Global Litigator

CONSIDERATIONS IN PLANNING AND TAKING DEPOSITIONS OVERSEAS

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With the global economy producing an ever-increasing number of cross-border transactions and the globalization of businesses' services and value chains, litigators are called upon to handle U.S. disputes with international dimensions—including overseas depositions. It is increasingly essential for the U.S. practitioner to develop a working knowledge of the U.S. and foreign rules and practices governing overseas depositions.

While specifics will vary depending on the foreign jurisdiction involved and strategic considerations regarding the litigation at hand, overseas depositions typically involve three phases: first, initial planning and familiarization with applicable rules; second, obtaining authorization to conduct the deposition from the relevant U.S. authority (typically, a court) and the relevant authority in the foreign jurisdiction; and, third, preparing for and conducting the deposition.

Phase One: Planning

Although there is no one-size-fits-all approach to planning for overseas depositions, several early considerations should be kept in mind.

Start planning early. Early in the case assessment process, every practitioner should evaluate whether, and to what extent, the case will require discovery from overseas witnesses. Early planning is necessary because there are often many unknowns that can affect the speed with which overseas depositions can be accomplished: Foreign witnesses may not be cooperative, especially if they are not currently employed by or affiliated with a party to the litigation. Foreign counsel's schedules may present complexities. And the timing of motions required both in the United States and in the foreign jurisdiction may be unpredictable and beyond a lawyer's control. Even in cases in which adverse parties and foreign witnesses are cooperative, it can take many months—sometimes upward of a year—to arrange and conduct foreign depositions. It is thus essential to begin planning early.

Consult applicable rules of both the U.S. jurisdiction in which the litigation is pending and the foreign jurisdiction in which testimony is anticipated. In federal cases, foreign depositions are governed by Rule 28 of the Federal Rules of Civil Procedure, the district court's local rules, and the judge's individual rules. Many judges—especially those in the federal courts—are well familiar with the various procedures available to pursue overseas depositions, and many have particular preferences with which lawyers should be familiar. Lawyers should therefore engage early with the U.S. judge overseeing the litigation on issues regarding foreign discovery.

But Federal Rule of Civil Procedure 28(b) and state analogues only prescribe what a party must do under U.S. rules to take a deposition outside the United States. They do not grant a litigant any power in the foreign country to compel a foreign national to testify there. Nor do they affect the foreign jurisdiction's procedural and substantive rules governing depositions conducted in that jurisdiction.

It is therefore essential also to consult the law and rules of the foreign jurisdiction. The U.S. State Department's website, which provides general information about conducting depositions in most countries, is a useful starting point. Among other things, it supplies basic information about what treaties may apply to obtaining evidence in different countries. Additional information on specific foreign countries' laws governing local depositions can often be found on the websites of U.S. embassies and consulates in the relevant jurisdictions.

Consult local counsel. The importance of seeking advice of foreign counsel, familiar with the procedural and substantive laws of the relevant jurisdiction, cannot be overstated. As foreign depositions are planned and taken, U.S. counsel will benefit greatly from the knowledge of foreign counsel on a broad range of issues, from local requirements governing letters rogatory (discussed below) and obtaining court orders to rules governing the conduct of depositions in the foreign jurisdiction (e.g., objections, instructions not to

answer, discoverability of conversations with witnesses' counsel, the ability of witnesses to consult counsel during breaks, and judicial resolution of disputes occurring at the deposition). Local counsel can also handle court appearances in connection with the foreign court's adjudication of a deposition request and can provide invaluable insight in navigating local norms governing communications with courts, adverse counsel, and witnesses' counsel.

Ensure that any protective order entered by the U.S. court will permit documents and other confidential information to be shared with foreign deposition witnesses. One consideration often overlooked is the extent to which a domestic protective order will affect counsel's ability to conduct foreign depositions effectively. Many protective orders in U.S. commercial cases contain a provision permitting confidential information to be shared with deposition witnesses only upon a witness's agreement to be bound by the order or upon the U.S. court's order directing the witness to comply. But it may not be possible to secure a foreign witness's compliance, either voluntarily or through a U.S. court order. As a result, it is a best practice to ensure that any protective order entered by the U.S. court permits documents and other confidential information to be shared with foreign deposition witnesses as needed, and perhaps to make arrangements with foreign counsel to compel the witness's compliance.

Determine whether the witness will appear voluntarily or will require an order from the foreign jurisdiction compelling testimony. A foreign witness's willingness to cooperate often will dictate the procedure and timing necessary to arrange for the deposition. Normally, a foreign witness who is either a party to the litigation or controlled by a party is subject to the U.S. court's power to compel testimony through the court's in personam jurisdiction over the party. For third-party witnesses, counsel seeking the deposition should contact the witness or the witness's counsel to assess the witness's willingness to cooperate. If a witness is willing to cooperate, inquire whether the witness is willing to travel to the United States for his or her deposition. Even if the party seeking the deposition must cover the witness's travel costs, doing so may be less expensive and time consuming than arranging for an overseas deposition.

Keep in mind that even if a witness is willing to appear voluntarily overseas, it may be prudent to secure an order compelling appearance on the agreed date so that all parties can plan for the deposition, and incur necessary expenses, without concern that the witness will fail to appear. In addition, even a cooperative witness may require that counsel obtain an order or subpoena from the foreign jurisdiction—for example, to ensure that insurance coverage for legal costs is triggered or that the testimony is legally considered "compelled" in order to trigger protections under foreign law against the use of the deposition testimony against the witness.

Determine whether it is necessary to compel the witness to produce documents in connection with the foreign deposition. Because most procedural rules for arranging overseas depositions apply similarly to obtaining document production from foreign custodians, it is often most efficient to pursue both avenues together.

Phase Two: Obtaining Authorization in the United States and Foreign Jurisdictions

Obtaining authorization from a U.S. court and foreign authorities for an overseas deposition is often the most time-consuming phase, as the process can be largely outside the parties' control. Federal Rule of Civil Procedure 28(b) delineates four methods by which a foreign deposition may be taken: (1) pursuant to a treaty; (2) pursuant to a letter of request (also called a "letter rogatory"); (3) upon notice before a person authorized to administer oaths under federal law or the law of the relevant foreign jurisdiction; and (4) before a person commissioned by the court to administer an oath and take testimony. In many cases, two or more of the methods listed in Rule 28(b) will be available to counsel, who will have to decide which method to pursue based on the needs of the particular litigation. Each method presents unique challenges.

In certain cases, it may be necessary to transport U.S. court reporters, interpreters, and videographers to the foreign jurisdiction.

Treaty. The treaty most often applicable to overseas depositions is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (referred to as the "Evidence Convention"). The Evidence Convention is a multilateral treaty, to which the United States is a party, whose main purpose is to establish non-mandatory procedures for the provision of documentary and testimonial evidence among contracting states for use in civil and commercial judicial proceedings. The Evidence Convention's rules governing contracting and acceding states are complicated, and some states have opted out of certain provisions. Accordingly, when planning overseas depositions, it is important to check not only whether the foreign jurisdiction is a party but also whether the treaty's provisions are enforced between that jurisdiction and the United States.

The tool most commonly used for overseas depositions under the Evidence Convention is a letter of request. Upon motion, a U.S. court may issue a letter of request to the "Central Authority" designated

by the foreign jurisdiction. Upon receipt and approval of the letter of request, the foreign central authority forwards it to the appropriate judicial authority in that jurisdiction for execution, which is governed by the law of the foreign jurisdiction. For more information on required elements of letters of request and procedures governing their issuance, including a model form endorsed by the Evidence Convention's contracting states, consult the official *Practical Handbook on the Operation of the Evidence Convention*, which is available from the Hague Conference's website.

Letters rogatory. The traditional method for securing overseas depositions is letters rogatory, a practice that pre-dates the Evidence Convention and continues to be available for most foreign jurisdictions, whether or not they are parties to the Evidence Convention. A letter rogatory is an official request from a court in one country to the courts of another, requesting the performance of a judicial act, such as compelling or authorizing a deposition. U.S. courts have inherent power to issue letters rogatory, and they routinely do so upon motion. The determination of whether to issue letters rogatory is generally left to a trial court's discretion.

If a letter rogatory is to be used, it is essential to secure the advice of counsel expert in the foreign jurisdiction's procedures and substantive law to guide the preparation and transmission of the letter. Oftentimes, a legal proceeding must be instituted in the foreign jurisdiction in order to obtain a court order compelling or authorizing the deposition. Counsel's request to the U.S. court to issue a letter rogatory should be guided in large part by the requirements of the foreign jurisdiction, which will apply once that jurisdiction's authorities receive the letter from the U.S. court. Many foreign jurisdictions require letters rogatory to be translated into multiple languages.

If possible, counsel also should consult with the U.S. judge before making a motion for letters rogatory. Many judges have preferred methods for parties to present such applications, which may or may not be reflected in the judge's individual rules.

Overseas depositions on notice or by commission. Federal Rule of Civil Procedure 28(b)(1)(C) permits depositions to be conducted on notice in a foreign country "before a person authorized to administer oaths either by federal law or by the law in the place of examination." Rule 28(b)(1)(D) permits foreign depositions "before a person commissioned by the court to administer any necessary oath and take testimony." For cooperative witnesses, where there is no need to compel them to appear, a deposition on notice or by commission may be an efficient approach. Keep in mind, however, that a foreign deposition must not violate the law of the country in which it is conducted. It is therefore essential to consult with local counsel to determine what authorization from the foreign jurisdiction may be required.

Phase Three: Preparing for and Conducting the Deposition

Once the deposition has been arranged, consider the practicalities of conducting the deposition.

The who, where, and how considerations. Certain foreign jurisdictions (e.g., France, Germany, and Japan) have prescribed processes for and limitations on who may conduct a deposition of their nationals and where depositions may occur. Consult the relevant U.S. embassy or consulate for requirements specific to the jurisdiction.

Counsel must also arrange for court reporters, interpreters, and videographers. Not all foreign jurisdictions have the numerous professionals in these fields that the United States has. In certain cases, it may be necessary to transport U.S. professionals to the foreign jurisdiction.

In determining which procedural rules will apply to the deposition (including those affecting the scope of the attorney-client privilege), assess whether the participants are willing to stipulate to U.S. rules. Doing so may alleviate the time and expense of having local counsel present at the deposition and learning to conduct the deposition under foreign rules. Even where the parties are willing to stipulate to U.S. deposition rules, counsel must confirm that the foreign jurisdiction permits such stipulations. Of course, counsel should also consider whether there are strategic advantages to applying the procedural rules of the foreign jurisdiction.

Travel considerations. Find out whether any travel permissions are required. Certain countries (e.g., India and Japan) require special visas to conduct depositions. Local U.S. embassies in these countries, and these countries' embassies in the U.S., often can assist in expediting visa processes.

Tailoring the questioning to the purpose of the deposition. As with all depositions, it is important to plan overseas deposition questioning with an eye toward how the testimony will be used in the United States litigation, especially at trial. During the discovery period, it is often uncertain, particularly for third parties, whether witnesses will be available and willing to travel to the United States for trial. Many are beyond the United States court's jurisdiction to compel.

Use of depositions in U.S. court proceedings is generally governed by Federal Rule of Civil Procedure 32 and its various state analogues, under which a litigant may use "for any purpose" at trial a deposition of a witness who is outside the United States at the time of trial as long as (1) the adverse party was represented at or had reasonable notice of the deposition and (2) the deposition is used "to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying." Fed. R. Civ. P. 32.

The latter requirement—admissibility under the Federal Rules of Evidence—often means that counsel should conduct the overseas deposition as if it were trial testimony, especially mindful of relevancy and hearsay rules. Consider adverse counsel's objections and whether to modify questions based on them. And, where appropriate, conduct the questioning in a fair and respectful manner so as to reduce optics risks when replaying the testimony to a fact finder. ■