

Tips For The Antitrust Lawyer Taking Depositions Abroad

Law360, New York (July 03, 2013, 1:21 PM ET) -- As business transactions become increasingly more globalized, antitrust practitioners are finding themselves faced with the accompanying challenges of litigating cases on a global platform. Indeed, the antitrust landscape today involves large, multinational companies embroiled in complex litigation with parties spread all around the world.



Hollis Salzman Meegan Hollywood

It therefore stands to reason that witnesses and physical evidence vital to the disposition of antitrust cases may be similarly strewn abroad. In these circumstances, it is important that counsel carefully consider all options available to them in obtaining foreign-based evidence.

This article discusses options available to U.S. antitrust litigants in procuring depositions of witnesses located in foreign countries, and the intricacies involved in taking a foreign deposition once it is procured. In particular, it is critical that counsel methodically prepare foreign depositions, whether voluntary or compelled, to ensure compliance with applicable immigration and treaty requirements as well as local laws and practices of the host country, and to ensure that the deposition progresses as smoothly as possible.

Below are some practical tips and important considerations for counsel to keep in mind when faced with a prospective deponent located abroad.

Is the Witness Within the Custody or Control of the Party?

The first question counsel must consider is whether the potential deponent is a current or former employee of the party. Many litigators overlook the fact that certain foreign employees are subject to deposition under the Federal Rule of Civil Procedure 30(b)(1) without resort to compulsion under the Hague Convention.[1]

Specifically, federal rules provide that an “officer, director or managing agent” of a corporate party may be compelled to give testimony upon written notice, commonly pursuant to a notice of deposition.[2] Further, because the district court has personal jurisdiction over the parties in litigation, resort to the procedures of the Hague Convention in the first instance is not required.[3]

Instead, the requesting party may choose to compel the witness under federal rules, even if he or she is located abroad. Although the district court may order that the witness be produced for a deposition, it is important to keep in mind that the court may not require that the deposition take place in the U.S. If the

witness resides in a jurisdiction where American-style depositions are permissible, counsel must be prepared to travel to the witness's home country to take the deposition.

On the other hand, if the witness is located in a country that places severe restrictions on American-style depositions, the court may require the witness to appear in the U.S. If the producing party fails to make the witness available for his or her deposition, federal rules provide a range of sanctions from contempt of court to declaring facts established to dismissing the action or rendering a default judgment.[4]

Of course, while it may not always be clear whether a prospective deponent is a party's "officer, director or managing agent," if the potential deponent had authority over the allegations at issue, and some aligned interest between the witness and the company can be shown, the requesting party will likely succeed in compelling that witness under federal rules.

Will the Witness Voluntarily Sit for a Deposition?

If the witness is a nonparty or otherwise not subject to the court's jurisdiction, counsel may attempt to solicit the witness's agreement to voluntarily sit for a deposition. However, American counsel may only conduct the foreign deposition of a willing witness if the foreign host country permits depositions under such circumstances. It is thereby critical that counsel check the local laws of the host country to determine whether and how depositions are restricted.

Certain countries so severely restrict American-style depositions that even voluntary depositions are essentially forbidden. For example, although China is a party to the Hague Convention, Chinese law prohibits American attorneys from taking depositions for use in foreign courts.[5]

Similarly, voluntary depositions are illegal in Russia and Brazil.[6] An American attorney attempting to participate in an unauthorized deposition in any of these countries can face serious sanctions, which range from deportation to arrest and detention.

While not rejecting depositions outright, some countries make voluntary depositions very difficult to obtain. For instance, France and Germany require that foreign attorneys secure approval from their respective governments before any deposition may take place in those jurisdictions.[7]

Likewise, voluntary depositions may take place in Switzerland, but only after obtaining prior approval from Switzerland's Federal Department of Justice and Police.[8] If counsel fails to obtain the requisite approval from the Swiss government, they could land themselves in a Swiss jail.

Even when the host country does not require special governmental approval to take a deposition within its borders, counsel must also pay close attention to the local immigration rules of that particular country. For example, attorneys traveling to Australia for any kind of business purpose must procure what is called an Electronic Travel Authority (ETA) prior to leaving the U.S.[9]

Furthermore, some countries, such as Japan, require attorneys to obtain a temporary work visa for deposition-taking, even if they are not required to do so for tourism or other business purposes.[10] Counsel should be aware that this special "deposition visa" in Japan and the ETA in Australia may also be required for deposition participants other than attorneys (i.e., court reporters, interpreters, etc.). Failure to adhere to the applicable immigration requirements of a particular country could result in serious sanctions for the attorneys involved.

Once the necessary approvals have been obtained and immigration laws have been complied with, the next step is to find a suitable location for the deposition to take place. Once again, it is critical that counsel check the local laws of the host country before scheduling the deposition. While some

countries, such as the United Kingdom and Hong Kong,[11] allow counsel to take voluntary depositions at law firms or hotel conference rooms without government involvement, others mandate that such depositions take place solely at the U.S. Embassy or Consulate.

It is important for counsel to be aware of these requirements and to factor in potential delays that may subsequently arise. For example, depositions in Japan may only take place in one of three conference rooms at the U.S. Embassy in Tokyo or the U.S. Consulate in Osaka.[12] Thus, with only three conference rooms available in all of Japan for deposition purposes, it is likely that U.S. lawyers may experience significant scheduling delays. Counsel must plan accordingly.

The Unwilling Witness

When a nonparty witness refuses to appear for a deposition voluntarily, counsel must resort to the Hague Convention, or other applicable bilateral agreement to compel evidence. This can be complex, costly and time-consuming. What's more, there are no uniform rules in place to help counsel navigate the arduous process of compulsion.

Indeed, not every country is a signatory to the Hague Convention, and even some who are have made reservations and declarations regarding the applicability of certain articles to their country. Once again, counsel must be keenly aware of the local laws in the target host country, and is strongly advised to consult with local attorneys to help facilitate the process.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides detailed procedures for compelling evidence pursuant to a formal letter of request. The Hague Convention is currently in force in 57 countries, and it essentially codifies the taking of depositions between citizens of different countries in an attempt to streamline the deposition process between members.

Counsel seeking to depose a citizen of a signatory country must submit an application to the U.S. court where the action is pending for the issuance of a letter of request.[13] Federal rules also require that notice be given to the adverse party.[14] Either the party seeking the evidence or the issuing court in the U.S. then submits the letter of request to the authority designated in the Convention to receive notice.

The Hague Convention's website provides a model letter of request for counsel to use as a sample in drafting their own.[15] Further, local counsel in the target country can assist in tailoring the request to comply with applicable local laws or practices.

Unfortunately, the Convention does not always promise counsel a traditional, American-style deposition.

In some countries, a deposition that is compelled via letter of request involves questioning of the witness, not by the American lawyer, but by a foreign judge or person appointed by the foreign judicial authority. The examiner will only ask the witness questions that have been submitted in advance by the American attorneys. Often, American counsel is not even permitted to attend. Another wrinkle to this emerges when the witness simply fails to appear, and recourse is limited or nonexistent. Accordingly, counsel must decide whether to continue to devote time and resources into pursuing the witness.

Finally, in the event that the unwilling witness is located in a country that is not a signatory to the Hague Convention, counsel must determine whether the country has a bilateral treaty with the U.S. governing procedures for compelling and taking depositions in that country.

Specifically, compulsion in a nonsignatory country is typically done through the execution of letters rogatory. Similar to the letter of request, letters rogatory are issued by the court in which the action is pending to an appropriate foreign authority. However, enforcement of letters rogatory is largely dependent upon the exercise of comity between the requesting court and the foreign court. Thus, counsel should be aware that letters rogatory may not be as effective a tool as compulsion through the Hague.

Plan. Plan. Plan.

Once the foreign deposition is scheduled, whether it is voluntary or compelled, and no matter where it is scheduled to take place, advance planning is absolutely critical to ensure that the deposition progresses without any major hiccups. The first thing to remember is that the deposition will likely take place thousands of miles and several time zones away from both your information technology department and your paralegal. (Let that sink in).

Thus, prior to traveling abroad counsel should make painstaking efforts to ensure that all necessary documents, supplies and participants are set to arrive on time. Organization is vital.

Next, attorneys often overlook the fact that overseas court reporters cannot swear in the witness. Thus, counsel will need to either hire a separate notary to administer the oath to the witness or enter into a stipulation with opposing counsel allowing the foreign court reporter to do so. It is important to make such arrangements prior to the deposition.

Furthermore, foreign depositions often require the use of an interpreter. It is crucial that counsel research prospective interpreters and carefully evaluate their ability. The interpreter should have past deposition experience and familiarity with the deposition process. Remember that the interpreter will be the one who is actually asking the witness questions. The questions may be the attorney's, but they will be asked in the interpreter's words. Likewise, the court reporter will be transcribing the interpreter's words, not those of the witness. Your record will only be as good as your interpreter's.

Finally, keep in mind that a translated deposition will move considerably slower than a deposition in English. Everything must be translated, and it is not uncommon for the witness to ask that questions be repeated or retranslated. Similarly, it is not uncommon for the interpreter, "check" interpreter and/or attorneys to quarrel over the words or phrases said or not said. Thus, be sure to allocate ample time to complete the deposition. If necessary, reserve extra time prior to the deposition.

Conclusion

Although the prospect of a deponent located in a foreign country can be stressful, and navigating foreign laws and immigration rules can seem unwieldy, a successful foreign deposition is possible with considerable advance planning and a touch of persistence. It's true that things will not always go as planned, but even with a modicum of success, the experience can prove to be extremely rewarding.

--By Hollis Salzman and Meegan Hollywood, Robins Kaplan Miller & Ciresi LLP

Hollis Salzman is a partner in Robins Kaplan's New York office and co-chairs the firm's antitrust and trade regulation group. Meegan Hollywood is an associate in the firm's New York office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its

clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555 (Hague Convention).

[2] Fed. R. Civ. P. 30(b)(1).

[3] Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 539-40 (1987).

[4] Fed. R. Civ. P. 37(b).

[5] United States Department of State, China Judicial Assistance, http://travel.state.gov/law/judicial/judicial_694.html (last visited June 25, 2013).

[6] United States Department of State, Brazil Judicial Assistance, http://travel.state.gov/law/judicial/judicial_672.html (last visited June 25, 2013); United States Department of State, Russia Judicial Assistance, http://travel.state.gov/law/judicial/judicial_3831.html (last visited June 25, 2013).

[7] United States Department of State, France Judicial Assistance, http://travel.state.gov/law/judicial/judicial_647.html (last visited June 25, 2013); United States Department of State, Germany Judicial Assistance, http://travel.state.gov/law/judicial/judicial_648.html (last visited June 25, 2013).

[8] United States Department of State, Switzerland Judicial Assistance, http://travel.state.gov/law/judicial/judicial_4303.html (last visited June 25, 2013).

[9] United States Department of State, Australia Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_954.html#entry_requirements (last visited on June 25, 2013).

[10] United States Department of State, Japan Judicial Assistance, http://travel.state.gov/law/judicial/judicial_678.html (last visited June 25, 2013); see also Embassy of the United States in Japan, Visas to Japan for Americans, <http://japan.usembassy.gov/e/acs/tacs-7108b.html> (last visited June 25, 2013).

[11] United States Department of State, United Kingdom Judicial Assistance, http://travel.state.gov/law/judicial/judicial_671.html (last visited June 25, 2013); United States Department of State, Hong Kong Judicial Assistance, http://travel.state.gov/law/judicial/judicial_650.html (last visited June 25, 2013).

[12] *Id.*

[13] See Hague Convention, Articles 3(a), 3(b), 28(a) and 32. See also Bruno A. Ristau, Sample Application to the U.S. Court for Issuance of Letter of Request under the Hague Convention, International Judicial Assistance (Civil and Commercial), International Law Institute, Sec. 5-2-1(3) p. 177-178 (1995 supp.).

[14] Fed. R. Civ. P. 28(b).

[15] Hague Convention, Model Letter of Request,
http://www.hcch.net/index_en.php?act=publications.details&pid=3309 (last visited June 25, 2013).

All Content © 2003-2013, Portfolio Media, Inc.