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Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?

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**ENFORCEMENT OF U.S. ELECTRONIC
DISCOVERY LAW AGAINST FOREIGN COMPANIES:
SHOULD U.S. COURTS GIVE EFFECT TO THE
EU DATA PROTECTION DIRECTIVE?**

*Kristen A. Knapp*¹

I. INTRODUCTION

Enforcing discovery against companies located in foreign nations is not a new phenomenon. The U.S. Supreme Court took up the conflict between U.S. discovery rules and foreign non-disclosure law in a 1958 case.² Despite more than fifty years to reach a settled jurisprudence regarding how to enforce U.S. law against foreign domiciled companies, there has yet to be a clear articulation of a standard applicable in all cases. Currently, there are two main sets of rules under which U.S. courts may enforce discovery laws against foreign companies, and if necessary impose sanctions for non-compliance: the Hague Convention and the U.S. Federal Rules of Civil Procedure. The trend of authority favors the use of the U.S. Federal Rules of Civil Procedure, but there remain some circumstances under which the Hague Convention is favored.

In 2006, amendments to the U.S. Federal Rules of Civil Procedure concerning electronic discovery (“e-discovery”) procedures went into effect. These amendments have had and will continue to have a significant impact on the conduct of business both abroad and within the United States. Accordingly, “[m]ore and more companies with global operations are finding themselves enmeshed in e-discovery that requires a greater understanding of the issues and laws from a global perspective” because “[i]t is challenging to navigate and manage e-discovery when you have parent companies based overseas or U.S.-based companies with foreign subsidiaries.”³

However, U.S. courts have yet to systematically address what effect, if any, the 2006 amendments will have on enforcement of e-discovery law against foreign domiciled companies, and in particular, against European companies. Surprisingly, to date, there is very little case law regarding the enforcement of e-discovery production requests.

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² See *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

³ *E-Discovery Issues Heating Up On A Global Basis*, METROPOLITAN CORP. COUNS., Sept. 2008, at 19.

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In light of this lack of jurisprudence, legal practitioners have articulated concern regarding “whether U.S. courts will defer to the laws of other jurisdictions that limit the electronic transmission of information across borders and afford greater privacy protections.”⁴

This paper looks at, in light of the 2006 amendments and the lack of case law regarding the affect of the 2006 amendments, whether the enforcement techniques, as applied to “paper” discovery should be applied to e-discovery and whether there is anything specific to the nature of e-discovery that necessitates a change in the application of the law. Specifically, the paper addresses how the European data privacy regime may affect the application of paper discovery enforcement techniques to e-discovery. The paper suggests that it would be unwise for U.S. courts to afford the European Data Privacy regime significant deference. Instead, the European Data Privacy regime should be treated with skepticism, similarly to how the U.S. courts have viewed “blocking statutes” contained in foreign law. In particular, treating the EU Data Privacy regime with skepticism will help to prevent the creation of perverse incentives for companies to store their data abroad, hoping to avoid legitimate discovery production requests under the Federal Rules of Civil Procedure, by raising the transaction costs for such behavior.

Section II of the paper surveys existing U.S. law obtaining discovery from abroad, including both the U.S. Federal Rules of Civil Procedure and the Hague Convention. The section focuses primarily on the regimes that have been held applicable to paper discovery requests. It also details the 2006 Amendments to the Federal Rules of Civil Procedure and the implications for e-discovery. This section also contains an examination of how U.S. courts have dealt with “blocking statutes,” particularly what affect and weight they have been given in the context of discovery enforcement proceedings. Finally, the section turns to how U.S. law addresses non-compliance with paper discovery laws.

Section III examines the Restatement (Third) of Foreign Law’s view of International Discovery. Section IV examines the European Data Privacy Regime, including how it differs from the U.S. perspective. The section also surveys recent litigation in U.S. courts that has given effect to the EU’s data privacy regime. Section V compares the effect of the European data privacy regime with the effect of the “blocking statutes” examined in Section II. Section II suggests that U.S. courts should decline to give effect to the EU Data Privacy regime, despite the fact that the emerging trend seems to suggest courts intend to give effect to the Data Privacy regime. Denying effect to the

⁴ Jennifer Toole, *International Litigation*, 42 INT’L LAW. 415 (2008) [hereinafter Toole 2008].

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EU Data Privacy regime would be beneficial because it would help eliminate the possibility that companies will use the EU law as a means to escape legitimate U.S. discovery requests. Section VI briefly concludes with a suggestion of how U.S. law might change to address the concerns of the “blocking statutes.” Additionally, the conclusion explores what effect potential changes might have on e-discovery litigation in the future.

II. SURVEY OF U.S. LAW ON OBTAINING DISCOVERY FROM ABROAD

There are two primary mechanisms through which a party to litigation in the U.S. may seek discovery of documents located abroad: the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters⁵ (“Hague Convention”) and the U.S. Federal Rules of Civil Procedure (“FRCP”). Given that there are already two accepted mechanisms to obtain evidence, the debate in U.S. courts has centered on what factual circumstances are required to necessitate use of one method over the other method. The choice between the two mechanisms is important to litigants because the scope of discovery obtainable under each method differs. The Federal Rules of Civil Procedure permit a much broader scope of discovery, including discovery for pre-trial purposes, than the Hague Convention, where pretrial discovery is generally not available.⁶ Furthermore, application of the Hague Convention procedures is arguably more complex than application of the FRCP, both because the Hague Convention procedures are impacted by principles of international comity, and because the Hague Convention procedures are simply less familiar to U.S. litigants than the procedures of the FRCP, under which U.S. litigants conduct proceedings regularly.

A. U.S. Federal Rules of Civil Procedure

1. Practice Prior to the 2006 Amendments to the Federal Rules of Procedure

The default position of U.S. courts favors the application of the Federal Rules of Civil Procedure, for reasons that subpart B of this section will more fully explain.⁷ As such, the choice faced frequently by courts was whether to straight-forwardly apply the Federal Rules of

⁵ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=82 [hereinafter The Hague Convention].

⁶ David Epstein, *Obtaining Evidence from Foreign Parties*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2006, at 11, 13-14 (PLI Litig. & Admin. Practice, Course Handbook Series No. 8710, 2006).

⁷ When the party from whom discovery is sought is not a State Party to the Hague Convention, U.S. courts have generally not sought to apply the Hague Convention,

Civil Procedure or whether to apply the law of the country from which the discovery of documents is sought.

In choosing between the FRCP and the foreign law, U.S. courts have repeatedly held that foreign litigants seeking protection behind their domestic law bear the burden of proving that the foreign law bars production.⁸ However, although it is necessary for a litigant to show that foreign law bars production, that showing alone is not sufficient. Consistent with prior decisions, the court in *In re Vitamins Antitrust Litigation* held that discovery requests can overcome foreign legal barriers provided that the requested information is “necessary.”⁹

The court did not expressly define “necessary” but the context in which the word is used suggests that the court was thinking of necessity in light of the concerns of comity,¹⁰ as outlined by the U.S. Supreme Court in *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*. A proper comity analysis includes an examination of five essential concerns:

- (1) the importance to the . . . litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether information originated in the United States;
- (4) the availability of alternative means of securing the information; and
- (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.¹¹

If after conducting a comity analysis a court declines to allow the use of foreign law to bar discovery, the question of sanctions for a non-compliant litigant may arise.¹²

although that option is permitted under U.S. law. See FED. R. CIV. P. 28(b)(2) (allowing a letter of request to be issued).

⁸ See *In re Vitamins Antitrust Litigation*, No. 99-197, 2001 U.S. Dist. LEXIS 8904, at *44 (D.D.C. June 20, 2001) (citing *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987)).

⁹ *Id.* at *56.

¹⁰ *Id.* at *56 n.20 (stating that “given the significant comity concerns of requiring disclosure of information that could conceivable [sic] violate foreign countries’ privacy laws, the Court is wary of ordering such discovery until it is clear that the requested discovery is necessary”).

¹¹ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

¹² For a discussion of the imposition of sanctions, see *infra* Section II.D.

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2. 2006 Amendments to the Federal Rules of Civil Procedure

The U.S. approach to e-discovery is enshrined in the Federal Rules of Civil Procedure. In 2006, the Federal Rules underwent significant amendments to clarify the scope of their application to electronically stored information (“ESI”). The amendments to the Federal Rules reflect the understanding by U.S. courts and Congress that “the discovery of electronically stored information presents markedly different issues from conventional discovery of paper records.”¹³

The 2006 changes to the Federal Rules can be divided into five categories: (1) amendments designed to provide early attention to e-discovery issues; (2) amendments to provide improved management of discovery; (3) amendments to clarify the process to assert privilege; (4) amendments to clarify application of rules to ESI; and (5) amendments to clarify the application of sanctions to ESI.¹⁴ For the purposes of this paper, the most significant amendments are those contained in categories four and five.

The amendments clarifying the application of the Federal Rules to ESI are found in Rules 33, 34, and 45.¹⁵ Rule 34 was modified to address the fundamental differences between ESI and traditional paper documents. According to the Sedona Group, “[c]ommentators have noted six major qualitative and quantitative differences between ESI and printed information: (1) Volume and ease of replication, (2) Persistence, (3) Dynamic nature, (4) Existence of hidden metadata, (5) Hardware & software system dependence and obsolescence, [and] (6) Mobility, portability and searchability.”¹⁶

Rule 34(a) addresses the scope of required production,¹⁷ while Rule 34(b) addresses the technical aspects of production itself.¹⁸ Rule 34(a) is of particular significance as it governs what documents fall

¹³ JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE 22 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>.

¹⁴ *Id.* at 26-28.

¹⁵ FED. R. CIV. P. 33, 34 & 45. Rule 33 concerns interrogatories and has limited application to e-discovery issues. Specifically, Rule 33(b)(5)(d) contains the option to produce electronically stored information as a means of producing business records in response to an interrogatory. Rule 45 is also of limited relevance to this paper as it addresses the duty of third-parties to produce ESI in response to a subpoena, and this paper focuses on the duties of the parties themselves. *Id.*

¹⁶ THE SEDONA CONFERENCE, FRAMEWORK FOR ANALYSIS OF CROSS-BORDER DISCOVERY CONFLICTS: A PRACTICAL GUIDE TO NAVIGATING THE COMPETING CURRENTS OF INTERNATIONAL DATA PRIVACY AND E-DISCOVERY 5 (2008) http://www.thesedonaconference.org/content/miscFiles/WG6_Cross_Border.

¹⁷ FED. R. CIV. P. 34(a).

¹⁸ FED. R. CIV. P. 34(b).

within the scope of e-discovery production requests. The 2006 amendments broadened the scope of the rule, making clear the expectation that “parties to civil litigation in the federal courts . . . [will] provide responsive information, regardless of the form of storage.”¹⁹ Furthermore, the broad language of the rule, which states that “any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained”²⁰ are subject to discovery, makes it clear that all forms of ESI are included within the rule’s scope, even those that have yet to be invented.²¹

The amendments to Rule 37 were designed to clarify the application of sanctions to ESI. These amendments are of particular relevance because they govern the conditions under which sanctions can be imposed for non-compliance with e-discovery production requests. Specifically, Rule 37(b) addresses failure to comply with a court order to compel discovery and includes the range of sanctions a court may impose on the non-compliant party.²² Under Rule 37, there are two significant kinds of sanctions available: case dismissal and default judgment.²³ Case dismissal is provided for under Rule 37(b)(2)(A)(v), which states that “[i]f a party or a party’s officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders . . . [including] dismissing the action or proceeding in whole or in part.”²⁴ Default judgments are provided for in Rule 37(b)(2)(A)(vi).²⁵

B. *Hague Convention*

The Hague Convention is a multilateral treaty that entered into force on October 7, 1972, whose purpose is to facilitate obtaining evidence from abroad for use in domestic litigation proceedings.²⁶ As such, it is an important means of obtaining documents from foreign countries, but its application is limited to those nations that are State Parties to the convention. As of September 16, 2010, there were fifty-

¹⁹ Charles L. Kerr, *Turbulence Ahead: Adjusting for E-discovery in Aviation Litigation*, 72 J. AIR L. & COM. 465, 469 (2007).

²⁰ FED. R. CIV. P. 34(a)(1)(A).

²¹ Kerr, *supra* note 19, at 469.

²² FED. R. CIV. P. 37(b).

²³ FED. R. CIV. P. 34(b)(2)(A)(v)-(vi); see Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 U. PITTSBURGH J. TECH. L. & POL’Y 5, ¶¶ 64-67 (2008).

²⁴ FED. R. CIV. P. 34(b)(2)(A)(v).

²⁵ FED. R. CIV. P. 34(b)(2)(A)(vi).

²⁶ The Hague Convention, *supra* note 5; see also Epstein, *supra* note 6, at *19.

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two State Parties to the treaty.²⁷ If a nation is not a State Party to the Hague Convention, the treaty's provisions cannot be used to obtain documents located abroad.²⁸ However, if a nation is a State Party to The Hague Convention, then litigants have a choice of law available to them.

Unfortunately, the situation is not as simple as referring to the procedures contained in the Convention. Although there are fifty-two parties to the treaty, the majority of these Parties have expressed reservations, either in whole or in part, to the disclosure of documents for use in pretrial discovery proceedings.²⁹ The refusal to allow requests for pretrial discovery stems in significant part from the traditions regarding privacy that are noticeably different between the United States and the rest of Europe.³⁰ As a result of the reservations, European nations may lawfully refuse to comply with letters of request,³¹ if they believe that the information being sought is solely for the purpose of locating other potentially admissible evidence.³²

A further issue that arises under both the Hague Convention procedures and the Federal Rules of Civil Procedure, when evidence gathering is conducted in the home state of the foreign litigant, is the domestic law of the foreign litigant does not provide for evidence taking procedures by counsel. In most civil-law countries, evidence taking is a function for the judge, and attorneys might not be permitted to take evidence.³³ Under such circumstances, foreign testimony or depositions may be obtained without the help of foreign governments only if the prospective witness testifies voluntarily and if foreign law allows

²⁷ For a table of the State Parties, see Hague Conference on Private International Law, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited September 16, 2010).

²⁸ This statement must be qualified by the fact that Rule 28 provides a mechanism for requesting the help of foreign governments in obtaining discovery abroad and applies regardless of whether the foreign nation is a State Party to the Hague Convention. FED. R. CIV. P. 28(b).

²⁹ William H. Baker, *Obtaining Evidence: International Discovery Techniques—The Taking of Evidence Abroad for Use in American Courts*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2001, at 321, 351-52 (PLI Litig. & Admin. Practice, Course Handbook Series No. H0-00B0, 2001).

³⁰ See *infra* Section IV.

³¹ A letter of request is one of the two methods under the Convention by which a State Party may request the cooperation and subsequent disclosure of materials for litigation purposes from another State Party under the Hague Convention. The Hague Convention, *supra* note 5, arts. 1-14. The other method by which information may be gathered is by the taking of evidence by a diplomatic official or by a court-appointed commission. *Id.* arts. 15-22.

³² *Id.* art. 23; see Epstein, *supra* note 6, at 13-14.

³³ Epstein, *supra* note 6, at 14.

the provision of such testimony on a voluntary basis.³⁴ If the laws prohibit even voluntary foreign testimony, U.S. parties will be forced to resort to treaty to obtain the evidence.³⁵

Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court. for the S. Dist. of Iowa is the leading case regarding whether a litigant must comply with the Hague Convention procedures or is free to use the Federal Rules of Civil Procedure.³⁶ From the outset, the courts have favored the use of the Federal Rules of Civil Procedure. As such, most U.S. courts have required that a litigant seeking to use the Hague Convention rather than the Federal Rules of Civil Procedure bears the burden of proving the Hague Convention's appropriateness.³⁷ The Supreme Court's holding in *Aerospatiale* rejected the mandatory application of the Convention because the language of the treaty itself is non-mandatory.³⁸ In particular, the Court took notice of Article 23 of the Hague Convention that allows any State Party to refuse to execute a letter of request for documents related to pretrial discovery if they have made the permitted reservation.³⁹

Second, the court in *Aerospatiale* rejected the mandatory application of the Hague Convention out of fear that the Hague Convention would be misused if its procedures were made mandatory.⁴⁰ The Court believed that "interpreting the Convention as exclusive would lead to the unacceptable result of subjecting U.S. pretrial discovery to the law of the Contracting State involved."⁴¹ The resulting "imbalance would hinder the parties' goal in discovery of obtaining knowledge of all the relevant facts" while concurrently allowing "foreign companies and foreign parties to be subject to less extensive discovery procedures than their domestic counterparts."⁴² However, this reason is slightly ironic if only because by rejecting the mandatory application of the

³⁴ *Id.* at 15.

³⁵ *Id.* at 19.

³⁶ *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court. for the S. Dist. of Iowa*, 482 U.S. 522 (1987).

³⁷ *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 52 (D.D.C. 2000); *Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997); *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 354 (D. Conn. 1991); *Doster v. Schenk*, 141 F.R.D. 50, 51-52 (M.D.N.C. 1991); *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 260 (M.D.N.C. 1988); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 389 (D.N.J. 1987); *Davila*, *supra* note 23, ¶ 33. *But see Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 40 (N.D.N.Y. 1987); *Knight v. Ford Motor Co.*, 615 A.2d 297, 300 (N.J. Super. Ct. Law Div. 1992).

³⁸ *Aerospatiale*, 482 U.S. at 529.

³⁹ *Id.* at 536; *see also Epstein*, *supra* note 6, at 23.

⁴⁰ *Aerospatiale*, 482 U.S. at 534.

⁴¹ *Epstein*, *supra* note 6, at 22.

⁴² *Id.*

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Hague Convention procedures, the Court heightened the burden on U.S. litigants (to prove that the Hague Convention procedures were not appropriate in a given case), a result the court was seeking to avoid.

Furthermore, the holding acknowledged that the Hague Convention “was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence.”⁴³ Rather, the Hague Convention “was [merely] intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad.”⁴⁴ Rejecting mandatory application, the court instead relied on comity as a guideline for the application of the Convention’s procedures.⁴⁵ While the court declined to articulate a specific comity test to be employed, the court hoped that there would be “prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures [would] prove effective.”⁴⁶ However, the court failed to provide potential litigants with clear guidance as to what factual circumstance would give rise to a requirement to use the Hague Convention. Finally, the situation was further complicated by the multitude of opinions found between the majority, concurrence, and dissent.

The concurrence suggested that in trying to resolve a conflict between domestic and foreign law, a court “should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.”⁴⁷ In contrast, Justice Blackmun argued in the dissent that the majority should place “the burden of proof on the party opposing the use of the Convention’s procedures and require[] first resort to the Convention.”⁴⁸ The single and significant commonality between the opinions, which explains the variety in the lower court opinions, is that under each potential test the trial court has significant discretion regarding whether to resort to the procedures in the Hague Convention.⁴⁹

The majority’s own test contained several contradictory suggestions. On one hand, the court cautioned against requiring the mandatory use of the Hague Convention by saying that “[a]n interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court

⁴³ *Aerospatiale*, 482 U.S. at 535.

⁴⁴ *Id.* at 536.

⁴⁵ *Aerospatiale*, 482 U.S. at 543-44.

⁴⁶ *Id.* at 544.

⁴⁷ *Id.* at 555 (Blackmun, J., concurring).

⁴⁸ Epstein, *supra* note 6, at 24.

⁴⁹ *Id.*

hearing a case involving a national of a contracting state to the internal laws of that state.”⁵⁰ This in effect “would subordinate the court’s supervision of even the most routine of these pretrial proceedings to the actions or . . . the inactions of foreign judicial authorities.”⁵¹ However, at the same time the Court suggested the importance of U.S. courts proceeding cautiously and taking “care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.”⁵² Based on *Aerospatiale* alone, it was far from clear how future cases would be decided, though even at this early stage there seemed to be a clear distrust of the Hague Convention because of its potential to subordinate the ability of the United States to exercise jurisdiction to the whim of a foreign litigant’s government.

After the Supreme Court’s decision in *Aerospatiale*, U.S. federal courts justified declining to resort to the Hague Convention procedures in numerous different ways, including time pressures and the ineffectiveness of the Hague Convention procedures themselves.⁵³ However, concurrently, some U.S. federal courts held that resort to the Hague Convention was appropriate if compliance with the Federal Rules of Civil Procedure would result in criminal sanctions against a litigant or when the sovereign interests of foreign litigants outweighed the inconvenience to U.S. parties of adapting to the Hague Convention procedures.⁵⁴

Jumping forward to 2006, three courts rejected litigants’ attempts to require the use of the Hague Convention as a means of obtaining documents from abroad.⁵⁵ In each of the cases, various federal courts held that resort to the Hague procedures was optional, even when both litigants were State Parties to the convention.⁵⁶ In the context of a RICO case, in *Jones v. Deutsche Bank* the court considered a situation in which Deutsche Bank refused to comply with a document production request unless the request was made through the Hague Convention procedures.⁵⁷ Further, Deutsche Bank claimed that com-

⁵⁰ *Aerospatiale*, 482 U.S. at 539.

⁵¹ *Id.*

⁵² *Id.* at 546.

⁵³ Davila, *supra* note 23, ¶ 35.

⁵⁴ *Id.*

⁵⁵ Jennifer Toole et al., *International Litigation*, 41 INT’L LAW. 329, 355 (2007) [hereinafter Toole 2007].

⁵⁶ See *Jones v. Deutsche Bank*, No. C 04 5357 JW (RS), 2006 U.S. Dist. LEXIS 14631, at *3 (N.D. Cal. Mar. 10, 2006); *In re Vivendi Universal*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at *2 (S.D.N.Y. Nov. 16, 2006); *In re Flag Telecomm Holdings, Ltd.*, 236 F.R.D. 177, 182 (S.D.N.Y. 2006).

⁵⁷ *Deutsche Bank*, 2006 U.S. Dist. LEXIS 14631, at *3.

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plying with the production request might infringe on sovereign interests.⁵⁸ The court rejected both of Deutsche Bank's claims, holding that it was "not persuaded that the burdens on Deutsche Bank . . . that would arise from requiring it to comply with its discovery obligations under the Federal Rules of Civil Procedure are such that Jones should be required instead to proceed under the Hague Convention."⁵⁹

This trend of rejecting the mandatory use of the Hague Convention continued in 2008. Increasingly, courts are realizing that the Hague Convention procedures are impractical in light of the nature of modern litigation.⁶⁰ In *SEC v. Sandifur*, the court specifically looked at the length of time it would take to complete discovery under the Hague Convention. Although an exact estimate of the time length of discovery could not be provided, the party requesting use of the Hague Convention procedures conceded that, under the Hague Convention, discovery could take up to a year.⁶¹ Furthermore, the party argued that the Hague Convention provided no guarantee of the foreign government's cooperation.⁶² Thus, at the end of the one year period the foreign government could still exercise its right not to comply with the request, preventing the counterparty from obtaining the desired documents.⁶³

Although the weight of the authority leans against requiring the use of the Hague Convention procedures, federal district courts continue to rely on the Hague Convention procedures in specific limited circumstances.⁶⁴ In *Metso Minerals*, the court found that use of the Hague Convention was "the only means by which the requested discovery may be obtained" because the information requested was in the control of a non-party foreign witness not subject to the jurisdiction of the court.⁶⁵ Consequently, the court held that the resort to the Hague Convention is required when it is the only method of obtaining the information sought.⁶⁶

In sum, based on the most recent cases, it would appear that U.S. federal courts strongly favor the use of the Federal Rules of Civil Procedure if both the FRCP and the Hague Convention procedures are

⁵⁸ *Id.* at *12.

⁵⁹ *Id.*

⁶⁰ Toole 2008, *supra* note 4, at 438.

⁶¹ *SEC v. Sandifur*, No. C05-1631 C, 2006 WL 3692611, at *4 (W.D. Wash. Dec. 11, 2006).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *Metso Minerals, Inc. v. Powerscreen Int'l Distribution Ltd.*, No. CV 06-1446(ADS)(ETB), 2007 WL 1875560, at *2-3 (E.D.N.Y. June 25, 2007).

⁶⁵ *Id.* at *3.

⁶⁶ *Id.* See also *In re Baycol Prods. Litig.*, 348 F. Supp. 2d 1058, 1060 (D. Minn. 2004).

available to litigants. The trend of authority seems to indicate that courts only require resort to the Hague Convention procedures when it is the only method of obtaining the requested information. The pragmatic approach of the U.S. courts is consistent with the generally liberal attitude toward discovery in the United States.⁶⁷

C. *The Effect of Blocking Statutes Under U.S. Law*

Blocking statutes are legislation that is specifically designed to prevent domestic individuals or corporations from having to comply with U.S. discovery production requests. Blocking statutes prohibit “the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities,” and all such statutes “appear to carry some penal sanction.”⁶⁸ As such, these kinds of statutes are not looked upon favorably by U.S. courts. Although many blocking statutes were enacted in response to petroleum cartel investigations in the 1950s, U.S. shipping legislation, and the investigation of uranium cartels in the mid-1970s,⁶⁹ they continue to be applied in all types of modern litigation.

For the purpose of illustration, I have reprinted below an example of a French blocking statute, the impact of which has been litigated in U.S. courts. The statute reads:

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek, or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.⁷⁰

This particular statute was considered in *Bodner v. Paribas*, where the court declined to give the statute effect.⁷¹ The court reasoned that “the legislative history of the statute [gave] strong indications that it was never expected to nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts.”⁷² In drawing this conclusion, the court drew an inherent distinction between those stat-

⁶⁷ See *Daval Steel Prods. v. M/V Fakredine*, 951 F. 2d 1357, 1367 (2d Cir. 1991).

⁶⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 n.4 (1987).

⁶⁹ *Id.*

⁷⁰ *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court. for the S. Dist. of Iowa*, 482 U.S. 522, 526 n.6 (1987) (citing C. PÉN. art. 1A, No. 80-583 (Fr.)).

⁷¹ *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (2000).

⁷² *Id.* (quoting *Compagnie Francaise D'assurance Pour Le Commerce Exterieur v. Phillips Petroleum*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984)).

utes which serve legitimate national interests and those that were solely intended to prevent enforcement of U.S. discovery requests. While the former are entitled to some measure of respect, the latter are not. This distinction is significant and its implications in the context of the EU Data Privacy regime will be explored in Section IV.

D. Imposition of Sanctions for Non-Compliance

Société Internationale, a 1958 Supreme Court case, is the leading case addressing the imposition of sanctions for failure to comply with pretrial production requests that implicate foreign domestic law.⁷³ Broadly, the case looks at what kind of sanctions are appropriate when a party fails to comply with a production request because of a competing prohibition in its domestic law. *Société Internationale* addresses case dismissal and adverse inference instructions, a third kind of sanction not expressly provided in the Federal Rules.⁷⁴

In *Société Internationale*, the District Court ordered the production of certain records in petitioner's control from a Swiss Bank.⁷⁵ The petitioner argued that production of the Swiss bank records violated Swiss law and could lead to the imposition of criminal sanctions, including the potential for imprisonment.⁷⁶ The District Court, despite accepting the petitioner's characterization of Swiss law, dismissed the complaint under Rule 37, holding that "Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order, since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum."⁷⁷ The Court of Appeals affirmed the District Court's decision to dismiss the case, despite finding "[t]hat [petitioner] and its counsel patiently and diligently sought to achieve compliance . . . is not to be doubted."⁷⁸ As a result of this disconnect, the Supreme Court granted certiorari.

The Supreme Court found that the District Court was "justified in drawing inferences unfavorable to petitioner," but not justified in its decision to dismiss the case.⁷⁹ The Supreme Court reasoned that case dismissal was not appropriate because "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been es-

⁷³ *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 197 (1958).

⁷⁴ Davila, *supra* note 23, ¶ 68.

⁷⁵ *Société Internationale*, 357 U.S. at 199-200.

⁷⁶ *Id.* at 200.

⁷⁷ *Id.* at 201-202.

⁷⁸ *Id.* at 203 (citing *Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. BROWNELL*, 243 F.2d 254, 255 (1957)).

⁷⁹ *Id.* at 213.

established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.”⁸⁰ In other words, the Supreme Court viewed the Court of Appeals finding that the petitioner had not acted in complicity with the government authorities to prevent the production of the relevant records as significant.

III. THE RESTATEMENT VIEW OF INTERNATIONAL DISCOVERY

The Restatement⁸¹ provides some additional guidance on how courts might balance the need for U.S. discovery against the prohibitions contained in foreign law against complying with such requests. Under the Restatement, courts may require a foreign litigant or their representative to make a “good faith effort to secure permission from the foreign authorities to make the information available” before pursuing disciplinary actions.⁸² However, before good faith is assessed, U.S. courts will typically consider five factors in the process of determining whether a party is entitled to the information sought. The factors are: (1) the significance of the discovery/disclosure issue in the case; (2) the degree of specificity of the request; (3) whether the information originated in the jurisdiction from which it is being requested; (4) the availability of alternative means of securing the information sought in the discovery request; and (5) the extent to which noncompliance would undermine the foreign sovereign’s interests in the information requested.⁸³ Particular questions that the courts have focused on in the past include: the risk of civil liability that a foreign litigant might face should it fail to comply with local law,⁸⁴ the state interest in requesting or protecting the requested information,⁸⁵ or allowing a foreign litigant time to seek a waiver to allow disclosure of the information sought.⁸⁶

In some respects the factors that U.S. courts are directed to weigh under the Restatement view are analogous to ancient concerns of comity. Comity is “the recognition which one nation allows . . . to

⁸⁰ *Id.* at 212.

⁸¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987).

⁸² *Id.* § 442(2)(a).

⁸³ *Id.* § 442(1)(c).

⁸⁴ See *United States v. First National City Bank*, 396 F. 2d 897 (2d Cir. 1968)

⁸⁵ See *United States v. Field*, 532 F.2d 404 (5th Cir. 1976). Compare *In re Grand Jury Proceedings, Bank of Nova Scotia*, 691 F.2d 1384, 1391 (11th Cir. 1982) (enforcing a request to produce documents because the investigative function of the grand jury outweighed the state interest of the Bahamas), with *United States v. First Nat’l Bank of Chi.*, 699 F.2d 341, 346 (7th Cir. 1983) (finding that Greece’s bank secrecy laws outweigh the interest of the United States in collecting taxes).

⁸⁶ See *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120, 127 (8th Cir. 1986).

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the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”⁸⁷ Nonetheless, as Bennett notes while the concept itself is clear, there is no more guidance on how U.S. courts are to apply comity than there is guidance on how U.S. courts are to balance the various interests under the Restatement view.⁸⁸

The Restatement also provides guidance regarding when it would be appropriate for a U.S. court to impose sanctions for non-compliance with U.S. discovery requests.⁸⁹ In accordance with the Restatement view, “a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a).”⁹⁰

IV. EUROPEAN UNION’S DATA PRIVACY REGIME

A. General Contrasts Between the U.S. and European Approaches to Privacy

The United States has developed a very permissive approach to discovery as compared with other countries, but particularly Europe. The U.S. Federal Rules of Civil Procedure, under Rule 26, permit discovery of “any nonprivileged matter that is relevant to any party’s claim or defense.”⁹¹ In general, U.S. Federal courts have liberally construed the scope of discovery.⁹² Furthermore, the information sought need not even be admissible at trial in order to be discoverable.⁹³ It is sufficient that the information sought appears “reasonably calculated to lead to the discovery of admissible evidence.”⁹⁴

⁸⁷ Steven C. Bennett & Jones Day, *Facing the Challenges of International E-Discovery*, in ELECTRONIC DISCOVERY & RETENTION GUIDANCE FOR CORPORATE COUNSEL 2007 291, 301 (PLI Litig. & Admin. Practice, Course Handbook Series No. 11596, 2007) (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

⁸⁸ *Id.* at 296 (citing Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 345 (2000)).

⁸⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF LAW OF THE UNITED STATES § 442(2)(b).

⁹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §442(2)(b) (1987).

⁹¹ FED. R. CIV. P. 26(b)(1).

⁹² See *Daval Steel Prods. v. M/V Fakredine*, 951 F. 2d 1357, 1367 (2d Cir. 1991).

⁹³ FED. R. CIV. P. 26(b)(1).

⁹⁴ *Id.*

Conversely, member states of the European Union, such as Germany and France, take a significantly more restrictive view of discovery than the United States.⁹⁵ The European member states' restrictive view of discovery, in particular e-discovery, stems from their conservative regulatory scheme for data privacy.⁹⁶ The European approach views information about a person as intellectual property belonging to the concerned person.⁹⁷ As such, the European States view data privacy and protection as a "fundamental human right."⁹⁸ In the European Union, data privacy is regulated by the European Union Data Protection Directive.⁹⁹ In order to comply with the Data Protection Directive, EU member states have promulgated domestic laws, which hamper their compliance with U.S. discovery production requests.¹⁰⁰

B. Implications of the EU Data Protection Directive

As briefly alluded to above, the European Union has a stringent data privacy regime, as codified in the European Union Data Protection Directive.¹⁰¹ The objective of the EU Directive is set out in Article 1, which states that "Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."¹⁰² Since EU member states are required to transpose EU directives into national law, this Article ensures that personal data enjoys a uniform minimum standard of protection across the EU member states.¹⁰³

The EU Directive has a direct impact on how companies operate within the EU. According to George et al., "[e]very company operating within the EU has affirmative legal obligations to protect the rights of data subjects."¹⁰⁴ For the purposes of U.S. discovery production requests, the EU Directive is relevant because it contains strict laws regarding under what circumstances personal data may be transferred from an EU to a non-EU country.¹⁰⁵ Articles 25 and 26 are

⁹⁵ Barbara Crutchfield George et al., *U.S. Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply with the EU Data Privacy Directive*, 38 AM. BUS. L.J. 735, 741-42 (2001).

⁹⁶ *Id.* at 742.

⁹⁷ *Id.*

⁹⁸ *Id.* at 742-43.

⁹⁹ Council Directive 95/46/EC, art. 7, 1995 O.J. (L 281) 31 (EC) [hereinafter EU Directive].

¹⁰⁰ See George et al., *supra* note 95, at 762-64.

¹⁰¹ EU Directive, *supra* note 99.

¹⁰² *Id.* art. 1.

¹⁰³ George et al., *supra* note 95, at 750.

¹⁰⁴ *Id.* at 753.

¹⁰⁵ EU Directive, *supra* note 99, arts. 25 & 26.

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worded broadly, and as such, prevent the transfer of information that would be considered “mundane” in the United States, including such information as “employee . . . phone numbers, e-mail addresses, and job titles.”¹⁰⁶ Some exceptions to this stringent transfer rule are granted, but none of these exceptions, which include consent, necessity for performance of a contract, or authorization of additional safeguards,¹⁰⁷ seem likely to apply in the context of a U.S. court case. Imagine a scenario in which a discovery request is made to a company based in an EU member state. If the production request includes data that could loosely identify individuals working at the company, even if the data ultimately sought is not the identity of the individuals, that data cannot be produced without violating the EU Directive.

C. Recent Litigation That Considers the Impact of the EU Data Privacy Regime on Discovery

As of the end of 2007, there were no reported U.S. decisions in which the scope and effect of the 2006 amendments to the Federal Rules of Civil Procedure regarding e-discovery had been explicitly applied or discussed.¹⁰⁸ One of the major concerns regarding the international e-discovery is how data privacy regimes, such as that of the European Union, will impact e-discovery requests.¹⁰⁹ There are some cases that have looked at the legal effect of the EU Data Privacy regime;¹¹⁰ however, none have looked at it in the specific context of e-discovery.

The court in *In re Vitamins Antitrust Litigation* looked at the effect of German and Swiss privacy laws¹¹¹ on the determination of whether or not to compel discovery. The German defendants argued that production of the requested documents, which contained employee data, would violate Germany’s Federal Data Protection Act (“BDSG”)¹¹² because such disclosure was prohibited unless the consent of the individual employees was obtained or another exception within

¹⁰⁶ George et al., *supra* note 95, at 759-760.

¹⁰⁷ *Id.* at 760.

¹⁰⁸ Toole 2008, *supra* note 4, at 438.

¹⁰⁹ *Id.* at 438-39.

¹¹⁰ See *In re Vitamins Antitrust Litigation*, No. 99-197, 2001 U.S. Dist. LEXIS 8904 (D.D.C. June 20, 2001); *Salerno v. Lecia*, No. 97-CV-973S, 1999 U.S. Dist. LEXIS 7169 (W.D.N.Y. Mar. 23, 1999).

¹¹¹ This paper concentrates on the court’s view of the German privacy laws because they are more directly linked to the EU Data Protection Directive.

¹¹² Bundesdatenschutzgesetz [Federal Data Protection Act], Dec. 20, 1990, BGBl. I at 2954 (F.R.G.). Although the BDSG predates the EU Data Protection Directive, it is the national legislation through which Germany complies with the EU directive.

the statute applied.¹¹³ In reaching its decision, the court sought to balance several different factors: (1) whether the foreign law applied in light of the facts, (2) the penalties for violating the foreign law, (3) the interests to be served by allowing discovery, and (4) the legitimacy of the interests potentially to be harmed.¹¹⁴

First, the court determined whether the foreign law claimed to prevent disclosure did in fact prevent disclosure in light of the facts. The court suggested that the files were not sufficiently electronic to be covered by the BDSG, but it did not seem to make a definitive finding on this issue.¹¹⁵ Second, the court closely examined the potential penalties for non-compliance with BDSG and found that violation of the BDSG was a criminal offense that carries the risk of a substantial fine or jail sentence.¹¹⁶

With regard to the third and fourth factors, the court stated that “disclosure may still be warranted if plaintiffs can show (1) that the information at issue is ‘necessary’ to protect public interests and/or the interests of the plaintiffs; and (2) the data subjects have no ‘legitimate interest’ in preventing disclosure of the information.”¹¹⁷ In determining that the information sought was necessary, the court reaffirmed the application of the well-settled rule that “a party is not required to accept the assurance of opposing counsel as to what has been made available. He is entitled to draw his own conclusions on examination of the papers”¹¹⁸ to proceedings regarding privacy statutes. Concerning the interests of the defendants, the court agreed that the BDSG created “legitimate privacy law concerns.”¹¹⁹ Ultimately the court weighed the factors and held that the privacy concerns combined with the potential for criminal penalties for non-compliance were strong enough to make the court “hesitant to order these defendants to violate their country’s laws without a better understanding of exactly what information is protected and how necessary this small subset of information is to plaintiffs’ claims in this case.”¹²⁰ Thus, the court ordered the creation of a privacy log,¹²¹ resulting in the non-resolution of the true legal status of the privacy law.

However, more troublesomely, the court in an earlier case from a different U.S. district court precluded the production of docu-

¹¹³ *In re Vitamins*, 2001 U.S. Dist. LEXIS 8904, at *44.

¹¹⁴ *Id.* at *46-47 and *53.

¹¹⁵ *Id.* at *48-49.

¹¹⁶ *Id.* at *46-47 & *53.

¹¹⁷ *Id.* at *49-50.

¹¹⁸ *Id.* at *51 (citing *Westinghouse Elec. Corp. v. Rio Algam Ltd. (In re Uranium Antitrust Litig.)*, 480 F. Supp 1138, 1155 (N.D. Ill. 1979)).

¹¹⁹ *Id.* at *53.

¹²⁰ *Id.*

¹²¹ *Id.* at *53-54.

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ments.¹²² The court found persuasive the conclusion of the advisory opinion provided by the defendant's European Counsel and held that "the document production sought by plaintiff is precluded by Directive 95/46/EC and the German Act on Data Protection."¹²³ This decision contrasts with the decision in *In re Vitamins Antitrust Litigation* because the European Counsel specifically argued that production was not appropriate because "safeguards for the maintenance of personal data within the United States are viewed by courts in the European Union countries as insufficient when compared to the level of protection provided by European law" and because "there are serious legal ramifications for those entities that disclose personal information in contravention of European Union and German data protection laws."¹²⁴

The outcome in this earlier case, combined with the reluctance of the court in *In re Vitamins Litigation* to compel the production of documents, illustrates the significant deference U.S. courts may be willing to attach to foreign data privacy legislation. This deference seems peculiar when compared to the hostility expressed by the U.S. courts regarding the mandatory application of the Hague Convention procedures. In the case of data privacy, courts seem significantly more willing to bow to the concerns of foreign sovereigns than they do in the context of requiring the application of the Hague Convention procedures. This conflict also results in contradictory practical effects. Due to the deference afforded foreign data privacy statutes, documents abroad may escape mandatory production and the documents sought will not be available for use in U.S. litigation. However, because the Hague Convention procedures are disfavored, it is more likely that document production requests will be enforced under the Federal Rules of Civil Procedure and consequently the sought documents will actually be available for use.

V. COMPARISON OF THE EFFECT OF THE EUROPEAN DATA PRIVACY REGIME WITH THE EFFECT OF BLOCKING STATUTES

The current weight of authority suggests that U.S. courts will not treat law promulgated in light of the EU Directive in the same way as they have treated "blocking statutes" in the past. The case *In re Vitamins Antitrust Litigation* suggested, though did not state explicitly, that the regulations of foreign nations, promulgated to comply with or affecting compliance with the EU Directive, are entitled to respect in U.S. courts. This result is further suggested by earlier cases

¹²² *Salerno v. Lecia*, No. 97-CV-973S, 1999 U.S. Dist. LEXIS 7169, at *9-10 (W.D.N.Y. Mar. 23, 1999).

¹²³ *Id.* at *9-10.

¹²⁴ *Id.*

from different U.S. jurisdictions, like *Salerno*. If this is the case, which at the moment it appears to be, this would mean that foreign privacy statutes will be given much more deference than was historically given to blocking statutes.

Privacy laws differ from blocking statutes in one fundamental respect. Unlike blocking statutes, privacy laws are enacted to fulfill a legitimate purpose. However, blocking statutes are similar to privacy laws in terms of their practical effect on litigation in U.S. courts. The similarity stems from the fact that both blocking statutes and privacy laws prevent compliance with U.S. discovery requests. It is for this reason that U.S. courts must pay particular attention to how they balance the legitimate interest of protection of individual privacy against the equally legitimate interest in ensuring fair access to documents in litigation proceedings. Are the policy objectives underlying enforcement of foreign data privacy laws sufficient to outweigh U.S. beliefs behind the policy choice of allowing litigants recourse to a system of liberal discovery procedures? This paper asserts that privacy interests are not sufficient except in rare circumstances.

Although the court in *In re Vitamins Antitrust Litigation* reached a non-committal result, it clearly placed a significant emphasis on the legitimacy of the interests that foreign privacy laws protect, and while this may be true now it may not always be so. Although it has yet to happen, one can easily see how U.S. enforcement of foreign privacy laws could lead to an easily exploited means of circumventing U.S. e-discovery production requests, making data privacy laws operate increasingly like blocking statutes.

Outsourcing data management, processing, and storage has become increasingly common and will continue to grow in frequency in light of the ever-rising cost of doing business within the territorial United States. Furthermore, improvement in technology services and the global communications infrastructure means that not only is outsourcing easy to do but it is now decidedly cheaper. Because of the ease of use of such procedures they will certainly be considered for their practical value, but they may also become attractive solely for the purpose of circumventing U.S. jurisdiction.

In the future, U.S. courts should not succumb to the temptation of allowing companies to hide behind foreign data privacy statutes as a means of escaping U.S. jurisdiction for the purposes of e-discovery. Succumbing to this temptation would give those litigants willing to abuse the situation a leg up in international disputes litigated in U.S. courts. Furthermore, it would generally frustrate the policy choices embodied by the Federal Rules of Civil Procedure, specifically that access to more information, indeed all information that is at least "reasonably calculated to lead to the discovery of admissible evidence" encourages and promotes the discovery of truth through the adver-

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sarial process.¹²⁵ Instead, courts should reconsider the application of some disfavored principles in the e-discovery context.

Moreover, there are practical reasons that courts should decline to give deference to the EU Data Privacy regime. First, giving deference to the EU Data Privacy regime has the potential to create perverse incentives for companies. Although in the long run the process of storing data overseas might be cheaper if no e-discovery requests are made, should e-discovery productions be made, there is the potential for costs to escalate significantly. The increase in costs stems from the cost and inconvenience of having to produce documents in the United States. Either companies will have to pay for U.S. litigation experts to travel overseas to conduct discovery in the foreign company or they will have to bear the cost and inconvenience of transporting the servers on which the data is stored back to the United States.¹²⁶

The second source of increasing costs stems from the fact that the process of deciding which laws apply and how those laws apply is a significant expense. The cost of litigating how e-discovery is to be conducted raises transaction costs for companies who elect to store data abroad. Since data storage abroad is only cheaper in the long run if transaction costs are low, unless courts create a body of settled jurisprudence containing detailed tests to be applied that account for a majority of factual circumstances, litigation expenses in the pre-trial phase will skyrocket as parties fight over exactly how discovery is to be conducted.

Were the courts to provide a more complete and settled outline of how e-discovery rules will be applied to data located overseas and how information may potentially be protected by the EU Data Privacy regime, companies would be in a better position to assess the potential costs and benefits of storing key data abroad. Given the current lack of guidance provided by the courts on this matter, it is difficult for companies to accurately judge the financial burden of the decision to store data abroad.

Although resort to the Hague Convention procedures is no longer the favored mode of proceeding in the paper discovery context, there are some aspects of the method that may be more applicable in the e-discovery context. Concerns of comity may provide a helpful way of distinguishing between situations under which privacy laws should be given effect in U.S. courts and those situations in which they should not be accorded deference. The fifth concern of comity articulated by

¹²⁵ FED. R. CIV. P. 26(b)(1).

¹²⁶ It is highly unlikely that in the course of litigation either party would be satisfied if the party whose servers were located abroad took care of the discovery without any independent U.S. oversight to ensure a complete accounting of the data at issue is provided.

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the court in *Aerospatiale*—“the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located”¹²⁷—may provide the basis for delineating situations. Those cases where it is clear from the facts that a foreign litigant’s non-compliance is based solely on its desire to frustrate U.S. interests should not be given effect. This rule should hold because it is consistent with U.S. jurisprudence declining to require mandatory imposition of the Hague Convention procedures when these procedures are more likely to frustrate the ability of litigants to obtain complete and punctual discovery than if discovery was allowed to proceed under the Federal Rules of Civil Procedure.

However, this paper does not mean to suggest that there are no circumstances under which privacy laws should be enforced. One competing but important consideration was articulated by the Court in *Société Internationale*. As part of the Court’s decision-making process to impose sanctions against non-compliant foreign governments seeking to hide behind foreign privacy laws, the Court drew a distinction based on the intentions of the corporation.¹²⁸ The Court declined to affirm the lower court’s decision to dismiss the case, the ultimate sanction for non-compliance with a discovery request, because the corporation had not acted with bad intentions or in bad faith.¹²⁹ Consequently, despite disfavoring giving effect to privacy law, this paper would not suggest that the law should be applied against those who have in good faith complied with the foreign law. Rather, this paper only seeks to prevent corporations who intentionally subvert U.S. jurisdiction from taking advantage of European privacy laws to do so. As such, U.S. businesses, to avoid being burdened by the skyrocketing costs of pre-trial litigation over e-discovery production requests, should seek from the courts a detailed set of procedures governing the wide array of factual circumstances so that they can properly assess the costs of various litigation strategies.

VI. CONCLUSION

This paper asks whether “paper” discovery enforcement techniques will work in the context of e-discovery. The answer to that question is yes, but it is a qualified yes. Given that within the jurisprudence on paper discovery enforcement there are two contradictory threads of opinion, it is imperative that U.S. courts apply only one of

¹²⁷ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

¹²⁸ *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

¹²⁹ *Id.*

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these threads in the context of e-discovery. Courts must resist the temptation to give effect to European data privacy laws. Since e-discovery will increasingly implicate data privacy laws, courts must resist the temptation to give effect to these laws in this context. Instead, courts should return to some of the disfavored considerations under paper discovery procedures and apply those rationales in the e-discovery context to ensure that the fundamental goals of discovery as enshrined in the Federal Rules of Civil Procedure are upheld in the context of e-discovery.

