); Chapter 2 "Reinsurance" (§§ 2:1 et seq.).

²*Utica Cutlery Co. v. Hiscock & Barclay, LLP*, 109 A.D.3d 1161, 972 N.Y.S.2d 371 (4th Dep't 2013) (dismissing law firm's summary judgment motion because whether law firm was proximate cause of client's failure to notify excess insurer was question of fact); *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 827 N.Y.S.2d 231, 236 (2d Dep't 2006).

evant insurance policies. In particular, where the European client is a defendant in litigation in the United States, counsel should be aware that the client's European commercial liability insurance may provide worldwide coverage and, thus, include defense and indemnity coverage for such litigation. Counsel should also make certain that in such a case, all insurance carriers, both primary and excess, receive written notice of the action as soon as possible. Timely notice may require that the insurer(s) be informed of the action in a matter of weeks—not months—once the company is reasonably certain that litigation will be commenced against it.

§ 23:31 Service of process

Often the first procedural issue confronting a European—or any foreign—company facing litigation in the United States is whether there was adequate service of process. Unless the company waives service, or has been properly served in the United States, service must be made either through the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”),¹ in those countries that are signatories,² or, in all other foreign countries, through the time-honored letters rogatory process.³ Although service under the Hague Service Convention is likely to be substantially swifter than via letters rogatory, both procedures cause substantial delay at the outset of the lawsuit.

Regardless of the mode of service, European inside counsel should be advised to designate one or more individuals to receive process servers at every location where the company

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¹Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 1361, T.I.A.S. No. 6638 (reprinted in 28 U.S.C.A. Fed. R. Civ. P. 4 app.). The text of the Convention is available at the Hague Conference on Private International Law website, http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (visited July 24, 2019). With respect to service of process under the Convention, see § 23:32.

²With respect to the countries that are signatories to the Hague Service Convention, see § 23:32.

³Among European countries, Austria and Liechtenstein are not signatories to the Hague Service Convention and service of process in those countries is effected by letters rogatory.

has offices, assuming such multiple designations are practicable. Where, for example, a European client has numerous branch offices and a designation of an individual to receive process servers at each branch or office is not workable, a central office, possibly that of European inside counsel, should be designated. The designees, often members of the in-house legal team, should be fully briefed in advance whether to accept whatever papers are served. The designees at individual branches or offices also should be instructed to deliver immediately to the inside counsel team leader any papers that may be served so that they can be sent promptly to U.S. outside counsel.

In some instances, plaintiffs may attempt to effect service on a foreign parent company by serving its subsidiaries in the United States.⁴ The company's United States subsidiaries should be alerted in appropriate situations that service may be attempted upon them and, if it is, that the documents should be transmitted without delay to European inside counsel and that outside U.S. counsel should be notified at once. U.S. counsel and European inside counsel should also discuss with one another and with an appropriate attorney or manager at the United States subsidiary what steps may be necessary to perfect a subsequent challenge to the validity of the service.⁵ Through such an "early warning" system, the receipt and review of process can be tightly controlled, and possible challenges asserted, with little time lost to needless administrative delays.

European clients sometimes ask U.S. counsel whether they should reject the service of process in Europe in the belief

⁴Often such attempts do not constitute effective service on the foreign parent company. *See, e.g., Foster v. Bridgestone Americas, Inc.*, 2011 WL 3606983, at *6 (S.D. Ala. 2011) (finding no effective service on parent company in Japan where only United States subsidiary served as putative involuntary agent for parent). However, a United States subsidiary may be deemed to be the agent of the foreign parent company for service of process purposes where the United States subsidiary is dominated by and is a mere instrumentality of the foreign parent company. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722, 11 Fed. R. Serv. 3d 417 (1988); *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880 (Ala. 1983).

⁵Some European countries permit service of process from abroad to be challenged in the courts of the country where service is attempted. *See, e.g.,* § 23 Einführungsgesetz zum Gerichtsverfassungsgesetz (EGGVG) (German Introductory Law to Court Constitution Law).

that by doing so they can avoid being brought into a lawsuit in the United States. If service of process is effected pursuant to the Hague Service Convention or pursuant to letters rogatory, then there is little point in attempting to reject service of process in Europe. Where service of process does not comply with the Convention's procedures or where it is contrary to the law of the European country where it is attempted, however, then an objection with European central authorities charged with effecting service should be made that the attempted service does not comport with local European law.⁶ Such an objection may be a necessary precondition to a motion to dismiss in the action in the United States for insufficiency of process and may also be essential if the European company were to challenge the enforcement of a U.S. verdict in Europe.⁷ At least one court has quashed the service of process on a foreign defendant, apparently without any objection by the defendant being lodged with the European authorities, where Hague Service Convention procedures were not followed.⁸

Where service of process is improper under either the Hague Service Convention or under local European law, challenging the sufficiency of service of process may only have a limited benefit. The weight of authority in United States is that, unless it appears that proper service is impossible, such as where the statute of limitations has run, the proper remedy for insufficient service is to quash the defective service and to afford the plaintiff leave to effect service via valid means.⁹

⁶See § 23:32 regarding the related issue of service of process by mail.

⁷See § 23:58.

⁸See *Ramirez De Arellano v. Colloides Naturels Intern.*, 236 F.R.D. 83 (D.P.R. 2006) (holding that plaintiff's attempted service of process on French company by leaving copies of verified complaint and summons with persons not authorized to receive service of process did not comply with requirements of Hague Service Convention). See § 23:32.

⁹See, e.g., *United States v. Park*, 389 F. Supp. 3d 561, 567, 123 A.F.T. R.2d 2019-1981 (N.D. Ill. 2019) ("Service generally will be quashed and the action preserved [rather than dismissed] in those cases in which there is a reasonable prospect that plaintiff ultimately will be able to serve defendant properly.")

§ 23:32 Service of process—Hague Convention on service abroad; letters rogatory

An important feature of the Hague Service Convention¹ is that each signatory country to the Convention is required to designate a central authority to receive requests for service and to effect service by a method allowed under the local law of that country (Articles 2-5).² In addition, as discussed below, unless objected to by a signatory country, service may be effected directly through diplomatic or consular agents (Article 8)³ or directly by mail (Article 10(a)). The requirement that the documents served be written in or translated into the official local language (Articles 5 and 7) may be dispensed with by agreement between two or more contracting states (Article 20(b)).⁴

If service is attempted under the Hague Service Conven-

[Section 23:32]

¹Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 1361, T.I.A.S. No. 6638 (reprinted in 28 U.S.C.A. Fed. R. Civ. P. 4 app.). The text of the Convention is available at the Hague Conference on Private International Law ("Hague Conference") website, <http://www.hcch.net/en/instruments/conventions/full-text/?cid=17> (visited Oct. 1, 2019). A sample Request for Service Abroad of Judicial or Extrajudicial Documents is reprinted as a note to Fed. R. Civ. P. 4.

²The European countries that are signatories to the Hague Service Convention are Albania, Andorra, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Republic of Macedonia, Malta, Moldova, Montenegro, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom. A complete list of signatories to the Convention is available at <http://www.hcch.net/en/states/hcch-members> (visited Oct. 1, 2019). Austria and Liechtenstein are not signatories to the Hague Service Convention and service of process in those countries is effected by letters rogatory; see § 23:31.

³A number of signatory states to the Hague Service Convention, such as Germany, pursuant to Articles 8(2) and 10 of the Convention, have objected to service of process through diplomatic or consular agents, except upon a national of the state in which the documents originate. Under United States law, consular officials may serve certain forms of legal process, such as subpoenas and show-cause orders issued by Federal courts, upon United States citizens or permanent residents of the United States who temporarily reside abroad. 28 U.S.C.A. §§ 1783; 1784.

⁴Signatory countries which require that the documents to be served

tion, European inside counsel should forward immediately to United States counsel all papers that were served along with an assessment as to whether the service was proper under domestic law. European inside counsel should reject the papers if the attempted service is clearly improper, *e.g.*, a required translation is missing, to avoid defaulting on the issue.

A recurring question that arises under the Hague Service Convention is whether service may properly be effected by directly mailing the relevant documents to persons or entities in a European signatory country. Article 10(a) of the Convention states that “[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad.” A number of signatory countries have formally objected to service by postal means under Article 10(a) of the Convention.⁵ With respect to the countries that have objected to mail service, courts in the United States have held that these objections must be honored as a treaty obligation and litigants should refrain from effecting service by mail on defendants located in these countries.⁶

However, where service of process by mail is sought to be effected on companies and persons in signatory countries that have not filed an objection under Article 10(a), service

must be translated into the local language are listed on the Hague Conference’s website, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> (visited July 24, 2019).

⁵The following European signatories to the Hague Service Convention have objected to service by postal channels: the Czech Republic, Germany, Greece, Latvia, Lithuania, Luxembourg, Norway, Poland, the Slovak Republic, Switzerland, and Ukraine. A complete list of the signatory countries that have objected to service by postal means is *available at* the Hague Conference’s website, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> (visited July 24, 2019).

⁶*See, e.g.*, *Enquip Technologies Group, Inc. v. Tycon Technoglass*, 2009 WL 2588197 (Ohio C.P. 2009) (Court of Common Pleas of Ohio, Civil Division, Aug. 24, 2009) (quashing service of process by mail in Germany); *In re Bernard L. Madoff Investment Securities LLC*, 418 B.R. 75, 52 Bankr. Ct. Dec. (CRR) 83 (Bankr. S.D. N.Y. 2009) (holding that service by regular mail to Switzerland was not sufficient); *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 718 N.Y.S.2d 66 (1st Dep’t 2001); *Dr. Ing H.C.F. Porsche A.G. v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (3d Dist. 1981).

by mail is proper if it is authorized by local law.⁷ In other words, service by mail is proper when two criteria are met: (a) service by mail is authorized in the jurisdiction where the litigation is pending and (b) the receiving state has not objected to service of process under Article 10(a).⁸ If so, then service by mail is proper. In some instances service must be made through a letter rogatory. A letter rogatory, sometimes called a letter of request, is a formal request from a judge in one country to the appropriate judicial authorities in a foreign country requesting, under the principle of comity among nations, that service of process be effected. The letter rogatory itself, as well as the documents to be served, must be translated into the official language of the foreign country, and, in most cases, turned over to the "diplomatic channel" for transmittal to the foreign judicial authorities.⁹ Service of process pursuant to letters rogatory comes into play especially where service is to occur in a country that is not a signatory to the Hague Service Convention, such as Austria and some Eastern European countries.¹⁰ In contrast to the Convention's procedures, which are mandatory for signatory countries, there is no requirement that service in countries that are not signatories to the Convention must only be made pursuant to letters rogatory. Alternative methods of service of process, permitted by the procedural rules of the United States court where the action is commenced, may be utilized

⁷See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 197 L. Ed. 2d 826, 41 I.E.R. Cas. (BNA) 1816 (2017).

⁸See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507, 197 L. Ed. 2d 826, 41 I.E.R. Cas. (BNA) 1816 (2017) ("[S]ervice by mail is permissible if the receiving state has not objected to service by mail and if such service is authorized under otherwise-applicable law."). There had been a split of authority on this issue, but it was resolved by the Supreme Court in *Water Splash Inc.* See, e.g., *Ballard v. Tyco Intern., Ltd.*, Fed. Sec. L. Rep. (CCH) P 93886, 2005 DNH 115, 2005 WL 1863492, at *3-4 (D.N.H. 2005) (discussing the former split in authority).

⁹U.S. litigation counsel should be able to ascertain from the clerk of the court whether an application has been made to the court for the issuance of a letter rogatory and, thereafter, whether the court has, in fact, issued it. Similarly, European inside counsel should be able to check with local authorities, usually the foreign ministry, to determine whether the letter has been received and, if so, when it is likely to be served. Once a letter rogatory is served, it should be forwarded immediately to U.S. outside counsel.

¹⁰See § 23:31.

in lieu of letters rogatory.¹¹ In that regard, service of process by e-mail has been held to be an acceptable alternate method of service.¹²

§ 23:33 Service of process—Hague Convention on service abroad; letters rogatory—Waiver

Delays of several months and as much as one year, respectively, in effecting service of process via the Hague Service Convention¹ and letters rogatory are not unusual. Because of that fact, United States plaintiffs may request that, in lieu of effecting service under the Convention or pursuant to letters rogatory, a foreign company defendant agree to voluntarily accept service of process. An agreed upon waiver of service under the Hague Service Convention or letters rogatory can be binding.² However, such a waiver will eliminate the many months of extra preparation time that the company will have to mount a defense while awaiting service of the summons and complaint.³

Therefore, a European defendant should carefully consider

¹¹Morgenthau v. Avion Resources Ltd., 11 N.Y.3d 383, 869 N.Y.S.2d 886, 898 N.E.2d 929 (2008) (holding that service of process on defendant in Brazil, not a signatory to Hague Service Convention, not required to be made pursuant to letters rogatory notwithstanding the fact that Brazilian law requires service be effected in this manner, and that service of process pursuant to N.Y. C.P.L.R. § 308(5), as court directs, is valid service).

¹²Safadjou v. Mohammadi, 105 A.D.3d 1423, 964 N.Y.S.2d 801 (4th Dep't 2013) (upholding service by e-mail on defendant in Iran, not a signatory to the Hague Service Convention).

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¹Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 1361, T.I.A.S. No. 6638 (reprinted in 28 U.S.C.A. Fed. R. Civ. P. 4 app.). The text of the Convention is *available at* the Hague Conference on Private International Law website, http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (visited Sep. 28, 2019). A sample Request for Service Abroad of Judicial or Extrajudicial Documents is published as a note to Fed. R. Civ. P. 4. See generally §§ 23:31 to 23:32.

²Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 141, 910 N.Y.S.2d 418 (1st Dep't 2010) (holding that waiver by resident of Netherlands of personal service and consent to jurisdiction precluded interposition of jurisdictional defense); see § 23:32.

³Where a waiver of service of process is acceptable, it is advisable to specifically reserve the defendant's right to assert any and all defenses, including personal jurisdiction defenses. With respect to motions relating

the question. One common concession plaintiffs may agree to is an agreement not to sue parent entities, subsidiaries, or affiliates of the primary defendant named in the complaint for insubstantial reasons. Plaintiffs may also agree to additional time to respond to the complaint.

Where the action is commenced in federal court, plaintiff must serve the defendant within 90 days after the complaint is filed.⁴ There is some dispute among the federal circuit courts whether the 90-day rule applies where service is effected in a foreign country. The wording of Fed. R. Civ. P. 4(m) (“[t]his subdivision (m) does not apply to service in a foreign country under Rule 4(f)”) appears to mean that the 90-day rule does not apply where service is on foreign soil, for example under the Hague Service Convention.⁵ However, some courts, including the Second Circuit, have held that plaintiff’s action should be dismissed if plaintiff makes no effort to effect service on the European defendant in that period.⁶

§ 23:34 Motion practice

While civil litigation in civil law countries often involves written submissions to the court at various interims, there is no counterpart to U.S. motion practice.¹ European inside counsel, therefore, may not always appreciate fully both the

to personal jurisdiction; see § 23:37.

⁴Fed. R. Civ. P. 4(m).

⁵See *Lozano v. Bosdet*, 693 F.3d 485, 488, 83 Fed. R. Serv. 3d 577 (5th Cir. 2012) (stating that adhering to the then 120-day rule for service abroad would, in effect, rewrite Fed. R. Civ. P. 4).

⁶See *DEF v. ABC*, 366 Fed. Appx. 250, 253 (2d Cir. 2010); *USHA (India), Ltd. v. Honeywell Intern., Inc.*, 421 F.3d 129 (2d Cir. 2005); *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985). See also *RCC Ventures, LLC v. Brandtone Holdings Limited*, 322 F.R.D. 442, 449–50 (S.D. N.Y. 2017) (citing *DEF v. ABC*, 366 Fed. Appx. 250, 253 (2d Cir. 2010)). Other Circuits have not followed the Second Circuit’s holding. See *Lozano v. Bosdet*, 693 F.3d 485, 488, 83 Fed. R. Serv. 3d 577 (5th Cir. 2012) (disagreeing with Second Circuit’s holdings in *Honeywell* and *Montalbano*); *3M Company v. Darlet-Marchante-Technologie SA*, 2009 WL 1228245, at *4 (D. Minn. 2009) (noting that majority of courts look to totality of circumstances to determine if plaintiff acted reasonably and diligently in effectuating service).

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¹See generally § 23:3; Chapter 60 “Pleadings and Pre-Trial Motions

time consuming nature and the costliness of motions to dismiss the complaint and for summary judgment in litigation in the United States. Upfront, detailed, and candid communication involving U.S. outside counsel of the inevitable frustrations inherent in U.S. motion practice can help to eliminate a sense of disappointment with the process. We discuss some of the issues presented by such motions in Sections 23:35 to 23:39.

§ 23:35 Motion practice—Client declarations

The selection of an appropriate declarant in support of or in opposition to motions in the U.S. litigation requires a great deal of care. Often corporate employees or managers are selected as declarants.¹ The work involved often is time consuming and distracting from one's normal duties and, what is worse, the declarant likely will have little or no control over when the work will need to be done. Senior management not familiar with U.S. litigation may be unaware of the attendant travel, preparation time and the possibility of being deposed. It is also generally not advisable for the declarant to be a member of the inside legal team, for blurring the line between attorney and client may jeopardize the declarant's ability to invoke the attorney-client privilege successfully at a deposition.²

In selecting a declarant, U.S. counsel and European inside counsel should bear in mind that the submission of the declaration will not necessarily end the person's involvement in the litigation. Further declarations may be required as part of subsequent submissions in connection with the motion. European inside counsel and the potential declarant should be made aware that declarants are prime candidates to be deposed by the opposing party—either in connection with the motion or, if the motion does not end the case, in the

in Complex Commercial Cases" (§§ 60:1 et seq.).

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¹With respect to depositions of corporate employees and managers, see § 23:47. See generally Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.) for a discussion of depositions of corporate employees, including "apex" depositions of senior officers.

²See § 23:22.

course of subsequent discovery proceedings.³ If U.S. discovery rules apply to such a deposition,⁴ European inside counsel and the declarant should be made aware that the deposition may be videotaped and shown to a jury at trial in lieu of live testimony.⁵ This may come as a surprise to European clients since a number of civil law countries generally prohibit the filming or videotaping of court proceedings.⁶ The possibility of videotaping should be a factor in the selection of a declarant.

U.S. outside counsel should also, as soon as possible, identify other persons who can be substituted for the declarant. Potential declarants who are not familiar with United States litigation may initially agree to be declarants but change their minds later when they realize that the preparation of the declaration is more involved than they anticipated or that the declaration may cause the other side to wish to depose them. Moreover, it is important to confirm with the selected declarant and inside counsel that European privacy and data protection laws do not preclude the declarant from executing the declaration.⁷

Additionally, in selecting a declarant, inside and outside counsel should consider to what extent they would prefer to use a person fluent in English who will not require the use of an interpreter at a deposition (or at trial). Generally, if the company is a plaintiff and the declarant's deposition and, ultimately, trial testimony is necessary to establish elements of a *prima facie* case, it may be advisable, to select a

³See generally §§ 23:46 to 23:48.

⁴U.S. discovery rules may not apply if evidence is obtained in Europe pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Evidence Convention"); see Article 9 Hague Evidence Convention ("The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed;" however, a special method or procedure for taking evidence may be requested unless it is incompatible with the internal law of the state of execution). See generally § 23:41; § 23:48.

⁵See, e.g., Fed. R. Civ. P. 30(b)(3)(A).

⁶See, e.g., § 169 Gerichtsverfassungsgesetz (GVG) (German Court Constitution Law). In Spain, all hearings and witnesses testimony is video recorded (*Ley de Enjuiciamiento Civil*, art. 147).

⁷See generally § 23:29; § 23:44.

witness fluent in English who can more readily persuade the trier of fact.

Generally, the use of declarations in federal courts, authorized by 28 U.S.C.A. § 1746,⁸ is preferable to affidavits, which would require that the signature of the affiant be notarized. Consular officers at a United States embassy or consulate in Europe are authorized to notarize documents.⁹ Notarization in civil law countries is often a considerably more solemn process than in the United States, and may involve unnecessary added costs and time.¹⁰

If U.S. outside counsel are working with European inside counsel in preparing the draft of a declaration for a corporate employee not fluent in English, who is only comfortable submitting the declaration in his or her native language, one way to expedite the process is for counsel to first prepare the draft in English, then, when the draft is in near final form, have the English version translated into the local language. The translated version can become the "original" and the English version the "translation." The advantage of this reversal is that it permits the lawyers to work together at the earliest possible time on the English version—which, though it ultimately will be called a "translation," is the version of the declaration that the American judge will read. Some jurisdictions may require that a translation be accompanied by a translator's certificate of accuracy.

⁸Section 1746 reads, in pertinent part: "Wherever . . . any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . ., such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration . . . in writing of such person, which is subscribed by him, as true under penalty of perjury, and dated . . ." See 28 U.S.C.A. § 1746.

⁹See 22 U.S.C.A. § 4215; 22 U.S.C.A. § 4221; 22 C.F.R. §§ 92.2 et seq.

¹⁰Notaries in Germany, for example, are trained lawyers who must meet the educational and practice requirements for becoming a judge, § 5 Bundesnotarordnung (BNotO) (German Federal Law on Notaries).

§ 23:36 Motion practice—Specific motions

A discussion of all possible pre-trial motions is beyond the scope of this Chapter.¹ However, we turn now in Sections 23:37 to 23:39 to a discussion of those motions that may be of particular interest to European companies litigating in the United States, especially as defendants.

§ 23:37 Motion practice—Specific motions—Subject matter and personal jurisdiction

Whether a court in the United States has jurisdiction over a foreign company that has only minimal contacts with the United States is “a question that arises with great frequency.”¹ Nonetheless, U.S. counsel should not assume that the European company’s management and inside counsel are fully aware of the federal subject matter and personal jurisdictional issues that commonly arise when litigation is commenced against a European company in the United States.

Federal subject matter jurisdiction is generally based on either federal question jurisdiction or on diversity jurisdiction.² A court has federal subject matter jurisdiction where the action arises under the U.S. Constitution, federal laws or a U.S. treaty.³ A court has diversity jurisdiction to hear a civil case in which all the parties are “diverse,” that is, where plaintiffs and defendants are all citizens of different states or are non-U.S. citizens, and where the matter in controversy exceeds \$75,000.⁴

In diversity question cases, the federal court looks to the

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¹See generally Chapter 60 “Pleadings and Pre-Trial Motions in Complex Commercial Cases” (§§ 60:1 et seq.) for a more extensive discussion of pre-trial motions.

[Section 23:37]

¹J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 877, 131 S. Ct. 2780, 180 L. Ed. 2d 765, Prod. Liab. Rep. (CCH) P 18653 (2011).

²See generally Marie R. Yeates, Chapter 1 “Subject Matter Jurisdiction,” in Haig, Business and Commercial Litigation in Federal Courts §§ 1:1 et seq. (4th ed. 2016).

³28 U.S.C.A. § 1331.

⁴28 U.S.C.A. § 1332.

law of the state in which the federal court sits in determining whether it has personal jurisdiction over a party.⁵ In federal question cases, the court looks first to the federal statute or law governing the action to determine if it has personal jurisdiction over a party and, in the absence of such a provision, to the law of the state in which the federal court sits.⁶ “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons,” including foreign corporations.⁷ “This is because a federal district court’s authority to assert personal jurisdiction in most cases is linked to service of process on a defendant” and service of process in a federal action may be effected on a defendant “‘who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.’”⁸ European managers and inside counsel frequently are surprised by the often artificial and complex lines that are drawn by different states to determine whether personal jurisdiction exists and how expansively courts in the United States have interpreted the concept of jurisdiction. However, this should probably not come as a complete surprise to European inside counsel since United States courts are not alone in broadly interpreting jurisdictional provisions. For example, some European civil procedure codes provide “catchall” provisions establishing a court’s authority to hear

⁵See Fed. R. Civ. P. 4(k)(1)(A) (“Serving a summons . . . establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996) (to determine whether personal jurisdiction exists in a diversity case, federal courts apply the long-arm statute of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment).

⁶See *Penguin Group (USA) Inc. v. American Buddha*, 609 F.3d 30, 35, 38 Media L. Rep. (BNA) 1878, 95 U.S.P.Q.2d 1217, 76 Fed. R. Serv. 3d 1541 (2d Cir. 2010), certified question accepted, 15 N.Y.3d 744, 906 N.Y.S.2d 807, 933 N.E.2d 205 (2010) and certified question answered, 16 N.Y.3d 295, 921 N.Y.S.2d 171, 946 N.E.2d 159, 39 Media L. Rep. (BNA) 1522, 98 U.S.P.Q.2d 1349 (2011) (“In litigation arising under federal statutes that do not contain their own jurisdictional provisions . . . federal courts are to apply the personal jurisdiction rules of the forum state”).

⁷*Daimler AG v. Bauman*, 571 U.S. 117, 125, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

⁸*Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (quoting Fed. R. Civ. P. 4(k)(1)(A)).

a case involving a foreign defendant based solely on the presence of the defendant's property in the forum's jurisdiction.⁹ Like their United States counterparts, courts in European civil law countries sometimes exercise personal jurisdiction over foreign companies with only minimal contacts to the European forum. For example, a German court sustained personal jurisdiction over a foreign defendant based on the fact that the foreign defendant's website referred to an office it shared with an affiliated company located in the German forum.¹⁰ U.S. counsel should plan to discuss some of the basic personal jurisdiction concepts with European inside counsel, which we outline below.¹¹

A court in the United States only has personal jurisdiction over a defendant if the defendant has sufficient contacts with the jurisdiction "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹² Personal jurisdiction is divided into two broad categories, general jurisdiction and specific jurisdiction.¹³ Although, as a practical matter, general jurisdiction plays less

⁹See, e.g., § 23 Zivilprozessordnung (ZPO) (German Code of Civil Procedure) (providing jurisdiction over defendant with no contacts to Germany other than the presence of defendant's property in the forum's jurisdiction).

¹⁰See Bundesgerichtshof (BGH) (German Supreme Court in Civil Matters), decision of Dec. 13, 2012, III ZR 282/11 (holding that trial court in Frankfurt properly exercised jurisdiction over foreign rating agency under § 23 ZPO where rating agency's only contact to Germany was reference on its website to office maintained with rating agency's affiliate in Frankfurt); the BGH decision is *available at* <http://www.bundesgerichtshof.de>.

¹¹For a German law perspective on the extraterritorial reach of U.S. jurisdictional rules, see Frank A. Immenga, *Extraterritoriale Rechtsanwendung im "American Style,"* *Recht der Internationalen Wirtschaft (RIW)* Vol. 5, p. 1 (2003).

¹²*International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945) (internal quotation marks omitted).

¹³See *Daimler AG v. Bauman*, 571 U.S. 117, 133, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (discussing differences between general and specific jurisdiction); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796, *Prod. Liab. Rep. (CCH) P 18654* (2011) (same).

of a role in modern jurisprudence than specific jurisdiction,¹⁴ either can be an important factor in any litigation involving European companies in the United States and should be discussed with European inside counsel at the earliest opportunity. That discussion should, in particular, focus on the guidance provided by recent United States Supreme Court rulings limiting the jurisdictional reach of courts in the United States over foreign defendants, discussed below.

General jurisdiction is “all-purpose jurisdiction” or “dispute-blind jurisdiction.”¹⁵ General jurisdiction over a defendant is based on the defendant’s connection to the forum that is unrelated to the underlying lawsuit against that defendant. In other words, the facts establishing general jurisdiction over a defendant are not related to the claim or cause of action at issue in the lawsuit. If general jurisdiction exists, a defendant may be sued for *any* claim, not simply for claims arising from its business contacts to the United States, and even for claims having no relationship to the United States.

In *Daimler AG v. Bauman*, the United States Supreme Court issued an important decision concerning the parameters of general jurisdiction over foreign corporate defendants.¹⁶ The issue in *Daimler* was whether a federal court in California had general jurisdiction over Daimler AG, a German corporation with its headquarters in Stuttgart, Germany. The underlying action against it in California was brought by 22 Argentine residents seeking damages for alleged criminal actions committed by Daimler AG’s Argentine subsidiary during the “dirty war” of the 1970’s. The plaintiffs argued that the California court had general jurisdiction over Daimler AG because, among other things, Daimler AG had numerous business dealings in California, principally through its wholly owned United States

¹⁴See *Daimler AG v. Bauman*, 571 U.S. 117, 128, 133, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (“specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [plays] a reduced role” and “general jurisdiction has come to occupy a less dominant place in the contemporary scheme.”) (internal quotation marks omitted).

¹⁵*Daimler AG v. Bauman*, 571 U.S. 117, 121, 138, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

¹⁶See *Daimler AG v. Bauman*, 571 U.S. 117, 122–25, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

subsidiary. That subsidiary, which was incorporated in Delaware and had its principal place of business in New Jersey, sold billions of dollars of luxury vehicles in California. Plaintiffs claimed that, for jurisdictional purposes, the subsidiary's contacts to California could be imputed to Daimler AG based on an agency theory.

In *Daimler*, the Supreme Court held that a court may subject a foreign defendant to judgment only when the defendant has sufficient contacts with a state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,"¹⁷ and ruled that the California court did not have general jurisdiction over Daimler AG.¹⁸ The Supreme Court stated that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction here."¹⁹ The "limited set of affiliations with a forum" effectively limits where a foreign defendant may be subject to general jurisdiction and sued for any claim. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place," such as the corporation's "place of incorporation and principal place of business."²⁰ These affiliations "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable" and, thus, foster legal certainty. They "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."²¹ Since Daimler AG was neither incorporated in California nor had its principal place of business there, the Supreme Court held that general jurisdiction over Daimler AG in California did not exist.

The United States Supreme Court in *Daimler* left open the

¹⁷*Daimler AG v. Bauman*, 571 U.S. 117, 126, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (citing *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945)).

¹⁸*Daimler AG v. Bauman*, 571 U.S. 117, 140, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

¹⁹*Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

²⁰*Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

²¹*Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

possibility that in an exceptional case general jurisdiction could arise in a forum other than where a corporation is incorporated or has its principal place of business. Only rarely, however, will such an exceptional case arise for a foreign corporation. Daimler AG's United States subsidiary had multiple California facilities, which included a regional office and an automobile preparation center, and had several billion dollars in annual sales of luxury automobiles there. Notwithstanding the continuous and systematic contacts of its wholly owned subsidiary to California, the Supreme Court held that neither Daimler AG nor its United States subsidiary were "at home" in that state for general jurisdiction purposes since neither was incorporated or had its principal place of business in California.

After *Daimler*, a few courts have sustained general jurisdiction over a foreign corporation on the basis of "continuous and systematic" contacts with the forum that rendered it essentially "at home" in the forum state.

For example, in *Barriere v. Juluca*,²² plaintiffs, Texas domiciliaries, sued an Anguillan corporation that managed a resort in Anguilla for an injury sustained at the resort. The Florida district court denied defendant's motion to dismiss for lack of personal jurisdiction. Plaintiffs argued that the defendant corporation's assets were managed by a company in South Florida. Plaintiffs also alleged that two other defendants, Leading Hotels of the World and Hotel Representative, Inc. (neither of which objected to personal jurisdiction in Florida), promoted, managed, operated and provided representation services for the resort; provided extensive sales and promotional support, including advertising and public relations; set forth the standards required to remain associated with Leading Hotels of the World; regularly inspected the Anguilla premises; that Leading Hotels of the World was the actual or apparent agent of Cap Juluca; and that Cap Juluca maintained control over Leading Hotels of the World or vice versa. The court concluded that these un rebutted allegations were sufficient to find that Cap Juluca had sufficient contacts with Florida to be considered "at home" there.²³ The court in *Barriere* noted that in *Daimler* the Supreme Court acknowledged that "it

²²*Barriere v. Juluca*, 2014 WL 652831 (S.D. Fla. 2014).

²³*Barriere v. Juluca*, 2014 WL 652831, at *6-7 (S.D. Fla. 2014).

would be possible for a corporation to be 'at home' in places outside its place of incorporation or principal place of business."²⁴ The *Barriere* court concluded that it did not believe *Daimler* should be read as effectively depriving American citizens of the right to litigate in the United States "for virtually all injuries that occur at foreign resorts maintained by foreign defendants."²⁵

On the other hand, a number of courts of appeal have rejected general jurisdiction, finding that plaintiffs were unable to satisfy *Daimler's* "at home" standard. For example, in *Sonera Holding B.V. v. Cukurova Holding A.S.*,²⁶ the Second Circuit reversed the district court, finding that a company organized under the laws of the Republic of Turkey, with operations, properties and assets predominately in Turkey and whose contacts with New York were generally based on the activities of other entities, could not be subjected to general jurisdiction in the United States. And in *Gucci America, Inc. v. Weixing Li*, the Second Circuit held that there was not a sufficient basis for the district court to exercise general personal jurisdiction over the Bank of China, which had but four branch offices in the United States and conducted only a small portion of its worldwide business in New York.²⁷

The Court also gave short shrift to the argument that general jurisdiction existed over *Daimler AG* based on an agency theory, imputing the subsidiary's contacts in California to its corporate parent, *Daimler AG*. Such an agency theory "stacks the deck" against a foreign defendant, practically always subjecting "foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' we rejected" in previous decisions.²⁸

Daimler is significant in another important respect. It

²⁴*Mannis v. Colvin*, 2014 WL 652931, at *5 (E.D. Tenn. 2014).

²⁵*Barriere v. Juluca*, 2014 WL 652831, at *6 (S.D. Fla. 2014).

²⁶*Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224–27 (2d Cir. 2014).

²⁷*Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 135–36, 112 U.S.P. Q.2d 1445 (2d Cir. 2014).

²⁸*Daimler AG v. Bauman*, 571 U.S. 117, 136, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929, 131 S. Ct. 2846, 180 L. Ed. 2d 796, *Prod. Ljib. Rep.* (CCH) P 18654 (2011)).

undermined the “doing business” test that courts in states such as New York traditionally used in determining whether a foreign defendant is “present” in the state and, therefore, subject to general jurisdiction.²⁹ In *Daimler*, the Supreme Court held that the “Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint.”³⁰ The fact that Daimler AG, through its wholly owned United States subsidiary, may have had “continuous and systematic” business ties to California did not change that analysis. The United States Supreme Court noted that, as a general matter, while a corporation’s continuous and systematic contacts to a state may be relevant in instances in which the exercise of *specific* jurisdiction would be appropriate (*see* discussion below), a corporation’s “continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.”³¹ Similarly, “[a]lthough the placement of a product into the stream of commerce ‘may bolster an affiliation germane to *specific* jurisdiction,’ . . . such contacts ‘do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.’ ”³² With respect to foreign companies doing business in the United States, the Court noted that

²⁹*See* *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 266, 115 N.E. 915, 3 A.F.T.R. (P-H) P 3297 (1917) (regular and systematic conduct of business within state leads foreign defendant to being present in state and subject to general jurisdiction); Patrick M. Connors, *Impact of Supreme Court Decisions on New York Practice*, N.Y.L.J., June 18, 2014.

³⁰*Daimler AG v. Bauman*, 571 U.S. 117, 121, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

³¹*Daimler AG v. Bauman*, 571 U.S. 117, 132, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

³²*Daimler AG v. Bauman*, 571 U.S. 117, 132, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (emphasis in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927, 131 S. Ct. 2846, 180 L. Ed. 2d 796, *Prod. Liab. Rep. (CCH)* P 18654 (2011)); *see also* *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 203 n.5, 209 U.S.P.Q. 633, 31 Fed. R. Serv. 2d 325 (D.C. Cir. 1981) (marketing arrangements of foreign company and its U.S. subsidiaries, although “adequate to permit litigation of claims relating to [their] introduction of . . . wine into the United States stream of commerce, . . . would not be adequate to support general, ‘all purpose adjudicatory authority.’ ”).

there is “unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in [a state court] based on those contacts.”³³ While some courts have continued to find that a foreign corporation’s registration to do business in a state constitutes consent to general personal jurisdiction,³⁴ most courts have followed the lead of the Second Circuit, which indicated that this approach is inconsistent with *Daimler*.³⁵

The United States Supreme Court’s decision in *Daimler* is significant for European companies for a number of reasons. European companies that are defendants in lawsuits here based on events or occurrences that have no nexus to the United States or to the forum in which the action is brought have a powerful defense to the exercise of general jurisdiction over them. *Daimler* will certainly be the lynchpin of a motion to dismiss for lack of jurisdiction in such cases. The Court in *Daimler* noted that specific jurisdiction, and not “all-purpose” or general jurisdiction, is the “centerpiece of modern jurisdictional theory” and that general jurisdiction has played a “reduced role.”³⁶ While that may be the case, the experience of European companies in litigation in the United States is that it is exactly the “sprawling view of general jurisdiction” over foreign defendants rejected in *Daimler*

³³*Daimler AG v. Bauman*, 571 U.S. 117, 132, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

³⁴See, e.g., *Serov ex rel. Serova v. Kerzner Int’l Resorts, Inc.*, 52 Misc. 3d 1214(A), 43 N.Y.S.3d 769 (N.Y. Sup. Ct. 2016) (denying motion to dismiss for lack of personal jurisdiction because “corporate registration [to do business in New York with Secretary of State] confers jurisdiction irrespective of their business activities”).

³⁵See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (“If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*’s ruling would be robbed of meaning by a backdoor thief.”); see also James M. Beck, *Post-BMS Personal Jurisdiction Cheat Sheet* (July 31, 2017), available at <https://www.druganddeviceblog.com/2017/07/post-bms-personal-jurisdiction-cheat-sheet.html> (collecting cases).

³⁶*Daimler AG v. Bauman*, 571 U.S. 117, 128, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

that creates the most troubling types of cases for such companies.

In contrast to general or "all-purpose" jurisdiction, specific jurisdiction has a more focused basis since the contacts to the forum establishing specific jurisdiction must be related to the underlying claim against the defendant. Specific jurisdiction over a foreign company exists in the United States where the company "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."³⁷ Specific jurisdiction exists over a foreign company if its business activity targeted the forum state and the claim arose from that business activity. A state's long-arm jurisdictional statutes are examples of statutes providing for specific jurisdiction.³⁸ In contrast to general jurisdiction, specific jurisdiction is limited to the claim or claims arising from the company's contacts to the forum state. Other activity or contacts to the forum state unrelated to the claim at issue in the litigation, such as purchases in the forum state, even if occurring at regular intervals, are not sufficient to establish specific jurisdiction over a foreign company in an action brought against it not related to those purchase transactions.³⁹

In *Walden v. Fiore*, decided weeks after *Daimler*, the United States Supreme Court clarified the nature of the "minimum contacts" to a forum necessary for a court to

³⁷Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

³⁸Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 926, 131 S. Ct. 2846, 180 L. Ed. 2d 796, Prod. Liab. Rep. (CCH) P 18654 (2011) (North Carolina's long-arm statute example of specific jurisdiction; but facts sufficient to establish specific jurisdiction, such as placing products in stream of commerce, were not sufficient to establish general jurisdiction where no continuous and systematic general business contacts to North Carolina existed).

³⁹See *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395, Prod. Liab. Rep. (CCH) P 20088 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927, 131 S. Ct. 2846, 180 L. Ed. 2d 796, Prod. Liab. Rep. (CCH) P 18654 (2011)) ("[A] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"). See also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

exercise specific jurisdiction over a foreign defendant.⁴⁰ The decision is relevant for European companies engaged in litigation in the United States because it sets limits on the exercise of such jurisdiction. *Walden* involved an action by airline passengers, professional gamblers, against a police officer for seizing \$97,000 in cash (their gambling “bank” and winnings) from plaintiffs while they were at an airport in Georgia on a return flight to Nevada. The proceeds lawfully belonged to plaintiffs and were returned to them seven months later. Plaintiffs brought a tort action in Nevada against the police officer, a Georgia resident, claiming damages for being deprived of their cash. Personal jurisdiction over the defendant was predicated on the theory that, in preparing an allegedly false affidavit concerning the seizure, the defendant police officer effectively “aimed” the submission of his affidavit at Nevada knowing that it would affect persons with a “significant connection” to that state.⁴¹ Plaintiffs also claimed that specific jurisdiction existed because the purported injury (being deprived of their cash) occurred in Nevada.

In a unanimous decision, the Supreme Court in *Walden* rejected plaintiffs’ jurisdictional arguments and held that the Nevada court lacked personal jurisdiction over defendant. The Court placed great emphasis on the fact that there were insufficient “minimal contacts” between the defendant and Nevada necessary to establish specific jurisdiction. The Court noted that the *plaintiffs’* contacts with the defendant and the forum cannot “drive the jurisdictional analysis.”⁴² Rather, the “‘minimum contacts’ analysis looks to the defendant’s contacts *with the forum State itself*, not the defendant’s contacts with persons who reside there.”⁴³ The Court recognized that “although physical presence in the forum is not a prerequisite to jurisdiction . . . physical entry into the State—either by the defendant in person or through an

⁴⁰*Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴¹*Walden v. Fiore*, 571 U.S. 277, 282, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴²*Walden v. Fiore*, 571 U.S. 277, 289, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴³*Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (emphasis added).

agent, goods, mail, or some other means—is certainly a relevant contact” for determining whether specific jurisdiction exists.⁴⁴ “To be sure, a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.”⁴⁵ Simply put, the Court stated that a plaintiff cannot be the only link between the defendant and the forum. Rather, for specific jurisdiction to exist, it is the defendant’s conduct that must form the necessary connection with the forum state.

The United States Supreme Court also rejected the plaintiffs’ argument that the fact that the purported injury (being deprived of their cash) occurred in Nevada, and that such harm was foreseeable for the defendant, were sufficient minimal contacts to that forum. The Court noted that “mere injury to a forum resident is not a sufficient connection to the forum.”⁴⁶ “The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.”⁴⁷ The Court concluded that since defendant’s relevant conduct occurred entirely in Georgia, the mere fact that his conduct affected plaintiffs with connections to Nevada did not suffice to authorize that state’s court to exercise jurisdiction over the defendant.

Walden effectively eliminates, or at least weakens, many arguments that plaintiffs typically use to establish specific jurisdiction in their home forums over foreign defendants. In conjunction with its decision in *Daimler*, discussed above, the Supreme Court has reined in some of the expansive jurisdictional interpretations of both general and specific jurisdiction that have long troubled many European companies about litigation in the United States.

Other examples of contacts that were deemed sufficient to

⁴⁴*Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴⁵*Walden v. Fiore*, 571 U.S. 277, 286, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴⁶*Walden v. Fiore*, 571 U.S. 277, 290, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

⁴⁷*Walden v. Fiore*, 571 U.S. 277, 290, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

establish either general or specific jurisdiction over a foreign company include: (1) regular utilization of a correspondent bank account in the United States;⁴⁸ (2) having a separately incorporated and independently managed affiliate operating in the United States that distributes promotional materials describing both companies as members of a single “network;”⁴⁹ (3) maintaining an office within the state for purposes of purchasing equipment;⁵⁰ (4) use of an instant messaging service to communicate with a securities broker in New York;⁵¹ (5) denominating or treating in practice its U.S. subsidiary as an alter ego or as the “mere department” of the European company;⁵² or (6) frequent telephone, e-mail or other forms of communication with the forum state.⁵³

⁴⁸See, e.g., *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 960 N.Y.S.2d 695, 984 N.E.2d 893, 899 (2012) (foreign bank’s regular use of correspondent bank account in New York established jurisdiction under New York’s long-arm statute, even if no other contacts with New York were established); *Ge Dandong v. Pinnacle Performance Ltd.*, 966 F. Supp. 2d 374 (S.D. N.Y. 2013) (same); cf. *In re Ski Train Fire in Kaprun, Austria* on November 11, 2000, 2003 WL 1807148, at *5 (S.D. N.Y. 2003) (maintaining bank accounts in New York for limited purpose of receiving proceeds before transferring funds outside U.S. not sufficient to establish general jurisdiction in New York).

⁴⁹*Koehler v. Bank of Bermuda, Ltd.*, 1994 WL 48825, at *2 (S.D. N.Y. 1994), on reargument, 1995 WL 728467 (S.D. N.Y. 1995). See also *Barriere v. Juluca*, 2014 WL 652831, at *8–9 (S.D. Fla. 2014) (holding parent subject to personal jurisdiction by imputing to it the contacts of its subsidiary).

⁵⁰See also *Ciprari v. Servicos Aereos Cruzeiro do Sul, S. A. (Cruzeiro)*, 232 F. Supp. 433, 441 (S.D. N.Y. 1964). But see *PSARA Energy, LTD v. SPACE Shipping, LTD*, 290 F. Supp. 3d 158, 165, 2017 A.M.C. 2952 (D. Conn. 2017), appeal dismissed as moot, 771 Fed. Appx. 45, 2019 A.M.C. 1598 (2d Cir. 2019), cert. denied, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019) (presence of foreign corporation’s office in Connecticut was insufficient to establish jurisdiction under Connecticut’s long-arm statute).

⁵¹*Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 818 N.Y.S.2d 164, 850 N.E.2d 1140, *Bankr. L. Rep. (CCH) P 74577*, *Blue Sky L. Rep. (CCH) P 74577* (2006).

⁵²See, e.g., *Williamson ex rel. At Home Bondholders’ Liquidating Trust v. Verizon Communications Inc.*, 2013 WL 227691, at 1 (S.D. N.Y. 2013) (“Where, as here, the claim is that a foreign corporation is present in New York because of the activities of a subsidiary within the state, the subsidiary must be either an agent or a mere department of the foreign parent.”) (internal quotation marks omitted); see also *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), rev’d, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (upholding jurisdiction over German parent company

An increasingly connected global economy reliant upon electronic forms of communication means that such contacts may establish personal jurisdiction over a European company. In particular, numerous courts have addressed the question whether the fact that a foreign company's website is accessible from the United States is sufficient to establish personal jurisdiction over the company. This is an area of the law that is still developing but some trends are discernable. A foreign company's use of a website to transact business in a state may subject it to personal jurisdiction in the United States where the website facilitates the purchase and delivery of goods or services to the forum state.⁵⁴ However, the mere fact that a foreign company's website may be accessible in the United States is, by itself, not sufficient to establish personal jurisdiction over the company.⁵⁵ That is particularly the case likely where the website is "pas-

because wholly owned U.S. subsidiary was agent of parent because it performed all functions that parent would have undertaken to sell its products in the U.S. market). Not all circuit courts adhere to the agency test propounded in *Bauman*, however; see *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 778 (9th Cir. 2011).

⁵³See, e.g., *Fischbarg v. Doucet*, 38 A.D.3d 270, 832 N.Y.S.2d 164 (1st Dep't 2007), order aff'd, 9 N.Y.3d 375, 849 N.Y.S.2d 501, 880 N.E.2d 22 (2007) (jurisdiction upheld over out-of-state defendants who transacted business with plaintiff attorney solely by telephone, fax and e-mail). See also *Stuart v. Churn LLC*, 2019 I.E.R. Cas. (BNA) 203099, 2019 WL 2342354, at 5 (M.D. N.C. 2019) (frequent communications with employee working remotely in North Carolina was sufficient to establish personal jurisdiction).

⁵⁴*Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 166, 96 U.S.P.Q.2d 1349 (2d Cir. 2010) (finding that court had personal jurisdiction over defendant who "operated a highly interactive website offering [products] for sale to New York consumers").

⁵⁵See, e.g., *inno360, Inc. v. Zakta, LLC*, 50 F. Supp. 3d 587, 594 (D. Del. 2014) ("The mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient or other related contacts."); *Unspam Technologies, Inc. v. Chernuk*, 716 F.3d 322 (4th Cir. 2013); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) ("[T]he mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum.") (quotation marks omitted); *Fagan v. Republic of Austria*, 2011 WL 1197677, at *14-16 (S.D. N.Y.

sive” in nature, that is, is informational only, cannot be used for the purchase of goods or services or does not support an online application process,⁵⁶ is only available in a foreign language,⁵⁷ or where the website does not lead to any commercial activity between the foreign company and the forum state.⁵⁸

Where the European company’s website is, in fact, not used to solicit or transact business in the United States, for example, where it is only used to provide information about the company, U.S. outside counsel and the company’s inside counsel should document that fact, for example, through declarations of IT and marketing personnel. In addition, an electronic “snap shot” of the website should be made and U.S. counsel and European inside counsel should make certain that the website is not altered so that it may be used to facilitate sales or services to persons in the United States. U.S. counsel should follow up with European inside counsel and the company’s IT and marketing staff to make certain these policies are maintained during the course of the litigation in the United States.⁵⁹

Jurisdictional discovery may become a vexing issue for European companies in United States litigation. For example, consider the following situation—a European company, a parent or holding company, is named as a defendant

2011).

⁵⁶See *Snegur v. Grupo Iberostar*, 2016 WL 74414 (E.D. N.Y. 2016) (website of Jamaican hotel that allowed for bookings was passive, and therefore personal jurisdiction was improper); *Paterno v. Laser Spine Institute*, 112 A.D.3d 34, 973 N.Y.S.2d 681 (2d Dep’t 2013), *aff’d*, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.3d 988 (2014).

⁵⁷*Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 218 (5th Cir. 2012).

⁵⁸*Shrader v. Beann*, 503 Fed. Appx. 650, 653–54 (10th Cir. 2012) (“[I]t bears emphasizing that general jurisdiction over a web site that has no intrinsic connection with a forum state requires commercial activity carried on with forum residents in such a sustained manner that it is tantamount to actual physical presence within the state.”); *Erickson Beamon Ltd. v. CMG Worldwide, Inc.*, 2013 WL 5355010 (S.D. N.Y. 2013); *Alibaba Group Holding Limited v. Alibabacoins Foundation*, 2018 WL 2022626, at *4 (S.D. N.Y. 2018) (“Even the existence of an interactive ‘patently commercial’ website that can be accessed by New York residents is not sufficient to justify the exercise of personal jurisdiction unless some degree of commercial activity occurred in New York.”).

⁵⁹See § 23:7; § 23:43.

in an action in the United States. The company does no business and has no contacts in the United States, other than, perhaps, its ownership interest in subsidiaries that may have United States contacts. Management or European inside counsel may take the position that the United States court has no personal jurisdiction over the parent or holding company and urge that it be dismissed as quickly as possible from the proceeding. Management and European inside counsel, however, should be forewarned that a court may nevertheless order jurisdictional discovery in the litigation.

Courts in the United States have jurisdiction to determine whether they have jurisdiction. "By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by the court's determination on the issue of jurisdiction."⁶⁰ Moreover, a defendant "cannot challenge the court's jurisdiction over it and then refuse to comply with the court's order compelling production of discovery pertinent to deciding the jurisdictional objection."⁶¹ It lies within the discretion of the court to grant jurisdictional discovery.⁶² Plaintiffs need make only a *prima facie* case for jurisdiction⁶³ or set forth "a sufficient start" and show that their position is not frivolous.⁶⁴ Indeed, courts in the United States have held that it is "axiomatic that plaintiffs must be given an opportunity to conduct discovery on . . . jurisdictional facts, at least where the facts, for which discovery is sought, are peculiarly within the knowledge of the opposing party."⁶⁵

While more limited in scope than full blown pre-trial

⁶⁰Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706-07, 102 S. Ct. 2099, 72 L. Ed. 2d 492, 34 Fed. R. Serv. 2d 1 (1982).

⁶¹Chevron Corp. v. Donziger, 296 F.R.D. 168 (S.D. N.Y. 2013).

⁶²Richtone Design Group, LLC v. Live Art, Inc., 2013 WL 5904975, at *10 (S.D. N.Y. 2013) (denying plaintiff's request for jurisdictional discovery where plaintiff had "ample opportunity to secure and present evidence relevant to the existence of jurisdiction").

⁶³Best Van Lines, Inc. v. Walker, 490 F.3d 239, 255 (2d Cir. 2007).

⁶⁴Falco v. Klear View Appliance Corp., 41 Misc. 3d 1214(A), 980 N.Y.S.2d 275 (Sup 2013).

⁶⁵See Chevron Corp. v. Donziger, 296 F.R.D. 168 (S.D. N.Y. 2013) (quoting Gualandi v. Adams, 385 F.3d 236, 244, 33 Employee Benefits Cas. (BNA) 2187, 192 Ed. Law Rep. 337 (2d Cir. 2004)) (internal quotation marks omitted); Roche v. Pebble Beach Co., 541 Fed. Appx. 208 (3d Cir.

discovery, jurisdictional discovery, though not very common, is another burdensome aspect of United States litigation that European in-house counsel should be advised to anticipate.⁶⁶ Additionally, such discovery is often conducted in accordance with U.S. discovery rules and not through the international judicial assistance procedures provided in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or pursuant to letters rogatory.⁶⁷

§ 23:38 Motion practice—Specific motions—Forum non conveniens

A potentially powerful threshold motion available to a European company in U.S. litigation is the common law *forum non conveniens* motion to dismiss.¹ These motions are

2013) (jurisdictional discovery particularly appropriate where defendant is a corporation or where relevant information solely in possession of defendant).

⁶⁶In re Porsche Cars North America, Inc., 2012 WL 4361430 (S.D. Ohio 2012) (jurisdictional discovery against European holding company permitted even though it may be “burdensome due to the language barrier and compliance with foreign law issues”).

⁶⁷Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (“Hague Evidence Convention”) (reprinted in 28 U.S.C.A. § 1781 note). See *Chevron Corp. v. Donziger*, 296 F.R.D. 168 (S.D. N.Y. 2013) (ordering that jurisdictional discovery of documents located in Ecuador, not a party to Hague Evidence Convention, proceed under Federal Rules of Civil Procedure); *Trueposition, Inc. v. LM Ericsson Telephone Co.*, 2012-1 Trade Cas. (CCH) ¶ 77822, 2012 WL 707012, at *2 (E.D. Pa. 2012) (denying motion for protective order seeking to have jurisdictional discovery of documents in France conducted solely through Hague Evidence Convention). With respect to discovery under the Hague Evidence Convention, see § 23:41.

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¹Federal district courts have an inherent power under the common law to dismiss lawsuits that have been initiated in an inconvenient forum. *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011). Common law forum dismissals are to be distinguished from transfers on forum grounds between two federal judicial districts within the United States under 28 U.S.C.A. § 1404(a). See generally Ved P. Nanda and David K. Pansius in 1 *Litigation of International Disputes in U.S. Courts*, Chapter 6, “Forum Non Conveniens,” (§§ 6:1 et seq.) (2013); Gary P. Naftalis and Michael S. Oberman, Chapter 3, “Venue, Forum Selection, and Transfer,” in Haig, *Business and Commercial Litigation in Federal Courts* §§ 3:1 et seq. (4th ed. 2016)

generally not available in civil law countries,² and a thorough explanation to European inside counsel of this motion is advisable. In particular, U.S. outside counsel should alert European inside counsel to the fact that even if a European company is subject to jurisdiction before a U.S. court, the judge may dismiss the complaint in favor of having the plaintiff refile the lawsuit in another adequate, and more convenient, forum.³ A European country is an adequate alternative forum when the defendant company is amenable to process there, and when some remedy (even if it should be significantly less generous than that available in the United States) is available if the facts alleged are proven.⁴

The unavailability of U.S.-type discovery and litigation procedures, such as class actions, in a European forum does not render it inadequate.⁵ Substantive and procedural differences in the law of the alternative forum are irrelevant.⁶

The Supreme Court, in *Gulf Oil Corp. v. Gilbert*, set forth

(§ 3:49 discussing *forum non conveniens*).

²In Germany, for example, a dismissal based on *forum non conveniens* grounds is generally barred by constitutional guarantees securing litigants access to the courts under Article 101 para. 1 Grundgesetz (GG) (German Federal Constitution). See Reinhold Geimer, *Internationales Zivilprozessrecht* (7th ed. 2015), cmt. no. 1075. The European Union Court of Justice has also held that the common law doctrine of *forum non conveniens* is incompatible with Article 2 of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968 (OJ 1978 L 304, p. 36), as amended (Brussels Convention). *Owusu v. Jackson* (trading as 'Villa Holidays Bal-Inn Villas'), 2005 WL 474200 (ECJ 2005). With respect to the Brussels Convention, see § 23:58.

³See generally Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Va. J. Int'l L. 157 (2012).

⁴In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (Bankr. S.D. N.Y. 2018) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419, 1982 A.M.C. 214 (1981)).

⁵In re Herald, 540 Fed. Appx. 19 (2d Cir. 2013) ("[I]t is well established that the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate . . . [n]or is an alternative forum generally 'considered 'inadequate' merely because its courts afford different or less generous discovery procedures than are available under American rules.") (internal citations and quotation marks omitted).

⁶*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S. Ct. 252, 70 L. Ed. 2d 419, 1982 A.M.C. 214 (1981); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993); *In re Union Carbide Corp. Gas*

the factors, private and public, that a federal judge must evaluate to determine when a *forum non conveniens* dismissal is appropriate.⁷

The private factors favoring dismissal where the alternative forum is a European one include:

1. Are all or most of the witnesses located in Europe? Are the European witnesses not subject to compulsory process to appear at trial in the United States? Will expensive interpreters be required to translate witness testimony into English?
2. Are all or most of the documents located in Europe? Will expensive translations be required of numerous documents? Will production of some documents violate European laws, such as data protection or privacy laws?
3. Will any judgment that issues from the United States court be unenforceable by either United States plaintiffs or European defendants before a European court?

The public factors favoring dismissal include:

1. Are all relevant contacts related to the subject matter of plaintiffs' claims connected with Europe rather than the United States?
2. Would a trial in the United States require the judge to apply European law to adjudicate the substantive issues raised by the complaint?
3. Do one or more European countries have the primary governmental interest in the subject matter of plaintiffs' claims?
4. Do mandatory or permissive forum selection clauses in

Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 198-99, 17 Env'tl. L. Rep. 20580, 89 A.L.R. Fed. 217 (2d Cir. 1987) (India held adequate alternative forum despite procedural and substantive "disadvantages" such as lack of class action procedures). Executive Committee Members v. Union of India, 484 U.S. 871, 108 S. Ct. 199, 98 L. Ed. 2d 150 (1987); Alcoa S. S. Co., Inc. v. M/V Nordic Regent, 654 F.2d 147, 159, 1980 A.M.C. 309, 70 A.L.R. Fed. 847 (2d Cir. 1980) (alternative forum adequate despite prospect of lesser recovery); In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (Bankr. S.D. N.Y. 2018).

⁷Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). See also Fresh Results, LLC v. ASF Holland, B.V., 921 F.3d 1043, 1049 (11th Cir. 2019) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

- contracts at issue in the lawsuit favor adjudication in a European forum?
5. Are key third party defendants subject to impleader in a European action, but not a United States action?
 6. Is the U.S. court, owing to congestion, less able to offer plaintiffs a speedy trial than a European forum?

A *forum non conveniens* motion typically entails a fact-specific analysis. The fact that the foreign forum may ultimately not be available to the litigants does not make the grant of such a motion improper;⁸ however, the basic requirement for granting a *forum non conveniens* motion is that plaintiff have a remedy in a foreign jurisdiction. In sum, a motion to dismiss on *forum non conveniens* grounds is one that almost every European company named as a defendant in a U.S. litigation should closely consider. Because experts in foreign law may have to be retained to assist with the preparation of a declaration on the law of the foreign (proposed alternative) forum, if a *forum non conveniens* motion is agreed upon, preparations should begin immediately.

§ 23:39 Motion practice—Specific motions—Summary judgment

A motion for summary judgment on some or all of the issues raised by a lawsuit is a legal device that European companies may find especially appealing. The advantage of a summary judgment motion, if granted, is that a full trial on the merits may be avoided. Although, as discussed below, some European civil law countries have analogous procedures, it may be advisable for U.S. counsel to discuss with

⁸See, e.g., *Galbert v. West Caribbean Airways*, 715 F.3d 1290, 85 Fed. R. Serv. 3d 707 (11th Cir. 2013) (district court dismissed plaintiffs' claims arising from aircraft crash in Venezuela based on *forum non conveniens* grounds and plaintiffs thereupon commenced action in Martinique; subsequent French Court of Cassation decision that plaintiffs had no available forum in Martinique did not abrogate district court's prior dismissal of plaintiffs' claims on *forum non conveniens* ground and did not warrant vacating district court's order under Fed. R. Civ. P. 60(b)(6) (because plaintiffs failed to assert inadequacy of Martinique forum in district court action)).

inside counsel the basics of such a motion, which we briefly outline in this Section.¹

In litigation in the United States, a party may move for summary judgment seeking to summarily dismiss all or part of the claims or defenses of another party.² In order to prevail on such a motion, the moving party must demonstrate that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.³ References to facts in the motion must be specific and identify materials in the record, such as depositions, affidavits and electronically stored information that support the claim.⁴ On a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.⁵ Once the moving party has carried its burden on the motion, its opponent “must do more than simply show that there is some metaphysical doubt as to the material facts.”⁶ The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Because of the requirement that there be no dispute as to any material fact, summary judgment motions are typically brought after discovery is completed.

To some degree, the concept of a summary judgment motion should be familiar to most European inside counsel. Although U.S.-style summary judgment motions may not have an identical counterpart in civil law countries, there are analogs in those countries’ procedural codes.⁷ For reasons of judicial economy, the European civil law system also favors pre-trial interim and final determinations by a judge based

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¹See Chapter 60 “Pleadings and Pre-Trial Motions in Complex Commercial Cases” (§§ 60:1 et seq.) for an additional discussion of summary judgment motions.

²See Fed. R. Civ. P. 56(a).

³See Fed. R. Civ. P. 56(a).

⁴See Fed. R. Civ. P. 56(c)(1).

⁵*U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

⁶*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 7 Int’l Trade Rep. (BNA) 2057, 1986-1 Trade Cas. (CCH) ¶ 67004, 4 Fed. R. Serv. 3d 368 (1986).

⁷See generally § 23:3.

upon evidentiary facts submitted by the parties.⁸ The key difference between the European procedural mechanisms to dismiss an action and U.S. summary judgment motions is, as mentioned above, that the latter may be granted only when "there is no genuine issue as to any material fact and [] the movant is entitled to judgment as a matter of law."⁹ Where a jury trial is demanded in litigation in the United States, questions of fact are resolved by the jury and not by the judge. In European civil law courts, questions of fact are determined solely by a judge, who is not constrained by a jury and is usually granted wide latitude in making those determinations and deciding when to make them.¹⁰

U.S. outside counsel and European inside counsel should jointly devise a strategy early in the course of litigation in the United States to determine as to which material facts there should be no genuine dispute and how such facts can be established. U.S. counsel should point out to European inside counsel that the timing of a summary judgment motion must be carefully considered. The factual record in the case must be developed and solidly support the motion. There are risks associated with a summary judgment motion. The court may deny the motion with adverse language that may

⁸For example, German courts may issue a variety of interim decisions, addressing only part of the claims made in the complaint or addressing only the question of liability. See, e.g., §§ 301-304 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). The judge may also dismiss the action if the plaintiff fails to adequately substantiate or establish the claim with specific offers of proof. § 253 ZPO.

⁹Fed. R. Civ. P. 56(c).

¹⁰German civil procedure law, for example, obligates the court to identify the contested factual allegations, usually set forth in a separate ruling, and ascertain whether they are true. § 139 para. 1; § 286; § 358 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). A court's authority to determine the veracity of the allegations and to conduct an inquiry has been broadly interpreted, and is generally only limited by constitutional provisions guaranteeing a fair trial. Article 20 para. 3 Grundgesetz (GG) (German Federal Constitution). The inquiry into the truth of the factual allegations must be initiated by the court *sua sponte*. The court may, for example, request records from government agencies, engage experts, determine the authenticity of documents, hold (informal) discussions with the parties and their attorneys, consider hearsay evidence and view physical evidence outside the courtroom. However, in its substantive decisions, the court is bound by the motions of the parties and may not grant relief or redress beyond that sought in the motions. § 308 ZPO. See generally § 23:3; § 23:53.

become the “law of the case” and make it more difficult for the European company to prevail at trial.

§ 23:40 Discovery

Because discovery is the single element of litigation in the United States that causes European inside counsel the most apprehension and which usually generates significant costs, it requires the highest degree of sensitivity and guidance on the part of U.S. outside counsel. It also requires an understanding of the fundamental differences between the common law and civil law legal systems with respect to how relevant evidence for a trial is discovered and produced.¹

To a limited degree, discovery of evidence also occurs in litigation in civil law countries. Judges have a wide degree of discretion in managing trials and may request that relevant evidence be submitted by the parties or others.² In the civil law system, parties do not propound discovery requests to each other. A party may request that a court order the opposing party to produce evidence in its possession if it is necessary to prove a claim or defense.³ However, such disclosure obligations are sharply limited, almost never require the production of large numbers of documents, and the parties are not subject to sanctions comparable to those imposed by courts in the United States if the evidence is not produced.⁴

Pre-trial discovery, as practiced in litigation in the United States,⁵ goes far beyond the limited disclosures required in civil law countries and would be deemed impermissible fish-

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¹See generally § 23:3; Paul M. Schwartz, Article 29 Data Protection Working Party—Working Document 1/2009 on Pre-Trial Discovery for Cross-Border Litigation, 969 PLI/Pat 749 (2009) (discussing general differences between common law and civil law discovery procedures).

²See § 23:3; § 23:53.

³See, e.g., § 371 para. 2; § 421 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure), permitting a party to an action to seek a court order requiring evidence in the possession of the opposing party necessary to prove the petitioner’s claim be produced to the court.

⁴Under German civil procedure law, a court generally does not have the authority to compel the production of such evidence but may make an adverse inference if it is withheld. § 371 para. 3; § 427 ZPO.

⁵See generally Chapter 61 “Discovery and Information Gathering” (§§ 61:1 et seq.).

ing expeditions.⁶ In light of these fundamental differences, if European outside counsel is not familiar with litigation in the United States, U.S. outside counsel should take pains to describe the central role that discovery plays in litigation in the United States and what that discovery may entail. In particular, U.S. outside counsel should explain that discovery may be sought of evidence that may not be admissible at trial.⁷

The main goal of U.S. outside counsel, however, must not be to allay the fears of European inside counsel, but, rather, to lay out the respective responsibilities of both inside and outside counsel, as well as those of company employees, with respect to discovery.⁸ A special emphasis should be placed on the fact that sanctions can be imposed upon the company under Fed. R. Civ. P. 37, and analogous state statutes and rules, for a failure to make disclosure or to cooperate in discovery.⁹

U.S. counsel should point out to European inside counsel that discovery is a two-way street that may also have advantages for the European company. Discovery of the opposing party and of third parties may reveal information that will permit an assessment of the strengths and weaknesses of each side's legal position.

⁶For example, German civil procedure laws prohibit most of the discovery requests common in U.S. litigation, deeming them an impermissible fishing expedition (Ausforschungsbeweis). See Reinhold Geimer, *Internationales Zivilprozeßrecht* (7th ed. 2015), cmt. no. 82.

⁷See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . Information within this scope of discovery need not be admissible in evidence to be discoverable.").

⁸With respect to the obligation to preserve relevant documents, particularly electronically stored information, see § 23:7; § 23:43. See generally Chapter 81 "Electronic Discovery" (§§ 81:1 et seq.) for additional discussion of the duty to preserve electronically stored information.

⁹By way of example, in an extreme case sanctions may include entering a default judgment against a party that fails to make disclosures or to cooperate in discovery or permitting the opposing party to recoup some or all of its attorneys' fees. By contrast, for example, in Germany, even where a party fails to comply with disclosure requirements, no contempt of court sanction looms. Rather, the court is empowered to draw the appropriate evidentiary inferences. See § 371 para. 3; § 427 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). See generally § 23:3; § 23:54.

§ 23:41 Discovery—Hague Evidence Convention and letters rogatory

Under basic principles of international comity—which is the time-honored “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”¹—European companies and their inside counsel might reasonably expect that when discovery in a U.S. lawsuit is to take place within Europe, the United States will defer to European rules governing the gathering of evidence rather than imposing U.S. discovery rules. That belief is sometimes strengthened by the fact that both the traditional device of letters rogatory² and the procedures set forth in the Hague Evidence Convention³ defer to European rules concerning discovery that will take place in Europe.⁴ Moreover, in most civil law jurisdictions, utilizing the

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¹*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S. Ct. 139, 40 L. Ed. 95, 2007 A.M.C. 2028 (1895)) (internal quotation marks omitted); see *Linde v. Arab Bank, PLC*, 706 F.3d 92, 111, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013)), cert. denied, 573 U.S. 954 (2014).

²In the context of a request for judicial assistance in discovery, letters rogatory are a formal request from a court in one country to the appropriate judicial authorities in another country seeking compulsion of testimony or the production of documentary or other evidence. See Fed. R. Civ. P. 4(f)(2)(B), Advisory Committee Note. With respect to service of process pursuant to letters rogatory, see § 23:32.

³Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). The text of the Convention is also reprinted as a note to 28 U.S.C.A. § 1781 and is available at the Hague Conference on Private International Law’s website, http://www.hcch.net/index_en.php?act=conventions.text&cid=82 (visited Sep. 28, 2019). The following European countries, among others, are signatories to the Hague Evidence Convention: Albania, Andorra, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, The Republic of Macedonia, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom of Great Britain and Northern Ireland. Notably, Austria is not a signatory to the Hague Evidence Convention and evidence obtained there must be sought through letters rogatory.

⁴With respect to judicial assistance sought under a letter of request

procedures set forth in the Hague Evidence Convention is deemed to be mandatory where judicial assistance is sought in obtaining evidence in another signatory country to the Convention.⁵ The Hague Evidence Convention also appears to be the appropriate vehicle for obtaining pre-trial discovery in England pursuant to English law.⁶ Other countries have specific laws that address obtaining evidence at the request of a foreign country (like Spain).⁷

Nevertheless, in *Société Nationale Industrielle Aérospatiale v. United States District Court*, the United States Supreme Court left it to the U.S. judge to decide whether letters rogatory or Hague Evidence Convention procedures will apply for discovery in Europe in connection with litigation pending before courts in the United States, or whether U.S. civil procedure rules will apply.⁸

The United States Supreme Court concluded that

[T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation . . . [which involves] scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.⁹

This tripartite “comity” analysis must balance a number of

under Chapter I, Article 9(1) of the Hague Evidence Convention provides that “[t]he judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.”

⁵See § 363 para. 1 Zivilprozeßordnung (ZPO) (German Civil Procedure Law) (“In cases in which evidence is to be taken abroad, the presiding judges is to file a request with the responsible public authority, asking it to so take the evidence.”).

⁶See James Drake and David Spears, Obtaining Evidence in England for U.S. Proceedings, N.Y.L.J. Apr. 15, 2014.

⁷The Spanish Ley 29/2015 July 30 (LCJI) generally facilitates obtaining evidence in Spain for use in a foreign proceeding provided that the process used to collect the evidence, including witness testimony, respects the procedural guarantees granted in the Spanish Civil Procedure Code. This means, regarding witness testimony, that foreign counsel will not be allowed to ask questions of a witness because the testimony is given in front of a judge, and, therefore, the questions must be put by local counsel.

⁸*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543–45, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

⁹*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543–44, 107 S. Ct. 2542, 96 L. Ed.

factors, which are set forth in the comments to Section 426 of the Restatement (Fourth) of Foreign Relations Law of the United States:

(1) the importance to the . . . 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.¹⁰

The direct result of the *Aérospatiale* test is that in many, if not most, instances, judges in the United States will refrain from requiring parties to employ Hague Evidence Convention procedures or letters rogatory to obtain discovery in Europe for litigation pending in the United States. Indeed, in *First American Corp. v. Price Waterhouse LLP*, the Second Circuit held that the Hague Evidence Convention is not only “not the exclusive means for obtaining discovery from a foreign entity,” it is not even “necessarily the means of first resort.”¹¹ To European lawyers and courts, this apparently dismissive view of a treaty is, at the very least, perplexing,¹² especially since European civil law countries deem the

2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

¹⁰*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.28, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (quoting a 1986 draft of the Restatement of Foreign Relations Law that is now § 426 Restatement (Fourth) of Foreign Relations Law of the United States); see *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013)), cert. denied, 573 U.S. 954 (2014). The same Section 442 factors are considered in resolving a conflict between discovery demands and European data protection and privacy laws; see § 23:44.

¹¹*First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 21 (2d Cir. 1998) (Hague Evidence Convention “does not really offer a meaningful avenue of discovery” because U.K. had, under Article 23, restricted pre-trial discovery of documents); *Securities and Exchange Commission v. Cole*, 661 Fed. Appx. 52, 54 (2d Cir. 2016) (“[T]he Hague Convention is not the exclusive, or even primary, means for obtaining discovery from foreign litigants.”). See also *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 305, 2004-1 Trade Cas. (CCH) ¶ 74294 (3d Cir. 2004) (rejecting argument that jurisdictional discovery regarding foreign defendants requires “first resort” to Hague Convention procedures).

¹²The U.S. approach to discovery abroad has been a subject of lively

Convention to be binding when it comes to obtaining evidence from a signatory country such as the United States for use in a proceeding in Europe.

European inside counsel sometimes note that a number of signatories to the Hague Evidence Convention have filed objections pursuant to Article 23 to utilizing the Convention's procedures to obtain documents for use in pre-trial discovery in the United States.¹³ European inside counsel sometimes argue that this fact militates against discovery of evidence located in Europe. That argument is rarely persuasive because courts in the United States are not required to utilize the Hague Evidence Convention's procedures for obtaining evidence in Europe, and permit discovery of documents in Europe to proceed under U.S. discovery rules. Moreover, the fact that a European signatory country has filed objections pursuant to Article 23 does not mean that the Convention altogether pre-empts a litigant in the United States from obtaining pre-trial discovery of documents in Europe. Article 23 only addresses formal letters of request for documents.¹⁴ Where evidence is gathered on a voluntary basis or through non-compulsory procedures (*i.e.*, through the use of consuls or commissioners), documentary evidence may be obtained. In any event, an objection under Article 23

debate in the United States and in Europe. See Restatement (Fourth) of Foreign Relations Law of the United States § 442 n.1 (1987 and Supp. 2008); Richard Zöller and Reinhold Geimer, *Zivilprozeßordnung* (29th ed. 2012), § 363 cmt. nos. 53 et seq.; Reinhold Geimer, *Internationales Zivilprozeßrecht* (7th ed. 2015), cmt. nos. 2353–68.

¹³For a list of the contracting states to the Convention that have declared that they will not execute letters of request in aid of pre-trial discovery of documents pursuant to Article 23 of the Convention, see http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=82 (visited Sep. 28, 2019). It appears that of the European signatory states, all but certain Eastern European countries, including Bosnia and Herzegovina, Bulgaria, Latvia, Serbia and Slovenia, have objected to the Article 23 provision on pre-trial discovery of documents. For example, Germany has declared that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents. § 14 para. 1 *Ausführungsgesetz* (*AusfG*) (German Implementing Law on the Hague Evidence Convention), *BGBI.* 1977 I S. 3105.

¹⁴See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 563, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (Blackmun, J., concurring in part and dissenting in part).

does not insulate a European company that is a party to litigation in the United States from pre-trial discovery.

Given the fact that the U.S. courts have not generally been receptive to parties' requests to gather evidence in European countries through the procedures of the Hague Evidence Convention,¹⁵ consideration should be given to alternative methods of taking evidence.¹⁶ One such possibility is to request that the court direct that United States consular officials in Europe take the deposition of a witness located there.¹⁷ The possibility of having consular officials take the deposition exists under Article 15 of the Hague Evidence Convention.¹⁸ In practice, where U.S. discovery rules apply to the deposition, the United States consular officer generally administers the appropriate oath at the United States Embassy and then withdraws, subject to recall. The actual questions are posed by the attorneys. However, United States consular officials in Europe have no authority to compel a witness to appear at a deposition.

European inside counsel will often prefer proceeding under the Convention or letters rogatory and sometimes request that this argument be made to the court in the United States. U.S. counsel should point out that courts in the United States have held that a party claiming that the Convention's procedures should be utilized bears the burden

¹⁵See, e.g., § 23:39; § 23:44; § 23:47.

¹⁶Under the Spanish LCJI, cooperation will be refused in certain cases such as when the government decides not to cooperate with a country's requests due to repeated lack of cooperation from that country (Art. 14).

¹⁷See *Eikenberry v. Celsteel Ltd.*, 2013 WL 5308028, at *4 (S.D. N.Y. 2013) (ordering, pursuant to Fed. R. Civ. P. 26(c), deposition of defendant by U.S. consular officials in London under 22 C.F.R. § 92.1(d), 22 C.F.R. § 92.55). 22 C.F.R. § 92.55 states, in pertinent part, that "[a]ny United States notarizing officer [i.e., consular official] may be requested to take a deposition on notice, or designated to execute a commission to take depositions." See also § 23:46.

¹⁸Article 15 of the Hague Evidence Convention permits diplomatic officers or consular agents to take evidence in the territory of a contracting state, without compulsion, of the nationals that the officer or agent represents. A similar result may be achieved outside the Hague Evidence Convention, under U.S. discovery rules permitting the court to commission a notarizing officer of the United States to take the deposition.

of demonstrating that those procedures will prove to be effective.¹⁹

In an attempt to buttress the argument that evidence should be taken pursuant to the Hague Evidence Convention, U.S. outside counsel should, at the beginning of any litigation, discuss with European inside counsel the need to gather support for the *Aérospatiale* factors favoring the utilization of the Convention's procedures. This includes the decision whether to retain an expert witness to establish that a European country, rather than the United States, has the primary governmental interest in the subject matter of the lawsuit, whether local European laws would be violated if discovery demands were complied with,²⁰ and how the European company would otherwise be disadvantaged if Hague Evidence Convention procedures were not followed.²¹ In particular, evidence that a foreign country has, in fact, imposed a fine or prosecuted its own citizens for seeking to comply with U.S. discovery demands would be a factor sup-

¹⁹See, e.g., *Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997); *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 528–29 (D.N.J. 2009) (Hague Evidence Convention procedures not deemed effective and deposition of Swiss defendant ordered to occur in United States under U.S. discovery rules); *Pinnacle Packaging Company, Inc. v. Constantia Flexibles GmbH*, 2015 WL 9216845, at *10 (N.D. Okla. 2015) (“Although many of the factors considered by the court are not applicable here, before the Court will require plaintiffs to pursue depositions in Germany or Austria, it must be convinced that doing so will likely prove fruitful.”).

²⁰See, e.g., § 23:29; § 23:44; *EFG Bank AG v. AXA Equitable Life Insurance Company*, 2018 WL 1918627, at *3 n.3 (S.D. N.Y. 2018) (no conflict with Swiss law); *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998) (no conflict between U.K. confidentiality laws and U.S. discovery); *Volkswagen, A.G. v. Valdez*, 909 S.W.2d 900 (Tex. 1995) (German privacy laws prohibit production of company phone book). In extreme situations, consideration may even have to be given to resorting to European courts in an attempt to avoid violating local law by complying with discovery requests from the U.S. See *Restatement (Fourth) of Foreign Relations Law of the United States*, § 426 n.5 (2018).

²¹*Merck Sharp & Dohme Corp. v. Sandoz, Inc.*, 2013 WL 12203112, at *2 (D.N.J. 2013) (“[T]he party seeking application of the Hague Convention bears the burden of persuading the trial court of its necessity.”); *In re Chiquita Brands International, Inc.*, 2015 WL 12601043, at *7 (S.D. Fla. 2015) (same).

porting the use of the Hague Evidence Convention's procedures.²²

If evidence is sought in Europe by a letter of request pursuant to Chapter I of the Hague Evidence Convention, the judicial authority of the state executing the letter of request will apply its own procedures and methods for obtaining the evidence.²³ However, the Convention allows a letter of request to propose that evidence be taken pursuant to other procedures as long as they are not incompatible with the internal law of the state of execution.²⁴ Although it is unlikely that the judicial authority of the executing state would agree to obtain evidence in accordance with U.S. discovery practice, a letter of request could successfully propose that certain elements of such practice be utilized, such as having the hearing conducted in English, allow the attorneys from the United States to be present at the proceeding, directly examining and cross-examining the witness and submitting evidence at a hearing.²⁵ The letter of

²²See § 23:29; § 29:44; Daniel S. Alterbaum, Christopher X and Cnil: A Clarion Call to Revitalize the Hague Conventions, 38 Yale J. Int'l L. 217 (2013) (discussing decision of In re Christopher X, Cour de Cassation, Chambre Criminelle [supreme court for judicial matters] Paris, Appeal No. 0783228m Dec. 12, 2007, imposing 10,000 Euro fine under French blocking statute on French lawyer for assisting with U.S. discovery in France). In re Air Cargo Shipping Services Antitrust Litigation, 278 F.R.D. 51, 2010-1 Trade Cas. (CCH) ¶ 76951 (E.D. N.Y. 2010), the court distinguished the French decision mentioned above, noting that in that case, the French attorney was prosecuted in France because he sought to obtain testimonial evidence for a case pending in a California court by making false statements to a potential witness in France. The case did not involve discovery responsive to requests made by the parties in the California proceeding or ordered by the court there. Accordingly, the court rejected the defendant's argument that the risk of criminal prosecution in France pursuant to the French blocking statute precluded it from complying with the plaintiffs' discovery requests.

²³Article 9(1) Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note).

²⁴*Id.*; see also *Accent Delight International Ltd. v. Sotheby's*, 2020 WL 64898, at *3-4 (S.D. N.Y. 2020) (letter of request including "Special Methods or Procedures to be Followed"); In re Urethane Antitrust Litigation, 267 F.R.D. 361 (D. Kan. 2010) (discussing instructions that may be included in letter of request).

²⁵For example, German law specifically provides that the judge may

request may contain additional instructions, such as identifying potential privileges available to a witness.²⁶

Since thirty-six European countries are signatories to the Hague Evidence Convention,²⁷ where evidence is taken under the rules of the executing state, there can be considerable variation as to rules governing the proceedings under which evidence is taken. At least in European civil law countries, these rules are markedly different from the rules governing depositions or trial testimony in the United States.²⁸ For example, in most civil law countries in Europe, when a witness is compelled to testify under the Hague Evidence Convention procedures, a judge must pose the questions to the witness in a formal court proceeding.²⁹ As mentioned above, a letter of request may ask that attorneys from the United States be present at that proceeding and that they be permitted to directly question the witness or pose additional questions through the civil law judge.³⁰ The judge then summarizes the witness's testimony. A verbatim transcript of the testimony is usually not prepared, unless the parties

permit the parties, and must permit their attorneys, to present questions to a witness before the court. § 397 para. 2 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). A cross-examination of the witness may also be requested. Richard Zöller and Reinhold Geimer, *Zivilprozeßordnung* (29th ed. 2012), § 363 cmt. nos. 125–26.

²⁶See *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F. Supp. 2d 450, 454 (D. Del. 2010) (noting that letter of request may include instructions as to applicable privilege under United States law); see generally §§ 23:21 to 23:26; § 23:28.

²⁷See status table for Hague Evidence Convention, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (visited Sep. 28, 2019).

²⁸With respect to the differences between United States and continental European civil law systems regarding taking testimonial evidence, such as depositions, see generally § 23:3; §§ 23:46 to 23:48; § 23:53; § 23:57.

²⁹See, e.g., §§ 139, 395, 396 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 834 (1985). German law permits courts to compel the appearance of a witness; failure to appear can result in the imposition of a fine or detention, up to a maximum of six months. §§ 380; 390; 802j; 890 ZPO.

³⁰Article 9(2) Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note).

specifically request it.³¹ If a verbatim transcript of the testimony is required, that should specifically be stated in the letter of request.

Witnesses providing testimony pursuant to Hague Evidence Convention procedures, have relatively generous privilege objections. A witness has the right to refuse to give evidence to the extent it is protected by a privilege under either the law of the state of execution (the European state in which the witness resides) or the state of origin (the state in which the United States action is pending).³² The letter of request can also set forth the specific privileges that a witness may invoke during his testimony.

An alternative procedure available for the taking of depositions in Europe is the use of a commissioner under Article 17 of the Hague Evidence Convention.³³ Article 17 of the Convention permits a foreign (U.S.) judge to seek the appointment of a commissioner through the appropriate central authority of a contracting state. Once authorized by the foreign judicial authorities, the commissioner may administer oaths, take witnesses' testimony, present questions, and prepare transcripts, among other things.³⁴ A commissioner need not necessarily follow local procedural rules, since the commissioner is not a judicial authority within the meaning of Article 9(1) of the Hague Evidence Convention. Indeed, the Convention expressly authorizes a commissioner to take

³¹See, e.g., § 160 para. 3 no. 4 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). In Germany, a verbatim transcript of the witness's testimony may be requested but, in practice, is rarely prepared. Richard Zöller and Reinhold Geimer, *Zivilprozeßordnung* (29th ed. 2012), § 363 cmt. no. 126.

³²Article 11 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note); see *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F. Supp. 2d 450 (D. Del. 2010). With respect to privileges applying to testimony taken of European company's former employees and other nonparty witnesses, see §§ 23:47 to 23:48.

³³Taking evidence through a duly appointed commissioner, pursuant to Chapter II of the Hague Evidence Convention, generally permits more flexibility than proceeding through a letter of request to the judicial authorities of a contracting state, as provided by Chapter I of the Convention.

³⁴Art. 21(a), (d) Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note).

evidence in the manner provided by the law applicable to the court where the action is pending—*e.g.*, U.S. law—as long as it is not forbidden by the law of the contracting state where the evidence is taken.³⁵ A commissioner may not compel a witness to appear for a deposition. However, a commissioner may indirectly compel the witness to appear by applying for assistance to the competent authorities of the executing state. The competent authorities may request the local court having jurisdiction over a witness to direct the witness to appear before the commissioner.³⁶ Thus, only the local courts in the signatory country have the power to compel a witness to appear before a commissioner.

While the United States judge may seek the appointment of an American attorney to serve as a commissioner, it may be preferable for U.S. outside counsel to recommend to the court the appointment of a local European attorney, fluent in the foreign language and familiar with local customs. Such a candidate may also be a more attractive choice to the appointing authority. Since a commissioner has no authority to directly compel a witness to appear for a deposition, the success of a commissioner's efforts will depend largely on the voluntary participation of the parties and their witnesses. If the procedure of taking evidence through a commissioner is to be followed, European inside counsel should take the initiative in urging the appointment of a European as commissioner and assuring that potential witnesses are willing to testify before such a commissioner.

§ 23:42 Discovery—Document production

U.S. style discovery of an adversary's documents is a procedural tool that is generally unknown in European civil law countries.¹ Such discovery appears to many European clients to be unnecessarily vexatious. At an early stage in

³⁵Art. 21(a), (d) Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note).

³⁶Article 18(1) Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note).

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¹To a limited extent, discovery may also occur in litigation in European civil law countries, *see generally* § 23:3; § 23:40; § 23:53.

the representation of European clients, U.S. counsel must therefore explain the significance of document discovery. In simple terms, the basic framework of such discovery may be outlined as follows. U.S. discovery rules require the initial disclosure of certain documents that may be used to support a party's claims or defenses without awaiting a discovery request.² In addition, any party to a lawsuit may serve on any other party, without court assistance, a request that documents be made available for inspection and copying.³ The party receiving the document request usually has 30 days to comply with the request and/or to state valid objections.⁴ If the documents are not produced or not fully produced, the requesting party has the right to file a motion with the court seeking an order compelling the adverse party to comply fully with the original request.⁵

The number of documents implicated by discovery is often surprising to European company clients and their inside counsel not familiar with the U.S. legal system. Especially in large, complex commercial cases, document discovery may result in the production of millions of documents, including electronic documents.⁶ To further complicate matters, by complying with discovery demands in the United States litigation, the European company may run the risk of violating its home country's data protection and secrecy laws and even subject itself to civil and criminal penalties.⁷

Document discovery demands may also impact companies other than the parties to the litigation in the United States, such as parent or sister companies in Europe which are not parties to the litigation in the United States. For example, documents maintained by a European parent company or affiliate in Europe may have to be produced in litigation in the United States in which its subsidiary, but not the foreign parent company, is a party, since some courts in the United States have undertaken an expansive interpretation of the

²Fed. R. Civ. P. 26(a)(1). See Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.).

³See, e.g., Fed. R. Civ. P. 34(a)(1)(A) to (B).

⁴See, e.g., Fed. R. Civ. P. 34(b)(2)(A).

⁵See, e.g., Fed. R. Civ. P. 37(a).

⁶See § 23:29; § 23:43.

⁷See § 23:29; § 23:44. See generally Chapter 82 "Privacy and Security" (§§ 82:1 et seq.).

“responding party’s possession, custody, or control” of documents under Fed. R. Civ. P. 34(a)(1).⁸ However, in order for the requesting party to prevail in its document demands, the courts generally require the presence of something more than simply a parent-subsidiary relationship, such as an alter ego relationship or the subsidiary acting as the agent of the parent, the fact that the subsidiary is able to obtain the documents in the ordinary course of business or some special factors relating to the use of the documents.⁹ In brief, courts generally will require a company to produce documents in the possession of a parent or sister company where it has the legal right or practical ability to obtain the requested documents.¹⁰

⁸See *St. Jude Medical S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 639, 91 Fed. R. Serv. 3d 422 (D. Or. 2015) (holding that U.S. company served with a third party subpoena had to search for responsive documents and electronically stored information held by legally distinct but affiliated European entities); *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127 (D. Del. 1986) (ordering defendant U.S. corporation to produce documents held by nonparty parent corporation located in Germany).

⁹See *Gerling Intern. Ins. Co. v. C.I.R.*, 839 F.2d 131, 140-142, 88-1 U.S. Tax Cas. (CCH) P 9158, 61 A.F.T.R.2d 88-553 (3d Cir. 1988); *In re Novartis and Par Antitrust Litigation*, 2019 WL 5722055, at *6-8 (E.D. Pa. 2019) (finding that nonparty U.S. subsidiary, “a subsidiary two levels removed from its parent company, does not meet the definition of control” requiring it to produce documents in possession of Indian parent); *Robert Bosch LLC v. Albere Products, Inc.*, 2017 WL 376270, at *3 (D. Del. 2017) (finding that U.S. subsidiary was required to produce documents held by German parent where U.S. subsidiary had obtained documents from parent that were helpful to subsidiary in litigation); *Coventry Capital US LLC v. EEA Life Settlements Inc.*, 333 F.R.D. 60, 105 Fed. R. Serv. 3d 75 (S.D. N.Y. 2019), on reconsideration in part, 2020 WL 638524 (S.D. N.Y. 2020) (defendants required to produce documents in possession of third party fund manager where management agreement granted defendant corporation the right to obtain documents in fund managers control and where individual defendants could obtain the documents in the ordinary course of business).

¹⁰See *Coventry Capital US LLC v. EEA Life Settlements Inc.*, 333 F.R.D. 60, 105 Fed. R. Serv. 3d 75 (S.D. N.Y. 2019), on reconsideration in part, 2020 WL 638524 (S.D. N.Y. 2020) (“[D]ocuments 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 nonparty to the action.”); see also *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); *but cf.* *In re Application of Potanina*, 2015 WL 4476612, at *1 (S.D. N.Y. 2015) (noting that there is a “possibility that a party could have a legal entitlement but

A frequent source of consternation for European company clients is that document discovery demands in litigation in the United States frequently fall outside the procedures set forth in the Hague Evidence Convention.¹¹ U.S. counsel should advise European clients and their inside counsel that in the United States, courts are not required to follow the Convention's protocols but, rather, may follow U.S. discovery rules. Similar objections may be made by European inside counsel that the documents sought in discovery are protected under European secrecy or data protection laws.¹² U.S. outside counsel must, in any event, carefully develop, in consultation with the inside legal team, a complete list of all valid grounds for objecting to the production of the documents demanded.

§ 23:43 Discovery—Document production—Discovery of electronically stored information in Europe

Litigation in the United States often involves the discovery of substantial amounts of electronically stored information (ESI).¹ At the outset, U.S. outside counsel should make clear to European inside counsel that documents, including ESI, are not exempted from discovery simply because they are located in Europe or because they may be protected by European data protection or secrecy laws, a fact that may not be self-evident to European inside counsel and company management.² Also, in keeping with the broad scope of discovery, the types of potentially discoverable information nonetheless lack the practical ability to exercise that right”).

¹¹Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note and *available at* the Hague Conference on Private International Law's website, http://www.hcch.net/index_en.php?act=text.display&tid=1 (visited Sep. 28, 2019)), *See generally* § 23:41.

¹²*See* § 23:29; § 23:44.

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¹*See* Fed. R. Civ. P. 26(a)(1)(A)(ii) and 34(a)(1)(A). With respect to the discovery of electronic records, *see generally* Chapter 81 “Electronic Discovery” (§§ 81:1 et seq.).

²*See, e.g.,* *Reino de Espana v. American Bureau of Shipping, Inc.*, 2008 WL 3851957 (S.D. N.Y. 2008) (discovery of electronic records in Spain); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 69 Fed. R.

may be numerous and they may be scattered over many media.

An especially important topic for U.S. counsel to discuss with European inside counsel is the necessity of preserving relevant electronic records in a timely manner.³ Apart from possibly not being familiar with a litigation hold, European inside counsel may not be aware of when the duty to preserve relevant documents arises. U.S. counsel should point out that courts in the United States have held that the preservation obligation may arise when a claim may reasonably be expected to lead to litigation, *i.e.*, even before a lawsuit has been commenced.⁴ It is important to emphasize to European inside counsel that the duty to preserve documents embraces electronically stored information in all of its forms, including the various media mentioned above. Where possible, U.S. counsel should set up direct lines of communication with such staff.

It is also important for U.S. counsel to discuss with European inside counsel the procedural risks arising from the spoliation of relevant records and that the United States courts have imposed sanctions for the spoliation of evidence. United States federal courts may impose sanctions where a party should have preserved electronically stored information but “failed to take reasonable steps to preserve it” and

Serv. 3d 173 (C.D. Cal. 2007) (granting discovery demand seeking preservation of information contained on server in the Netherlands); Philips v. Ford Motor Company, 2016 WL 8505624 (N.D. Cal. 2016) (requiring production of documents held by defendant’s German affiliate after finding that the documents were not protected from disclosure by German privacy law); *see generally* § 23:29; § 23:44.

³*See* Hon. Shira A. Scheindlin and Jonathan M. Redgrave, Chapter 26, “Discovery of Electronically Stored Information,” in Haig, *Business and Commercial Litigation in Federal Courts* §§ 25:1 et seq. (4th ed. 2016) (discussing duty to preserve ESI and discussing spoliation issues). *See also* §§ 23:19 to 23:20; Chapter 81 “Electronic Discovery” (§§ 81:1 et seq.).

⁴*See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D. N.Y. 2003) (“The scope of a party’s preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”); Lokai Holdings LLC v. Twin Tiger USA LLC, 2018 WL 1512055, at *9 (S.D. N.Y. 2018) (finding that duty to preserve evidence arose before litigation commenced upon receipt of cease and desist letter); *see also* VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep’t 2012).

the court finds either that the loss of such evidence prejudiced the other party,⁵ or that the party responsible for preserving the evidence “acted with intent to deprive another party of the information’s use in litigation.”⁶ Such sanctions rulings are always fact specific. If the court finds that another party was prejudiced by the spoliation of evidence, a court can only order measures “necessary to cure the prejudice.”⁷ On the other hand, if the court finds that a party intentionally failed to preserve evidence to deprive the other party of it, then a court can order an adverse inference instruction to a jury, the imposition of costs and even dismiss the action itself or enter a default judgment.⁸ European inside counsel must agree on internal protocols for conducting a search within the company (or, if appropriate, a group of companies) for responsive documents and preventing the destruction of potentially relevant documents.

European inside counsel not familiar with litigation in the United States occasionally point out to U.S. counsel that the electronic records sought to be preserved fall outside the scope of documents that may be discovered under the Hague Evidence Convention or are protected by European secrecy and data protection laws.⁹ U.S. counsel should explain that while such issues may legitimately be raised later in the litigation, for example, in the context of a motion for a protective order or a summary judgment motion, they may, ultimately, not be successful.¹⁰ While such objections should certainly be addressed,¹¹ the preservation objective at the beginning of the litigation has a more limited focus, namely, to preserve the status quo with respect to relevant documents and to make certain that the company will not run afoul of its preservation obligations or be subject to sanctions in the United States litigation.

⁵Fed. R. Civ. P. 37(e)(1).

⁶Fed. R. Civ. P. 37(e)(2).

⁷Fed. R. Civ. P. 37(e)(1).

⁸Fed. R. Civ. P. 37(e)(2).

⁹See § 23:29; § 23:44.

¹⁰See § 23:41; § 23:44.

¹¹See § 23:42.

§ 23:44 Discovery—Document production—Resolving conflicts with European data protection and privacy laws

Discovery demands in litigation in the United States may seek the production of documents that are protected by European privacy and data protection laws.¹ Complying with such demands may place the European company in the untenable position of choosing between being sanctioned by the court in the United States for failing to comply with discovery demands or complying with such demands and violating European privacy and data protection laws with possible civil and criminal penalties.²

The courts in the United States have long been cognizant of the hardship faced by parties for whom compliance with a discovery order by a United States court would violate foreign law.³ Notwithstanding such hardship, the United States Supreme Court has held that the operation of foreign law “do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that [law].”⁴ A United States court may “impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party’ notwithstanding provisions of

[Section 23:44]

¹See § 23:29; §§ 23:41 to 23:42; see also Chapter 82 “Privacy and Security” (§§ 82:1 et seq.) for a discussion of international privacy laws and regimes and European data protection standards.

²See generally Brimsted, *Privacy Challenges in Obtaining Discovery from Europe*, 40 *Global Litigator* 63 (2014).

³See *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) (“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.”).

⁴*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.29, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (citing *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 204–06, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) (internal quotation marks omitted)).

foreign law that would prohibit production.”⁵ In resolving the conflict between U.S. discovery demands and the protections under foreign law, the courts possess “wide discretion to proceed” in whatever manner they deem most effective.⁶ In exercising that discretion, the United States Supreme Court has instructed the courts to undertake a “particularized analysis,”⁷ and weigh a number of factors, which are now set forth in Section 426 of the Restatement (Fourth) of Foreign Relations Law of the United States.⁸ Essentially, a court must undertake a comity analysis and balance the respective interests of the foreign nation and the requesting nation.⁹

Section 426 of the Restatement (Fourth) of Foreign Relations Law of the United States identifies the salient factors in that a court should consider in such a comity analysis, including: (1) the importance of the documents or information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of retrieving 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 the important interests of the state where

⁵*Vringo, Inc. v. ZTE Corp.*, 2015 WL 2380061, at *3 (S.D. N.Y. 2015) (quoting *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 198 (S.D. N.Y. 2013)) (“[T]he Supreme Court has made clear that ‘it is well settled that [foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.’”).

⁶*Linde v. Arab Bank, PLC*, 706 F.3d 92, 109–10, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013); see also *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346, 364 (S.D. N.Y. 2018) (affirming order granting motion to compel production of documents from Chinese banks, notwithstanding that such discovery violated Chinese bank secrecy laws).

⁷*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987); see also *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 96, 87 Fed. R. Serv. 3d 1579 (S.D. N.Y. 2014).

⁸*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.28, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987); *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346, 364 (S.D. N.Y. 2018).

⁹See *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346 (S.D. N.Y. 2018).

the information is located.¹⁰ In addition, courts have weighed the hardship that compliance with the court's order to produce documents in contravention of foreign law would impose upon a party and whether that party has demonstrated good faith in its discovery obligations.¹¹

Parties claiming that compliance with a discovery demand would violate foreign bank secrecy laws have had limited success in avoiding compliance with discovery requests or orders, particularly where the cases involved United States criminal laws or laws combating terrorism.¹² Where the courts have decided not to order such discovery of documents protected by foreign bank secrecy laws, they have undertaken a fact-specific analysis identifying mitigating factors such as comity considerations, well-documented arguments that production would violate foreign data protection laws or the fact that the documents were otherwise available to the litigants in the United States litigation.¹³

¹⁰Restatement (Fourth) of Foreign Relations Law of the United States § 426 cmt. a; *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109-10, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013); see § 23:41.

¹¹*In re Sealed Case*, 932 F.3d 915, 932 (D.C. Cir. 2019); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 110, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013); *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346, 364, 368 (S.D. N.Y. 2018).

¹²*See, e.g.*, *Linde v. Arab Bank, PLC*, 706 F.3d 92, 84 Fed. R. Serv. 3d 961 (2d Cir. 2013) (upholding discovery order because U.S. interest in combating terrorism outweighed Lebanese and Jordanian bank secrecy laws); see also *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346, 364 (S.D. N.Y. 2018) (affirming order compelling discovery of Chinese bank records where magistrate found that U.S. interest in enforcing intellectual property law outweighed Chinese interest in enforcing banks secrecy laws); *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409, 422-25, Comm. Fut. L. Rep. (CCH) P 33741 (S.D. N.Y. 2016) (finding that U.S. interest in enforcing commodities fraud laws and applying its own discovery rules outweighed British interest in enforcing U.K. bank privacy laws).

¹³*See Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734, 757-59 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017) (denying motion to compel subpoena on nonparty banks where court found that documents requests were overbroad as to where the requested documents could be found, the requested documents did not originate in the United States, there were alternative means for plaintiffs to obtain requested documents, and nonparty banks had shown that compliance with the subpoena could subject them to civil and criminal penalties under foreign bank secrecy and data privacy laws); *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D. N.Y. 2011), order *aff'd*, 2011 WL 11562419 (S.D. N.Y. 2011) (comity analysis led to result that third party records subject to Chinese banking

At an early stage of the litigation, U.S. inside counsel should develop a strategy with European inside counsel for solving the dilemma that foreign secrecy and data protection laws present to litigants in the United States. Such a strategy should address the following issues.

- Outside counsel should identify categories of documents and information that opposing counsel in the United States litigation will likely request, for example, bank records, transcripts or notes of board meetings, employee e-mails and employer personnel files, among others.
- European inside counsel should identify with particularity the legal protections under European Union and national law that may be implicated by the discovery requests, the legal requirements that must be met in order to lawfully transmit such information to the litigants in the United States and which document requests violate such laws. For example, in order to comply with European data protection laws, it may be necessary to obtain an employee's consent before an employee's e-mails are produced in response to a discovery demand in the United States.¹⁴
- U.S. counsel and European inside counsel should document instances in which violations of the European secrecy or data protection laws have, in fact led to civil fines or even criminal prosecutions in the relevant European country.¹⁵
- In cases where an irreconcilable conflict between the

laws need not be produced under subpoena duces tecum); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 529, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) (denying motion to compel because "[m]ost important among the [] countervailing [factors at stake] . . . is the reduced degree of importance of the requested discovery in light of the waivers of bank secrecy already executed by . . . key players [in the case]").

¹⁴See, e.g., European Court of Human Rights, *Barbulescu v. Romania*, 61496/08, September 5, 2017 held that the monitoring of an employee's e-mail account is an unjustified interference in his private life and, therefore, is a violation of his right to respect for private life and correspondence. Following that decision, the Spanish Supreme Court protected an employee's e-mail communications under his privacy and intimacy rights and under the secret of communications right (Sentencia del Tribunal Supremo 8 febrero 2018). See generally § 23:29.

¹⁵See *In re Christopher X*, Cour de Cassation, Chambre Criminelle [supreme court for judicial matters] Paris, Appeal No. 0783228m Dec. 12,

discovery demands in the United States litigation and European data protection laws is anticipated or, in fact, arises, European inside counsel will want to address this issue with the appropriate European regulatory authorities, for example, state banking regulators or data protection ombudsmen, and seek guidance with respect to responding to the discovery requests. However, the mere fact that authorization has been sought from regulatory authorities may not be deemed sufficient to comply with discovery requests in litigation in the United States.¹⁶

- In cases where the discovery demands create an irreconcilable conflict for the European company, consideration should also be given to seeking a declaratory judgment from a European court having jurisdiction over the parties on the legality of the specific discovery requests under European data protection laws.
- Where responding to a discovery demand would require the European company to break the laws of its home country, consideration should also be given to requesting the federal government of the company's place of

2007 (imposing 10,000 Euro fine under French statute on French lawyer for assisting with U.S. discovery in France), discussed in Daniel S. Alterbaum, Christopher X and Cnil: A Clarion Call to Revitalize the Hague Conventions, 38 Yale J. Int'l L. 217 (2013). See also *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409, 425, Comm. Fut. L. Rep. (CCH) P 33741 (S.D. N.Y. 2016) ("Notably, however, the Moving Defendants are unable to cite a single instance in which a UK enforcement action was taken against an entity for violating the DPA by complying with discovery demands in the United States; nor have they provided an instance where a UK financial institution was found liable for damages for producing otherwise confidential customer information pursuant to an order by a United States court."). See generally § 23:41.

¹⁶See *In re Marc Rich & Co., A.G.*, 736 F.2d 864, 866-67 (2d Cir. 1984) (finding contemnor "barred from relying on Swiss law or orders of the Swiss Government as an excuse for its noncompliance with the subpoena"); see also *NIKE, Inc. v. Wu*, 349 F. Supp. 3d 346, 364 (S.D. N.Y. 2018) (holding that magistrate judge did not need to give weight to letter from Chinese Ministry of Justice that stated that production of documents pursuant to U.S. discovery would violate Chinese bank secrecy laws); *Vringo, Inc. v. ZTE Corp.*, 2015 WL 2380061, at *3 (S.D. N.Y. 2015) (finding that e-mail from Chinese regulator claiming that disclosure of information in defendant's possession would violate Chinese law was "ambiguous, of unproven binding authority, and arguably evidence of bad faith" where defendant only sought guidance from regulator after it had already refused to production of requested information).

business to file an *amicus curiae* brief in the proceeding in the United States in support of the European company's position.¹⁷

● Finally, in order to provide cover to the European company in responding to the discovery demands, the company should consider requesting that the United States court seek judicial assistance, either by Letter of Request pursuant to the Hague Evidence Convention or by letters rogatory, from the appropriate European authorities or agencies seeking authorization for the European company to comply with the discovery demand.¹⁸

The practical challenges for United States counsel in implementing such a strategy should not be underestimated. The discovery demands that contravene European secrecy and data protection laws cannot successfully be opposed by a broad or general claim that a request for production of documents from the European company "would violate privacy laws" or is contrary to the privacy rights in the European country's constitution. It is necessary to carefully specify the provisions of the foreign data protection law that are implicated and document the potential violations of foreign law through expert affidavits and statements from European regulatory authorities.

Complicating matters is the fact that some courts in the United States characterize European bank secrecy laws and data protection laws as "blocking statutes."¹⁹ In contrast to certain laws specifically enacted to thwart United States

¹⁷See, e.g., *S.E.C. v. Stanford Intern. Bank, Ltd.*, 776 F. Supp. 2d 323, 336 (N.D. Tex. 2011) (discussing Swiss *amicus curiae* brief in international discovery dispute involving Swiss bank secrecy laws); see also *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2011-1 Trade Cas. (CCH) ¶ 77519, 2010 WL 3420517 (E.D. N.Y. 2010) (submission by European Commission opposing plaintiff's motion to compel production of documents on ground that they are confidential under European law).

¹⁸See *Linde v. Arab Bank, PLC*, 2008 WL 3154755 (E.D. N.Y. 2008) (granting defendant's request that court endorse letter of request to authorities in France and Germany under Hague Evidence Convention seeking disclosure authorization to enable defendant to produce bank records protected by bank secrecy laws).

¹⁹See, e.g., *Connex Railroad LLC v. AXA Corporate Solutions Assurance*, 2017 WL 3433542, at *5 (C.D. Cal. 2017) ("The mere existence of a

pre-trial discovery,²⁰ European privacy and data protection laws were not enacted to “block” or frustrate discovery requests of litigants in the United States but, rather, were enacted to address policy considerations and, in some cases, national constitutional mandates, protecting individual privacy rights.²¹

In essence, the strategy of United States counsel seeking to oppose discovery requests violating European data protection and privacy laws should be to emphasize that the issues addressed by the discovery demand go beyond a simple discovery dispute, implicate international comity and present the European company with a Hobson’s choice.

§ 23:45 Discovery—Interrogatories

While interrogatories as a discovery device should not present the same degree of intrusiveness to the European sensibility and experience that U.S. pre-trial document requests usually do,¹ they are likely to generate problems along the lines previously discussed with respect to declarations.² In practice, in litigation in the United States, interrogatory answers, though almost always drafted by lawyers, are signed by the client under oath.

blocking statute does not preclude an American court from ordering discovery from a foreign litigant.”).

²⁰See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 526, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (discussing French Penal Code Law No. 83-538 of July 1980); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 524, 8 Fed. R. Serv. 3d 1121 (S.D. N.Y. 1987) (distinguishing bank secrecy laws from ordinary blocking statutes and noting that latter are “foreign anti-disclosure laws whose purposes courts have determined do not warrant deference”).

²¹See § 23:29; see also Chapter 82 “Privacy and Security” (§§ 82:1 et seq.) for a discussion of international privacy laws and regimes and European union data protection standards.

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¹Interrogatories are not unique to discovery rules in the United States. German civil procedure rules, for example, permit the judge to request that a witness submit answers to written questions—in effect, a form of interrogatories. § 377 para. 3 *Zivilprozeßordnung* (ZPO) (German Code of Civil Procedure). See generally § 23:3.

²See § 23:35.

§ 23:46 Discovery—Depositions

Without doubt, of all discovery devices, depositions—witness testimony taken before trial—generate the greatest problems for both U.S. outside and European inside counsel. Depositions of a European company's executives, managing agents and employees present particular problems and are discussed in the following sections.¹ As a threshold matter, U.S. counsel and European inside counsel should discuss the stark differences existing between the legal systems of the United States and continental Europe with respect to how testimonial evidence is taken.² Some of these differences are briefly outlined below in this section.

In the United States, a party to a lawsuit may be deposed upon notice by another party and the deponent's attendance may be compelled by subpoena.³ The deposition is usually conducted outside the court room, typically in a law firm office, the witness testifies under oath, is directly questioned by the parties' attorneys, usually without any involvement of the judge, and a verbatim transcript of the testimony is prepared by a court reporter. In the United States, a party may testify as a witness. A corporate deponent may be required to designate the persons who will testify on its behalf.⁴ Courts in the United States do not view the Hague Evidence Convention to be mandatory when it comes to taking testimony of witnesses located abroad and have often ordered foreign witnesses to testify at a deposition in the United States or in another country and required that the deposition be governed by U.S. discovery rules.⁵

In most European civil law countries, parties to litigation

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¹See §§ 23:47 to 23:48.

²With respect to the differences between the procedural systems of the United States and Germany, see Tobias Kraetschmar and Phillip Wagner, Responding to Differing Procedural Concepts in U.S.-German Cross-Border Disputes, 23 SPG Int'l L. Practicum 32 (2010). With respect to differences between the United States legal system and the civil law legal system, see generally § 23:3; § 23:53.

³See Fed. R. Civ. P. 30(a)(1); 45. See Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.) for a discussion of depositions.

⁴See Fed. R. Civ. P. 30(b)(6).

⁵See § 23:41. See, e.g., *Eikenberry v. Celsteel Ltd.*, 2013 WL 5308028, at *4 (S.D. N.Y. 2013) (holding that Hague Evidence Convention not the

are also free to identify witnesses and request that their testimony be taken.⁶ However, it is the court that, ultimately, decides which witnesses must testify and on which topics, setting these items forth in a formal hearing notice.⁷ It is the court, and not a party, that orders a witness to testify and questions the witness at a hearing, practically always a formal court proceeding. The court may, but typically does not, require a witness to testify under oath.⁸ While parties and their attorneys may also question the witness in this proceeding, such questioning usually occurs after the judge's examination of the witness. Lengthy U.S.-style direct and cross-examinations, with objections by the attorneys, are typically not permitted. A witness's testimony is usually not recorded in a verbatim transcript but, rather, is summarized by the judge and read into the record.

In most European civil law countries, a clearer distinction is drawn between parties and witnesses than is made in the United States.⁹ For example, a court in a civil law country may compel a witness over whom it has jurisdiction to appear and testify in a court proceeding, but a party may not be compelled to testify as a witness.¹⁰

Courts in the United States and Europe also have diverse means for obtaining discovery from a foreign entity and ordering deposition of defendant by consular officials in London pursuant to Fed. R. Civ. P. 26(c), 22 C.F.R. § 92.1(d), 22 C.F.R. § 92.55; latter provision states, in pertinent part: "Any United States notarizing officer may be requested to take a deposition on notice, or designated to execute a commission to take depositions.")

⁶See, e.g., § 373 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure).

⁷See, e.g., §§ 358; 373 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure).

⁸See § 391 Zivilprozeßordnung ("ZPO") (German Code of Civil Procedure).

⁹For example, German civil procedure rules distinguish between the parties to the litigation (§§ 50-127 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure)) and witnesses (§§ 373-401 ZPO). This distinction between parties and witnesses is generally more clearly defined in civil law procedural systems than in the United States. See Reinhold Geimer, *Internationales Zivilprozeßrecht* (7th ed. 2015), cmt. no. 2324; Richard Zöllner and Reinhold Geimer, *Zivilprozeßordnung* (29th ed. 2012), § 363 cmt. no. 164.

¹⁰See §§ 445; 448 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). In Spain, if a party does not appear in court to be examined,

employees.¹ Some of the key concerns for European companies include identifying the appropriate persons to serve as deponents, whether they must testify in the litigation, where the depositions will occur and whether they will be governed by U.S. discovery rules or the procedures set forth in the Hague Evidence Convention or other rules.² In large part, these concerns stem from the differences that exist between the United States and continental Europe with respect to how testimonial evidence is taken.³

The reality is that where a foreign company is a litigant in a lawsuit in the United States, courts here have often ordered that depositions of the company's officers, directors, managing agents and employees be governed by U.S. discovery rules.⁴ Since U.S. discovery rules will likely apply in litigation in the United States, U.S. counsel should discuss with European inside counsel some basic rules governing depositions.⁵ In litigation in United States federal courts, only a party to the litigation may be compelled to give testimony pursuant to a notice of deposition from another party.⁶ Where a corporation is a party to the litigation, a party seeking discovery from the corporation has two options. It may notice the deposition of the corporation pursuant to Fed. R. Civ. P. 30(b)(6). Alternatively, a party seeking

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¹With respect to depositions of a company's former employees and similar persons, see § 23. See generally Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.) for additional discussion of depositions, including "apex" depositions of corporate senior management.

²Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). See § 23:41; §§ 23:47 to 23:48.

³See § 23:46.

⁴See *Trusz v. UBS Realty Investors LLC*, 2011 WL 577331 (D. Conn. 2011) (ordering general counsel and chief risk officer of Swiss bank, residing in Switzerland, to be deposed in New York or Connecticut); see also *Peerless Industries, Inc. v. Crimson AV, LLC*, 2013 WL 85378, at 2 (N.D. Ill. 2013), *aff'd*, 2013 WL 1195829 (N.D. Ill. 2013) (ordering managing agent of defendant, a Chinese national, to be deposed in Illinois).

⁵See Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.).

⁶*Calderon v. Experian Information Solutions, Inc.*, 290 F.R.D. 508, 516 (D. Idaho 2013); *Schindler Elevator Corp. v. Otis Elevator Co.*, 2007 WL 1771509, at 2 (S.D. N.Y. 2007).

discovery of a corporation may identify a specific officer, director or managing agent of the corporation and notice that person's deposition pursuant to Fed. R. Civ. P. 30(b)(1). The same rules apply where the witness is located abroad. "Foreign nationals who qualify as managing agents of a party may be subject to deposition pursuant to notice. However, if the witness sought to be deposed is not an officer, director, or managing agent of a corporate opponent, the procedures of the Hague Convention or other applicable treaty must be utilized."⁷

Although no definitive line of cases in the United States has emerged setting forth exactly when a court in the United States may compel a European company's officers, managing agents and employees residing in Europe to appear at a pre-trial deposition or to provide testimony at trial in the United States, two general trends are discernable. Although the general rule is that depositions of a company's officers, directors or managing agents should be taken at the corporation's principal place of business,⁸ courts in the United States have nevertheless ordered that individuals who exercise managerial responsibilities or are positioned high in the corporate hierarchy of a European company, such as the company's officers, directors or managing agents, be deposed in the United States. Courts have considerable discretion in requiring that depositions be taken at a location other than the company's headquarters.⁹

When a European witness is not an officer, director or

⁷*Calderon v. Experian Information Solutions, Inc.*, 290 F.R.D. 508, 516-17 (D. Idaho 2013); *McAnney v. Smith & Nephew, Inc.*, 2017 WL 6459797, at * 1 (D. Conn. 2017); *cf. Eikenberry v. Celsteel Ltd.*, 2013 WL 5308028 (S.D. N.Y. 2013) (rejecting defendant's arguments that testimony of company representative residing in London be obtained through Hague Evidence Convention and ordering deposition of representative take place in London under U.S. discovery rules).

⁸*See Baxalta Incorporated v. Genentech, Inc.*, 2018 WL 3814616, at *1 (D. Del. 2018); *U.S. ex rel. Barko v. Halliburton Co.*, 270 F.R.D. 26, 29 (D.D.C. 2010); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886, at *2-3 (E.D. Pa. 1998); *Salter v. Upjohn Co.*, 593 F.2d 649, 651, 27 Fed. R. Serv. 2d 822 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.").

⁹*See, e.g., Invensas Corp. v. Renesas Electronics Corp.*, 2012 WL 2501106, at *4 (D. Del. 2012) (requiring depositions of officers, directors or managing agents of Japanese corporation to be taken in Delaware); *Calixto*

managing agent of the corporation, but, rather, is a lower level salaried employee, the courts in the United States are less willing to order the witness to be deposed or to provide testimony at trial here. Where such employees reside in a European country that is a signatory to the Hague Evidence Convention and are not willing to testify or produce documents or other evidence voluntarily, courts in the United States have held that the assistance of foreign authorities under that Convention is generally required in order to obtain such testimony or documents.¹⁰

Not surprisingly, sometimes it is not clear whether the person sought to be deposed is a managing agent of the European company. Determining whether a witness is a managing agent is a fact-specific inquiry.¹¹ Generally, the examining party has the burden of providing enough evidence to show that it is at least a "close question" whether the proposed deponent is a managing agent.¹² If the examining party fails to meet its burden, it must resort to Fed. R.

v. Watson Bowman Acme Corp., 2008 WL 4487679, at *3 (S.D. Fla. 2008) (ordering that former employee of defendant, now residing in Switzerland, be produced for deposition in London); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886 (E.D. Pa. 1998) (requiring Swiss defendant's managing agents to be deposed in Pennsylvania).

¹⁰See *McAnneny v. Smith & Nephew, Inc.*, 2017 WL 6459797, at *1 (D. Conn. 2017) (person not officer, director or managing agent of company may only be compelled to testify pursuant to a subpoena or through procedures of Hague Evidence Convention); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886, at *1 (E.D. Pa. 1998); *Boss Mfg. Co. v. Hugo Boss AG*, 1999 WL 20828 (S.D. N.Y. 1999) (German corporation's employees who are not managing agents may only be compelled to testify in accordance with Hague Evidence Convention procedures). If the employee resides in a European country that is not a signatory state to the Hague Evidence Convention, then the testimony must be sought through letters rogatory; see § 23:41.

¹¹*Campbell v. Sedgwick Detert, Moran & Arnold*, 2013 WL 1314429, at *14 (D.N.J. 2013) ("The inquiry regarding the identification of a managing agent essentially involves the extent of the individual's decision-making discretion and unsupervised authority, the degree to which his interests converge with those of the corporation, and his general responsibilities, particularly with regard to the matters at issue in the litigation.").

¹²*Stanley Works Israel Ltd. v. 500 Group, Inc.*, 2019 WL 5485266, at *2 (D. Conn. 2019); *Calderon v. Experian Information Solutions, Inc.*, 287 F.R.D. 629, 633, 83 Fed. R. Serv. 3d 1257 (D. Idaho 2012), *aff'd*, 290 F.R.D. 508 (D. Idaho 2013); *Schindler Elevator Corp. v. Otis Elevator Co.*, 2007 WL 1771509, at *2 (S.D. N.Y. 2007); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886, at *2 (E.D. Pa. 1998).

Civ. P. 45 for subpoenas on nonparty witnesses, and, if the witness resides in Europe, the examining party must resort to procedures outlined in the Hague Convention or pursuant to letters rogatory.¹³

Since the legal issues regarding the depositions of a European company's executives, managers and employees are sometimes complex, U.S. counsel should offer European inside counsel some practical advice. The argument that the testimony of witnesses located in Europe may only be taken pursuant to Hague Evidence Convention procedures should be reserved for potential deponents who clearly are European nonparty witnesses, such as lower level employees or former company managers and employees.¹⁴ For other potential deponents, including the European company's executives, directors or managing agents, it is probably advisable for U.S. counsel and European inside counsel to identify knowledgeable persons who would be willing to testify voluntarily at a deposition or at trial under U.S. discovery rules.

Agreeing to forego Hague Evidence Convention or letters rogatory procedures and produce deponents voluntarily for depositions under U.S. discovery rules provides the possibility for U.S. outside counsel to agree with the adversary to limit the number or length of depositions. If the deponent resides abroad, the examining party may be required to cover the deponent's costs for traveling to and from the United States.¹⁵ Often the parties will agree that the depositions take place in Europe. There are some obvious advantages to going forward on European soil. For example, apart from the

¹³*McAnney v. Smith & Nephew, Inc.*, 2017 WL 6459797, at *1 (D. Conn. 2017); *In re Honda American Motor Co., Inc. Dealership Relations Litigation*, 168 F.R.D. 535, 540 (D. Md. 1996).

¹⁴With respect to depositions of former employees and similar persons, see § 23:48.

¹⁵*See, e.g., Randall v. Offplan Millionaire AG, R.I.C.O. Bus. Disp. Guide (CCH) P 13145*, 2019 WL 1003167, at *6 (M.D. Fla. 2019) (compelling Swiss resident to appear for a deposition outside of Switzerland and for plaintiff to reimburse deponent's reasonable travel expenses); *S.E.C. v. Banc de Binary*, 2014 WL 1030862, at *10 (D. Nev. 2014) (requiring S.E.C. to bear travel costs of Cypriot, Israeli, and Seychellois defendants or stipulate to alternative procedures); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886, at *4 (E.D. Pa. 1998) (conditioning deposition of Swiss executives in Pennsylvania on plaintiff's reimbursement of travel and lodging costs).

saved travel time and expenses, a European company manager will be more comfortable being deposed in his or her "home" forum, the process will be less disruptive and documents may be more accessible.

As mentioned above, depositions are routinely conducted in Europe on a voluntary basis. Many of them do not involve any participation by government officials either in the United States or in Europe and are generally conducted outside the scope of the Hague Evidence Convention.¹⁶ These voluntary depositions are typically conducted by U.S. lawyers in the offices of a foreign attorney who has the power to administer oaths or before a U.S. notary public, such as a court reporter from the United States.

U.S. counsel and European inside counsel should be aware of European professional conduct rules that may constrain European lawyers from engaging in U.S.-style witness preparation.¹⁷ Moreover, some countries, such as Switzerland, view the unauthorized taking of depositions in their territory—for example, without permission of the appropriate central authority¹⁸—as a violation of their sovereignty and even may deem it to be a criminal violation,¹⁹ or, at the very least, an objectionable practice.²⁰ Although there is little evidence that prosecutions for such violations have occurred

¹⁶See *Work v. Bier*, 106 F.R.D. 45, 52, 226 U.S.P.Q. 657, 2 Fed. R. Serv. 3d 679 (D.D.C. 1985).

¹⁷See, e.g., Art. 7 *Standesregeln des Schweizerischen Anwaltsverbandes* (professional code of Swiss Lawyers Federation) (regulating contact of attorneys with witnesses). With respect to witness preparation, see generally § 23:50.

¹⁸See Dr. Martin P. Henrich, *Obtaining Evidence in Switzerland, The Dilemma and the Stumbling Blocks of Art. 271 and Art. 273 Swiss Penal Code*, available at https://www.amcham.ch/publications/downloads/2009/obtaining_evidence_in_switzerland.pdf (visited July 24, 2019).

¹⁹See, e.g., Art. 271 *Schweizerisches Strafgesetzbuch* (Swiss Penal Code), Decl. 21, 1937, SR 311.0 (Switz.), available at <http://www.admin.ch/opc/de/classified-compilation/19370083/index.html#a271> (visited July 24, 2013).

²⁰See *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37–38, 9 Fed. R. Serv. 3d 301 (N.D. N.Y. 1987) (citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 558, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (Blackmun, J., concurring in part, dissenting in part)) ("Evidence gathering by a private party from even a willing citizen is especially objectionable to . . . Germany, since use of American discovery procedures can

in Europe,²¹ U.S. counsel should consult with European inside counsel to determine the position of local European authorities on this issue.

§ 23:48 Discovery—Depositions—Former employees and similar persons

The law in the United States is relatively settled with respect to testimony sought from persons over whom the European company has no control, such as former employees and similar persons who reside in Europe and over whom the U.S. court has no jurisdiction (“European nonparty witnesses”).¹ Where a European nonparty witness resides in a country that is a signatory to the Hague Evidence Convention,² a court in the United States generally has no authority to compel such a witness to respond to discovery demands made in litigation in the United States, unless the evidence is sought through the procedures provided by the Hague Evidence Convention.³ Where the European nonparty witness

violate rights protected by that nation’s constitution”); *S.E.C. v. Stanford Intern. Bank, Ltd.*, 776 F. Supp. 2d 323, 328 (N.D. Tex. 2011) (“[M]any foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures.”).

²¹See *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 532 (D.N.J. 2009) (noting that defendant’s expert on Swiss law provided no information on the number of prosecutions resulting from a Swiss national’s compliance with U.S. federal court’s discovery order and was unable to identify any individual prosecuted under Swiss law for complying with orders of a United States court). However, in at least one notable case, *In re Christopher X*, Cour de Cassation, Chambre Criminelle [supreme court for judicial matters] Paris, Appeal No. 0783228m, Dec. 12, 2007, a French court imposed a 10,000 Euro fine on a French lawyer for assisting with U.S. discovery in France; see § 23:41.

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¹With respect to obtaining testimony from current executives, managing agents or employees of a European company that is a litigant in a U.S. action, see § 23:47.

²Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). See § 23:41.

³*RCA Trademark Management S.A.S. v. Voxx Intern. Corp.*, 2015 WL 4865693, at *1 (S.D. N.Y. 2015) (“Because *Mss. Wahl and Petit* are French citizens who reside in France, if they are not officers, directors or

resides in a country that is not a signatory to the Convention, the evidence must be sought through letters rogatory.⁴

Although courts in the United States have generally adhered to the foregoing rule, the specific facts of the case may nonetheless lead to the application of U.S. discovery rules.⁵ Also, the Hague Evidence Convention's procedures will not be necessary if a European nonparty witness is willing to testify voluntarily. In such a case, the deposition of the nonparty witness may proceed on notice under U.S. discovery rules.⁶

managing agents of RCA, they can be deposed only pursuant to the Hague Convention.”); *In re Urethane Antitrust Litigation*, 267 F.R.D. 361 (D. Kan. 2010) (granting motion to seek testimony of defendant's former employees residing in Germany through Hague Evidence Convention procedures); *Astrazeneca v. Ranbaxy Pharmaceuticals, Inc.*, 2008 WL 314627 (D.N.J. 2008) (granting motion to seek judicial assistance pursuant to Hague Evidence Convention with respect to deposition of plaintiff's former employees residing in Sweden).

⁴Austria, for example, is not a signatory to the Hague Evidence Convention and evidence there would have to be sought through letters rogatory. *See* § 23:41. *See also* *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181 (9th Cir. 2006) (evidence located in Phillipines, not a signatory to Hague Evidence Convention, only to be obtained through voluntary deposition there or by letters rogatory); *Pinnacle Packaging Company, Inc. v. Constantia Flexibles GmbH*, 2015 WL 9216845, at *2 (N.D. Okla. 2015) (“Austrian authorities have informed the U.S. Department of State and the U.S. Embassy in Vienna that voluntary depositions of willing witnesses may not be taken of Austrian citizens and that depositions of U.S. nationals or permanent residents can only be taken with specific permission of the Ministry of Foreign Affairs.”).

⁵*See Calixto v. Watson Bowman Acme Corp.*, 2008 WL 4487679 (S.D. Fla. 2008) (ordering former employee of defendant, now employed by defendant's affiliate and residing in Switzerland, be produced for deposition in London).

⁶*Promotional Containers, Inc. v. Aztec Concrete Accessories, Inc.*, 2006 WL 897190 (E.D. Ky. 2006) (where defendant noticed deposition of nonparty witness in Germany, plaintiff could not require that Hague Evidence Convention's procedures be followed since nonparty witness was willing to testify in Germany); *see also Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 292 F.R.D. 19, 24, 85 Fed. R. Serv. 3d 789 (D.D.C. 2013) (noting that where party was willing to have corporate representative deposed in Mexico under United States law, the procedures of the Hague Convention did not need to be followed). With respect to voluntary depositions of a European company's executives, managing agents and employees in Europe, *see generally* § 23:47.

A European company might conclude that by terminating an employee, it can effectively insulate the former employee from a deposition under U.S. procedural rules and require that testimony from such former employee be obtained only under the Hague Evidence Convention's procedures. At least one court in the United States has held that such a strategy will not work.⁷ Similarly, a European company's effort to denominate an employee a "consultant" or "independent contractor" will, by itself, not be sufficient to qualify that person as a European nonparty witness.⁸

European nonparty witnesses from whom testimony is sought under the Hague Evidence Convention's procedures have the right to refuse to give evidence under a generous privilege standard. They may avail themselves of a privilege under either the law of the state of execution (the European state in which the witness is present) or the state of origin—here, the United States.⁹ A party to the United States action may require that the letter of request directed to a nonparty witness identify potentially applicable privileges under United States law, including the attorney-client privilege and the privilege against self-incrimination conferred by the

⁷Rundquist v. Vapiano SE, 277 F.R.D. 205, 208, 80 Fed. R. Serv. 3d 1051 (D.D.C. 2011); E.I. DuPont de Nemours and Co. v. Kolon Industries, Inc., 268 F.R.D. 45, 51 (E.D. Va. 2010) (finding that "[t]he timing and circumstances of" the "reassignment or termination of [defendant corporation's] employees render the true status of the proposed deponents highly suspect, and allow for a strong inference that [defendant] is moving its employees around like chessmen, conveniently shielding them from [plaintiff's] access."); Boss Mfg. Co. v. Hugo Boss AG, 1999 WL 20828, at *2 (S.D. N.Y. 1999).

⁸See Schindler Elevator Corp. v. Otis Elevator Co., 2007 WL 1771509 (S.D. N.Y. 2007) (Swiss inventor no longer affiliated with plaintiff deemed to be managing agent for discovery purposes); Nellcor Puritan Bennett LLC v. CAS Medical Systems, Inc., 2013 WL 3242960, at *5 (E.D. Mich. 2013) (permitting deposition noticed under Fed. R. Civ. P. 30(b)(1) because no evidence that employee was, in fact, an independent contractor).

⁹Art. 11, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note); see Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc., 708 F. Supp. 2d 450 (D. Del. 2010) (acknowledging that under Art. 11, Hague Evidence Convention, European nonparty witness could invoke privilege under laws of United States, Sweden or Norway).

Fifth Amendment to the United States Constitution.¹⁰ It is advisable to include such an instruction in the letter of request because neither the foreign witness nor the foreign judge taking the evidence may be aware of such privileges under United States law.

European nonparty witnesses may not be under any obligation to produce documents for legal proceedings in the United States. Many European countries have made specific declarations under Article 23 of the Hague Evidence Convention objecting to the pre-trial discovery of documents.¹¹ Witnesses residing in countries that are not signatories to the Convention similarly are not obligated to comply with a pre-trial document discovery demand made by a U.S. litigant. Letters rogatory rules follow the local rules of the country in which discovery is sought and countries in which evidence must be sought through letters rogatory, such as Austria, do not permit U.S.-style document discovery.¹²

A European company litigant in the United States may seek to use the testimony of a European nonparty witness affirmatively, for example, in a declaration supporting a motion submitted to the court in the United States. In such an event, U.S. outside counsel should discuss with European inside counsel the substantial likelihood that the U.S. judge, as a *quid pro quo* for accepting the declaration, would require the European declarant to be available for a U.S. "rules" deposition and that U.S. discovery rules may govern the production of documents relating to the declaration. By availing itself of the procedural rights afforded to it by the United States legal system, a European company will likely not prevail in its argument that the declarant may only be deposed through the procedures set forth in the Hague Evidence Convention or pursuant to letters rogatory since the

¹⁰Art. 3, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). Article 3 states, in pertinent part, that a letter of request "may also mention any information necessary for the application of Article 11. See *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F. Supp. 2d 450, 454 (D. Del. 2010) (noting that letter of request may include instructions as to applicable privilege under United States law).

¹¹See § 23:41.

¹²See § 23:41.

U.S. courts have regularly criticized these procedures as cumbersome and time-consuming.¹³

Therefore, just as U.S. litigators will select declarants not only for what they will say in a declaration, but also for how they might respond at a deposition and for what documents are in their custody and control, so, too, must European inside counsel consider that the same factors should be evaluated in the selection of nonparty declarants or witnesses.¹⁴ The opportunity to use the declaration in the proceeding in the United States may be a direct function of the declarant's willingness to be deposed or testify pursuant to U.S. procedural rules.

§ 23:49 Discovery—Depositions—Experts

In some civil law countries, experts are generally appointed by the judge and paid by the state treasury.¹ Other countries accept experts appointed by the parties and a judge can appoint an expert if requested by a party and at that party's expense.² An expert is expected to be strictly neutral and to provide a written, unbiased opinion to the court. Rarely will oral testimony be taken of the expert.³

U.S. outside counsel should candidly draw a contrast for European inside counsel between a European court-appointed expert and experts who are retained for U.S. litigation.

¹³See § 23:41.

¹⁴See § 23:35 regarding client declarations.

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¹For a comparison of the role of experts in the common law and civil law systems, see Andrew W. Jurs, *Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reforms of Post-Daubert U.S. Reliability Determinations*, 95 Marq. L. Rev. 1329 (2012); Sven Timmerbeil, *The Role of Expert Witnesses in German and U.S. Civil Litigation*, 9 Ann. Surv. Int'l & Comp. L. 163 (2003). With respect to the differences between the common and civil law systems, see generally § 23:3.

²See Arts. 336 and 339 Spanish LEC.

³Hein Kötz, *Civil Justice Systems in Europe and the United States*, 11 Duke J. Comp. & Int'l L. 61 (2003). See §§ 404; 404a; 411 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). In Spain, the judge may decide that the expert should provide oral testimony explaining his report and answer questions asked by the parties (Art. 347 LEC).

In a reaction to "junk science," the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*, ruled that in performing its "gate-keeping" function under Rule 702 of the Federal Rules of Evidence, a federal court must be satisfied that the methodology employed by a proposed scientific expert meets certain standards of reliability before permitting the expert to testify.⁴ Subsequently, in *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court expanded the application of *Daubert* to *all* expert testimony, not just scientific testimony.⁵ These attempts at moving the focus on the qualification of experts from resumé to methodology have resulted in considerable progress toward reducing dubious "expert" testimony.

Written expert testimony is often an essential element of certain motions.⁶ For example, a *forum non conveniens* motion to dismiss requires the moving party to establish that the defendant European company is subject to jurisdiction in an alternative forum that has adequate "due process" features and causes of action sufficient to afford plaintiff substantial relief.⁷ Additionally, the party seeking dismissal may want to establish that complicated issues of foreign law are implicated by plaintiff's claims and that the alternative European forum has a greater governmental interest in the subject matter of these claims than does the United States.

Fed. R. Civ. P. 44.1 relating to determining foreign law seems to invite that these points be established by the testimony or declaration of an expert in foreign law. However, the use of foreign law experts by U.S. courts has been subject to criticism since the judge is supposed to be the "expert" in the law.⁸ A U.S. judge has no obligation to take "judicial notice" of foreign law, but may "consider any

⁴*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Env'tl. L. Rep. 20979 (1993). See generally Chapter 62 "Expert Witnesses" (§§ 62:1 et seq.).

⁵*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238, 50 U.S.P.Q.2d 1177, Prod. Liab. Rep. (CCH) P 15470, 50 Fed. R. Evid. Serv. 1373, 29 Env'tl. L. Rep. 20638 (1999); see also Fed. R. Evid. 702.

⁶See generally §§ 23:34 to 23:39.

⁷See § 23:38.

⁸See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 631, 96

relevant material or source, including testimony, whether or not admissible under the Federal Rules of Evidence.⁹ Some courts have expressly stated that they prefer English language translations of foreign law rather than the parties' expert summary judgment declarations.¹⁰ This rule also applies to submissions by foreign governments on that country's law. In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, the United States Supreme Court held that while "[a] federal court should accord respectful consideration to a foreign government's submission," the court "is not bound to accord conclusive effect to the foreign government's statements."¹¹

In order to preserve the work product protection and the attorney-client privilege, U.S. counsel and European in-house counsel should discuss the rules on the use of experts.¹² For example, under the Federal Rules of Civil Procedure, drafts of any expert reports are protected, "regardless of the form in which the draft is recorded,"¹³ and communications between counsel and any witness, including an expert, are protected by the attorney work product doctrine, "regardless

U.S.P.Q.2d 1689 (7th Cir. 2010) (Posner, J., concurring).
 Fed. R. Civ. P. 44.1 and Advisory Committee Notes, 1966 adoption; see also *Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 772 F. Supp. 2d 218, 228 (D.D.C. 2011) (judge not obligated to conduct independent research into "obscure sources," such as foreign law); *Faggionato v. Lerner*, 500 F. Supp. 2d 237 (S.D. N.Y. 2007) (in determining foreign law, court "may reject even uncontradicted expert testimony and reach its own decisions on basis of independent examination of foreign legal authorities"). With respect to related issues raised in the recent debate concerning the "anti-international law" movement in some United States jurisdictions, see § 23:4.

⁹*Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 96 U.S.P.Q.2d 1689 (7th Cir. 2010) (Easterbrook, J.). See also *Argonaut Partnership, L.P. v. Bankers Trustee Co. Ltd.*, 1997 WL 45521, at *9 (S.D. N.Y. 1997) (noting that "a court need not slavishly accept a party's sworn affidavit on foreign law, even if it is uncontroverted" and requesting parties to submit English language translations of foreign law relied upon in expert declaration).

¹⁰*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865, 1869, 201 L. Ed. 2d 225, 2018-1 Trade Cas. (CCH) ¶ 80408, 100 Fed. R. Serv. 3d 1269 (2018).

¹¹See §§ 23:21 to 23:26; see generally Chapter 62 "Expert Witnesses" (§§ 62:1 et seq.).

¹²Fed. R. Civ. P. 26(b)(4)(B).

of the form of the communications."¹⁴ Communications between the expert and a European company's in-house counsel would similarly be protected.¹⁵ Communications between the expert and attorney are, however, not protected to the extent that they relate to the expert's compensation, concern data or facts the attorney provided to the expert and that were used by the expert in his or her report, and assumptions provided by the attorney to the expert that were relied upon in preparing the report.¹⁶

§ 23:50 Discovery—Depositions—Witness preparation

In European civil law countries, the general rule is that while lawyers may contact witnesses to elucidate the basic facts observed or known by a witness, they may not discuss possible testimony or otherwise prepare a potential witness to testify.¹ In the United States, by contrast, extensive preparation of witnesses by attorneys is the norm.² Depositions taken in European civil law countries, or depositions taken outside of Europe but defended by European inside counsel, may be subject to the civil law rule and practice that there is to be no preparation of the deponent before her testimony.³ Where it is contemplated to engage European inside counsel in the preparation of the witness for a deposition, U.S.

¹⁴Fed. R. Civ. P. 26(b)(4)(C).

¹⁵Fed. R. Civ. P. 26(b)(4)(C).

¹⁶Fed. R. Civ. P. 26(b)(4)(C)(i) to (iii).

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¹See Peter Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. Kan. L. Rev. 9, 16 (1996) ("Any out-of-court contacts between the witness and the party or the attorney proposing that witness are strictly prohibited except to verify whether the person has any relevant knowledge."). However, even without preparation of the witness through an attorney, German law imposes a general, independent obligation on witnesses to refresh their recollection of the facts prior to their testimony and, where necessary, to review documents and other materials in their possession. § 378 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure). See also Art. 7 Standesregeln des Schweizerischen Anwaltsverbandes (professional code of Swiss Lawyers Federation) (regulating contact of attorneys with witnesses). See generally § 23:47.

²See Chapter 63 "Trial Preparation and Presentation" (§§ 63:1 et seq.) for discussion of witness preparation.

³With respect to depositions, see generally §§ 23:46 to 23:50.

outside counsel should discuss whether civil law ethical or legal constraints on European inside counsel preclude him from such participation.

Because the mastery of the art of preparing witnesses for testimony is one of the key skills for a practicing litigation attorney in the United States, it may be useful to permit the deposition to go forward in the United States and for U.S. outside counsel to be responsible for defending the deposition—particularly if it is clear that the “no preparation rule” will apply if the deposition proceeds in Europe. Outside and inside counsel, therefore, must try to ascertain in advance the degree to which witness preparation will be permitted in the forum in which the deposition is to take place.

While U.S. inside counsel tend to be extremely familiar with the intricacies of witness preparation in litigation in the United States, many European inside counsel have not been exposed to this practice. Thus, the brief discussion that follows may be of particular interest to European inside counsel.

The guidelines for preparation generally suggested by U.S. counsel include advising witnesses to answer only the question being asked. Thus, if the question posed is do you live in New York City, the answer is either “yes” or “no.” The witness generally should not volunteer additional information, such as the street address of his or her current residence. The job of the witness in this adversarial proceeding is to answer only the question asked. It is the job of the lawyers conducting the deposition to ask questions that will elicit the information they are seeking. The foregoing rule generally applies where the witness testifies on behalf of the defendant. Where the witness testifies on behalf of the plaintiff, a different strategy may apply and it may be advisable to have the witness provide a fuller answer to support the plaintiff’s claims.

Another element of strategy that a U.S. outside counsel will be able to employ is to decide the extent to which he or she may wish to refresh the witness’s recollection before the deposition by showing the witness documents. While it is likely that any documents shown during preparation will have to be produced to the other side (if they have not yet been), it may be essential to so prepare a witness to avoid inaccurate recollection of facts simply because of the passage of time.

Of course, the foregoing examples are based upon two premises that are not always true. First, we have assumed that the witness will submit voluntarily to preparation by one side to the litigation.⁴ While this is often the case, it is not universally true.⁵ Second, in advising a witness to answer questions narrowly at a deposition, counsel should be careful not to undercut the witness's ability to provide information affirmatively in a declaration to be submitted later in the proceeding. In other words, if the witness will be needed as a declarant, his deposition testimony must be consistent with his subsequent declaration.⁶ Moreover, if one plans to rely upon the witness as a trial witness, problems are likely to arise if the witness is reticent at his deposition but effusive at trial. Finally, even if the witness will not be needed for a later declaration, if there is any doubt about the witness's later availability to testify at trial, U.S. litigation counsel should consider prudently eliciting testimony at the deposition that will clarify or ameliorate any ambiguous or harmful testimony the witness may give in response to questions put by opposing counsel.

Regardless of the use that a U.S. litigator will ultimately make of a deposition, certain rules of thumb apply to the testimony of witnesses at depositions:⁷ (1) the witness should always tell the truth; (2) the witness should be reminded that his or her testimony will be under oath and be taken down by a stenographer;⁸ (3) the witness should not be concerned with the demeanor of the attorney asking the questions, whether "friendly" or "intimidating;" (4) the witness should be careful only to answer questions on the basis of personal knowledge, and not speculate as to what the

⁴With respect to the considerations for having a deposition of the company's executives, managing agents and employees be conducted under U.S. discovery rules, see § 23:47.

⁵See § 23:48.

⁶See § 23:35.

⁷With respect to the general differences between the United States and continental European legal systems regarding taking a witness's testimony, see § 23:46; see also Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.) for a discussion of depositions.

⁸This fact may be surprising to some European deponents, since in civil law countries the court may, but typically does not, require a witness to testify under oath. See § 391 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure).

answer most probably is; (5) if the witness does not understand the question, the witness should say so rather than attempt to answer; and (6) the witness should carefully listen to objections made by attorneys since they will alert the witness to deficiencies in the questions being asked.

§ 23:51 Discovery—Protective orders

Discovery rules, in both federal and state courts in the United States, offer protection against abusive discovery by means of protective orders from the court.¹ For example, certain items demanded of parties to the litigation, such as confidential documents or proprietary business secrets, can be protected under rules such as Fed. R. Civ. P. 26(c)(1)(A) to (H), which states that “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” by ordering: (1) that there be no discovery; (2) that disclosure take place only under certain specified terms and conditions; (3) that the requested disclosure be effected by a different method than the one selected by the other party; (4) that certain matters not be inquired into and/or that the scope of certain inquiries be limited; (5) that discovery be conducted only with certain persons present; (6) that a deposition be sealed, and be opened thereafter only pursuant to the order of the court; (7) that a trade secret or other confidential or commercial information not be revealed or be revealed only in a designated manner; and (8) that the parties simultaneously file specified documents or information in sealed envelopes to be opened as directed by the court.

The foregoing rule, in practice, allows the court to fashion all manner of orders to prevent harm to a party as a result of the disclosure of information that should be disclosed, if at all, only for purposes of the lawsuit, and not for public dissemination. Consequently, U.S. outside counsel should encourage European inside counsel, at the commencement of the discovery process, to specify each way that disclosure of information to the opposing party or to non-parties to the lit-

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¹See Chapter 61 “Discovery and Information Gathering” (§§ 61:1 et seq.) for a discussion of protective orders.

igation would injure the European company.³ These potential harms can then form the basis of discussions with the other side of possible “confidentiality agreements,” and, if no such agreements can be entered into, of possible motions for protective orders from the court.

§ 23:52 Discovery—In aid of foreign proceedings (28 U.S.C.A. § 1782)

Experience has shown that not many European clients or their inside counsel are aware of the fact that parties to a judicial or other proceeding in Europe may request assistance from a United States federal court in obtaining discovery in the United States pursuant to 28 U.S.C.A. § 1782 for use in the proceeding in Europe.¹ In particular, it sometimes comes as a surprise to European clients that discovery pursuant to 28 U.S.C.A. § 1782 may be sought not only from a party but also from a nonparty to the European litigation² or in aid of foreign arbitration proceedings.³ Such

²European inside counsel should be advised that, in contrast to civil law countries, documents submitted to courts in the United States are generally matters of public record. They may, therefore, be available to competitors or otherwise have an adverse impact on a company’s business. However, documents exchanged in discovery generally are not matters of public record.

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¹See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 71 U.S.P.Q.2d 1001, 2004-1 Trade Cas. (CCH) ¶ 74453, 64 Fed. R. Evid. Serv. 742, 58 Fed. R. Serv. 3d 696 (2004); *Marubeni America Corp. v. LBA Y.K.*, 335 Fed. Appx. 95 (2d Cir. 2009).

²See *Kulzer v. Esschem, Inc.*, 390 Fed. Appx. 88 (3d Cir. 2010) (German corporation generally entitled to discovery under 28 U.S.C.A. § 1782, but subpoena seeking trade secrets or confidential business information quashed); *In re Application of Heraeus Kulzer GmbH for an Order Pursuant to 28 U.S.C. 1782 to Take Discovery Pursuant to the Federal Rules of Civil Procedure for Use in Foreign Proceedings*, 2011 WL 1003588 (N.D. Ind. 2011) (granting discovery under Section 1782).

³*Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 2014 A.M.C. 786 (11th Cir. 2014) (Section 1782 discovery permitted in aid of arbitration in Ecuador); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC*, 2008 WL 4809035 (D. Del. 2008); *but cf. La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481 (S.D. Tex. 2008), *aff’d*, 341 Fed. Appx. 31 (5th Cir. 2009) (statute not intended to be used to assist foreign arbitration).

an insight may temper the notion of many European clients that the cards in pre-trial discovery in the United States are stacked against them.⁴

While discovery under 28 U.S.C.A. § 1782 may seem to provide a tantalizing opportunity for litigants in Europe to gather, on an *ex parte* basis, documents and information not otherwise available to them through the legal process in civil law countries, European clients should also be aware that discovery under 28 U.S.C.A. § 1782 is not a matter of right, but that courts have discretion in granting the request.⁵ The criteria that a court considers in making that determination include the following factors set forth in the United States Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.* ("Intel factors"): "(1) Whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent Section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign-proof gathering restrictions or other policies of a foreign country or the United States; and (4) whether the [discovery] contains unduly intrusive or burdensome requests."⁶ The fact that the Section 1782 discovery is sought from a

⁴See § 23:3; § 23:40.

⁵*Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 97 U.S.P.Q.2d 1652 (7th Cir. 2011) (party to litigation in a foreign country can seek discovery relating to that litigation in federal district court, and, at discretion of that court, can obtain as much discovery as it could if the lawsuit had been brought in that court rather than abroad); *In re Application for an Order Permitting Metallgesellschaft AG to take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997) (court should closely tailor discovery order so as to not skew foreign litigation).

⁶*In re Ex Parte Motorola Mobility, LLC*, 2012 WL 4936609, at *1 (N.D. Cal. 2012) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 71 U.S.P.Q.2d 1001, 2004-1 Trade Cas. (CCH) ¶ 74453, 64 Fed. R. Evid. Serv. 742, 58 Fed. R. Serv. 3d 696 (2004)); *see also In re Accent Delight International Ltd.*, 791 Fed. Appx. 247 (2d Cir. 2019) (affirming grant of discovery request of nonparty under Section 1782 where evidence to be used in Monaco criminal fraud proceeding).

nonparty to the European litigation usually weighs in favor of granting the request.⁷

Parties opposing Section 1782 discovery sometimes seek to preclude it on the ground that the evidence sought would not be admissible in the foreign proceeding. The United States federal circuit courts are split on whether the evidence's admissibility in the foreign tribunal is a factor that the United States court should consider in determining whether to grant an application for assistance under Section 1782.⁸ However, where "the real party from whom documents are sought" is a party to a foreign proceeding, a party cannot use Section 1782 to circumvent the foreign jurisdiction's discovery restrictions.⁹

Any "interested person" may seek judicial assistance pursuant to Section 1782 for aid in a foreign proceeding. The courts have interpreted that to mean that such a person have significant participation rights in the foreign proceeding.¹⁰ For example, the agent of a party to the foreign proceeding has been deemed to qualify as such an interested

⁷*Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 71 U.S.P.Q.2d 1001, 2004-1 Trade Cas. (CCH) ¶ 74453, 64 Fed. R. Evid. Serv. 742, 58 Fed. R. Serv. 3d 696 (2004) ("A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence . . . In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."); *see also* *In re Accent Delight International Ltd.*, 791 Fed. Appx. 247 (2d Cir. 2019) ("The first *Intel* factor requires only that a petitioner has sufficient need for § 1782 aid. If the target of the § 1782(a) application is a party to the foreign proceeding, that need is diminished.").

⁸*Compare* *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76 (2d Cir. 2012) (district court abused its discretion in denying request for judicial assistance under Section 1782 because evidence sought would not be admissible in court proceeding before *Oberlandesgericht* in Germany), with *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594, 97 U.S.P.Q.2d 1652 (7th Cir. 2011) (in deciding whether to grant Section 1782 discovery, district court should consider whether documents or other materials sought would be admissible into evidence in foreign proceeding).

⁹*Kiobel v. Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 245 (2d Cir. 2018), cert. denied, 139 S. Ct. 852, 202 L. Ed. 2d 582 (2019) (finding that district court abused its discretion in granting Section 1782 request for documents of counterparty in foreign proceeding in the possession of U.S. law firm).

¹⁰*RTI Ltd. v. Aldi Marine Ltd.*, 523 Fed. Appx. 750, 752 (2d Cir. 2013).

person.¹¹ However, the affiliate or sister corporation of a party to the European proceeding, which does not participate in that proceeding, is not an interested party under Section 1782.¹²

A European litigant's application to a United States District Court seeking discovery under Section 1782 should address all of the *Intel* factors, particularly the first *Intel* factor, quoted above. In order to facilitate the request, the foreign tribunal should request the discovery in the United States.¹³ That request should state that the documents or evidence sought are not within the tribunal's jurisdiction, that it is relevant to the proceeding, that local procedural or evidentiary rules are not being circumvented by the request and that the courts of the European jurisdiction are receptive to such discovery assistance.¹⁴ In addition, the foreign tribunal should state that, as a matter of comity or by treaty, the foreign country would provide assistance to the United States court in like circumstances.¹⁵ If the foreign tribunal declines to issue such an order, the Section 1782 discovery request may be submitted by a party to the foreign action and should be accompanied by an affidavit of a foreign legal expert, for example, a retired judge from the foreign jurisdiction, attesting to these factors. The burden of proof is on the party opposing the Section 1782 discovery.¹⁶

Sometimes parties opposing the discovery request claim

¹¹*Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996).

¹²*RTI Ltd. v. Aldi Marine Ltd.*, 523 Fed. Appx. 750, 752 (2d Cir. 2013).

¹³Before requesting that a foreign tribunal request assistance under Section 1782, European parties should consult with local European counsel whether it is appropriate under the local law where the foreign tribunal is situated to resort to Section 1782 without first exhausting the Hague Convention's procedures.

¹⁴*See, e.g.*, *In re Kreke Immobilien KG*, 2013 WL 5966916 (S.D. N.Y. 2013) (abrogated by, *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019)) (denying Section 1782 discovery of U.S. subsidiary of foreign bank where documents were located exclusively in Germany).

¹⁵*Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012) (purpose of statute is to provide "efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts").

¹⁶*In re Application of Auto-Guadeloupe Investissement S.A.*, for an Order to Take Discovery Pursuant to 28 U.S.C. Section 1782, 2012 WL

that the foreign tribunal would not be receptive to this type of discovery assistance, that the request violates local procedural rules in Europe or that the request for assistance may not be made directly to the United States court but, rather, must be made through the procedures set forth in the Hague Evidence Convention.¹⁷ The courts have frequently rejected such arguments.¹⁸ Nonetheless, the party seeking Section 1782 discovery should bolster the request with an affidavit setting forth with specificity cases in the foreign jurisdiction in which the courts have accepted evidence obtained through Section 1782 discovery.

§ 23:53 Trials

The Seventh Amendment to the United States Constitution enshrines the principle of a jury trial in civil cases in the United States: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."¹⁹ Although there are numerous exceptions to the requirement of a jury trial—for example, in equitable actions seeking to enjoin some activity—the bread and butter civil lawsuit for damages based upon breach of contract or tort almost always is eligible, if any party requests it, for a jury trial.²

However, even when there is no jury, and the judge

4841945 (S.D. N.Y. 2012).

¹⁷Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (reprinted in 28 U.S.C.A. § 1781 note). See § 23:41.

¹⁸See, e.g., *In re Application of Auto-Guadeloupe Investissement S.A.*, for an Order to Take Discovery Pursuant to 28 U.S.C. Section 1782, 2012 WL 4841945 (S.D. N.Y. 2012).

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¹See also Fed. R. Civ. P. 38(b)(1): "On any issue triable of right by a jury, a party may demand a jury trial by . . . serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served."

²A contract may provide for waiver of a trial by jury. Given the concerns of most European inside counsel about jury trials, European companies should consider whether to include such waivers in their commercial agreements with U.S. firms.

becomes the trier of fact, trials in the United States³ require that the facts of the case be developed, *inter alia*, through the oral testimony of witnesses, subject to cross-examination by other parties, preferably live in the courtroom (otherwise through deposition testimony).⁴

By contrast, in civil law countries “there is nothing that could properly be called a trial” and, indeed, “there has never been a jury in civil-law procedure.”⁵ A civil lawsuit in Europe is primarily based on written submissions. The judge decides, after reviewing the written materials, whether it would be useful to interrogate any witnesses proposed by the parties. The judge conducts the interrogation, and, although attorneys are free to put questions to the witnesses when the judge completes his or her questioning, the questions must be in the nature of further clarification rather than cross-examination.⁶

This difference between the trial of civil lawsuits in the United States and the way cases are decided in Europe suggests that, even when European inside counsel has experience with U.S. trials, inside and outside counsel should, prior to a trial, jointly undertake a detailed review of how the trial is likely to unfold and the goal(s) to be achieved at each stage of the proceeding. This discussion will facilitate significant assistance by European inside counsel with the vital tasks of drafting pre-trial papers, preparing witnesses, and developing cross-examination materials. It may also help to allay any concerns on the part of European inside counsel that U.S. outside counsel is too issue-oriented, and not sufficiently cognizant of the “big picture.” It is essential that U.S. outside counsel not allow the customary pressures

³See generally Chapter 63 “Trial Preparation and Presentation” (§§ 63:1 et seq.).

⁴When oral testimony is not required, the case can be disposed of on motion papers, for example, on a motion for judgment on the pleadings or for summary judgment. See generally § 23:34.

⁵Peter Schlosser, Lectures on Civil-Law Litigation Systems and Cooperation with Those Systems, 45 U. Kan. L. Rev. 9, 11 (1996). See § 23:3; § 23:39; § 23:46.

⁶Peter Schlosser, Lectures on Civil-Law Litigation Systems and Cooperation with Those Systems, 45 U. Kan. L. Rev. 9, 11, 15-16 (1996). See § 23:3; § 23:39; § 23:46.

⁷See § 23:2.

of trial preparation and the trial itself to interfere with his or her communications with European inside counsel. Indeed, as the litigation reaches its climactic stage, both inside and outside counsel should consult continually on all aspects of the case.

§ 23:54 Trials—The court's role

The role of the judge in U.S. trials varies substantially depending upon whether the case will be tried before a jury or the judge will serve as the trier of fact.¹ In Sections 23:55 and 23:56, we highlight some of the most important trial functions of a judge. U.S. outside counsel will generally be familiar with these points. European inside counsel, however, may find the discussion particularly useful.²

§ 23:55 Trials—The court's role—Pre-trial orders

In jury trials in the United States, the judge's primary roles are to decide what issues will be presented to the jury for its determination, to make rulings both before and during trial as to what proof will be admitted into evidence, and to instruct the jury concerning what law is applicable to the issues and the facts in the lawsuit.¹

Fed. R. Civ. P. 16 furnishes federal judges with broad discretion to make one or more pre-trial orders that simplify the issues in the lawsuit, limit unnecessary and cumulative evidence, and restrict the time permitted for the presentation of evidence to the jury so that a just, speedy, and inexpensive disposition of the action can be achieved.² The pre-

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¹With respect to the role of a judge in the civil law system, see § 23:3; § 23:39; §§ 23:45 to 23:47; § 23:52.

²See also Chapter 63 "Trial Preparation and Presentation" (§§ 63:1 et seq.) for a discussion of trials in the United States.

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¹See generally Chapter 63 "Trial Preparation and Presentation" (§§ 63:1 et seq.).

²Fed. R. Civ. P. 16(d).

trial order controls the course of the action unless the court modifies it.³

Among the items that may be dealt with in pre-trial orders are: (1) a statement of the facts and other matters on which the parties agree; (2) a specific enumeration of each party's remaining claims against any other party, with specific amounts of damages claimed for each cause of action; (3) a list of the names and addresses of likely fact and expert witnesses; (4) a list of all exhibits to be offered or that may be offered into evidence by each party; (5) a final estimate of the length of the trial; and (6) (in a case to be tried to a jury) each party's specific contentions as to the facts that remain in dispute, or (in a non-jury case) each party's proposed findings of fact and conclusions of law.⁴

Sometimes judges will entertain pre-trial briefs that set forth in persuasive fashion each party's view as to the facts relevant to all claims and defenses, and the reasons why such claims and defenses should be sustained. Regardless of whether such pre-trial briefs are submitted, each party to a lawsuit before a jury, at the close of the submission of the evidence, or at any earlier time as the court directs, will submit to the judge written requests as to how the jury should be instructed (or "charged") on the applicable law.⁵

Deciding what law is applicable to the issues in a lawsuit arguably is the most important task that a judge will perform in a jury trial. Attorneys for the parties, in order to preserve a right to appeal the judge's instructions, must state distinctly each instruction objected to and the grounds of such objection before the jury retires to consider its verdict.⁶

It is vital that U.S. outside counsel not view the prepara-

³Fed. R. Civ. P. 16(d).

⁴See Fed. R. Civ. P. 16(c)(2) and 26(a)(3)(A).

⁵See Fed. R. Civ. P. 51.

⁶See Fed. R. Civ. P. 51(c). Although jury verdicts in civil trials most often are general verdicts assigning responsibility and assessing damages, if any, a judge may decide either to require that a jury issue a special verdict in the form of a written finding upon each issue of fact, Fed. R. Civ. P. 49(a)(1), or a general verdict accompanied by the answers to written questions upon one or more issues of fact necessary to the general verdict, Fed. R. Civ. P. 49(b)(1). See also N.Y. C.P.L.R. 4111(e) (providing for itemized jury verdict in certain actions).

tion of requests for jury instructions on the applicable United States law as a purely local or technical matter in which European inside counsel need not be deeply involved. European inside counsel is in the best position to assess how the application of a particular rule of law in a pending litigation might affect the European company's business and potential liability in other lawsuits, pending or yet to be filed.

§ 23:56 Trials—The court's role—Post-trial orders

If the trial was without a jury, the judge must articulate the specific findings of fact and conclusions of law that support his judgment. The findings of fact, whether derived from oral or documentary evidence, may not be set aside by an appellate court unless clearly erroneous. In applying the clearly erroneous standard of review, the reviewing court must give "due regard to the trial court's opportunity to judge the witnesses' credibility."¹

When a trial is decided by a jury, the judge may still have an important role to play in sustaining or overturning the jury's verdict. When there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on one or more issues, the court may determine the issue against the party.² In the alternative, the judge can overturn the jury's verdict and order a new trial before a different jury.³

Therefore, a judge has the power to overturn a jury's verdict *as a matter of law* on the ground that there was no substantial evidence that would support a reasonable jury rendering that verdict—a fact that European inside counsel, unfamiliar with the jury trial system, may find surprising. However, European inside counsel should be informed that there are limitations on the power of the court to elicit juror testimony as an aid in the inquiry of the validity of a verdict. The testimony, affidavit, or statement by a juror on any matter discussed or statement made during the course of the jury's deliberations is deemed incompetent, except under

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¹Fed. R. Civ. P. 52(a)(6). See Chapter 66 "Appeals" (§§ 66:1 et seq.).

²Fed. R. Civ. P. 50(a)(1).

³Fed. R. Civ. P. 50(b)(2) and 59(a)(1)(A), (d).

unusual circumstances; for example, when there is a question of juror misconduct.⁴

§ 23:57 Trials—The attorney's role

A trial in the United States, especially one before a jury, calls upon special skills of U.S. outside counsel that in common law countries such as the United Kingdom are the province of the barrister, the lawyer who knows how to speak persuasively to both judges and juries. The essential characteristic that defines the "barrister" role in the U.S. courtroom is the ability to tell a compelling story.¹

While some U.S. attorneys never tire of praising the jury system and the "fact" that juries almost always make the correct decision, they not only expend enormous effort to fashion a story that will be persuasive on its face, but they also attempt to select people on the jury who will be likely to agree with the story. At least for trials where a great deal is at stake, jury consultant firms are also often retained to do research and advise trial counsel with respect to the selection of potential jurors.² This is a subject that should be discussed with European inside counsel well before the trial. Indeed, it may be advisable to raise the issue at the very outset of the litigation, particularly if there is reason to believe that a jury may view the European company negatively.

Jury research is often based upon a demographic survey of the inhabitants of the area from which the jury pool will be drawn. The hope is to discover which types of jurors would most easily be persuaded by the "story" that the attorney will tell. For example, are younger females less likely than middle-aged men to award damages to a middle-aged man who was injured in a car accident and was driving while intoxicated if the accident was caused by defective brakes? Through the judicious use of peremptory and "for cause" challenges to the seating of individual jury members, U.S.

⁴Fed. R. Evid. 606(b).

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¹The central role of attorneys in U.S. trials is one of the major differences between the common law and civil law systems. See § 23:3; Chapter 63 "Trial Preparation and Presentation" (§§ 63:1 et seq.).

²See generally Chapter 64 "Use of Jury Consultants" (§§ 64:1 et seq.).

outside counsel will try to have a jury that will be predisposed to his client's story. Of course, jury selection is still more art than science.

Simply because European inside counsel are not likely to have substantial experience in the techniques of the key elements of a U.S. trial—opening and closing statements, direct and cross-examination—does not mean that a member of the European inside counsel team should not be present during the trial. New issues almost always arise at trial and the on-site perspective of a European lawyer intimately familiar with the company and its operations may prove to be essential. Also, European inside counsel can report back to management, thereby allowing U.S. counsel to focus on the trial.

§ 23:58 Recognition and enforcement of U.S. judgments in Europe

Unless a European company defendant has assets in the United States, any attempts to enforce a judgment issued against it for money damages awarded by a court in the United States will probably begin in Europe where the company is based. There is no bilateral treaty or multilateral international convention now in force between the United States and other countries allowing for a reciprocal, automatic recognition and enforcement of judgments.¹

Whether a U.S. judgment will be enforced abroad, there-

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¹The U.S. State Department has prepared an analysis of "Enforcement of Judgments," available at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assst/Enforcement-of-Judgments.html> (visited July 24, 2019). In some countries, such as Germany, the terms "recognition" and "enforcement" as applied to judgments have two distinct meanings. Foreign judgments are automatically recognized under the doctrine of international comity provided that no bar to recognition, as enumerated in § 328 Zivilprozeßordnung (ZPO) (German Code of Civil Procedure), exists. Pursuant to § 723 para. 1 ZPO, German courts will enforce foreign judgments without examining the underlying merits of the lawsuit, provided certain criteria are met. For example, a foreign judgment will not be enforced until it is "final," that is, *res judicata* according to the procedural law of the rendering court. § 723 para. 2 ZPO. See Wolfgang Wurmnest, Recognition and Enforcement of U.S. Money Judgments in Germany, 23 Berkeley J. Int'l L. 175 (2005); see also Alessandro Barzaghi, Recognition and Enforcement of United States Judgments in Italy, 18 N.Y. Int'l L. Rev. 61 (2005); Yves P. Piantino, Recognition and Enforcement of

fore, depends upon both the local laws of the country in which enforcement is sought and general principles of international law. Generally speaking, a foreign state will examine a U.S. judgment

(1) to determine if the court that issued the judgment had jurisdiction; (2) to determine whether the defendant was properly notified of the action; (3) to determine if the proceedings were vitiated by fraud; and (4) to establish that the judgment is not contrary to the public policy of the foreign country. While . . . requirements vary widely from country to country, judgments which do not involve multiple damages or punitive damages generally may be enforced, in whole or in part, upon recognition as authoritative and final . . .²

At the start of the litigation, U.S. outside counsel and European inside counsel should carefully consider the company's views on enforcement of a judgment that might issue from the U.S. court. If, for example, the company is a defendant and is concerned that the litigation may result in a substantial judgment against it—including, perhaps, punitive damages—certain procedures may need to be followed in the litigation in the United States in order to maximize the chances of preventing enforcement of the judgment in Europe, such as asserting any and all available motions and arguments against jurisdiction in order to preserve them for

Money Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law, 17 N.Y.L. Sch. J. Int'l & Comp. L. 91 (1997); Dennis Campbell and Dharmendra Papat, Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments, 56 Am. Jur. Trials 529, 545, 580–90 (1995).

²U.S. State Department analysis, "Enforcement of Judgments," available at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assist/Enforcement-of-Judges.html> (visited July 24, 2019). German court decisions have held that where the foreign judgment clearly shows that punitive damage awards also serve a compensatory function, *i.e.*, constitute liquidated damages, represent illegal profits earned from tortious conduct or provide redress for harm that is not readily quantifiable, such portions of the award may be recognized despite their characterization as punitive damages. Bundesgerichtshof in Zivilsachen (German Supreme Court in Civil Matters), BGHZ 118, 312. *See also* Bundesverfassungsgericht (German Federal Constitutional Court), BVerfGE 91, 334 (service of complaint in foreign proceeding on German defendant under Hague Service Convention upheld even though complaint sought punitive damages); Cedric Vanleenhove, A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional "no Pasarán!", 41 Vt. L. Rev. 347 (2016).

assertion at the subsequent enforcement proceedings in Europe.³

Because of the globalization of world commerce, a simplified procedure for enforcing judgments across national boundaries has been widely advocated in recent years. In Europe, the recognition and enforcement of judgments of courts of the EU Member States are governed by Regulation (EU) 1215/2012,⁴ and the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments.⁵ The Hague Conference on Private International Law has recently

³European countries have differing standards concerning the extent to which a defendant must raise jurisdictional objections in the foreign proceeding in order to preserve these challenges in a subsequent recognition proceeding in Europe. See Reinhold Geimer, *Anerkennung ausländischer Entscheidungen in Deutschland* 120-21 nn.59, 62 (1995) (“Geimer”) (comparing German, Swiss and English law). In Germany, in order to maintain the jurisdictional challenges that may bar the recognition of the foreign judgment (§ 328 para. 1 no. 1 Zivilprozessordnung (ZPO) (German Code of Civil Procedure)), a defendant must assert those objections in the foreign court. A defendant that voluntarily submits to the jurisdiction of the foreign court may be precluded from later arguing that the foreign court’s lack of jurisdiction bars recognition of the judgment in Germany (*venire contra factum proprium*). Similar considerations may apply with respect to objections directed to violations of public policy—these should also be raised in the foreign proceeding in order to preserve this challenge in the recognition proceeding. Geimer at 119, 137. See *Bundesgerichtshof* (German Supreme Court in Civil Matters), NJW 1999, 3198 (no violation of German public policy in recognition of default judgment of U.S. district court).

⁴Regulation (EU) No. 1215/2012, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:EN:PDF> (visited July 24, 2019).

⁵The recognition of judgments from Denmark in Member States of the EU is governed by the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968 (“Brussels Convention”), reprinted in Stephen O’Malley and Alexander Layton, *European Civil Practice* (Sweet and Maxwell 1989), App. 3. The full text of the Brussels Convention is available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm> (visited July 24, 2019). The parallel Convention Executed in Lugano on Sept. 16, 1988 (“Lugano Convention”) was concluded among member states of the European Free Trade Association and contains essentially the same provisions as the Brussels Convention. The Lugano Convention governs the recognition of judgments of certain European states that are not E.U. Member States or parties to the Brussels Convention (*i.e.*, Iceland, Norway, and Switzerland). The Lugano Convention is available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> (visited July 24, 2019).

adopted a treaty on the recognition and enforcement of judgments in civil or commercial matters, but currently only one country has signed the convention.⁶

§ 23:59 Settlement

European inside counsel and senior managers may be accustomed to seeing a litigation through to its conclusion in civil law systems. At the very least, many are not accustomed to examining settlement possibilities at an early stage of the case. It is, therefore, especially important that U.S. outside counsel raise the question of settlement with European inside counsel early in a case.¹ There are a number of reasons for doing so.

First, European senior managers and inside counsel not familiar with the U.S. litigation system simply may not appreciate the degree to which a case is likely to impact upon their time and that of their staff. Of particular importance to European inside counsel is a sense of the likelihood that depositions will be sought of the company's senior management. But even aside from depositions, U.S. litigation, particularly substantial cases, can be highly distracting. Second, U.S. litigation can be enormously expensive, far more so than traditional civil law cases in which there will be no discovery and no jury trial.²

A risk/reward (or cost) analysis should be conducted at the outset to help focus a settlement evaluation.³ Factors that should be taken into account when the company is a defendant—besides the impact on company personnel and costs—include the extent to which the litigation may bear on the company's accounts (including whether a reserve for the case has been established and, if so, whether a jury will

⁶The text of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> (visited July 24, 2019).

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¹See generally Chapter 12 "Evaluating Legal Risks and Costs with Decision Tree Analysis" (§§ 12:1 et seq.); Chapter 65 "Settlement" (§§ 65:1 et seq.).

²See generally § 23:3.

³See generally Chapter 65 "Settlement" (§§ 65:1 et seq.).

learn of it), whether the company plans to issue a prospectus or otherwise publish accounts that may require, in connection with financial disclosure, an evaluation of the litigation and, if so, what sort of legal opinion counsel may be able to provide the company's auditors, whether the case involves public relations issues that may overshadow the litigation or impact upon its resolution,⁴ and the likelihood that a settlement may attract additional claims against the company.

Even if an early settlement is deemed undesirable or simply is unattainable, counsel should revisit and update their evaluation of settlement possibilities on a regular basis.

§ 23:60 Alternative dispute resolution

In light of the substantial cost and inconvenience to a European company of litigating in the United States, U.S. outside counsel and European inside counsel should also carefully consider other possible alternatives to litigation at the start of their work together.¹

There may be an existing arbitration agreement that can be invoked. But, even if there is not, counsel still may wish to propose some form of alternative dispute resolution ("ADR") to counsel for the adverse party. For example, an early effort at mediation may be a particularly attractive option to a European litigant in the United States. Such an alternative to litigation may result not only in saving time and money, but also may prevent exposing the company to possible adverse judicial determinations and attendant negative publicity. Thus, if a European company has had sufficient contacts with the United States to give rise to a pos-

⁴Often a natural tension develops between the company's public relations objectives and its legal needs. For example, company public relations personnel or consultants may wish to publicize information that, when it appears in media reports, will engender discovery requests from the adverse party. Also, the public relations team may want to release information that could jeopardize various litigation privileges and protections. This, too, is an area that must be carefully explored by counsel at the outset. *See generally* Chapter 67 "High Profile Litigation" (§§ 67:1 et seq.) for a discussion of special features and considerations present in high profile litigation.

[Section 23:60]

¹*See generally* Chapter 57 "Alternative Dispute Resolution" (§§ 57:1 et seq.); Chapter 58 "Arbitration of International Commercial Disputes" (§§ 58:1 et seq.).

sible finding that it is subject to general jurisdiction in the state where a case has been brought against it, by finding an acceptable alternative to litigation, counsel can defer to another day a ruling that could invite other suits against the company in the United States.²

Another major advantage of ADR is the flexibility it often gives the parties to write their own rules. For example, the parties may be able to agree upon such issues as venue, the identity of the arbitrator(s), the extent of discovery (if any), what jurisdiction's substantive law will apply, whether the award will be in writing, and whether the award's factual and legal basis will be set forth. A European company on the verge of litigating in the United States may view ADR as an opportunity to avoid certain distasteful features of U.S. litigation, such as depositions, juries, and punitive damages. In this connection, a European company may wish to consider including ADR clauses (as well as choice of law or forum selection clauses) in its contracts to enable it to avoid the U.S. courts and U.S. laws.

§ 23:61 Practice checklist

1. Establish clear and realistic timetables for all tasks and revisit these timetables frequently. Take into account one another's schedules. (See § 23:8)
2. Schedule a face-to-face meeting of the inside and outside counsel teams as early as practicable. (See § 23:11)
3. Agree on protocols for communications, including methods and timing, which team members are to be addressed and which copied. Always take into account time differences. (See § 23:12)
4. All inside and outside team members should have a complete and up-to-date list of home, office, cellular telephone and e-mail addresses. (See § 23:12)
5. Billing and budgetary matters should always be discussed clearly. Agree in advance on an engagement letter and whether there is to be an advance retainer. Budgets should be revisited on a regular basis. (See § 23:17)
6. Establish the universe of potentially relevant docu-

²See generally § 23:37.

- ments, debrief custodians and appropriate personnel, such as the client's information technology personnel, develop a plan for "triage," and assess translation needs and costs. (See §§ 23:16, 23:18 to 23:20)
7. Be familiar with applicable U.S. and European privilege, privacy and data protection laws. Do not assume that invocations of privilege by European clients will be evaluated under U.S. law. (See §§ 23:21 to 23:29)
 8. Both inside and outside counsel should, when applicable, place appropriate "attorney-client privilege," "work product," and "joint defense" endorsements on written and e-mail communications. (See §§ 23:22 to 23:27)
 9. Discuss at the outset any possible insurance coverage for the matter at issue, including primary and excess insurance coverage in Europe and the United States. (See § 23:30)
 10. Do not waive service of process under Hague Service Convention or letters rogatory procedures without an appropriate concession from opposing counsel in return. (See § 23:33)
 11. Inside counsel in Europe should designate appropriate corporate employees to accept service of process. Other employees likely to be confronted by a process server should be instructed to refer the process server to these designees. Where appropriate, affiliates or subsidiaries should be alerted to possible attempts at service of process. (See § 23:31)
 12. Any papers that are served in Europe should be transmitted promptly to U.S. outside counsel, along with an assessment as to whether service was proper under local law. (See § 23:32)
 13. Counsel should agree in advance what their position will be in the event service by mail is attempted. (See § 23:32)
 14. Appropriate company declarants should be selected in a coordinated fashion. (See § 23:35)
 15. Where the "original" of a client declaration is to be a non-English version, counsel may wish to prepare the draft in English, then, when the draft is in near final form, have the English version translated. The translated version can become the "original" and the English version the "translation." This reversal permits

- counsel to work together at the earliest possible time on the English version—the one the American judge will read. (See § 23:35)
16. Ascertain if the client has access to either in-house or outside translators. The cost may be significantly lower in Europe than in the United States. Determine whether applicable court rules require a certificate of accuracy for translated documents. (See § 23:16)
 17. In federal court, use declarations rather than affidavits to avoid the unnecessary added costs and time caused by the solemnity of European notarization procedures. (See § 23:35)
 18. Discuss with European inside counsel and the company's IT staff the procedures necessary to establish a litigation hold once it is reasonably likely that litigation will ensue. The litigation hold must make certain that all relevant documents, including electronically stored information, are not destroyed, for example, by suspending automatic e-mail deletion programs. U.S. counsel and European inside counsel must monitor the company's compliance with the litigation hold and make follow-up inquiries with IT staff and key players in the company to assure that relevant documents are, in fact, being preserved. (See §§ 23:20, 23:43)
 19. In considering a motion to dismiss on *forum non conveniens* grounds, anticipate that the U.S. judge may impose conditions to a dismissal. Counsel may want to retain an expert in foreign law for a *forum non conveniens* motion. (See § 23:38)
 20. Develop a complete list of valid grounds for objecting to document requests, including, for companies based in states that are signatories to the Hague Evidence Convention, possible specific objections to any pre-trial production of documents pursuant to Article 23 of the Convention and European data protection and privacy laws. (See §§ 23:39, 23:41, 23:44)
 21. Consider the likelihood that the adverse party will seek to depose a company employee who is a declarant on a potentially dispositive motion. Therefore, in selecting a declarant, consider how the person will perform at a deposition. (See §§ 23:35, 23:46 to 23:47)
 22. Gather support for those *Aérospatiale* factors favoring deference to Hague Evidence Convention or letters rogatory procedures. (See § 23:41)

23. Carefully consider whether to volunteer to let discovery proceed under U.S. rules. (See §§ 23:41 to 23:44)
24. Be prepared to argue that under applicable European law, a company that is a party to a lawsuit cannot require its employees and former employees to submit to depositions, and thus Hague Evidence Convention or letters rogatory procedures must be followed. (See §§ 23:47 to 23:48)
25. Determine in advance whether U.S.-style witness preparation is permissible in connection with a deposition and, if so, whether European inside counsel may participate. (See §§ 23:47, 23:50)
26. Prepare arguments as to how the disclosure of particular information may harm the company and use them as a basis for discussions with the other side concerning confidentiality agreements. If such agreements are not possible, seek a protective order from the court. European inside counsel should be advised that papers filed with courts in the U.S. are generally matters of public record. (See § 23:51)
27. A member of the European inside counsel team should attend the trial. (See § 23:57)
28. If it is desirable to preserve all arguments against a subsequent proceeding to enforce a judgment in Europe, counsel must be careful to follow all appropriate procedures, including, for example, asserting any and all available motions and arguments challenging the U.S. court's jurisdiction. (See § 23:58)
29. Consider the benefits of an early settlement and of ADR as a means of not only saving time and money, but also of possibly avoiding certain distasteful features of U.S. litigation. (See §§ 23:59 to 23:60)