

International Discovery of Financial Information

Ariel Leichter-Maroko | Leichter Leichter-Maroko LLP

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Ariel Leichter-Maroko is a founding partner of Leichter Leichter-Maroko LLP, a family law firm in Beverly Hills. His practice focuses on complex family law litigation and appeals, including large asset division and support matters, high-conflict custody matters, and interstate and international family law issues, including custody, child support, spousal support/alimony, property division, and jurisdictional disputes



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SCOPE OF PRESENTATION

- Discovery of financial information located in a country other than the one in which the case is being litigated
- Will focus on issues faced by attorneys litigating cases in the U.S. and seeking discovery abroad



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PRELIMINARY ANALYSIS

- Outline the financial issues of the case
- What relevant information is in another country?
- How important is that information to any issue?
- Can the information be obtained without international discovery?
- Determine availability and cost of discovery
- Weigh costs and benefits of pursuing discovery
- Could or should the case itself be litigated in the other country
- Evaluate client's ability and willingness to pay



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TYPES OF FINANCIAL ISSUES AND RELEVANT INFORMATION

- Property division
 - Relevant information could be anything probative of the existence, value, character, acquisition date, etc. of assets or debts that could be subject to division. For example:
 - Real property deeds
 - Financial account statements
 - Corporate stock ledgers
 - Business financial statements
 - Loan applications

TYPES OF FINANCIAL ISSUES AND RELEVANT INFORMATION

- Child support, spousal support (alimony), attorney's fees
 - Relevant information could be anything probative of the parties' respective financial conditions, including their incomes, expenses, assets, and debts. For example:
 - Most information relevant to property division
 - Employment records
 - Credit card statements
 - Bills for living expenses
 - Passports, travel itineraries, calendars

HOW IMPORTANT IS THIS INFORMATION?

- This is an important question to ask before embarking on international discovery
- International discovery is expensive
- Spending \$100,000 to discover information regarding a \$50,000 asset is usually unwise
- Likewise, spending \$100,000 to discover information to belt-and-suspenders an issue that you already have in the bag may be unwise

CAN THE INFORMATION BE OBTAINED WITHOUT INTERNATIONAL DISCOVERY

- This is another critical question to consider very early on, as international discovery is likely going to be the most expensive and—all else being equal—the least fruitful method of obtaining information
- Information is likely obtainable without international discovery when it is within a party's possession, custody, or control

INFORMATION IN A PARTY'S POSSESSION, CUSTODY, OR CONTROL

- Usually obtainable through:
 - Family law disclosure obligations (in many or most states)
 - *E.g.*, Cal. Fam. Code § 1100(e) ("obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request"); *id.* §§ 2100-2113.
 - Conventional (i.e., domestic) formal discovery (e.g., demand for production of documents or deposition with document request)

INFORMATION IN A PARTY'S POSSESSION, CUSTODY, OR CONTROL

- A party refusing to comply with such discovery usually can simply be ordered to produce the information regardless of where it's located. *See, e.g., Volkswagenwerk Aktiengesellschaft v. Super Ct.*, 123 Cal. App. 3d 840, 856-57 (1981) (abrogated on other grounds).

INFORMATION OBTAINABLE WITHOUT INTERNATIONAL DISCOVERY

- For example, before trying to figure out how to subpoena a bank in Tonga to obtain a party's account statements, consider:
 - Demanding that the party produce the statements per family law disclosure obligations (if applicable).
 - Serving the party with a document demand (or deposition notice) requesting production of those statements. If the party claims (s)he doesn't have them, ask the court to order the party to obtain them from the bank and produce them.



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INFORMATION OBTAINABLE WITHOUT INTERNATIONAL DISCOVERY

- Alternatively (and especially where the party cannot be trusted to produce authentic or complete documents), ask the court to order the party to authorize and instruct the Tongan bank to send statements directly to you.



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INFORMATION OBTAINABLE WITHOUT INTERNATIONAL DISCOVERY

- However, there are limited exceptions to the general rule that courts will simply order a party to produce documents when the party is foreign:
 - The court may limit discovery under general comity considerations
 - The litigant may be able to limit discovery under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters



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GENERAL COMITY CONSIDERATIONS

- International comity compels courts to give special consideration to objections from foreign litigants and exercise “special vigilance” to protect them from discovery requests that conflict with foreign interests.
- However, this exception generally applies only to corporate parties, and is unlikely to protect non-corporate litigants, such family law litigants (although it might protect a foreign corporation joined to a family law proceeding)



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HAGUE CONVENTION

- Discussed more fully in the context of nonparty discovery
- A foreign litigant can object to standard discovery and request that the Hague Convention discovery procedures be used
- But courts are *not* required to grant the request, and foreign litigants have the burden of establishing that comity considerations mandate use of Hague Convention procedures



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DETERMINING AVAILABILITY AND COST OF INTERNATIONAL DISCOVERY

- Talk to foreign counsel
- Review your own discovery laws
- Determine whether the foreign country is a signatory to the Hague Convention or other agreement regarding discovery
- Review the Hague Convention or other agreement as implemented in the subject foreign country (if applicable)
- Talk to foreign counsel again



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FINDING FOREIGN COUNSEL

- This is CRITICAL. Never pursue international discovery, or waste measurable time researching it, before first finding and contacting competent counsel in the foreign country
- Where to find counsel:
 - Start with the IAFL website:
 - www.iafl.com
 - Searchable by country, state/region, and city
 - Biographies, contact information, links to attorney websites
 - Fellows are usually very friendly, knowledgeable, patient, and generous with their time



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FINDING FOREIGN COUNSEL

- Other sources:
 - The website of the U.S. Embassy for the specific country, under the tab "U.S. Citizen Services," then "Legal Assistance"
 - Example – Angola: <https://ao.usembassy.gov/u-s-citizen-services/local-resources-for-u-s-citizens/legal-assistance/>
 - Bar associations
 - Study groups
 - Google



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ISSUES TO DISCUSS WITH FOREIGN COUNSEL

- Methods and scope of available discovery
- Signatory to Hague or other agreement?
- Peculiarities and nuances of discovery
- How long will particular methods of discovery take?
- Logistical challenges
- Should or must foreign counsel be retained



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EXAMPLES OF PECULIARITIES AND NUANCES OF DISCOVERY

- Japan
 - Illegal to take depositions outside U.S. embassy or consulate
 - More specifically, a deposition is legal only if:
 - It is presided over by a U.S. consular officer
 - It is taken at a U.S. embassy/consulate
 - It is taken pursuant to a U.S. Court order
 - Any non-Japanese participant applies for and obtains a Japanese Special Deposition Visa

See Article 17(1)(e) of the U.S.-Japan Consular Convention (<https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html>)



EXAMPLES OF PECULIARITIES AND NUANCES OF DISCOVERY

- Japan (cont'd)
 - No deposition by phone or videoconference absent authorization from the Japanese Ministry of Foreign Affairs
 - Can't compel nonparty document production
- Israel
 - "Israeli bank-confidentiality laws protect bank customer account and transactional information from disclosure to third parties. The infringement of a bank customer's privacy by the disclosure of his bank account and transactional information may result in civil and criminal penalties, including imprisonment for up to five years."
Linde v. Arab Bank, PLC, 262 F.R.D. 136, 148 (E.D.N.Y. 2009).



EXAMPLES OF PECULIARITIES AND NUANCES OF DISCOVERY

- In some countries, deponents may not be sworn in
- In some countries, there will be no verbatim transcript of a deposition
- In some countries, a judge—not the attorney—asks questions of the deponent



HOW LONG WILL PARTICULAR DISCOVERY METHODS TAKE

- This is a critical consideration, especially when faced with litigation deadlines, or when a motion for much-needed immediate financial relief (e.g. support, fees) relies on the information being sought (e.g., foreign income records). For example:
 - Deposition rooms in the embassy and consulate in Japan are often fully booked for several months
 - Letters rogatory can take many months to issue and process



PROCEDURES FOR INTERNATIONAL DISCOVERY

- First look to the discovery laws of the state in which the case is being litigated
- Just as with intrastate discovery procedures, international discovery procedures must comply with the home-state's law.
- It is therefore imperative to review the home-state's international discovery laws.
 - Example: California Code of Civil Procedure section 2027.010, entitled "Depositions in a foreign nation"



PROCEDURES FOR INTERNATIONAL DISCOVERY IN A CALIFORNIA ACTION

- "Any party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in a foreign nation. Except as modified in this section, the procedures for taking oral depositions in California [] apply to an oral deposition taken in a foreign nation." Cal. Civ. Proc. Code § 2027.010(a).



PROCEDURES FOR INTERNATIONAL DISCOVERY IN A CALIFORNIA ACTION

- A *party* can be compelled to attend a deposition, testify and produce documents by serving him/her with a deposition notice. Cal. Civ. Proc. Code § 2027.010(b).
- REMEMBER: It's usually easier to obtain information in a foreign country when that information is in a *party's* possession, custody, or control



PROCEDURES FOR INTERNATIONAL DISCOVERY IN A CALIFORNIA ACTION

- For a *nonparty* deponent, the "party serving a deposition notice ... shall use any process and procedures required and available **under the laws of the foreign nation where the deposition is to be taken** to compel the deponent to attend and to testify, as well as to produce any document" Cal. Civ. Proc. Code § 2027.010(c) (emphasis added).



PROCEDURES FOR INTERNATIONAL DISCOVERY IN A CALIFORNIA ACTION

- The deposition must be supervised by:
 - a person authorized to administer oaths in the U.S. or the foreign country; or
 - a person appointed by commission or letter rogatory; or
 - any person agreed to by all parties.Cal. Civ. Proc. Code § 2027.010(d)
- The home court must issue a commission, letters rogatory, or letter of request upon a party's motion and the court's finding that it is necessary or convenient. *Id.* subd. (e). (Discussed below.)



NONPARTY DEPOSITION IN A FOREIGN COUNTRY – CALIFORNIA ACTION

- A nonparty in a foreign country can be compelled to attend a deposition, testify, and produce documents *only by the process and procedures required and available under the laws of that country.* Cal. Civ. Proc. Code § 2027.010(d)
- Next step: determine what process and procedures are required and available under the laws of the foreign country.



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PROCESS AND PROCEDURES OF THE FOREIGN COUNTRY

- Threshold questions:
 - Is the country a signatory to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters?
 - Does the Country have other treaties or agreements with the U.S. regarding discovery (e.g., U.S.-Japan Consular Convention of 1963)?
- These can be answered by
 - Asking foreign counsel; and
 - The following table of Hague signatories: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>



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HAGUE CONVENTION

- The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters became effective in 1972 and is codified in the U.S. as 28 U.S.C. § 1781
- It currently has 62 signatories



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HAGUE CONVENTION

- The Hague Convention “is a multilateral treaty that was designed to provide a uniform procedure to be used in obtaining evidence in foreign countries. A central purpose of the convention was to reconcile the markedly different discovery procedures that exist in common law countries, such as the United States, and civil law countries, such as West Germany.” *Philadelphia Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 59 (E.D. Pa. 1983).



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HAGUE CONVENTION

- Its stated purpose is “to facilitate the transmission and execution of Letters of Request” and to “improve mutual judicial co-operation in civil or commercial matters.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987), quoting the Convention’s preamble.



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HAGUE CONVENTION

- “Great differences exist, however, between the American approach that places discovery largely in the hands of the parties with minimal court supervision before trial, and the traditional civil law approach that regards gathering of evidence as an exercise of judicial sovereignty entrusted largely to the court and often delayed until the trial itself. [citation] These differences led sometimes to impasses between U.S. courts and foreign governments, and frequently to the result that evidence secured abroad via unfamiliar procedures was either inadmissible or otherwise useless in the requesting court. The Hague Evidence Convention was designed to bridge these procedural obstacles by providing a means of securing evidence abroad that would be ‘tolerable’ in the executing state while at the same time ‘utilizable’ in the requesting forum.” *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 612 (M.D. Tenn. 1986).



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HAGUE CONVENTION EXCLUSIVE?

- It is **NOT** the exclusive means for discovering information located in a signatory country. *Aerospatiale*, 482 U.S. at 529, 538 (“the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish *optional* procedures that would facilitate the taking of evidence abroad”).



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HAGUE CONVENTION EXCLUSIVE?

- “An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court’s supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities.” *Aerospatiale*, 482 U.S. at 539.



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DISCOVERY IN A HAGUE COUNTRY

- However, because discovery from a *nonparty* witness in a foreign country can only be compelled under the process and procedures required and available under that country’s laws (Cal. Civ. Proc. Code § 2027.010(e)), discovery from a nonparty witness in a Hague country can generally be compelled **only** via the process and procedures of the Hague Convention.



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DISCOVERY IN A HAGUE COUNTRY

- Discovery under the Hague Convention usually proceeds via “letters of request” (alternatively, the Hague Convention allows certain discovery to be conducted by consular agent)
- “Letters of request” are sent from the home court to a court in another country, asking the foreign court to compel a witness to attend a deposition



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LETTERS OF REQUEST

- California law requires a court to issue a letter of request upon a party’s motion and the court’s finding that it is necessary or convenient. Cal. Civ. Proc. Code § 2027.010(e). (Other jurisdictions will likely have comparable rules. E.g., FRCP 28(b).)
- Letters of Request must follow specific format and language requirements which are beyond the scope of this presentation, but can be found on the Hague Convention website.



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LETTERS OF REQUEST

- After the home court issues the letter of request, it should be sent to the foreign country’s “central authority” (each signatory designates at least one such central authority, and these can be found on the Hague Convention’s website) which then sends the letter to the correct court in that country.
 - Article 27 allows the foreign country to relax procedures (e.g., to permit the letter of request to be sent directly to the foreign court, rather than through the central authority).



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LETTERS OF REQUEST – MANDATORY EXECUTION SUBJECT TO RESERVATION

- The foreign court must execute the letter of request unless it is within the scope of a reservation made by the foreign country to the Hague Convention.
- **Reservation:** Article 23 allows signatory countries to “declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries [i.e., the U.S.]”
- **This can make discovery very difficult**



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PRETRIAL DISCOVERY RESERVATION

- This is designed to protect foreign countries from what they may perceive as abusive discovery tactics endemic to American litigation, but absent from litigation anywhere else. (The scope of discovery in most countries is far more narrow than in the U.S.)



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PRETRIAL DISCOVERY RESERVATION

- **SUGGESTION:** to decrease the likelihood that the foreign court will refuse to execute your letter of request because of a “pretrial discovery” reservation, try to show, in the letter of request, that the requested documents are directly relevant to the facts of the case, so that the foreign court is less inclined to perceive the discovery request as overbroad or abusive.



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DISCOVERY IN NON-HAGUE COUNTRIES

- Again, first talk to foreign counsel
- Discovery will likely need a letter rogatory. Recall that California discovery law requires a court to issue a letter rogatory upon a party's motion and the court's finding that it is necessary or convenient. Cal. Civ. Proc. Code § 2027.010(e). (Other jurisdictions will likely have comparable rules. *E.g.*, FRCP 28(b).)



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BLOCKING STATUTES

- Some countries have laws prohibiting their citizens from disclosing certain information when responding to discovery which could interfere with your discovery efforts. For example:
 - France prohibits witnesses from disclosing information that could threaten France's economic interests
 - Israeli law prohibits disclosure of bank customer account and transactional information to third parties. Violation may result in civil and criminal penalties, including imprisonment for up to five years



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TESTIMONIAL PRIVILEGES

- Some countries have testimonial privileges that are either not available, or far narrower, in the U.S. For example, nonparty witnesses in Germany have a privilege to not disclose information that could cause them financial harm



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CONDUCTING A FOREIGN DEPOSITION

- The procedures for taking a foreign deposition will likely be very unfamiliar to most U.S. attorneys. For example, they could involve a judge asking the questions to the witness, they could prohibit putting the witness under oath, they could prohibit a verbatim transcript, etc. It is imperative that attorneys discuss with foreign counsel the procedures for taking depositions, and it may be advisable to retain foreign counsel.



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CONDUCTING A FOREIGN DEPOSITION

- In countries that permit depositions *only* if the witness *voluntary* complies (e.g. Japan), it is good practice to ask witnesses, at the beginning of their depositions, whether they are appearing and testifying of their own free will. This will reduce the likelihood of the deponents' (or opposing parties') later seeking to strike deposition testimony on grounds of duress (i.e., that the deposition was taken in violation of the foreign country's discovery laws).



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THE CLIENT'S FINANCIAL RESOURCES AND TOLERANCE

- International discovery can be very expensive
- In addition to fees for preparing discovery requests to comply with Hague or other foreign law, there are often substantial out of pocket costs, such as:
 - Travel
 - Reservation of consular room
 - Court reporter and videographer
 - Interpreter (if not in English)



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THE CLIENT'S FINANCIAL RESOURCES AND TOLERANCE

- Educate yourself about the cost of international discovery, the likelihood of it's bearing fruit, and the value of that fruit to your client's bottom line, so that you can give your client the information needed to make an informed decision
- Be up front and realistic with your client about the costs of international discovery, and don't push them to incur more fees and costs to pursue international discovery than they can reasonably expect to recover from the fruits of that discovery



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