

Data jams

Drew Macaulay offers some top tips on unblocking jurisdictional log jams

IN BRIEF

- International legal, regulatory and investigative matters often involve the collection, review and production of information from multiple jurisdictions.
- Problems may arise when legal requirements to produce information in response to proceedings in one jurisdiction, clash with the data privacy requirements of other jurisdictions.

In a globalised environment where legal and regulatory matters can involve corporate offices and subsidiaries based in multiple jurisdictions, moving data from one country to another in order to respond accurately can lead to significant legal, political and social hurdles. For example, a discovery request arising from US litigation may require the production of documents from a company's French subsidiary, including those containing personal data. The US legal team will then be faced with the EU Data Protection Directive, an instrument concerned with the level of protection of personal data after it has left the EU, and the French Blocking Statute French Penal Code Law No. 80-538, which prohibits a French national or corporation from moving data out of France in response to civil proceedings in another country.

Matters involving moving data in the Asia-Pacific region can also be problematic. For instance China's state secrecy laws prohibit unlawful copying, recording, transmission or storage of state secrets and incorporates a broad definition of such secrets, including "secrets in the areas of national economic and social development" or "secrets concerning science and technology". In Japan, the Personal Information Protection Act of 2003 does not allow acquisition and use of personal data by "business operators" without consent.

It is also worth considering the data protection environment in the jurisdiction to which the requested data will be sent. Once there, will it be subject to other information requests by opposing parties in litigation or accessible by the state under security legislation?

Creating a smooth data flow

To minimise the risk of serious penalties and procedural delay, companies can take a number of practical measures, both legal and technology-based, to overcome these cross-border challenges. In a matter spanning several jurisdictions it may be necessary to take a different approach in each location to deliver the best possible results. If necessary, seek advice from local counsel to validate your decisions.

In countries such as France which block even limited transfers of data, but have acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the court in the requesting jurisdiction can make a letter of request to the central authority in the jurisdiction in which the data exists. This request must detail the nature of the information required and be highly specific, listing particular categories of documents, rather than simply a broad request for any potentially relevant documents.

If local data privacy laws require consent for collection of data from individual employees, consider asking the local labour unions' assistance in gaining co-operation, which may particularly assist in jurisdictions such as Germany.

Where a particular jurisdiction specifically prohibits the transfer of irrelevant data, or requires that the data disclosed be limited to only specific classes of documents, a two-step process can be employed by using a specialist data collection and processing firm with facilities in the jurisdiction concerned to efficiently identify those documents likely to be relevant, before the local legal team conducts a more detailed, manual review.

If no appropriate service provider exists in the country concerned, identify a vendor with the ability to set up a facility on the

client's premises or elsewhere in that jurisdiction for that specific engagement. This type of arrangement can also be beneficial where corporate clients are concerned about the security of trade secrets or other confidential data. Service providers with solid experience of supporting complex matters in the relevant locations should be preferred—there is unlikely to be time for learning on the job.

A step in the right data direction

To prepare for cross-border information requests the following measures are suggested:

- Obtain a good understanding of the company's data locations and the data protection regimes in each relevant jurisdiction. This will facilitate and speed up decisions on how to best proceed if a need to collect data arises.
- Within each location, understand how and where the company stores its data. This will speed up the collection process, gaining valuable time for review and analysis.
- Identify partners that have the specific expertise and technology necessary to deal with your information formats and that can deliver services in the locations where data is stored, or can operate effectively on site.
- Identify potential local counsel in the jurisdictions in which the company operates, with detailed knowledge of the regulatory and cultural environment in which a potential collection exercise may take place.

Taking time to invest in these steps will pay dividends, particularly in matters where the speed and standard of co-operation with the regulator could significantly impact the severity of fines levied on the corporation. **NLJ**

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