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E-Discovery in the EU:

Balancing the Competing Demands of E-Discovery Rules and EU Privacy Laws

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Philosophical Difference in Approaches to Privacy and Discovery

United States

- Sectionalized approach to privacy
  - Certain areas of information are protected such as medical information and credit information (HIPPA & Fair Credit Reporting Act). Otherwise discovery allows wide latitude in collecting data.

Under the FRCP

- Rule 26(b): discovery may be had of any unprivileged data that is "relevant to the claim or defense of any party."
  - Need not be admissible. Discovery can be obtained if it "appears reasonable calculated to lead to the discovery of admissible evidence."
  - Discovery can be limited, or precluded completely, by agreement, uncontested objection or Court Order. F.R.C.P. 26(c), 34(b) 45(c).

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Philosophical Difference in Approaches to Privacy and Discovery

European Union

- EU has a much more comprehensive approach to privacy
- Under the EU Data Protection Directive (95/46) member nations must implement laws to restrict all manner of "processing" of "personal data", meaning "any information relating to an identified or identifiable natural person" EU Directive Art. 2.
  - Prohibits the transfer of personal data outside the EU unless the country to which it is transferred provides "adequate protection" of personal data. EU Directive Art. 25.
  - The United States is generally not considered to have adequate protection for personal data.
  - Limited exceptions to Article 25 exist when the transfer is in furtherance of an "important public interest" or the "exercise, establishment of defence (sic) of legal claims." EU Directive Art. 26(1)(d).
  - These exceptions are hotly debated and an independent EU advisory board on data protection and privacy has interpreted them quite restrictively.

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Philosophical Difference in Approaches to Privacy and Discovery

- Each EU member nation has its own interpretation of the EU Directive and the privacy and production standards vary from country to country.
- Violation of the EU Directive can be subject to enforcement by EU authorities.
- EU citizens also have a private right of action for violations of the EU Directive. EU Directive Art. 22.
- The French Blocking Statute carries punishment by fine or imprisonment for requesting, seeking or disclosing information directed toward establishing evidence in view of legal or administrative proceedings abroad. French Penal Law No. 80-538 (July 16, 1980).

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Courts Confront a New Iteration of an Old Problem

"No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."

Restatement (Third) of the Foreign Relations Law of the United States §442, Reporters' Notes, n.1.

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- Parties are required to comply with the Federal Rules of Civil Procedure even in the face of violating another country's laws or they could be subject to sanctions from the United States court.

- *United States v. Vetco*, 691F.2d 1281(9th Cir 1981) - Vetco was sanctioned for not complying with an IRS summons even though its attorneys argued that to fulfill its obligations under US law would violate Swiss law.

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- Under Restatement §442 Courts considering whether to order production of information located abroad should weigh five factors:
  - Importance of the information to the litigation or investigation
  - Degree of specificity of the request
  - Whether the information originated in the United States
  - Availability of alternative means of securing the information
  - Extent to which noncompliance would undermine important interests of the state where the information is located

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- Courts have added two additional considerations:
  - Hardship of compliance on the party or witness from whom the discovery is sought
  - Good faith of the party resisting discovery

Strauss v. Credit Lyonnais, S.A., 2000 U.S. Dist. Lexis 38378 (E.D.N.Y May 25, 2007); *Reino de Espana v. Am. Bureau of Shipping*, 2005 U.S. Dist. Lexis 15685 (S.D.N.Y. 2005)

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***Societe Internationale Pour Participations Industrielles et Commerciales, S.A v. Rogers*, 357 U.S. 197 (1958).**

- A Swiss holding company sued the U.S. Attorney General to recover property that had been seized by the U.S Government.
- Trial court dismissed the case for failure to produce Swiss banking records that "might have vital influence" on the outcome of the case because the production would violate Swiss law.
- The Supreme Court found that the failure to comply with the court's order was "due to inability fostered neither by [plaintiff's] own conduct nor by circumstances within its control."
- Dismissal was not proper because failure to comply "was due to inability, and not to willfulness, bad faith, or any fault of the petitioner."
- Nevertheless the Supreme Court held that the Trial court might be "justified in drawing inferences unfavorable to petitioner as to particular events."

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Courts Confront a New Iteration of an Old Problem

***Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).**

- "American Courts should take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or location of its operations, and for any foreign interest expressed by a foreign state."
- The Hauge Convention is not the exclusive mechanism for obtaining discovery in a foreign country.
- The French Blocking Statute and similar laws do not deprive the United States District Court of its jurisdiction to order, under the Federal Rules of Civil Procedure, a party before it to produce evidence physically located in another country.
- Outlined the five considerations set forth in Restatement §442.

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Courts Confront a New Iteration of an Old Problem

***Columbia Pictures v. Bunnell*, 245 F.R.D. 443 (C.D. Ca. 2007)**

- Copyright infringement action against operators of internet search engine alleged to be facilitating the illegal duplication of movies.
- Held that Random Access Memory ("RAM") data was within the scope of discovery.
- Ordered production of data off computer servers located in the Netherlands over the argument that production of such data would violate Dutch law.

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Courts Confront a New Iteration of an Old Problem

***Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)**

- AMD sought discovery from Intel in an antitrust proceeding in the EU under 28 U.S.C. §1782 (allowing U.S. Courts to order a person found in the district to produce evidence for use in a foreign tribunal).
- The Court held that §1782 did not contain a requirement that the information sought would have had to have been discoverable if the documents were located in the EU.
- The Court also held that §1782 makes discovery available to complainants who do not have the status of private litigants or sovereign agents.
- The Court held that a proceeding need not be imminent for an applicant to invoke §1782.

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Methods to Collect Data From the European Union

- Consent
- Safe Harbor
- Model Contractual Clauses
- Binding Corporate Rules

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Methods to Collect Data From the European Union

Consent

- Under the EU Directive "processing" of data can occur if the data subject gives unambiguous consent. EU Directive Art. 7.
- Different EU member nations have different definitions of "consent", but it is usually interpreted strictly.
- Some countries have found that the inherently coercive nature of a request for access to information by an employer to an employee means that they are unable to consent to the processing of data.

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EU-US Safe Harbor

- Approved by the EU in 2000.
- Companies can either join a self-regulatory privacy program or develop its own privacy policy that conforms to the Safe Harbor policies.
- Companies must self certify each year and state in its privacy policy that it adheres to the Safe Harbor program.

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EU-US Safe Harbor

Organizations must adhere to the seven Safe Harbor Principles:

- Notice
- Choice
- Onward transfer
- Access
- Security
- Data integrity
- Enforcement

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Model Contractual Clauses

- Used between a data exporter and a data importer.
- Creates an enforceable pledge that the data importer will comply with the EU Privacy directive, respect the human rights of the data subject, and allow audits of its data handling methods.
- Excludes transfers of a single company's data, because a company can’t contract with itself.
- The data subject has enormous rights under this system and could potentially block the production of electronically stored information.

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Binding Corporate Rules

- A large multinational corporate group can commit itself to a binding set of corporate rules regarding data transfer.
- Applies to companies across the globe, not just in the US as with the Safe Harbor.
- Still difficult because the corporation must ensure that the rules are internally binding within the corporate group.
- Must get the approval of each EU member state and allow for judicial enforcement of the rules within each EU member state.
- So far, very few multinational groups have obtained full EU approval of Binding Corporate Rules.

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Bio and Contact Information

- Ed Larkin is a litigation partner in the Winston & Strawn's New York office. He concentrates his practice on complex, high profile matters in a wide range of areas including securities fraud, antitrust, products liability, and breach of fiduciary duty in numerous state and federal courts. He is also the east coast chairperson of the firm's e-Discovery and Electronic Information practice group. With over ten years experience in matters involving electronic discovery, he is highly experienced in advising clients regarding document retention, electronic document policies and protocols, litigation hold policies and procedures, production and review of electronically stored information, and spoliation issues. He is a member of the Sedona Conference Working Group 1 - Electronic Document Retention and Production.

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