

Cross-Border Discovery: Why Local Counsel Is Indispensable

IN BRIEF

- When engaging in cross-border discovery, be mindful of the differences in jurisdictional issues, including but not limited to, blocking statutes, data privacy, and attorney-client privilege differences.
- When drafting letters rogatory, be detailed and specific in the information and knowledge you are seeking, to facilitate the court's decision to grant your requested discovery.
- International arbitration rules for discovery are not the same as when engaged in litigation/potential litigation—check the law of the arbitration seat to determine what your restrictions on discovery may be.
- While it is essential to have a working knowledge of discovery rules in the jurisdiction you're seeking information in, it is also essential to engage local counsel from the outset, to help navigate jurisdictional specific issues.

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As I traveled to Toronto, Canada, for the 2025 Fall Meeting of the ABA Business Law Section, it struck me that I was navigating the delicate balance of being a foreigner among friends, which our international colleagues must traverse each and every time they cross a border, whether it's for another section meeting, or in the pursuit of their clients' goals. And especially for me as a young litigator, this became all the more apparent as I listened to a group of incredible panelists present the CLE program "Cross-Border Enforcement in Discovery, Including Data and Personal Privacy Considerations." We live in a globalized world, where transactions and clients transcend traditional boundaries. Therefore, in order to most effectively advocate when litigation arises (or could arise), it is essential to understand exactly how to obtain (or protect) evidence.

This CLE, which took place on September 19, 2025, included experts who have practiced in

jurisdictions around the world. First, we met Steven Barber, partner at Steptoe LLP. Moderating the panel on behalf of Judge Gail Andler (retired) was Deborah Templer, partner at McCarthy Tetrault, LLP. The third panelist was Jonathan Fitch, an international arbitrator and mediator for JAMS. Rounding out the panel was Kim Nemirow, a partner at Kirkland & Ellis, LLP.

International Discovery: Guidelines and Considerations

While the panel primarily focused on issues and considerations in obtaining discovery in the United States and Canada, they also briefly touched on the importance of the Hague Evidence Convention in seeking discovery beyond those two borders. The Hague Evidence Convention guides the taking of discovery abroad (a voluntary process that protects sovereignty). Sixty-nine countries are signatories, including the United States.

United States international discovery is also governed by 28 U.S.C. § 1781 and § 1782, which are U.S. statutes allowing both the direct transmittal of letters rogatory (the formal request for judicial assistance to exchange discovery) between tribunals and permission for a U.S. district court to compel production of evidence from a person/entity in the court's jurisdiction for use in a foreign proceeding or international tribunal. Therefore, when working with a client who needs to engage in cross-border discovery, it is important to note if the country in which you are seeking information is a Hague Evidence Convention signatory or not and whether you need information from within the United States. However, while the panelists did recommend having a working knowledge of the rules and considerations that guide discovery, they confirmed that the first thing to do when seeking discovery in a foreign jurisdiction is to obtain local counsel, who will be your guide through the local and/or national standards that may limit the ability to seek discovery.

Barriers to Information: Blocking Statutes, Data Privacy, and Investigations

The next key takeaway from the program was the importance of local blocking statutes, data privacy laws, and investigation considerations.

To begin, most jurisdictions have enacted blocking statutes, which protect their citizens against foreign discovery orders seeking evidence. Unless your request fits into an exception of that statute, you may have to engage in creative lawyering to obtain the information you need, as a lack of exception may lead that court to not even recognize discovery orders from your jurisdiction. Next, consider local data privacy laws and local statutory privilege issues. There may be different attorney-client privilege rules in the other jurisdiction.

Also consider what, if any, cultural differences in data sharing and attorney-client relationships exist between your practicing jurisdiction versus where the evidence is. These issues and statutes impact how, or if, one can obtain data from a third party or individual residing in that jurisdiction. Further, depending on the statutory guidance, one may not even be able to get the data out of the country; so consider that when seeking discovery.

But, what if you're not even in litigation; you're just conducting an investigation? That investigation could be either internal or in cooperation with a regulator, but the data is in another country. The same considerations, as previously discussed, apply.

Once again, it becomes clearer how important it is to engage local counsel—don't engage in cross-border discovery without them.

Word Choice Is Important: Understanding How to Tailor the Discovery Request

Discovery in all jurisdictions is discretionary, but especially in Canada, which is not a signatory to the Hague Evidence Convention, where it is rooted in principles of comity and reciprocity. Therefore, to engage in cross-border practice between Canada and the United States, we now come to the panelists' discussion of how to obtain discovery information—a practical tool for any international litigator. The importance of narrowly tailoring your discovery request, especially for letters rogatory, was heavily emphasized. As a U.S.-based litigator who has so far only found themselves in state and federal court, the discovery I've seen has generally been lengthy and broadly written. So as you find yourself venturing into other jurisdictions, be extremely specific in your asks.

In Canada and the United States, the decision to grant a discovery request is a two-part test. In Canada, the court begins by the statutory/

jurisdictional basis for granting the request and then decides, in part two, if it should grant the request. While there are several factors, the most important is the relevancy of the information sought. Given that the common objections include (1) that the evidence is not necessary to the U.S. litigation, (2) that the evidence could be obtained in the United States through other parties, or (3) that the request is overly broad, we see why it is essential to narrowly tailor the request. If not, the Canadian court might just do it for you. This is also true of letters rogatory in the United States—when letters rogatory are used to seek information in a U.S. jurisdiction by a foreign litigant or tribunal, the information is usually limited to documents or depositions.

The U.S. two-part statutory and discretionary test examines (1) whether the person/entity from whom discovery is sought resides, or is found, in the geographical reach of the U.S. district court, and (2) is the discovery going to be “for use” in a foreign or international tribunal? This means that one doesn’t have to actually be in litigation to seek evidence located in the United States with a letter rogatory—one just has to be reasonably contemplating litigation. But for both countries, be mindful that anyone providing an affirmation to the supporting documentation for the discovery request is open to cross-examination, so choose wisely.

International Arbitration and Discovery

When it comes to cross-border discovery in arbitration, most countries are guided by the New York Convention, which enforces arbitration agreements (Article IV). However, there can be significant obstacles to obtaining discovery in arbitration. First, arbitrators have no coercive power to compel discovery, and discovery orders are not enforceable per se in the European Union. Further, provisions of the Hague Evidence Convention do not apply to commercial arbitration. Further, in arbitration, unlike in litigation, blocking statutes may not apply to discovery, though that will be dependent upon the law of the arbitration seat. One may also have to seek to have information produced based on disclosure under specific laws, so, once more, local counsel is key.

Perhaps the biggest takeaway from this informative CLE is that when engaging in cross-border discovery, obtain local counsel. They will help you narrowly frame your request so that it is granted. They will be your partner in speaking to the relevance and necessity of the evidence sought. They are essential to understanding local data privacy restrictions as well as attorney-client privilege protections or limitations. They are the essential partner to any international litigant, and obtaining them should be the first discussion with your client.

